BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
DOCKET TO EVALUATE CHATTANOOGA	)	**DOCKET NO.**
GAS COMPANY'S GAS PURCHASES AND	)	**07-00224**
RELATED SHARING INCENTIVES	)	

NOTICE OF FILING: MOTION AND RESPONSES TO CHATTANOOGA MANUFACTURER'S ASSOCATION'S MOTION TO COMBINE IN DOCKET 09-00183

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully provides the following notice that the attached *Motion of Chattanooga Manufacturer's Association to Combine the Request of Chattanooga Gas for Reimbursement of Legal Fees in Docket 07-00224 with the Request of Chattanooga Gas for a General Rate Increase in Docket 09-00183*, as well as the attached responses of the Consumer Advocate and Chattanooga Gas Company ("CGC") which have been filed in TRA Docket 09-00183. This *Notice of Filing* is being made because the pleadings are related to the issue of an award of legal fees sought by CGC in the present matter, Docket 07-00224.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via first-class U.S. Mail, postage prepaid, or electronic mail upon:

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This the 12th day of January, 2010.

T. Jay Warner
Assistant Attorney General

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	*	
	*	
PETITION OF CHATTANOOGA GAS FOR APPROVAL OF ADJUSTMENT OF ITS RATES AND CHARGES, MODIFICATION OF ITS RATE DESIGN, AND REVISED TARIFF	*	**DOCKET NO. 09-00183**

MOTION OF CHATTANOOGA MANUFACTURER'S ASSOCIATION TO COMBINE THE REQUEST OF CHATTANOOGA GAS FOR REIMBURSEMENT OF LEGAL FEES IN DOCKET 07-00224 WITH THE REQUEST OF CHATTANOOGA GAS FOR A GENERAL RATE INCREASE IN DOCKET 09-00183

The Chattanooga Manufacturer's Association ("CMA") asks that the request by Chattanooga Gas Company ("CGC") to increase rates by $700,000 to reimburse the company for its legal fees spent in Docket 07-00224 be considered as part of the company's recently filed petition for a general rate increase of $2.6 million in Docket 09-00183. Both dockets are assigned to the same panel (Chairman Kyle, Director Hill, and Director Roberson) and, as explained further below, both requests for higher gas rates should be consolidated and considered at the same time.

SUMMARY

Accusing the Consumer Advocate and Protection Division ("CAPD") of conducting a two-year "witch hunt" and "wild goose chase" in Docket 07-00224, Chattanooga Gas claims it was the "prevailing party" in that investigation and seeks recovery of $700,000 in legal fees, not from the State, but from the ratepayers of Chattanooga.[1] CMA, which represents many of CGC's largest customers, is opposed to the gas company's request.

[1] See, Transcript of TRA agenda conference, November 9, 2009, at 48. CGC's argument for reimbursement is couched in language more suitable to a motion for sanctions made pursuant to Rule 11 of the Tennessee Rules of

(footnote continued on following page ...)

As the Tennessee Court of Appeals has held, this agency has no power to award legal fees to any party. CGC's request for $700,000 is, in essence, a petition for a rate increase to cover a specific expense. The company, however, has not given public notice of the increase, as it is required to do by the TRA's rules, nor has the TRA given ratepayers the opportunity to comment on this unusual request. Furthermore, the parties in Docket 07-00224 have not adequately addressed many of the legal and equitable issues raised by the company's reimbursement request.

In order to give ratepayers notice of the reimbursement request and the opportunity to comment, to allow the TRA to weigh the impact on customers of two, back-to-back rate increases, and to afford CMA and other potential interveners in the company's pending rate case (Docket 09-00183) the ability to make arguments concerning the reimbursement issue which the Authority has not yet heard, CMA asks that the reimbursement issue be rolled into the rate case and decided as part of this docket.

BACKGROUND

On July 9, 2007, the Authority voted to open Docket 07-00224 to "evaluate Chattanooga Gas Company's gas purchases and related sharing incentives." See TRA Docket 07-00224, Order of September 23, 2009, at 1. Concerns over the company's "sharing incentives" and its impact on ratepayers had initially been raised by both the CAPD and by CMA in the gas company's last general rate case, Docket 06-00175. Although the Authority initially agreed to hear those issues as part of the rate case, the TRA later decided, at the request of Chattanooga

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(... footnote continued from previous page)
Civil Procedure. Rule 11, of course, does not apply to the TRA. CMA was not a party to Docket 07-00224 but notes that there have been no findings by the Hearing Officer or the Authority which would support the company's allegations of misconduct.

Gas, to close the rate case and open a new proceeding to investigate the company's profit sharing arrangement and other issues related to the utility's management of its regulated assets.

Early in the investigation, Chattanooga Gas requested permission "to accumulate and defer the costs incurred in defending" itself in the investigation "so that it may ultimately recover these costs from the ratepayers." See Motion of Chattanooga Gas "To Accumulate and Defer Litigation Costs" February 28, 2008, at 1. The Hearing Officer agreed to list as an issue in the case, "Should CGC be able to recover litigation costs incurred as a result of its participation in this docket from rate payers in the future" ("Order Setting Issues List," March 17, 2008, Exhibit A) and later recommended that the reimbursement request be separated from the other issues in the case and determined by the TRA Directors following "discovery, testimony and a hearing before the panel." "Re-Hearing Order," July 6, 2009, at 4. The TRA Directors agreed, ordering CGC to raise the reimbursement issue "upon completion of this docket." See "Order," September 23, 2009, at 6.

Two weeks after the issuance of a final order addressing the merits of the investigation docket, Chattanooga Gas filed "documentation and information" requesting reimbursement of approximately $700,000 in legal fees spent in connection with Docket 07-00224. But, contrary to the expectations of the Hearing Officer, no evidentiary hearing was ever held on the company's request. CGC and the CAPD filed briefs and argued orally to the TRA concerning the amount of legal expenses, if any, the company should be allowed to recover from ratepayers but there was no evidentiary hearing, no debate over whether $700,000 in legal fees was a "prudent" expense, no argument over whether the Authority has the statutory power to award legal fees, and no discussion as to whether Chattanooga customers should be forced to pay higher gas rates because of an unusually protracted legal battle between Chattanooga Gas and the CAPD. Furthermore, Chattanooga Gas never published notice of the proposed rate increase, as

the company is required to do by the TRA's rules, nor did the TRA conduct a public hearing on the company's request to raise rates by $700,000. At this time, the reimbursement request remains pending before the TRA.

On November 16, 2009, Chattanooga Gas filed a petition for a general rate increase. The matter was designated as Docket 09-00183 and assigned to Chairman Kyle, Director Freeman, and Director Roberson, the same panel assigned to hear Docket 07-00224. In that case, Chattanooga Gas seeks a rate increase of $2.6 million. CMA, which was not a party to Docket 07-00224, has intervened as a party in the rate case which is tentatively scheduled to be heard in April, 2009. CMA presumes that Chattanooga Gas will comply with the TRA's rules requiring the company to publish in a local newspaper of general circulation a summary and explanation of the proposed rate increase and the time and date of the Authority's hearing. CMA also anticipates that the Authority, as it has always done when considering an increase in utility rates, will convene a public hearing to receive comments from ratepayers and other interested persons concerning the company's rates and services.

ARGUMENT

CMA urges the TRA to make no decision on the proposal by Chattanooga Gas to increase rates by $700,000 until the public has been notified of the proposed increase in accordance with the TRA's rules and the Authority has convened a public hearing on the company's unprecedented reimbursement request. This can be easily accomplished by rolling the reimbursement issue into the company's pending $2.6 million rate case. Furthermore, these increases should be considered together, not separately, so that the agency can weigh the cumulative impact of both rate hikes on gas customers. Finally, the Authority should combine the two matters so that it can hear argument on the Authority's power under state law to award legal fees, the prudency of the company's expense of $700,000 in legal fees, and the fairness of

forcing ratepayers, rather than the State, to pay for legal expenses incurred allegedly because of "outrageous conduct" by the CAPD.[2]

I. Granting this request will insure compliance with the Authority's rules. TRA Rule 1220-4-1-05 states that "all public utilities applying for a revision of rates shall . . . cause a summary of the proposed changes and the reasons for them to be published in a newspaper of general circulation located in the utility's service area." The published notice must also "state the date and place when the application will be heard by the Authority, if known."

There is no dispute that Chattanooga Gas is "applying for a revision of rates"[3] but has failed to publish notice and an explanation of the proposed $700,000 increase as required by the TRA rule. Similarly, the Authority has not convened a public hearing to allow ratepayers to comment upon the company's $700,000 request. The TRA has never, to CMA's knowledge, allowed a pubic utility to implement a rate increase without giving ratepayers the opportunity to comment upon the utility's rates and services.[4]

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[2] See footnote 1, supra.

[3] Chattanooga Gas, in its own words, "is seeking . . . to recover the costs incurred in this contested case proceeding from the ratepayers through the Purchased Gas Adjustment Rules. "CGC's "motion to Accumulated and Defer Litigation Costs," at 2. In other words, CGC seeks to increase by $700,000 the price customers would otherwise pay for natural gas. Although CGC and the CAPD have stipulated that the $700,000 increase, or any portion thereof, should be applied to customers through the PGA rule, neither party contends that the PGA rule itself includes or authorizes the recovery of legal expenses.

[4] Even the hearing on the TRA's investigation of the CGC's sharing incentives included the opportunity for any members of the general public to make oral comments to the Authority. See "PreHearing Order" in Docket 07-00224 at 8. That hearing, however, did not address the issue of whether the company could recover its litigation costs. That issue was separated from the hearing on the merits and, according to the Hearing Officer, was to be the subject of another evidentiary hearing at a later date. "Pre-Hearing Order" at 4. Because CGC and the CADP entered into a stipulation agreeing to certain facts, no evidentiary hearing was ever held on the reimbursement issue. The parties presented oral argument on the issue during a regularly scheduled TRA agenda conference on November 9, 2009, but, according to the transcript of the conference, there was no request or opportunity for pubic comment on the reimbursement question.

Both of these issues can be addressed by including the reimbursement request as an issue in Docket 09-00183. The company can include notice of the request in the same publication notifying ratepayers of the general rate case. Moreover, the TRA can hear comments from ratepayers on both matters when the TRA convenes a public hearing on the general rate case in April.

II. The TRA should move the reimbursement question into the rate case in order to have a better appreciation of the full impact of the combined requests of $700,000 and $2.6 million. Depending upon how $700,000 increase is collected from ratepayers and over what period of time, ratepayers potentially face a total increase of $3.3 million, significantly more than the $2.6 million announced by the company in connection with the filing of its general rate case. Ratepayers should be told that they face a larger increase and have the opportunity to address the total impact of the two requests.

III. The TRA should include the reimbursement issue in the general rate case in order to hear argument from CMA and any other parties who may intervene in the rate case concerning the legality and fairness of awarding $700,000 in legal fees to Chattanooga Gas. CMA respectfully suggests that neither CGC nor the CAPD has adequately briefed these questions.

For example, although the CAPD noted that the TRA has apparently never awarded legal fees to a party (other than allowing a utility to recover its reasonably incurred expenses in bringing a rate case), the CAPD did not question the agency's statutory authority to award fees in this case. ("[T]he Consumer Advocate maintains it is in the discretion to . . .[allow CGC] to recover all their costs, some of their costs, or none of their costs." Transcript of TRA agenda conference on November 9, 2009, at 41-42. More importantly, neither CGC nor the CAPD has cited any statute which authorizes the TRA to award legal fees in this case. No such authority exists. As the Tennessee Public Service Commission held almost thirty years ago, "no

Tennessee statute" gives the agency the power to award legal fees. See PSC Docket G-81-4-4, April, 1981, and PSC Docket U-82-7183. The PSC's ruling that it lacked the authority under state law to award legal fees was affirmed by the Tennessee Court of Appeals in an unpublished opinion issued February 5, 1985, Kingsport Power Company v. Tennessee Public Service Commission et al. A copy of that opinion is attached.

In 1994, nine years after the Court of Appeals decision, the Tennessee legislature amended the Tennessee Uniform Administrative Procedures Act ("UAPA") to allow an administrative agency to award legal expense under limited circumstances. See T.C.A. §4-5-325. That is the only statute which permits a party to a contested case proceeding under the UAPA to recover legal fees. It allows the hearing officer to award legal fees to the prevailing party when "a state agency issues a citation" which is later found to be "not well grounded" or to have been issued "for an improper purpose." Since the TRA's investigation did not arise from the issuance of a citation, that statute appears inapplicable to this case.

Furthermore, no one has challenged whether the company's legal fees were "prudently" incurred, which is the legal test for recovery. The CAPD stipulated to "the accuracy of the total amount" and explained that it has "no basis to contest" that the lawyers employed by CGC "did not perform all of the work described in their monthly billings." See "Stipulation Regarding CGC's Requested Cost Recovery" at 1. But no one has apparently investigated, much less challenged, the prudency of spending $700,000 in legal fees in this investigation.[5]

[5] CMA has not investigated CGC's legal bills and has no reason at this time to question the prudency of the company's expenses. Unfortunately, no one else appears to have done an investigation either. The CAPD was provided "heavily redacted" copies of CDC's legal bills and stipulated only to the "accuracy of the total amount" and did not contest that "all of the work described" was actually done. "Stipulation," October 28, 2009, at 1-2. But the CAPD did not stipulate to the reasonableness or prudency of those expenses, even though CGC attempted to characterize the stipulation as saying more than it does. See "Brief of Chattanooga Gas Company Regarding Cost Recovery," October 28, 2009, at 3 and 19.

Finally, no one has questioned whether it is fair for the TRA to, in essence, punish ratepayers because of what CGC argued was a "witch hunt" by the CAPD. Transcript, at 48. In summarizing CGC's argument for reimbursement, the utility's attorney described the CAPD's "outrageous course of action" (id., at 41) and argued that this "type of tactic needs to come to an end." Id., at 48. "One way to help it come to the end," he told the TRA, "is to have the full cost recovery granted as we respectfully requested." Id., at 48-49. CMA suggests that if the Authority has the power to award CGC recovery of its legal expenses – which CMA disputes – the costs should be paid by the State, not the ratepayers. As previously discussed, there is only one statute authorizing state agencies to award legal fees, T.C.A. §4-5-325, and that statute provides that the hearing officer may order the prevailing party's expenses paid by the state agency responsible for instigating the proceeding.

The TRA has yet to hear any of these arguments which should be addressed before the Authority rules on the merits of CGC's request for reimbursement. By including that request in the utility's pending rate case, the Authority will have the benefit of hearing these issues flushed out and debated by CMA and, perhaps, other interveners. The TRA should not take the unprecedented step of awarding legal fees to a prevailing party without full consideration of these legal and equitable arguments.

CONCLUSION

To put the matter bluntly, CGC's motion to increase rates by $700,000 to reimburse the utility for its legal fees in the investigation docket must be either (1) a rate case or (2) a request for the award of legal fees. If it is a rate case, then none of the procedural rules or evidentiary submissions required in a rate case have been followed. If it is a request for an award of legal fees, the TRA has no statutory authority to grant the request. The only appropriate action for the Authority to take is to recognize the company's motion for what it is – a request for a rate increase – and to consider the motion as part of the company's pending request for a general rate increase in Docket 09-00183.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of December, 2009 served the foregoing Motion of Chattanooga Manufacturer's Association To Combine The Request of Chattanooga Gas For Reimbursement of Legal Fees In Docket 07-00224 With The Request of Chattanooga Gas For A General Rate Increase In Docket 09-00183, either by fax, electronic transmission, overnight deliver service or first class mail, postage prepaid, to all parties of record at their addresses shown below:

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Henry M. Walker

06/13/84 KINGSPORT POWER COMPANY v. TENNESSEE

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION AT NASHVILLE

Docket Number available at www.versuslaw.com

Citation Number available at www.versuslaw.com

June 13, 1984

KINGSPORT POWER COMPANY, PLAINTIFF-APPELLANT
v.
TENNESSEE PUBLIC SERVICE COMMISSION, FRANK D. COCHRAN, KEITH BISSELL, AND JANE ESKIND, COMMISSIONERS, AND KINGSPORT POWER USERS ASSOCIATION, DEFENDANT-APPELLEES

Davidson Equity; APPEAL FROM CHANCERY COURT, DAVIDSON COUNTY, TENNESSEE; THE HONORABLE IRVIN H. KILCREASE, JR., CHANCELLOR.

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Henry Walker, Cordell Hull Building, Room C1-103, Nashville, Tennessee 37219, Attorney For Defendant-appellee, Tennessee Public Service Commission

D. Bruce Shine, The R & W Building, Suite 201, 433 East Center Street, Kingsport, Tennessee 37660, Attorney For Defendant-appellee, Kingsport Power Users Association

Todd, Presiding Judge, Middle Section wrote the opinion. Concur: Houston Goddard, Judge, Samuel L. Lewis, Judge

The opinion of the court was delivered by: Todd

HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION

Plaintiff, Kingsport Power Company, has appealed from the judgment of the Chancellor dismissing its petition for review of an order of the defendants, members of the Tennessee Public Service Commission.

Issues presented by appellant are:

I. Whether a party against whom a determination has been made by an administrative agency without the authority to make that determination may have that determination reviewed pursuant to the Tennessee Administrative Procedures Act?

A. Whether an Order by the Tennessee Public Service Commission in excess of the Commission's statutory authority is void and, therefore, may not be used in subsequent judicial or administrative proceedings to the prejudice of Plaintiff-Appellant?

B. Whether Plaintiff-Appellant is aggrieved by a void Order of the Public Service Commission in excess of the Commission's statutory authority and prejudicial to Plaintiff-Appellant in judicial proceedings already instituted?

On October 1, 1982, plaintiff filed its petition for review before the Chancery Court. The record does not indicate the date of service of the Petition, but it must be presumed to have been served promptly.

T.C.A. § 4-5-322 provides that a transcript of proceedings before the administrative agency must be certified to the reviewing court within 45 days after service of the petition, or within further time allowed by the court. There is no evidence that the reviewing court extended the 45 days which would have expired during November, 1982 if the petition were served within 15 days after filing.

Strangely, the transcript was not transmitted to the Trial Court, and is not in this record. There is no copy of the order entered by the defendants. There are only references to it in the pleadings and appellate briefs. The only direct quotation is found in the answer of defendants as follows:

"The Commission has not statutory authority from the Tennessee legislature to award litigation costs to any party. We will, however,

make a determination of those costs in light of the standards set forth in the federal statute. If the utility chooses to pay this amount to the intervening consumer, we will treat this expense as an operating cost of the utility. If the utility does not pay the costs which we find are appropriate for reimbursement, the consumer group may seek appropriate relief in the state courts.

The petition gives very few details of the order, but states that:

(14) While conceding that it does not have the authority to order reimbursement to the Association, the Commission has, nevertheless, made a determination of the amount of costs which it feels should be allowed in a state court proceeding to collect same and, further, has asserted its opinion that the "contribution" of the Association in the various proceedings was "substantial".

On December 10, 1982, without having filed a transcript as required by law, the defendants filed an "answer", admitting and denying various parts of the petition and containing considerable argument in favor of its position. The answer asserted the following defenses:

1. The final Order of the Commission in Docket U-82-7183, issued August 4, 1982, is not a final decision in a "contested case" as that term described in T.C.A. 4-5-322 and 4-5-102(3) and the Order is not subject to review under 4-5-322.

2. The Kingsport Power Company has not been "aggrieved" by the Commission's order in Docket U-82-7183 since that Order does not affect the rights or privileges of any person and the Company therefore has no standing under T.C.A. 4-5-322 to petition this Court for review of that Order.

On June 16, 1983, over 8 months after the filing of the petition, and over 6 months after filing their answer, defendants filed a "Motion to Dismiss" setting out the following facts:

Defendant, Kingsport Power Users Association, filed a petition with Defendant, Tennessee Public Service Commission, for the reimbursement of litigation expenses arising out of the Association's participation in proceedings involving Petitioner, Kingsport Power Company, Docket No. U-82-7183. Reimbursement is sought pursuant to the Public Utility Regulatory Policies Act of 1978 (hereinafter PURPA), 16 U.S.C. § 2632.

The Commission determined in its Order in Docket No. U-82-7183 that it lacked statutory authority to award legal fees or other costs to any party. Therefore, the Order does not affect the rights or privileges of any person. The Order, as it states, was written to make a determination, but not an award of fees and costs which the Commission has found are reimbursable under 26 U.S.C. § 2632. Should the utility decline to pay those costs, the Order is intended to assist a state court in determining whether the consumer group is entitled to an award under federal standards.

The motion to dismiss concludes as follows:

Therefore, because the Tennessee Public Service Commission has no statutory authority to award costs, Plaintiff, Kingsport Power Company, has not been "aggrieved" by the Commission's Order in Docket No. U-82-7183 because that Order does not affect the rights or privileges of any person. Therefore, Kingsport Power Company has no standing under T.C.A. § 4-5-322 to petition this Court for review of that Order.

Thereafter, on June 20, 1983, plaintiff filed a "Motion" as follows:

Comes the plaintiff, Kingsport Power Company, pursuant to TRCP 12.03, and moves the Court to enter judgment on the pleadings in this case in favor of the plaintiff in that the pleadings show that the defendant has acted in a manner wholly outside of its statutory authority, thus rendering its purported order of August 4, 1982 (Docket No. U-82-7183) null and void.

Upon the foregoing pleadings without transcript, affidavit or other evidence, on August 3, 1983, the Chancellor entered a "Memorandum and Order" concluding as follows:

Plaintiff's motion for judgment on the pleadings is hereby denied. Defendants' motion to dismiss is granted. Costs are taxed against plaintiff.

It is so ORDERED.

The briefs present a substantial and important question of law which must eventually be resolved. However, this Court has determined that the record was not in suitable condition for decision by the Chancellor, and it is not in suitable condition for a decision on appeal.

The principal reason for this is that the Chancellor and this Court have been asked to exercise judicial review of an order which has never been furnished to either court.

Ordinarily, it would be expected that the plaintiff's pleading would set out fully the facts upon which the suit is based, which, in this case, would include the pertinent background facts and the exact contents of the order of the commission. If this had been done, the issue could have been disposed of upon a timely motion to dismiss on the ground that the petition (complaint) fails to state a claim for which relief can be granted. TRCP Rule 12.02 (6). The same rule requires the motion to be filed before or with other defenses. If the motion relies upon facts outside plaintiff's pleading, the motion is to be treated as motion for summary judgment which requires the production of evidence by affidavit or otherwise.

It is understandable that petitioner might omit details expecting them to be supplied by the transcript which the statute requires to be filed. Without details in the petition or in a transcript or supplied by other evidence, this case was not ready for Disposition on a motion to dismiss.

The same may be said of plaintiff's motion for judgment on the pleadings which, as stated, do not contain sufficient information upon which to act summarily. TRCP Rule 12.03.

It is necessary for this cause to be remanded for further proceedings to build a record that will support a Disposition of the issue now being pressed by the parties. Upon remand, the Chancellor should enter such orders as in his judgment seem best calculated to produce the desired information. He may require the petitioner to plead more specifically, presenting a certified copy of the order complained of; he may require the defendant's to perform their statutory duty of producing a transcript, complete or abridged by consent; he may require the defendants to support their motion to dismiss with certified excerpts from the transcript; or he may take other suitable action to produce a substantial record of the facts upon which his decision and, if appealed, that of this Court must rest.

The judgment of the Chancellor is vacated. The cause is remanded for further proceedings. One half of the costs of this appeal is taxed against the petitioner-appellant. One half of the costs of this appeal is taxed against the appellee-commission.

Vacated & Remanded.

Concur: HOUSTON M. GODDARD, JUDGE, SAMUEL L. LEWIS, JUDGE

19840613

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF CHATTANOOGA GAS FOR	)	**DOCKET NO. 09-00183**
APPROVAL OF ADJUSTMENT OF ITS RATES	)	
AND CHARGES, MODIFICATION OF ITS	)	
RATE DESIGN, AND REVISED TARIFF	)	

RESPONSE OF THE CONSUMER ADVOCATE TO THE MOTION OF CHATTANOOGA MANUFACTURER'S ASSOCIATION TO COMBINE THE REQUEST OF CHATTANOOGA GAS FOR REIMBURSEMENT OF LEGAL FEES IN DOCKET 07-00224 WITH THE REQUEST OF CHATTANOOGA GAS FOR A GENERAL RATE INCREASE IN DOCKET 09-00183

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), respectfully provides the following Response to the *Motion of Chattanooga Manufacturer's Association to Combine the Request of Chattanooga Gas for Reimbursement of Legal Fees in Docket 07-00224 with the Request of Chattanooga Gas for a General Rate Increase in Docket 09-00183* in Tennessee Regulatory Authority ("TRA" or "the Authority") Docket 08-00183.

INTRODUCTION

As will be shown more fully below, the Consumer Advocate believes the issue of whether Chattanooga Gas Company ("CGC") can be awarded legal fees for work performed in Docket 07-00224 can be heard in either Docket 07-00224 or, as proposed by the Chattanooga Manufacturer's Association ("CMA"), in the recently filed rate case, Docket 09-00183. The Consumer Advocate, however, also believes that, whatever docket the issue of legal fees is

heard, the Court's holding in the case of Kingsport Power Company v. Tennessee Public Service Commission, cited by CMA in its motion, precludes the award of legal fees to CGC for work performed in Docket 07-00224, 1984 Tenn. App. LEXIS 2949.

Significantly, the Court of Appeals decision in Kingsport Power makes clear the difference between an award of legal fees at the conclusion of a case and the treatment of rate case costs, including legal fees, as an operating expense that can be recovered in a rate case as part of the cost of providing service to ratepayers. Id. *supra*. In the asset management case, Docket 07-00224, CGC is attempting to obtain an "award" of legal fees at the end of a non-rate case and such an award is not permissible under Tennessee law.

PROCEDURAL HISTORY OF CGC'S REQUEST FOR LEGAL FEES

As prescribed in the Hearing Officer's July 6, 2009 *Pre-Hearing Order*, the issue of CGC's request to recover legal fees was bifurcated into a separate hearing from the July 13, 2009 Hearing on the Merits, before the TRA Panel of Directors. During the regularly scheduled TRA Conference on August 24, 2009, following the Hearing on the Merits, the assigned Panel of TRA Directors, in keeping with the Hearing Officer's *Pre-Hearing Order*, instructed the parties to attempt to resolve the issue of CGC's request for recovery of legal fees, if possible, under the direction of Hearing Officer Kelly Cashman-Grams. Counsel for CGC filed documentation in support of the company's legal fees with the TRA on October 6, 2009. Specifically, the law firm of Farmer & Luna, PLLC, has submitted billings of $467,148.62 as of August 31, 2009, in its capacity as counsel in this Docket and anticipates future billings of approximately $14,000 for the month of September. Furthermore, via telephone, counsel has informed the Consumer Advocate that additional billings of approximately $21,791.88 in October of 2009, and $12,500

in November of 2009, have been submitted to the utility for payment. Additionally, the law firm of McKenna, Long & Aldridge, LLP, has billed CGC $205,109.71 as of August 31, 2009; however, the Consumer Advocate has no knowledge as to what amounts, if any, may have been submitted for payment since that time. Based upon CGC's filings and conversations with counsel for CGC, the Consumer Advocate anticipates that CGC's actual billings are likely to exceed $725,000 in Docket 07-00224.

On Wednesday, October 14, 2009, the parties notified the Hearing Officer via email that the Consumer Advocate was willing to stipulate that it had no basis to contest the accuracy of amounts itemized in the bills submitted by counsel for CGC (see the formal stipulation filed by the Consumer Advocate with the TRA on October 28, 2009). The parties further notified the Hearing Officer that while the Consumer Advocate did not intend to dispute the accuracy of counsel's billings, the parties could not agree as to what amount, if any, of those costs CGC should be allowed to recover and over what period of time that recovery should take place.

In light of the information provided by the parties, the Hearing Officer ordered both CGC and the Consumer Advocate to file briefs on the subject of CGC's request for recovery of litigation expenses no later than Wednesday, October 28, 2009. This matter was set for deliberation before the Directors at the TRA's regular conference on Monday, November 9, 2009. In both its *Position Brief* and oral argument, the Consumer Advocate made clear that it could find no precedent supporting an award of costs to a utility in a non-ratemaking docket, pp. 5-7 (October 28, 2009). The Consumer Advocate went on to state that should the TRA choose to award litigation costs to CGC under the unique facts of Docket 07-00224, any such award should

be limited one-half of CGC's actual legal expenses in accordance with the TRA's prior rulings. Id.

At the conclusion of the conference on November 9, 2009, Director Roberson inquired if there was "any room for settlement between the parties on this issue?," and urged the parties to attempt settlement with the question, "do you think if we called a recess for a little while that you could talk and try to resolve this matter, reach agreement?" Id. at 49: 3-13. Ultimately, the parties did not feel that they could resolve this issue at that time. Id. The Directors then took the matter under advisement and reserved deliberations until an unspecified later date. Following the November 9, 2009 Hearing, the parties once again engaged in settlement discussions, but were unable to reach an agreement following the Consumer Advocate's review of the case law discussed more fully below.

CGC then filed a *Petition of Chattanooga Gas for Approval of Adjustment of its Rates and Charges, Modification of its Rate Design, and Revised Tariff* with the Authority on November 16, 2009, thereby creating Docket 09-00183, *In Re: Petition of Chattanooga Gas for Approval of Adjustment to its Rates and Charges, Modification of its Rate Design, and Revised Tariff.* As a result of that petition, the Consumer Advocate filed a *Petition to Intervene* on December 8, 2009, and the CMA filed its own *Petition of the Chattanooga Manufacturer's Association for Leave to Intervene* on December 8, 2009. Both of these petitions were uncontested by CGC and ultimately granted by the TRA.

On December 29, 2009, Chattanooga Manufacturer's Association filed a *Motion of Chattanooga Manufacturer's Association to Combine the Request of Chattanooga Gas for Reimbursement of Legal Fees in Docket 07-00224 with the Request of Chattanooga Gas for a*

General Rate Increase in Docket 09-00183 ("Motion of CMA"), in relation to the request for recovery of litigation costs in Docket 07-00224. In summary, the *Motion of CMA* took the position that CGC's request for litigation costs was either: 1) a request for recovery of litigation costs, or 2) a request for a rate increase to recover litigation expenses as if Docket 07-00224 was a ratemaking docket, p. 9 (December 29, 2009). CMA went on to state that under the Tennessee Court of Appeals ruling in Kingsport Power Company v. Tennessee Public Service Commission, the TRA has no statutory authority "to award litigation costs to any party," *Motion of CMA*, p. 7. Alternatively, CMA argued that if CGC's request for litigation expenses was intended as a rate increase, an explanation of the increase must first be properly noticed to ratepayers and a public hearing must be held, as required by TRA regulations. Id. at 5. CMA then noted that, to date, CGC has not provided public notice to ratepayers, as required under the TRA rules. Id. CMA concluded by arguing that the issue of CGC's request for recovery of litigation expenses should be moved into CGC's pending rate case, Docket 09-00183, so as to provide ratepayers with notice of the requested recovery and to allow the Authority to measure the "full impact" of CGC's "combined requests of $700,000 and $2.6 million." Id. at 6.

RESPONSE OF THE CONSUMER ADVOCATE

In its *Position Brief*, filed in Docket 07-00224, the Consumer Advocate argued that any recovery of litigation costs awarded to CGC should be limited to no more than a maximum of one-half of the company's legal expenses in Docket 07-00224, pp. 2-3 (October 28, 2009). Further, the Consumer Advocate argued:

> it is within the discretion of the TRA to completely deny CGC's request for cost recovery. To date, CGC has offered **no statutory authority for such cost recovery and, as will be shown below, the Consumer Advocate has not found any authority to support an award of costs**

> **outside of a rate case proceeding before the Authority.** However, given the unique history of this matter, including extensive discovery filed by the Consumer Advocate in an attempt to gather information in this complex Docket of first impression, the Consumer Advocate understands that some recovery of costs may be appropriate under the circumstances...

Id. at 3 (emphasis added). As CMA properly points out, during the Conference on November 9, 2009, the Consumer Advocate stated that "it is in [the TRA's] discretion to ...[allow CGC] to recover all their costs, some of their costs, or none of their costs," *Motion of CMA*, p.6. However, after reviewing the authority cited in the *Motion of CMA*, it is the opinion of the Consumer Advocate that the current law of Tennessee does not permit an award of any litigation costs to CGC, see Kingsport Power Company v. Tennessee Public Service Commission, 1984 Tenn. App. LEXIS 2949.

The Consumer Advocate reviewed the Court of Appeals' ruling in Kingsport Power Company v. Tennessee Public Service Commission, 1984 Tenn. App. LEXIS 2949 (hereinafter "Kingsport Power"). In that case, the Tennessee Public Service Commission ("the Commission") is quoted as saying that it has no "statutory authority from the Tennessee legislature to award litigation costs to any party." Id. at 3. Additionally, the Consumer Advocate conducted its own research for subsequent case law and/or statutory changes that might authorize such action by the Commission or the TRA, arising since the Kingsport Power decision. In conducting that research, the Consumer Advocate discovered a companion case to Kingsport Power, in which the Court of Appeals once again heard this issue on appeal from the remanded proceedings of the first Kingsport Power holding; see Kingsport Power Company v. Tennessee Public Service Commission, 1985 Tenn. App. LEXIS 2655 (hereinafter "Kingsport Power II") (attached hereto as Exhibit A). In Kingsport Power II the Court of Appeals not only quoted the Commission as stating that it "has no statutory authority from the Tennessee legislature to award

litigation costs to any party," but the Court went on to accept that position as a correct statement of the law where it ruled that "**because the Public Service Commission has no statutory authority to award costs,** and has not directed the Plaintiff to do anything in this regard, plaintiff is not an aggrieved party." Id. at 4-5 (emphasis added). In the course of its research of the newly identified authority by the CMA, the Consumer Advocate has been unable to find any subsequent case law altering or reversing this finding of the Court of Appeals.

Thus, the Court of Appeals decision in Kingsport Power makes clear the difference between an award of legal fees at the conclusion of a case and the treatment of rate case costs, including legal fees, as an operating expense that can be recovered in a rate case as part of the cost of providing service to ratepayers. Id. *supra.* In the asset management case, Docket 07-00224, CGC is attempting to obtain an "award" of legal fees at the end of a non-rate case and such an award is not permissible under Tennessee law.

Similarly, the Consumer Advocate was unable to find any subsequent statutory changes in the Tennessee Code Annotated ("the Code" or "T.C.A.") which would permit the TRA, as successor to the Public Service Commission, to award litigation costs under the present circumstances of Docket 07-00224. As CMA addressed in its motion, T.C.A. § 4-5-325, passed in 1994, does permit for the recovery of litigation costs in proceedings before a state administrative agency, but only in very narrow circumstances. The Code requires that a state agency must first issue a "citation" for "the violation of a rule, regulation or statute and such citation results in a contested case hearing," T.C.A. § 4-5-325(a). Obviously, the Docket 07-00224 does not meet the basic criteria of that statute as this Docket was not brought as a result of a "citation," much less a "citation alleging the violation of a rule, regulation or statute." Id.

In fact, under the principal of *expressio unius est exclusio alterius*, the legislature's passage of T.C.A. § 4-5-325 is evidence that the TRA lacks the power to award litigation costs in other circumstances, not specifically enumerated by statute, see Wells v. Tennessee Board of Regents, 231 S.W.3d 912, 917 (Tenn. 2007) (attached hereto as Exhibit B). In Wells v. Tennessee Board of Regents, the Supreme Court of Tennessee describes the principal of "*expressio unius est exclusio alterius*, which translates as 'the expression of one thing implies the exclusion of ... things not expressly mentioned.'" Id. *citing* Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 84 (Tenn. 2001). Furthermore, the Supreme Court in Limbaugh v. Coffee Med. Ctr., when addressing the failure of the legislature to include two specific torts in a statute dealing with exceptions to the state's immunity from suit, held that:

> we find it noteworthy that the legislature excluded the two intentional torts most likely to give rise to injury. Under the maxim '*expressio unius est exclusio alterius,*' which states the principle that the expression of one thing implies the exclusion of all things not expressly mentioned...we are unable to expand the intentional torts exception to include assault and battery...

59 S.W.3d 73, 84 (Tenn. 2001) (attached hereto as Exhibit C). Clearly, if the legislature had intended the TRA to have the power to award litigation costs in situations other than those arising as described in T.C.A. § 4-5-325, they would have expressly provided for that power by statute. Presently, they have provided no such statute, and thus the recovery of litigation costs in a non-ratemaking docket is barred.

Further, the Tennessee Supreme Court has held that the American Rule "has been firmly established in this State" with regard to the recovery of litigation costs, House v. Estate of Edmonson, 245 S.W.3d 372, 377 (Tenn. 2008) (attached hereto as Exhibit D). The American Rule provides that a party in a civil action may not recover attorney's fees absent a specific

contractual or statutory provision providing for attorney's fees as part of the prevailing party's damages. Id. While the Consumer Advocate, in this case, is not seeking to re-argue the TRA's holding in Docket 08-00039, that the American Rule does not block the recovery of some regulatory expenses incurred as a result of a **ratemaking docket**, the Consumer Advocate does assert that the American Rule is applicable to bar an award of litigation costs in a **non-ratemaking docket**, such as Docket 07-00224. The parties have never been in dispute that Docket 07-00224 is not a rate case; as the Vice President and General Manager of CGC recently said in a response to an editorial printed in the *Chattanooga Times Free Press*, "this proceeding is NOT a rate case," *Editorial on Gas Inaccurate, Chattanooga Times Free Press*, December 31, 2009 (attached hereto with a copy of the editorial to which it responded as Exhibit E.) Therefore, CGC may not recover its litigation costs because this is not a rate case and there is no statutory authority authorizing the recovery of such costs in a non-ratemaking docket before the TRA.

Finally, the Consumer Advocate agrees with CMA that ratepayers must be properly notified of any potential rate increase, so that they may have an opportunity to provide meaningful comment on any such proposed increase. *Motion of CMA*, 5-6. Clearly, ratepayers, particularly those represented by CMA who have participated so importantly in so many rate cases, have taken an interest in Docket 07-00224, as evidenced by the editorial printed on December 24, 2009. (attached hereto at Exhibit E). Thus, CMA should be allowed to appear as a party and set forth its position in whatever docket this legal fees issue is ultimately decided. As always, the Consumer Advocate welcomes the opinions of the citizens of Chattanooga who will be directly impacted by any award of litigation fees, as well as any other members of the public

who may wish to speak on this issue before the TRA, and feel that any such comments are sure to provide meaningful feedback for the Authority to consider in its deliberations.

CONCLUSION

In light of the controlling precedent and existing statutory authority granted the TRA, the Consumer Advocate is of the opinion that CGC is unable to recover its litigation costs in Docket 07-00224. The *Motion of CMA* succinctly states that CGC's request for recovery of litigation costs "must be either (1) a rate case or (2) a request for the award of legal fees," at 9. However, throughout Docket 07-00224, CGC has stated that this was not a ratemaking docket. Therefore, CGC's request for recovery of its litigation costs is just that, a request for the TRA to award the utility its legal fees in Docket 07-00224, and, as was more fully addressed above, such an award is not authorized under the existing law in the State of Tennessee, regardless of the docket or forum in which this issue is ultimately heard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This the 8th day of January, 2010.

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EXHIBIT A

KINGSPORT POWER COMPANY Plaintiff-Appellant VS. TENNESSEE PUBLIC SERVICE COMMISSION, FRANK D. COCHRAN, KEITH BISSELL, and JANE ESKIND, Commissioners, and KINGSPORT POWER USERS ASSOCIATION Defendants-Appellees

Court of Appeals of Tennessee, Middle Section at Nashville

1985 Tenn. App. LEXIS 2655

February 5, 1985

PRIOR HISTORY: [*1] NO. 84-281-II

DAVIDSON EQUITY

DISPOSITION: AFFIRMED, MODIFIED AND REMANDED

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant power company challenged a decision from The Chancery Court of Davidson County (Tennessee), which granted appellee Public Service Commission's motion for judgment on the pleadings, dismissing the power company's petition to review the Commission's order involving appellee association pursuant to *Tenn. Code Ann. § 4-5-322*, the section of the Uniform Administrative Procedures Act providing for judicial review of contested cases.

OVERVIEW: The association sought reimbursement for litigation expenses arising out of proceedings with the power company pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA), *16 U.S.C.S. § 2632*. The Commission found that under the Act the association was entitled to compensation for legal fees, expert witness fees, and out-of-pocket expenses in two of the proceedings reviewed. However, the court noted the Commission's statement that it had no authority to award costs under the Act, although it made findings and conclusions that it would deem appropriate if it had the requisite jurisdiction. The court observed that the instant case was manifestly not a contested case. The Commission concluded that it had no power to order the power company to pay expenses to the association. The court pointed out that no hearing was held by the Commission, so there was no contested case for a court to review, and nothing before the trial court to invoke its jurisdiction; therefore there was nothing before the appellate court on which to base a judgment. The court concluded that the power company was not without a remedy, but it could petition the Commission for a declaratory order.

OUTCOME: The court modified the trial court's order to reflect that the basis for dismissal was a lack of jurisdiction to review the Commission's order. As modified the judgment of the trial court was affirmed and the cause was remanded for any further proceedings necessary. Costs on appeal were taxed to the power company.

LexisNexis(R) Headnotes

Energy & Utilities Law > Administrative Proceedings > Costs & Attorney Fees
Energy & Utilities Law > Cogeneration & Independent Power Companies > Public Utility Regulatory Policies Act > General Overview
Energy & Utilities Law > Utility Companies > General Overview

[HN1] Under the Public Utility Regulatory Policies Act of 1978 (PURPA), *16 U.S.C.S. § 2632*, an electric consumer may be compensated for attorney's fees and other litigation costs if the consumer participates in a Public Service Commission hearing and makes a substantial contribution to the Commission's approval, in whole or in part of a position relating certain standards set forth in the statute. The consumer may collect these fees from an

electric utility by either bringing a civil action against the utility in state court or by requesting and receiving an award of costs from the state regulatory commission.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review
[HN2] A court of appeal's jurisdiction is appellate only. *Tenn. Code Ann. § 16-4-108* (1980). Consequently, it is confined to a review of the issues presented to a court below.

Administrative Law > Judicial Review > Reviewability > Final Order Requirement
Administrative Law > Judicial Review > Reviewability > Standing
[HN3] Pursuant to the Uniform Administrative Procedures Act, specifically *Tenn. Code Ann. § 4-5-322(a)* (Supp. 1984), a person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review.

Administrative Law > Agency Adjudication > Hearings > General Overview
Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN4] "Contested case" means a proceeding, including a declaratory proceeding, in which the legal rights, duties, or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing. *Tenn. Code Ann. § 4-5-102(d)* (Supp. 1984).

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JUDGES: Cantrell, Judge, wrote the opinion. CONCUR: LEWIS, J., KOCH, J.

OPINION BY: Cantrell

OPINION

BEN H. CANTRELL, JUDGE

This action was filed in the court below to review an order of the Public Service Commission pursuant to *T.C.A. § 4-5-322*, the section of the Uniform Administrative Procedures Act providing for judicial review of contested cases. The Chancellor dismissed the action, holding that the petitioner-appellant was not "an aggrieved party."

We have no record from the Commission and there is no evidence from the court below. The background facts are recited in the order under attack. These facts are as follows:

This matter is before the Tennessee Public Service Commission upon the petition of the Kingsport [*2] Power Users Association (Association) for reimbursement for litigation expenses arising out of the Association's participation in proceedings involving the Kingsport Power Company. Reimbursement is sought pursuant to the Public Utility Regulatory Policies Act of 1978 (hereinafter "PURPA") *16 U.S.C. 2632.*

[HN1] Under *Section 2632*, an electric consumer may be compensated for attorney's fees and other litigation costs if the consumer participates in a Commission hearing and makes a "substantial" contribution to the Commission's "approval, in whole or in part" of a position "relating" certain standards set forth in the statute.

The consumer may collect these fees from an electric utility by either bringing a civil action against the utility in state court or by requesting and receiving an award of costs from the state regulatory commission.

This Commission held in April, 1981 (Docket G-81-4-4):

No Tennessee statute confers on the Commission the authority to set attorney fees, expert witness fees, and other litigation costs and assess these costs against the regulated utility.

That order went on to state:

However, the Commission recognizes that a state court would be at [*3] a distinct disadvantage in determining whether a consumer has substantially contributed to the approval, in whole or in part, to a decision relating to a hearing in which the judge does not participate. The Commission finds that by making an analysis of the consumer's contribution it can facilitate the court's task in implementing the federal law.

* * *

We today reaffirm those principles. The Commission has no statutory authority from the Tennessee legislature to award litigation costs to any party. We will, however, make a determination of those costs in light of the standards set forth in the federal statute. If the utility chooses to pay this amount to the intervening consumer, we will treat this expense as an operating cost of the utility. If the utility does not pay the costs which we find are appropriate for reimbursement, the consumer group may seek appropriate relief

The Commission's order goes on to analyze the activities of the Association in various proceedings before the Commission involving the appellant, Kingsport Power Company. In conclusion the Commission found that under the federal act the Association was entitled to compensation for legal fees, expert [*4] witness fees, and out-of-pocket expenses in two of the proceedings reviewed. The order fixed the amount at $9,675.43.

Thus, to the surprise of all, especially of the appellant, the Commission entered an order starting from the proposition that it had no authority to award costs under the federal act. Nevertheless, the Commission goes forward from that modest beginning and makes findings and conclusions that it would deem appropriate *if* it did have the requisite jurisdiction.

When the appellant filed a petition to review the action of the Commission in the court below, the Commission filed an answer and then a motion for a judgment on the pleadings. The Chancellor granted the motion and dismissed the petition to review making the following findings:

The Commission agrees that it is without statutory authority to award legal fees and costs to Kingsport Power Users Association so therefore, the order does not affect the rights or privileges of any person. It is asserted that the order is merely intended to assist a state court in determining whether the consumer group is entitled to an award under federal standards.

Because the Public Service Commission has no [*5] statutory authority to award costs, and has not directed the plaintiff to do anything in this regard, plaintiff is not an aggrieved party as provided in *T.C.A. § 4-5-322*. Therefore, plaintiff has no standing to petition this court for review of the order entered in Docket No. U-82-7183.

On a former appeal this court remanded the case to the lower court for a supplemental record. This court's opinion stated:

It is necessary for this cause to be remanded for further proceedings to build a record that will support a disposition of the issue now being pressed by the parties. Upon remand, the Chancellor should enter such orders as in his judgment seem best calculated to produce the desired information. He may require the petitioner to plead more specifically, presenting a certified copy of the order complained of; he may require the defendants to perform their statutory duty of providing a transcript, complete or abridged by consent; he may require the defendants to support their motion to dismiss with certified excerpts from the transcript; or he may take other suitable action to produce a substantial record of the facts upon which his decision and, if appealed, that of this court [*6] must rest.

On remand the only thing added to the record was a certified copy of the Commission's order. The Chancellor affirmed and re-entered his prior opinion and an order dismissing the action.

At the outset we are confronted with the perplexing question of what to do with an order of the Commission which it admits it had no authority to make. If this were a direct attack on the order, as in an action for declaratory judgment concerning its validity, we would not hesitate to express our collective opinion. However, lest we yield to the same temptation that charmed the Commission -- the temptation to issue advisory opinions -- let us first examine where we are and how we got there.

This court's [HN2] jurisdiction is appellate only. *T.C.A. § 16-4-108* (1980). Consequently, we are confined to a review of the issues presented to the court below. *Clement v. Nichols, 186 Tenn. 235, 209 S.W.2d 23 (1948)*. The action in the lower court was a petition to review filed [HN3] pursuant to the Uniform Administrative Procedures Act, specifically *T.C.A. § 4-5-322*. That section provides:

Judicial Review. - (a) A person who is aggrieved by a final decision in a contested case is [*7] entitled to judicial review under this chapter, which shall be the only available method of judicial review.

T.C.A. § 4-5-322(a) (Supp. 1984).

A contested case is defined in *T.C.A. § 4-5-102* as:

(3) [HN4] "Contested case" means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after

T.C.A. § 4-5-102(d) (Supp. 1984).

The record shows this is manifestly *not* a contested case. The Commission's order reflects the Commission's conclusion, which it restated and affirmed, that it had no power to order the appellant to pay expenses to the Association. We think it ineluctably follows that no statute or constitutional provision requires the Commission to hold a hearing for the purpose of producing such an order. Although the record before us does not show it,

counsel in oral argument conceded that no hearing was held by the Commission. Therefore, there was no contested case for the court to review, and nothing before the court below to invoke its jurisdiction. *National Health Corp. v. Snodgrass, 555 S.W.2d 403 (Tenn. 1977).* Hence, [*8] there is nothing before us on which we could base a judgment about the order in question.

The appellant is not without a remedy. If, as the appellant insists the order is void, it can be attacked in any proceeding where it may appear. The Code provides that the appellant may petition the Commission itself for a declaratory order as to the validity of the order. *T.C.A. § 4-5-223* (Supp. 1984). The ruling on the petition is then reviewable as any other contested case. *Id.* If the Commission refuses to issue a declaratory order, the complaining party may seek a declaration from the Chancery Court of Davidson County. *T.C.A. § 4-5-224* (Supp. 1984).

The order of the court below is modified to reflect that the basis for dismissal is a lack of jurisdiction to review the Commission's order. As modified the judgment of the court below is affirmed and the cause is remanded to that court for any further proceedings necessary. Tax the costs on appeal to the appellant.

CONCURRING: SAMUEL L. LEWIS, JUDGE, WILLIAM C. KOCH, JR., JUDGE

EXHIBIT B

231 S.W.3d 912, 224 Ed. Law Rep. 482, 26 IER Cases 1285
(Cite as: 231 S.W.3d 912)

H

Supreme Court of Tennessee,
at Nashville.
Alexander C. WELLS
v.
TENNESSEE BOARD OF REGENTS, Tennessee State University, and James Hefner.
No. M2005-00938-SC-R11-CV.

June 7, 2007 Session.
Aug. 17, 2007.

Background: Tenured state university professor sought judicial review of Board of Regents' decision to terminate him. The Chancery Court reversed, and Board of Regents, state university, and president of university appealed. While appeal was pending, professor filed a motion seeking monetary damages. The Chancery Court overruled the motion. Ultimately the Supreme Court, 9 S.W.3d 779, affirmed the Chancery Court's reversal of the Board of Regents' decision. Professor filed motion for relief from chancellor's previous order of dismissal of the claim for damages. The Chancery Court, Davidson County, Carol McCoy, Chancellor, granted relief and awarded back pay. Defendants appealed. The Court of Appeals, 2006 WL 2786937, affirmed. Defendants appealed.

Holding: The Supreme Court, Gary R. Wade, J., held that professor could not recover back pay and lost benefits pursuant to statute authorizing judicial review of the decision to terminate him.

Reversed.

West Headnotes

[1] Colleges and Universities 81 ⇨8.1(7)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(6) Judicial Review
81k8.1(7) k. Relief; Reinstatement or Damages. Most Cited Cases
Tenured state university professor, who was wrongfully discharged, could not recover back pay and lost benefits pursuant to statute authorizing a tenured faculty member of state university to obtain judicial review of final decision to dismiss him for cause. West's T.C.A. § 49-8-304.

[2] Statutes 361 ⇨176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases
Construction of a statute is a question of law.

[3] Appeal and Error 30 ⇨893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Standard of appellate review for questions of law is de novo.

[4] Statutes 361 ⇨206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving Effect to Entire Statute. Most Cited Cases

Statutes 361 ⇨212.6

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.6 k. Words Used. Most Cited Cases

Court must presume that every word in a statute has meaning and purpose; thus, each word should be given full effect if the obvious intention of the General Assembly is not violated by so doing.

[5] Statutes 361 ⇨188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

If the statutory language is clear and unambiguous, courts apply its plain meaning in its normal and accepted use and without a forced interpretation that would limit or expand the statute's application.

[6] Statutes 361 ⇨176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial Authority and Duty. Most Cited Cases

Statutes 361 ⇨181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

When called upon to construe a statute, courts must take care not to unduly restrict a statute's application or conversely to expand its coverage beyond its intended scope.

[7] Statutes 361 ⇨223.1

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases

If a statute is ambiguous, capable of conveying more than one meaning, courts look to the entire statutory scheme to determine legislative intent.

[8] States 360 ⇨191.1

360 States
360VI Actions
360k191 Liability and Consent of State to Be Sued in General
360k191.1 k. In General. Most Cited Cases

Doctrine of sovereign immunity has both a constitutional and statutory basis. West's T.C.A. Const. Art. 1, § 17; West's T.C.A. § 20-13-102(a).

[9] Statutes 361 ⇨190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of Ambiguity. Most Cited Cases

When a statute is not ambiguous, courts need only to enforce the statute as written, with no recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the Legislature's purpose.

[10] Statutes 361 ⇨223.2(1.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(1) Statutes That Are in Pari Materia

361k223.2(1.1) k. In General. Most Cited Cases

Statutes may be construed in pari materia in order to ascertain their purpose or intent.

[11] Statutes 361 ⇐195

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k195 k. Express Mention and Implied Exclusion. Most Cited Cases

When considering the meaning of statutes, court may employ the Latin maxim, express unius est exclusio alterius, which translates as the expression of one thing implies the exclusion of things not expressly mentioned.

[12] Colleges and Universities 81 ⇐8.1(6.1)

81 Colleges and Universities
81k8 Staff and Faculty
81k8.1 Duration of Employment and Removal or Other Discipline
81k8.1(6) Judicial Review
81k8.1(6.1) k. In General. Most Cited Cases

Given Supreme Court's determination on appeal that tenured state university professor who was wrongfully discharged had no remedy for monetary relief, Court would not address ancillary issues raised by defendants of whether chancery court abused its discretion by granting a motion for relief from judgment or whether professor waived his right to relief in the chancery court by filing a breach of contract claim in the Claims Commission.

***913** Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Jay C. Ballard, Assistant Attorney General, for the appellants, Tennessee Board of Regents, Tennessee State University, and James Hefner.

Phillip L. Davidson, Nashville, Tennessee, for the appellee, Alexander C. Wells.

GARY R. WADE, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., JANICE M. HOLDER and CORNELIA A. CLARK, JJ., joined.

OPINION

GARY R. WADE, J.

We accepted review of this case to decide whether a tenured university professor whose employment by the State was ***914** wrongfully terminated may recover back pay and lost benefits pursuant to Tennessee Code Annotated section 49-8-304. While the trial court initially found there was no statutory authority to grant monetary damages, the plaintiff was awarded back wages, lost benefits, and interest. The Court of Appeals affirmed. Because there is no statutory authority for the award, however, the judgments of the trial court and the Court of Appeals must be reversed and the cause dismissed.

Factual and Procedural Background

In 1958, Alexander Wells ("the Plaintiff") was employed as a lab assistant at Tennessee State University ("TSU"). As a part of his duties at the school, he conducted research and taught several biology-related courses each semester. In 1985, the Plaintiff was granted tenure.

In 1990, a student filed a complaint with TSU alleging that the Plaintiff had sexually harassed her. In accordance with the policy of the Tennessee Board of Regents, an administrative law judge conducted an evidentiary hearing and determined that the Plaintiff had, in fact, violated the sexual harassment policy. TSU subsequently conducted proceedings to determine if adequate grounds existed to terminate employment. An internal hearing committee found that the Plaintiff had "capricious[ly] disregard[ed] ... accepted standards of professional con-

duct," a statutory ground for dismissal, and recommended termination. *See* Tenn.Code Ann. § 49-8-302(5) (2002). TSU President, James Hefner, who was joined as a defendant in his official capacity, terminated the employment of the Plaintiff in 1995. An appeal to the Board of Regents, also a named defendant, was unsuccessful.

The Plaintiff then filed a petition seeking judicial review of the decision to terminate his employment. After considering the record and testimony of the Plaintiff's witnesses, the Davidson County Chancery Court determined that the evidence did not sufficiently establish any violation of the professional standards of conduct and reversed the decision of the Tennessee Board of Regents. Upon review, this Court affirmed the ruling of the chancellor.[FN1] *See Wells v. Tenn. Bd. of Regents,* 9 S.W.3d 779 (Tenn.1999). The issue of damages was not before us in the prior appeal.

FN1. At that time, Tennessee Code Annotated section 49-8-304(d) (1990) authorized a direct appeal to this Court.

In 1998, while the first appeal was pending, the Plaintiff filed a motion in the chancery court seeking monetary damages. The chancellor ruled that the trial court no longer had jurisdiction over the case because of the appeal and concluded that, even if there was jurisdiction, the Plaintiff had waived his right to relief by failing to seek damages at trial. The chancellor also ruled that the State was protected from liability by the doctrine of sovereign immunity.

A few months later, the Plaintiff filed an action against the State in the Tennessee Claims Commission alleging breach of contract. He sought $600,000 in damages for back pay, attorney's fees, lost benefits, and litigation costs incurred since the date of his dismissal. The Claims Commission dismissed the action because the Plaintiff failed to prove the existence of a contract. The Court of Appeals affirmed. *See Wells v. State,* No. M2002-01958-COA-R3-CV, 2003 WL 21849730 (Tenn.Ct.App. Aug.8, 2003). As to the claim for damages, the Court of Appeals observed that "[i]t is a mystery to us why the claim for back pay *915 was not pursued in the original action in the chancery court or why the order overruling the motion for back pay was not appealed. But those issues are not before us now." *Id.* at *4.

Undeterred by a lack of success in either the chancery court or the Claims Commission, the Plaintiff filed a motion in 2004 under Rule 60.02(5) seeking relief from the chancellor's previous order of dismissal of the claim for damages.[FN2] The chancellor granted the motion and directed the Board of Regents to pay the Plaintiff back wages, lost benefits, and interest stemming from his termination. The chancellor reasoned that because the issues of reinstatement and back pay were never addressed, "the end result" from the prior litigation was "not fair."

FN2. Rule 60.02 of the Tennessee Rules of Civil Procedure provides in part: "On motion and upon such terms as are just, the court may relieve a party ... from a final judgment ... for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud ... misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged ...; or (5) any other reason justifying relief from the operation of the judgment."

In a divided decision, the Court of Appeals affirmed the award. The majority concluded that (1) the chancery court did not abuse its discretion by granting Rule 60 relief to the Plaintiff, and (2) even though Tennessee Code Annotated section 49-8-304 does not expressly provide for an award of back pay, the enactment of the statute waived the State's sovereign immunity in that regard.

Analysis

The General Assembly has authorized the Tennessee Board of Regents to promulgate a tenure policy for faculty within the state university and college system to "ensure academic freedom and provide sufficient professional security to attract the best qualified faculty available." Tenn.Code Ann. § 49-8-301(a) (2002). The Board is also charged with the responsibility of providing "for the termination of faculty with tenure by institutions for adequate cause...." Tenn.Code Ann. § 49-8-301(b)(3) (2002). Among other proper grounds, "adequate cause" is defined as falsification of qualifications, incompetence or dishonesty, the willful failure to perform duties or assignments, conviction of a felony, excessive use of drugs or alcohol, or, as was initially found in this case, the capricious disregard of accepted standards of professional conduct. *See* Tenn.Code Ann. § 49-8-302 (2002).

In the event a tenured faculty member is dismissed based on the grounds identified in section 49-8-302, judicial review is available under section 49-8-304:

> **Judicial review.**-(a) A faculty member who has been awarded tenure, and who has been dismissed or suspended for cause, may obtain de novo judicial review of the final decision by filing a petition in a chancery court having jurisdiction within thirty (30) days of the final decision, and copies of the petition shall be served upon the board and all parties of record.
>
> (b) Within forty-five (45) days after service of the petition, or within such further time allowed by the court, the board shall transmit to the court the original or a certified copy of the entire record of the proceeding.
>
> (c) The chancellor shall reduce the chancellor's findings of fact and conclusions of law to writing and make them parts of the record.

Tenn.Code Ann. § 49-8-304 (2002).

[1][2][3][4][5][6][7] Our task in this appeal is to determine whether section 49-8-304 authorizes***916** an award of back pay and lost benefits to a tenured faculty member who has been wrongfully discharged. In performing this analysis, we are guided by the established rule that the construction of a statute is a question of law. *Sallee v. Barrett,* 171 S.W.3d 822, 825 (Tenn.2005). The standard of appellate review for questions of law is de novo. *Leab v. S & H Mining Co.,* 76 S.W.3d 344, 348 (Tenn.2002); *Bryant v. Genco Stamping & Mfg. Co.,* 33 S.W.3d 761, 765 (Tenn.2000). We must presume that every word in a statute has meaning and purpose; thus, each word should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.,* 173 S.W.3d 714, 722 (Tenn.2005). If the statutory language is clear and unambiguous, we apply its plain meaning in its normal and accepted use and without a forced interpretation that would limit or expand the statute's application. *Eastman Chem. Co. v. Johnson,* 151 S.W.3d 503, 507 (Tenn.2004). When called upon to construe a statute, courts must take care not to unduly restrict a statute's application or conversely to expand its coverage beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.,* 90 S.W.3d 676, 678 (Tenn.2002). If, however, a statute is ambiguous, capable of conveying more than one meaning, we look to the entire statutory scheme to determine legislative intent. *Sallee,* 171 S.W.3d at 828.

The Plaintiff argues that Tennessee Code Annotated section 49-8-304 permits an award of monetary damages for wrongful termination and submits that the State has, therefore, waived its sovereign immunity as to awards of back pay and lost benefits. In response, the defendants, the Board of Regents, TSU, and Dr. Hefner, point out that the section contains no language indicating the legislature meant to provide for an award of monetary damages in circumstances like these and maintain that they are protected by sovereign immunity.

[8] Historically, the doctrine of sovereign immunity has provided that a sovereign governmental entity cannot be sued in its own courts absent legislative

consent. *Hawks v. City of Westmoreland,* 960 S.W.2d 10, 14 (Tenn.1997); *Williams v. State,* 139 S.W.3d 308, 311 (Tenn.Ct.App.2004); *see also* Lewis L. Jaffe, Suits Against Governments and Officers, Sovereign Immunity, 77 Harv. L.Rev. 1 (1963). Article 1, section 17 of the Tennessee Constitution does, however, authorize the General Assembly to waive sovereign immunity: "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Further, Tennessee Code Annotated section 20-13-102(a) (1994) prohibits courts from entertaining suits against the State, absent waiver, and requires dismissal on proper motion. The doctrine of sovereign immunity, therefore, has both a constitutional and statutory basis. *Jones v. L & N R.R. Co.,* 617 S.W.2d 164, 170 (Tenn.Ct.App.1981).

In Tennessee, the principal case on the subject at issue is *State ex rel. Chapdelaine v. Torrence,* 532 S.W.2d 542 (1976), wherein a tenured university professor was awarded back pay for breach of his employment contract following his wrongful discharge. At the time that case was decided, Tennessee Code Annotated section 49-1421 (1966) provided that tenured college and university professors were entitled to "judicial review of [termination decisions] for the same purposes and in the same manner provided in section 49-1417." Section 49-1417 was part of the statutory scheme applicable to elementary and secondary school teachers in local school systems, for whom the courts had "consistently approved awards of back ***917** pay." *Chapdelaine,* 532 S.W.2d at 550; *see also Wagner v. Elizabethton City Bd. of Educ.,* 496 S.W.2d 468 (Tenn.1973); *Jeffers v. Stanley,* 486 S.W.2d 737 (Tenn.1972). While the State relied upon the defense of sovereign immunity in *Chapdelaine,* this Court awarded back pay, observing that the "college and university teachers' tenure law, as incorporated in [section] 49-1421, ... would be 'as a sounding brass, or a tinkling cymbal' if it did not carry with it the coordinate right of a tenured teacher to seek back pay in wrongful dismissal cases." *Chapdelaine,* 532 S.W.2d at 551.

In 1976, however, the legislature repealed section 1421, thereby severing the statutory connection between actions of tenured college and university faculty and those of tenured elementary and secondary teachers in local school systems. As expressed by Judge Patricia Cottrell in her dissent to the opinion of the Court of Appeals, the "basis for the *Chapdelaine* court's reliance on authority governing public school teachers in local systems no longer exists."

[9][10][11] The present statute governing state college and university professors, Tennessee Code Annotated section 49-8-304 (2002), makes no mention of back pay or other monetary relief. In contrast, section 49-5-511(a)(3) (2002), the statute applicable to tenured school teachers on the elementary and secondary level, provides that if the teacher is "vindicated or reinstated, the teacher shall be paid the full salary for the period during which the teacher was suspended." That the legislature did not include any such remedy for tenured faculty at the college or university level in section 304 speaks to the issue. Had the legislature intended for a wrongfully terminated college or university professor to receive monetary damages, the statute should have included that provision. When a statute is not ambiguous, "we need only to enforce the statute as written, with no recourse to the broader statutory scheme, legislative history, historical background, or other external sources of the Legislature's purpose." *Abels v. Genie Indus. Inc.,* 202 S.W.3d 99, 102 (Tenn.2006). Statutes may be construed *in pari materia* in order to ascertain their purpose or intent. *Lyons v. Rasar,* 872 S.W.2d 895, 897 (Tenn.1994). When considering their meaning, this Court may employ the Latin maxim, *express unius est exclusio alterius,* which translates as "the expression of one thing implies the exclusion of ... things not expressly mentioned." *Limbaugh v. Coffee Med. Ctr.,* 59 S.W.3d 73, 84 (Tenn.2001). The application of these guidelines suggests that the General Assembly has chosen not to waive sovereign immunity under these circumstances. Moreover, we have held that any abrogation of the immunity doc-

trine by the legislature must be set out in "plain, clear, and unmistakable terms." *Northland Ins. Co. v. State*, 33 S.W.3d 727, 731 (Tenn.2000). In summary, the Plaintiff has no remedy for monetary relief.

[12] In the alternative, the defendants argue that the chancery court abused its discretion by granting a Rule 60 motion six years after denying relief. Further, the defendants maintain that the Plaintiff waived his right to relief in the chancery court by filing a breach of contract claim in the Claims Commission. As authority, the defendants rely upon Tennessee Code Annotated section 9-8-307(b) (1999), which provides that "[c]laims against the state ... shall operate as a waiver of any cause of action, based on the same act or omission, which the claimant has against any state officer or employee." In light of our conclusion that section 49-8-304 does not ***918** authorize an award of monetary relief, we decline to address these ancillary issues.

Conclusion

Because section 49-8-304 does not authorize an award of back pay and lost benefits to a wrongfully discharged tenured faculty member of a state college or university, the State is protected by sovereign immunity. Accordingly, the judgments of the trial court and the Court of Appeals are reversed, and the cause is dismissed. The costs on appeal are taxed against the Plaintiff, for which execution may issue if necessary.

Tenn.,2007.
Wells v. Tennessee Bd. of Regents
231 S.W.3d 912, 224 Ed. Law Rep. 482, 26 IER Cases 1285

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EXHIBIT C

59 S.W.3d 73
(Cite as: 59 S.W.3d 73)

Supreme Court of Tennessee,
at Nashville.
Eddie Brown LIMBAUGH, Executor of the Estate of Emma Ruth Limbaugh
v.
COFFEE MEDICAL CENTER, et al.
No. M1999-01181-SC-R11-CV.

Oct. 16, 2001.

Resident's conservator sued nursing home and nursing assistant for damages resulting from assistant's assault on resident. Following a bench trial, the Circuit Court for Coffee County, John W. Rollins, J., entered judgment for conservator and both parties appealed. The Court of Appeal affirmed the judgment against the nursing assistant, but reversed the judgment against nursing home. Conservator sought permission to appeal, which was granted. The Supreme Court, William M. Barker, J., held that: (1) nursing home was negligent in failing to protect resident from assault by nursing assistant; (2) nursing home was not immune from liability for assistant's assault and battery under the Government Tort Liability Act (GTLA), overruling *Potter v. City of Chattanooga,* 556 S.W.2d 543, and abrogating *Jenkins v. Loudon County,* 736 S.W.2d 603, *Belk v. Obion County,* 7 S.W.3d 34, *Roberts v. Blount Mem'l Hosp.,* 963 S.W.2d 744, *Gifford v. City of Gatlinburg,* 900 S.W.2d 293, and *Anderson v. Hayes,* 578 S.W.2d 945; (3) nursing home was not immune from liability under the discretionary function exception of the GTLA; and (4) nursing home and assistant were jointly and severally liable for resident's damages.

Judgment of Court of Appeals affirmed in part, reversed in part, and remanded.

Janice M. Holder, J., concurred and filed opinion.

West Headnotes

[1] Health 198H ⇨662

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(C) Particular Procedures
198Hk662 k. Nursing Homes. Most Cited Cases
(Formerly 43k7)
The relationship between a nursing home and its residents, where a nursing home voluntarily assumes an obligation to provide care for those who are unable because of physical or mental impairment to provide care for themselves, gives rise to an affirmative duty owed by the nursing home to exercise reasonable care to protect its residents from all foreseeable harms within the general field of danger which should have been anticipated.

[2] Health 198H ⇨662

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(C) Particular Procedures
198Hk662 k. Nursing Homes. Most Cited Cases
(Formerly 43k7)
Nursing home breached its duty of care by failing to take reasonable precautions to protect resident from foreseeable risk that she would be assaulted by nursing assistant, where staff members eighteen days earlier had witnessed assistant's physical outburst at visitor, resident was known to physically strike out at caretakers as a result of her dementia, nursing home's discipline policies recognized that physical abuse by staff members previously known to be physically aggressive was a foreseeable danger against which reasonable precaution had to be taken, but nursing home administrator took no steps to discipline assistant due to physical outburst at visitor until after assault on resident.

[3] Municipal Corporations 268 ⇨723

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723 k. Nature and Grounds of Liability. Most Cited Cases
Provision of Governmental Tort Liability Act (GTLA) immunizing government entities from tort liability if the injury arises from enumerated intentional torts does not immunize a government entity from liability for those intentional torts not specifically enumerated, overruling *Potter v. City of Chattanooga,* 556 S.W.2d 543, and abrogating *Jenkins v. Loudon County,* 736 S.W.2d 603, *Belk v. Obion County,* 7 S.W.3d 34, *Roberts v. Blount Mem'l Hosp.,* 963 S.W.2d 744, *Gifford v. City of Gatlinburg,* 900 S.W.2d 293, and *Anderson v. Hayes,* 578 S.W.2d 945. T.C.A. § 29-20-205(2).

[4] Statutes 361 ⇨239

361 Statutes
361VI Construction and Operation
361VI(B) Particular Classes of Statutes
361k239 k. Statutes in Derogation of Common Right and Common Law. Most Cited Cases
Statutes created in derogation of the common law must be strictly construed.

[5] Statutes 361 ⇨181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ⇨184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases
Supreme Court in construing statutes is to ascertain and give effect to the legislative purpose and intent without unduly restricting or expanding a statute's coverage beyond its intended scope.

[6] Statutes 361 ⇨188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language, without a forced or subtle interpretation that would limit or extend the statute's application.

[7] Constitutional Law 92 ⇨2474

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2472 Making, Interpretation, and Application of Statutes
92k2474 k. Judicial Rewriting or Revision. Most Cited Cases
(Formerly 92k70.1(2))

Statutes 361 ⇨129

361 Statutes
361IV Amendment, Revision, and Codification
361k129 k. Power to Amend in General. Most Cited Cases

Statutes 361 ⇨212.7

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction

361k212.7 k. Other Matters. Most Cited Cases
Courts are not authorized to alter or amend a statute, and must presume that the legislature says in a statute what it means and means in a statute what it says there.

[8] Municipal Corporations 268 ⇐723.5

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k723.5 k. Constitutional and Statutory Provisions. Most Cited Cases
Governmental Tort Liability Act (GTLA) must be strictly construed, as it was created in derogation of the common law. T.C.A. §§ 29-20-101 to 29-20-407.

[9] Health 198H ⇐662

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(C) Particular Procedures
198Hk662 k. Nursing Homes. Most Cited Cases
(Formerly 43k7)

Health 198H ⇐770

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(E) Defenses
198Hk770 k. Official or Governmental Immunity. Most Cited Cases
(Formerly 43k7)
Provision in Governmental Tort Liability Act (GTLA) immunizing government entities from tort liability for injuries arising out of enumerated intentional torts did not immunize government nursing home which negligently failed to take reasonable precautions to protect resident from foreseeable risk that she would be assaulted by nursing assistant, as torts of assault and battery were not among the enumerated torts. T.C.A. § 29-20-205 (2).

[10] Municipal Corporations 268 ⇐728

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 k. Discretionary Powers and Duties. Most Cited Cases
Discretionary function exception of the Governmental Tort Liability Act (GTLA) prevents the use of tort actions to second-guess what are essentially legislative or administrative decisions involving social, political, economic, scientific, or professional policies, or some mixture of these policies. T.C.A. § 29-20-205(1).

[11] Municipal Corporations 268 ⇐728

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 k. Discretionary Powers and Duties. Most Cited Cases
The rationale of the discretionary function exception of the Governmental Tort Liability Act (GTLA), which preserves immunity for certain acts performed by governmental entities, is that the government should be permitted to operate without undue interference by the courts, as courts are often ill-equipped to investigate and balance the numerous factors that go into an executive or legislative decision. T.C.A. § 29-20-205(1).

[12] Municipal Corporations 268 ⇐728

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k728 k. Discretionary Powers and Duties. Most Cited Cases

Decisions that rise to the level of planning or policy-making are considered to be discretionary acts requiring judicial restraint and are not subject to tort liability under Governmental Tort Liability Act (GTLA), while decisions that merely implement pre-existing policies and regulations are considered to be operational in nature and require the decision-maker to act reasonably in implementing the established policy. T.C.A. § 29-20-205(1).

[13] Health 198H ⇨662

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(C) Particular Procedures
198Hk662 k. Nursing Homes. Most Cited Cases
(Formerly 43k7)

Health 198H ⇨770

198H Health
198HV Malpractice, Negligence, or Breach of Duty
198HV(E) Defenses
198Hk770 k. Official or Governmental Immunity. Most Cited Cases
(Formerly 43k7)

Discretionary function exception to the waiver of governmental immunity in the Governmental Tort Liability Act (GTLA) did not bar recovery for claims against negligent government nursing home arising out of assault upon resident by nursing assistant known to be combative; though decision on whether and how to discipline combative employees was a policy decision that could not give rise to tort liability, nursing home negligently failed to follow the guidelines adopted and discipline assistant for physical outburst that proceeded assault upon resident. T.C.A. § 29-20-205(1).

[14] Appeal and Error 30 ⇨169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of Presentation in General. Most Cited Cases

Appeal and Error 30 ⇨1082(2)

30 Appeal and Error
30XVI Review
30XVI(L) Decisions of Intermediate Courts
30k1081 Questions Considered
30k1082 Scope of Inquiry in General
30k1082(2) k. Considering Questions Not Raised or Passed Upon in Intermediate Court. Most Cited Cases

Any claim by nursing assistant of immunity for assault she committed as a governmental employee was waived, where she did not raise claim in the trial court, Court of Appeals, or Supreme Court. T.C.A. § 29-20-310(b).

[15] Negligence 272 ⇨484

272 Negligence
272XV Persons Liable
272k484 k. Joint and Several Liability. Most Cited Cases

Torts 379 ⇨135

379 Torts
379I In General
379k129 Persons Liable
379k135 k. Joint and Several Liability. Most Cited Cases
(Formerly 379k22)

When an intentional actor and a negligent actor are both named defendants, the intentional misconduct was a foreseeable risk created by the negligent defendant, and each are found to be responsible for the plaintiff's injuries, then each defendant is jointly and severally responsible for the plaintiff's total damages.

***76** H. Thomas Parsons, Manchester, Tennessee, for the Appellant.

Michael M. Castellarin, Nashville, Tennessee, for

the Appellee.

Louise Ray, pro se.

John C. Duffy, Knoxville, Tennessee, for amicus curiae, Tennessee Municipal League Risk Management Pool.

OPINION

WILLIAM M. BARKER, J., delivered the opinion of the court, in which FRANK F. DROWOTA, III, C.J., and E. RILEY ANDERSON, and ADOLPHO A. BIRCH, JR., JJ., joined.

WILLIAM M. BARKER, J.

The plaintiff, originally acting as the conservator for his mother, filed suit against Coffee Medical Center and its employee, nursing assistant Louise Ray, to recover damages for his mother's injuries when she was assaulted by this nursing assistant. In his complaint, he alleged that the medical center had prior notice of Ms. Ray's propensity for violence and that it negligently failed to take precautionary measures, which proximately caused his mother's injuries. The Circuit Court for Coffee County, following a bench trial, entered a judgment against Ms. Ray for her assault and battery in the amount of $25,000 and against Coffee Medical Center for its negligence in the amount of $40,000. The Court of Appeals affirmed the judgment against Ms. Ray, but it reversed the judgment against the medical center after concluding that it was a governmental entity and was therefore immune from suit under Tennessee's Governmental Tort Liability Act (GTLA). We then granted this appeal to determine the following issues: (1) whether a governmental entity's negligence can provide the basis for liability under the GTLA for injuries arising out of a reasonably foreseeable assault and battery by an employee of that entity; and (2) whether comparative fault principles should apply when the negligent and intentional tortfeasors are both made parties to the suit. After examining the evidence and applicable law, we conclude that the medical center is not immune from tort liability where the injuries at issue were proximately caused by its negligence in failing to exercise reasonable care to protect a resident from the foreseeable risk of an employee's intentional assault and battery. Furthermore, we conclude that where the harm arising from the intentional acts of the nursing assistant was a foreseeable risk created by the negligent medical center, and all tortfeasors have been made parties to the suit, each tortfeasor party shall be held jointly and severally liable for the entire amount of damages awarded. Accordingly, we reverse in part and affirm in part the Court of Appeals and remand the case to the Circuit Court for Coffee County to determine the total amount of damages to be awarded to the plaintiff.

BACKGROUND

The events surrounding this case arose on January 19, 1997, when an employee of the Coffee Medical Center's ("CMC") nursing home,[FN1] nursing assistant Louise Ray, physically assaulted and seriously injured*77 ninety year old Emma Ruth Limbaugh, one of the nursing home's residents. Ms. Limbaugh had been diagnosed with Alzheimer's disease and was predominantly confined to her bed or a wheelchair. As a result of her mental and physical infirmities, she was required to wear restraints for her personal safety and was otherwise completely dependent on her caretakers for all of her personal needs.

> FN1. The parties have stipulated that Coffee Medical Center Hospital and Coffee Medical Center Nursing Home are one entity under the single name of Coffee Medical Center.

Following the attack, Mr. Eddie Brown Limbaugh, Ms. Limbaugh's son, filed suit[FN2] against nursing assistant Louise Ray for assaulting and injuring his mother. He also filed a complaint against CMC, al-

leging that CMC had prior notice of Ms. Ray's propensity for violence and therefore had a duty to take reasonable precautions to protect its residents from the foreseeable acts of a violent staff member. Because CMC breached its duty to remove her from direct contact with patients, CMC's negligence proximately caused his mother's injuries.

> FN2. Mr. Limbaugh originally filed this action as the conservator for his mother. While this action was pending, Emma Ruth Limbaugh died. Mr. Limbaugh moved, and was granted permission, to continue the action as the executor of his mother's estate.

In support of his allegations against CMC, Mr. Limbaugh introduced at trial the testimony of Jennie Louise Cox, the daughter-in-law of a resident at the nursing home. Ms. Cox testified that she was engaged in an altercation with Ms. Ray just eighteen days prior to the incident involving Ms. Limbaugh. According to Ms. Cox, on the evening of January 1, 1997, she was standing in the hall talking with some of the nurses before going to visit her mother-in-law in her room. While the group was talking, Ms. Ray came out of a nearby patient's room and joined the conversation. At one point, Ms. Cox jokingly pointed her finger at Ms. Ray. Ms. Ray allegedly responded by grabbing Ms. Cox's finger and twisting her hand, bending the finger backwards. As she dug her fingernails into Ms. Cox's hand, she warned Ms. Cox never to point her finger in her face again. Ms. Cox testified that at the time of the trial, she still had scars on her hand from this incident.

Ms. Cox informed Shirley Price, the Director of Nursing, of Ms. Ray's outburst and harmful behavior. Ms. Price, in turn, reported the incident by filing a formal complaint with William Moore, the CMC Administrator. Included in the report were statements made by several of Ms. Ray's colleagues who described her as being "short with residents" and using a tone of voice that was "too harsh at times," indicating Ms. Ray's "illness, or lack of patience with residents." However, only after Ms. Ray had assaulted Ms. Limbaugh did Mr. Moore discipline the nursing assistant for her behavior towards Jennie Cox by placing her on probation for one year.

At the conclusion of a bench trial, the trial court determined that Ms. Ray was "an accident about to happen" and affirmatively found that CMC "had more than ample forewarning of the demeanor, conduct, attitude, belligerence and physical aggressiveness through the incident with Ms. Cox." Accordingly, the court awarded a judgment of $40,000 against CMC for its negligence. The court also found that Ms. Ray assaulted Ms. Limbaugh without justification, causing her to suffer severe injuries to her arm and face. The court awarded a judgment of $25,000 against Ms. Ray.

Both Mr. Limbaugh and CMC appealed the trial court's judgment.[FN3] The Court of ***78** Appeals determined that the weight of the evidence supports the trial court's finding that Ms. Limbaugh's injuries were caused by Ms. Ray's assault and battery, and therefore, it affirmed the trial court's $25,000 judgment against Louise Ray. However, the intermediate court reversed the trial court's judgment against CMC. The court found that CMC, a governmental entity,[FN4] is subject to the Governmental Tort Liability Act ("GTLA"), Tenn.Code Ann. §§ 29-20-101 to -407 (1999), which waives governmental immunity from suit for any injury resulting from its tortious acts subject to the statutory exceptions specifically enumerated in its provisions. *See* Tenn.Code Ann. § 29-20-201(a). Indeed, the Court of Appeals applied one of these exceptions, section 29-20-205, which expressly waives immunity for injuries proximately caused by a negligent act or omission of a governmental employee. However, the court cited this Court's decision in *Potter v. City of Chattanooga,* 556 S.W.2d 543 (Tenn.1977), to conclude that while CMC was in fact negligent, the nursing home is nevertheless immune from suit pursuant to subsection (2) of this provision, which retains the entity's immunity if the injuries at issue "arise out of" the intentional conduct of a governmental employee.

FN3. Specifically, both parties argued that the trial court improperly allocated fault among the negligent and intentional defendants. Mr. Limbaugh asserted that the trial court erred in not holding the nursing home liable for the entire amount of damages. In the alternative, CMC argued that it was immune from suit under the Governmental Tort Liability Act, and consequently, it should not have been allocated fault for the intentional torts of one of its employees.

Notably, Ms. Ray did not file a notice that she was appealing the trial court's judgment against her. However, because both Mr. Limbaugh and CMC filed notices of appeal, Ms. Ray was not required to file a separate notice pursuant to Rule 13(a), which states that "once any party files a notice of appeal the appellate court may consider the case as a whole." Tenn. R.App. P. 13(a) Advisory Commission Comment.

FN4. The parties stipulated that CMC is a governmental entity as defined in Tennessee Code Annotated § 29-20-102(3).

Mr. Limbaugh sought permission to appeal, which we granted,[FN5] presenting two issues for our review: (1) whether a governmental entity's negligence can provide the basis for liability under the GTLA for injuries arising out of a reasonably foreseeable assault and battery by an employee of that entity; and (2) whether comparative fault principles should apply when the negligent and intentional tortfeasors are both made parties to the suit.[FN6]

FN5. Oral argument was heard on June 13, 2001, in Nashville. Although then Chief Justice Anderson was unavoidably absent from the argument, the parties were informed in open court of his participation in the discussion and in the decision of this case pursuant to Rule 1(a)(ii) of the Internal Operating Procedures of the Tennessee Supreme Court:

Absent exceptional circumstances, all members of this Court shall participate in the hearing and determination of all cases unless disqualified for conflicts. However, a hearing shall proceed as scheduled notwithstanding the unavoidable absence of one or more justices. Any justice who is unavoidably absent from the hearing may participate in the determination of the case either by teleconferencing, videoconferencing, or by reviewing the tape of oral argument, subject to the determination of the Chief Justice. Counsel shall be advised in open court that the absent justice will fully participate in the discussion and decision of the case.

FN6. The Court of Appeals declined to directly address this issue, stating that its reversal of the trial court's judgment against CMC rendered this issue moot as to the medical center. However, by affirming the $25,000 judgment against Ms. Ray, the Court of Appeals implicitly upheld the trial court's apportionment of fault between the negligent and intentional tortfeasors.

***79 STANDARD OF REVIEW**

Our review of the trial court's findings of fact in this case is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. *See* Tenn. R.App. P. 13(d); *Cross v. City of Memphis*, 20 S.W.3d 642, 644-45 (Tenn.2000) (upholding Rule 13(d) as the applicable standard of appellate review for findings of fact in a bench trial).

I. LIABILITY OF COFFEE MEDICAL CENTER, A GOVERNMENTAL ENTITY, UNDER

THE GOVERNMENTAL TORT LIABILITY ACT

In 1973, the General Assembly enacted the Tennessee Governmental Tort Liability Act (GTLA) to codify the general common law rule that "all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities," Tenn.Code Ann. § 29-20-201(a), subject to statutory exceptions in the Act's provisions. For instance, a general waiver of immunity from suit for personal injury claims is provided in section 29-20-205 "for injury proximately caused by a negligent act or omission of any employee within the scope of his employment," unless the injury arises out of one of several enumerated exceptions to this section, such as the intentional tort exception. Specifically, this exception bars claims for injuries arising out of "false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights." Tenn.Code Ann. § 29-20-205(2). At issue in this case, then, is whether the plaintiff's claim against CMC to recover for injuries arising out of the nursing assistant's assault and battery is barred by the intentional tort exception that potentially immunizes CMC from liability.

Negligence of Coffee Medical Center

[1] Although the parties have not raised the issue of whether a nursing home is under "an affirmative duty to act to prevent [its residents] from sustaining harm," *Bradshaw v. Daniel,* 854 S.W.2d 865, 871 (Tenn.1993), we have held that where a special relationship exists between the defendant and "a person who is foreseeably at risk from ... danger," *id.* (citing *Restatement (Second) of Torts* § 315 (1965)), the defendant is under an affirmative duty to take "whatever steps are reasonably necessary and available to protect an intended or potential victim." *Turner v. Jordan,* 957 S.W.2d 815, 819 (Tenn.1997) (quoting *Naidu v. Laird,* 539 A.2d 1064, 1075 (Del.1988)). An example of this special relationship, and one most analogous to the relationship at issue in this case, is the physician/patient relationship born out of the physician's assumption of responsibility for the care and safety of another. *See, e.g., Turner,* 957 S.W.2d at 820-21 (holding that a psychotherapist has an affirmative duty to protect a foreseeable third party when the patient presents an unreasonable risk of danger to that party); *Bradshaw,* 854 S.W.2d at 872 (holding that a physician owes a duty to warn identifiable persons in the patient's family against foreseeable risks related to the patient's illness); *Wharton Transport Corp. v. Bridges,* 606 S.W.2d 521, 526 (Tenn.1980) (holding that a physician owed a duty to a third party injured by a truck driver whom the physician had negligently examined and certified). It follows, then, that the relationship between a nursing home and its residents, where a nursing home voluntarily assumes an obligation to " 'provide ***80** care for those who are unable because of physical or mental impairment to provide care for themselves,' " *Niece v. Elmview Group Home,* 131 Wash.2d 39, 929 P.2d 420, 424 (1997) (alteration in original) (citations omitted), gives rise to an affirmative duty owed by the nursing home to exercise reasonable care to protect its residents from all foreseeable harms "within the general field of danger which should have been anticipated." *Id.* at 427.

[2] In this case, the evidence clearly reflects that the risk of harm to Ms. Limbaugh was a foreseeable one. First, several members of the nursing home staff had witnessed, just eighteen days prior to the incident with Ms. Limbaugh, Ms. Ray's physical outburst directed at visitor Jennie Cox. Second, Ms. Limbaugh herself was well known by the nursing staff to physically strike out against her caretakers as a result of her dementia. Consequently, it was certainly foreseeable that this nursing assistant, who had demonstrated her propensity to be physically aggressive even when slightly provoked, presented a risk of harm to a resident also known to

be combative. In addition, evidence was presented by Mr. William Moore, the administrator of the nursing home during Ms. Ray's employment, as to the nursing home's standard procedure for dealing with the errant behavior of an employee. He testified that "if there was any contact between any associate, [who] is an employee of the facility, that is combative in any manner whatsoever, it would be reported directly to the [S]tate within 24 hours, written up, and sent in. That employee would be sent home and placed on leave." He further testified that he would discharge any employee who had "physically assaulted, battered, [or] touched" another person, or who otherwise had demonstrated a propensity for violence. We believe that CMC's policy for disciplining a combative employee, although not followed in this case, further demonstrates that physical abuse by staff members previously known to be physically aggressive is a foreseeable danger against which reasonable precautions must be taken.

Obviously, "[t]here is ... no liability when such care has in fact been used, nor where the defendant neither knows nor has reason to foresee the danger or otherwise to know that precautions are called for." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 56, at 385. However, this was not the case. The record indicates that on January 2, 1997, the day after the incident between Louise Ray and Jennie Cox, the Director of Nursing filed a Record of Complaint reporting Ms. Ray's harmful behavior, which was submitted to Mr. Moore. However, the only evidence in the record regarding Mr. Moore's acknowledgment of this incident with Ms. Cox is a memorandum signed by Mr. Moore and dated January 22, 1997. In this memorandum, Mr. Moore explained that he discussed this incident with Ms. Ray and put her on probation for one year "from the date of this discussion." Although this date is never specified, the record reflects that Ms. Ray was working scheduled shifts until the date of the incident involving Ms. Limbaugh. As the trial court found,

> [T]he defendant nursing home had more than ample forewarning of the demeanor, conduct, attitude, belligerence and physical aggressiveness through the incident with Ms. Cox and the fitness reports.... It is clear[ ] Ms. Ray was an accident about to happen. The records are barren of any attempts at intervention prior to the Limbaugh assault.
>
> I find affirmatively the inaction of the nursing home and the lack of corrective action involving this employee, Ms. Ray, was the direct and proximate legal cause ***81** of the injury sustained by [Ms. Limbaugh].

We affirm the trial court's decision and hold that CMC did indeed act negligently in failing to take reasonable precautions to protect Emma Ruth Limbaugh from the foreseeable risk that she would be assaulted by a staff member known to be physically aggressive.

Intentional Tort Exception

[3] Having determined that CMC was indeed negligent in failing to take affirmative action to protect Ms. Limbaugh from the foreseeable risk that she would be harmed by Ms. Ray, CMC is potentially subject to liability pursuant to section 29-20-205 of the GTLA. However, the issue here is whether CMC nonetheless retains its immunity pursuant to the intentional tort exception to this provision, which immunizes the governmental entity from tort liability if the injury arises out of "false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights." The intermediate court cited our decision in *Potter v. City of Chattanooga,* 556 S.W.2d 543 (Tenn.1977), to hold, albeit reluctantly, that CMC retains its immunity because Ms. Ray

committed an intentional tort, assault and battery

> [sic], upon Emma Ruth Limbaugh. Inasmuch as the GTLA does not permit a plaintiff to recover for the intentional torts of governmental employees, and inasmuch as our supreme court's decision in *Potter* does not permit a plaintiff to circumvent the defense of governmental immunity by asserting a claim for negligent hiring or retention, we conclude that the judgment entered against the Medical Center in this case must be reversed.

Because our decision today overrules *Potter* to the extent that it retains immunity from liability for those torts *not specifically enumerated in the intentional tort exception,* we reverse the intermediate court and hold that CMC is liable for the intentional assault and battery committed by the nursing assistant.

The factual background in *Potter* involved the plaintiff's arrest by a City of Chattanooga police officer who discovered a bottle of alcohol in the plaintiff's vehicle. Although the officer did not test the plaintiff to determine whether she was intoxicated, he nevertheless arrested her for public drunkenness. At the city jail, the officer became irate when she started to cry, whereupon he physically assaulted the plaintiff in her cell, causing her to suffer severe injuries including broken bones and bleeding in her ear. *Id.* at 544.

The plaintiff filed suit against the city for the intentional torts of false arrest and battery. In response to the city's motion to dismiss, the plaintiff amended her complaint to allege that the city was negligent in failing to "screen[ ] its employees to adequately determine the psychological capabilities of its employees to handle the jobs to which they were assigned"; consequently, such negligence failed to protect her from the police officer's "berzerk and callous" actions, which the city "should have known or reasonably could have known were likely to [occur]." *Id.* We dismissed the action against the city, holding that

> the true bases of the injuries for which recovery of damages is sought are false arrest and assault and battery. The amendment to the complaint, while levelling additional charges of negligence against the City, does not alter the fact that the injuries that are the subject of the action "arose out of" the battery and ***82** the false arrest, and was not effective to avoid the immunity granted the City under [Tennessee Code Annotated section] 23-3311.

Id. at 545.

Notably, our decision relied in part on two factually similar cases outside this jurisdiction that addressed the same issue and that ultimately reached the same results. However, as the respective tort liability statutes were worded differently, those two decisions should have had little impact in our jurisdiction. First, we cited *Salerno v. Racine,* 62 Wis.2d 243, 214 N.W.2d 446 (1974), where the plaintiff sued the city for the intentional torts committed by a police officer and for the city's negligence in retaining that violent officer. The Wisconsin Supreme Court, applying the applicable statute, found the city to be immune from suit on all counts. The statute at issue in that case provided in pertinent part: "No suit shall be brought against any [governmental entity] for the intentional torts of its [employees] nor shall any suit be brought against [governmental entities] or against [their employees] for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." *Id.* at 447 n. 1. Although the statutory language plainly protected the city from suit for the officer's intentional assault and battery, the statute was unclear as to whether a governmental entity could be liable for its negligence. Accordingly, the Wisconsin Supreme Court was able to avoid addressing the issue of the city's negligence by deciding instead that the officer's retention was a quasi-judicial function and the city was therefore immune under the statute. Consequently, the *Salerno* decision does not provide adequate guidance for determining whether a Tennessee governmental entity should be held liable for negligently allowing an employee to inten-

tionally proximately cause the plaintiff's injuries.

[4] We also relied on the decision in *Little v. Schafer,* 319 F.Supp. 190 (S.D.Tex.1970), which interpreted the Texas Tort Claims Act containing statutory language similar to that in the GTLA but expressly listing assault and battery in its provision preserving a municipality's immunity. In *Little,* the district court rejected the plaintiff's claim that two Texas cities negligently entrusted its police officers with night clubs. The court relied on the plain language in the Texas Act, which excluded a municipality from liability for "[a]ny claim arising out of assault, battery, false imprisonment, or any other intentional tort." *Id.* at 191. The court reasoned that "a citizen's complaint about the negligent utilization of police officers has no meaning apart from those officers' acts or omissions which inure to the detriment of the complainant. The assault is the sine qua non of plaintiff's knowledge that municipal negligence exists." *Id.* at 192. While we continue to agree with that rationale,[FN7] our statute does not allow us to ***83** reach this precise result if the intentional torts committed are not enumerated in the intentional tort exception.

> FN7. Justice Holder, in her concurring opinion, disagrees with the majority on this point and would hold instead that *Potter* should be overruled in its entirety. She argues that a governmental entity should be held liable "for its negligent employment practices regardless of the nature of the underlying acts of the employee causing the injury." We respectfully disagree with this interpretation of the statute. We reemphasize that the General Assembly enacted Tennessee's GTLA to codify the general common law rule that "all governmental entities shall be immune from suit," Tenn.Code Ann. § 29-20-201(a), subject to the specific exceptions contained within the Act. One such exception is provided in section 29-20-205, which waives immunity for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment." If this general waiver ended here, Justice Holder's position would be more persuasive to us. However, the provision goes on to exempt from liability those injuries "arising out of" one of several enumerated exceptions to this section, including the intentional tort exception. As this Act was created in derogation of the common law, it must be strictly construed. *Roberts,* 963 S.W.2d at 746. Therefore, we decline to impose blanket liability on a governmental entity for its negligent employment practices when one of the exceptions immunizing the entity is applicable.

As a result of *Potter's* overbroad application of the intentional tort exception, courts following *Potter* have subsequently, albeit erroneously, held that the intentional tort exception preserves immunity for injuries arising from *all* intentional torts. *See, e.g., Jenkins v. Loudon County,* 736 S.W.2d 603, 608 (Tenn.1987) (stating that the "scope of the GTLA is generally intended to exclude intentional torts"); *Belk v. Obion County,* 7 S.W.3d 34, 40 (Tenn.Ct.App.1999) (stating that "neither intentional torts nor violations of civil rights" give rise to liability of county and municipal governments); *Roberts v. Blount Mem'l Hosp.,* 963 S.W.2d 744, 746 (Tenn.Ct.App.1997) (stating that it is "well-settled that the Governmental Tort Liability Act has no application to intentional torts"); *Gifford v. City of Gatlinburg,* 900 S.W.2d 293, 296 (Tenn.Ct.App.1995) ("[T]here is no waiver of immunity under the [GTLA] for intentional tort."); *Anderson v. Hayes,* 578 S.W.2d 945, 949 (Tenn.Ct.App.1978) (stating that "it is logical to conclude that [section 29-20-205(2)] shows an obvious legislative intention to exclude only [i]ntentional tort cases"). While this principle is *generally* accurate, we notice that conspicuously absent from the list of intentional torts in subsection (2) are those of assault and battery.

[5][6][7][8] It is well-settled that the role of this Court in construing statutes is "to ascertain and give effect to" the legislative purpose and intent without unduly restricting or expanding a statute's coverage beyond its intended scope. *Mooney v. Sneed,* 30 S.W.3d 304, 306 (Tenn.2000). " 'The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language, without a forced or subtle interpretation that would limit or extend the statute's application.' " *Id.* (quoting *State v. Blackstock,* 19 S.W.3d 200, 210 (Tenn.2000)). Courts are not authorized to alter or amend a statute, and must " 'presume that the legislature says in a statute what it means and means in a statute what it says there.' " *Id.* at 307 (quoting *BellSouth Telecomm., Inc. v. Greer,* 972 S.W.2d 663, 673 (Tenn.Ct.App.1997)); *Gleaves v. Checker Cab Transit Corp.,* 15 S.W.3d 799, 803 (Tenn.2000) (" 'If the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction.' " (quoting *Henry v. White,* 194 Tenn. 192, 250 S.W.2d 70, 72 (1952))). This last principle applies especially when analyzing the GTLA, as the legislature created this Act in derogation of the common law, and therefore, the Act must be strictly construed. *Roberts,* 963 S.W.2d at 746 (citing *Lockhart ex rel. Lockhart v. Jackson-Madison County Gen. Hosp.,* 793 S.W.2d 943 (Tenn.Ct.App.1990)).

Applying the foregoing principles of statutory construction, we conclude that it was error to expand the intentional torts exception to include the torts of assault and battery. The legislative intent has been expressed in plain and unambiguous terms, and we are therefore required to enforce the statute as written. The General Assembly expressly created section 29-20-205 to remove governmental immunity ***84** for injuries proximately caused by negligent acts; that it wanted to then create several exceptions to this general waiver convinces us that additional exceptions are not to be implied absent legislative intent to the contrary. *Cf. United States v. Smith,* 499 U.S. 160, 167, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

Accordingly, we hold that section 29-20-205 of the GTLA removes immunity for injuries proximately caused by the negligent act or omission of a governmental employee except when the injury arises out of *only those specified torts enumerated in subsection (2).* To immunize *all* intentional torts would result in an overly broad interpretation of the statute, and there is no indication that the legislature intended such a result. Indeed, we find it noteworthy that the legislature excluded the two intentional torts most likely to give rise to injury. Under the maxim "*expressio unius est exclusio alterius,*" which states the principle that the expression of one thing implies the exclusion of all things not expressly mentioned, *City of Knoxville v. Brown,* 195 Tenn. 501, 260 S.W.2d 264, 268 (1953), we are unable to expand the intentional torts exception to include assault and battery. To do so would be to judicially create two additional exceptions giving rise to an entity's immunity.[FN8] To the extent that *Potter* and other cases hold otherwise, they are overruled.

> FN8. Moreover, when we compare similarly worded statutes outside our jurisdiction, we observe that the torts of assault and battery are specifically included in the exceptions to the removal of immunity. For example, the Federal Tort Claims Act, which waives the government's historic sovereign immunity, allows recovery against the United States for the negligent acts of any of its employees "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1994). However, this waiver of immunity does not apply to "[a]ny claim arising out of assault, battery," or other enumerated intentional torts. 28 U.S.C. § 2680(h). Similarly, the Utah Governmental Immunity Act, which is

phrased almost identically to the Tennessee Act, also has a provision barring recovery for claims arising out of "assault [or] battery" and other specifically enumerated intentional torts. *See* Utah Code Ann. § 63-30-10(2).

[9] Applying our conclusions to the present case, we first reiterate that Ms. Ray's assault of Ms. Limbaugh was a foreseeable consequence of CMC's failure to take reasonable precautions to protect its residents from the risk of abuse by this aggressive nursing assistant. Based on the plain language of section 29-20-205, the injury inflicted on Ms. Limbaugh was "proximately caused by a negligent act or omission" of this nursing home's supervisory personnel. Although it is that negligence of which the plaintiff complains, it is clear that Ms. Limbaugh's injuries "arose out of" the intentional torts of assault and battery committed by Ms. Ray. Because these torts are conspicuously absent from the intentional tort exception rendering governmental entities immune from liability for injuries, we hold that the clearly negligent defendant is not immune under this exception.

The Discretionary Function Exception to Liability for Negligence Under the Governmental Tort Liability Act

[10][11] We next address whether CMC is nevertheless immune from tort liability under section 29-20-205(1), the discretionary function exception. This exception immunizes local governmental entities from liability for an employee's negligence if the injury arises out of "the exercise or performance or the failure to ***85** exercise or perform a discretionary function, whether or not the discretion is abused." Essentially, the discretionary function exception prevents the use of tort actions to second-guess what are essentially legislative or administrative decisions involving social, political, economic, scientific, or professional policies or some mixture of these policies. *Doe v. Coffee County Bd. of Educ.*, 852 S.W.2d 899, 907 (Tenn.Ct.App.1992) (citing *United States v. Gaubert*, 499 U.S. 315, 323, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991)). The rationale for preserving immunity for certain acts performed by governmental entities is that the government should be permitted to operate without undue interference by the courts, as courts are often "ill-equipped to investigate and balance the numerous factors that go into an executive or legislative decision." *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 431 (Tenn.1992) (quoting *Wainscott v. State*, 642 P.2d 1355, 1356 (Alaska 1982)); *see also Carlson v. State*, 598 P.2d 969, 972 (Alaska 1979).

[12] In *Bowers v. City of Chattanooga*, this Court recognized that a more precise method of analysis was needed for determining which acts are entitled to discretionary function immunity. Consequently, we adopted the planning-operational test under which it is the "nature of the conduct," that is, the decision-making process, and not the "status of the actor," *Bowers*, 826 S.W.2d at 430-31, that governs whether the exception applies. *See also United States v. Gaubert*, 499 U.S. 315, 322, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). Under this analysis, a planning decision is most likely to reflect a course of conduct that was determined after consideration or debate by those in charge of formulating plans or policies. *Bowers*, 826 S.W.2d at 430 (citing *Carlson*, 598 P.2d at 972-73). Decisions that rise to the level of planning or policy-making are considered to be discretionary acts requiring judicial restraint and are, therefore, not subject to tort liability. On the other hand, decisions that merely implement pre-existing policies and regulations are considered to be operational in nature and require the decision-maker to act reasonably in implementing the established policy. If the policy, regulation, or other standard of procedure mandates specific conduct, then any employee reasonably complying with that direction will not abrogate the entity's immunity if the action furthers the underlying policies of the regulation. *See generally Chase v. City of Memphis*, 971 S.W.2d 380, 384 (Tenn.1998). If such an employee does not act reasonably but pursues a course of conduct that violates mandatory

regulation, the discretionary function exception will not apply because the action would be contrary to the entity's established policy. *Id.; see also Gaubert,* 499 U.S. at 324, 111 S.Ct. 1267.

[13] Turning to the facts in this case, the administrator of the nursing home at the time of Ms. Limbaugh's abuse testified as to the existence of certain standards for disciplining an employee who has exhibited combative behavior. According to Mr. Moore's testimony, these standards required that the incident be reported to the State within twenty-four hours of its occurrence and that the offending employee be sent home and "placed on leave," presumably also within that twenty-four hour period to await the State's investigation. Applying the foregoing principles, we find that the nursing home's broad discretion to implement a policy governing the questions of whether and how to discipline combative employees is indeed a policy determination that cannot give rise to tort liability. However, CMC negligently failed to follow the guidelines designed to prescribe the proper disciplinary measures ***86** to impose upon Ms. Ray after the incident involving Jennie Cox. Accordingly, the discretionary function exception to the waiver of governmental immunity does not bar recovery for Mr. Limbaugh's claims against the negligent nursing home. Therefore, we reverse the judgment of the intermediate court and hold that CMC is liable for Ms. Limbaugh's injuries proximately caused by its negligent acts.

II. APPORTIONMENT OF FAULT

[14] The final issue presented for our review is whether the trial court erred in apportioning fault between the negligent and intentional defendants where the intentional conduct was the foreseeable risk created by the negligent nursing home.[FN9] This question is one of first impression and requires us to review our holding in *Turner v. Jordan,* 957 S.W.2d 815 (Tenn.1997).

FN9. Interestingly, the issue of Ms. Ray's immunity from suit for her tortious actions committed as a governmental employee has not been raised in the trial court, the Court of Appeals, or in this Court. Therefore, any claims for Ms. Ray's immunity made pursuant to Tennessee Code Annotated § 29-20-310(b) ("No claim may be brought against an employee or judgment entered against an employee for damages for which the immunity of the governmental entity is removed by this chapter unless the claim is one for medical malpractice brought against a health care practitioner ....") have been waived.

In *Turner,* the plaintiff, a hospital nurse, was assaulted and severely injured by Tarry Williams, a mentally ill patient in the hospital where she worked. Dr. Jordan, Williams's treating psychiatrist, had diagnosed his patient as "aggressive, grandiose, intimidating, combative, and dangerous," *id.* at 817 (emphasis omitted), but he nevertheless decided to discharge him from the hospital by "allowing him to sign out AMA [Against Medical Advice]." *Id.* (alteration in original). After her attack, the plaintiff brought suit against Dr. Jordan, alleging that he violated his duty to use reasonable care in the treatment of his patient, which proximately caused her injuries and resulting damages. After determining that the psychiatrist did indeed owe a duty of care to the plaintiff nurse because he knew or should have known that his patient posed "an unreasonable risk of harm to a foreseeable, readily identifiable third person," *id.* at 821, we then held that the "conduct of a negligent defendant should not be compared with the intentional conduct of another in determining comparative fault where the intentional conduct is the foreseeable risk created by the negligent tortfeasor." *Id.* at 823.

We held the defendant responsible for the entire amount of the plaintiff's damages for several reasons. First, we determined that the legal conception of "fault" necessarily precluded the allocation of fault between negligent and intentional actors be-

cause "negligent and intentional torts are different in degree, in kind, and in society's view of the relative culpability of each act." *Id.*[FN10] Second, we expressed ***87** our concern that allowing comparison would reduce the negligent person's incentive to comply with the applicable duty of care and thus prevent further wrongdoing. *Id.* Finally, we recognized that when a defendant breaches a duty to prevent the foreseeable risk of harm by a nonparty intentional actor, that negligent co-tortfeasor cannot reduce his or her liability by relying on the foreseeable risk of harm that he or she had a duty to prevent. *Id.*

> FN10. As aptly expressed by the dissenting opinion in a case decided by the Wyoming Supreme Court,
>
> > The law of intentional torts constitutes a separate world of legal culpability. It is a system that balances specific rights and obligations, and imposes liability on the basis of a party's intent, rather than the moral blameworthiness of that party's conduct by societal standards. The real qualitative distinctions between intentional torts and other forms of culpable conduct share a single origin-the "duty" concept. Intentional torts are dignitary by nature. They are designed to protect one's right to be free from unpermitted intentional invasions of person or property. Alternatively, the duty underlying an action in negligence or strict products liability is to avoid causing, be it by conduct or by product, an unreasonable risk of harm to others within the range of proximate cause foreseeability. These distinct worlds of culpability cannot be reconciled.
>
> *Mills v. Reynolds*, 807 P.2d 383, 403 (Wyo.1991) (Urbigkit, C.J., dissenting).

[15] The present case presents a different factual setting. Unlike *Turner*, the plaintiff here has brought a cause of action against all tortfeasors whose unreasonable acts have contributed to the elderly resident's injuries. Consequently, we are required to determine how to assign causal responsibility between negligent and intentionally tortious defendants where the intentional misconduct is the foreseeable risk created by the negligent defendant. We continue to adhere to the principle established in *Turner* that the conduct of a negligent defendant should not be compared with the intentional conduct of a nonparty tortfeasor in apportioning fault where the intentional conduct is the foreseeable risk created by the negligent tortfeasor. *Id.; see also White v. Lawrence*, 975 S.W.2d 525, 531 (Tenn.1998) (holding that the defendant physician's liability would not be reduced by comparing his negligent conduct with the decedent's intentional act of committing suicide since the intentional act was a foreseeable risk created by the defendant's negligence). After careful consideration, we conclude that where the intentional actor and the negligent actor are both named defendants and each are found to be responsible for the plaintiff's injuries, then each defendant will be jointly and severally responsible for the plaintiff's total damages. *See generally Restatement (Third) of Torts* § 24 (1999). Therefore, both CMC and Ms. Ray are each liable for all of the plaintiff's damages.[FN11]

> FN11. Although statutory principles of contribution and indemnity apply, there is "no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury." Tenn.Code Ann. § 29-11-102(c).

Although our adoption of comparative fault abrogated the use of the doctrine of joint and several liability in those cases where the defendants are charged with separate, independent acts of negligence, *see McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn.1992), the doctrine continues to be an integral part of the law in certain limited instances. *See Owens v. Truckstops of Am.*, 915 S.W.2d 420, 431 n. 13, 432 (applying joint and several liability

to parties in the chain of distribution of a product when the theory of recovery is strict liability); *see also Resolution Trust Corp. v. Block,* 924 S.W.2d 354, 355-56 (Tenn.1996) (holding the officer and director jointly and severally liable to the corporation for their collective actions). We believe that in the context of a negligent defendant failing to prevent foreseeable intentional conduct, the joint liability rule "is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all." *Resolution Trust Corp.,* 924 S.W.2d at 356. Consequently, we reverse the trial court's apportionment of fault and hold that CMC and Louise Ray are jointly and severally liable for the full amount of damages awarded to Mr. Limbaugh. However, because the trial court incorrectly apportioned damages between the two tortfeasors, we remand this case to the Circuit Court for Coffee County to determine***88** the total amount of damages for which each tortfeasor shall be jointly and severally liable.

CONCLUSION

Having thoroughly examined the record in this case and after carefully applying all applicable law, we hold that: (1) the Governmental Tort Liability Act removes governmental immunity for injuries proximately caused by the negligent act or omission of a governmental employee except when the injury arises out of only those specified torts enumerated in Tennessee Code Annotated section 29-20-205 (2); and (2) where the harm arising from the tortious acts of an intentional tortfeasor was a foreseeable risk created by a negligent defendant, and all tortfeasors have been made parties to the suit, each tortious actor shall be jointly and severally liable for the plaintiff's damages.

Accordingly, we affirm that portion of the judgment of the Court of Appeals finding Coffee Medical Center negligent. However, we reverse those portions of the judgment (1) holding Coffee Medical Center immune from suit, and (2) implicitly upholding the trial court's apportionment of fault and allocation of damages between the negligent and intentional tortfeasors. We remand the case to the trial court to determine the total amount of damages to be awarded to the plaintiff.

Costs of this appeal are taxed to the appellee, Coffee Medical Center.

JANICE M. HOLDER, J., filed a concurring opinion.

Coffee Medical Center (CMC) owed a duty to its patient, Emma Ruth Limbaugh, to protect her from the foreseeable risk of harm presented by the employment of nursing assistant Louise Ray. I therefore agree with the result reached by the majority holding CMC liable for the injuries in this case. I write separately to express my disagreement with the majority's analysis of the applicable governmental immunity statutes. Because I believe that the rationale supporting *Potter v. City of Chattanooga,* 556 S.W.2d 543 (Tenn.1977), is flawed, I would overrule that opinion in its entirety. Instead, I would hold that a governmental entity may be held liable for its own negligent employment practices regardless of the nature of the underlying acts of its employees.

The General Assembly has removed governmental immunity for injuries proximately caused by the negligent acts of governmental employees within the scope of their employment. Tenn.Code Ann. § 29-20-205. Subsection (2) of § 29-20-205 preserves immunity for injuries arising out of certain enumerated intentional torts committed by governmental employees. In *Potter,* we misapplied the intentional tort exception in a manner indicating that the exception preserves immunity for injuries arising from all intentional torts. *Id.* at 544-46. The majority today corrects that misapplication of the intentional tort exception, overruling *Potter* to the extent that it immunized intentional torts not specifically listed in § 29-20-205(2).

Although I agree with the limitation of § 29-20-205 (2) to those intentional torts specifically enumerated, I disagree with the premise underlying our decision in *Potter* and would therefore fully overrule

its holding. In *Potter,* the plaintiff initially filed her complaint alleging liability on the part of the City of Chattanooga for the intentional torts committed by a police officer. *Id.* at 544. In response to the City's motion to dismiss, the plaintiff amended her complaint to include a claim of negligence by the City for failure to provide adequate psychological screening of its employees. *Id.* This Court held that the "true bases" of the injuries were the intentional ***89** torts of false arrest and assault and battery alleged in the complaint. *Id.* at 545. The Court reasoned that the negligence claim based upon failure to provide psychological screening did not alter the fact that the injuries arose out of the intentional torts. *Id.* Based upon the intentional tort exception, this Court concluded that the plaintiff could not maintain an action against the City despite her negligence claim. *Id.* at 545-46.

I find the reasoning in *Potter* to be fundamentally flawed. We have noted that "plaintiffs are free to pursue several alternative theories of recovery and to structure their claims in the manner that is most beneficial to them." *Concrete Spaces, Inc. v. Sender,* 2 S.W.3d 901, 909 (Tenn.1999). Rule 8.01 of the Tennessee Rules of Civil Procedure, governing claims for relief in pleadings, provides that "[r]elief in the alternative or of several different types may be demanded." Furthermore, this Court has recognized that an intentional tortious act does not necessarily supersede a prior negligent act. *See Turner v. Jordan,* 957 S.W.2d 815 (Tenn.1997) (addressing the comparative fault of a psychiatrist for failure to warn of a patient's dangerous propensities); *McClenahan v. Cooley,* 806 S.W.2d 767 (Tenn.1991) (finding that a car owner could be held liable in a wreck after leaving the keys in a car that was subsequently stolen; the car theft was not necessarily an intervening act breaking the chain of causation). Instead, a plaintiff may recover damages from both the intentional tortfeasor and the original negligent tortfeasor. *See id.* The plaintiff in *Potter* should have been allowed to pursue separate claims against the City-one based upon the intentional torts committed by the police officer and one based upon the City's negligence in failing to properly screen its employees. The second claim arises out of the City's negligent employment practices, not the police officer's intentional torts. It therefore is not barred by the intentional tort exception under § 29-20-205(2).

Moreover, the General Assembly has clearly expressed its intent to waive governmental immunity for injuries proximately caused by negligent governmental acts. Tenn.Code Ann. § 29-20-205. We are bound to uphold that intent to the fullest extent. "This Court's role in statutory interpretation is to ascertain and to effectuate the legislature's intent." *Freeman v. Marco Transp. Co.,* 27 S.W.3d 909, 911 (Tenn.2000). The interpretation of § 29-20-205 employed in *Potter* did not carry out the intent of the General Assembly to allow recovery for the negligent acts of the governmental entity.

The holding in *Potter* also provides us with an inconsistent outcome. It allows recovery for negligent governmental employment practices if the governmental employee acts negligently but not if the employee acts intentionally. I cannot agree with a result so contrary to common sense and legislative intent. Proper interpretation of § 29-20-205 should hold a governmental entity liable for its negligent employment practices regardless of the nature of the underlying acts of the employee causing the injury.

Accordingly, I would wholly overrule this Court's holding in *Potter v. City of Chattanooga,* 556 S.W.2d 543 (Tenn.1977). The plaintiff in this case should be able to proceed in an action against CMC based upon CMC's negligent employment practices. Because I agree with the result reached by the majority in this case, however, I concur in the judgment remanding this case to the trial court for a determination of damages.

Tenn.,2001.
Limbaugh v. Coffee Medical Center
59 S.W.3d 73

59 S.W.3d 73
(Cite as: 59 S.W.3d 73)

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EXHIBIT D

Supreme Court of Tennessee,
at Memphis.
J.O. HOUSE
v.
ESTATE OF J.K. EDMONDSON.
No. W2005-00092-SC-R11-CV.

Nov. 13, 2007 Session.
Jan. 25, 2008.

Background: Minority shareholder of closely held corporation brought derivative action against majority shareholder to recover for misappropriating corporate funds for his personal use. Board of directors appointed lawyer as litigation committee. The Chancery Court, Shelby County, No. Arnold B. Goldin, Chancellor, approved report recommending settlement and declined request for attorney fees. The Court of Appeals, Alan E. Highers, J., 2006 WL 1328810, affirmed in part in unreported opinion. Appeal was permitted.

Holdings: The Supreme Court, Cornelia A. Clark, J., held that:J.O. HOUSE
v.
ESTATE OF J.K. EDMONDSON.

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Holdings: The Supreme Court, Cornelia A. Clark,

J., held that:
(1) plaintiff in a shareholder's derivative suit brought on behalf of a for-profit corporation may not recover attorney fees, overruling *McRedmond v. Estate of Marianelli*, 2006 WL 2805158, and
(2) report of independent litigation committee was properly approved.

Affirmed.

Gary R. Wade, J., dissented and filed opinion.

West Headnotes

[1] Corporations 101 ⇒214

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k214 k. Costs and Expenses. Most Cited Cases
Plaintiff in a shareholder's derivative suit brought on behalf of a for-profit corporation may not recover attorney fees; overruling *McRedmond v. Estate of Marianelli*, 2006 WL 2805158. West's T.C.A. § 48-17-401(d).

[2] Costs 102 ⇒194.16

102 Costs
102VIII Attorney Fees
102k194.16 k. American Rule; Necessity of Contractual or Statutory Authorization or Grounds in Equity. Most Cited Cases
The "American rule" provides that a party in a civil action may not recover attorney fees absent a specific contractual or statutory provision providing for attorney fees as part of the prevailing party's damages.

[3] Attorney and Client 45 ⇒155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases
The "common fund doctrine," as exception to American rule, provides that attorney fees may be awarded when the efforts of a litigant succeed in securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common; in that event, the beneficiaries of the fund or property may be required to contribute to the litigant's attorney fees by having those fees assessed against the fund or property itself.

[4] Attorney and Client 45 ⇒155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases
Whether the common fund doctrine applies in a given case is a question of law for the court to decide.

[5] Appeal and Error 30 ⇒893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appeal and Error 30 ⇒895(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of Findings Below. Most Cited Cases
The appropriate standard of review on applicability of common fund doctrine in a given case is de novo, according no presumption of correctness to the trial court's decision on request for attorney fees.

[6] Attorney and Client 45 ⇐155

45 Attorney and Client
45IV Compensation
45k155 k. Allowance and Payment from Funds in Court. Most Cited Cases
Upon finding that the common fund doctrine is applicable, the allowance of attorney fees is largely in the discretion of the trial court.

[7] Appeal and Error 30 ⇐984(5)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(5) k. Attorney Fees. Most Cited Cases
A trial court's award of attorney fees under common fund doctrine will be upheld unless it has abused its discretion, meaning that it either applied an incorrect legal standard or reached a clearly unreasonable decision resulting in an injustice.

[8] Corporations 101 ⇐320(5)

101 Corporations
101X Officers and Agents
101X(C) Rights, Duties, and Liabilities as to Corporation and Its Members
101k320 Actions Between Shareholders and Officers or Agents
101k320(5) k. Failure of Action by Corporation and Demand That Action Be Brought. Most Cited Cases
Litigation committee recommending settlement of shareholder's derivative action against president for misappropriating funds of closely-held corporation could limit scope of investigation to four years based on applicable statute of repose for action alleging breach of fiduciary duty, conducted adequate investigation, and reached decision in corporation's best interests; attorney who was experienced commercial litigator acted as the committee, spent at least 250 hours on the case, hired accounting firm, consulted expert in corporation's industry and real estate appraiser, deposed witnesses, and reviewed thousands of documents, and his reports were detailed and extensive. West's T.C.A. § 48-18-601.

[9] Corporations 101 ⇐202

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k202 k. Right to Sue or Defend in General. Most Cited Cases
Generally, the proper party to bring a claim on behalf of a corporation is the corporation itself acting through its directors or a majority of its shareholders.

[10] Corporations 101 ⇐202

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k202 k. Right to Sue or Defend in General. Most Cited Cases
A "derivative action" is a suit brought by one or more shareholders on behalf of a corporation to redress an injury sustained by, or to enforce a duty owed to, the corporation; thus, a derivative action is an exception to the rule that the corporation itself is the proper party to bring suit on its own behalf.

[11] Corporations 101 ⇐206(1)

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k206 Refusal of Corporation, Officers, or Stockholders to Act
101k206(1) k. In General. Most Cited Cases
Although courts should critically evaluate the litigation committee's findings and recommendations to determine whether they were made in good faith, are supported by the record of the investigation,

and are consistent with the corporation's best interests, they should not substitute their own business judgment for that of the committee.

[12] Corporations 101 ⇨206(1)

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k206 Refusal of Corporation, Officers, or Stockholders to Act
101k206(1) k. In General. Most Cited Cases
In evaluating the independence of a litigation committee, courts consider factors such as the size of the committee, the committee members' relationship with the corporation's officers and directors, their qualifications and experience, the scope of the committee's authority, and the committee's autonomy from the officers and directors.

[13] Corporations 101 ⇨320(3)

101 Corporations
101X Officers and Agents
101X(C) Rights, Duties, and Liabilities as to Corporation and Its Members
101k320 Actions Between Shareholders and Officers or Agents
101k320(3) k. Limitations and Laches. Most Cited Cases
Shareholder's derivative action against president for misappropriating corporate funds was governed by four-year statute of repose for actions to recover for breach of fiduciary duty, not six-year statute of limitations for breach of contract action or ten-year catch-all statute for cases not expressly provided for. West's T.C.A. §§ 28-3-109, 28-3-110, 48-18-601.

[14] Corporations 101 ⇨206(1)

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k206 Refusal of Corporation, Officers, or Stockholders to Act
101k206(1) k. In General. Most Cited Cases
In determining the adequacy of a litigation committee's investigation, courts consider several factors, including length and scope of the investigation, the committee's use of independent experts, the corporation's or the defendant's involvement in the investigation, and the adequacy and reliability of the information supplied to the committee.

[15] Corporations 101 ⇨206(1)

101 Corporations
101IX Members and Stockholders
101IX(C) Suing or Defending on Behalf of Corporation
101k206 Refusal of Corporation, Officers, or Stockholders to Act
101k206(1) k. In General. Most Cited Cases
In assessing whether litigation committee has reached a decision that is in the corporation's best interests, courts consider the likelihood that the plaintiff will succeed on the merits, the financial burden on the corporation of litigating the case, the extent to which dismissal will permit the defendant to retain improper benefits, and the effect continuing the litigation will have on the corporation's reputation.

*374 Tim Edwards, Memphis, Tennessee, and Kent J. Rubens, West Memphis, Arkansas, for the appellant, J.O. House.

Jef Feibelman, Memphis, Tennessee, for the appellee, Estate of J.K. Edmondson.

John McQuiston, II, Memphis, Tennessee, for the intervenor, Ram-Tenn, Inc.

James G. Stranch, III, Michael J. Wall, and Joe P. Leniski, Nashville, Tennessee, for the Amicus Curiae, The Plumbers and Pipefitters Local 572 Pension Fund.

OPINION

CORNELIA A. CLARK, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and JANICE M. HOLDER and WILLIAM C. KOCH, JR., JJ., joined. GARY R. WADE, J., dissenting.

CORNELIA A. CLARK, J.

A minority shareholder in a closely held Tennessee corporation filed a derivative suit claiming that the company's majority shareholder, who also served as the corporation's president and chairman of its board of directors, misappropriated corporate funds. The minority shareholder also filed an individual claim against the majority shareholder alleging that he breached a pre-incorporation agreement in which the majority shareholder agreed to offer available stock to the corporation and other shareholders before purchasing the stock himself. A litigation committee appointed by the corporation to investigate the allegations against the majority shareholder found merit to the charges. The litigation committee recommended to the corporation that the company either settle the derivative claim or proceed with the litigation if the majority shareholder was unwilling to resolve the lawsuit in accordance with terms proposed by the committee. The trial court found that the litigation committee's findings and recommendations were in the corporation's best interests and that, once a settlement was reached, the derivative suit would be dismissed. The trial court also granted summary judgment to the majority shareholder on the individual breach of contract claim and denied the minority shareholder's request for attorney's fees. The Court of Appeals affirmed the trial court's acceptance of the litigation committee's report and the denial of attorney's fees to the minority shareholder, but reversed the trial court's grant of summary judgment to the majority shareholder on the breach of contract claim. We accepted review to determine: *375 (1) whether a plaintiff in a shareholder's derivative suit brought on behalf of a for-profit corporation may recover attorney's fees; and (2) whether the trial court was correct in adopting the findings of the litigation committee's report. We hold that Tennessee law does not authorize an award of attorney's fees to a plaintiff in a shareholder's derivative suit brought on behalf of a for-profit corporation. We also hold that the trial court did not err in approving the sufficiently independent, thoroughly researched report of the litigation committee. Accordingly, the judgment of the Court of Appeals as to those issues is affirmed.

Factual and Procedural Background

This appeal arises out of a derivative action initiated in the Chancery Court for Shelby County on behalf of Ram-Tenn, Inc. ("Ram-Tenn"), a closely held Tennessee corporation, by J.O. House, a minority shareholder of Ram-Tenn. The suit was filed against the corporation's majority shareholder, J.K. Edmondson, alleging that Edmondson had misappropriated corporate funds for his personal use. The plaintiff sought monetary damages and injunctive relief against Edmondson on behalf of Ram-Tenn. Ram-Tenn intervened in the lawsuit.

In 1968, the plaintiff and Edmondson, along with seven other individuals, formed Ram-Tenn for the purpose of building, buying, and managing hotels and restaurants. At the time Ram-Tenn was formed, Edmondson owned 25% of the company's stock. By 1988, Edmondson was the majority shareholder, owning 62% of the company's stock. He was also the president of Ram-Tenn and chairman of its board of directors. The plaintiff, a minority shareholder of Ram-Tenn since its inception, owned 5% of the company's stock. There is no dispute that Ram-Tenn has been controlled by Edmondson throughout its corporate existence.

In 1997, the plaintiff examined Ram-Tenn's financial records and discovered that Edmondson had been misusing corporate funds. The plaintiff discovered, for example, that Edmondson had used corporate money to pay insurance premiums for another business that he owned, tuition for an indi-

vidual attending college, and various personal expenses. The plaintiff also discovered that Edmondson had used Ram-Tenn funds to make contributions to a church and had used another corporation in which he had an ownership interest to bill Ram-Tenn for products and services at inflated prices.

Following the discovery of Edmondson's misuse of corporate funds, the plaintiff, on April 12, 1999, filed this shareholder derivative action against Edmondson alleging that he had violated his fiduciary obligations to Ram-Tenn. The complaint, which sought monetary damages as well as injunctive relief, claimed that Edmondson's actions caused minority stockholders to suffer a decrease in the value of their investments. In addition to the derivative suit, the plaintiff filed a claim against Edmondson for breaching a pre-incorporation agreement in which Edmondson agreed to offer available shares of stock to the corporation and other shareholders before buying the stock himself. *See Hall v. Tenn. Dressed Beef Co.*, 957 S.W.2d 536, 540 (Tenn.1997) (holding that shareholders may bring derivative and individual claims simultaneously). Ram-Tenn subsequently intervened in the lawsuit and became a party.

In response to the plaintiff's suit, Ram-Tenn's board of directors appointed a Memphis lawyer, Michael McLaren, to serve as a one-person litigation committee to investigate the plaintiff's allegations against Edmondson. The board charged *376 McLaren, who had no affiliation with Ram-Tenn or any of the parties, with the responsibility of determining how the corporation should respond to the suit. Ram-Tenn's specific charge to McLaren was to use his "independent business judgment to determine whether, in the best interest of the corporation, the litigation should be continued, dismissed, or settled."

After conducting an investigation with the assistance of an accounting firm, McLaren issued an initial report and then a supplemental report concluding that Edmondson had misappropriated $552,501 from Ram-Tenn for his personal use. McLaren recommended to the corporation that the parties settle the lawsuit for that amount to avoid the expense of further litigation. Specifically, McLaren recommended that Edmondson pay Ram-Tenn $552,501, which the corporation would distribute to shareholders according to their ownership interests, less any amounts that shareholders chose to waive.[FN1] McLaren further recommended that if the parties were unwilling to settle, Ram-Tenn should pursue the derivative claim against Edmondson. Ram-Tenn moved the trial court to accept McLaren's report. *See* Tenn.Code Ann. § 48-17-401(c) (2002) (a derivative suit "may not be discontinued or settled without the court's approval").[FN2]

FN1. Ninety percent of such payments were eventually waived by Ram-Tenn's shareholders. It should also be noted that Ram-Tenn's principal asset, a hotel in Nashville, was sold for $3,400,000 before McLaren's reports were issued. McLaren described the company in his reports as "nonfunctioning." The company is apparently in wind-up mode pending the conclusion of this litigation.

FN2. Because the language of the cited statutes has not changed from the version in effect in 1998, the year this suit commenced, we cite to the most recent edition.

Following multiple hearings in which the plaintiff, McLaren, and others testified, the trial court, on January 16, 2004, approved McLaren's report recommending that the case be settled by Edmondson paying Ram-Tenn $552,501. The trial court found that McLaren's findings and recommendations were in the corporation's best interests and that, once a settlement was reached, the derivative suit would be dismissed.[FN3] The trial court also directed that any funds paid by Edmondson as part of the settlement be placed in escrow pending any appeal. Finally, the trial court granted summary judgment to Edmondson on the plaintiff's individual claim that Edmondson had breached a pre-incorporation agreement. Accordingly, the trial court found that

Edmondson properly owned 62% of Ram-Tenn's stock.

> FN3. The parties' briefs indicate that the derivative suit has in fact been settled subject to the approval of the trial court and the outcome of this appeal.

While the case was pending in the trial court, the plaintiff requested that attorney's fees be awarded to him on the theory that the derivative suit against Edmondson had benefited the corporation. The trial court and the Court of Appeals declined to award attorney's fees based on the principle that litigants must pay their own attorney's fees absent a statute or an agreement providing otherwise. The courts below reasoned that the statutes governing for-profit corporations such as Ram-Tenn do not provide for an award of attorney's fees to a shareholder bringing a derivative action. The Court of Appeals further concluded that the trial court properly approved McLaren's report. However, the Court of Appeals, in a divided decision, reversed the grant of summary judgment to Edmondson on the plaintiff's individual breach of contract claim. With respect to this claim, the intermediate court found that there were disputed issues*377 of fact concerning the plaintiff's knowledge of Edmondson's acquisition of additional stock for statute of limitations purposes. This part of the intermediate court's decision-which remanded the case for a determination of whether the plaintiff's breach of contract claim was timely-has not been challenged in this Court. Thus, the plaintiff's individual claim against Edmondson is not before us.[FN4]

> FN4. Edmondson passed away in December 2006 while the case was pending in the Court of Appeals. Upon motion of the parties, this Court substituted Edmondson's estate as the proper party.

Analysis

I. Attorney's Fees

[1] The primary issue before us is whether a plaintiff in a shareholder's derivative suit brought on behalf of a for-profit corporation may recover attorney's fees. The trial court found that Tennessee law does not provide for an award of attorney's fees to a plaintiff in a derivative suit involving a for-profit company. The Court of Appeals agreed, holding that the statutes governing for-profit corporations do not contemplate an award of attorney's fees to a plaintiff. The intermediate court further concluded that attorney's fees were not available under the common fund doctrine. We agree.

[2] We begin our analysis of this issue by noting that Tennessee, like most jurisdictions, adheres to the "American rule." *John Kohl & Co. v. Dearborn & Ewing,* 977 S.W.2d 528, 534 (Tenn.1998). The American rule provides that a party in a civil action may not recover attorney's fees absent a specific contractual or statutory provision providing for attorney's fees as part of the prevailing party's damages. *Id.*

The American rule, which has been described by this Court as "firmly established in this state," *State v. Brown & Williamson Tobacco Corp.,* 18 S.W.3d 186, 194 (Tenn.2000), is based on several public policy considerations. First, since litigation is inherently uncertain, a party should not be penalized for merely bringing or defending a lawsuit. *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), *superseded by statute on other grounds,* Act of Jan. 2, 1975, Pub.L. No. 93-600, 88 Stat.1955. Second, the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included paying the fees of their opponent's lawyer. *Id.* Third, requiring each party to be responsible for their own legal fees promotes settlement. *Allstate Ins. Co. v. Huizar,* 52 P.3d 816, 818 (Colo.2002). Fourth, the time, expense, and difficulty inherent in litigating the appropriate amount of attorney's fees to award would add another layer to the litigation and burden the courts and the parties with ancillary proceedings.

Fleischmann, 386 U.S. at 718, 87 S.Ct. 1404. Thus, as a general principle, the American rule reflects the idea that public policy is best served by litigants bearing their own legal fees regardless of the outcome of the case.

[3] As with most rules, however, there are exceptions to the American rule. One of these exceptions is the common fund doctrine. The common fund doctrine provides that attorney's fees may be awarded when the efforts of a litigant succeeds in "securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common." *Travelers Ins. Co. v. Williams,* 541 S.W.2d 587, 589 (Tenn.1976). In that event, the beneficiaries of the fund or property may be required to contribute to ***378** the litigant's attorney's fees by having those fees assessed against the fund or property itself. *Kline v. Eyrich,* 69 S.W.3d 197, 204 (Tenn.2002). Designed to spread attorney's fees among the various beneficiaries to the fund or property, the doctrine serves two important purposes.

> First, the doctrine prevents the beneficiaries of legal services from being unjustly enriched by requiring them to pay for those services according to the benefit received. Second, the doctrine serves to spread the costs of litigation proportionally among all of the beneficiaries so that the plaintiff does not bear the entire burden alone.

Id. (citations omitted).

[4][5][6][7] Whether the common fund doctrine applies in a given case is a question of law for the court to decide. *Id.* at 203. Accordingly, the appropriate standard of review on appeal is de novo, according no presumption of correctness to the trial court's decision. *Id.* However, "upon finding that the common fund doctrine is applicable, '[t]he allowance of attorney's fees is ... largely in the discretion of the trial court.' " *Id.* (first alteration in original) (quoting *Aaron v. Aaron,* 909 S.W.2d 408, 411 (Tenn.1995)). Consequently, a trial court's award of fees will be upheld unless it has abused its discretion, "meaning that it either applied an incorrect legal standard or reached a clearly unreasonable decision" resulting in an injustice. *Id.* at 203-04.

A. Statutory Law

Guided by these principles, we turn to the precise issue before us-whether Tennessee law authorizes an award of attorney's fees to a plaintiff in a derivative suit brought on behalf of a for-profit corporation. At one time, Tennessee law clearly permitted such an award. In 1968, the legislature enacted Tennessee Code Annotated section 48-718, which provided for an award of attorney's fees to both plaintiffs and defendants. Under section 48-718(4), "[i]f the suit [brought on behalf of the corporation for profit] is successful, ... the court may award the [plaintiff] reasonable expenses and reasonable attorneys' fees." This section went even further and provided that the court "shall declare a lien upon the recovery made by the corporation to secure the payment to the [plaintiff] and [the plaintiff's] attorneys of the amount thus awarded." [FN5] Tenn.Code Ann. § 48-718(4). Additionally, under section 48-718(5), if there was a finding "that the suit was brought without reasonable cause," the court "may require the [plaintiff] to pay to the party or parties named as defendant or defendants the reasonable expenses, including fees of attorneys, incurred by them in the defense of such suit."

> FN5. Although by its terms section 48-718 applied to for-profit corporations, it was construed by the Court of Appeals to apply to not-for-profit corporations as well. *See Hannewald v. Fairfield Cmtys., Inc.,* 651 S.W.2d 222 (Tenn.App.1983). In *Hannewald,* the intermediate court, in awarding attorney's fees to a derivative plaintiff, reasoned that attorney's fees were necessary in shareholder derivative suits "to encourage and assist shareholders ... in pursuing justified claims for the benefit of corporations in which they have a valid interest." *Id.* at 230.

In 1986, the General Assembly updated Tennessee's corporation statutes. In the process of doing so, the General Assembly considered the revised Model Business Corporation Act of 1984 (MBCA). *See Kradel v. Piper Industries, Inc.*, 60 S.W.3d 744, 749 (Tenn.2001). Like the already-existing Tennessee statute, section 48-718, the MBCA specifically provided for the recovery of attorney fees by both successful***379** plaintiffs and defendants. *See* Model Bus. Corp. Act § 7.46(1) ("On termination of the derivative proceeding the court may ... order the corporation to pay the plaintiff's reasonable expenses (including counsel fees) incurred in the proceeding...."); Model Bus. Corp. Act § 7.46(2) ("On termination of the derivative proceeding the court may ... order the plaintiff to pay any defendant's reasonable expenses (including counsel fees) incurred in defending the proceeding...."). Thus, the General Assembly, in revising Tennessee's corporation statutes, had before it two clear methods to allow successful plaintiffs to continue to have the ability to receive attorney's fees in shareholder derivative suits; the legislature could either have (1) adopted the language of section 7.46(1) of the MBCA or (2) reincorporated existing section 48-718 into the updated legislation.

However, the Tennessee Business Corporation Act of 1986 (TBCA), as adopted by the legislature and codified at Tennessee Code Annotated sections 48-11-101 to -27-103 (2002 & Supp.2006), does not include language similar to that found in either Tennessee Code Annotated section 48-718(4) or section 7.46(1) of the MBCA. Instead, in enacting the TBCA, the legislature repealed section 48-718 FN6 in its entirety and chose not to include all of the suggested language found in the MBCA. As the TBCA was written in 1986 and as it reads today, there is no corresponding provision to either 48-718(4) or 7.46(1) in the act allowing a successful *plaintiff* to recover attorney's fees. Instead, the legislature adopted what is now Tennessee Code Annotated section 48-17-401(d), which limits the recovery of attorney's fees in derivative actions to only successful *defendants*. Thus, section 48-718 was expressly repealed and replaced with a provision that contemplates an award of attorney's fees to a *defendant* if the derivative suit has no factual or legal basis, but no provision entitling *plaintiffs* to attorney's fees, as the former statute did. For whatever reason, the General Assembly specifically chose not to include such a provision.

> FN6. In 1984, section 48-718 was renumbered as section 48-1-718. Sections 48-1-701 to -721 were repealed by the TBCA. *See* Tenn.Code Ann. §§ 48-1-701 to -721, *repealed* (2002).

Accordingly, it is apparent to us that the legislature affirmatively considered and determined the circumstances in which attorney's fees may be awarded in a shareholder derivative suit. Moreover, the General Assembly's decision not to include plaintiffs in section 48-17-401(d) may not be interpreted as silence on the issue. That body replaced a statute that permitted successful plaintiffs and defendants to recover attorney's fees in a derivative action with a statute permitting only successful defendants to recover attorney's fees. While the dissent views this course of action as "legislative silence," we do not. This Court has stated that a change in the law by statute raises a presumption that a departure from the old law was intended, *State v. Turner*, 193 S.W.3d 522, 527 (Tenn.2006), and not merely an omission or mistake on the part of the legislature. While we, like the drafters of the MBCA, might see merit in permitting successful plaintiffs in a derivative action to recover attorney's fees, it is not for this Court to question the wisdom of this statutory scheme. Instead, we are to construe and apply the law as written. *See Carson Creek Vacation Resorts, Inc. v. State Dept. of Revenue*, 865 S.W.2d 1, 2 (Tenn.1993). Therefore, we conclude that the controlling statutes simply do not provide for an award of attorney's fees to derivative plaintiffs in actions involving for-profit corporations. Although the dissent essentially urges us to do so, we decline to resurrect judicially a repealed ***380** statute, no matter how equitable it might seem

to do so. *See McBrayer v. Dixie Mercerizing Co.*, 176 Tenn. 560, 144 S.W.2d 764, 768 (Tenn.1940) (holding that courts "cannot, of course, under the guise of construction amend or alter [statutes]").

B. Case Law

The plaintiff and the amicus curiae maintain, and the dissent agrees, that even in the absence of statutory authority for an award of attorney's fees, such fees should be recoverable under the common fund doctrine because successful derivative suits confer a benefit upon the corporation. They rely upon *Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 28 S.W. 90 (Tenn.1894), which held that attorney's fees may be awarded to a plaintiff in a shareholder derivative action. *Id.* at 93. The problem with the plaintiff's reliance upon *Grant*, however, is that the case was decided nearly a century before the adoption of the Tennessee Business Corporation Act, which plainly sets out the type of cases in which attorney's fees may be awarded. *See* Tenn.Code Ann. § 48-17-401(d). Cases such as the present one are not among those included in the statutes governing for-profit corporations. Thus, *Grant* has been abrogated by subsequent changes in the law and, as such, does not compel the result urged by the plaintiff and the amicus.[FN7]

> FN7. The dissent argues that *Grant* remains viable despite the repeal of section 48-718. Relying on *Tucson Gas & Electric Co. v. Schantz*, 5 Ariz.App. 511, 428 P.2d 686, 690 (Ariz.Ct.App.1967), and *Lavin v. Jordon*, 16 S.W.3d 362, 368 (Tenn.2000), the dissent asserts that a common law rule is not explicitly abrogated by statute unless the statute clearly reflects legislative intent to do so. As we see it, however, the abrogation of the common law, as reflected in *Grant*, was explicit and intended by the legislature. In 1968, the General Assembly subsumed the common law common fund doctrine into section 48-718. Subsequently, when the TBCA was passed in 1986, section 48-718 was explicitly rejected by the legislature when not included into the new Act. "As a general rule of statutory construction, a change in the language of the statute indicates that a departure from the old language was intended." *Lavin*, 16 S.W.3d at 369. Therefore, in intentionally removing section 48-718, the General Assembly placed the common law rule at odds with the TBCA. And, as this Court has previously stated, "[w]hen there is a conflict between the common law and a statute, the provision[s] of the statute must prevail." *Id.* at 368 (quoting *Graves v. Illinois Cent. R.R. Co.*, 126 Tenn. 148, 148 S.W. 239, 242 (Tenn.1912)).

The plaintiff and the amicus also rely upon an unreported case, *McRedmond v. Estate of Marianelli*, No. M2004-01496-COA-R3-CV, 2006 WL 2805158 (Tenn.Ct.App. Sept.29, 2006). In that case, the trial court in a shareholder's derivative action awarded attorney's fees against a Kentucky company pursuant to Kentucky's common fund doctrine. The issue in *McRedmond*, as framed by the parties, was whether the trial court "erred in its application of the Kentucky common fund doctrine in ordering [the Kentucky corporation] to pay the attorneys' fees and expenses of the [ ] derivative plaintiffs." *Id.* at *7. In affirming the trial court's award of fees, the Court of Appeals noted that "[t]he applicable law in this case is Kentucky law." *Id.* at *4. Despite the intermediate court's declaration that Kentucky law governed, however, the court went on to state that the question before it was "whether the common fund doctrine (either under Tennessee or Kentucky law) applies under the facts of this case. We find that it does." *Id.* at *20. Regardless of which state's law was actually applied in *McRedmond*, that case is not dispositive of the present case. To the extent that *McRedmond* may be construed to conflict with our decision today, it is overruled.

Finally, the plaintiff and the amicus rely upon *Han-*

newald where, as noted, the *381 Court of Appeals, in awarding attorney's fees to a plaintiff in a shareholder derivative suit, reasoned that attorney's fees were necessary "to encourage and assist shareholders ... in pursuing justified claims for the benefit of corporations in which they have a valid interest." *Hannewald,* 651 S.W.2d at 230. Citing *Hannewald,* the plaintiff and amicus argue that disallowing attorney's fees to plaintiffs will chill shareholder derivative litigation because minority shareholders lack the practical means to hold corporate fiduciaries accountable for their actions. They assert that contingency fee arrangements would serve no beneficial purpose because the corporation itself, not the client, would receive any proceeds of the litigation, and that few clients would have the financial means to pay an hourly fee. It seems to us that while these arguments are not unreasonable given the complex nature of derivative litigation, their merits should be addressed by the legislature, for that body has made a policy choice to depart from former law providing for attorney's fees in cases involving for-profit corporations. Furthermore, we note that, like *Grant, Hannewald* predates the adoption of the Tennessee Business Corporation Act. Thus, *Hannewald* is of little avail to the plaintiff.

In sum, we hold that Tennessee law does not authorize an award of attorney's fees to a plaintiff in a shareholder's derivative suit involving a for-profit corporation. If the application of the relevant statute, namely section 48-17-401(d), produces an unfair or unintended result,[FN8] the answer lies in changing the statute.

FN8. Plaintiff's counsel has suggested to this Court that the omission of attorney's fees for plaintiffs in section 48-17-401 was due to "bad drafting."

II. Litigation Committee's Report

[8] Following multiple hearings in which the plaintiff, McLaren, and others testified, the trial court, on January 16, 2004, approved McLaren's report recommending that the case be settled by Edmondson paying Ram-Tenn $552,501. *See* Tenn.Code Ann. § 48-17-401(c) (derivative suits "may not be discontinued or settled without the court's approval"). The trial court found that McLaren's findings and recommendations were in the corporation's best interests and that, once a settlement was reached, the derivative suit would be dismissed. If the case failed to settle, the derivative action would proceed.

The plaintiff maintains that the trial court erred in approving McLaren's report. According to the plaintiff, McLaren improperly limited his investigation of Edmondson's activities to four years prior to the filing of the complaint. The plaintiff contends that had the investigation been broadened by going back further McLaren would have discovered larger sums misappropriated by Edmondson. The plaintiff also asserts that McLaren's report should have been rejected by the trial court because his conclusions and recommendations were the product of an inadequate investigation. Resolving these issues requires that they be viewed in the context of certain well-established principles.

[9][10] Generally, "the proper party to bring a claim on behalf of a corporation is the corporation itself acting through its directors or a majority of its shareholders." *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 531-32, 104 S.Ct. 831, 78 L.Ed.2d 645 (1984). However, since at least 1874, the courts of this state have been available to enforce the rights of corporations and their stockholders through what is called a derivative action. *See Deaderick v. Wilson,* 67 Tenn. (8 Baxt.) 108 (1874). A derivative action is a *382 suit brought by one or more shareholders on behalf of a corporation to redress an injury sustained by, or to enforce a duty owed to, the corporation. *See Bourne v. Williams,* 633 S.W.2d 469, 471 (Tenn.Ct.App.1981). Thus, a derivative action is an exception to the rule that the corporation itself is the proper party to bring suit on its own behalf.

[11] Tennessee, like other jurisdictions, has ap-

proved a corporation's appointment of an independent individual or group, called a special litigation committee, as a mechanism for assessing the merits of a shareholder's derivative action and for making recommendations to the corporation concerning its resolution. *See Lewis v. Boyd,* 838 S.W.2d 215, 222-24 (Tenn.Ct.App.1992). As our courts have recognized, these litigation committees "provide a legitimate vehicle for expressing a corporation's interest in derivative litigation." *Id.* at 223. Given that a shareholder derivative action cannot be dismissed or settled without court approval, Tenn.Code Ann. § 48-17-401(c), courts deciding whether to accept a litigation committee's recommendations consider a number of factors, including the committee's independence, good faith, procedural fairness, and the soundness of the committee's conclusions and recommendations. *Lewis,* 838 S.W.2d at 225. Although courts should critically evaluate the committee's findings and recommendations to determine whether they were made in good faith, are supported by the record of the investigation, and are consistent with the corporation's best interests, they should not substitute their own business judgment for that of the committee's. *Id.* at 224.

[12] In this case, the plaintiff does not challenge Ram-Tenn's decision to appoint McLaren to serve as a one-person litigation committee. Nor does the plaintiff challenge McLaren's independence or his good faith.[FN9] Rather, the plaintiff's arguments for rejecting McLaren's report center on whether McLaren acted with procedural fairness and whether his conclusions and recommendations were the product of an inadequate investigation.

> FN9. In evaluating the independence of a litigation committee, courts consider factors such as the size of the committee, the committee members' relationship with the corporation's officers and directors, their qualifications and experience, the scope of the committee's authority, and the committee's autonomy from the officers and directors. *Lewis,* 838 S.W.2d at 224. It is undisputed in this case that McLaren had no affiliation with Ram-Tenn or any of the parties when Ram-Tenn appointed him. Further, it is undisputed that McLaren has been a licensed attorney for 26 years, focusing his practice in the area of commercial litigation.

[13] As to the procedure employed by McLaren, the plaintiff argues that McLaren improperly restricted the scope of his review of Ram-Tenn's records to 1994-four years prior to the filing of the complaint. In deciding to limit his inquiry to the period 1994 forward, McLaren applied the three-year statute of repose found at Tennessee Code Annotated section 48-18-601, which governs actions alleging a breach of fiduciary duty by a director or officer of a corporation. That statute adopts a one-year statute of limitations for such claims, but provides that "[i]n no event shall any such action be brought more than three (3) years after the date on which the breach or violation occurred, except when there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year" after the breach is or should have been discovered. Tenn.Code Ann. § 48-18-601 (2002). McLaren, relying upon section 48-18-601 in framing the scope of his investigation, applied a three-
***383** year statute of repose and added an additional year for any fraudulent concealment that may have occurred.[FN10] The plaintiff maintains that McLaren should have broadened the scope of his investigation even further by covering a ten-year period under Tennessee Code Annotated section 28-3-110 (2000), which provides that "cases not expressly provided for" must be commenced within ten years after the cause of action accrues. Alternatively, the plaintiff argues that McLaren should have broadened the scope of his investigation by covering a six-year period under Tennessee Code Annotated section 28-3-109 (2000), the limitations period applicable to breach of contract actions.

> FN10. When questioned at trial as to why he added only one additional year for any

fraudulent concealment that may have occurred, McLaren testified that he made a judgment call to limit the time period of the investigation to four years prior to the filing of the complaint because of the cost and practical difficulty of getting Ram-Tenn's records prior to that time. As he stated, Ram-Tenn had few records for the period prior to 1994, and it would have taken longer and been more costly to keep digging beyond four years. The evidence does not preponderate against these findings. Moreover, in the litigation committee report, McLaren stated:

> After a great deal of work on this matter, some definite conclusions can be drawn:
>
> ....
>
> 3. That little or no effort was made [by Edmondson] to conceal the misappropriations, and the sums misappropriated would have been apparent to anyone reviewing the books, accounts, and records....
>
> ....
>
> 6. That little or no effort was made by any shareholder to monitor or even inquire as to the affairs of Ram-Tenn, Inc.....
>
> ....
>
> 10. That [the plaintiff] (or any other shareholder) in the exercise of any due diligence, [sic] could have ascertained the nature and extent of Edmondson's misappropriations at any time.
>
> Given McLaren's findings and the language found within section 48-18-601 requiring fraudulent concealment on the part of the defendant in order to extend the statute of limitations beyond one year, *see* Tenn.Code Ann. § 48-18-601, McLaren's decision to extend the scope of review of his report to as many as four years prior to the filing of the lawsuit appears to be generous to the plaintiff.

The plaintiff's argument that McLaren improperly limited the scope of his investigation into Edmondson's activities is unpersuasive. The legislature has clearly provided a limitations period applicable to cases of this type in section 48-18-601. Under its own terms, that statute applies to "[a]ny action alleging a breach of fiduciary duties by directors or officers" of a corporation. The present case falls squarely within the ambit of section 48-18-601. Therefore, the limitations periods set forth in sections 28-3-109 (six years for breach of contract) and 28-3-110 (ten years for cases "not expressly provided for") do not apply. Thus, we conclude, as the Court of Appeals did, that McLaren did not improperly limit the scope of his investigation.

[14][15] The plaintiff also argues that McLaren's conclusions and recommendations are the product of an inadequate investigation and are inconsistent with the corporation's best interests. In considering this issue, we note that courts take into account several factors in determining the adequacy of a litigation committee's investigation. These factors include the length and scope of the investigation, the committee's use of independent experts, the corporation's or the defendant's involvement in the investigation, and the adequacy and reliability of the information supplied to the committee. *Lewis,* 838 S.W.2d at 224. Moreover, in assessing whether the committee has reached a decision that is in the corporation's best interests, courts consider*384 the likelihood that the plaintiff will succeed on the merits, the financial burden on the corporation of litigating the case, the extent to which dismissal will permit the defendant to retain improper benefits, and the effect continuing the litigation will have on the corporation's reputation. *Id.*

Mindful of these principles, we note that the record

before us establishes that McLaren, an experienced commercial litigator, began his investigation in December 1999 and rendered his first report in October 2000 and a supplemental report in July 2001. Thus, McLaren's investigation spanned nineteen months. During that time, he employed an accounting firm to assist in the investigation at a cost of at least $50,000 to Ram-Tenn. The accounting firm spent 275 hours on the case. McLaren's law firm spent 313 hours performing the investigation at a cost of $70,000 to Ram-Tenn. Further, McLaren consulted with an expert in the hotel industry, along with the real estate appraiser involved in the sale of Ram-Tenn's hotel in Nashville. Thus, not only did McLaren employ outside experts to assist in the lengthy investigation, he spent many hours-at least 250-on the case himself.

Furthermore, we note that McLaren's reports, along with exhibits to the reports, are detailed and extensive, encompassing hundreds of pages. The accounting firm's report by itself is sixty-three pages in length and details the areas of inquiry. Numerous exhibits to the reports, along with the testimony of McLaren and the accountant who assisted him, more than adequately reflect their extensive efforts at uncovering Edmondson's activities. McLaren testified that none of Ram-Tenn's officers or directors attempted to prevent him from receiving any information and that nothing was concealed from him. McLaren described Edmondson as "open and willing to provide" whatever he requested. Indeed, it is uncontraverted that McLaren examined all of Ram-Tenn's records that could be located.

The record also reflects that McLaren deposed witnesses and reviewed thousands of documents supplied by the plaintiff and others. He also met several times with individuals who could provide useful information including, among others, the custodian of Ram-Tenn's records, corporate counsel, the plaintiff, Edmondson, and their lawyers. Further, McLaren reviewed the law concerning stock transfers, statutes of limitations, damages, and the role of special litigation committees. The record also demonstrates that in arriving at his recommendation that the case be settled, McLaren took into account a number of relevant factors-"the likelihood of success on the merits, the extraordinary expense of going forward with the case,[FN11] the delay in wrapping up the affairs of the nonfunctioning corporation, the age of [Edmondson who was in his eighties and in poor health], the length of time involved to try the case, and the almost certain appellate process following any trial." In the event Edmondson refused to settle in accordance with terms specified in his reports, McLaren recommended that Ram-Tenn pursue the case against him.

FN11. McLaren estimated that to continue the litigation would cost "far in excess" of $250,000 in attorneys's fees alone.

Based upon the extensive record before us, we find unconvincing the plaintiff's argument that McLaren's conclusions and recommendations were the product of an inadequate investigation. Indeed, it is difficult to pinpoint what more McLaren could have done in the nineteen months that he conducted the investigation on behalf*385 of Ram-Tenn. Moreover, we have no basis to find that McLaren failed to exercise sound business judgment in determining that the best interests of Ram-Tenn-a nonfunctioning, closely held company-would be served if the case were settled, especially given that the company's primary asset had been sold, the litigation has spanned nearly nine years, and the company is in wind-up mode pending the conclusion of this suit.[FN12] In short, the record more than adequately demonstrates that McLaren's conclusions and recommendations were the product of much time, effort, and expense. In light of these circumstances, we will not, as we have said, substitute our business judgment for that of the duly appointed independent litigation committee.[FN13]

FN12. It is interesting to note that McLaren made a judgment call at the outset of his investigation that because Ram-Tenn's records were not kept in a "sophisticated fashion," expenditures that could not be

supported with documentation would be held against Edmondson and placed "in the repayment column." In other words, any lack of information was automatically charged against Edmondson. Contrary to the plaintiff's argument that McLaren's conclusions and recommendations were not in Ram-Tenn's best interests, it seems plausible to us that this approach by McLaren suggests the possibility that McLaren's findings may actually be generous in favor of the corporation.

FN13. The plaintiff makes additional arguments concerning the scope of McLaren's authority and the method by which proposed settlement proceeds were to be paid by Edmondson. We have concluded that these alternative arguments have no merit.

Conclusion

For the foregoing reasons, we hold that Tennessee law does not authorize an award of attorney's fees to a plaintiff in a shareholder's derivative suit brought on behalf of a for-profit corporation. We further hold that the trial court did not err in approving the report of the litigation committee. Accordingly, the judgment of the Court of Appeals is affirmed. The costs in this Court are taxed to the plaintiff, J.O. House, and his surety, for which execution may issue if necessary.

GARY R. WADE, J., dissenting.

GARY R. WADE, J., dissenting.

I agree with the majority that the trial court did not err by approving the special litigation committee's report. For a variety of reasons, however, I must respectfully dissent with regard to the holding that a minority shareholder suing on behalf of a for-profit corporation can never recover attorney fees under the common fund doctrine. First, I do not believe that failure of the General Assembly to include the common fund doctrine in the Tennessee Business Corporation Act ("TBCA") abrogates our holding in *Grant v. Lookout Mountain Co.*, 93 Tenn. 691, 28 S.W. 90 (Tenn.1894). Secondly, the common fund doctrine is not analogous to Tennessee Code Annotated section 48-17-401(d), which authorizes an award of attorney fees against the opposing party. Finally, from a policy standpoint, the application of the common fund doctrine to shareholder derivative suits is desirable to promote corporate accountability.

I.

Indeed, Tennessee follows the "American rule," whereby parties in a civil action pay for their own attorney fees absent any agreement to the contrary. The common fund doctrine, however, is a well-recognized exception to the American rule. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980) (applying the common fund doctrine to a class action). As applied to shareholder derivative***386** suits, the doctrine provides that a minority shareholder who initiates a meritorious suit may recover reasonable fees from the common fund (the settlement or verdict) paid by the shareholders as compensation for the efforts expended for the benefit of all shareholders alike. *Grant*, 28 S.W. at 90. This compensation is fair, considering that the benefit would not have accrued to the other shareholders, large or small, but for the efforts by the minority shareholder. As *Grant* put it, "the property [rightfully] restored to the corporation, was set in motion by minority stockholders." *Id.* at 91. The common fund doctrine is particularly suited for a shareholder derivative action because a minority shareholder is not suing on his own behalf, but on the behalf of the corporate entity, which is unlikely to file suit against its own leadership unless forced to participate through a derivative action.

As indicated, this Court has previously recognized the common fund doctrine as applied to attorney fees in shareholder derivative suits on behalf of a for-profit corporation. *Grant*, 28 S.W. at 93 (holding that an "owner of stock in a corporation

who sues for himself and all other shareholders successfully, for a wrong done to the corporation, is entitled to be re-imbursed his actual and necessary expenses, including attorneys fees, out of the corporate fund."). However, the majority asserts that this common law rule was repealed by statute in two separate ways: (1) through the codification and subsequent repeal of Tennessee Code Annotated section 48-718; and (2) by the adoption of Tennessee Code Annotated section 48-17-401(d). I cannot agree.

A. Section 48-718

In 1968, the General Assembly adopted a statute that allowed plaintiffs in derivative actions to recover attorney fees by placing a "lien upon the recovery made by the corporation." This legislation was comparable with our holding in *Grant*. Tenn.Code Ann. § 48-718(4). The TBCA, which was enacted in 1986, did not include a provision that addresses the subject. This presents the classic question of whether codification of a common law doctrine, followed by subsequent repeal of the statute, implicitly abrogates the common law. Unlike the majority, I do not believe this is always the case. By codifying the common fund doctrine in 1968, the General Assembly enacted a statute that both affirmed and operated concurrently with the common law. [FN1] Through the adoption of the TBCA, the General Assembly repealed that codification. It did not, in my view, overrule the common law.[FN2] As American Jurisprudence (Second) points out, statutes are not deemed to repeal the common law by implication unless the legislative *387 intent to do so is clearly manifested. 15A *Am.Jur.2d Common Law* § 15 (1995). This legislation does not meet that test.

FN1. The Arizona Court of Appeals has held that codification of a common law right creates a statutory right in addition to the right a common law. In holding that a shareholder maintained a common law right to inspect corporate records, the court wrote, "[S]ince the legislature has not clearly manifested its intent to repeal the common law rule nor specifically declared the statutory remedy to be exclusive, a shareholder's common law right of inspection, which exists independently of statute, is not abrogated...." *Tucson Gas & Elec., Co. v. Schantz*, 5 Ariz.App. 511, 428 P.2d 686, 690 (1967).

FN2. It is notable that neither Westlaw's KeyCite feature nor Lexis's Shepard's feature categorizes *Grant* as overruled at the time of this case. Application of both research tools to *Grant* reveals that it is in the "yellow" category. According to Westlaw's website, "[A] yellow flag warns that the case or administrative decision has some negative treatment, but has not been reversed or overruled." *See* http:// web 2. westlaw. com/ keycite/ default. A "yellow" label in Lexis has a similar meaning. While this is not controlling authority, it is persuasive considering that many lawyers rely on these tools while conducting their research.

Silence in a statute is not affirmative law. Simply because the legislature did not provide a statutory remedy does not preclude application of the common law. The United States Supreme Court recognized this principle when awarding attorney fees to a plaintiff in a derivative action brought under section 14(a) of the Securities and Exchange Act. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 389, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). In that case, our highest court ruled that "[t]he absence of express statutory authorization for an award of attorneys' fees in a suit under § 14(a) does not preclude such an award in cases of this type." *Id.* Likewise, the failure to include the common fund doctrine in the TBCA is insufficient for this Court to fairly infer a legislative "purpose to circumscribe the courts' power to grant appropriate remedies." *Id.* at 391, 90 S.Ct. 616. The common law should trump legislat-

ive silence.

This approach is consistent with our previous decisions on the subject. While upholding the statutory cap on recovery against parents for intentional damage caused by their children, this Court made the following observation:

> While the General Assembly has plenary power within constitutional limits to change the common law by statute, ... the 'rules of the common law are *not repealed by implication,* and if a statute does not include and cover such a case, *it leaves the law as it was before its enactment.*'

Lavin v. Jordon, 16 S.W.3d 362, 368 (Tenn.2000) (emphasis added) (citations omitted).[FN3] This Court further observed that the statute prevailed only when it conflicted with the common law. *Id.*

> FN3. The majority cites to *State v. Turner,* 193 S.W.3d 522, 527 (Tenn.2006), for the proposition that "a change in the law by statute raises a presumption that a departure from the old law was intended." What *Turner* actually said was "When the legislature makes a change in the *language* of a statute, we must assume that it was deliberate." *Id.* (emphasis added). This case does not involve a change in the language of a statute. Because the common fund doctrine is not addressed in the TBCA, there is no language of two different versions of a statute to compare in this case.

The principle confirmed by our ruling in *Lavin* does not support the majority's holding. Since 1894, Tennessee courts have recognized that the common fund doctrine applies to shareholder derivative suits. *Grant,* 28 S.W. at 93. While the common fund doctrine was recognized by section 48-718 of our 1968 corporate legislation, its exclusion in the TBCA, absent express intent to the contrary, "leaves the law as it was before its enactment." *Lavin,* 16 S.W.3d at 368. The only way to conclude that our rule in *Grant* has been overruled by the more recent act would be "by implication." Unlike the majority, I am unwilling to draw that implication without a manifest directive from the legislature.

B. Section 48-17-401(d)

The majority states that its conclusion is merely an "application of the relevant statute, namely section 48-17-401(d)...." However, I am unable to find anything in that section explicitly barring a plaintiff from recovering reasonable attorney fees from the common fund. Furthermore, I do not find any helpful comparison between the common fund doctrine and this provision of the TBCA.

Section 48-17-401(d) directs a plaintiff to pay the defendant's attorney fees if the suit was not commenced with "reasonable ***388** cause." The policy behind section 48-17-401(d) is to discourage frivolous derivative suits and compensate defendants that are harmed by the costs incurred in the defense of baseless litigation. The policy goals of the common fund doctrine are completely different:

> First, the doctrine prevents the beneficiaries of legal services from being unjustly enriched by requiring them to pay for those services according to the benefit received. Second, the doctrine serves to spread the costs of litigation proportionally among all of the beneficiaries so that the plaintiff does not bear the entire burden alone.

Kline v. Eyrich, 69 S.W.3d 197, 204 (Tenn.2002). The objective of the common fund doctrine is to "impose fees on the class that would have had to pay the fees if it had brought the suit for its benefit." 19 *Am.Jur.2d Corporations* § 2487 (1995). Just as the 1986 legislation discourages a frivolous suit, our common law encourages a meritorious one.

Section 48-17-401 and the common fund doctrine differ in other aspects besides policy goals. In section 48-17-401(d), the defendant's attorney fees would be paid by the opposing party. Under the doctrine, the minority shareholder's attorney fees

would be paid from a common fund before being distributed to the shareholders. In other words, "the obligation to reimburse the successful plaintiffs in a derivative action falls on *the corporation, and not on the losing party,* such as the directors charged with mismanagement." 19 *Am.Jur.2d Corporations* § 2487 (emphasis added). The fees are assessed against the fund or property itself as fair compensation for "securing, augmenting, or preserving property or a fund of money in which other people are entitled to share in common." *Travelers Ins. Co. v. Williams,* 541 S.W.2d 587, 589 (Tenn.1976)).

In short, these are two different concepts. In my view, nothing in section 48-17-401(d) supports the abrogation of the common fund doctrine. While this Court's role is to apply the law as written and not second-guess the wisdom of the legislature, I simply find no clear statutory directive[FN4] that mandates abrogation of the common law.

> FN4. Our holding in *Grant* concurs with many of our sister states. *See, e.g., Decatur Mineral & Land Co. v. Palm,* 113 Ala. 531, 21 So. 315, 316 (Ala.1896); *Knutsen v. Frushour,* 92 Idaho 37, 436 P.2d 521, 525 (Idaho 1968); *State ex rel. Weede v. Bechtel,* 244 Iowa 785, 56 N.W.2d 173, 188 (Iowa 1952); *Bosch v. Meeker Cooperative Light & Power Ass'n.,* 257 Minn. 362, 101 N.W.2d 423, 425 (Minn.1960); *Fitzgerald v. Bass,* 122 Okla. 140, 252 P. 54, 55 (Okla.1927). As stated, the common fund doctrine is also recognized by the federal courts. *Mills,* 396 U.S. at 392, 90 S.Ct. 616.

II.

The majority opinion bases its conclusion solely on the grounds of statutory construction. Public policy considerations, in my view, support a different result.

The common fund doctrine enables shareholders to "pursu[e] justified claims for the benefit of corporations in which they have a valid interest." *Hannewald v. Fairfield Cmtys., Inc.,* 651 S.W.2d 222, 230 (Tenn.App.1983). Here, the minority shareholder owned only 5% of the shares. A verdict or settlement in a derivative action would have to be $200,000 or above for a minority shareholder to recoup a fee of $10,000-minimal compensation for a suit of that matter. The cost of litigation could be so burdensome as to deter otherwise valid claims unless the misappropriation is substantial. Derivative suits are risky and difficult to prove even when there is clear misconduct by corporate fiduciaries. ***389** A shareholder is less inclined to seek deserved relief when doing so would result in a net loss.[FN5]

> FN5. An alternative is a *pro bono* attorney, but as the amicus curiae states: "Given the complex nature of derivative litigation and the massive investment of work that it requires, this is neither fair nor realistic."

The common fund doctrine-the exception to the American rule-arose as an equitable doctrine. 20 *Am.Jur.2d Costs* § 66 (1995). In 1970, former Justice Harlan wrote that allowing a plaintiff to recoup his expenses when conveying a significant benefit to the other shareholders is simply fair and equitable. *Mills,* 396 U.S. at 392, 90 S.Ct. 616. He believed that a contrary ruling would be unjust: "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.* That assessment makes perfect sense.

For these reasons, I must dissent. I would not overrule *Grant* and would hold that a plaintiff in a derivative action on behalf of a for-profit corporation can recover reasonable attorney fees under the common fund doctrine.

Tenn.,2008.
House v. Estate of Edmondson
245 S.W.3d 372

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EXHIBIT E

TFP 12/24/09

Another gas company ploy

Tennessee's natural gas industry and the Chattanooga Gas Co. have a lamentable record of trying to snow state regulators and their customers to secure higher rates. Now the Chattanooga Gas Co. is at it again.

Its latest ploy comes in a petition to have its local customers pay, in addition to a debatable $2.6 million rate increase, some $700,000 extra to reimburse the company for legal bills on another matter. The company claims it incurred those legal costs for its defense against what it called "a witch hunt" by the state attorney general over its financial dealings with Sequent Energy Management, a corporate affiliate.

We doubt State Attorney General Bob Cooper's office acted improperly. Mr. Cooper has a good record of fairly protecting consumers' interest. He resisted the company's interpretation of costs it claimed for the Sequent Energy transaction because it invited questions. The Tennessee Regulatory Commission, which regulates private utilities' rates, apparently agreed. It subsequently ruled that there should be an independent accounting of the two companies' financial dealings every three years. That's a reasonable response to prevent unjustifiable charges.

The Chattanooga Manufacturers Association wants to block the company's attempt to role the $700,000 into its contested rate hike, as well. CMA president Ray Childers sensibly claims that the gas company's play to roll the $700,000 expense into its rates would "turn that investigation into a back door rate case."

We couldn't agree more. As the TRA decision showed, Mr. Cooper's investigation had merit. The TRA should stand by him, and reinforce its ruling.

TFP 12/31/09

Editorial on gas firm inaccurate

The Times editorial "Another gas company ploy" (Dec. 24) doesn't provide an accurate representation of the facts.

It asserts Chattanooga Gas is trying to modify the regulatory process with state regulators and customers in a case involving an independent accounting of Chattanooga Gas and its corporate affiliate, Sequent Energy Management.

The facts:

- We spent two years involved in a proceeding regarding gas procurement and asset management. Legal fees from this proceeding are more than $700,000.
- We have asked the Tennessee Regulatory Authority (TRA) for recovery of those fees directly related to gas procurement over the next three to five years in the Purchase Gas Adjustment.
- This proceeding is NOT a rate increase; therefore we aren't required to publish notice. The TRA has given notice on several occasions.
- This asset management contract has returned over $15.9 million to Chattanooga Gas customers since 2003 in lower gas costs.
- The Chattanooga Manufacturers Association chose not to participate in this docket until now and has been aware of this proceeding for the last two years.

We are proud of the safe, reliable service we provide. We will continue to seek ways to improve, while focusing on cost-saving opportunities for our customers.

STEVE LINDSEY
Vice President
and General Manager
Chattanooga Gas

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

January 8, 2010

IN RE:	)	
	)	
PETITION OF CHATTANOOGA GAS	)	
FOR GENERAL RATE INCREASE,	)	Docket No. 09-00183
IMPLEMENTATION OF THE	)	
ENERGYSMART CONSERVATION	)	
PROGRAMS, AND IMPLEMENTATION OF	)	
A REVENUE DECOUPLING MECHANISM	)	
	)	

CHATTANOOGA GAS COMPANY'S RESPONSE IN OPPOSITION TO THE CMA'S REQUEST TO COMBINE DOCKET 07-00224 WITH DOCKET 09-00183

Chattanooga Gas Company ("CGC" or "Company") files this response in opposition to the Chattanooga Manufacturers Association's ("CMA") motion to transfer the cost recovery issue that is pending before the Tennessee Regulatory Authority ("TRA" or "Authority") in Docket 07-00224 into the Company's current rate case Docket 09-00183. The CMA has mischaracterized CGC's request in Docket 07-00224.

First, CGC is not seeking a rate increase or even dealing with a rate case issue in Docket 07-00224. Rather, Docket 07-00224 has involved issues concerning gas supply and capacity related costs, including the revenues generated from non-jurisdictional transactions associated with capacity assets, which are governed by the Purchased Gas Adjustment ("PGA") Rule, not rate making principles. Second, CGC, at this time, has not argued that it should recover legal fees pursuant to Tenn. Code Ann. § 4-5-325. However, CGC reserves the right to do so if the TRA determines that gas related costs, including the costs incurred to disprove the charges that the Company oversubscribes to

gas supply and capacity assets and thus inflates gas costs on its customers' bills, are not recoverable through the PGA.[1]

The CMA should not be allowed to mischaracterize the cost recovery issue that has been presented to the TRA in Docket 07-00224 by filing a motion in a totally unrelated docket. If the CMA wishes to address the Company's cost recovery issue, it should have intervened in Docket 07-00024. The CMA has had notice of both the docket and the Company's cost recovery issue since no later than February 11, 2008, when the cost recovery issue was raised during the initial status conference. After participating in that initial status conference on February 11, 2008, the CMA chose not to intervene in Docket 07-00224, but instead chose to sit on the sidelines and allow a contested case to be litigated for two (2) years without intervening and participating. Now that the sole remaining issue in the docket has been briefed, orally argued, and is pending before the TRA for deliberation, the CMA attempts to circumvent the intervention rules in that docket by incorrectly re-characterizing the issue into a rate making issue. However, the Company has consistently asserted that, since gas costs are recoverable through the PGA and since CGC is seeking the recovery of gas-related costs, the PGA is the appropriate mechanism for recovery, and the Attorney General has agreed. To allow a non-party at the end of a docket to re-direct the sole remaining issue that the TRA has taken under advisement into another separate docket and re-characterize that remaining issue will make intervention rules meaningless and will create much uncertainty and unnecessary expense for parties in contested cases.

[1] The TRA ultimately ruled for CGC and determined that CGC subscribes to an appropriate level and mix of gas supply and capacity assets. (See Order (filed Sept. 23, 2009 in Docket 07-00224), at 5).

CGC respectfully requests that the CMA's motion be denied and that the cost recovery issue as presented by the Company be properly considered by the TRA in Docket 07-00024 where issues pertaining to CGC's gas and capacity supply costs have been litigated for over two (2) years.

BACKGROUND

Docket 07-00224 was initiated for the CAPD and the CMA to pursue any claims against the Company relating to asset management and capacity release issues. (See Order Closing Phase II of Docket 06-00175 (filed Dec. 17, 2007)). During the February 11, 2008 initial status conference in Docket 07-00224, attorneys for CGC, the CAPD, and the CMA attended and participated in the status conference. In fact, the CMA's long-standing attorney Henry Walker represented that, while a petition to intervene had not been submitted, such a filing would be forthcoming. (See Order on February 11, 2008 Status Conference (filed Feb. 19, 2008), at 3).

At the February 11, 2008 initial status conference, the Hearing Officer directed the parties to file their statements of claims and issues setting forth their specific claims against CGC concerning asset management and capacity release issues that would be decided by the TRA. (See id. at 5-6). At that same conference, CGC requested that the TRA enter an order to allow it to accumulate and defer litigation costs associated with the gas cost issues being pursued in Docket 07-00224 so that it could later seek recovery of these costs. (See id. at 6). As the CMA's attorney participated in the February 11, 2008 initial status conference, the CMA has had notice of the proceedings in Docket 07-00224 and of the Company's request for cost recovery. Notwithstanding Mr. Walker's representations, the CMA never filed a petition to intervene in Docket 07-00224.

As ordered by the Hearing Officer, the CAPD filed the claims that it has asserted against CGC and the issues that it has litigated against CGC for the past two (2) years. Included among the CAPD's assertions was the claim that "CGC is subscribing to too much system capacity relative to its jurisdictional requirements thereby unfairly inflating customers' natural gas utility bills by charging them for more system capacity than is required to adequately serve their gas supply needs." (See CAPD's Identification of Issues, Claims, and Remedies (filed March 12, 2008), at 5). The TRA has allowed CGC to accumulate for accounting purposes all costs related to Docket 07-00224 so that CGC could seek to recover these gas-related costs through the PGA. (See Order on March 7, 2008 Status Conference (filed March 11, 2008), at 3). CGC has always maintained that the litigation costs incurred in Docket 07-00224 are related to gas and capacity costs that are governed by the PGA and thus should be recoverable through the PGA. The CAPD has previously agreed with this recovery mechanism.

In November 2009, CGC filed a petition for a rate increase in the present Docket 09-00183. The rate case does not include the cost recovery issue raised in Docket 07-00224, which the Company is seeking to recover through the PGA, not through rates.

ARGUMENT

As stated above, the CMA has mischaracterized CGC's request for cost recovery.

A. CGC is not seeking a rate increase or even dealing with a rate case issue in Docket 07-00224. Rather CGC is seeking to recover costs related to gas supply and capacity costs through the PGA.

In Docket 07-00224, the TRA has considered issues related to gas and capacity costs including CGC's gas supply and capacity planning process and the level and mix of gas supply and capacity assets maintained by CGC to adequately serve its customers.

The TRA has traditionally reviewed and handled all costs associated with gas supply and capacity assets, as well as all revenues generated from non-jurisdictional transactions associated with capacity assets, through the PGA, Chapter 1200-4-7. As an example, the TRA has recognized the costs incurred by a company to engage an outside consultant to perform a prudency audit of gas and capacity supply related costs are to be included in its PGA and has allowed companies to recover those costs and expenses through the PGA. See Rule 1220-4-7-.05.

The costs incurred by CGC in Docket 07-00224 are no different; thus, CGC is requesting that these costs be considered as part of the PGA.[2] The PGA operates outside of ratemaking, and the direct pass-through of gas costs operates solely as a function of the PGA. Therefore, the costs that CGC has incurred in Docket 07-00224 dealing with issues related to gas costs and gas supply assets should be allowed to pass through the PGA.[3]

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[2] Because the CAPD chose the process of convening a contested case to assert its allegations of improper conduct related to CGC's gas supply and capacity assets and gas costs, and because the CAPD solely relied upon its improper expert testimony, CGC spent over two (2) years trying to convince the CAPD of the problems and inaccuracies in its testimony and theories, including inviting the CAPD to its asset manager's offices in Houston. In the end, because of the litigious nature of the docket, CGC was forced to file legal motions to exclude all of the CAPD's expert testimony regarding gas supply and capacity planning issues, which the CAPD withdrew just ten (10) days before the hearing on the merits. Then, at the hearing on the merits, CGC presented substantial testimony to the TRA regarding its gas supply and capacity planning process, and in the end, the TRA determined that CGC subscribed to an appropriate level and mix of gas supply and capacity assets. As a result, CGC can continue to pass the gas costs associated with its gas supply and capacity assets directly to its firm customers through the PGA. The costs incurred to prevail in Docket 07-00224 are analogous to consultant costs that would have been incurred had the CAPD decided to pursue another process. Rather, the CAPD decided to advance inappropriate and incorrect testimony and theories to support its claims for almost two years.

[3] These costs will be offset against the credits that CGC has been able to obtain through its asset management program and flow through the PGA. A decision to allow cost recovery to occur through the PGA in Docket 07-00224 will have no affect on the rate case or on CGC's rates. Further, Tennessee Gas Pipeline Company has been ordered by FERC to return money to various companies including CGC for certain environmental remediation costs. Any cost recovery that the TRA allows in Docket 07-00224 will likely be offset from these credits which will pass through the PGA to CGC's firm customers. The issue of allowing cost recovery of gas-related costs through the PGA only affects CGC's firm customers. The industrial customers that comprise the majority of the membership of the CMA are not firm customers as they receive only transportation services from CGC and thus will not be beneficially or adversely affected by the decisions in Docket 07-00224.

As explained in detail in CGC's brief regarding cost recovery (filed in Docket 07-00224 on October 28, 2009, at pages 4 -14), Docket 07-00224 has dealt with a very unique set of facts and circumstances relating to the procurement of natural gas and the capacity required to transport the gas through the interstate system. Therefore, CGC is asking that it be allowed to recover these specific costs through the PGA. The CAPD through its filings and arguments has likewise agreed that the PGA is the proper mechanism to recover prudently incurred costs in Docket 07-00224. (See Stipulation Regarding CGC's Requested Cost Recovery (filed Oct. 28, 2009), at 2). The Company's rate case filed in this present docket does not include the cost recovery issue raised in Docket 07-00224. As the cost recovery issue is not part of the current rate case filed by the Company in Docket 09-00183, the CMA's argument regarding improper public notice is also a mischaracterization. In Docket 07-00224, proper public notice has been given by the TRA of all hearings and all proceedings. The CMA has had ample notice and opportunity to intervene and participate at the appropriate time in Docket 07-00224 over the past two (2) years.

B. CGC, at this time, has not argued that it should recover legal fees pursuant to Tenn. Code Ann. § 4-5-325; however, CGC reserves the right to do so if the TRA determines CGC's gas-related costs are not recoverable through the PGA.

The CAPD has agreed with and has not challenged the recovery of CGC's costs related to gas supply and capacity assets through the PGA. Therefore, CGC has not argued for recovery under Tenn. Code Ann. § 4-5-325. However, if the CAPD should reverse its position and argue that the PGA is not the proper mechanism for recovery of CGC's costs and/or the TRA should determine that the PGA is not the proper mechanism

for recovery, CGC reserves its right to seek recovery from the State under Tenn. Code Ann. § 4-5-325.

C. Alternatively, if the TRA decides to combine the dockets and to allow the CMA to circumvent the intervention rules, the TRA should immediately decide the cost recovery issue as presented by the Company, not as re-characterized by the CMA.

Alternatively, if the TRA determines that it will allow the CMA to circumvent the intervention rules and order the transfer of CGC's unrelated cost recovery issue dealing with the PGA to be transferred and litigated in CGC's rate case docket, the Company believes that the TRA should decide the issue as presented by the Company – the recovery of gas-related costs through the PGA – not as presented by the CMA. Only upon an adverse determination of the issue of cost recovery through the PGA can the Company determine whether it will seek recovery of legal fees pursuant to Tenn. Code Ann. § 4-5-325 or whether to incorporate these issues into its petition for a general increase in rates.

If the TRA considers the substance of the CMA's brief, the CMA has misstated the holding by the Tennessee Court of Appeals in Kingsport Power Company v. Tennessee Public Service Commission, an unpublished opinion. The Court of Appeals remanded the case because the Court of Appeals was asked to review and determine the accuracy of a Tennessee Public Service Commission ("PSC") order that was never presented to the Court. Apparently, the PSC's order and the administrative transcript were not filed with the Trial Court or the Court of Appeals for consideration. The PSC order was never reviewed by a court. Based on the somewhat confusing facts presented in the unpublished opinion, it appears that the Kingsport Power Users Association petitioned the PSC to recover its legal fees from the utility, Kingsport Power Company,

pursuant to a federal statute, 26 U.S.C. §2632. The Kingsport Power Company case appears not to address gas cost issues or the PGA. Rather, it deals with a federal statute that CGC has not raised in Docket 07-00224.

Before the TRA in Docket 07-00224 is the issue of whether the TRA will allow the Company to recover the costs incurred to prevail in showing that its gas supply and capacity assets and thus its gas costs are appropriate and prudent. The Company is requesting that, based on the unique circumstances of Docket 07-00224 (which have been fully briefed by the Company in Docket 07-00224 (see CGC's Brief Regarding Cost Recovery)), the TRA allow the Company to recover its gas-related costs through the PGA.

CONCLUSION

In summary, CGC opposes the transfer of the remaining issue pending in Docket 07-00024 to the unrelated present rate case docket. In Docket 07-00224, CGC has asked the TRA to allow it to recover through the PGA the costs incurred to prevail in showing that its gas supply and capacity assets and thus its gas costs are appropriate and prudent. In that docket, the CAPD has heretofore agreed to this mechanism of recovery. CGC is not currently seeking recovery through rates and has not included the cost recovery issue in its petition for a general rate increase in the present docket. Further, CGC, at this time, has not moved to recover legal fees through Tenn. Code Ann. § 4-5-325 but reserves its right to do so pending the Authority's decision.

The CMA has attempted to re-characterize and re-direct the Company's cost recovery issue raised by CGC and incorporate it into CGC's rate case in order to circumvent the intervention rules. The CMA has had notice of Docket 07-00224 and of

the cost recovery issue since no later than February 11, 2008 when its attorney attended and participated in the initial status conference. However, the CMA never intervened in Docket 07-00224. The Company respectfully requests that the TRA deny the CMA's motion and enter a ruling in Docket 07-00224 on the issues as presented by the Company which are currently pending before the TRA.

Respectfully submitted,

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I hereby certify that on this 8th day of January 2010, a true and correct copy of the foregoing was served on the persons below by electronic mail:

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