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## Welcome and Introduction Tennessee Journal of Law and Policy Second Annual Symposium

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DEAN THOMAS GALLIGAN: Good afternoon. I am Tom Galligan, the Dean of the University of Tennessee College of Law, and it is my privilege to welcome you this afternoon to the *Tennessee Journal of Law and Policy*'s symposium, "The Tennessee Supreme Court's Impact on Law and Policy: Celebrating the Legacies of Justices Anderson, Birch, and Drowota."

This is a very special day for us at the College of Law. It's a special day because today we honor and analyze the very positive and significant impact of three great Tennessee jurists: Justice Riley Anderson, Justice Adolpho Birch, and Justice Frank Drowota. One, Justice Drowota, has already retired. The others, Justices Anderson and Birch, will retire this year.

Together and individually, they have moved the Tennessee Supreme Court and the administration of justice in our state and our nation forward over their long and very distinguished careers. We are extremely honored that each of them could be with us this afternoon. We are also extremely honored to have so many other distinguished guests here from the federal bench, from the state bench, from our faculty, from our students, and from our colleagues. We're glad that you are here.

Before I sit down, let me also praise and thank the *Tennessee Journal of Law and Policy* for putting this important symposium together. Joseph Hyder and his colleagues along with their faculty advisors, Professor Penny White and Professor Otis Stephens, have done a truly fabulous job putting this incredible tribute and program together. Welcome and enjoy the afternoon.

MR. JOSEPH HYDER: Thank you, Dean Galligan, for that welcome, and more importantly, I would like to thank you for your years of service to this law school and for your steadfast support for the *Tennessee Journal of Law and Policy*.

It was only a few years ago when a couple of students went to Dean Galligan with a crazy idea about starting a new journal here at the College of Law. Instead of laughing at those students, he decided to get behind the idea and to make it a reality. Without your energy, enthusiasm, and support, the *Tennessee Journal of Law and Policy* would not be the success that it is today. For that we thank you, and you will be dearly missed.

While I am thanking people, I would be remiss if I did not thank two members of the *Journal* who made this symposium possible. Maha Ayesh and Kelly Randall worked tirelessly along with one of the *Journal's* faculty advisors, Professor Penny White, to create what will be an informative and enjoyable program. If it is not, then you now know who to blame.

Seriously, they have put together a remarkable program because we have three of Tennessee's greatest and most influential jurists gathered in this room today. Justices Adolpho Birch, Jr., E. Riley Anderson, and Frank F. Drowota, III have more than fifty years of combined service on the Tennessee Supreme Court and over ninety years combined judicial experience. What a remarkable achievement to say the least.

In light of their recent retirement announcements, the *Tennessee Journal of Law and Policy* and the University of Tennessee College of Law felt that it would be proper to examine the impact that these justices have had on law and policy in Tennessee while also honoring the extraordinary gentlemen behind the accomplishments.

Today's symposium will be divided into two portions. First, we will have two panels that will examine contributions that the Tennessee Supreme Court has made to Tennessee jurisprudence over the last twenty-five years. After a short break, we will have a current or former law clerk for each justice present a brief tribute to the justice for whom they worked. Each tribute will then be followed by a response from that justice.

Our first panel will be moderated by Kelly Randall, who is the incoming Editor-in-Chief of the *Tennessee Journal of Law and Policy*, and she will be moderating the panels on professional ethics, public confidence in the judiciary, and public access to the courts. Kelly, I will turn it over to you.

MS. KELLY RANDALL: Thank you, everyone, for attending. Good afternoon. I am Kelly Randall. Welcome to our symposium. Our panel today will focus on three specific programs in the Tennessee Supreme Court. First, in the area of professionalism, the Supreme Court adopted rules pertaining to specialization which help identify lawyer practice areas for the public. The Court<sup>4</sup> also began posting information on the web about disciplinary action as well as information for members of the public who had complaints about lawyers.

Next, the SCALES program is an American Bar Association award-winning program founded by Justice Anderson that takes the Court to the people. The Court hears its docket in a high school where the students have been prepared for the cases of the day. Justices meet with the students afterwards to discuss the cases.

Finally, “Cameras in the Courtroom” is another program that increases the public access to the courts that was piloted by Justice Anderson when he was Chief Justice. It was experimented with in many high profile cases such as the case of *State v. Huskey*,<sup>5</sup> which Judge Baumgartner tried.

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<sup>4</sup> The *Tennessee Journal of Law and Policy*'s Editorial Board chose to capitalize “court” throughout this issue when referring to the Tennessee Supreme Court. We made this decision because this symposium was held in honor of the Tennessee Supreme Court's contributions to Tennessee jurisprudence.

<sup>5</sup> *State v. Huskey*, 964 S.W.2d 892 (Tenn. 1998).

## INTRODUCTION

I will introduce each of our speakers and allow them to speak, and then we will have a brief question and answer session. First, Mr. Lance Bracy is Chief Disciplinary Counsel for the Tennessee Board of Professional Responsibility. He has served the Tennessee Supreme Court in that capacity since 1979.

## COMMENTS OF LANCE BRACY

MR. LANCE BRACY: I thank the University of Tennessee College of Law for sponsoring this symposium celebrating the legacies of Justices Drowota, Anderson, and Birch. I am very honored to be a participant.

I will identify some of what are believed to be the most significant benchmarks in the development of professional ethics in Tennessee that are attributed to the stewardship and legacies of Justices Drowota, Anderson, and Birch.

The first and likely the most significant development occurred in 1980, the year that Justice Drowota was elected to the Supreme Court. This is the year the Court empowered its Board of Professional Responsibility to issue ethics opinions. The concept of providing guidance to lawyers about ethical dilemmas came about due to the compounding increase of ethical complaints, which had been increasing at the rate of approximately 15% each year since the Board's inception in 1976.<sup>6</sup> The objective was to preemptively assist lawyers in identifying and resolving ethical issues and thereby avoid ethical complaints being filed.

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<sup>6</sup> Tenn. Bd. of Prof. Responsibility.org, Annual Reports, <http://www.tbpr.org/NewsAndPublications/AnnualReports/.html> (last visited July 29, 2007) [hereinafter T.B.P.R.].

Other benchmarks in the 1980s, during Justice Drowota's tenure, which had a significant impact on ethics and professionalism were as follows:

- providing for immediate and summary suspensions of lawyers who had misappropriated trust funds, failed to respond to a disciplinary complaint, or posed a threat of irreparable public harm;
- providing for lawyers to acquire twelve hours of annual continuing legal education credits; and
- creating the Lawyers Fund for Client Protection.

The decade of the 1990s brought Justices Anderson and Birch to the Supreme Court. During that period, in 1993, a significant benchmark in the development of professional ethics occurred with the requirement of three hours of annual ethics and professionalism credits in addition to the twelve hours of general continuing legal education credits. This development spawned a new and heightened focus on ethics and professionalism.

In 1994, a significant development occurred when a program was implemented to detect and prevent trust account violations. This program, known as the Overdraft Notification Program, was a proactive response to the problem of theft by a small yet significant segment of the bar. The program requires that trust accounts be maintained only in financial institutions which agree to report overdrafts in trust accounts. More than 300 financial institutions are participating in this program.<sup>7</sup>

A major development occurred in 1999 with the implementation of the Tennessee Lawyers Assistance Program, which was designed to protect the public from harm caused by impaired lawyers or judges, to assist impaired members of the legal profession to begin and continue recovery, and to educate the bench and bar as to causes and remedies for impairments. The legal profession currently contributes approximately \$350,000 annually to

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<sup>7</sup> T.B.P.R., *supra* note 6.

support this program, which arguably ranks in the top three lawyer assistance programs nationwide.<sup>8</sup>

Justice Birch served as the Supreme Court's liaison to the Board for the past twelve years, from 1993 to 2005, during which many of these and other significant benchmarks occurred. We are indeed very grateful for his services during these fruitful years. Some of the other important developments during the tenure of Justice Birch as liaison to the Board are as follows:

- Membership on the Board was expanded to include three lay members, thereby expanding the Board's perspective and outlook;

- The confidentiality rule was revisited, broadened, and expanded to present more openness and visibility about the actions of the Board;

- A diversion program was created to permit professionalism enhancement for lawyers engaged in minor infractions;

- A consumer assistance program was implemented to mediate minor client-attorney misunderstandings, permitting their relationships to be restored and enhanced, and also to provide referrals to consumers to appropriate resources and programs, such as lawyer referral and fee dispute alternatives; and

- Finally, a robust website was implemented that provides user-friendly resources to lawyers and consumers using lawyers, including online ethics inquiries by lawyers.

These and other progressive developments during Justice Birch's tenure and service to the Board have resulted in a turning point in professional ethics in Tennessee, as evidenced in the following comparison and analysis of current data and statistics.

In 1980 during the initial year of the implementation of the Board's ethics opinion service, the Board issued three formal ethics opinions, and Disciplinary

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<sup>8</sup> T.B.P.R., *supra* note 6.

Counsel issued forty-nine advisory opinions. This proactive program to prevent ethical misconduct has resulted in 163 formal ethics opinions and 837 advisory opinions, and the Disciplinary Counsel's staff has responded to more than 55,000 hotline telephone inquiries from attorneys seeking guidance.<sup>9</sup>

The Board received 288 overdraft notices in 1995, the initial year of the implementation of that program.<sup>10</sup> Only sixty-one overdraft notices were received last year indicating a 78% decline from those reported in 1995 and further indicating that lawyers have become more proficient in maintaining appropriate trust accounts.<sup>11</sup>

In 1980, there were approximately 7,800 active lawyers in Tennessee at which time there were approximately 450 complaint files opened, a ratio of one complaint file for every seventeen lawyers in Tennessee.<sup>12</sup> Complaints per lawyer peaked in 1998 when approximately 1,700 complaint files were opened with an active lawyer population of nearly 15,000, a ratio of one complaint for every 8.7 lawyers which was nearly double the ratio of one to seventeen in 1980.<sup>13</sup> This steady and significant increase in complaints was a major source of motivation for the proactive measures which have been identified.

The year 1999 ushered in a watershed era when the cumulative effects of these proactive measures began to reflect a decrease in complaints, a trend which has continued and is continuing with few exceptions. For instance, last year there were approximately 982 complaint files opened compared to 1,655 opened in 1998, representing a 40% decline in the complaint files opened in the past seven years.<sup>14</sup> The cumulative effect of the

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<sup>9</sup> T.B.P.R., *supra* note 6.

<sup>10</sup> T.B.P.R., *supra* note 6.

<sup>11</sup> T.B.P.R., *supra* note 6.

<sup>12</sup> T.B.P.R., *supra* note 6.

<sup>13</sup> T.B.P.R., *supra* note 6.

<sup>14</sup> T.B.P.R., *supra* note 6.



disciplinary efforts of the Board have resulted in 155 disbarments, 281 suspensions, 436 censures, and 2,695 reprimands or admonitions from the 36,000 complaints that have been filed since the inception of the Board.<sup>15</sup> This has also been a major factor in the declining trend of complaints.

During 1999, the Supreme Court, in its supervisory role relating to the ethical conduct of lawyers, identified several issues or objectives for a performance audit of the activities of the Board. In May 2000, a report of the Comptroller of the Treasury, Division of State Audit, concluded that “the operations of the Board of Professional Responsibility are efficient, effective, and are achieving the results desired by the Tennessee Supreme Court.”<sup>16</sup>

Also during 1999, a nationwide survey of fifty-six disciplinary agencies conducted by the American Bar Association revealed that Tennessee ranked 16<sup>th</sup> in public sanctions issued during that year, 22<sup>nd</sup> in complaints filed, 14<sup>th</sup> in lawyers formally charged, and 12<sup>th</sup> in private sanctions, while ranking 27<sup>th</sup> in funding received.<sup>17</sup>

In August 2003, the ABA Standing Committee on Professional Discipline issued its report on the Tennessee Lawyer Regulation System, in a response to a request by the Supreme Court to identify the Board's strengths, structure, rules, and resources. An advisory committee of nine members was designated by the Supreme Court to review the recommendations of the ABA report. The Court's advisory committee report, filed in June 2004, concluded that the “current lawyer disciplinary system generally functions effectively and efficiently.”

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<sup>15</sup> T.B.P.R., *supra* note 6.

<sup>16</sup> T.B.P.R., *supra* note 6.

<sup>17</sup> Am. Bar Assoc. Ctr. for Prof. Responsibility.org, Survey on Lawyer Discipline Sys., [http://www.abanet.org/cpr/discipline/sold/toc\\_98-99.html](http://www.abanet.org/cpr/discipline/sold/toc_98-99.html) (last visited July 29, 2007).

Last fall, a staff writer from *The Tennessean* began an inquiry of the operations of the Board as a major news item. After many weeks of inquiry, *The Tennessean* published its report consisting of a front page headline and above-the-fold article in its November 25, 2005 publication. The article explained how complaints are filed, identified types of complaints, and cited disciplinary data for the last seven years. In conclusion, “[s]ince its inception in 1976, the Board of Professional Responsibility has fielded thousands of reports from disgruntled Tennessee clients complaining of everything from being unable to get their lawyers on the phone to over-billing, stealing money and poor legal performance.”<sup>18</sup>

The following week, on November 30, 2005, the Editorial Board of *The Tennessean* published an editorial on the Tennessee Lawyer Discipline Program, appearing on the editorial page with the following caption: “Supreme Court has Effective Program to Investigate and Address Problems.” The editorial goes on to state in part:

Tennesseans should appreciate the seriousness that the Tennessee Supreme Court gives to professionalism and ethics among lawyers. The state is better for it. The legal profession in Tennessee is much better for it.

The State Supreme Court’s Board of Professional Responsibility, which is comprised of nine attorneys and three non-attorneys, supervises the ethical conduct of lawyers in Tennessee. Although the Board may be best known for receiving and investigating complaints against lawyers, it also works to foster greater understanding

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<sup>18</sup> Sheila Burke, *Complaints against Lawyers Go Up*, THE TENNESSEAN, Nov. 25, 2005, at 1A.

among lawyers about ethical obligations through its ethics hot line and its seminars. Additionally, it operates a consumer assistance program that offers suggestions on hiring an attorney and on fostering better communication between attorneys and clients.

...  
... [C]onsumers need to know that their grievances will be heard and investigated. And the lawyers need to know that frivolous complaints will not count against them.<sup>19</sup>

In conclusion, Mr. Justice Drowota, Mr. Justice Anderson, and Mr. Justice Birch: We are grateful for your significant efforts in bringing the state of legal ethics and professionalism in Tennessee to the forefront and within what I believe is among the top five lawyer-regulation systems nationwide. We applaud your faithful stewardship.

## INTRODUCTION

MS. KELLY RANDALL: Thank you, Mr. Bracy. Next we have Ms. Sue Allison, who is the Public Information Officer for the Tennessee Supreme Court. She has served in that capacity as spokesperson for the Court since 1993.

## COMMENTS OF SUE ALLISON

MS. SUE ALLISON: First—this will not surprise anybody that knows me—I got up this morning, and I was having allergies. So I picked up a bottle of allergy medicine and took a great big swig, and it was nighttime allergy

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<sup>19</sup> Editorial, *Lawyer Complaints Increase*, THE TENNESSEAN, Dec. 1, 2005, 10A.

medicine. So if I start talking about something else, that's what it is. For that reason, I will probably read my talking points.

Before I talk about one of the Court's truly most successful outreach programs, the SCALES program, I need to lay a little groundwork. For sixteen years this Court more so than any other, probably any other in the nation, has been committed to being open and accessible. It is just incredible. I hear stories from Public Information Officers in other states, and I feel so blessed.

In 1993, three years after the 1990 Court really kind of made that commitment, the Court created the position of Public Information Officer as part of that commitment. By the grace of God, I was fortunate enough to be hired, and especially because—I love this—among the people I beat out—there were a lot of applicants—was a stripper named Cherry who kept sending the screening committee baskets of cherry products, cherry preserves, and cherry candy. So anyway, I am quite honored that I got the job.

Creating the Public Information Officer position was just one of many steps this Court has taken to help the citizens of Tennessee feel like they are in touch with the court system, with the judicial branch, and like they have a right to know what their court system is doing.

One thing I will mention in passing for those who may not be familiar with it, is that we have a fabulous website. We post not only opinions but—there is just so much information, including a section for children. We have just recently made the web address something that you can actually remember and write down without having two or three sheets of paper. It is now [www.tenncourts.gov](http://www.tenncourts.gov), and it really is a great tool for law students.

The justices on this Court give of themselves in so many ways. They speak to civic clubs, and they speak at schools. They do many, many things. The Chief Justice is speaking at a high school graduation in my home town next

month, I think. So, I mean, they do many, many things, but they wanted to do more. They wanted to help young Tennesseans grow up with an understanding of the judicial branch, which is the neglected branch of government as far as civics classes go: what it does for them, how it works, and how it affects their lives. We all realize this; we all learn how a bill becomes law, but nobody knows much about the judicial branch. So the Court wanted to address that problem.

In 1995, then Chief Justice Anderson and the Court initiated a program to make it possible for high school students across the state to attend oral arguments in their own or a nearby community. Obviously, the students cannot all be bussed to Nashville, Jackson, or Knoxville to hear oral arguments. SCALES is an acronym for the Supreme Court Advancing Legal Education for Students, and Sherry Ross right over there came up with the acronym. We were all trying to think of something, and Sherry did. It has been hugely successful in the last eleven years.

Since the first SCALES program in Murfreesboro, more than 15,000 high school students including home-schoolers have participated from 337 schools across the state. Some of the students who are attending or have attended law school here may have been inspired to do so when they participated in SCALES. We hear that a lot.

As Professor White knows, then Justice White, SCALES takes a tremendous amount of effort by many, many people including the Court, lawyers who are arguing the cases and have to pack up and go to Dresden or Clinton or different places, the local judges, and the bar. It is a real group effort, but I think the students who participated, those 15,000 students, will tell you it is well worth the effort.

When a community is chosen to host SCALES at the request of the local judge or the bar, several months of planning take place; several months of labor take place.

For one thing, the Court flags potential SCALES cases. These are cases with issues that might be interesting to students. We have had death penalty cases, which are always popular. I remember a date rape case that was quite popular.

And—this is one of my favorites—the community always hosts a luncheon for the students and the Court. I will get into that, but at this particular SCALES Kentucky Fried Chicken was donating the luncheon. I did not know that, and the Court did not know that. I am reading the issues in the cases, and one of them was food poisoning at Kentucky Fried Chicken. So we had to quickly—rather than change the case, we had to change the lunch. But it was—it could have been an awkward situation because KFC was donating the food.

But anyway, teachers whose classes are going to participate attend a three-hour in-service training session. Our office, the Administrative Office of the Court, oversees that, but an appellate judge from the Tennessee Court of Appeals or Court of Criminal Appeals is actually the teacher for the session. They review the cases that the students are going to hear, the issues in those cases. They discuss the state and federal court systems. It is amazing. The teachers are very open about the fact that they know very, very little about the court system. They are really grateful. The teachers are given huge notebooks of material to take back and use in the classroom and handbooks for each of the students that has general information about the system as well as detailed information about the cases they are going to hear.

Then—we are not through yet—local judges and attorneys from the community go into the classrooms before the students who will hear the oral arguments, and they review again the cases they are going to hear. So the students, when they get to oral arguments, know as much as the attorneys do really. They could actually probably argue the cases.

The students are divided into groups, and each group hears one case. Following oral arguments, the students have an opportunity that I have always thought was the most fun, and I think maybe they do too. They go into another room while the next group comes into the courtroom with the attorneys who argued the case, and they are allowed to ask no-holds-barred, anything they want. They generally ask fantastic questions, better than the Court sometimes. They have gotten to hear them, but they are really great questions.

A couple of times the attorneys have brought the parties in and let the kids ask the parties questions which was interesting. One was—I remember it was really moving—a man in Memphis whose wife had been murdered at a Wal-Mart. It was actually a civil case involving Wal-Mart. He came in and answered questions for the students. He described it, and it was just a real moving debriefing. Those are just really wonderful for the students, and I wish the Court could attend. They would be impressed.

All of the students gather for lunch with members of the Court, local judges, other local officials, and some legislators. The lunches, as I said, are sponsored locally, so there is no taxpayer cost. I need to mention the Frist Foundation here too, which has been very generous with the SCALES program and, therefore, allowed us to provide materials. The students get scales of justice lapel pins and some other things that we could not do with tax money. So thank you to the Frist Foundation, and thank you to Judge Drowota.

During lunch, a great part of the program, the Court members sit with the students, and they talk about everything from their hopes for the future to their teenage romances or the prom, whatever. The students really enjoy that. And I have to say that Justice White—we were talking about this on the way up. I rode up with Judge Drowota—always it was like flies around something. All

the little girls would swarm around Justice White. I do not know what it was, but I think I do. I mean, we are real comfortable with them, and it was just really cute and sweet to watch. They were very attracted to her. They always want their pictures taken with the members of the Court. She used to do something I thought was so kind of warm and nice: she brought her camera and wanted to take pictures of the students. They liked that.

Finally, the opinions are filed. As most of you in here would know, it could be several months later, but the students and their teachers are made aware of that. We used to actually mail them, but now they are online. We let them know, and they discuss and read and talk about the way they thought it was.

SCALES is not easy for the Court. It requires travel time in addition to a lot of travel they already do. It requires extra work for the appellate court clerk and his staff. It requires staff, other staff. It is a lot of work. When the Court travels for SCALES, we even take the bench. We had a bench made. It folds up flat on piano hinges. You would not know when it was set up that it was not just a regular bench.

We used to joke that SCALES was sort of like a Rolling Stones concert with all the planning and hauling equipment, and we would say that makes the Chief Justice the Mick Jagger. I mean, it really is sort of like that. It is a huge production. In fact, one year we had T-shirts made with all the dates and locations on the back that looked like concert T-shirts. We sold those, and the proceeds went to the Judicial Conference Foundation, which provides scholarships for law students including the students here. I might mention that the very first Judicial Conference Scholarship went to a student who was inspired by attending SCALES, so there you go.

I do not think the Court or any of the supporting cast could have imagined, on that cold, rainy October day in 1995 when we had the first one, how successful it would



be. It was a less than perfect start. We had planned an outdoor lunch—or the community had. It poured rain all day, so very quickly churches were called into service, and that was, you know, a problem. Then just to make matters worse, the O.J. Simpson verdict came in, so everyone was really distracted by that. But in spite of that, it was a success. At least as far as the students were concerned, it was a big success.

We will never know exactly what the payoff is. We know the stories about students who go to law school, but we will never know. We do know that many students have said that they have decided on a career in law as a result, and we believe—I believe—that all of the students will be better informed adults and citizens because of their participation. I for one want to thank the Court for SCALES and the other projects to open the court system.

## INTRODUCTION

MS. KELLY RANDALL: Thank you, Ms. Allison. Next, we have Judge Richard Baumgartner, who is a judge for the Criminal Court in Knox County, Tennessee. He has served as Judge since 1992.

## COMMENTS OF JUDGE RICHARD BAUMGARTNER

JUDGE RICHARD BAUMGARTNER: Thank you very much. You pronounced my name exactly right. Not many people do that. I am pleased to be here today. I want to make one observation about these three justices and actually all the justices in my experience with the Supreme Court. Not only have they been very progressive in what they do on the bench and the programs they have initiated, but each and every one of them is very accessible to all the members of the judiciary and, I suspect, the bar.

They all routinely attend judicial conferences that we have every year. They participate in those programs.

They participate in social events. They make it very comfortable for us to be with them. I know that I personally very much appreciate that and have talked to other members, other colleagues, and they do also. Not only are they progressive in their policies and decisions, but they are very accessible to the rest of the judiciary and the bar, and they are to be commended on that.

I took the bench in 1992. Governor McWherter had the great sense to appoint me. Of course, in 1992 and up until December 1995, the rules with regard to cameras in the courtroom, public access to the courtroom other than by print media or people drawing sketches, was extremely restricted. Under those rules you could have cameras in the courtroom, including T.V. cameras, but to do that you had to write a specific written plan and submit that by way of petition to the Supreme Court. The plan had to set out not only why you wanted to do it but where the cameras were going to be and great detail with regard to everything related to having the cameras in the courtroom. It had to be approved by the Supreme Court or at least by the justice that was assigned to your particular district.

And of course, if it were a criminal case the accused had to submit a written consent to being photographed, so anytime a defendant objected that was an automatic prohibition from continuing with that. And any lawyer, witness, juror, or anyone else could make a complaint, and the rule pretty much specified that you were to terminate, at least with regard to that particular witness or lawyer, the showing of that individual in any kind of still or video-type of recording.

In 1995 prior to the rule change, we had a case come up in Division I. It was styled *State v. Sedalia Freeman*. Ms. Freeman killed her boyfriend, and her defense was that she was battered by this individual. It was really a very interesting case, and Mr. Francis, who represented Ms. Freeman, proposed the idea—apparently he had been approached by the Court T.V. people—that we

televise this particular case. General Randy Nichols, who was my predecessor on this bench, was progressive enough and enlightened enough to agree to that.

So we approached Justice Anderson, who was the Chief at that time but also the individual assigned to my particular district. He was very encouraging and easy to work with and authorized us to go forward with that. Unfortunately, on the day of trial Ms. Freeman pled. They offered her a deal she could not turn down. She did the right thing; I am confident. Because it was a plea, all they got to film was the plea itself.

But in the fall of 1995, also prior to the rule change in December of that year, the case of *State v. Frazier*<sup>20</sup> came up. If you recall that case, it was a love triangle case where a woman's lover was involved in attempting to kill the husband. That was the allegation. Again, the Court T.V. people were interested in that case, and again, we were approached about televising it, and again, we got approval to do that.

They came in, set up, and filmed the entire trial. They did not play it contemporaneously; they edited it to a certain degree and played it thirty days later or something like that. It was my first experience with having that type of activity in the courtroom, and it became immediately apparent to me that all of the things that I had heard and talked about concerning disruption and the effect on people in the courtroom were not going to be a problem. They were very professional. They had a single camera. They provided the feed for local stations to use on the local news. They were unobtrusive and very easy to deal with. So that was our first experience, and again, Justice Anderson was very progressive in helping us with that.

Then, of course, in December of 1995 the rule change came into effect. The Court actually wrote an

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<sup>20</sup> *State v. Frazier*, No. 03C01-9602-CR-000841997, 1997 WL 294472, at \*1 (Tenn. Crim. App. June 4, 1997).

entirely new rule regarding cameras in the courtroom, so to speak. They instituted a one year pilot project across the state to see how it would play. As you can imagine, a number of judges were immediately just shocked that we were going to allow cameras in the courtroom, and there was a great deal of resistance to it. As it turned out—I think you can talk to most judges, and they will tell you today that they have had similar experiences as mine; that it is not obtrusive, that it is helpful in the community, and that it does not affect the proceedings.

In effect, while going over all of the conditions or parts of this particular rule, the rule created the presumption that cameras would be allowed in the courtroom. They would be allowed public access by way of print media, photographers, and television media coverage of these proceedings, including organizations such as Court T.V. They put rules in place where the trial judge could limit that access for specific reasons. They set out four categories of reasons that would justify keeping them from televising it.

We had a case very soon after the rule was put in place, which tested that. That was the case of *State v. Morrell*.<sup>21</sup> It was decided in April of 1996 by the Tennessee Court of Criminal Appeals. In that case, a trial judge named Robert Wedemeyer, if I remember correctly, was in a seminar and started out by saying, “My name is Robert Wedemeyer, and I’m a discretion abuser.” He had excluded the media from this particular case because of high racial tensions, but the Court found that it was not a justification for exclusion and again reiterated the fact that there is a presumption that we are going to have cameras in the courtroom.

My experience with it since that period of time—there have been a number of cases that were televised,

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<sup>21</sup> *State v. Morrell*, No. 03-C-01-9409-CR00355, 1996 WL 36120, at \*1 (Tenn. Crim. App. Jan. 31, 1996).

including *State v. Huskey* on three different occasions and cases just as recently as this past week. We had a case, not where it was national interest but where there was great local interest, and all three of the channels were there on a daily basis five days last week.

Again, with the local media as it is with the national organizations, they are very courteous, they are not disruptive, and they take any instructions very well. A couple of times—to be candid with you, the worst—the people that are harder to deal with than the video people are the still photographers because for some reason they are just—I do not know—pushier I guess you would say. They take a thousand photographs, and you can hear every click of that camera. I have on occasion said, “That’s enough, you’ve got enough pictures of the defendant,” or whoever they are taking a picture of. On occasion they will get too close to the jury box itself. Of course, you cannot film the jurors, and they all know that. They are good about that. They are good about putting notice up ahead of time, so if anybody wants to object they can.

Some of the myths about cameras in the courtroom are that they affect the conduct of the parties and the people in the courtroom, the lawyers included. My experience is that people do not alter the way they testify. They are not intimidated by the camera. They are there, and it is serious business. They know it is serious business, and the fact that a camera was there recording it has not, in my experience, affected them in any way.

And lawyers do not play to the camera. If anything, it makes otherwise sometimes disruptive lawyers behave better because they know they are in fact on camera. It also makes the judge act better sometimes. You have to be careful about those embarrassing moments.

I remember one time during the *Huskey* trial my mother called me, and she said, “Richard, you have got to stop chewing gum on the bench.” I said, “Mother, I am not chewing gum.” It turns out I used to have these little tins of

hard candies; I would put one in my mouth, and I would end up chewing them. She thought I was chewing gum. You have got to be careful.

Just last week I went home, and my wife said, "It looked like you were sound asleep up there on the bench today. You know, you have a habit of sitting back, putting your head back in the chair, and sometimes that looks like you are going to sleep." So it causes us to think about those things: think about what we say, think about how we look, and think about what we are doing. I think that's good.

As I have already said, the presence does not disrupt courtroom proceedings. It does not delay the proceedings in any way. I have never had that experience. It does not affect the dignity or the decorum of the courtroom. So my experience with cameras in the courtroom has been very good. Not only have they covered some trials gavel to gavel, but they have been there on numerous occasions for motion hearings and pretrial hearings. I think it educates the public. It lets them know what we in fact are doing down there in the courtroom. In my judgment, the more the public knows about what we do, the better off we're going to be.

I have one last story I want to tell about cameras. Of course, Justice White was one of the five members of the Court who instituted this rule. By the way, it became effective completely in December of 1996. But she then had an occasion, after she came here to the law school, to represent a defendant in my courtroom, a juvenile defendant who was ordered to be tried as an adult. Although she did not actually participate in the argument, she took the position that we should exclude cameras from the courtroom. I find it somewhat ironic that here is a justice who institutes this policy and shows up a couple years later taking the position that we should not allow cameras in the courtroom.

So that is my experience with cameras. I want to mention one last thing, and that is all I have left. The one thing that is not on this symposium—another very progressive step by this Supreme Court—is that they have completely changed the way we deal with juries in our courtroom. Again, this was initiated by Justice Anderson back in 1998. The Bar Association wanted to do a study with regard to that. He was very supportive of that. He was very supportive of sending some of us to a symposium in New York City about changing the way we do the jury system.

Again, they did the pilot project for a year, and then they instituted those changes so that jurors now have the absolute right to take notes during the trial. They have the right to have a copy of the jury instructions. It was amazing to me that judges did not give them a copy of the instructions to take back in the jury room. Of course, in criminal cases you had to always do that, but in civil cases they did not.

They allowed them to ask questions, and everybody said, “That just cannot work.” We have been doing it for five years now, it works like a charm, and we get great questions and other things about the order of offered proof and things of that nature. So that is another major contribution, I think, that we have had from this Court, to be progressive and bring Tennessee into the 21<sup>st</sup> century.

I thank all of those gentlemen, particularly these three, for their service on the Court. They are great jurists.

## QUESTIONS AND ANSWERS

MS. KELLY RANDALL: Thank you, Judge Baumgartner. Now, we will take some questions from the audience if anyone has some questions for the group here. I will start. Judge Baumgartner, maybe you could elaborate a little bit on the changes for the jury system.

JUDGE RICHARD BAUMGARTNER: Well, it's recognition. I think Arizona was probably the state that started most of this, and I think Massachusetts was also a leader. But, you know, we used to bring juries in and not tell them anything about the case, not give them any idea what is coming. We did not let them participate in any way in the trial itself, and we did it on our own schedule. If the jury had to sit out in the hallway for four hours, so be it.

Well, I think what these rule changes recognized is that, number one, we need to respect juries more; we need to be cognizant of the fact that they should not have to sit out there and wait for us to do our work in the courtroom. So to the extent possible, the rules now provide that you are to do all pretrial matters prior to the date of trial, which just makes sense.

I think the fact that they instituted the taking of notes, although some courts had already been doing that, is major. I mean, again, what judge—what lawyer—does not take notes about what is going on in the courtroom? Of course they do. Why in the world would we ask the people that we are calling upon to make the final decision in this case to not take notes? It just makes sense.

Questions are another thing. It gives them the sense that they are participating in the trial itself. It brings them in. It makes them more a part of the case, and I think they really appreciate that. As a matter of fact, we had them complete questionnaires for that year's pilot project, and they commented that they felt that made a great deal of sense.

Another major part of it is the order of testimony. For instance, with regard to expert proof, the courts in the past—you had the plaintiff's case and the defendant's case or the state's case and the defendant's case, and you might have a mental health expert offer an opinion on the sanity of the defendant. You hear the testimony of one of them, and, you know, two weeks later you hear the testimony from the other one. It just makes sense to hear all of that



testimony at one time. So the rule now provides that you can have that testimony back to back instead of breaking it up between the two cases.

Also, it just makes sense that we now give jurors a description of the case prior to voir dire. It is a basic description of what the case is about: who the parties are, where it took place, when it took place, and what the defense is. These are things that they need to know, in my judgment, to be an effective juror. We also give them instructions at the beginning of trial with regard to the elements of the defense and with regard to the general principles of law that apply to the case so that they know those rules on the front end.

Q. I wonder if you would comment on the resistance to jury trials now.

JUDGE RICHARD BAUMGARTNER: I am not sure I understand you. What do you mean by “resistance”? Do you mean from a civil standpoint or from a criminal standpoint?

Q. Well, I think everybody is a little—maybe this is an exaggeration—afraid of what happens within the jury trials from juries now. I hear from some of the insurance attorneys that they like to go to juries because they are getting such good decisions; juries are not giving much money now. I think there are a lot of reasons, but nationally, certainly, the use of juries has gone way down.

JUDGE RICHARD BAUMGARTNER: I think one of the things that had an effect on that is alternative dispute resolution. You find now that many, many more cases are resolved through the mediation process on the civil side rather than at a jury trial. I think that is another great advancement that has come into play in the last ten or twelve years.

From a criminal standpoint, I have got a couple prosecutors that I wish you would tell that they ought to be afraid of going to trial. They have no fear; they try everything. From my standpoint, I think if anything the number of cases that we are trying in the criminal field has certainly stayed steady and, I think, probably increased some in the last few years. We have tried a lot of cases.

Q. Do you think in the civil cases that maybe we are missing something if we forget the jury trial and go so much into mediation?

JUDGE RICHARD BAUMGARTNER: You have still got that ultimate avenue that you can take. I think every once in awhile it ought to be tested. I think that is true, but it also makes a great deal of sense that, if you can resolve a case through mediation, that is in everybody's best interest.

Q. I was wondering if there is anything explicit in the rule regarding cameras in the courtroom about how that relates to the record on appeal. I could see a dispute about the accuracy of the written transcript or maybe sanctions that were based on the demeanor of the attorney, and I was wondering if that affects the standards of review of rulings if that starts becoming a legitimate part of the record.

JUDGE RICHARD BAUMGARTNER: The rule actually explicitly provides that any recordation by that type of organization cannot be used for any other purpose, including appellate purposes. There are times when I wish that was not the case. There are times when I wish I could send this to them and show them just how these lawyers are behaving in the courtroom. I have also had attempts by other people to put it in the record, but the rule specifically prohibits that, which I think is probably wise.

Q. Could you speak a little bit on the impact of the media on the jury and follow that up with how the media has affected your job dealing with lawyers?

JUDGE RICHARD BAUMGARTNER: The media and the multiple defendant situation—I am amazed. For instance, we had this case last week. The concern is that because of the pretrial publicity it is going to be difficult to get a jury. I am also amazed how easy it is to get a jury under those circumstances. We called in a special panel last week and called in some 200. I said to everybody in the court, “Has anybody heard anything about this case?” There had been an article in the paper that morning, nothing all week until that morning. One hand went up out of eighty-five people.

I guess my point is this: The lawyers always say that we are going to have trouble getting a jury, but it is not my experience. In the multiple defendant case—by the way, it is rare that you have to try each one of those defendants. Usually, you get a result in one case, and it is going to foster a resolution of the other ones.

But again, I have not had any experience that indicates that media being present in the courtroom has affected that, and, as I said, it does not have any real impact on me other than me trying to make sure I do not do something embarrassing on the bench.

Q. How about you, Mr. Bracy?

MR. LANCE BRACY: From the disciplinary enforcement standpoint, we see no impact.

Q. Ms. Allison?

MS. SUE ALLISON: I will reiterate what I said. It has worked incredibly well. The media, for the most part, is familiar with the rule. We ask the cameras—if it is a high

profile case, you have one camera inside, and the others are outside.

I will tell you an instance. There was a hearing in Memphis concerning Robert Coe who was executed four years ago, and I went over for that. Sometimes if there is a high profile case I will help manage media. Mr. Coe kept misbehaving and screaming things and screaming at everybody and spitting on prosecutors. Finally, it reached the point where the judge had to order him gagged. Some paramedics, very humanly, gagged him, but he ate the gag. Finally, in an effort to keep this going the judge asked, during lunch, for a chair from a psychiatric hospital to be brought into a jury room. When they had gotten Mr. Coe out of the room, he asked me if I would ask the media if they could set up monitors so Mr. Coe and his attorney could hear it but not speak. I want you to know the T.V. stations took their lunch hour, got their equipment, set that up, and did it just as a courtesy.

So, I mean, there is a give and take there too, and that was a tremendous help. It allowed the hearing to continue, whereas it could not have without that. They are very grateful to be able to be in the courtroom, and in return, they bend over backwards to help out.

JUDGE RICHARD BAUMGARTNER: We did have a funny thing happen during the *Huskey* murder trial. One of the things they do in addition to filming what is going on in the courtroom is interview people all the time. During the course of trial, the General came in and said, "Are you going to do something about the sheriff on T.V. telling this whole story out there?" The tendency is to go sit in the witness chair or interview chair and talk to the media. That is the only thing I can think of that has ever been a little disruptive.

Q. Mr. Bracy, what is one of the most significant issues that you have come across on the Board of Professional Responsibility during your time?

MR. LANCE BRACY: I would say that the majority of complaints have to do with lawyer-client communications. So, through the years we have continuously talked about that in ethics seminars. That is the significant complaint that clients have with their lawyers, that they do not get adequate communication. But I think that lawyers are doing a much, much better job now due to the heightened interest that has come about on that issue in seminars. I mentioned the three hours of ethics and professionalism continuing education credits, and all the sponsors of those seminars talk about that and emphasize that. We have come a long way in addressing that issue.

Q. Ms. Allison, do you give out all opinions to the various media as they are filed?

MS. SUE ALLISON: Yes.

Q. Is there a limited list or—

MS. SUE ALLISON: It is all major media in the state, and it is an extensive list. I also blast fax press releases to every media in the state. My e-mail media list is pretty inclusive. There are some small radio stations, but it is pretty all-inclusive. Those are e-mailed out.

Again, when I was first hired and the job was created—in my prior life I was a reporter, so I remember going over on every other Monday in the morning and picking up copies of opinions. I had to pay for them, and when you work for UPI, which was bankrupt, I probably did not get reimbursed. Every other Monday in the afternoon—that was to accommodate morning and afternoon papers.

So, one of the first things I asked the Court when I got there was, “Can we give away opinions? Can we quit charging for them?” And with no hesitation, they allowed that. Well, when opinions started being e-mailed to me from the clerk's office, when they started doing things electronically, I asked the Court, “Is there any reason I cannot e-mail these out?” No hesitation at all.

Again, it goes to their desire to make information about the court system available and available quickly. Within minutes after an opinion is filed I get it by e-mail, and it is gone. It is gone out to the media, and that is a great way to keep the public informed about what the court system is doing.

Another thing this Court has done that some of the Public Information Officers in other states are just flabbergasted about—it has really worked well—is that we learned people really, really do not understand death penalty cases. They do not understand the process. They get outraged because they do not understand the process. So, on capital cases—and this was initiated although I cannot remember which Chief was in at the time—we started doing press releases. Any time the court does something in a capital case, I do a press release, and it goes out. Of course, it gets approved by the author, the person who wrote about the incident. It has helped so much to stop misinformation from being published about capital cases.

Q. You have had some district attorneys upset with the media, have you not?

MS. SUE ALLISON: Yes, we have. We have had a push, and it is debatable, I suppose, because the minute the opinion is filed I send it out, and my attitude is that it is public record; I do not care who gets it first. But we have had some, particularly some prosecutors, who have been upset because they want, for instance, a victim's family to

hear what the Court decides before it is in the newspaper. My thought on that is that they get a statement by e-mail so pick up the phone and call. I cannot see withholding a public record from the public because some prosecutor is not at his desk.

JUDGE RICHARD BAUMGARTNER: Do you send it to the prosecutor?

MS. SUE ALLISON: No, the clerk's office.

JUDGE RICHARD BAUMGARTNER: I don't get it. I have heard a lot of my cases—and I am not complaining about you.

MS. SUE ALLISON: I will put you on my list.

JUDGE RICHARD BAUMGARTNER: Yeah, I mean, you might want to include the trial judge and the prosecutor and defense.

MS. KELLY RANDALL: I think we will take just one more question in the back here.

Q. Sue, what is the policy of the Court in terms of being proactive and responding to grossly unfair criticism of the Court by the public?

MS. SUE ALLISON: That is really frustrating as some people in this room know. The Bar Association has a program that they modeled after an American Bar Association program. The problem with it and the reason it really has not worked and we have quit asking to use it, is the delay involved. Assume the newspaper publishes something that needs to be responded to. If you ask the bar to respond, it has to go through a committee. A week or so

later they're ready to respond if they agree to do so, but by then you don't want to.

That is a real tough one. My advice—I think they generally agree—is that, unless it's something that just simply must be responded to, why make a two day story out of something that is one day. Do not respond at all. Leave it alone unless it is egregious and needs to be responded to. That is the one unanswerable—that is something nobody has solved, not just in Tennessee. We discuss it among Public Information Officers. There is nothing much you can do.

MS. KELLY RANDALL: I want to thank our speakers, Judge Baumgartner, Sue Allison, and Lance Bracy, for joining us today, and I am going to turn it over to Joe to get ready for the next panel. Thank you.

## INTRODUCTION

MR. JOSEPH HYDER: Our second panel is entitled “Comparative Fault: How the Court Changed Tort Law in Tennessee.” This portion will be moderated by Dr. Otis Stephens who is the Alumni Distinguished Service Professor of Political Science and Resident Scholar of Constitutional Law here at the University of Tennessee College of Law. More importantly, we are happy to call him one of our faculty advisors on the *Tennessee Journal of Law and Policy*. Dr. Stephens, I will turn it over to you.

## COMMENTS OF PROFESSOR OTIS STEPHENS

PROFESSOR OTIS STEPHENS: Thank you very much, Mr. Hyder. I cannot resist the opportunity of making a comment about the importance of states—and this comes out of the political science background, I guess—the importance of states as laboratories of experiment. What



we have seen from that first panel is innovation led by our State Supreme Court.

I think our United States Supreme Court should take notice of that. There are a number of reforms that could be instituted at that level, which I think would not interfere with the majesty and dignity of the Court. This Court has had the foresight to enter some of those new ideas. I notice that the United States Supreme Court is finally recording orally, providing an audio record, of its arguments, but we still do not have cameras in the United States Supreme Court, as you know.

Now, as Mr. Hyder mentioned, this panel will discuss Tennessee's move to a comparative fault system that occurred in 1992, and the effect that that has had on tort law in Tennessee. The Tennessee Supreme Court, as many of you know, adopted a comparative fault system in *McIntyre v. Balentine*,<sup>22</sup> and that was a rather significant decision, a watershed decision. We are going to hear perspectives on that decision and its impact. As with the previous panel, each panelist is going to be speaking for approximately fifteen minutes followed by a fifteen minute question and answer period.

Our first speaker is Marshall Davidson who is a staff attorney for the Tennessee Supreme Court and also an instructor at the Nashville School of Law where he teaches, of all things, tort law.

#### COMMENTS OF MARSHALL DAVIDSON

MR. MARSHALL DAVIDSON: Before I begin, I wanted to just note as an aside that not only did Professor White try to mess with the cameras in that courtroom as referred to earlier, but she also wrote the opinion for the Court that Sue referred to where the wife was murdered in a Wal-Mart

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<sup>22</sup> *McIntyre v. Balentine*, 833 S.W.2d 52 (1992).

parking lot and the husband showed up in the SCALES case and cried.

PROFESSOR PENNY WHITE: I think you wrote that one, Marshall.

MR. MARSHALL DAVIDSON: You resolved the case in his favor; he won. I am privileged to be a part of today's event honoring Justices Anderson, Birch, and Drowota for these three men have truly stamped their impression across the full scope of Tennessee common law, and nowhere is this more apparent than in the area of torts.

Now, as you had just mentioned, Professor, in 1992 when I suppose most of you law students were in the first grade or thereabout, *McIntyre v. Balentine* was decided. I can remember that when that decision was released a lawyer with more than thirty years experience trying tort cases said to me that *McIntyre v. Balentine* was the most significant tort case ever decided by the Tennessee Supreme Court.

Having been out of law school for only a couple of years at the time, I frankly did not appreciate the full importance of that lawyer's comment. Fast forward nearly a decade and a half later, and I can stand here and say with some degree of confidence that *McIntyre v. Balentine* is the most significant tort case ever decided by the Tennessee Supreme Court. This single decision has affected nearly every facet of Tennessee tort law.

Now, at the outset, I think it is interesting to note that *McIntyre* was just a typical car accident case. The plaintiff, McIntyre, was intoxicated. He pulled out in front of the defendant, Balentine, who was speeding, and the two vehicles collided. The defendant's position was that even though he was speeding the plaintiff could not recover because the plaintiff was contributorily negligent by virtue of his intoxication.

Well, the jury agreed and returned a defense verdict. The Tennessee Court of Appeals affirmed on the basis that comparative fault was not the law in Tennessee, and therefore, the plaintiff was barred from recovering any damages because of his intoxication. Factually and procedurally, *McIntyre* was about as straightforward as they come.

But then the proverbial shoe dropped, and tort law in this state changed from the settled and the familiar to the uncertain and the unfamiliar. In an opinion written by Justice Drowota, in which Justice Anderson concurred—Justice Birch was to join the Court the following year—the Court decided in *McIntyre* that the common law contributory negligence rule, which had been around for more than 150 years, was outmoded, unjust, and should be abolished.

The rationale driving the Court's decision was, according to the Court, basic fairness. The Court said in its opinion, "Justice simply will not permit our continued adherence to a rule that, in the face of a judicial determination that others bear primary responsibility, nevertheless completely denies injured litigants a recompense for their damages."<sup>23</sup>

And so with that injustice in mind, coupled with the fact that forty-five other jurisdictions had abolished contributory negligence as an absolute bar to recovery, the Court swept away that defense and in its place adopted a system of comparative fault. Specifically, Justice Drowota and his colleagues on the Court at the time held that, so long as a plaintiff's fault is less than the fault of the defendant, the plaintiff can recover damages, but those damages would be reduced by whatever percentage of fault was attributable to the plaintiff.

Now, here is where things get interesting, I think, insofar as the *McIntyre* opinion is concerned. Justice

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<sup>23</sup> *Id.* at 56.

Drowota, Justice Anderson, and the other members of the Court understood well that their decision would have profound consequences on the law, and so the Court endeavored in the opinion to provide guidance to lawyers and litigants in court as to how the new system of handling tort cases would interface with other legal doctrines. To that end, the Court in *McIntyre* noted that comparative fault made the doctrines of remote contributory negligence and last clear chance obsolete.

As you know from Torts 101 with Professor King, remote contributory negligence allows a plaintiff who is negligent to recover damages if the plaintiff's negligence is too far removed from the time and place or causative force to be regarded as a cause of harm. Likewise, the doctrine of last clear chance permits a negligent plaintiff to recover damages provided the defendant had the last clear opportunity to avoid the harm but negligently failed to take advantage of that opportunity. Well, the Court in *McIntyre* concluded that both of these principles were no longer freestanding doctrines in Tennessee but instead were factors to consider when assessing relative degrees of fault.

The Court also noted in *McIntyre* that because comparative fault links liability with fault, joint and several liability, a staple of Tennessee law, was likewise obsolete. Further, the Court observed in *McIntyre* that the Uniformed Contribution Among Tortfeasors Act,<sup>24</sup> which determines how damages are allocated among multiple tortfeasors, no longer applied because under comparative fault each wrongdoer would be liable only for the harm they caused.

Then, the Court in *McIntyre* did something that I do not believe the Court had ever done prior to *McIntyre*, and I do not believe the Court has ever done since *McIntyre*. The Court wrote out, as part of its opinion, proposed jury

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<sup>24</sup> TENN. CODE ANN. §§ 29-11-102 to -106 (1968), *abrogated by McIntyre*, 833 S.W.2d at 52.

instructions and even constructed a comparative fault verdict form.

Now, why would the Court resort to such unusual measures? Well, it's because the Court was keenly aware that this single decision would completely reshape the way tort cases are analyzed in Tennessee. Indeed, Justice Drowota believes that *McIntyre* is his most significant decision in the twenty-five years that he was on the Supreme Court. Ladies and gentlemen, he has authored more than a thousand opinions and participated in thousands more during his career, and he places *McIntyre* at the top of the list in terms of its impact on law.

Now, to the law students among us, permit me to suggest that you have come along in a rather fortunate time in your legal education. The reason that I say this is because enough time has passed since *McIntyre* was decided that many of the previously undefined contours of comparative fault have now been established. In fact, *McIntyre* has been the subject of literally hundreds of appellate cases since 1992 and for good reason I suppose. The courts and litigants alike have had to work through the mechanics of just how comparative fault operates under a seemingly endless array of fact scenarios.

In the years since *McIntyre* was decided, the Supreme Court has undertaken to weave comparative fault principles into existing tort law, or where that has proven unworkable, the Court has changed the law outright to comport with comparative fault principles. For example, two years after *McIntyre* was decided the Court was faced with the question of whether and to what extent assumption of risk, which had been part of English common law for centuries, survived the adoption of comparative fault. As you know from basic tort law, if a plaintiff was found to have assumed the risk of harm it could not then recover for that harm.

Well, Justice Anderson, writing for the Court in a case called *Perez v. McConkey*,<sup>25</sup> held that assumption of risk did not survive the adoption of comparative fault, and with that a part of Tennessee law since 1960 was no more. Justice Anderson believes that *Perez* is his most significant comparative fault case in the sixteen years that he has been on the Supreme Court.

The Court has had to decide whether long-standing bodies of law like contribution, indemnity, respondeat superior, and the family purpose doctrine survived the adoption of comparative fault. The Court has faced issues like whether the rescue doctrine, the sudden emergency doctrine, the last clear chance doctrine, and the remote contributory negligence doctrine should all be subsumed into comparative fault law and become part of the comparative fault mixing bowl.

Well, Justices Anderson, Drowota, and Birch have each written or participated in decisions involving each of these major, major issues. The Court has also had to tackle a number of procedural type questions in the wake of *McIntyre*. For example, the Court considered the following issues:

- Whether the courts can alter the percentages of fault assigned by a jury. The answer is no;
- Whether comparative fault applies if a wrongdoer is protected from liability by a statute of repose. The answer is yes;
- Whether the comparative fault joinder statute applies in a case brought under the Governmental Tort Liability Act or GTLA.<sup>26</sup> Justice Birch, writing for the Court, held that it does;
- Whether fault can be assigned to one who by statute cannot be held liable for furnishing alcohol to a minor. The Court has held that it cannot;

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<sup>25</sup> *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994).

<sup>26</sup> TENN. CODE ANN. §§ 29-20-101 to -111 (1973).

- Whether a defendant is entitled to an offset for settlement proceeds paid to a plaintiff by other tortfeasors, someone other than the defendant. The Court held that the answer is no after comparative fault although the answer was yes prior to comparative fault.

I can go on with this list, but suffice it to say that what tort law is today in 2006, which is very different from what it was in 1992 when *McIntyre* set the course for modernizing Tennessee law, is the direct result of the work of Justices Drowota, Anderson, and Birch. I suspect that what tort law will be in this state decades from now will be the direct result of the work of these three men.

Now, they did not always agree on what the law should be. In fact, they have had their fair share of disagreements in this regard, but there is a common thread among these three justices: They could disagree about what the law is or about what the law should be without being disagreeable. May I suggest that that speaks volumes about their integrity, about their humanity.

There is another common thread among these three justices that I have noticed in working with them over the years, and that is that each is motivated by a profound desire to get it right and to make the law as clear and as sensible as it can be made. I do not believe that as a legal profession, as a society in general, we could ask for more of a judge than that—to make every effort to get it right and to ensure that the law is as clear and as sensible as possible. Frankly, I can think of no higher compliment to their stewardship of Tennessee's common law and no more wonderful legacy to their successors.

Justices Anderson, Birch, and Drowota: Your sense of justice and fair play has brought high honor to yourselves and to the Supreme Court. From those of us who have had the wonderful privilege of working with you all over the years, our parting wish is that you long enjoy the rich family lives and rewards of friends and faith that I

know you so much deserve and so highly value. Thank you for your contributions to Tennessee law.

PROFESSOR OTIS STEPHENS: Thank you, Mr. Davidson. Mr. Davidson's reference to history on two or three occasions throughout his presentation reminds me of the fact that we have a very fine history of the Tennessee Supreme Court.<sup>27</sup> Just a few years ago not all states had produced histories of their highest courts. Of course, we have a number of histories of the United States Supreme Court, the most recent one being approximately eleven or twelve volumes in length and actually read by very few people. This history of the Tennessee Supreme Court is very well done and consists of essays by a number of prominent historians including our own Professor Carl Pierce, who writes on the contemporary Tennessee Supreme Court. I know that the attorneys and judges who are here are aware of that history, but I want our students to be sure to take note of it. It's in our library. I think you might want to consult that history at some point. You may even want to look at some of the development of tort law that is sketched within that volume. Thank you very much, Mr. Davidson, for those excellent remarks.

## INTRODUCTION

Mr. John Day is our next presenter here. He is the founder of Branham & Day, P.C. in Nashville and also the founder and editor of the *Tennessee Tort Law Letter*. Mr. Day, we are pleased to have you with us and would like to hear from you at this time.

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<sup>27</sup> A HISTORY OF THE TENNESSEE SUPREME COURT (Theodore Brown, Jr., James W. Ely, Jr., & Carl A. Pierce eds., 2002).



## COMMENTS OF JOHN DAY

MR. JOHN DAY: Good afternoon. Before I get to the assigned topic, I have to bring to the attention of the Chief Justice a conspiracy which I have discovered just a few minutes ago during Sue's speaking. We need to look into this, Judge. This is bad. Though some of you were not here, what we learned is that a couple years ago the Supreme Court had an oral argument involving some chicken. What happened was that the chicken people turned out to be providing lunch for the Court and other people that day. This was discovered before anybody was embarrassed. It was obviously swept under the rug by the Administrative Office of the Courts, but I think the case you are talking about is *McCarley v. West Quality Foods*.<sup>28</sup> It is the only chicken case I can remember in the last fifteen years. That was a very important case on two points.

Number one, it extended *Byrd v. Hall*,<sup>29</sup> which was a summary judgment case and talked about the burden of the movant for summary judgment. The second part of that case, the chicken part—or should I say McNugget—has to do with making it possible for somebody to actually win a food poisoning case. It was impossible before, but it's now possible. Somebody leaked a straw poll vote on that case, and the chicken people tried to poison the Tennessee Supreme Court. You saved their lives by cutting the chicken off at the pass.

The case we are here to talk about today, *McIntyre*, as well as its predecessor, *Street v. Calvert*,<sup>30</sup> remind me of the words of Justice Wanamaker from 1919 who said, “A decided case is worth as much as it weighs in reason and

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<sup>28</sup> *McCarley v. West Quality Foods Serv.*, 960 S.W.2d 585 (Tenn. 1998).

<sup>29</sup> *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993).

<sup>30</sup> *Street v. Calvert*, 541 S.W.2d 576 (Tenn. 1976), *abrogated by McIntyre*, 833 S.W.2d at 52.

righteousness and no more.”<sup>31</sup> There is a lot of law out there, and some of it is bad. The fact that it happens to be printed in books and put on shelves in libraries does not mean it’s right.

What this Supreme Court did in *McIntyre* was look at *Street v. Calvert* and all the cases that it cited and said, “This is not right. This is not righteous. This is no longer reasonable, and we are going to fix it. We have invited the legislature to do it. They have refused, and we are going to fix it on our own.” What they did with one sweep of the pen that May 4, 1992 has truly changed the landscape of tort law that will affect all of us and our children to the extent that we are ever involved in tort law, tort litigation, or any sort of incident ourselves. There were lots and lots of cases that followed. I am not going to discuss each one of those. I am going to discuss on a broader scale what the adoption of comparative fault has meant to plaintiffs and to plaintiffs’ lawyers.

First of all, the adoption of comparative fault has made it easier to settle cases. It used to be that there was always a risk of zero if your client was found at fault in some shape, form, or fashion. Now, that risk is less. There is still a risk of zero verdicts—do not get me wrong—but the risk of a zero is reduced. Therefore, it is easier to try a case; it makes you less afraid to try a case, and it, therefore, makes it easier to settle a case. It is difficult to tell what effect that has had on the number of settlements because of the advance of alternative dispute resolution during the same time period. We are not dealing with the same set of variables, but I feel reasonable people will say that it has made it easier to resolve cases because the risk of a zero is reduced. It has still not tilted the scales too far in favor of the plaintiff and against the defendant because cases still get zeroed out. You can still lose a case, so it makes things fair as it were.

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<sup>31</sup> *Adams Express Co. v. Beckwith*, 126 N.E. 300, 352 (1919).

The creation of nonparty liability and the abolition of joint and several liability has been sort of a mixed blessing for the plaintiff, and I almost hate to say that out loud because publicly it is my position that joint and several liability should be the law. One advantage to a plaintiff having several liability is a shift in the strategy among defendants.

You see, it used to be that defendants would come into court with their gray suits on arm in arm singing Kumbaya because they had decided that at the end of the day—Andy, you know, you have that gray suit on—at the end of the day they would all go down together. They knew that picking on one another would not do anybody any good, so they had this unholy alliance. Every once in awhile somebody would break out of the cartel in closing argument and point the finger at somebody else, and that would be remembered.

Really, in the ordinary course there was a deal cut that they were going to go down together or win together, and that's the way it worked. That is no more with several liability. Now, with several liability there is an economic advantage for people to point the finger at one another, so what you see with the skilled plaintiffs' lawyers is an effort to make defendants point the finger at one another early and hard.

There are all sorts of ways you can achieve this: through the timing of settlements, through the timing of scheduling orders, or by cutting off motions to amend to add fault against coparties or nonparties. There are all sorts of things you can do to cause one defendant to point a finger at another defendant and, therefore, enhance if not justice than certainly the result in the case. So the abolition of joint and several liability, the replacement of it with several liability, and the presence of nonparty liability have changed the way we litigate cases today.

On the other hand, the abolition of joint and several liability has wreaked havoc with other types of cases. Let

me say this: In an abstract world one could argue that joint and several liability should not exist. In a perfect world where people are truly responsible for their actions, it works every time. It has some sort of intellectual appeal that I am only responsible for what I do.

The problem with that approach is that the legislature doesn't see it this way. The legislature grants certain privileges to money interests, and the legislature grants immunities to people just because they have more lobbyists than somebody else. The legislature puts damage caps on wrongful conduct by the government because it can. The legislature says that because of the mere passage of time a manufacturer of a product or a careless doctor at a hospital should get off the hook because they have not been caught quickly enough.

These immunities, those special privileges, and those damage caps alter a world where people are supposed to be responsible for what they do, and instead, create a world where people are only responsible if they don't have a lobbyist. So the problem with the abolition of joint and several liability and some of the Court's decisions in that regard, is that they are going to fall on the plaintiff. Justice Anderson and I agree that that's wrong, but he's got one vote. I don't have any.

I say that negative thing, in a way, only to point out the pros and cons of the abolition from the standpoint of the plaintiff not to take away from the decision itself. It was a wonderful progression in the law to have this opinion released at 8:03 a.m. on May 4, 1992. It was a wonderful thing. It was the way it should have been. It was done the way it had to be done under all of the circumstances. I can tell you that it would never have passed the legislature.

I participated in the negotiations with the business and insurance industry. We could not get this done. It would have never happened any other way. It took the courage of the Supreme Court to make it happen. While I from time to time express some problem with the result, I

have to say—in fact, it is easy for me to say—that we are so much better off as a society with this case than we were without it, and I look forward to the opportunity to tweak it in the future.

In fact, I told Justice Drowota during lunch that we had filed a Notice of Appeal to *McIntyre*. I believe that pure comparative fault should be adopted. I understand why it was not adopted at the time. I am not being critical when I say that, but I believe that should be the law. We now have the case. It has been filed. It seems to me that, in the words of *McIntyre*, liability should be imposed only proportionate to fault. If a 50% at fault defendant does not bear 100% of the financial responsibility for a loss, why should a 50% at fault plaintiff bear 100% of the financial responsibility for a loss? What is good for the goose is good for the gander.

So I hope, sir, to reverse you, but I hope you think that you could be reversed too. I say that for this reason: The law is a living organism. It is not supposed to be cast in concrete. It needs to be changed, and we are now, as we were, at a point where we can do this. We are at a point where we can take the next step.

Now, let me comment for a couple of minutes about what else has happened in tort law. Before 1990—I think it's fair to say—the Court was wedged to the past, and I say that not in a way of challenging or questioning the intellect or the integrity of the people who served then because Justice Drowota was on the Court before 1990. I am talking about the mindset of the Court before 1990 compared to the mindset of the Court after 1990. I am talking about August of 1990. There was a shift, and anybody watching could see there was a shift in the mindset: “We're going to look forward not back.”

Justice Henry said in 1975, “The common law does not have the force of a Holy writ; It is not a last will and testament, nor is it a cadaver embalmed in perpetuity, nor is it to be treated like the sin of Judah—‘written with a pen of

iron and with the point of a diamond.”<sup>32</sup> The Supreme Court that took office in August of 1990 took those words to heart and started fixing what needed to be fixed. Let me hit some highlights.

- *McClenahan v. Cooley*<sup>33</sup> was Justice Drowota's case holding that a person who negligently leaves their keys in the car in violation of the law can be held liable for a wreck twenty minutes later when that car is stolen by a thief. This is a critical case in the law of duty and probable cause that will live in the history of this state forever;

- *Haynes v. Hamilton County*<sup>34</sup> held that the police can chase a wrongdoer, but they are going to be responsible for the harm they cause if they recklessly chase another;

- *Camper v. Minor*<sup>35</sup> held that an injured mind is worth as much and has as much right to be heard by a jury as an injured leg. What a progressive opinion for the courts of this state;

- *Jackson v. General Motors*<sup>36</sup> brought our products liability law into the 20<sup>th</sup> century;

- *McDaniel v. CSX Transportation*<sup>37</sup> is the expert witness case. Judges should be gatekeepers of expert testimony, not storm troopers. We adopted a gatekeeper not a storm trooper approach;

- *Myint v. Allstate*<sup>38</sup> was your opinion, Justice Birch. Insurance companies are responsible for their insureds. They are consumers, and the Consumer Protection Act<sup>39</sup> is available to them. There should not be any question about

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<sup>32</sup> *Dunn v. Palermo*, 522 S.W.2d 679, 688 (Tenn. 1975) citing *Jeremiah* 17:1 (King James).

<sup>33</sup> *McClenahan v. Cooley*, 806 S.W.2d 76 (Tenn. 1991).

<sup>34</sup> *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994).

<sup>35</sup> *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996).

<sup>36</sup> *Jackson v. General Motors Corp.*, 60 S.W.2d (Tenn. 2001).

<sup>37</sup> *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997).

<sup>38</sup> *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920 (Tenn. 1998).

<sup>39</sup> TENN. CODE ANN. §§ 47-18-101 to -128 (1977).

it. It was contested before the Supreme Court heard about it;

- *McClung v. Delta Square*<sup>40</sup> held that if you invite people onto your property, you have a duty to make that property reasonably safe from foreseeable criminal activities. Roger McClung, who lost his wife there, fought the courts for ten years. This Court, these people—authorized by you—did the right thing by Roger McClung;

- Before *Jordan v. Baptist Three Rivers Hospital*<sup>41</sup> the life of a wife, mother, nonworking husband, or elderly person was measured by the stone cold abacus not as the value of a human being. This Court recognized that that loss, the loss of a mother, is something that should be compensated by a jury;

- One of the best cases and one that this Supreme Court should be the most proud of is *Mercer v. Vanderbilt*.<sup>42</sup> Why? Because this Court reversed itself after just eight years. *Gray v. Ford Motor Company*<sup>43</sup> was dead wrong. It was wrong, and there are two ways you can handle something that's wrong. You can write it off as *stare decisis*, or you can fix it. Listen to what Justice Jackson said in *Massachusetts v. United States*: “I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.”<sup>44</sup> The Court realized that they were unconsciously wrong in 1996, and in 2004 they fixed it. What tremendous courage. What tremendous courage;

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<sup>40</sup> *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891 (Tenn. 1996).

<sup>41</sup> *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593 (Tenn. 1999).

<sup>42</sup> *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121 (Tenn. 2004).

<sup>43</sup> *Gray v. Ford Motor Co.*, 914 S.W.2d 464 (Tenn. 1996), *overruled by Mercer*, 134 S.W.2d at 121.

<sup>44</sup> *Massachusetts v. United States*, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting).

- Finally, there's *Doe v. Roman Catholic Church*.<sup>45</sup> That was my case. What you do not know because obviously I would never tell you this before today is that I turned that case down—those children who were sexually abused by a former priest of the church. I turned that case down for two reasons. First of all, I assumed that a church would not do what these kids told me they had done. Second, there was not a hole; there was not a pigeon hole in which to put that case.

I am pretty familiar with the law, and I knew that the law of outrageous conduct was not quite there yet. Well, then I learned some more facts about the case. I figured out that the church did what they did, but I still had a problem with the law. I took that case to help those kids because I knew that this Court would not be mired down in old pigeon holes but would look to create a new one, and that is exactly what they did. It cost me \$130,000 and over 3,000 hours, but this Court made new law for the nation with that one case and gave these boys the opportunity to go in front of a jury who would hold two bishops accountable for what they did.

The common theme running through all these cases is that this Court trusts people to make decisions. Concepts of duty and proximate cause are like circles, and those circles are bigger or smaller depending on the philosophy of the people who are drawing them. People who tend not to trust juries make the circle small. People who trust the wisdom of a jury make the circle bigger. This Court recognized that the circle should be bigger because the people on juries knew how to handle the responsibility that they were given.

The fact of the matter is that poor people and weak people and powerless people don't have any voice in the legislature. There is no "Future Wrongful Death Victims of

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<sup>45</sup> *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.2d 22 (Tenn. 2005).



America” lobby. There are twenty-three million members. We’re all a part of it. We have no path. We have no executive director. We don’t meet at the Greenbrier for meetings. But we do have the enlightened wisdom of judges that help us get justice.

So on behalf of my clients, I want to thank each of you for what you have done for real people during your term. You should be proud of what you have done.

## INTRODUCTION

PROFESSOR OTIS STEPHENS: Thank you very much, Mr. Day, for your very interesting and informative comments. Our final speaker is Andrew Tillman. Andrew Tillman is a partner with Paine, Tarwater, Bickers & Tillman right here in Knoxville. He specializes in tort defense litigation. Mr. Tillman, we will hear from you now.

## COMMENTS OF ANDREW TILLMAN

MR. ANDREW TILLMAN: I am honored but a little intimidated by all these fine speakers. Mr. Day here has been talking about my clients and my clothes. I knew I was chosen to be on this program because my senior partner was not going to be available, but some of these things kind of took me by surprise. I thought this was a roast. I did not know I was supposed to say good things about these justices.

Anyway, to understand my perspective of what *McIntyre* has done you have to understand where I was when *McIntyre* came along. I had an amount of gray hair, but they did not turn gray from lawyering. I went back to law school after I got too old to do anything really constructive, and I got out of law school in 1989. I worked two years as a federal clerk, so that put me walking into private practice on the day after Labor Day in 1991. So in

September of 1991 I started practicing law. Then in May of 1992 along comes *McIntyre*. I am at the very bottom of the letterhead at that point in time, and we know that some things roll downhill.

When we first read *McIntyre* we were primarily defending product liability claims. We had been held jointly and severally liable under the circumstances. The first reading says we're going to be evenly responsible for our fault. That sounded pretty good to us. And so within about a week all these questions arose, and the Court said in *McIntyre* that we would have to wait for an answer another day. What happens here? Should we amend our answer? Can we plead this person's fault? There was just a tremendous pile of questions. So, being the great legal scholar that I was, I ran.

Judge Tony Phillips had agreed to take the federal bench. He was the County Attorney from Scott County, so I got on the ballot in Scott County to be the County Attorney. The people of Scott County decided to make a great sacrifice, and they sent me back to Knoxville to practice law. When I got back my desk was piled just as full as it ever was with all these unanswered questions, so I organized those questions in groups that I will address here today as to how *McIntyre* changed the practice of law from a defense perspective. Really there are just three areas of law that *McIntyre* affected as far as I can tell: pleadings, motions, and trials.

Well, how did *McIntyre* affect the pleadings part of the law? Well, for one thing Rule 11 is pretty wide open. You can allege about anything you want after *McIntyre* as far as other responsible persons, but the question comes up, "Well, what happens?" It usually comes down to this: "I don't know who this person is. I don't know where they work. This car ran me off the road. I don't know who they are. Why can't we plead them? Will we only be responsible for our fault?" You get those kinds of questions. Well, the Court only took eight years to answer

that one for me. It was *Brown v. Wal-Mart*<sup>46</sup> in 2000 as far as I can tell.

Then you have those cases where you'd rather not. You get this great answer, and you raise all these affirmative defenses about all these other tortfeasors. Then the partner says, "That's his brother, his kin folk, that you're alleging is at fault here," or he says, "That person is probably insured by the same insurance company that hired us. How many more times do you think we're going to get hired if you get them sued?" Or maybe you've got a situation where this person you maybe need to allege fault against is a witness. Perhaps it's a medical malpractice case, and they're a witness, a treating doctor, and you want some favorable testimony. Good luck if you allege comparative fault. These are the kind of questions we have to deal with from the defense side. So along comes *George v. Alexander*,<sup>47</sup> and we know what we've got to allege. We know that we've got to put some specificity in there, who they are and what they did.

There is a related question you may get. A new defendant is brought in, and a partner comes to you and asks, "Can they bring me in after the statute of limitations?" You have the *Lipscomb case*.<sup>48</sup> The plaintiff knew about my guy all long, so why did he wait until now to sue him? So you get those kinds of things. By the way, I had a corollary to the *Lipscomb* case long before *Lipscomb* down in Cookeville with Judge Maddux, and I believe he reached the right decision there consistent with *Lipscomb* to let me out. Those are the primary pleading issues that I want to mention.

I see two distinct changes in motion practice from the defense perspective. There are *Barney* motions, the nip-it-in-the-bud motions. I would say that there have been

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<sup>46</sup> *Brown v. Wal-Mart Discount Cities*, 12 S.W.3d 785 (Tenn. 2000).

<sup>47</sup> *George v. Alexander*, 931 S.W.2d 517 (Tenn. 1996).

<sup>48</sup> *Lipscomb v. Doe*, 32 S.W.3d 840 (Tenn. 2000).

more motions to strike filed in the five or ten years after *McIntyre* than were ever filed in the history of the State of Tennessee. Well, what type of motions to strike? They did not plead it with specificity, so they cannot shift fault over to us. The trial court would tell them, now, that they don't get to use this as an affirmative defense. Well, this is a strict liability case. That never was a defense before, back in the old days, so why should it be now?

I do not know how many cases were raised on motions to strike, but I am sure some of the cases came to this Court on motions to strike—came up the ladder somehow on a motion to strike an affirmative defense. Not all the cases can take that format, where the defendant files an answer that lays the affirmative defense and the plaintiff says, "I do not want them to raise that affirmative defense. They should not be able to." That is a distinct change, I believe, in defense practice when we are posing the *Barney* motions.

I think maybe the primary change in motions practice is on motions for summary judgment. Occasionally, the plaintiff's lawyer will not be as capable as Mr. Day over here and will not do the best job of defending a motion for summary judgment or opposing a motion for summary judgment filed by a codefendant. So the question comes to us from the defense perspective: Do we jump in and play tag team with the plaintiff's lawyer?

You say, "Why would you ever want to do that? Why would you do that?" Well, one of these days you might be trying this case. One of these days you're going to be deciding who goes on the verdict form, and one of these days the trial judge might say to you, "Look, we have already determined as a matter of law that this particular defendant has no fault." I, as a codefendant, might not want that. I might want that person on the verdict form. So that is sort of a dilemma for us. It kind of hampers the ability to sing Kumbaya and go arm and arm with the other guys. So why not go ahead and do it? There is an old

saying that people who live in glass houses should not throw stones. They might throw stones back at us. That might be one reason.

I will say that Mr. Day hit the nail on the head there in a sense. After all, somebody has got to pay the bill for all these actions and pleadings and all this follow up that we have. There is a matter of showing your hand sometimes too with experts and that sort of thing. Sometimes you've got to use a motion for summary judgment to flush something out of the bushes. If everybody starts jumping in the ring, everybody knows everything early on.

As to the trial aspects of *McIntyre*, I think probably one of the most dreaded things is to have a serious case and go before the jury with every defendant or every possible defendant or potential defendant pointing the finger at the other. There is a distinct idea that the jury is going to lose its reluctance to say, "This is just a plaintiff making a big thing out of nothing," and award a very, very nice verdict in the case.

I had a note about peremptory strikes. All the commentators seem to think that many defendants want as many strikes as they can get. It has been my experience picking a jury that with only six peremptory strikes there is not much to go around when you have a lot of parties, and I have had trial courts that would not let us even talk to each other about who is going to get struck. So potentially, with six defendants there they can strike the same juror, and those are their strikes; knock one juror off the panel.

Every issue that I have mentioned may also be a jury instruction issue, whether they go on the verdict form and that so forth issue. If a motion to strike is not filed and the issue lives, the question is whether the issue may go on the verdict form. Rather than talk about all of these issues again, I thought I would mention three that appear to me to be appropriate instruction type issues that might come before the Court in another way.

Should the jury be instructed that the plaintiff's acts can be a superseding and intervening cause in comparative fault and that if that plaintiff is 50% at fault that plaintiff goes home with nothing? So why do you need a superseding and intervening cause anyway? That is a potential jury instruction issue, and I think that it's illustrative of the things that we have sort of struggled with from the defense perspective.

In a crash-worthiness case tried as a comparative fault case on the issue of injury, do you instruct the jury that they can deduct any injury that the plaintiff would have sustained with a safe product, or is that double dipping? That was talked about in *Whitehead v. Toyota*,<sup>49</sup> but I don't understand it. I don't understand what you deduct and what you do not. I think there is still a jury instruction issue in there. What if a good doctor might have prevented the injury; then might a good product have reduced the injury?

I will make just a couple of comments of what I could have done better with the *McIntyre* case. I could have started a comparative tort newsletter like Mr. Day over here, and I could have embraced the uncertainty. Even though they have labeled me a defense lawyer, I have been on both sides of the issue. I think there is a cost to plaintiffs in uncertainty. Recently, I was involved in a fairly significant plaintiff's case that cost hundreds of thousands of dollars to get to a jury. We got a good verdict, but there were lots of issues that we had to just punt because while we might have gotten a better verdict who could afford to try this case twice? Who could afford to go to the jury twice? You do the best trial you can and eliminate as many of the issues as you can. I never realized until that case how much the uncertainty might work in the defendant's favor. So I guess if I were to criticize myself, I

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<sup>49</sup> *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d. 684 (Tenn. 1995).

need to embrace any uncertainty raised in *McIntyre* more. Thank you all. Thank you.

## INTRODUCTION

MR. JOSEPH HYDER: In the second portion, we have invited former and current law clerks for the justices that we are honoring today to give us a brief tribute about what they are like to work for.

First, we will have Rodd Barckhoff. Rodd Barckhoff has served as a law clerk to Justice Anderson since 1996. He also serves as an adjunct professor of law here at the University of Tennessee College of Law. Professor Barckhoff:

## COMMENTS OF PROFESSOR RODD BARCKHOFF

PROFESSOR RODD BARCKHOFF: If any of my students happen to be here—they had oral arguments on Wednesday of this week—I would like to reserve two minutes for rebuttal. Particularly since Justice Anderson is going to be speaking next, and as modest as he is, I may need that rebuttal.

Thank you very much for this opportunity to pay this tribute to Justice Anderson of the Tennessee Supreme Court. I have had the honor of working for Justice Anderson for almost ten years. I feel like it has been like having a front row seat to watch a great Court and truly remarkable justices engage in the pursuit of justice. Justice Anderson, Justice Birch, and Justice Drowota, as we have heard in the first two hours, have been towering figures in Tennessee law. I think in their combined fifty years of experience on the Supreme Court they have had an impact that has been matched or rivaled by very few judges or lawyers. Just as important, I think they have all been visible role models in demonstrating the commitment to the

administration of justice that we should all have as judges or lawyers.

Justice Anderson was appointed to the Tennessee Court of Appeals in 1987 after he had practiced law in Oak Ridge for almost thirty years. He was first elected to the Supreme Court in 1990, and he was reelected to the Court in 1998. His tenure as a Supreme Court Justice has been marked by his wisdom, his guidance, and his compassion.

As you know, the cases that come before the Court are often extraordinarily difficult cases: capital punishment, comparative fault which we have heard so much about, discrimination, professional malpractice, land use, elections, and term limits to name just a few. These issues come up in cases that likely have very heated or emotional backdrops. There are very few easy decisions. There are even fewer routine matters.

In the face of these challenges Justice Anderson's temperament and demeanor have remained calm, assured, and experienced. It has truly been remarkable. He is motivated only by his desire to find an answer that is right and a result that is just. He has a judge's knowledge of the law, and he still retains a lawyer's feel for the practical effects of a decision.

Just recently, I was working on what I thought was a very complex medical malpractice case, and as longtime judicial clerks do I was combing the rules and reading cases from other states and jumping on Westlaw and all that. I started to talk to Justice Anderson about it, and he said, "The first mistake here is suing the nurses. You never sue the nurses. You need to have them on your side." I thought, "Those are the words of somebody who has remained a trial lawyer at heart after all this time."

In sixteen years on the Supreme Court, Justice Anderson has served four terms as Chief Justice, more terms than any other Chief Justice in the history of the Court. His service as Chief Justice has been marked by his



vision, his leadership, and the Court's contributions to the administration of justice.

Under Justice Anderson's leadership, the Court increased the efficiency of the judicial system through alternative dispute resolution, automation, and increased technology. There is some irony here because those of us who have worked for Justice Anderson on his staff have often witnessed his encounters with faulty cell phones, stubborn computers, and broken fax machines that have no paper. All of this usually led to his pleas for help from longtime administrative assistant, Debbie Harmon.

Under Justice Anderson's leadership that we have heard so much about, the Court made a priority of visibility. The Court fostered education and awareness of the system by adopting and allowing cameras in the courtroom. The Court also implemented the SCALES program, which provided thousands of students with a first-hand look at the role of courts, the role of judges, the role of lawyers, and the deliberate and careful manner in which disputes are resolved.

In an age where perceptions of the judicial system are often negative and too often fueled by the sensational, Justice Anderson believes that solutions are found through more visibility, not less, and by opening doors, not building walls. He has put a human face to the Court: traveling to over ninety counties in his time, educating the public about the role of an independent judiciary, discussing the workings or the failings of the judicial system, and always searching for the new and the better to replace the old or the ineffective.

As important as these tangible contributions have been, my lasting impression of Justice Anderson will always be his concern about the cases that do not make it before the Court or do not make it before any court because the individuals may not have had access to counsel. Justice Anderson has rarely said "no" when asked to speak to students, bar organizations, or civic organizations, and his

remarks always emphasize the importance of pro bono service and the need to provide a voice to those who have none.

He has provided a strong, visible reminder that justice is attained only if the courts are open to all without regard to income, race, ethnicity, or social status. He often quotes the words of Justice John Marshall Harlan, which I am going to do here: “But in the view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.”<sup>50</sup> Justice Anderson has worked to embody these words.

Although he has certainly earned his retirement, he will be greatly missed and not just by those of us who have to find new jobs. He has earned the time to rest although I doubt his grandchildren will let him. He has earned the time to travel, to read, to study history, and most importantly, to work on his golf swing. I am truly privileged to have had my front row seat for ten years, and we are grateful to have had Justice Anderson's service as a member of the Court. Thank you for this opportunity.

#### COMMENTS OF JUSTICE E. RILEY ANDERSON

JUSTICE E. RILEY ANDERSON: Members of the faculty especially Professor White and Professor Stephens, members of the *Tennessee Journal of Law and Policy*, fellow judges, and ladies and gentlemen: Rodd, thank you for that overly generous introduction. I am honored and humbled to be a part of this symposium. I had some great teachers at this law school, and I am not sure they would

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<sup>50</sup> *Plessy v. Ferguson*, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting).

have ever predicted that the word “legacy” would be associated with my work.

I am particularly pleased that this symposium has focused on some of the issues that have been most important to me during my time on the Court and during my terms as Chief Justice. I hope that I have contributed in some way to the legacy of openness and accessibility to the judicial system.

In the literature and some of the speaking here, I have been given credit for SCALES and Cameras in the Courtroom, but I want to emphasize that the whole Court was responsible for and enthusiastic about both of those projects. It was not a one-person thing. It was a whole court approach to both of those progressive things.

All of the studies of the last three decades have concluded that the Court is the least understood and most often misportrayed branch of government, and yet it is the only branch of government which the Constitution requires to do its business in public and which allows the public as jurors to be a part of its decision-making process.

One of the ways—and we did try to make the judiciary more open during my time—is through the adoption of Cameras in the Courtroom. Ten years after we adopted Rule 30<sup>51</sup> and piloted the Cameras in the Courtroom rule, I continue to believe that live coverage of actual court proceedings is vital to citizens’ understanding and accountability of the justice system. It’s the sit-up-straight factor that Richard Baumgartner referred to. It is in the best interest of the public to be fully and accurately informed about the system, and I think the last ten years has shown that this interest can be compatible with the fair administration of justice. I think it has provided the public with an invaluable opportunity to observe and understand the judicial process.

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<sup>51</sup> TENN. SUP. CT. R. 30.

It was originally and still is my hope that courts would be covered daily by cable on a gavel to gavel basis as much as city council and county governments are covered now, and we made some efforts along that line. They were not completely successful. I hope to avoid the sound byte coverage which tends to misportray the issues in trial. We have had partial success with cable television in Middle Tennessee in some well-publicized trials which have had gavel to gavel coverage and commentary, and hopefully that coverage will continue.

In the courtroom of the real world as opposed to that of television and movies, the viewing public has not found ultra-polished lawyers and judges. They are only human beings like the rest of us; they search for words, lose their place, and sometimes become confused. And instead of the fast pace of L.A. Law, they see a mostly slow-moving process with low-key, complex rules and arguments that focus on procedures which protect rights. Cameras in the Courtroom has enhanced the public's awareness of the judicial system as a human one, dedicated to preserving and protecting individual rights for a fair trial and at the same time preserving and protecting the rights of society.

A federal court camera experiment, which was also very successful, was not adopted by the Federal Judicial Conference headed by the late Chief Justice Rehnquist. I think that was a major mistake. In an environment of hostility to the independence of the courts by irresponsible members of Congress, cable T.V. commentators, and others, it is particularly important that the public have the opportunity to view the courts as they actually are.

Another avenue for broadening the accessibility of the courts is to bring the courts to the people. The SCALES program strives to do this. I believe SCALES is one of the things I am most proud to have been a part of during my time on the Court. In its twelve years the SCALES program has reached thousands of students,

giving them a front row seat to the judicial process. The goal of SCALES, like Cameras in the Courtroom, is to demystify the courtroom and give students an understanding of how real lawyers handle real cases.

You have been told about the impact since its inception. In reaching over 15,000 students in thirty-five counties, 337 schools have been involved. The courtroom is not sacrosanct. It belongs to the people just as any other part of government does. The mystique that surrounds the judicial process is under revision. Televising judicial proceedings and inviting students to observe and be a part of a special program provides for greater opportunity for public scrutiny and allows citizens to judge for themselves whether the courts are functioning well.

As to the last topic in today's symposium, comparative fault, all I can say about that is that it is just one example of the many, many fascinating issues that have been my pleasure and privilege to work with during my time on the Court.

On a personal note, I have loved the law both as a trial lawyer and as a judge. I have looked forward to coming to work each and every day that I have been on the Supreme Court, and every day has been different and enjoyable. I have had excellent law clerks that worked for me on the Supreme Court. Rodd Barckhoff, who has worked for me for ten years, is an example of the best of the best. Lisa Rippey, who worked for me before Rodd for four years, was outstanding. Although Kathy Shirk has been with us only two years, she is very talented and following in their footsteps. Aside from their stellar work, it has been a pleasure to get to know them personally and to follow their successes. I am proud that first Lisa and now Rodd will become members of the Supreme Court central staff.

I have had the great fortune of having Debbie Harmon as my executive secretary for almost twenty years. She does a fabulous job, and that makes me look far better

than I am. And as Rodd pointed out, she helps me with technology occasionally. I have also had the opportunity to be associated with talented and very intelligent members of the Court. Chief Justice Barker and Justice Clark are two of those that are present, and two other Justices, Frank Drowota and Al Birch, not only did exceptional work on the Supreme Court but were a pleasure to work with. We became close friends. I will miss them all. Thank you.

## INTRODUCTION

MR. JOSEPH HYDER: Our next speaker, who will be doing the tribute to Justice Birch, will be Raney Irwin. Ms. Irwin is the Assistant General Counsel for the Tennessee Department of Health, and she served as Justice Birch's law clerk in 2002.

## COMMENTS OF RANEY IRWIN

MS. RANEY IRWIN: Good afternoon. I am a 2002 graduate of this prestigious University, and I am glad to be back to speak at this symposium. Almost everyone knows of Justice Adolpho A. Birch, Jr. and his many accomplishments in the field of law. Almost everyone knows of Justice Birch and his undying commitment for equal treatment during the civil rights movement. Almost everyone knows of Justice Birch, the pioneer who helped pave the road for African Americans in Tennessee who wanted to become lawyers and judges and anything else that they wanted to be in the legal arena.

When you mention his name you may hear people say that he was the first African American to do this and the first African American to do that, and for the most part they are correct. Justice Birch was the first African American to serve as General Sessions Court Judge in Nashville, Tennessee. He was the first African American to serve as Criminal Court Judge in Nashville as well. He

was also the first African American to serve on the Tennessee Court of Criminal Appeals and then later to be elected to the Tennessee Supreme Court. In 1996, he was the first African American Chief Justice to serve on the Supreme Court.

While many know of Justice Birch and his many first accomplishments, few people know him from the perspective of his judicial law clerks. Few people know him as Justice Birch the teacher, the mentor, the friend. As a former clerk for Justice Birch, I was honored that the members of the *Tennessee Journal of Law and Policy* invited me to speak to this audience, to give some insight on Adolpho A. Birch, Jr., so I will relate to you some of my personal experiences with Justice Birch the teacher, the mentor, the friend.

My first experience with Justice Birch was during the interview phase for the position of the clerkship. I was excited to say the least when I learned I had been granted an opportunity to interview with him for a clerkship on the Tennessee Supreme Court, but I must say that I was quite surprised when I received a phone call from one of his clerks informing me that I should pack a lunch for the interview. This seemed a bit unorthodox, and I did not take it seriously. In my mind the interview would not take longer than one to one and a half hours, and I would just grab a bite to eat on the drive back to school. After all, my interview time was set for eight o'clock in the morning.

I arrived a few minutes early and was surprised to learn that the Judge was already there and waiting to start the interview. I was escorted into his office where he spoke with me for about fifteen minutes or so. At the conclusion of that time, the Judge thanked me for taking the time to drive to Nashville to meet him, and he informed me that he would be in touch. He then directed me to his assistant's office, and I left. I thought, "Whoa, that was easy." I thought I was going to be nervous, sweating profusely, hands clammy.

I walked into his assistant's office, and she directed me down a hall to a tiny room where there was a desk, a computer, nine or ten Westlaw cases, and a paragraph long question. She sat me down at the computer, and she instructed me to read the question and the cases and write an opinion on which side should win and why. She informed me that I had until the close of business that day to submit my answer. Now I was nervous. Now I was sweating profusely.

After about six gut wrenching hours, I submitted my final draft opinion. All the way home back to Knoxville I pondered over whether I answered the question correctly and what would happen if I had not answered correctly. I later learned that my answer had come down on the side of the dissenting opinion, but Justice Birch hired me anyway. He explained to me that it was not as important for me to get the answer right as it was to come up with a sound, concise, and logical analysis of the law. He explained to me that that's what makes an excellent lawyer.

I learned early on in my clerkship that having Justice Birch for a mentor would be challenging to say the least. Imagine arriving to your fourth grade English class on the first day of school only to find out that your father is teaching the class. Imagine arriving to the first day of basketball tryouts only to find out that your father is the new head coach. Imagine going to Sunday school only to find out that Deacon Smith is ill, and your father is going to substitute the class. That's what having Justice Birch for a mentor was like; learning was a daily experience.

Justice Birch was a stickler for grammar, word choice, and usage. In law school we learn to carry around our Bluebook like it's our Bible. We never left home without it, and when in doubt we always consulted with it before putting pen to paper. Well, in the Judge's office we used the Bluebook and the Redbook, a book I never knew existed. But there is a Redbook, and Justice Birch made



sure all of his clerks knew how to use it. Now, I won't bore you with stories of debating word usage, but suffice it to say that to this day I have dreams of being chased by the Bluebook and the Redbook.

Justice Birch has been an encouraging friend to me as I know he has been to his many other former clerks. He is not afraid to give his opinion on a matter once solicited and rarely holds back when he has something to say that he believes can make a difference. He has given me advice on just about everything ranging from the best colleges and universities for my son to attend to what types of shrimp make the best Louisiana gumbo. Don't worry, Judge, your secret is safe with me.

I do take seriously his words of wisdom which I know are not given at random. I, as do others, hold him in the highest regard and greatly respect his opinion. Justice Birch, I applaud you on receiving yet another great accolade during your tenure on the Supreme Court. The examples you have set during your most distinguished career make you one who is most deserving. I hope what I have said today comes through loud and clear that, if I could, I would not go back and change a thing. It was a privilege to work for you, sir. It was an invaluable experience, and I am truly grateful for the opportunity you gave. I know that I am a better writer and that I give a better argument after having clerked for you.

As my own special tribute to you, I would like to read you this poem on behalf of all of your former clerks:

*Clerks all over this great Tennessee finally  
call him the Judge.*

*An excellent writer he expects us to be;*

*On grammar and syntax he won't budge.*

*Research and writing are skills most  
desired, and a good personality is a plus.*

*Punctuality is a skill you will to acquire,*

*Or Judge will surely make a fuss.*

*But a better mentor we could not ask,  
He's there for us to the very end,  
Guiding us all on our legal path,  
As our teacher, our mentor, our friend.*

Thank you.

### COMMENTS OF JUSTICE ADOLPHO A. BIRCH

JUSTICE ADOLPHO A. BIRCH: Justice White, Mr. Hyder, participants, and those here at this prestigious symposium where I have learned so much about torts and about law and I guess about myself: I thought I would have to get up and rebut a lot of things that Raney would say. She has been extremely kind and generous to me, and I appreciate it very much.

Raney is but one of many clerks that I have hired from the University of Tennessee College of Law. My practice was to hire a new clerk almost every year. By far, Raney was among the top three that I have had, and I guess I have had twenty or thirty clerks. Raney was certainly one of the very best. I appreciated the time she spent with me.

I always tell my clerks, "It's a two-way street. It's give and take. I hope that when you leave, you leave with more than what you brought because you will teach me, and I will teach you." Raney's progress as a lawyer has convinced me that she has really taken a lot, and I can attest to the fact that she has left a lot of learning with me also. So I thank you, Raney and the other speakers, for the kind things that you've said. It really, you know, is kind of—I didn't think things would get to me, but sometimes they do.

I have also had a very, very wonderful relationship with the University of Tennessee College of Law starting back with Dean Wirtz. I have come up here many, many times to participate in the events, and I have always felt that I have received a great benefit from it. I appreciate that, and I appreciate the opportunity to do this.

Let me clarify one thing that I always want to leave with you. I would be less than candid if I did not. I do appreciate Raney mentioning that I have been the first this and the first that, and it does mean something to me. There is pride involved, but there is also the acknowledgment and recognition that for everything that I have done first there are many, many others who tried hard to get there and who were thwarted and stymied and stopped by unconstitutional prejudice and segregation. So while I do not want you to think I am ungrateful—I am grateful—I just want to temper it with the idea that those people who tried and were rejected certainly deserve as much if not more credit than I do.

I have had the pleasure of working with some very, very distinguished persons both in the past and at present, and if there is any thought I want to leave you with it is my feeling, my confidence, that the Court is in good hands. We leave Justice Barker in charge along with Justices Holder and Clark. They are people who will carry the Court forward and people who will advance what I think us older folks set as the tone. We can be confident about that.

I told Justice Drowota I would give him some of my time so I am going to finish up now by simply saying that I have given the judiciary all that I have, and it in turn has rewarded me profoundly with the opportunity to serve. To me that is reward enough. I thank you very, very much.

## INTRODUCTION

MR. JOSEPH HYDER: The final tribute to Justice Drowota will be by Lisa Rippy. Ms. Rippy is a staff attorney for the Tennessee Supreme Court, and she has the distinct honor of serving as a law clerk to two justices, Justice Anderson and Justice Drowota.

## COMMENTS OF LISA RIPPY

MS. LISA RIPPY: I am happy to have been invited to speak in honor of these three fine justices. I have spent the last thirteen and a half years clerking because I do not like public speaking, so I am a bit nervous today.

It has been really a blessing to me to be able to clerk for Justice Anderson and Justice Drowota. Justice Anderson hired me straight out of law school, and I was from a background with no lawyers in my family at all. Justice Anderson patiently talked to me about the law and his legal experience, taught me every facet of the Court's work, and allowed me to be informed about that. I so appreciate that. I still call upon the things that he taught me about the Court to do my job. More than that I am grateful for the fact that in 1996 when I decided to move back home to Middle Tennessee he wished me well and encouraged me to accept Justice Drowota's offer of a clerkship. I really appreciate Justice Anderson for all he did for me.

When I began working for Justice Drowota I already knew him to some degree. I also knew that he and Justice Anderson were alike in many ways. For example, as Rodd mentioned, they are both technologically challenged, but they are learning in that regard. They also both enjoy the same fine restaurants. I have personally eaten at McDonald's on many occasions going to and from court.

Their most important similarity is that they are humble, modest, and calm leaders. Let me tell you a little bit about Justice Drowota although you have heard already about his contributions to Tennessee law. I will give you a little background. He went on the chancery bench in Nashville in 1970 where he remained until 1974 when he was appointed to the Tennessee Court of Appeals. He was elected to the Supreme Court in 1980 where he served until his retirement last September, a sad day for me, but as

Justice Anderson mentioned, the Court allowed me to stay on as a staff attorney. I appreciate that very much.

Justice Drowota authored thousands of opinions, participated in thousands more, and is tremendously accomplished professionally, but what a lot of people do not know about Judge Drowota is what a wonderful person he is to work for on a daily basis. I would like to talk to you about that just a little bit. I was fortunate in that I knew him somewhat when I began to work for him. Otherwise, I would have probably been intimidated by his many, many years of experience. He had ridden to court with Justice Anderson and me on occasion, and I knew that he was a sports fan and that he was a down-to-earth person. I learned even more over the next nine years about what a generous and genuinely nice person he is.

He seems to me to never have a negative thought towards anyone, and he is almost incapable of believing that anyone else has a negative thought towards him. It is truly amazing. I do not know of any person in the world other than Justice Drowota who seems not to have an enemy. His generosity is well known among the members of the Court as well. They appreciate his leadership style. It is difficult to describe his generous spirit and his truly genuine kindness and consideration towards everyone, not just the Justices but the Supreme Court staff, the Administrative Office of the Court staff, and the building personnel. Justice Drowota knew them by name. He knew their job, and he thanked them for it on a regular basis. He was just genuinely nice and respectful towards everyone.

It sometimes seems strange to me that a person as nice as Justice Drowota could enjoy as much as he did the work of the Court, which is sometimes contentious and sometimes requires strong debate, but he loved every aspect of the Court's work. He was enthusiastic about it. He was just as enthusiastic about it on the day he retired as he was the day that I began clerking for him.

He was attentive to every detail. Sometimes he would be so enthusiastic about it that he could be annoying. On those cold, rainy days when he was not feeling well and we'd just gotten three memos from three different justices saying, "We don't agree with your opinion that you worked on for weeks," it seemed that he would become more enthusiastic because he would be thinking of ways he could persuade them to his point of view. I will tell you that I was not as enthusiastic about those three memos disagreeing with that opinion, but he always reminded me that the Court was a team and that we were all working towards the same goal: to render the best possible decision for the litigants, for the law, and for the people of Tennessee.

Beauty contests have "Miss Congeniality." I always thought that Justice Drowota should wear a sash that said "Mr. Collegiality" because he focused on improving the relationships among the justices, realizing that unanimous or nearly unanimous opinions were more definitive and that they provided lawyers and judges in Tennessee with answers that people need to plan their lives on a daily basis.

That is not to say that he compromises principle to come up with a unanimous decision because he did not, but he was aware of the importance of that. He was also aware that it was more possible to have unanimous or nearly unanimous decisions if the justices were able to work well together. I think any of you who have read a Supreme Court decision that was 5-4 with nine different opinions can understand what a tremendous asset that is for the Tennessee Supreme Court, which is a five member court, because the closer to a unanimous decision the better it is.

He also understood the importance of timely issuing decisions. He knew that litigants and real people were waiting for those opinions. He knew that they had issues that were important to their lives, and they needed an answer. They didn't need it a year from now; they needed

it as soon as possible after the Court had heard the case. Justice Anderson said in a tribute letter about Justice Drowota that his idea of the proper time to release an opinion was immediately after oral argument, and that is pretty close to the truth. When he was Chief Justice he had the right to assign cases. He normally would assign difficult cases that needed speedy answers to him because he would get those opinions out as quickly as possible, and he would work long and hard to do it.

His enthusiasm did not wane over the years and neither did his work ethic. In the summer of last year when he knew he had two or three months, he was coming in and still looking at everything, still being careful about everything, and still noticing if someone had the wrong lawyer for oral argument on an opinion. He was that careful and detailed, yet he was even tempered. I do not recall ever seeing him upset enough to raise his voice. If he had I'm not sure, but the building might have collapsed around him. That is how much everyone in the Supreme Court building in Nashville depended upon his even-keeled, even-tempered conduct.

He was very concerned about my speaking very long today. I do not know what he thought I could say that would be negative about him because I could never come up anything that would be negative about him. I can tell you that he won the Titan's "Best-Dressed" because he had on Titan's apparel the year that they went to the Super Bowl. He participated in the lives and activities of the Court.

I will end by reading a quote from one of his former law clerks, Dexter Brewer, who is now a Catholic priest. He said about Justice Drowota, and I think it's true that "your presence on the high court brought wisdom and life and vitality to that place where so many come to get an answer to some of the most desperate questions of their lives."

I am grateful as a Tennessean that he gave thirty-five years of his life and service to the courts of Tennessee. I am also grateful as Justice Birch said that the Court now has fine men and women to carry on the attitude of team work that Justice Drowota was interested in establishing and fostering among the Court. Again, I appreciate the opportunity to speak here today.

#### COMMENTS OF JUSTICE FRANK F. DROWOTA

JUSTICE FRANK F. DROWOTA: Lisa, I want you to come and do my funeral. That was beautiful. I am sorry my wife could not be here today. Lisa was always kind and generous in her words as you members of the Court know, and I think the Court is very fortunate to have her stay on. One of the smartest moves I ever made and I think the only time that I felt I got the best of Riley Anderson was when I stole Lisa from him about nine or ten years ago, and he immediately went and stole Rodd from Justice Barker. Lisa is really more than a law clerk or a staff attorney. Her new title under me was "Chief of Staff to the Chief Justice." She served in that capacity for Chief Justice Barker. She has all these titles, but I think the title I would give you is "good friend."

Marshall Davidson was my clerk back in 1990, and Marshall and Lisa have been good friends. We try to have lunch together at least once a month and discuss old times and different things that are going on. I appreciate them both. Marshall is an interesting person as you heard him speak on tort law. He knows tort law backwards and forwards, but there are little things you do not know about him. I have seen him now for sixteen years and seen his family grow. He forces his children to go to Disney World every other summer. He claims they are the ones that want to go. I have talked to his children, and they say, "Tell dad we don't need to keep going back to Disney World." So, Marshall, I'm telling you right now.



On a serious note, I do want to thank the *Tennessee Journal of Law and Policy* for this symposium and, in particular, Justice Penny White and Professor Otis Stephens. Penny, some of the most fun times were when we served together. When Penny would come to Nashville she and I would double date, and those were interesting times. She would always—Riley and Al remember—grade our ties. I am afraid I failed today. I want her to rule on Riley's and Al's. She was tough on ties.

Both Rodd and Raney, you all were right on point on Justice Anderson and Justice Birch. They have truly served the state so well for so, so many years. I have served with Riley for fifteen years, which is longer than I have served with anyone, and Al for thirteen years, and I have great respect and admiration for both. I have really missed working with you guys. I really have.

Mickey Barker who is your Chief Justice now really changed things on the Court. I always said he brought humor to the Court, and I meant that in a very positive, positive way because I think it is important for any appellate court, any group of five people and the combined staff, to have some humor. But he brought much more than that as I have always said in my remarks discussing him. He brings a great deal of intellect and common sense. You know the Court is in good hands. You have got him leading the Court. You have got Connie Clark up here at the back. I appreciate both of them being here today. I hope they did it out of respect for the judges they have served with, and I know I speak for them when I say how much we appreciate it.

Connie Clark took my place, and I could not have been happier because I have never known anyone that is a true workaholic. She and I worked closely, myself as Chief over the last few years and she as the Director of the Administrative Office of the Court. On Saturdays and Sundays if I ever needed to reach her, which I often did, I

didn't call her at home; I called her at the office, and she would always be there. It was just truly amazing.

Let me tell you if I can in the time remaining a few observations of the Supreme Court that I have made during my thirty-five years on the bench and twenty-five of those on the Court. We often refer to the Court in the late '60s and early '70s as the "prior to the '74 Court" because we talk about the '74 Court that really changed the way the Court functioned and operated. But the Court prior to that time we would describe as, what oftentimes people would say, a "cold court": they would not have studied your briefs ahead of time; they never really prepared for oral argument; and, they never discussed the cases around the circular table that we do. This is coming from judges who served on that Court.

It was amazing that Ross Dyer who was Chief Justice from '69 to '74 and who I think was an exceptional leader was able to basically hold that Court together. I think "dysfunctional," as some people have used the term, is perhaps a little too strong, but they had personalities on that Court who would not even speak with one another. When they were holding court and staying in the hotel they would come to get a cab to go to the courthouse, and they would not take the same cab even though they were standing together.

It was unfortunate in many ways, and yet they came out with some excellent, excellent opinions because they had some bright, bright people. But they did not really function as you would think an appellate court would necessarily function simply because of personal ties. I remember when the Court of '74 was running. They made certain pledges about what they would do if elected to the Supreme Court, and one of the things was that they would not have one-judge opinions. The reason they said that was because the Court, like I said, never sat down and discussed the cases together.

They circulated their opinions and either signed onto them or signed off, and most of the time, if you are familiar with that Court, they were 5-0 opinions. With the present court, a 5-0 opinion certainly is not a one-judge opinion. A 5-0 opinion means that a lot of work and compromise has gone into getting the Court together.

As Lisa pointed out, it is extremely important for courts to have 5-0 or 4-1 opinions. In this era when you're getting ready to lose two members of the Court and one other went off last year, if most of the majority opinions were 3-2 it would leave a lot of question marks in a lot of people's minds. Fortunately, cases like *McIntyre* and others have been 5-0 even though they were not close to that at the beginning when the discussion started.

But the '74 Court that was basically five new judges decided on various procedures and things that they wanted to accomplish before they ran that particular summer. One of the main things they decided was that they were going to sit down together as a court and discuss the opinions and work on them and be a willing collegial court and have an opinion that was the opinion of the Tennessee Supreme Court and not just one person.

In '76, as has been pointed out earlier by Lance, they created the Board of Professional Responsibility. In '78 they created the Rules of Criminal Procedure. In '79 they created the Rules of Appellate Procedure. In '79 the Court of the Judiciary was established. They were really described as an activist Court because they used their rule-making powers. They hated people using that term for them. They did not like to be called an activist court, but they truly were.

I went on in '80. In '84 we had the Rules of Juvenile Procedure. IOLTA (Interest on Lawyers Trust Accounts) came on board in '84, and in '86 we had mandatory CLE (Continuing Legal Education). In '88 the Judicial Ethics Commission was created. In '89 the Court started taking certified questions from the federal courts

that I think helped very much in the development of comparative fault. Many of those cases came through the federal court system.

In '89 we also began the Client Protection Fund, and in January of '90 the Rules of Evidence were established. It is hard for young lawyers to believe that the Rules of Evidence are that recent and that we did not have rules of civil and criminal procedure until this “activist Court of '74” came on board.

In 1990, we had three new members come on the Court, and as I have often said, I think the Court of the '80s left a solid foundation for the Court of the '90s on which to continue, on which to build. In 1993 the Tennessee Plan, the merit selection of appellate judges, came about, and I think that is one of the true good things that we have in the appellate court system.

But I guess the thing that meant the most was the jurisdictional change in '93 when we began to be a pure Rule 11 permission-to-appeal court or whatever you want to call it. We became a law-development court and no longer an error-correcting court in areas of workers' compensation and other areas. I think that change in jurisdiction materially strengthened the Court because then the Court was able to deal with and pull up the cases that it felt were important in trying to develop the law. In '95, as Sue Allison said, SCALES came to be under the leadership of Riley Anderson. Riley brought so many new and interesting things to the Court.

When I was Chief back in '89 and '90, I had heard about a small SCALES program in Ohio, and I didn't even bring it back to the Court for discussion because I didn't think it would work. Riley had the vision to see that it would work, and it is one of the most successful programs I think we've had. It is difficult. It is hard. It requires a lot of extra travel and extra court time, but I think it is something, Riley, that has been very meaningful and is showing its rewards.

Penny, it's interesting that when we were doing a SCALES project in Clinton—you probably remember it because Sue said all of the young girl students would come around you and want to have your picture taken. When Gary Wade with the Judicial Conference Foundation gave a scholarship to a Tennessee student, in her remarks to the conference, she said, “The reason I wanted to go to law school is because I attended a SCALES conference program in Clinton, Tennessee when I was in high school, and I got to sit next to and talk to Justice Penny White.” The profound impact you had on her is being felt by many, many, many students. I am so glad the Foundation is now able to give four scholarships a year to students.

Riley also created the Supreme Court Historical Society. The Court of the '90s created a Commission on Gender Fairness and a Commission on Racial and Ethnic Fairness under the guidance of Al Birch. In '93, the Court consolidated three appellate court clerks' offices under one person. These were all things that were important to have occurred.

But I feel the makeup of the Court is also revealing. During the Court of the '80s, those ten years, there were six white male justices. Most of them went to the same law school, were in law school at the same time, and had the same law professors. I do not know how you students are impressed with your law professors, but most of them followed pretty much in lock-step with their torts and contracts professors. It was interesting how Justices Harbison and Cooper thought so much alike. During their sixteen years together they only thought differently on two cases where one dissented and one went the other way.

So the '74 to '90 Supreme Court was a great Court, but it was not a real diverse Court. The '90 to '98 Court was interesting in that during that eight year period there were nine different judges. There was constantly changing personnel and some lack of continuity and focus that maybe the '80s Court had. However, it gained diversity not

only in terms of gender and race but also in ideas and points of view. I really think the areas of ideas and points of view were so important.

The present Court is made up of people from five different law schools. When they sit around the table they certainly do not think alike because their backgrounds are different, and yet they agree to disagree. I think it is very important that it is a collegial court that you have now, a court that respects one another. I think mutual respect is certainly a necessary ingredient for any appellate court to function properly.

The Court of 2006 through 2014—that chapter has not been written yet, Carl. I hope you will write it for them. I think it's going to be exciting because I know that the three members that remain on the Court are brilliant scholars and hard workers, and that's what it takes. With Riley and Al leaving, I know one thing: Chief Justice Barker, they will give you 110% until September 1<sup>st</sup> comes.

I think all court observers are going to have a field day for the next few years observing how you handle things. You have already gotten one argument today from John Day, so deduct five minutes off his argument next time he's arguing a particular case on the pure form comparative fault.

In closing, let me again thank the *Tennessee Journal of Law and Policy* for hosting this symposium. It was certainly great for the members of Court to get together, and we appreciate what each of you had to say. Thank you very much.

## INTRODUCTION

MR. JOSEPH HYDER: Chief Justice Barker also wanted to say a few words about his parting colleagues.

COMMENTS OF CHIEF JUSTICE WILLIAM M.  
BARKER

CHIEF JUSTICE WILLIAM M. BARKER: I want to thank the people who have put this on. It has been a time for us to reminisce on the Court and for you to get some insight into these folks. This is a day that will be a highlight for me.

Someone told me one time—if you'll think about it you may tend to agree—that if you can count on your hand five real, real friends you are pretty fortunate. I can count on my right hand five friends: these three here, Connie Clark, and Justice Janice Holder who is over in Memphis and was unable to be here today. We are not only colleagues in the sense of getting our work out and doing the business of the Court, we think, in a professional way. I can tell you that we are really close friends, and I miss these guys.

So I just want you to know that even though I had the privilege of serving eight years with them, it was apparently—Frank, as you can tell from his talk, is the historian of the group—about as long as a group of five people without a chance have served in about twenty-five or thirty years. It's more than that he says. So this is a change for us.

Do you realize that within the space of twelve months with the retirement of these three folks and even with the optimistic and hopeful assumption that I along with Justices Holder and Clark will be retained this summer, this Court will undergo a 60% turnover? I'm looking forward to it. As Frank has indicated, we have got some pretty good things to build on. I am very confident.

The first thing I want you to know as you sit here today is that now that you are all retired, as the Chief Justice, I have to fill vacancies from time to time when people are sick or have conflicts. Justice Birch, I am going to appoint you to go to Pickett County to try a boundary

line dispute. Justice Drowota, I am going to appoint you to go to Lake County, and I want you to try a bad ax-murder case. Justice Anderson, I am going to send you down to Bedford County where you can try a custody dispute. That way you will stay in touch. Thanks for letting us be here today.

### COMMENTS OF PROFESSOR PENNY WHITE

PROFESSOR PENNY WHITE: Thank you so much, Justices Barker and Clark, for being here and all the other judges in the audience. Will policy journal staff members please stand including Lee Evans, last year's editor.

As you can tell from this program, there has been a lot of work put into it. There is one person who put more work into it than is imaginable and who has managed to make herself absent from the stage. Maha, will you please come and accept a little token of appreciation from the policy staff? This is Maha Ayesh. She has been the working oar behind this program, so join me in thanking her.

Justices, you are going to need something to do now that you are retired. The journal staff has a gift for each of you. This includes a subscription to the *Tennessee Journal of Law and Policy*. This is a small gift for each of you from the journal staff.

This is the first time in a long, long time that I have regretted not having longer to serve with you gentlemen. It's not that I didn't regret it a long time ago, but I got over that. One of the reasons that I regretted it so much today is that it just feels unbelievable that I had the opportunity to work with you all and to be a small part of what we have heard about today. It's overwhelming to me, and it's overwhelming to know really the contribution you all have made.

I hope as you sat there that each of you has taken some time and reflected really upon your greatness because



that's what this has been about. It is, I know for me personally, such an honor that each of you would come out of retirement or almost retirement to be here. So thank you for being here.

