IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

MICHAEL MURPHY v. RICHARD SARTA ET AL.

Circuit Court for Hamblen County
No. 13CV127

No. E2020-00445-COA-R3-CV

ORDER

On September 15, 2020, this Court entered an order directing the appellant, Michael Murphy, to show cause why this appeal should not be dismissed as having been untimely filed. Appellant responded asserting that he is attempting to appeal issues with regard to both the Trial Court's November 8, 2019 order and its February 13, 2020 order. The November 8, 2019 order denied appellant's motion for a new trial. With regard to issues raised in the motion for new trial, Appellant failed to timely file his appeal, as explained fully below. Appellant, however, did timely file his notice of appeal with regard to the February 13, 2020 order regarding discretionary costs.

The Trial Court entered judgment upon the jury's verdict on June 20, 2019. Appellant timely filed a motion for a new trial pursuant to Rule 59 of the Tennessee Rules of Civil Procedure. The Trial Court denied the motion for a new trial by order entered November 8, 2019. The November 8, 2019 order also granted a motion for discretionary costs that had been filed by the appellees. Appellant then filed a motion regarding the November 8, 2019 order. By order entered February 13, 2020, the Trial Court disposed of the motion concerning the November 8, 2019 order. Appellant filed his notice of appeal in this Court on March 16, 2020.[1]

A notice of appeal "shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from . . .." Tenn. R. App. P 4(a). "The thirty-day time limit for filing a notice of appeal is mandatory and jurisdictional in civil cases." *Albert v. Frye*, 145 S.W.3d 526, 528 (Tenn. 2004); *also, e.g., Ball v. McDowell*, 288 S.W.3d 833, 836 (Tenn. 2009). If a notice of appeal is not timely filed, this Court is

[1] Thirty days from February 13, 2020 would have been March 14, 2020, which was a Saturday. As such, appellant had until Monday, March 16, 2020 within which to timely file his notice of appeal. *See* Tenn. R. App. P. 21(a) (explaining computation of time).

Appendix A

not at liberty to waive the procedural defect. Tenn. R. App. P. 2.; *also, e.g., Arfken & Assocs., P.A. v. Simpson Bridge Co., Inc.*, 85 S.W.3d 789, 791 (Tenn. Ct. App. 2002).

The thirty-day time limit for filing a notice of appeal may be extended by the timely filing of one of four allowed motions pursuant to Tenn. R. Civ. P. 59.01. Those motions are:

> (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment.

Tenn. R. Civ. P. 59.01. Rule 59.01 clearly and unambiguously provides that these four motions "are the only motions contemplated in these rules" which will extend the time for filing an appeal. Tenn. R. Civ. P. 59.01. Furthermore, Rule 59.01 provides: "Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings." Tenn. R. Civ. P. 59.01.

"[A] motion for discretionary costs is not among the motions that toll the time for taking an appeal." *Gunn v. Jefferson Cnty. Econ. Dev. Oversight Comm., Inc.*, 578 S.W.3d 462, 464 (Tenn. Ct. App. 2019). This Court has held "that a motion for discretionary costs does not 'arrest the finality' of the trial court's judgment for purposes of appellate jurisdiction, regardless of whether the motion is filed prior to the entry of final judgment." *Id.* at 468. It, therefore, logically follows that a motion seeking to amend an order for discretionary costs likewise would not toll the time for filing a notice of appeal.

The record before us on appeal does not contain a copy of the appellant's motion regarding the November 8, 2019 order.[2] This deficiency, however, does not impact our analysis regarding jurisdiction. We are able to determine from the Trial Court's February 13, 2020 order that the motion sought to amend or revise the November 8, 2019 order related to the amount of discretionary costs. The February 13, 2020 order stated that "[appellant's] ***Motion*** to amend and/or revise the Court's Order of November 8, 2019 related to the amount of discretionary costs awarded to the [appellees]" was "well-taken and should be granted," and set out a corrected amount for the award of discretionary costs.

Furthermore, although the filing of a second motion pursuant to Rule 59 is in certain circumstances permissible if the judgment was amended in response to a previous Rule 59

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[2] The record does contain appellees' response to appellant's motion regarding the November 8, 2019 order. This response states: "According to the [appellant's] Motion to Alter or Amend the Order on Post-Trial Motions, the [appellant] is seeking **only** to alter or amend the Order on Post-Trial Motions as to the Court's ruling on discretionary costs."

motion, the judgment in this case was not altered in response to appellant's motion for a new trial. *See cf. Legens v. Lecornu*, No. W2013-01800-COA-R3-CV, 2014 WL 2922358, at *12–13 (Tenn. Ct. App. June 26, 2014) (discussing the filing of a second Rule 59 motion to alter or amend), *no appl. perm. appeal filed.* As such, if we were to consider appellant's motion regarding the November 8, 2019 order as one filed pursuant to Rule 59, the motion would be an impermissible motion to reconsider.

The thirty-day time period for filing a notice of appeal of the judgment began to run when the Trial Court entered its November 8, 2019 order denying plaintiff's motion for a new trial. Appellant's motion with regard to discretionary costs did not operate to toll the time for filing a notice of appeal. As appellant failed to file his notice of appeal within thirty days of entry of the order denying his motion for a new trial, the notice of appeal was untimely filed as to any issues regarding the motion for new trial or the underlying judgment, thus depriving this Court of jurisdiction to consider these issues.

Appellant did timely file his appeal with regard to the February 13, 2020 order regarding discretionary costs. As such, this appeal shall proceed with regard to issues regarding discretionary costs only.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

MICHAEL MURPHY v. RICHARD SARTA ET AL.

Circuit Court for Hamblen County

No. 13CV127

No. E2020-00445-COA-R3-CV

RESPONSE

Comes the Appellant, Michael Murphy, and in Response to the appellate Court's Order to show cause why the appeal should not be dismissed as untimely, shows the Court as follows:

Appellant timely filed an appeal herein, March 16, 2020, within 30 days of the trial Court's February 13, 2020, final ruling on Plaintiff's Motion to Alter or Amend pursuant to Tenn.R.Civ.P.59.04, and the Notice of Appeal is therefore timely filed since the appeal period is tolled by the Rule 59.04 filing. Franklin-Murray Dev.Co.,L.P. v. Shumaker & Thompson, 2017 Tenn.App.LEXIS 567 (Tenn.Ct.App. Aug.18,2017). Plaintiff is appealing all issues, including discretionary costs.

The Rule 59.04 Motion was filed to allow the trial Court the opportunity to correct errors before the judgment became final so as to avoid unnecessary appeals, or a remand, and to prevent injustice from occurring. It was, again, timely due to the tolling of the 30 day filing period. Gotez v. Autin, 2016 Tenn.App.LEXIS 95 (Tenn.Ct.App. Feb. 10, 2016); Tenn.R.App.P. 4(b). There is no logic in forbidding a correction of a post-trial order by rule 59.04 for an obvious mistake overlooked by the judges and therefore causing an appeal.

The Appellant is certainly aware that motions for reconsideration of these Rule 59 motions are not allowed, and none was filed. The record before this Court is devoid of a Motion for Reconsideration. Plaintiff's Rule 59.04 Motion to Alter or Amend mentions the words "alter or amend" while mentioning the word "reconsider" zero times. It is noted that the lower Court file, including the expensive transcript of testimony, was received by the appellate clerk for filing well in advance of the August 3, 2020, deadline. Appellant requests that the record be filed.

Concerning the substance of the timely Rule 59.04 Motion to Alter or Amend of December 5, 2019 (appended), it involved matters regarding the trial Court's Order of November 8, 2019. The Rule 59.04 Motion was joined in by Defendants and granted by the trial judge. The procedural rules under Rule 59.01 do not limit post-trial motions to just one. Rule 52.02 even contemplates more than one filing, for instance.

Plaintiff was not attempting to relitigate the matter, but to give the trial Court an opportunity to revisit and correct an overlooked mistake and error that the Court failed to consider so the lower Court

could have the opportunity to correctly alter or amend the Order. Vaccarella v. Vaccarella, 49 S.W. 3d 307 (Tenn. Ct. App. 2001); Chadwell v. Knox County, 980 S.W. 2d 378 (Tenn. Ct. App. 1998).

The appeal is timely filed since the finality of the judgment is tolled by the Rule 59.04 Motion to Alter or Amend until it has been granted or denied. McCullough v. Johnson City Emergency Physicians, P.C. 2002, 106 S.W. 3d 36, appeal denied. Clear Water Partners, LLC v. Benson 2017, WL 376391, unreported. It is noted that the Parks case is not dispositive and did not involve the same matter as the present Rule 59.04, which was filed to prevent unnecessary appeals, or a remand, and to provide the trial Court an opportunity to correct errors before a judgment became final; the Court in Parks did allude to the principle that a Court should exercise its discretion in favor of allowing a case to be heard on its merits Parks v. Mid Atlantic Finance Co. Inc., 343 S.W. 3d 792, 798 (Tenn. Ct. App. 2011).

From all of which Appellant requests that the appeal not be dismissed.

RESPECTFULLY SUBMITTED:

Michael C. Murphy

MICHAEL C. MURPHY (BPR#007183)
Appellant
P.O. Box 1365
Morristown, TN 37816
423-581-1022

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the above Response has been served via U.S. Mail, postage prepaid, to the business address of Appellee's attorney, Ken Ward, this 29 day of September, 2020.

Michael C. Murphy

MICHAEL C. MURPHY

IN THE CIRCUIT COURT FOR HAMBLEN COUNTY, TENNESSEE

MICHAEL MURPHY,
Plaintiff,

v.

RICHARD SARTA,and
CHRISTINA SARTA

Docket No. 13CV127
(consolidated with 16CV220)

and

MICHAEL MURPHY,
Plaintiff,

v.

REBECCA KECK, d/b/a INGENUITY 101,RICHARD SARTA and CHRISTINA SARTA(TIMM),

Defendants.

TERESA WEST
CIRCUIT COURT CLERK
HAMBLEN COUNTY

DEC 05 2019

BY

MOTION

Comes the Plaintiff,Michael Murphy,pursuant to Tennessee Rules of Civil Procedure 59.04 and moves the Court to alter or amend the Order On Post-Trial Motions of November 8,received by Plaintiff from the Clerk on November 19,2019.Plaintiff requests the Court to specify and identify which particular court reporter expenses are being awarded to Defendant of $2,500,and to correct the amount in the third paragraph of the Order on page 2 which states $3,587.81,as well as to indicate whether the award is pursuant to TRCP 54.04(2).It is noted that Plaintiff has never agreed that the court reporter expenses were reasonable or necessary,particularly the ones for the April 2,2018,lengthy continuous five hour long deposition solely of Plaintiff by Defendants Sartas' counsel.From all of which, Plaintiff requests the relief sought and general relief.

RESPECTFULLY SUBMITTED:
Michael Murphy
MICHAEL MURPHY,Attorney
P.O.Box 1365
Morristown,TN 37816

CERTIFICATE

I hereby certify that I have mailed a true and exact copy of the above to Defendants' counsel via U.S.Mail,postage prepaid,at their business address,this December 5,2019.

Michael Murphy
MICHAEL MURPHY

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

MICHAEL MURPHY v. RICHARD SARTA ET AL.

Circuit Court for Hamblen County
No. 13CV127

No. E2020-00445-COA-R3-CV

ORDER

The notice of appeal in this case was filed on March 16, 2020. The notice of appeal states that appellant is appealing "the final Judgment entered in this action on February 13, 2020, preceded by an Order of November 8, 2019, denying Plaintiff's Motion for New Trial regarding the June 20, 2019, Judgment." A review of the record on appeal reveals that appellant did not timely appeal the November 8, 2019 order, thus depriving this Court of jurisdiction to consider any issues with regard to his motion for new trial.[1] In order to be timely, a notice of appeal "shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from . . .." Tenn. R. App. P. 4(a). "The thirty-day time limit for filing a notice of appeal is mandatory and jurisdictional in civil cases." *Albert v. Frye*, 145 S.W.3d 526, 528 (Tenn. 2004). We are unable to determine from the notice of appeal whether appellant is attempting to appeal issues with regard to his motion for new trial or whether he is attempting to appeal the award of discretionary costs contained in the February 13, 2020 order.

Accordingly, the appellant, Michael Murphy, is hereby ordered to on or before September 30, 2020 show cause why this appeal should not be dismissed as having been untimely filed.

PER CURIAM

[1] The November 8, 2019 order denied appellant's motion for new trial and constituted a final judgment for purposes of filing an appeal.

No - 0214

IN THE CIRCUIT COURT FOR HAMBLEN COUNTY. TENNESSEE

MICHAEL MURPHY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**Docket No. 13CV127**
RICHARD SARTA, and	)	**(consolidated with 16CV220)**
CHRISTINA SARTA	)	**NOTICE OF ENTRY REQUIRED**
	)	
~and~	)	
	)	
MICHAEL MURPHY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
REBECCA KECK, d/b/a INGENUITY 101, RICHARD SARTA and CHRISTINA SARTA (TIMM),	)	
	)	
Defendants.	)	

TERESA WEST
CIRCUIT COURT CLERK
HAMBLEN COUNTY
FEB 13 2020
By

ORDER ON PLAINTIFF MOTION RELATED DISCRETIONARY COSTS

This matter came on for hearing on the 7th day of February 2020, before the Honorable Alex E. Pearson, Circuit Court Judge, upon the Plaintiff's ***Motion*** related to the Court's Order entered November 8, 2019 awarding discretionary costs to the Defendants and denying the Plaintiff's Post-Trial Motions. At the hearing, the parties reviewed the Court's Order of November 8, 2019 and determined that there was a mathematical error in calculating the award of discretionary costs to the Defendants. Based upon calculations of the Court and the parties during the hearing, the correct amount of discretionary costs to be awarded to the Defendants is $3,499.81. The Court is of the further opinion that the Plaintiff's Motion related to amending/revising the amount of discretionary costs awarded to the Defendants in the Court's Order of November 8, 2019 is well-taken and should be granted. Therefore, it is hereby

Appendix B

ORDERED, ADJUDGED and DECREED that the Plaintiff's ***Motion*** to amend and/or revise the Court's Order of November 8, 2019 related to the amount of discretionary costs awarded to the Defendants is **GRANTED**. Pursuant to T.R.C.P. 54.02, the Defendants are awarded a judgment against the Plaintiff for discretionary costs in the amount of $3,499.81 for which execution may issue if necessary. It is further

ORDERED, ADJUDGED and DECREED that the statutory costs of this matter are taxed to the Plaintiff, Michael C. Murphy, P.O. Box 1365, Morristown, Tennessee, 37815-1365, and/or 1055 Claudette Drive, Talbott, TN 37877 (home address) for which execution may issue if necessary. It is further hereby

ENTER this 11 day of February, 2020

JUDGE ALEX E. PEARSON

APPROVED FOR ENTRY

TRAMMELL, ADKINS & WARD, P.C.

By: _____

Kenneth W. Ward, Esq. BPR#015707
Hannah S. Lowe, Esq. BPR#029281
Attorneys for Defendants
P.O. Box 51450
Knoxville, TN 37950-1450
kenward@tawpc.com (email)
(865) 330-2577 (phone)
(865) 330-2578 (fax)

RULE 58 CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this pleading has been served on all counsel of record by placing same in the United States Mail, postage prepaid, by delivering same to the office of said counsel, or via facsimile.

Michael C. Murphy, Esq.
P.O. Box 1365
Morristown, TN 37816

This 17 day of Feb, 2020.

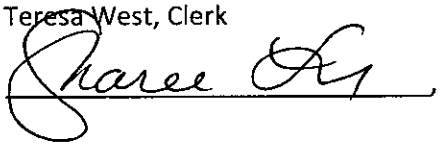
COURT REPRESENTATIVE

State of Tennessee, Hamblen County

I, Teresa West, Clerk of Circuit, General Sessions and Criminal Courts of Hamblen County, do hereby certify that the foregoing is a true and exact copy of this document has been served upon by placing a true and exact copy in the US Mail or by fax or by hand delivery or by email as indicated below.

This the day 17 February 2020

Teresa West, Clerk

 , Deputy Clerk

Hand Mail Fax Email	Kenneth Ward Env provided	Hand Mail Fax Email	Michael Murphy PO Box 1365 Morristown, TN 37816
Hand Mail Fax Email		Hand Mail Fax Email	
Hand Mail Fax Email		Hand Mail Fax Email	

IN THE CIRCUIT COURT FOR HAMBLEN COUNTY, TENNESSEE

MICHAEL MURPHY,

Plaintiff,

vs.

RICHARD SARTA, and
CHRISTINA SARTA

~and~

MICHAEL MURPHY,

Plaintiff,

v.

REBECCA KECK, d/b/a INGENUITY 101, RICHARD SARTA and CHRISTINA SARTA (TIMM),

Defendants.

TERESA WEST
CIRCUIT COURT CLERK
HAMBLEN COUNTY
NOV 08 2019
BY

Docket No. 13CV127
(consolidated with 16CV220)
NOTICE OF ENTRY REQUIRED

ORDER ON POST-TRIAL MOTIONS

This matter came on for hearing on the 11th day of October 2019, before the Honorable Alex E. Pearson, Circuit Court Judge, upon the Plaintiff's ***Motion for New Trial***, Plaintiff's ***Amended Motion for New Trial***, and the Defendants' ***Motion for Discretionary Costs***. A copy of the transcript of the hearing related thereto is attached hereto as **Exhibit 1** and incorporated herein by reference.

Based upon the argument of counsel, and the records as a whole, this Court is of the opinion that the Plaintiff's ***Motion for New Trial***, all eleven (11) grounds stated, is not well-taken, should be overruled and should be denied.

This Court is over the further opinion that the Plaintiff's ***Amended Motion for New Trial***, is not well-taken, should be overruled and should be denied.

This Court is of the further opinion that the Defendants' ***Motion for Discretionary Costs*** is well-taken and should be granted, in part. In particular, it is the opinion of this Court that the Defendants are entitled to an award of discretionary costs in the amount of ~~$3,587.81~~ $2,500.00 on 11-6-19 which represents all costs sought by Defendants with the exception of expenses of $2,125.00 related to Defendants' expert witness, Gary Cobble, and $2,721.25 related to Defendants' expert witness, Gary Cobble. Therefore, it is hereby

ORDERED, ADJUDGED and DECREED that the Plaintiff's ***Motion for New Trial*** and Amended Motion for New Trial, jointly consisting of eleven (11) grounds are **DENIED** in all respects for the specific reasons set for in attached **Exhibit 1**. It is further hereby

ORDERED, ADJUDGED and DECREED that the Defendants' ***Motion for Discretionary Costs*** is well-taken and should be GRANTED, IN-PART. Defendants are awarded a judgment against the Plaintiff for discretionary costs in the amount of $3,587.81 for which execution may issue if necessary. It is further

ORDERED, ADJUDGED and DECREED that the statutory costs of this matter are taxed to the Plaintiff, Michael C. Murphy, P.O. Box 1365, Morristown, Tennessee, 37815-1365, and/or 1055 Claudette Drive, Talbott, TN 37877 (home address) for which execution may issue if necessary. It is further hereby

ENTER this 6 day of November, 2019

JUDGE ALEX E. PEARSON

APPROVED FOR ENTRY

TRAMMELL, ADKINS & WARD, P.C.

By: _____

Kenneth W. Ward, Esq. BPR#015707
Hannah S. Lowe, Esq. BPR#029281
Attorneys for Defendants
P.O. Box 51450
Knoxville, TN 37950-1450
kenward@tawpc.com (email)
(865) 330-2577 (phone)
(865) 330-2578 (fax)

RULE 58 CERTIFICATE OF SERVICE

The undersigned hereby certifies that an exact copy of this pleading has been served on all counsel of record by placing same in the United States Mail, postage prepaid, by delivering same to the office of said counsel, or via facsimile.

Michael C. Murphy, Esq.
P.O. Box 1365
Morristown, TN 37816

This 15 day of Nov, 2019.

_____
COURT REPRESENTATIVE

IN THE CIRCUIT COURT OF HAMBLEN COUNTY,AT MORRISTOWN,TN

MICHAEL MURPHY,
Plaintiff,

v.

No. 16CV22
(and 13CV127)

TERESA WEST
CIRCUIT COURT CLERK
HAMBLEN COUNTY
OCT 08 2019
BY

REBECCA KECK dba INGENUITY 101, and
RICHARD SARTA and CHRISTINA SARTA,
Defendants.

AMENDED MOTION FOR NEW TRIAL

Comes the Plaintiff,Michael Murphy,and amends his Motion for New Trial filed July 18,2019,and adds as follows for No. 11:

11. Juror James Coffey withheld information from the Court and the parties during voir dire that in fact he or his employer had been a Defendant in at least 12 lawsuits,with him being listed individually in around five lawsuits and in his capacity as the Lieutenant or officer of Hamblen County Jail(HCSD)operations in another seven or so that were currently pending at the time of the June 6,2019,trial herein.His wife is also employed in the HCSD as a corrections officer.These 12 lawsuits involved allegations by a Plaintiff against him as a Defendant or as an officer of his employer being sued as a Defendant,and obviously constitutes a situation whereby this juror would be prejudicial and not an impartial juror.

Juror Terry Norton withheld information from the Court and the parties during voir dire that his sister,Mindy Seals,has been an attorney in this district for some 35 years and shared legal space at one time with the Plaintiff.The relationship did not end amicably,and certainly gives doubt to this juror being prejudicial,and not being an impartial juror.

From all of which,including the original Motion for New Trial filed herein and adopted by reference,Plaintiff moves the Court upon a hearing to grant a new trial in the interests of justice.

RESPECTFULLY SUBMITTED:
Michael C. Murphy
MICHAEL C. MURPHY,Attorney
P.O.Box 1365
Morristown,TN 37816

CERTIFICATE

I hereby certify that I have mailed a true and exact copy of the above to Defendants' attorney,via U.S.Mail,postage prepaid,this 3 day of October,2019.

Michael C. Murphy
MICHAEL C. MURPHY

IN THE CIRCUIT COURT OF HAMBLEN COUNTY,AT MORRISTOWN,TN

MICHAEL MURPHY,
Plaintiff,

v.

No. 16CV220
(and 13CV127)

REBECCA KECK dba INGENUITY 101, and
RICHARD SARTA and CHRISTINA SARTA,
Defendants.

MOTION FOR NEW TRIAL

Comes the Plaintiff,Michael Murphy,and moves for a new trial pursuant to TRCP 59 concerning the June 20,2019,Judgment regarding the June 6,2019, trial by Judge Alex Pearson,and says as follows.

1. The Court erred in failing to declare a mistrial as requested by Plaintiff due to the use by Defendants' counsel Ken Ward of a large Jury Verdict Form on the digital display screen facing the jurors during Opening remarks that he had marked in red "NO" ink on the black and white form where liability was to be chosen(Motion for New Trial Exhibit 1).The large screen was overhead near the Judge's bench facing the jury box.The Court did tell Ward to remove it upon objection and then attempted to caution the jury to disregard it.However,the Court during Closing remarks allowed it over Plaintiff's objection,and denied Motions for a mistrial concerning both instances.The jury form returned by the jury as their verdict was identical to that marked in red by Ward in his visual exhibit shown twice to the jury.

It is also noted that at one point as a first morning break was beingheld Ward loudly told his client Richard Sarta in front of the jury still departing the jury box that Sarta had done a good job on the witness stand,to which he replied "I just told the truth".The Court cautioned Ward outside the presence of the jury,but Ward's misconduct was evident through the entire trial.

2. The Court erred in excluding res ipsa loquitur at trial as a theory of liability recovery based on an inference of negligence since it was established that exclusive control of the automatic doors was in the hands of the Defendants,and that injuries such as the 2012 near amputation of a finger(MNT Ex.2) do not ordinarily happen to the public walking through a door absent lack of due care.The injury occurred to Plaintiff from behind to his hand as he was proceeding and looking foward.Res ipsa loquitur is especially relevant herein since witness Rick Eldridge of Cumberland Glass testified that he had tried to work on these doors for the prior owner when they were previously malfunctioning by closing too fast,but due to their age(1961)he could basically only band aid the problem in that

mechanical replacement parts for these doors could no longer be found due to their age.In addition,a photograph of the doors (MNT Ex.3)taken just a few weeks after the injury shows a severe misalignment of the doors,confirmed by both Rebecca Keck as well as Defendants' expert Gary Cobble.Richard Sarta testified at the one day trial that the doors were at a point in time following the injury used only manually ,rather than automatic,because "the doors were not working".Cobble stated that he was unable to examine the automatic doors since they were only being used as manual operation when he visited the structure in 2019.(In addition,the Court erred in his pretrial ruling(May 17,2019)that Plaintiff could not even mention res ipsa loquitur to the jury in his Opening Statement.)Absentee landlord Sarta admitted that from 2004 when he bought the property through the date of injury in 2012 he had not once inspected,maintained,or serviced these public entry doors(which had most likely not been in use some ten years prior to his purchase),nor did he employ anyone to do so during this time period.

3. The Court erred in not recusing himself from the case as requested by Plaintiff pretrial due to Judge Pearson's stated remarks of May 17,2019,of "I just want this case over with",and on previous occasions,rather than considering anyMotions with regard to the merit that might cause any rescheduling for any reason whatsoever.

4. The Court erred in allowing Defendants' expert Cobble to testify over Plaintiff's objection to hearsay in stating to the jury that there were "no safety defects" concerning the automatic doors on June 22,2012,basing his statement on a July 25,2012,report sent to Defendants' insurance adjustor by "Crawford and Company"(Brian Dougherty,who was not called by them to testify about his examination of the automatic doors in 2012).Cobble revealed that he was unable to examine the doors when he visited the building in 2019,nearly seven years after the injury,because the doors were only being operated manually.

5. The Court erred in restricting Plaintiff from mentioning in his Voir Dire,Opening Statement,and examination of witnesses any reference to the American National Standards Institute(ANSI) safety standards for automatic doors(MNT Ex.4),as well as any reference to the theory of punitive damages.The Court also erred in restricting Plaintiff from mentioning punitive damages at trial,such as when Ward told the jury that Plaintiff was asking for $147,000 but Plaintiff could not explain to them that the figure also included punitive damages as well as compensatory. It is also noted that at the trial the jurors were called at random as instructed of the Clerk by the Court,rather than by panels(eight in this case,which was the only civil trial in the June term of Court).That procedure could allow the Clerk to basically pick the makeup of the jury(i.e. occupations,laborer or supervisor,retired or disabled,rural or urban dweller).

6. The Court erred in not allowing Plaintiff to amend his original Complaint,which requested punitive damages,by adding the statutory language since amendments are to be granted liberally and certainly Defendants had notice for six years(MNT Ex.5).The Court then further erred at trial in excluding punitive damages from consideration by the jury.Testimony showed a callous disregard for public safety by the Defendants in not inspecting, servicing,or maintaining the automatic doors during the entire period from 2004 to the 2012 date of injury.Each door weighed about 300 pounds and was triggered by stepping on a floor mat, a dangerous condition with no warnings whatsoever that automatic doors were in use,no warnings to show "Do Not Enter" the other identical glass door,or even an "Enter" or "Exit" sign.Their entryway was a booby trap in essence(when used automatically rather than manually).Nothing whatsoever complied with the ANSI safety regulations in effect on the date of the injury,which had previously been adopted by the City of Morristown.To allow 1961 automatic doors not to operate safely to the public in 2012 is against public policy.Richard Sarta testified that if he had bought a house with a fireplace he would of course have had it checked by a chimney expert,but did not think it was necessary to have his automatic doors checked,inspected,serviced,or maintained,showing a wanton and outrageous disregard for the safety of public invitees.An important purpose of punitive damages is to deter such reckless conduct.

7. The Court erred in not disqualifying Ward from his obvious conflict of dual duties he undertook April 10,2019,to represent both the Sartas and then Keck,who for six years had been attempting to point fingers at each other regarding who was in control of what areas of the building concerning fault of the other.Ward was trying to dump liability on Keck,the non-covered Codefendant,for six years.Plaintiff had also requested time to seek a formal ethics board opinion and ruling.

8. The evidence presented at trial by Defendants was insufficient to support a finding by the jury on Defendants' behalf,and was contrary to the law and weight of evidence.

9. The Court erred in not ordering re-Mediation as requested by Plaintiff since Defendant Sartas' attorney Ward showed up at the April 2,2019,mediation(which took six years to obtain and is required by the Local Rules)without his clients and kept a meaningful Mediation in this matter from occurring.

10. The Court erred in forcing Plaintiff to trial without his medicalproof,especially the medical deposition testimony of his treating physician Dr. Douglas Calhoun of Knoxville Orthopedic Clinic(MNT Ex.6).The deposition of a Plaintiff's treating physician is the heart of a personal injury case for very many reasons.Plaintiff had requested that the case be continued from its first setting of June 6,2019,in order to take the medical deposition due to the misconduct of Defendants' counsel Wardand this was the first motion to continue the trial by any party.

The length of six years was due to various factors,including three TRCP 56 Motions by Defendants filed over the course of the litigation ,and not caused by the Plaintiff or the Court(who inherited the case due to the illness and death of the previous Judge).In his May 23,2019,continuance motion Plaintiff explained that Defendants' lawyer Ward had been contacted several times since April 5,2019,requesting the stipulation to the medical records in lieu of Depositions (MNT Ex.7),with no response from him.Apparently Ward was stringing Plaintiff along until after the May 6,2019,deposition deadline.Defendants' counsel should not be allowed to profit from his own misconduct in that he has an ethical duty to both respond and communicate with Plaintiff's counsel.In fact,it was not until June 5,2019,at a hearing set by the Court one day before trial that Ward finally stated that he would not stipulate to the medical records in lieu of a deposition.The Court abused its discretion.Plaintiff expressed to the Court that if it took six years to get this far,then do it right(the medical deposition could have been done within two weeks).The Court had previously refused to grant Plaintiff's request to file an interlocutory appeal.In addition to the relevancy of a Plaintiff's treating physician's deposition to damages,it also has value establishing crucial credibility of the Plaintiff in all aspects of the case.Such testimony would include from the treating physician that the Plaintiff was sincere in his complaints,truthful,and cooperative during the course of treatment,for instance.Ward mentioned throughout the trial to the jurors that Plaintiff had not taken his doctor's deposition, but not mentioning that the reason was the subterfuge of Ward. Ward for example asked Plaintiff on cross-examination if he had taken his physician's deposition.The Court erred in not granting Plaintiff's mistrial motion concerning Ward stating in his closing remarks that the jury could not award future medicals to Plaintiff by order of the Judge due to insufficient evidence (i.emedical deposition),a ruling made outside of the presence of the jury and with no reference by the Court to insufficient evidence as claimed by Ward.

Plaintiff reserves the right to amend the Motion for New Trial once he has been given the opportunity to speak with the jurorsFrom all of which,Plaintiff requests the Court upon a hearing to grant a new trial in the interests of justice,and for general relief as the Court deems proper.

RESPECTFULLY SUBMITTED:

Michael C. Murphy

MICHAEL C. MURPHY,Attorney
P.O.Box 1365
Morristown,TN 37816
(423) 581-1022

CERTIFICATE

I hereby certify that I have mailed a true and exact copy of the above via U.S.Mail,postage prepaid,to Ken Ward at his business address,this 18 day of July,2019.

Michael C. Murphy

MICHAEL C. MURPHY

COPY

MNT Ex. 1

IN THE CIRCUIT COURT FOR HAMBLEN COUNTY, TENNESSEE

MICHAEL MURPHY, Plaintiff, v. RICHARD SARTA, and CHRISTINA SARTA ~and~ MICHAEL MURPHY, Plaintiff, v. REBECCA KECK, d/b/a INGENUITY 101, RICHARD SARTA and CHRISTINA SARTA, Defendants.	)	Docket No. 13CV127 (consolidated with 16CV220)

JURY VERDICT FORM

We, the Jury, unanimously answer the questions submitted by the Court as follows:

1. Was the defendant Rebecca Keck, d/b/a Ingenuity 101 at fault?

ANSWER: _____ **(YES OR NO)**

(If your answer to Question 1 was "NO" put a "0" in the space provided in Question 5 for Rebecca Keck, d/b/a Ingenuity 101 and proceed to Question 2)

2. Was the defendant Richard Sarta at fault?

ANSWER: _____ **(YES OR NO)**

(If your answer to Question 2 was "NO" put a "0" in the space provided in Question 5 for Richard Sarta and proceed to question 3)

EXHIBIT 5

3. Was the defendant Christina Sarta Timm at fault?

ANSWER: No **(YES OR NO)**

(If your answer to Question 3 was "NO" put a "0" in the space provided in Question 5 for Christina Sarta)

(If your Answers to Questions 1, 2 AND 3 were "NO" then you are done. Stop your deliberations, sign the verdict form and contact the Court Officer)

(Otherwise go on to question 4)

4. Was the Plaintiff Michael Murphy at fault?

ANSWER: _____ **(YES OR NO)**

(Proceed to Question 5. If your answer to Question 4 was "NO" put a "0" in the space provided in Question 5 for Michael Murphy)

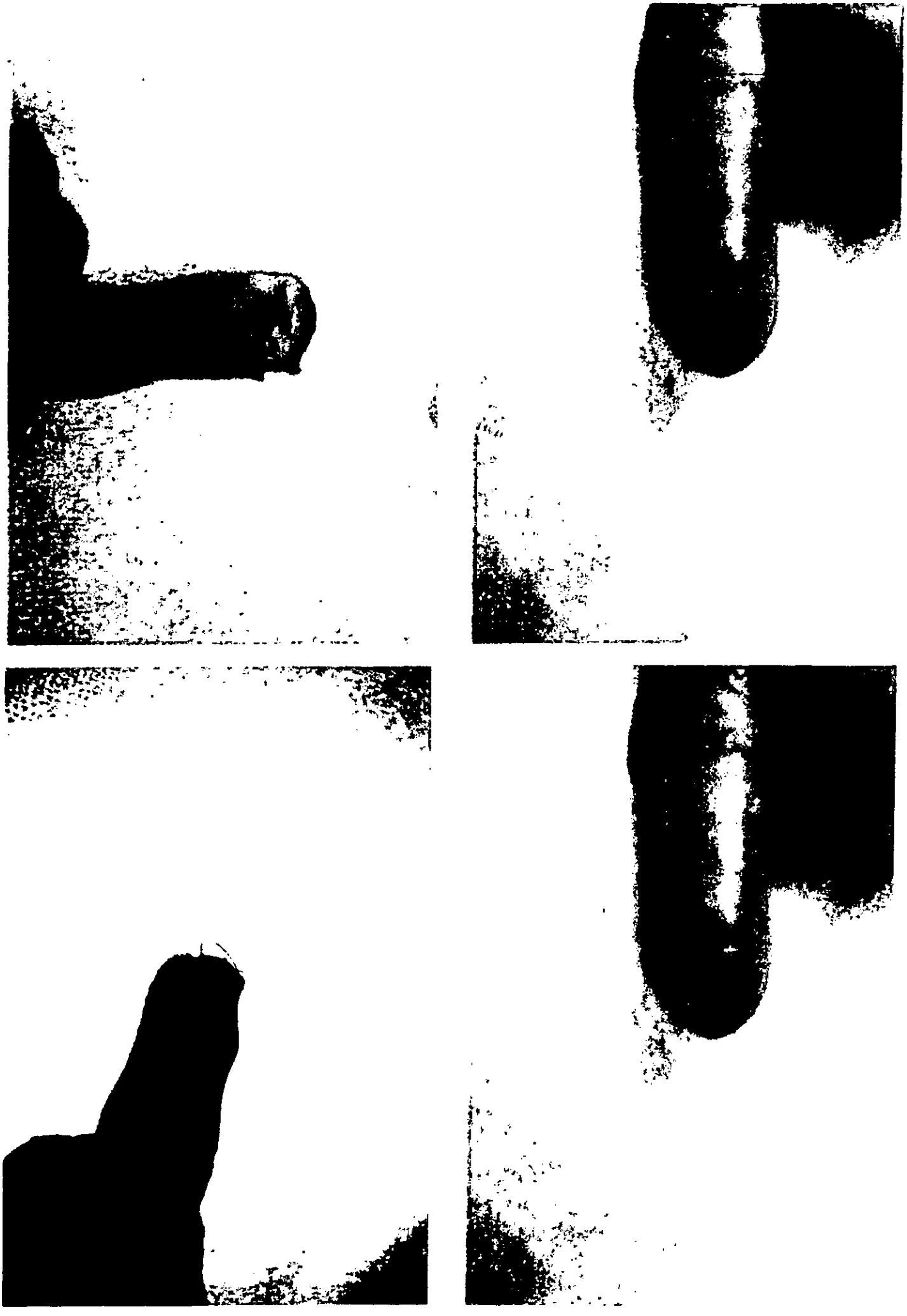
5. Using a 100% to represent the total fault related to the incident that is the subject matter of this case, state in percentages what proportionate part of that fault is attributable to the following parties:

Rebecca Keck d/b/a Ingenuity 101:		_____%
Richard Sarta:		_____%
Christina Sarta:		_____%
Michael Murphy:		_____%
	TOTAL	100%

5. What sum of money, if necessary, to fairly and reasonably compensate the Plaintiff, Michael Murphy, for all injuries, losses and damages, if any, proximately sustained by him as a result of the incident that is the subject matter of this case, without regard to whose fault caused those injuries, losses or damages?

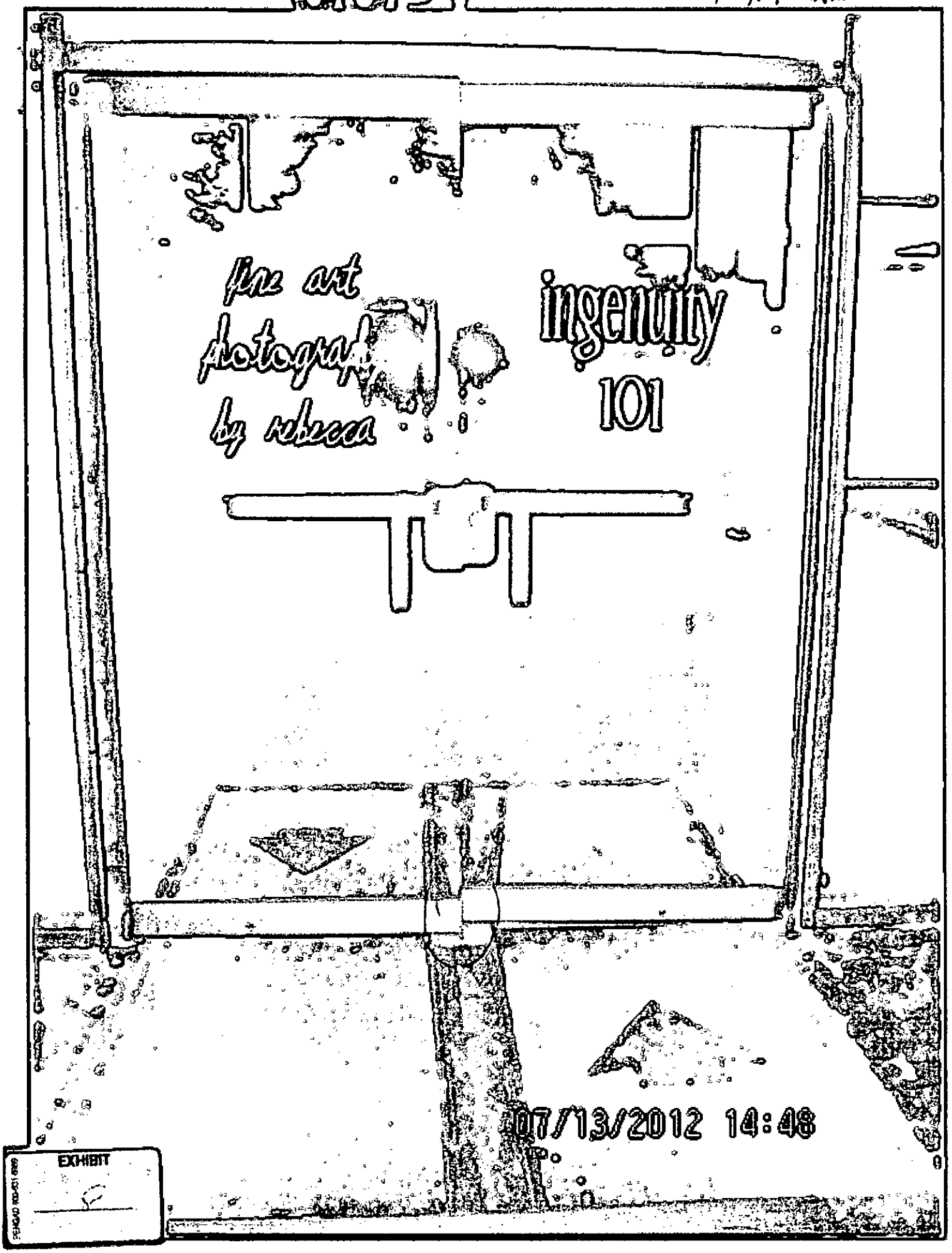
$_____

MN
Ex.2



COPY

MNT Ex. 3



EXHIBIT

MNT Ex. 4

ANSI/BHMA A156.10-2011 current
Revision of ANSI/BHMA A156.10-2005

STANDARD

FOR

POWER OPERATED PEDESTRIAN DOORS

SPONSOR

BHMA
builders hardware manufacturers association

BUILDERS HARDWARE MANUFACTURERS ASSOCIATION, INC.

Approved American National Standard
ANSI

American National Standards Institute
Approved August 2, 2011

7.1 Two guide rails shall be installed on the swing side of each door and shall project from the face of the door jambs for a distance of not less than the width of the widest door leaf.

Exception #1: A wall or separator may be used in place of a rail, provided that it meets the criteria in 7.2 through 7.5.

Exception #2: Guide rails for swinging doors serving both egress and ingress shall project out from the face of the door jambs on the swing side to no less than the outside leading edge of the required activating carpet (See 3.2.4) less 5 in (127 mm). (See Figure A-4)

7.2 Guide rails shall be a minimum of 30 in (762 mm) high measured from the floor surface.

7.3 Guide rails shall have panels or dividers to inhibit access to the protected area.

7.4 There shall be a maximum of 6 in (152 mm) clearance between the rail and the door in the fully open position or between the rail and the leading edge of the door at the point in its arc of travel when it is closest to the rail. There shall be a 2 in (51 mm) minimum clearance between the rail at the hinge side and the door in the fully open position.

7.5 Free standing guide rails shall have a maximum dimension between the rail and the jamb (or other adjacent surface) of 2 in (51 mm).

8. MARKING

8.1 An arrow sign (See Figure 1) shall be visible from the approach side of a swinging door mounted on the door at a height 58 in ± 5 in (1427 ± 127 mm) from the floor to the center line of the sign. The sign shall be a minimum of 6 in (152 mm) in diameter, having a green circle surrounding a black arrow on a white background.

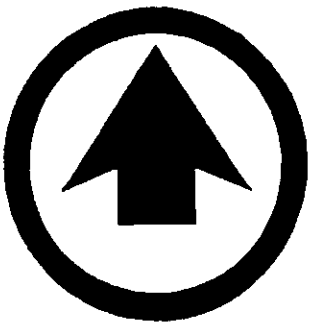


Figure 1

8.2 An international "DO NOT ENTER" sign (See Figure 2) shall be visible from the side of doors that would swing toward pedestrians attempting to travel in the wrong direction mounted on the door at a height 58 in ± 5 in (1427 ± 127 mm) from the floor to the center line of the sign. The sign shall be a minimum of 6 in (152 mm) in diameter, having a red circle with the wording, "DO NOT ENTER", in white letters in the red circle.

Figure 2

8.3 Swinging doors serving both egress and ingress shall be marked with a decal, visible form both sides of the door, with the words "Automatic Caution Door" (See Figure 3). The sign shall be mounted on the door at a height 58 in ± 5 in (1472 ± 127 mm) from the floor to the centerline of the sign. The sign shall be a minimum of 6 in (152 mm) in diameter and made with black lettering on yellow background.

Figure 3

1985

MNT Ex. 5

IN THE CIRCUIT COURT FOR HAMBLEN COUNTY
AT MORRISTOWN

2013 JUN 21 AM 11:40

BY _____
TERESA WEST
CIRCUIT COURT CLERK
HAMBLEN COUNTY

MICHAEL MURPHY,

Plaintiff,

vs

No. 13CV127

Rebecca Keck, dba Ingenuity 101,
and Richard Sarta, and Christina Sarta,

Defendants.

COMPLAINT

1. The Plaintiff is a citizen and resident of Hamblen County, Tennessee; the Defendant Rebecca Keck owns and operates Ingenuity 101, a place of business located at 101 East Main Street, Morristown, Tennessee, in a building owned by Defendants Richard Sarta and Christina Sarta.

2. On June 22, 2012, about 6:45 P.M., the Plaintiff went upon the premises for the first time as a business invitee for the purpose of looking at retail goods and merchandise offered to the general public by the Defendant Keck in her store.

3. Plaintiff avers that on the above date as he was entering the premises, the thick glass double doors nearly amputated his right hand middle finger. As result of the serious injury he has sustained permanent, as well as temporary, disabilities due to Defendants' negligence in maintaining safe premises. The bleeding Plaintiff spent some four hours in the hospital emergency room, receiving nine stitches in a "complicated repair" of deep lacerations to the mangled, mutilated, broken and crushed middle finger of the right hand which was splinted. The fingernail could not be saved, and has not properly grown back and is painful and disfigured. The right handed Plaintiff has lost the use of his right hand for such daily activities as writing, typing, driving, mowing, eating, personal health and grooming, lifting, gripping, and carrying.

4. Plaintiff avers that the Defendants, through their agents, servants and employees were negligent, among other things, in that:

(a) The Defendants, through their agents, servants and employees failed to warn the Plaintiff of the doorway when they knew or should have known said doorway constituted a hazardous and dangerous place. Apparently, unknown to Plaintiff, the identical doors upon information and belief were being operated as automatic doors whereupon the weight of the pedestrian stepping on a rubber mat device triggered the door to open. The entry appears as if it is one large glass doorway.

(b) The Defendants through their agents, servants, and employees failed to properly post the area with warning signs so the general public was aware of the condition of the doors, such as prominent signs indicating "caution automatic doors," or do not enter the left door, or prominently indicating it as exit only, or even clear signage marking Enter and Exit, for example.

(c) The Defendants through their agents, servants, and employees failed to take the necessary precautions to provide a safe premises, and safe passage to enter the store through the doorway.

(d) The Defendants through their agents, servants, and employees failed to provide necessary safety devices with which to proceed through the doorway. Plaintiff has entered hundreds of thousands of doorways without so much as a scratch, but nearly had his finger amputated entering Defendants' door. Defendants knew or should have known of the dangerous doorway, and should have provided safe and properly adjusted and maintained doors that did not guillotine the fingers of guests.

5. Plaintiff avers that the acts done were done by either the Defendants or their agents, servants, and employees of the Defendants and thus the negligence of said agents, servants and employees are imputable to Defendants.

(6). Defendants voluntarily agreed to pay the medical bills and "take care of everything" related to the injury. Keck stated at the emergency room that she and the building owner "needed to do something about those doors," whereupon Plaintiff pointed out that if it had been a small child the doors could have severed their hand. The approximate one inch thick solid glass doors probably weigh 300 pounds each.

(7) As result of the negligence of the Defendants, the Plaintiff suffered serious and disabling injuries for which he has been required to seek medical attention and has been under the care of a physician and remains under a physician's care with possible future surgery. Plaintiff has sustained hospital bills and additional medical bills for which he is liable and further has sustained permanent scarring and disability. Plaintiff has endured much pain and suffering and loss of enjoyment of life.

(8) Plaintiff avers that the sole, proximate cause of the injuries and losses he sustained has been the result of the negligence of the Defendants in failing to maintain safe premises.

WHEREFORE, PLAINTIFF demands judgment against Defendants in the sum of $72,000 as compensatory and punitive damages and demands a jury try this case.

BY: Michael Murphy

MICHAEL MURPHY
Attorney at Law
P.O. Box 1365
Morristown, TN 37816
(423) 581-1022

COST BOND

I secure costs in this cause.

Michael Murphy
MICHAEL MURPHY, ATTORNEY

MNT Ex. 6

KOC

1422 Old Weisgarber Road
Knoxville, Tennessee 37909

Murphy, Michael Cary DOB: 8/11/1951 File #244432

01/08/13

Mr. Murphy has reached maximum medical improvement. It has been about 7 months since his original injury but continues to have a nail deformity, starting to develop a pincer nail deformity, and some problems with some ingrowing of the nail. There has been some separation of the nail and has loss of some of the pulp with painful scar neuroma formation. It is affecting his ability to grasp and lift things. He has trouble grasping things and lifting things secondary to pain and discomfort and numbness so he will be issued an impairment based on this crushing injury to the tip of his finger.

According to the 6th Edition of Guides to the Evaluation of Permanent Impairment by the American Medical Association on page 391 table 15-2 a healed soft tissue injury to the digit with significant soft tissue or skin injury including nail abnormalities greater than 50% of the nail, I believe this would be a class I impairment class with a grade modifier of D. He has quite a bit trouble with this hand and therefore would give him a digital impairment of 9%. On page 421 table 15-12 a 9% impairment to a middle finger would equate out to 2% impairment to the hand or 2% impairment to the upper extremity or 1% impairment to the whole person.

PLAN: Mr. Murphy's been released to normal duties; however, if he continues to have trouble with the finger I will see him back and we can discuss trying to correct his pincer nail deformity or excise some of the scar material and neuroma but if he is doing reasonably well I will not necessarily make him return.

Douglas N. Calhoun, M.D./10450

Electronically signed by Douglas N. Calhoun MD on 01/10/2013 07:49 AM

DICTATED BUT NOT EDITED

MNT Ex. 7 Attachment

MICHAEL CARY MURPHY

Attorney and Counselor at Law

P. O. BOX 1365
MORRISTOWN, TENNESSEE 37816-1365

AREA CODE 423
TELEPHONE 581-1022

April 5, 2019

Ken Ward,Trammell
P.O.Box 51450
Knoxville,TN 37950

Circuit,Hamblen 16CV220

Rebecca Keck
100 Jadestone Ct.
Centerville,GA 31028

Ken:

As indicated in my March deposition, Rick Eldridge is familiar with the automatic doors involved in this case,and I have asked him to testify at the June trial. In my deposition I indicated what he would know,and gave contact information for him. If you need further information let me know.

*
Concerning the medical experts, Dr. Doug Calhoun(KOC) and Linda Rothery(MHH) NP, are the two involved and their records have been provided to you years ago. If you want to consider stipulating their records in lieu of taking depositions then we can discuss that.

Thank you for your time and consideration.

Sincerely,
Mike
Michael C. Murphy
Attorney at Law

*
May 1, 2019 KEN: This will confirm our telephone conversations whereby you indicated that you see no problem with agreeing to stipulate to the medical records in lieu of taking medical depositions(where they basically read their notes into the record as we both know). I have requested that you send me something indicating what you will and won't stiputlate to since you want me to draw it up, or at least send an example/sample of one you have used before so that I will know what you are expecting.It would seem to be the more efficient way to go rather than just sending it back and forth between us to get an agreement. Thanks.

MIKE

May 8,2019 KEN: I received your Stipulation to the medical bills,but you did not include your Stipulation to the medical records(examples attached) in lieu of depositions as agreed. Please send it. Thanks.
Mike
MIKE

CC: Hon. Judge Alex Pearson (copy mailed 5-15-19)

Recd
3-18

FILED
03/17/2021
Clerk of the
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

MICHAEL MURPHY v. RICHARD SARTA ET AL.

Circuit Court for Hamblen County
No. 13CV127

No. E2020-00445-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of Michael C. Murphy and the record before us, the application is denied.

PER CURIAM

Appendix C

IN THE SUPREME COURT
FOR THE STATE OF TENNESSEE

MICHAEL MURPHY,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**Appeal No.**
RICHARD SARTA, and	)	**E2020-00445-COA-R3-CV**
CHRISTINA SARTA	)	
	)	**Hamblen County Circuit Court**
~and~	)	**Docket No. 13CV127**
	)	**(consolidated with 16CV220)**
MICHAEL MURPHY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
REBECCA KECK, d/b/a	)	
INGENUITY 101, RICHARD	)	
SARTA and	)	
CHRISTINA SARTA (TIMM),	)	
	)	
Defendants.	)	

APPLICATION FOR PERMISSION TO APPEAL

MICHAEL C. MURPHY
Attorney for Appellant
P.O. Box 1365
Morristown, TN 37816-1365
(423) 581-1022
BPR No. 007183

Application pursuant to Rule 11 of Tennessee Rules of Appellate Procedure
From the Court of Appeals at Knoxville

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

MICHAEL MURPHY v. RICHARD SARTA ET AL.

Appeal from the Circuit Court for Hamblen County

No. 13CV127 and No. 16CV220

Alex Pearson, Judge

No. E2020-00445-COA-R3-CV

APPLICATION FOR PERMISSION TO APPEAL

Comes the Appellant, Michael Murphy, and seeks permission to appeal to the Tennessee Supreme Court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure from the Judgment and Opinion of the Court of Appeals, at Knoxville, filed October 14, 2020 (copy of Opinion appended). There was no petition for rehearing. The question for review is whether the intermediate appellate Court was correct in dismissing the appeal in part as untimely. The applicable standard of review is abuse of discretion.

Appellant timely filed an appeal herein, March 16, 2020, within 30 days of the trial Court's February 13, 2020, final ruling on Plaintiff's Motion to Alter or Amend pursuant to Tenn.R.Civ.P.59.04, and the Notice of Appeal is therefore timely filed since the appeal period is tolled by the Rule 59.04 filing. Franklin-Murray Dev.Co.,L.P. v. Shumaker & Thompson, 2017 Tenn.App.LEXIS 567 (Tenn.Ct.App. Aug.18,2017). Plaintiff is appealing all issues, including discretionary costs.

The Rule 59.04 Motion was filed to allow the trial Court the opportunity to correct errors before the judgment became final so as to avoid unnecessary appeals, or a remand, and to prevent injustice from occurring. It was, again, timely due to the tolling of the 30 day filing period. Gotez v. Autin, 2016 Tenn.App.LEXIS 95 (Tenn.Ct.App. Feb. 10, 2016); Tenn.R.App.P. 4(b). There is no logic in forbidding a correction of a post-trial order by rule 59.04 for an obvious mistake overlooked by the judges and therefore causing an appeal.

The Appellant is certainly aware that motions for reconsideration of these Rule 59 motions are not allowed, and none was filed. The record before this Court is devoid of a Motion for Reconsideration. Plaintiff's Rule 59.04 Motion to Alter or Amend mentions the words "alter or amend" while mentioning the word "reconsider" zero times. Concerning the substance of the timely Rule 59.04 Motion to Alter or Amend of December 5, 2019, it involved matters regarding the trial Court's Order of November 8, 2019, which included in **one** Order the Court's ruling on the issues of the Plaintiff's Motion For New Trial and the discretionary costs. The Rule 59.04 Motion was joined in by Defendants and granted by the trial judge. The procedural rules under Rule 59.01 do not limit post-trial motions to just one. Rule 52.02 even contemplates more than one filing, for instance. Only Motions to Reconsider are not allowed, not other post-trial motions.

Plaintiff was not attempting to relitigate the matter, but to give the trial Court an opportunity to revisit and correct an overlooked mistake and error that the Court failed to consider so the lower Court could have the opportunity to correctly alter or amend the Order. Vaccarella v. Vaccarella, 49 S.W. 3d 307 (Tenn. Ct. App. 2001); Chadwell v. Knox County, 980 S.W. 2d 378 (Tenn. Ct. App. 1998).

The appeal is timely filed since the finality of the judgment is tolled by the Rule 59.04 Motion to Alter or Amend until it has been granted or denied. McCullough v. Johnson City Emergency Physicians, P.C. 2002, 106 S.W. 3d 36, appeal denied. Clear Water Partners, LLC v. Benson 2017, WL 376391, unreported. It is noted that the Parks case is not dispositive and did not involve the same matter as the present Rule 59.04, which was filed to prevent unnecessary appeals, or a remand, and to provide the trial Court an opportunity to correct errors before a judgment became final; the Court in Parks did allude to the principle that a Court should exercise its discretion in favor of allowing a case to be heard on its merits Parks v. Mid Atlantic Finance Co. Inc., 343 S.W. 3d 792, 798 (Tenn. Ct. App. 2011).

As a matter of the need to secure settlement of important questions of law and public interest, and regarding the need for the Supreme Court to exercise its supervisory authority, the intermediate appellate Court did not correctly address the issue. The Gassaway case for instance alludes to the fact of "the Supreme Court's policy of liberality in resolving doubt as to the proper construction of statutes and rules regulating appeals in favor of the right of appeal". Gassaway v. Patty Tenn. App., 604 S.W. 2d, 60,61, citing Saunders v. McKenzie, 572 S.W. 2d 653 (Tenn.1978). As indicated, since there is no motion to "reconsider" filed herein, and Gassaway acknowledged that Tenn.App. Rule 4(b) and Tenn.R.Civ.P 59.01 toll or terminate the running of the 30 day appeal period by a Motion to Alter or Amend (applicable as well to a Rule 52.02 motion to amend or made additional findings of fact). Subjectivity and vagueness should not be allowed to relabel a Motion to Alter or Amend by the Court to prevent a case from being heard on appeal on its merits.

A Tenn.R.Civ.P 59.04 motion tolls the running of the 30 day period of appeal, as indicated by Tenn.R.App.P. 4(b) and Tenn.R.Civ.P. 59.01. Appellant timely filed an appeal herein, March 16, 2020, within 30 days of the final Order of the trial Court's denial of Plaintiff's Motion to Alter or Amend and the Notice of Appeal is therefore timely. Franklin-Murray Dev.Co.L.P., v. Shumaker & Thompson 2017 Tenn.App.LEXIS 567 (Tenn.Ct.App. August 18, 2017). The Rule 59.04 motion was filed to allow the trial Court to correct errors before the judgment became final so as to avoid unnecessary appeals, or a remand, and to prevent injustice from occurring. It was timely filed due to the tolling of the 30 day filing period, and the judgment appealed from was not final until February 13, 2020. Gotez v. Autin 2016 Tenn.App.LEXIS 95 (Tenn.Ct.App. February 10, 2016). The finality of the judgment is tolled by the Rule 59.04 Motion. McCullough v. Johnson City Emergency Physicians, P.C., 2002, 106 S.W. 3d 36, appeal denied.

Concerning the need to secure uniformity of decision and settlement of important questions of law, the Eastern Section intermediate appellate Court's decision runs counter to other decisions, such as the holding that a finality of judgment does not arise in the presence of a Tenn.R.Civ.P. 59.04 motion to alter or amend what a movant considered to be a clear error or injustice and thereby provides the trial court with an opportunity to correct any errors before its judgment becomes final. Clear Water Partners, LLC v. Benson 2017, 2017 WL 376391, unreported. (See also U.S. Bank, N.A. v. Tenn.Farmers Mut.Ins. Co., 410 S.W. 3d 820, 2012 Tenn.App.LEXIS 826, Tenn.Ct.App.Nov. 29, 2012, appealed denied.)

It is respectfully submitted that it is not in the interest of justice to relabel a TRCP 59.04 Motion and then call it a Motion to Reconsider that could keep the case from being reviewed, hypothetically speaking. That runs counter to the principle of allowing a case before the appellate Court to be heard on its merits and to promote justice. Plaintiff's Rule 59.04 Motion to Alter or Amend does not request the trial Court Judge to "reconsider" and "change" its ruling in any manner whatsoever, which would occur in any motion to reconsider, but for a correction of the Order and to clarify the lower Court's ruling prior to an appeal.

From all of which the Appellant respectfully requests the Honorable Supreme Court of Tennessee to grant the application for permission to appeal the decision of the intermediate appellate Court.

RESPECTFULLY SUBMITTED:

Michael C. Murphy

MICHAEL C. MURPHY
Attorney for Appellant
P.O. Box 1365
Morristown, TN 37816
423-581-1022
BPR#007183

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the above has been served via U.S. Mail, postage prepaid, to the business address of Appellees' attorney, Ken Ward, this 14 day of December, 2020.

Michael C. Murphy

MICHAEL C. MURPHY