Appendix "A"

FILED
01/09/2024
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 1, 2023

HAMID HOUBBADI v. KENNEDY LAW FIRM, PLLC ET AL.

Appeal from the Circuit Court for Montgomery County
No. CC21-CV-2457 Kathryn Wall Olita, Judge

No. M2022-01166-COA-R3-CV

The plaintiff filed an action for breach of contract and fraud against his former attorneys and the attorneys' law firm. The defendants moved for a judgment on the pleadings, arguing that the plaintiff failed to state a claim for which relief can be granted, and that the action was untimely. The trial court granted the defendants' motion, and, having determined that the plaintiff's action is untimely under Tennessee Code Annotated section 28-3-104(c)(1), we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which ANDY D. BENNETT, J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Hamid Houbbadi, Mountain City, Tennessee, Pro Se.

Joshua A. Powers, Chattanooga, Tennessee, and Nora A. Koffman, Johnson City, Tennessee, for the appellees, Kennedy Law Firm, PLLC, Kevin Kennedy, and Gordon Rahn.

OPINION

BACKGROUND

According to his complaint, Hamid Houbbadi ("Appellant") hired the Kennedy Law Firm in 2018 to represent him in a divorce and order of protection proceeding, both of which Appellant's wife initiated. Based on the wife's petition for an order of protection, the Montgomery County General Sessions Court ("general sessions court") had issued an ex parte order of protection against Appellant on September 26, 2018. A hearing was set for October 9, 2018. Appellant met with attorneys Kevin Kennedy and Gordon Rahn on

October 1, 2018. It is undisputed that Appellant hired Defendants and paid $1,000 towards the total fee. Mr. Rahn attended the October 9, 2018 court date, but a hearing did not occur. Appellant avers that a scheduling issue occurred with the court interpreter and that the hearing was reset to November 13, 2018. Appellant also avers that Mr. Rahn agreed to reset the hearing and continue the ex parte order without discussing the continuance with Appellant. The order entered October 9, 2018, provides that the ex parte order was continued by agreement of the parties but that Appellant could return to the marital home to retrieve his personal clothing and medication between 12:00 p.m. on October 9, 2018, and 5:00 p.m. on October 10, 2018.

Appellant murdered his wife in the marital residence on October 19, 2018. "[Appellant] was subsequently indicted for first degree premeditated murder, first degree felony murder in perpetration of or the attempt to perpetrate especially aggravated burglary, and especially aggravated burglary." *State v. Houbbadi*, No. M2022-01751-CCA-R3-CD, 2023 WL 8525144, at *1 (Tenn. Crim. App. Dec. 8, 2023). Following his trial, a "jury convicted [Appellant] of first degree premeditated murder, first degree murder during the perpetration of the felony of aggravated burglary, and especially aggravated burglary." *Id.* at *5. The criminal court sentenced Appellant to life in prison plus twelve years. *Id.*

On December 14, 2021, Appellant initiated the instant case in the Circuit Court for Montgomery County (the "trial court"), naming Mr. Kennedy, Mr. Rahn, and the Kennedy Law Firm (collectively, "Defendants" or "Appellees") as defendants. The complaint is captioned as "Claim of fraud and breach of contract." While it is handwritten and generally difficult to discern, the complaint seems to allege that Defendants defrauded Appellant when Appellant hired them; that Defendants failed to act in good faith in their representation of Appellant; that Defendants agreed to continue the ex parte order of protection without consulting Appellant; and that Defendants should have moved the general sessions court at the October 9, 2018 hearing for Appellant to have exclusive use and possession of his marital residence. Under the section titled "Prayers of relief," Appellant requests twenty million dollars in damages. Appellant also claims that he suffered economic damages due to Defendants' "unprofessional behavior, deshonsty [sic] and fraud and taking advantage of complain[ant's] nationality and broken english." Appellant alleges that he lost his house, car, furniture, and job, and that Appellant "would not charge on a murder charge [sic] if defendant Kenndy [sic] and Rahn did their jobs in good f[a]ith." Appellant also asked for a jury trial.

Appellees answered the complaint on January 18, 2022, admitting that they represented Appellant and appeared at the October 9, 2018 court date. They denied, however, agreeing to reset the order of protection hearing without Appellant's permission. Appellees claimed that they reset the hearing because of a scheduling conflict with the court interpreter but agreed to a window of time in which Appellant could go to the marital residence to retrieve various items. Appellees also denied that Appellant asked them to

move the general sessions court for an order providing Appellant exclusive access to the marital residence. Appellees raised several affirmative defenses, including the statute of limitations and that Appellant failed to state any claim for which relief could be granted.

Appellant proceeded to file several items, including a request for appointment of counsel and a notice for an evidentiary hearing, that are not ultimately relevant to the dispositive issue on appeal. On May 3, 2022, Appellees filed a motion for judgment on the pleadings and a supporting memorandum. Appellees argued that to the extent Appellant's claims sounded in fraud and breach of contract, those claims were inadequately pled under the Tennessee Rules of Civil Procedure. Alternatively, Appellees claimed that Appellant's cause of action actually sounded in legal malpractice and was untimely under Tennessee Code Annotated section 28-3-104. Regarding Appellant's alleged damages, Appellees urged that the losses "are simply not the result of any action or inaction by [Appellees,]" but rather "the result of a gruesome murder that [Appellant] was found guilty of committing in early 2022." Appellant filed a response to the motion for judgment on the pleadings on June 1, 2022. Therein, Appellant claimed that he "would not be charge [sic] and convicted with murder if [Appellees] did their job in good faith." For the first time, Appellant also argued that Mr. Kennedy had been having an affair with Appellant's wife prior to her death.

The trial court held a hearing on several pending motions, including Appellees' motion for judgment on the pleadings, on July 14, 2022. Appellant and a court interpreter participated by video-call. The trial court denied Appellant's motion for appointment of counsel,[1] but took the motion for judgment on the pleadings under advisement. The trial court also took under advisement a motion to amend the complaint filed by Appellant, which Appellees argued was futile.

The trial court entered its final order on August 8, 2022, denying Appellant leave to amend and granting Appellees' motion for judgment on the pleadings. As to breach of contract, the trial court found that Appellant failed to state a claim for which relief could be granted, noting that "[i]n that there are no specific terms of the agreement for general legal representation, Plaintiff has failed to state a claim for breach of the same as it relates to an unfiled motion." Explaining that fraud claims must be stated with particularity, the trial court also found that claim was not properly pled. Finally, the trial court found that to the extent Appellant was alleging his damages stemmed from Appellees' failure to move for exclusive use of Appellant's residence and continuing the ex parte order of protection, those claims sounded in legal malpractice. Because Appellant filed his complaint in 2021,

[1] Appellant sought appointed counsel from the trial court multiple times throughout these proceedings, the trial court ruling each time that as a civil litigant, Appellant had no right to a court-appointed attorney.

the trial court concluded that any claim for legal malpractice was untimely. All remaining motions or requests for relief were denied, and the trial court certified its order as final.

Appellant timely appealed to this Court.

ISSUES

Appellant states several issues for review; however, we have determined that two issues are dispositive in this appeal:

1. Whether the trial court erred in concluding that Appellant's claims sound in legal malpractice.

2. Whether the trial court erred in concluding that Appellant's cause of action was untimely under Tennessee Code Annotated section 28-3-104.

STANDARD OF REVIEW

The trial court resolved this case on a motion for judgment on the pleadings. Accordingly, the standard of appellate review is as follows:

> When reviewing orders granting a Tenn. R. Civ. P. 12.03 motion, we use the same standard of review we use to review orders granting a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim. *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). Accordingly, we must review the trial court's decision de novo without a presumption of correctness, *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997), and we must construe the complaint liberally in favor of the non-moving party and take all the factual allegations in the complaint as true. We should uphold granting the motion only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief.

Young v. Barrow, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003).

DISCUSSION

Here, the trial court determined that Appellant failed to adequately plead any of his claims and that, in any event, Appellant's cause of action sounded in legal malpractice and was time-barred. If the trial court correctly determined that Appellant's claim is actually a time-barred malpractice action, then any other issues raised are pretermitted and need not be reached.

To state a prima facie case of legal malpractice, the following elements must be established: "(1) that the accused attorney owed a duty to the plaintiff, (2) that the attorney breached that duty, (3) that the plaintiff suffered damage, and (4) that the breach proximately caused the plaintiff's damage." *Horton v. Hughes*, 971 S.W.2d 957, 959 (Tenn. Ct. App. 1998) (citing *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 403 (Tenn. 1991)). Ultimately, the

> plaintiff must "prove that the attorney's conduct fell below that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys practicing in the same jurisdiction . . . and demonstrate a nexus between the negligence and the injury." *Sanjines v. Ortwein and Associates, P.C.*, 984 S.W.2d 907, 910 (Tenn. 1998).

Lewis v. Caputo, No. E1999-01182-COA-R3-CV, 2000 WL 502833, at *3 (Tenn. Ct. App. Apr. 28, 2000) (bracketing omitted). Further, "[a]ctions and suits against . . . attorneys . . . for malpractice . . ." must be commenced within one year after the cause of action accrues. Tenn. Code Ann. § 28-3-104(c)(1). This is true "whether the action or suit is grounded or based in contract or tort." *Id.*

Here, Appellant captioned his claims as breach of contract and fraud. Nonetheless, the substance of the allegations sound in legal malpractice. *See PNC Multifamily Cap. Inst. Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 538 (Tenn. Ct. App. 2012) (noting that "we must always look to the substance of the pleading rather than to its form" (citing *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992)); *see also Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 457 (Tenn. 2012) ("The choice of the correct statute of limitations is made by considering the 'gravamen of the complaint.'" (quoting *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006))); *Lewis*, 2000 WL 502833, at *3 (to determine the "gravamen" of a complaint and thus the applicable statute of limitations, we "'must look to the basis for which damages are sought'" (quoting *Keller v. Colgems-EMI Music, Inc.*, 924 S.W.2d 357, 359 (Tenn. Ct. App. 1996))).

Indeed, Appellant does not claim that Appellees failed to represent him or did not fulfill a certain aspect of their general representation; rather, Appellant takes issue with the manner in which Appellees executed the representation. Specifically, Appellant claims that Appellees did not act in good faith by 1) agreeing to continue the ex parte order of protection on October 9, 2018, and 2) failing to move the general sessions court for an order granting Appellant exclusive use of his marital residence. At their essence, these are claims that Appellees' conduct fell below the appropriate professional standard of care, thus resulting in injury to Appellant. Appellant claims that he would not have killed his wife, thus resulting in his imprisonment, if Appellees had sought an order allowing Appellant exclusive use of the marital residence on October 9, 2018. With that failure as

the basis for Appellant's alleged damages, "the complaint makes out an allegation of legal malpractice." *Lewis*, 2000 WL 502833, at *4.

Regardless, the one-year statute of limitations applies "whether the action or suit is grounded or based in contract or tort." Tenn. Code Ann. § 28-3-104(c)(1). Thus, even if the complaint states a cause of action for breach of contract, it may still be untimely under the statute. Under these circumstances, our opinion in *Ferrell v. Long*, No. M2008-02232-COA-R3-CV, 2009 WL 1362321 (Tenn. Ct. App. May 14, 2009), cited by Appellees in their principal brief, is analogous and persuasive. In that case, the plaintiff hired Attorney Long on May 19, 2003, to defend the plaintiff's brother in a criminal matter. *Id.* at *1. Part of the agreement required Attorney Long to deposit the plaintiff's $7,500 retainer in an escrow account. *Id.* It was revealed during a post-conviction hearing on February 28, 2007, that Attorney Long did not put the plaintiff's retainer in an escrow account. *Id.* The plaintiff then filed suit against Attorney Long on March 11, 2008, alleging claims for breach of contract, fraud, and "theft by deception and conversion." *Id.* The trial court dismissed the action based upon the one-year statute of limitations found at section 28-3-104(a)(2),[2] and the plaintiff appealed to this Court. We affirmed the trial court, explaining as follows:

> The Court of Appeals has already addressed the statute of limitations in the breach of contract context:
>
> > On appeal, Ms. Swett argues that her claim is not one of legal malpractice but of a breach of contract, and that it is governed by the six-year statute of limitations in Tenn. Code Ann. § 28-3-109.
> >
> > We disagree. Tenn. Code Ann. § 28-3-104(a)(2) governs "actions and suits against attorneys or licensed public accountants or certified public accountants for malpractice, whether the actions are grounded or based in contract or tort." We think it is instructive to note that this section of the statute was passed by the legislature on May 17, 1967, in the first session after the Supreme Court's December 1966 decision in *Hillhouse v. McDowell*, 219 Tenn. 362, 410 S.W.2d 162 (1966). In that case, the court held that an action for malpractice for failing to timely file an action for personal injuries was a breach of contract and was governed by what is now Tenn. Code Ann. § 28-3-109. The court distinguished its

[2] Since we decided *Ferrell*, the statute has been re-numbered such that the pertinent one-year limitation is now found at sub-section (c)(1). The relevant language, however, is the same.

> earlier decision in *Bland v. Smith*, 197 Tenn. 683, 277 S.W.2d 377 (1955), in which it applied the one-year statute to a legal malpractice action because, as the court read the declaration, it alleged a tort for personal injuries. We think the legislature sought to remove any doubt about which statute applied to a malpractice claim, and it chose the one-year period of limitations.
>
> In addition, the courts are admonished to determine the appropriate statute of limitations "according to the gravamen of the complaint," *Keller v. Colgems–EMI Music, Inc.*, 924 S.W.2d 357 (Tenn. Ct. App. 1996); and it seems to us that the gravamen of Ms. Swett's complaint is not Mr. Binkley's breach of a promise. Instead, it is a complaint that he failed to recover all the fees and expenses from Mr. Swett or his estate. That complaint clearly comes within the legal malpractice statute of limitations contained in Tenn. Code Ann. § 28-3-104(a)(2).

Swett v. Binkley, 104 S.W.3d 64, 67 (Tenn. Ct. App. 2002). Like Swett, this case involves a claim for breach of contract against an attorney. Swett found that the one year statute of limitations governs this situation. *Id.* Since Tenn. Code Ann. § 28-3-104(a)(2) applies to torts as well, it also controls Ferrell's claims for fraud, theft by deception and conversion.

Ferrell, 2009 WL 1362321, at *2.

Consequently, section 28-3-104(c)(1) applies to the case at bar. This is true even when the allegations are taken as true and the complaint construed liberally in Appellant's favor. *See Young*, 130 S.W.3d at 63 (noting that we are required to "construe the complaint liberally in favor of the non-moving party and take all the factual allegations in the complaint as true" when considering a judgment on the pleadings).

Having determined that section 28-3-104(c)(1) applies, the question then becomes whether Appellant filed his complaint within one year of when his cause of action accrued. "Although the statute does not define the point of accrual, in legal malpractice cases . . . the date that the statute of limitations begins to run is determined by applying the discovery rule." *Story v. Bunstine*, 538 S.W.3d 455, 463 (Tenn. 2017) (citing *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998)). The "discovery rule" provides that "a cause of action accrues when the plaintiff knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful or tortious conduct by the defendant." *Id.* (quoting *John Kohl*, 977 S.W.2d at 532). First,

"the plaintiff must suffer legally cognizable damage—an actual injury—as a result of the defendant's wrongful or negligent conduct . . ." *Id.* at 463–64. Second, "the plaintiff must have known or in the exercise of reasonable diligence should have known that this injury was caused by the defendant's wrongful or negligent conduct." *Id.* at 464. "[T]he plaintiff is deemed to have discovered the right of action if he is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct." *Lewis*, 2000 WL 502833, at *3 (quoting *Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn. 1995)).

Here, the trial court found that Appellant should have known about his purported cause of action in October of 2018, explaining in the final order:

> The alleged unauthorized agreement to continue the Order of Protection hearing took place on October 9, 2018. As of the date of [Appellant's] wife's murder on October 20, 2018, [Appellees] had not filed a motion for exclusive possession of the marital home and [Appellant] knew or should have known of that fact. As such, [Appellant's] claims accrued in October of 2018, nearly 3 1/2 years prior to the filing of this action. At the hearing of this matter, [Appellant] claims he did not truly discover that the Order of Protection had been continued by an alleged unauthorized agreement until December 7, 2020. Even taking that assertion as true, which is difficult to do in light of the fact that [Appellant's] counsel in the criminal trial relied upon the agreement and extension in support of a motion to dismiss the indictments filed December 26, 2019,[3] [Appellant's] claim regarding that issue is still untimely.

We agree with the trial court's analysis. Appellant claims that he was injured by Appellees continuing the ex parte order of protection and failing to move the general sessions court for Appellant's exclusive possession of his marital residence. Both of these events occurred on October 9, 2018. Appellant claims that he would not have murdered his wife on October 19, 2018, if he had been awarded exclusive possession of the marital home. Taking these allegations as true, it follows that Appellant should have known about

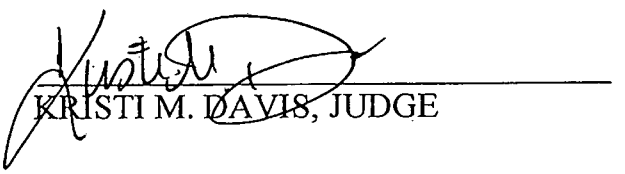
[3] During the hearing on Appellees' motion, the trial court took judicial notice of several court documents from the criminal proceedings against Appellant. Normally, "[i]f matters outside the pleadings are presented in conjunction with either a Rule 12.02(6) motion or a Rule 12.03 motion and the trial court does not exclude those matters, the court must treat such motions as motions for summary judgment and dispose of them as provided in Rule 56." *Patton v. Est. of Upchurch*, 242 S.W.3d 781, 786 (Tenn. Ct. App. 2007). Nonetheless, courts may consider items subject to judicial notice without converting a motion to dismiss to a motion for summary judgment. *See Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016) (citing *Haynes v. Bass*, No. W2015-01192-COA-R3-CV, 2016 WL 3351365, at *4 (Tenn. Ct. App. June 9, 2016)); *see also Coffee Cnty. v. Spining*, No. M2020-01438-COA-R3-CV, 2022 WL 168145, at *5 n.4 (Tenn. Ct. App. Jan. 19, 2022), *perm. app. denied* (Tenn. May 18, 2022).

Appellees' purported failures on October 19, 2018.[4] Moreover, we agree with the trial court's assessment that even if Appellant was not aware of his purported injuries in October of 2018, he admits he became aware of the agreement to continue the ex parte order on December 7, 2020. The complaint was not signed and dated by Appellant until December 8, 2021, and not filed with the trial court until December 14, 2021. Thus, even under the most liberal interpretation of Appellant's claims that is possible under the circumstances, his action is time-barred.

The trial court correctly concluded that Appellant's action is untimely and that Appellees are entitled to a judgment on the pleadings. All other issues raised on appeal are pretermitted, and we affirm the trial court.

CONCLUSION

The judgment of the Circuit Court for Montgomery County is affirmed. Costs on appeal are assessed to the appellant, Hamid Houbbadi.



KRISTI M. DAVIS, JUDGE

[4] The trial court's order states that the murder occurred on October 20, 2018. *See Houbbadi*, 2023 WL 8525144, at *1–2 (explaining that the murder occurred sometime in the evening on October 19, 2018, but that the victim was not discovered by neighbors until the early morning hours of October 20, 2018).

Appendix "B"

Supreme Court – Middle Division
Appellate Court Clerk's Office - Nashville
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407
(615) 741-2681

Hamid Houbbadi #00637286
Northeast Correctional Complex
P.O. Box 5000
Mountain City TN 37683-5000

Re: M2022-01166-SC-R11-CV - HAMID HOUBBADI v. KENNEDY LAW FIRM, PLLC ET AL.

Notice: Case Dispositional Decision - TRAP 11 Denied

Attached to this cover letter, please find the referenced notice issued in the above case. If you have any questions, please feel free to call our office at the number provided.

cc: Hamid Houbbadi
Nora Ann Koffman
Judge Kathryn Wall Olita

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

HAMID HOUBBADI v. KENNEDY LAW FIRM, PLLC ET AL.

Montgomery County Circuit Court
CC21-CV-2457

No. M2022-01166-SC-R11-CV

Date Printed: 03/06/2024 **Notice / Filed Date: 03/06/2024**

NOTICE - Case Dispositional Decision - TRAP 11 Denied

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

HAMID HOUBBADI v. KENNEDY LAW FIRM, PLLC ET AL.

Circuit Court for Montgomery County
No. CC21-CV-2457

No. M2022-01166-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of Hamid Houbbadi and the record before us, the application is denied.

PER CURIAM

Appendix "C"

ATTACHMENT 1A-BRIEF-COVER PAGE
IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Hamid Houbbadi Plaintiff/Appellant,	)	
v.	)	Case No. M2022-01166-COA-R3-CV Montgomery County No. CC21-CV-2457
Kennedy Law Firm, PLLC, Kevin Kennedy, and Gordon Rahn Defendants/Appellees,	)	

Rule 3 Appeal from The Final Judgement of the Circuit Court for Montgomery County,

Case No. CC21-CV-2457

BRIEF OF APPELLANT
HAMID HOUBBADI

Hamid Houbbadi #637286
N.E.C.X.
P.O. Box 5000
Mountain City, TN. 37683

[Oral Argument Requested]

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Matus v. Metropolitan Gov't of Nashville, 128 S.W.3d 653 (Tenn. Ct. App. 2003)

Coker v. Redick, 1995 WL 89706 (Tenn. Ct. App. 1995)

HMF Trust v. Bankers Trust Co. 827 S.W.2d 296 (Tenn. Ct. App. 1991)

Harris v. St. Mary's Medical Center, 726 S.W.2d 902 (Tenn. 1987)

Gathright v. First Tennessee Bank of Memphis, 728 S.W.2d 7 (Tenn. Ct. App. 1986)

Liberty Mutual Ins. Co. v. Taylor, 590 S.W.2d 920,921 (Tenn. 1979)

Richland County Club Inc. CRC Equities Inc. 832 S.W.2d 554, 559 (Tenn. Ct. App. 1991)

Cheatham County v. Cheatham County Bd. Of Zoning Appeals, 2012 WL 5993757 (Tenn. Ct. App. 2001)

Lynch, 205 S.W.3d at 391

Logan v. Zimmerman Brush Co. 455 U.S. 422-30, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)

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STATUTES

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T.C.A. 28-3-109

T.C.A. 1505

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T.R.C.P. 6.04

T.R.C.P. 6.05

ATTACHMENT 1D-BRIEF-STATEMENT OF THE ISSUE(S)
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1) Whether the trial court erred in granting defendants motion for Judgment on the Pleading.

2)Whether the trial court committed reversible error by taking judicial notice of disputed facts.

3) Whether the trial Court erred in holding that plaintiff failed to state a claim

4) Whether the trial Court erred in holding that plaintiff claims are barred by the applicable statute of limitation.

5) Whether the trial Court erred in holding that plaintiff claims sound in tort of legal malpractice.

6) Whether the trial Court erred in denying plaintiff motion for leave to amend.

7) Whether the trial court denied plaintiff due process.

STATEMENT OF THE FACTS

1. On December 14, 2021 plaintiff filed his complaint against defendants Kennedy law Firm, Kiven Kennedy and Gordon Rahn for fraud and breach of contract. (Vol. I. p. 1-6).

2. On February 02, 2022 plaintiff sent a letter to trial court informing the court 48 days passed still no answer from defendant (Vol. I p. 27-28) plaintiff also filed a notice of hearing the same day setting May 09, 2022 for a hearing.

3. Plaintiff received a letter from the trial court dated February 08, 2022 and a copy of defendant answer which was filed January 18, 2022 (Vol. IIII) Supplemented Record).

4. On February 23, 2023, plaintiff filed a "Response to defendants' answer" to inform the court that plaintiff never received an answer from defendants as the certificate of service they filed with the court said, plaintiff received a copy of defendant answered from the court after more than 50 days and after plaintiff sent a letter to the court. (Vol. I. P. 20-34).

5. Defendant filed a motion to strike and to cancel evidentiary hearing on April 06, 2022 to strike plaintiff "Response to defendant answer" and to cancel May 09, 2022 evidentiary hearing (Vol. I. p. 38-43).

6. Defendant filed a notice of hearing on April 22, 2022 setting May 06, 2022 for a hearing (Vol. V. Supplemented Record).

7. On May 02, 2022 defendant filed a supplement to motion to cancel or continue evidentiary hearing (Vol. I p. 47-48) and on May 03, 2022 defendant filed two motions (1) motion for judgment on the pleading (2) Memorandum in support of motion for judgment on the pleading (Vol. I p. 47-48 and 49-51).

8. On May 06, 2022 was the hearing on defendant motions to strike and to cancel or continue evidentiary hearing and on plaintiff motion for appointment of counsel. At the hearing plaintiff informed the court that defendants did not serve plaintiff with an answer as they claim but plaintiff receive the answer from the court, and that defendants May 02, and 03, 2022 motions were served to plaintiff on May 06, 2022 the night before the hearing. The court also advice plaintiff that he could amend his complaint when it striked plaintiff "Response to defendants' answer."

9. On May 13, 2022 plaintiff filed his motion for leave to amend. (Vol. I. p. 117).

10. On May 18, 2022 the trial court issued its order granting defendants motions to strike and to cancel or continue the evidentiary hearing and denied plaintiff motion (Vol. I. p. 119-121).

11. On May 24, 2022 plaintiff filed a notice of hearing setting July 14, for a hearing on motion for leave to amend (Vol. IIII supplemented record).

12. On June 1, 2022 plaintiff filed an opposition to the motion for judgment on the pleading and a memorandum in support of opposition to judgment on the pleading (Vol. I. p. 125-126 and 127-128).

13. On July 11, 2022 the trial court issued an order to transport plaintiff from prison to the court for July 14, 2022 hearing (Vol. I. p. 139-141).

14. On July 11, 2022 defendants filed three motions (Vol. I. p. 142-44 and 145-148 and 149-154).

15. On July 14, 2022 plaintiff participated at the hearing via video informed the trial court that he had three witnesses for this case and also informed the court about the testimony of the opposing part on the order of protection at plaintiff criminal trial (Vol. III).

16. On July 21, 2022 plaintiff requested time to file a supplement response motion for judgment on the pleading and amendment (Vol. II. P. 156-160).

17. On August 02, 2022 the trial court issued its order granting defendant's motion for judgment on the pleading and denied plaintiff motion for leave to amend (Vol. II. P. 182-188).

ATTACHMENT 1E-STATEMENT OF THE CASE

STATEMENT OF THE CASE

Plaintiff filed his action for fraud and breach of contract of Montgomery County Circuit Court. The first hearing was held on May 06, 2022. The trial court issued its first order on May 18, 2022 regarding May 06, 2022 hearing. The trial court denied plaintiff's motion for appointment of counsel and granted defendants' motion to strike and to cancel on continuance May 09, 2022 evidentiary hearing the court did not rule on plaintiff May 13, 2022 motion for leave to amend.

On May 24, 2022 plaintiff filed a notice of hearing setting July 14, 2022 for a hearing on his May 13, 2022 motion for leave to amend.

On July 14, the hearing the court heard argument about all the motion included defendants July 11, 2022 motions. Which plaintiff did not know anything about them.

On August 08, 2022 the trial court issued its order denying motion for leave to amend and granted defendants' motion judgment on the pleading. Now plaintiff brings this timely appeal for this Honorable Court.

ARGUMENT

1) Whether the trial Court erred in granting defendants Motion judgment of the pleading.

Motion for judgment on the pleading pursuant to T.R.C.P. 12.03, the motion is in effect to a motion to dismiss for failure to state a claim upon which relief may be granted. Sakaan v. Fedx Crop Inc, 2016 WL 7396050, at 6(Tenn. Ct. App. Dec 21,2016) quoting Timmins v. linolsey,310 S.W.3d 834,838 (Tenn.Ct.App.2009). Thereof motion for judgment on the pleading also challenges the legal sufficiency of the complaint. A defendant filing a motion either to dismiss or motion for judgment on the pleading. Admits the truth of all the relevant material allegation contain in the complaint, but asserts that allegation fail to establish a cause of action, Weeb,346 S.W.3d, at 426(quoting Brown v. Tenn. Title-Loans Inc,328-s.W.3d 850,854 (Tenn 2010) see also Sakaan,2016 WL 7396050, at 6) (citing Timmins,310 S.W.3d, at 838). A court resolves motion filed pursuant to either Rule 12.02(6) or 12.03 11 by examining the pleading alone. Ellithorpe v.Weisamark, 479 S.W.3d 818,824(Tenn. 2015). Sakaan, 2016 WL 7396050, at 5.

When determining whether a complaint should be dismissed for failure to state a claim under either rule 12.06(6) or Rule 12.03.the court must construe the complaint liberally presuming all factual allegations to be true and giving the plaintiff of all reasonable inferences. Tigg v. Pirelli Tire Crop,232 S.W.3d 28,31 32(Tenn.2007) (quoting Trau-Med Ins. Co v. Allstate Ins Go,71 S.W.3d 691,696 (Tenn. 2008) Chill v. Tenn. Farmers Mut. Ins. Co. 2013 WL 3964272 (Tenn. Ct. App. 2013) (quoting Frankenberg v. River City Resort Inc. 2013 WL 1952980 at 2 (Tenn. Ct. App. 2013) the court should grant motion to dismiss or motion for judgment on the pleading if it appears that the plaintiff cannot prove any set of fact in support of the claim entitling him or her to relief. Webb, 346 S.W.3d at 426 Frankenberg, 2013 WL 1952980 at 2.

In the case at bar, the trial court footnote (Vol. II p. 183) "the fact stated herein are taken from plaintiff complaint and defendant motion for judgment on the pleading. Additionally the court has been asked to take judicial notice of certain facts and find it appropriate to do so as follows (1) petition for order of protections & order for hearing (2) temporary order of protection (3) order amending temporary order of protection (4) divorce docket at Davidson County Court (5) true bill Montgomery County Circuit Court (6) motion to dismiss 2 and 3 of indictment (7) judgment (8) transcripts of sentencing hearing on plaintiff criminal case.

The trial court abused its discretion because Rule 12.03 of T.R.C.P. state in part "that if matters outside the pleading are presented to and not excluded by court the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. In the plaintiff's case the trial court included matters outside of the pleading (Judicial Notice) of eight documents not relevant to the case without converting the motion for judgment on the pleading to a summary judgment.

JUDICIAL NOTICE

2) Whether the trial court committed reversible error by taking judicial notice of disputed facts.

Rule 201 of T.R.C.P. provides that a court may take judicial notice of any adjudicative fact "not subject to reasonable dispute" and capable of accurate and ready determination by reason to sources whose accuracy reasonably be questioned. Tenn. R. Evid. 201 (b). This limitation means, almost by definition, if a party offers anything other than dilatory or pretextual reason for opposing the taking of judicial notice, the court should view the fact a subject to reasonable dispute and decline to take judicial notice of it. State v. Nunley, 22 S.W.3d 282, 288 (Tenn. Crim. App. 1999) (quoting Neil P. Cohen, Sarah Y. Sheppard & Donald F. Paine,

Tennessee Law of Evidence 44 (3d Ed. 1995) in State v. Lawson, 291 S.W.3d 864 (Tenn. 2009) the supreme court recognized that the federal courts have approved the taking of judicial notice of filed documents so long as the purpose was to establish the fact of such litigation and related filings, rather than to establish the truth of the matters asserted in the other litigation." Lawson, 291 S.W.3d 870 (quoting Liberty Mut. Ins. Co. v. Rotches Port Packers Inc., 969 F.2d 1384, 1388 (2d Cir. 1992).

In plaintiff's case the trial court erroneously took judicial notice of documents of other courts file not related to this case. Tennessee historically permitted the taking of judicial notice of facts from early proceeding only if they occurred in the same action. See Sims v. Barham, 743 S.W.2d 179, 181 (Tenn. Ct. App. 1987).

3) Whether the trial Court erred in holding that plaintiff failed to state a claim.

Dismissal under a motion to dismiss pursuant to Rule 12.03 for failure to state a claim upon which relief can be granted, is warranted only when no set of facts will entitle the plaintiff, or when complaint is totally lacking in clarity specificity. Dobbs v. Guenther, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992) (citations omitted). Furthermore, complaint should not be dismissed no matter how poorly drafted, if it states a cause of actions.

In plaintiff's case he clearly set the allegations of fraud and breach of contract. See complaint pages 2-3 on the record.

*FRAUD CLAIM

The essence of fraud is deception, Lobes v. Taylor, 195 S.W.3d 627, 634 (Tenn. Ct. App. 2005). In the most general fraud is a trick or artifice other use false information that induces a person to act in a way he or she would not otherwise have acted. Rawlings v. John Hancock Mut.

Life Ins. 78 S.W.3d 291, 301 (Tenn. Ct. App. 2001). Fraud occurs when a person intentionally misrepresents a material fact to mislead another to obtain unfair advantage. Brown v. Birman Care Ins. 42 S.W.3d 62, 66 (Tenn. 2001).

In plaintiff's case defendants defrauded plaintiff in several ways. First allegations of fraud occurred on October 01, 2018, when plaintiff and his friend Ali Sadif met with defendant Kevin Kennedy at his law firm. Defendant Kennedy mentioned to plaintiff and his friend Ali Sadif that he knew plaintiff's wife Liela Chanane. Plaintiff and defendant Kennedy agreed that the fee for the representation on the order of protection and divorce would be $2500. Plaintiff paid defendant Kennedy $1000 and agreed to pay $500 a month until paid off. Plaintiff gives his debit card to defendant Kennedy who left the meeting room with Plaintiff card and came back with another attorney (Defendant Gordon Rahn) Defendant Kennedy ask plaintiff to sign a receipt which was a contract in the name of defendant Rahn, and to repeat what plaintiff told him to defendant Rahn, which plaintiff did. All this discussion happened in the presence of plaintiff friend Ali Saif. Plaintiff find out later when he receives a copy of the fake contract with defendants answer to plaintiff complaint with Board of Professional Responsibility that he did not sign a receipt but a contract in the name of defendant Rahn. At October 01, 2018, meeting at no time defendant Kennedy informed plaintiff that he signed a contract in the name of defendant Rahn, or informed plaintiff that the contract an hourly fee of $250 per hour instead of a total fee of $2500. (Plaintiff only make $500 a week). Defendant Kennedy and plaintiff agree about $2500 fee in the presence of plaintiff friend Ali Sadif. At no time defendant Kennedy show or explain the contract to plaintiff, nor defendant Rahn, discuss the fee with plaintiff. Defendant Kennedy trick plaintiff in signing the contract as a receipt. Defendant Kennedy falsly claim he was not present when plaintiff and defendant Rahn issue the contract. The contract continued

three handwriting, defendant Kennedy handwriting on the top right corner, defendant Kennedy who wrote plaintiff name and the fee of $2500, the other hand writing is defendant Rahn, the signature is plaintiff. This is evidence contrary to defendant Kennedy claim that he was not presented when the contract was issue, see (Vol. II page 166 p. 2). Plaintiff found out late that defendant took plaintiff's case to take care of the opposing party Liela Chanane whom defendant Kennedy have an affair with and to damage plaintiff. Defendants denied in their answer to this action that the total fee is $2500. See page 14 paragraph on the record. On other hand they admitted that plaintiff paid $1000 toward $2500 fee, see (Vol. II page 164). Plus, the contract did not continue the $1000 plaintiff paid toward the $2500, see page 172 on the record.

The second allegation of fraud occurred on October 09, 2018, when defendant Rahn made false and misleading statement to plaintiff regarding the reason for continuance October 09, 2018, hearing to November 13, 2018, defendant Rahn informed plaintiff that they reset the hearing until November 13, 2018, because the Judge was running late that day and the interpreter can not wait for the Judge arrival because she had another job. Defendant Rahn informed plaintiff before 9:00 a.m. on December 07, 2020, plaintiff attorney on the criminal case gave plaintiff a box full of papers at the court room. A couple days later plaintiff found in that box an ordered agreement for continuance the October 09, 2018, hearing. Defendants never informed plaintiff or mentioned they make agreement continue with the opposing party's attorney Mr. Kevin Fowler. Plaintiff never been informed or agree to continue and the continuance was not in plaintiff's best interest. After plaintiff filed a complaint against defendants with the Board of Professional Responsibility, they claim another story. This time they claim that the opposing party attorney Mr. Fowler request interpreter on behalf of his client Liela Chanane.On defendants answer to this action they repeat the first claim that the judge was running late

(Vol.I.P.14). The third reason of continue is come from the opposing party attorney Mr. Fowler at plaintiff criminal trial (plaintiff informed the trial court in his "Response to Defendant's Answer," (Vol.I.P.30-34), which the trial court striked. Plaintiff also served the opposing party attorney Mr. Fowler with subpoena to appear at May 09, 2022, hearing, which the trial court cancelled. Plaintiff also informed the trial court at May 06, 2022, hearing about Mr. Fowler testimony. For unknown reason the trial court did not include this information on its May 18, 2022, order regarding May 06, 2022, nor the order mentioned the trial court advice to plaintiff that he can amend his complaint, nor the order mention the three motion defendants filed only three days before May 6, 2022 hearing, nor the order mention that plaintiff did not receive defendants answer on time, plaintiff receive defendants answer after 50 days from the court clerk not from defendants, see a copy of the clerk of the trial court to plaintiff on February 08, 2022, which is on the supplement record (see volume 4 on the record) for unknown reason the letter was not on the record as will Mr. Fowler Subpoenaed plaintiff sent to this court Mr. Fowler testimony transcripts as exhibit. Plaintiff was denied to amend his complaint to included the transcripts of Mr. Fowler testimony, which he testified that defendant Rahn who request the continue the October 09, 2018 hearing.

Plaintiff rely on a case law similar to plaintiff case, see Nobes v. Earhart, 769 S.W.2d 868, in both cases Nobes and plaintiff the client's attorney was having an affair with the opposing party, in both cases attorneys defrauded their client in the best interest of the opposing party. Plaintiff strongly believe he state a claim for fraud.

***Breach of Contract**

The Tennessee Supreme Court has explained, in a breach of contract action claimant must prove the existence of a valid enforceable contract deficiency in performance amounting to a

breach and damages caused by the breach. See Fed Ins. Co. v. Winters, 354 S.W.3d 287. 291 (Tenn. 2001).

In plaintiff's case there was a written contract even the contract is forgery and an oral agreement in the presence of plaintiff friend Ali Sadif, who plaintiff served with a subpoena to appear at May 09, 2022, hearing, which the trial court canceled. (Vol.I.P.10) The written contract stated "represent on order of protection plus uncontested divorce defined to both parties signing on MDA no appeal no guarantees." (Vol.II.P.172) on the record. The oral agreement is for defendants to file on plaintiff's behalf a motion for exclusive possession of plaintiff residence in the present of Ali Sadif. Defendants falsely claimed in their motion to strike and to cancel or continue the May 09, 2022, hearing "plaintiff alleges he was the home sole owner as will be addressed in a dipositive motion. The deed demonstrates this claim entirely false, the home was jointly owned with Chanane. See footnote (Vol.I.P.39). Defendant did not submit any evidence to support their claim. On the other hand, plaintiff submitted prove that he is the sole owner of the home, (Vol.II.P.176-177). Defendants making excuses for their failure to file a motion for exclusive possession of plaintiff's residence. Defendants intentionally and knowingly did not move to file such a motion because defendant Kennedy had an affair with plaintiff's wife Liela Chanane. Defendants agreed with the opposing attorney Mr. Fowler to continue October 09, 2018, to November 13, 2018, without plaintiff authorization and in the best interest of the opposing party Liela Chanane.

On December 07, 2020, plaintiff attorney on the criminal case give plaintiff a box full of papers. A couple of days later plaintiff find in that box a copy of the order agreement continues the October 09, 2018, hearing. As soon as plaintiff finds the order agreement, he sent a letter to defendant Kennedy on January 03, 2021, (Vol.II.P.163). Plaintiff received an answer on January

11, 2021 from defendant Rahn not from Defendant Kennedy to whom plaintiff sent the letter. (Vol.II.P.164). With defendants' answer was a check of $1000 full refund of the money plaintiff paid defendant Kennedy, (Vol.II.P.173). Plaintiff filed a complaint against defendants with the Board of Professional Responsibility, (Vol.II.P.165-169). To which defendant answer, (Vol.II.P. 166-168). With defendant's answer was a copy of the fake contract, (Vol.II.P.172). Defendant claim in their answer with the Board that the reason for continue October 09, 2018, hearing because the opposing party request an interpreter for his client Liela Chanane, (Vol.II.P.167.P.5). Defendants also claim that a hearing with interpreter present was not going to happened that day, (Vol.I.P.67.P.7), on the same page 167 paragraph 8 defendants claim that the particular date was given to the parties by the court, this claim is entirely false because the interpreter was at the court room on October 09. 2018, plaintiff served her with a subpoena to appear at May 09, 2022 hearing which the trial court canceled, (Vol.I.P.11). Plaintiff also served the opposing party attorney on the order of protection Mr. Fowler with a subpoena to appear at May 09, 2022, see supplement record, (volume 4 on the record) which the trial court cancelled and for some unknown reason Mr. Fowler subpoena was excluded from appellate record until plaintiff filed a motion to supplement the record with Mr. Fowler testify for the state at plaintiff criminal trial said that the interpreter was at the court room on October 09, 2018, and that the interpreter helped him explain what was going on that day to his client, he also testify that the reason for the continue because defendant Rahn request the continue, he also testify that him who drafted the order agreement and him who sign it on behalf of defendant Rahn, which contrary to defendant Rahn claim that he review the order and give his approval, the question if he review the order why he did not sign it him self why he give it back to Mr. Fowler to sign it on his behalf, (Vol.II.P.167.P.9).

Plaintiff informed the trial court about the opposing party attorney testimony on motion "Respond to defendant Answer" and at may 06, 2022 hearing, and at July 14, 2022 hearing. The trial court at May 06, 2022 advised plaintiff that he could amend his complaint, which plaintiff file a motion for leave to amend on May 13, 2022, to include Mr. Fowler testimony transcripts, (Vol.I.P.118). The trial court May 18, 2022 order did not address the motion for leave to amend which was filed before the trial court issue its order on May 18, 2022, on other hand defendants admitted on its January 25, 2023, "Response to appellant motion to supplement the record with a statement of evidence, which they state "the court only advised plaintiff that he could move to amend."

Plaintiff filed a motion for leave to amend on May 13, 2022, the trial court denied the motion for failure to comply with T.R.C.P., also futile (Vol.P.118), see also July 14, 2022, (Vol. III transcripts regarding Mr. Fowler's testimony).

4). Whether the trial court erred in holding that plaintiff claims are barred by the applicable statute of limitation.

FRAUD STATUTE OF LIMITATION

In Tennessee the applicable statute of limitation for fraud is three (3) years not one year as the trial court apply (see trial court order granting defendants motion for judgment on the pleading), see (Vol.III.P.187). See Alexander v. Third Nat Bank, 915 S.W.2d 797, 799, 800 (Tenn. 1996). The Supreme Court has held that economic loss by plaintiff from fraud or mispresentation is an injury to personal property requiring application of three (3) years limitations see Vance v. Schulder, 547 S.W.2d 927, 932 (Tenn. 1997). Additionally, the supreme court held that fraud in inducement of a contract sound in a tort and is therefore, subject to T.C.A. 28-3-105 three (3) years limitations period see Am Fid Fire Ins. v. Tucker, 671 S.W.2d

837, 841 (Tenn. Ct. App. 1983). Therefore, the applicable statute of limitation is three (3) years period in T.C.A. 28-3-105. However, pursuant to discovery rule "the statute of limitations will be tolled until plaintiff knows."

Defendants defrauded plaintiff in several ways (1) defendant Kennedy trick plaintiff in signing the contract as a receipt (2) plaintiff never agree to an hourly rate of $250 per hour (3) defendant Kennedy never informed plaintiff that he signed a contract in the name of defendant Rahn (4) defendant Rahn mislead plaintiff by false statement regarding the reason for continue October 09, 2018. (5) defendants agree with the opposing party attorney to continue the hearing without plaintiff authorization (6) defendants never explain the contract to plaintiff as required by the law.

1. The client fully understands the contract meaning and effect.
2. The attorney and the client shared the same understanding of the contract.
3. The terms of contract are just and reasonable.

See Peoples Nat. Bank of Washington v. King, 697 S.W. 2d 344, 346 (Tenn. 1995). In plaintiff's case defendants did none of this instead they trick and mislead plaintiff. Never explained the contract or the contract was just, and the contract did not continue the $1000 plaintiff paid towards $2500 fee agree about.

BREACH OF CONTRACT STATUTE OF LIMITATIONS

Plaintiff claim was on breach of contract, not legal malpractice as the trial court implied. See Jordan v. Clifford 2010 WL 2075871. In plaintiff's case defendants breached the contract by failing to provide the service the plaintiff paid them for. There are no allegations of negligence or defendants fell below the standard care an element for legal malpractice. Instead defendants

intentionally and knowingly did not perform the service plaintiff paid them for. Defendants were working with the opposing party Liela Chanane and her attorney to damage plaintiff and in the best interest of the opposing part Liela Chanane whom defendant Kennedy have an affair with. The statute of limitations for breach of contract is six (6) years T.C.A. 28-3-109.

5) Whether the trial court erred in holding that plaintiff claims sound in tort of legal malpractice.

A legal malpractice claim requires proof of the following element (1) that the accused attorney owed a duty to plaintiff. (2) the attorney breached that duty. (3) that plaintiff suffered damages. (4) That the breach cause in fact of the plaintiff damages. (5) That attorney negligence was proximate, or legal cause of plaintiff damages.

In plaintiff case there was no negligent or fell below standard care on the part of defendants as an element of legal malpractice, but defendant intentionally and knowingly tricked, mislead, false statements, and refuse to perform the service plaintiff paid for. Instead defendants were working with the opposing party attorney to take care of the opposing party Liela Chanane who defendant Kennedy had an affair with and to damage plaintiff. The tricks, misleading, false statements, and nonperformance are elements of fraud and breach of contract.

6) Whether the trial court erred in denying plaintiff's motion for leave to amend.

The Tennessee Supreme Court has stated the following principles about pro-se litigation. Parties who decide to represent themselves are entitled to a fair and equal treatment by the court. The court should consider that many pro-se litigants have no legal training and little familiarity with the judicial system, however, the court must also be mindful of boundaries between fairness to a pro-se litigant and unfairness to pro-se litigant adversary thus, the court must not excuse pro-

se litigant from complying with the same substantive and procedural rules that represented parties are expected to observe. Young v. Barrow, 130 S.W.3d 59, 62, 63 (Tenn. Ct. App. 2003) (citations omitted) see also Hessmer v. Hessmer, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003) additionally, Tennessee Supreme Court allows pro-se litigants some latitude in preparing their court filings. Young, 130 S.W.3d at 63.

*Tenn. R. Civ. P. 15.01.

Tennessee law has a history of favoring amendment as noted by Supreme Court and reflected in this state rules of civil procedure, the court states that the rule of civil procedure "were designed to simplify and ease the burden of procedure under the sometimes harsh and technical rules of common law pleading." Branch v. Warren, 527 S.W.2d 89, 91 (Tenn. 1975) regarding amendment in particular, the court has adopted an expansive view that favors party seeking to amend:

Rule 15.01: provides that leave to amend shall be freely given when justice so requires. This provision in the rule substantially lessens the exercise of pre-trial discretion on the part of trial judge indeed. The statute (T.C.A. -1505) which conferred a measure of discretion on trial judge was repealed and Rule 15 in its place instead: That rule not construction it means precisely what it says, that leave shall be freely given.

A plethora of cases illustrates the willingness of Tennessee Courts permit amendments under Rule 15.01. See Branch v. Warren, 527 S.W.2d 89 (Tenn. 1975); Tennessee Dept. of Mental Health & Mental Retardation v. Hughes, 531 S.W.2d 299 (Tenn. 1975); Matus v. Metropolitan Gov't of Nashville, 128 S.W.3d 653 (Tenn. Ct. App. 2003); Coker v. Redick, 1995 WL 89706 (Tenn. Ct. App. 1995); HMF Trust v. Bankers Trust Co. 827 S.W.2d 296 (Tenn. Ct. App. 1991); Harris v. St. Mary's Medical Center, 726 S.W.2d 902 (Tenn. 1987); Garthright v. First Tennessee Bank of Memphis, 728 S.W.2d 7 (Tenn. Ct. App. 1986). A court does not abuse its discretion by granting leave to amend a complaint when the amendment is necessary to bring the court an issue which if found in favor of the pleader, would be conclusive of the case. Liberty Mutual Ins. Co. v. Taylor, 590 S.W.2d 920, 921 (Tenn. 1979). Furthermore, the Supreme Court said that when the court grants a motion to dismiss for failure to state a claim, only extraordinary

circumstances would prohibit the plaintiff from exercising the right to amend its complaint. Richland County Club Inc. v. CRC Equities Inc. 832 S.W.2d 554, 559 (Tenn. Ct. App. 1991).

In plaintiff's case the trial court advised plaintiff at May 06, 2022 hearing, that he could amend his complaint after the trial court striken plaintiff's "Response to Defendants Answer." Which was a counterclaim reply to defendants' false information of their answer. The trial court did not mention its advice to plaintiff on its May 18, 2022, order. Defendants confirmed in their January 25, 2023 "answer to appellant motion to supplement the record with a statement of evidence." That the court advice plaintiff he could move to amend his complaint. Nor the trial court approved plaintiff's motion to supplement the record with a statement of evidence.

7) Whether the trial court denied plaintiff's due process.

Procedural due process, however, does not prevent deprivations of life, liberty, or property but indeed it simply "requires state and local governments to employ fair procedures when deprive person of constitutionally protected interest in life, liberty, or property. Cheatham County v. Cheatham County Bd. Of Zoning Appeals, 2012 WL 5993757 at 3 (Tenn. Ct. App. 2012) (quoting Parks Props v. Maury County, 70 S.W.3d 735, 743 (Tenn. Ct. App. 2001). Procedural due process requires "that individuals be given an opportunity to have their legal claims heard at the meaningful time and in a meaning manner." Lynch, 205 S.W.3d at 391 (citing Logan v. Zimmerman Brush Co. 455 U.S. 422, 429-30, 102 S.Ct.1148, 71 L. Ed.2d 265 (1982); Manning v. City of Lebanon, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003).

In plaintiff's case he sent a letter to trial court on February 02, 2022, informing the trial court that after 48 day still no answer from defendants, plaintiff filed the same day a notice of hearing setting May 09, 2022 for a hearing (Vol.I.P.29). Plaintiff also served four witnesses with

a subpoena to appear at May 09, 2022, hearing they are, Ali Sadif, Hebba Abulsaad, Beverly Sharp, Kevin Fowler. Plaintiff received a letter and a copy of defendants answer from the trial court clerk dated February 08, 2022. See a copy if the letter in the supplement record (Vol.IIII). The copy of defendants answer plaintiff received from the trial court clerk stated in its certificate of service a copy of the answer was sent to plaintiff on January 14, 2022. This claim is false. Plaintiff never received an answer from defendants but from the trial court clerk as the proof showed.

On February 23, 2022, plaintiff filed a counterclaim reply to defendants' false service claim titled "Response to Defendants Answer." (Vol.P.30-34). In which plaintiff informed the trial court clerk after 48 days still no answer from defendants, plaintiff request to the trial court that defendants submitted proof they served plaintiff with an answer. On April 06, 2022 defendants filed a motion to strike and cancel or continue the evidentiary hearing. Defendants claims they did not know about May 09, 2022 hearing until late March. (Vol.P.45), which means that defendants have more than 40 days to prepare for May 09, 2022 hearing, plus defendants filed on April 22, 2022, a notice of hearing to set May 06, 2022, for a hearing. Defendants schedule their hearing on May 06, 2022, three days before plaintiff requested hearing May 09, 2022, plaintiff have already served four witnesses to appear at May 09, 2022, hearing. Defendant did not prejudice by not knowing about May 09, 2022 hearing until late March. To show defendants bad faith act, they waited until three days before May 06, 2022, hearing to file three motions, they are (1) supplement to motion to cancel or continue evidentiary hearing (2) motion for judgment on the pleading (3) memorandum in support of a motion for judgment on the pleading. (Vol.P.47-48, 49-51, and 52-116).

Plaintiff informed the trial court at May 06, 2022, hearing about this act from defendants, which the service was in bad faith, the defendants' counsel knew its impossible for plaintiff to receive these motions before May 06, 2022 when she mailed them on May 03, 2022, and in violation of T.R.C.P. 6.04 and 6.05, which states in part.

Rule 6.04.

(1) A written motion other than one which may be heard ex part and notice of hearing shall be served no later than five days before the time specified for the hearing.

Rule 6.05.

Whenever a party has the right or is required to do some act or take some proceeding within prescribed period after the service of a notice or other papers upon such parties and the notice or papers are served upon such party by mail three days shall be added to prescribed period.

Defendant served plaintiff by mail on May 03, 2022 and the hearing was held on May 06. 2022 defendant did not give plaintiff five days as required by Rule 6.04, nor they add three days as required by Rule 6.05 when the service made by mail for plaintiff to prepared and answered.

The trial court let defendants' do the same thing on July 14, 2022 hearing. On July 11. 2022, defendants filed another three motions they are (1) response to motion for appointment of counsel (2) response to motion for leave to amend (3) reply in support of motion for judgment on the pleading. (Vol.P.142-144, 145-148, and 149-154). Again, and in violation of T.R.C.P. 6.04 and 6.05 plus the trial court issue an order to transport plaintiff from Mountain City prison to Montgomery County Court for a hearing on July 14, 2022. The order dated July 11, 2022. Plaintiff is U.S. citizen originally from Morocco his English is poor he communicates with the court via interpreter. Defendants takes advantage of plaintiff who is pro-se and the trial court showed its bias by giving them leeway and by not addressing all of plaintiff claims. For example, the court did not rule on plaintiff motion for a court order compelling production of documents

(Vol.I.P.123). On July 21, 2022, plaintiff filed a motion requesting for time to file supplemental motion for judgment on the pleading and amendment (Vol.II.P.156-160), because plaintiff did not receive defendants' motions until the July 14, 2022, hearing was over.

*The trial court did not address that defendant Kennedy knew plaintiff's wife Liela Chanane which she was the opposing party.

*The trial court did not address plaintiff's claim that defendant Kennedy tricked plaintiff in signing the contract as a receipt.

*The trial court did not address why the contract not included $1000 plaintiff paid toward $2500.

*The trial court did not address why defendant Rahn did not sign the order agreement if he reviewed it and gave his approval.

Plaintiff did not have a fair hearing on both hearings' dates, May 06, 2022 and July 14, 2022, and when trial court showed its bias and not addressed all of plaintiff's claims and by applying the wrong law (statute of limitations for fraud – is THREE years NOT ONE year) as the trial court applied T.C.A. 28-3-105. (Vol. III). Plaintiff informed the trial court that he was convicted of first degree murder, felony murder, and especially aggravated burglary, because of defendants' fraud and dishonesty, and because defendants agreed with the opposing attorney party to continue the October 09, 2022, hearing without plaintiff's authorizations (the state used the order agreement to convict plaintiff for especially aggravated burglary, and felony murder, because the order agreement shows it was by agreement of the parties. The evidence plaintiff submitted in this case showed that plaintiff knew nothing about the agreement on October 09,

2018. And if the ordered agreement is valid defendant would not claim two different stories for continuing the October 09, 2018 hearing.

Plaintiff on his motion to complete the appellate record pursuant to T.R.App.24(e) due to extraordinary circumstances, dated February 16, 2023, on page 2 stated (however in its footnote to this point the trial court. Clearly acknowledged that the statement was essential to the argument this case was dismissed on Judgment on the Pleadings motion.) See trial court Order on statement of evidence footnote. Plaintiff continue writing (that was never served on plaintiff.) because defendant filed his motion on July 11,2022, and the hearing was held on July 14, 2022. (Vol.P.149-154), defendants in their Response to February 16, 2023 motion to complete the record, falsely noted Houbbadi claim that the trial court acknowledge in a footnote its February 07, 2023 order. That appellant did not receive notice of the dispositive nature of the hearing or time to prepare or respond to that motion to dismiss. The trial court footnote says nothing of the kind.

See again plaintiff motion to complete the appellate record; plaintiff said nothing of that kind, defendants fabricating everything compared what plaintiff wrote in his motion to complete the appellate record with the trial court order on statement of evidence footnote, and to defendant Response to February 16, 2023 motion to complete the appellate record footnote.

CONCLUSION

For the reason mention above, the plaintiff requests this honorable court to reverse the Montgomery county Court order dismissing plaintiff claims for fraud and breach of contract, and find plaintiff was denied due process, and to grant plaintiff a change of venue because the defendants works with Judge in the same court and county and that the trial court already showed its bias.

Respectfully Submitted,

Hamid Houbbadi
Pro'se Petitioner
N.E.C.X.
P. O. Box 5000
Mountain City, TN 37683-5000

CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of the foregoing upon counsel for the Appellees by placing same in the United States Mail, with sufficient postage thereon, and addressed as follows:

Appellate Court Clerk, James M. Hivner
401 7th Ave. N. Ste 100, Supreme Court Bldg.
Nashville, Tennessee 37219

Nora A. Koffman, Esq.
602 Sevier Street, Suite 300
Johnson City, Tennessee 37604

On this 22 day of June, 2023.

Hamid Houbbadi

Appendix "D"

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

HAMID HOUBBADI, Appellant, v. KENNEDY LAW FIRM, PLLC, KEVIN KENNEDY, and GORDON RAHN Appellees.	Case No. #M2022-01166-COA-R3-CV Circuit Court, Montgomery County, Civil Action No. CC-21-CV-2457

BRIEF OF DEFENDANTS-APPELLEES, KENNEDY LAW FIRM, PLLC, KEVIN KENNEDY, AND GORDON RAHN

Appeal from the Circuit Court of Tennessee
for the 19th Judicial District at Clarksville

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Rules

INTRODUCTION

This is a professional liability action against Defendants-Appellees Kennedy Law Firm, PLLC ("KLF") and attorneys Kevin Kennedy ("Kennedy") and Gordon Rahn ("Rahn") (collectively "Defendants"). *Pro se* Plaintiff-Appellant's ("Houbbadi" or "Plaintiff") Complaint purports to assert breach of contract and fraud claims. Defendants moved for judgment on the pleadings for failure to assert a claim pursuant to *Tennessee Rule of Civil Procedure* 12.03 ("Rule 12.03 Motion" or "Motion for Judgment on the Pleadings"):

First, the breach of contract and fraud claims were inadequately pleaded.

Second, the claims, in actuality, sounded in legal malpractice and were untimely filed under the applicable statute of limitations.

Finally, Houbbadi's asserted "damages" – i.e. his arrest and indictment for the murder of his wife and the ramifications of these criminal proceedings on his life. These so-called "damages" were not and could not have been the result of *any* action or inaction by Defendants. The "damages" were the result of Houbbadi murdering his wife.

Accordingly, the Circuit Court of Montgomery County correctly denied Plaintiff's Motion for Leave to Amend his Complaint as futile (and procedurally deficient), found Defendants' motion well-taken, including determining that the claims were barred by the expiration of the limitations period, and dismissed the action.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Pursuant to *Tenn. R. App. P.* 27(b), Defendants identify the issues on appeal in light of Plaintiff's unclear presentation of the issues and attempt to obtain appellate relief based upon information outside the pleadings and matters not preserved in the trial court record:

1. Whether the trial court properly took judicial notice of various records of the Montgomery County General Sessions and Circuit Courts and the Davidson County divorce docket in granting Defendants' Motion for Judgment on the Pleadings.

2. Whether the trial court properly granted Defendants' Motion for Judgment on the Pleadings for:

   a) Failure to state a claim for and adequately plead breach of contract,

   b) Failure to state a claim for and adequately plead fraud;

3. Whether Plaintiff's action accrued on or before December 7, 2020 resulting in Plaintiff's December 14, 2021 Complaint being untimely and barred by the statute of limitations set forth in Tenn. Code Annotated § 28-3-104(c) as found by the Court in granting the Rule 12.03 motion.

4. Whether the trial court properly denied Plaintiff's Motion for Leave to Amend his Complaint because of:

   a) the failure follow Tennessee procedure to seek to amend, and

   b) the futility of amendment.

5. Whether Plaintiff's unpreserved legal arguments and factual allegations outside the Technical Record allow for appellate relief.

STATEMENT OF THE CASE

On December 14, 2021, *pro se* Plaintiff, Hamid Houbbadi, then an inmate in the Montgomery County Jail, filed a handwritten and often incomprehensible and incoherent Complaint. (TR 1).[1] The Complaint, which purports to assert breach of contract and fraud claims, arose from Plaintiff's October 1, 2018 consultation with and engagement of Defendants to represent him in (1) an Order of Protection ("OP Case") case in Montgomery General Sessions Court filed by his wife, Leila Chanane, and (2) a divorce from Chanane. (TR 1, ¶¶ 3-9). Defendants appeared for Houbbadi at the October 9, 2018 OP Case hearing. (TR 2, ¶¶ 10-11). The hearing was continued for a month and Order of Protection terms extended during this period. (*Id.*). Plaintiff was arrested for murdering his wife on October 20, 2018. (*Id.*). Plaintiff blames his wife's death and the ramifications of his own actions (i.e. his "damages") on Defendants.

On May 3, 2022, Defendants moved for judgment on the pleadings pursuant to Rule 12.03 due to Plaintiff's failure to adequately plead fraud and breach of contract accordance with Tennessee authority, including *Tennessee Rule of Civil Procedure* 9.02. Plaintiff's claims, in actuality,

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[1] The Technical Record consists of five volumes – two primary written record volumes, a Transcript volume, and two supplemental record volumes. The primary written record volumes are referred to hereafter as "T.R." with the Technical Record page and volume, if necessary, listed.

sounded in legal malpractice and were not timely asserted under Tenn. Code Ann. § 28-3-104. Lastly, Plaintiff's claimed "damages," i.e. his arrest and indictment on murder charges and the various ramifications on his life, were not the result of *any* action or inaction by Defendants as required by the elements of *any* cause he attempted to assert in the Complaint. Defendants asked the Court to take judicial notice of certain court records as a part of this motion.

Plaintiff moved to amend his Complaint on May 13, 2022, merely claiming there was "new discover evidence [sic][2] at Plaintiff murder trial" and without tendering a proposed pleading. (TR 118). Although not articulated in the amendment motion, Plaintiff's appellate brief now alleges that Defendants obtained a continuance in the OP Case and did not pursue exclusive occupancy of his home on October 9, 2018 in order to benefit Plaintiff's wife. Plaintiff now contends Kennedy was having an affair with his wife. Regardless, the "damages" flowed directly from Plaintiff's own criminal conduct. Defendants objected to amendment. (TR 145-48). The motion was procedurally deficient. Plaintiff failed to tendered a proposed amended pleading or otherwise explain his grounds to amend. It was futile for the reasons stated in the Rule 12.03 Motion. (*Id.*).

Plaintiff filed two responses in opposition to the Rule 12.03 Motion. (TR 127-28; 129-33). He concluded the second brief with the argument that he "would not be charge and convicted with murder if defendants did

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[2] Plaintiff's filings contain various grammar and spelling errors. Rather than insert [sic] for all such errors, Defendants advise that all quoted content herein is presented as written by Plaintiff.

their job in good faith ... if Plaintiff get his house ... she will still be alive and Plaintiff would not be charge for her murder" and that "defendants destroyed Plaintiff and they are responsible of Plaintiff wife death." (TR 132-33). Defendants replied. (TR 149-54).

On July 14, 2022, the trial conducted a hearing on the motion to amend the complaint and the Rule 12.03 Motion. Plaintiff newly claims on appeal that he did not know the Rule 12.03 Motion was to be argued on this date and he was denied due process. Plaintiff raised no objection during the hearing when he appeared from prison via Zoom videoconference. (*See* 7/14/22 Transcript). On July 18, 2022, Plaintiff filed a motion claiming not to have received Defendant's reply in support of the Rule 12.03 Motion and response to his motion to amend prior to the hearing. He sought 45 days to file another brief (his third) in response to the Rule 12.03 Motion and reply as to the motion to amend. (TR 156). He did not assert lack notice as to the purpose of the hearing in his July 18 motion, instead writing that the Court had set the July 14, 2022 hearing on the Rule 12.03 motion and his motion to amend.

The Trial Court subsequently granted the Rule 12.03 Motion and denied leave to amend and further briefing (TR 516-520). The court dismissed Plaintiff's Complaint with prejudice. (*Id.*). This appeal followed.

STATEMENT OF THE FACTS

This professional liability action arises from legal representation provided to Houbbadi in fall 2018. Houbbadi filed his *pro se* Complaint on **December 14, 2021.** (TR 1-24).

A. Plaintiff's Legal Representation

On **October 1, 2018,** Plaintiff sought to hire Kennedy and Rahn of KLF to represent him in the OP Case in Montgomery General Sessions Court filed by his wife, Leila Chanane, ("Chanane"). (TR 1 ¶ 3). Chanane alleged Houbbadi had been physically violent toward her. (*Id.*). This was a new matter, having been filed by Chanane on September 26, 2018. (TR 68-73). The General Sessions Court issued a Temporary Order of Protection, including barring Plaintiff from the parties' home, and set an October 9, 2018 hearing. (TR 74-76). Houbbadi also sought representation in a divorce. (*Id.*) A divorce case was already pending in Davidson County. (TR 78). While Plaintiff now tries to claim the existence of a contract with Defendants to pursue a motion for exclusive possession of his residence, his Complaint did not allege that he contracted with Defendants to pursue such motion. He only alleged that he "asked" them to pursue this relief. (TR 2, ¶ 9; 4, ¶ 18).

Counsel appeared for Houbbadi at the October 9, 2018 hearing. (TR 2, ¶ 10). Per the Complaint, Rahn "informed [Houbbadi] they reset the hearing on November 13, 2018" as a result of the judge running late and the court interpreter being unable await the judge's arrival. (*Id.*). Houbbadi further alleged that Rahn, without Houbbadi's authorization or informing him of the agreement, agreed with Chanane's counsel to extend the terms of the Temporary Order of Protection via a written Order. (TR 2-3, ¶¶ 10, 12). The extension included the requirement that Houbbadi vacate and not come around the marital residence at 508 Bellamy Lane prior to the new hearing date. (TR 77). But, it specified

that Houbbadi would be allowed to visit the home in a specified time period to obtain his clothing and medication. (*Id.*).

B. Murder of Houbbadi's Wife and Houbbadi's Arrest and Prosecution

On October 20, 2028, eleven days after the General Sessions appearance and extension of the Temporary Order of Protection, Chanane was found dead outside 510 Bellamy Lane, a home next door to marital residence at 508 Bellamy Lane. (TR 56). Houbbadi was arrested for Chanane's murder. (TR 2, ¶ 11; 80). He was indicted on charges of first degree murder and especially aggravated burglary in April 2019 and was jailed pending trial. (TR 2, 79).

C. Initiation of Suit

In his *pro se* Complaint on **December 14, 2021**, Plaintiff first asserted that Defendants breached a contract regarding Plaintiff's legal representation in the OP Case. (TR 2, ¶ 10). Houbbadi alleged Rahn appeared at the October 9, 2018 OP Case hearing and "informed [Houbbadi] they reset the hearing on November 13, 2018" as a result of the judge running late and the court interpreter being unable await the judge's arrival. (*Id.*). Plaintiff also alleged Rahn simply agreed with Chanane's counsel to extend the terms of the Temporary Order of Protection via a written Order, including extending the Temporary Order's requirement that Houbbadi vacate and not come around the marital residence prior to the new hearing date, *without Plaintiff's authorization or knowledge.* (TR 2 ¶ 10). Plaintiff pleaded that his criminal attorney in his murder prosecution later gave him a box of discovery papers containing the Temporary Order extension on

December 7, 2020 and that he did not know about the agreement in the OP case "until December 7, 2020." (TR 2 ¶ 11, 4 ¶ 18). (Because Plaintiff pleaded he learned of the document forming of the basis of his suit on December 7, 2020, his December 14, 2020 Complaint was untimely. (TR 64)). He further alleged that Defendants did not move for exclusive possession of the parties' residence as he "asked." (TR 2 ¶ 9, 4 ¶ 18).

The Complaint contained little to establish the existence or breach of a contract by Defendants. Plaintiff merely referred to signing a debit card receipt for a payment and made references to a contract, which he failed to attach or describe, and asserted it was a "forgery." (TR 3 ¶ 16). At best, the Complaint alleged an oral agreement pursuant to which Defendants agreed to *generally* represent Plaintiff in the OP Case and a divorce. The Complaint also did not plead or establish that Defendants contracted or agreed to take any specific action beyond general representation in the OP case and divorce, including filing an exclusive possession motion or that such motion would be filed within a set period.

Plaintiff next stated that he had a fraud claim. His Complaint did not explain this claim or how he was defrauded. The claim was indecipherable. Plaintiff now alleges on appeal that Defendants agreed to represent him and took his payment in order to facilitate an affair between counsel and his wife. Plaintiff never pleaded the existence of such a relationship in the Complaint. Plaintiff only later stated his "*belief*" that an affair had occurred in his response to the Rule 12.03 Motion. (TR 132). On appeal, this "belief" has metamorphosed into the outright contention than an affair was, in fact, occurring. (Appellant's Brief, p. 15). (This change is but one example of Plaintiff's tenuous

relationship with the truth and actual record content. *See also* footnote 6, *infra.*) There is no record content whatsoever to support this ever-changing and contrived theory; there is the opposite.[3]

Third and lastly, Plaintiff asserted he sustained damages as a result of his vague and amorphous claims. Plaintiff's "damages" were pleaded as follows:

> Complaint [sic] would submit that his credit score before he get arrested on murder charge was over 820 point. Complaint believe he would not charge on murder if defendant Kennedy and Rahn did their jobs in good fith. Complaint would submit he lost his house, his car, all of his furniture and property he have in his house. Complaint lost his job. Complaint would submit he disabled now physically and mentally. Complaint can't work no more. Complaint lost enjoyment of life. Complaint Houbbadi would submit that he see mental healt staff weekly. Complaint Houbbadi suffer anxiety, depression.

(TR 5-6, ¶ 23). These "damages" do not flow from fraud or a contract breach. Plaintiff simply blames Defendants for the ramifications of a homicide he committed.

D. Answer, Motion to Dismiss, and Non-dispositive Motion Practice

Defendants served their answer on January 14, 2022 and it was filed by the Clerk on January 18. (TR 12-24). The answer was mailed to Plaintiff at the Montgomery County Jail via U.S. Mail per *Tennessee Rule of Civil Procedure* 5. (TR 24). Plaintiff makes much ado of his claim that

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[3] Plaintiff also admitted in his sentencing hearing that he **"did not know what [Kennedy's] relationship was with" his wife**. The trial court took judicial notice of the sentencing transcript. (TR 92, p. 13, l. 17-22).

he did not receive the service copy - he nevertheless received a copy from the Court Clerk via letter of February 8, 2022, as he admits. (TR Vol. 4, 01)).

On January 19, 2022, Plaintiff filed a Motion for Appointment of Counsel. (TR 25). On February 2, 2022, he submitted a Notice of Hearing to the Montgomery Circuit Clerk to set the case for a hearing/trial on May 9, 2022. (TR 27, 40-41). He also had a subpoena issued for at least one witness, Beverly Sharp of the Board of Professional Responsibility, to attend this hearing, (TR 29). When Sharp objected in late March 2023 and served her objection to KLF's address (TR 39-40), Defendants learned of the hearing notice, the motion for appointment of counsel and Plaintiff's February 23, 2023 filing of a document entitled "Respond to Defendant Answer." (TR 30-34). None of these items had been served on Defendants, including the "Respond to Defendant Answer." (TR 39-40).

Although Plaintiff claims in his Brief that he filed the "Respond to Defendant Answer" to advise the Court that he never received an Answer from Defendant, this five-page filing was a combined reply to the Answer and an amendment of the Complaint. (TR 30-34). Because *Tennessee Rule of Civil Procedure* 7.01 precludes a reply to an answer absent court order and Rule 15.01 precludes a pleading amendment without consent or leave of count after a responsive pleading is served, these post-answer filings were improper. (TR 40-41). Plaintiff's Notice of Hearing ostensibly setting the case trial was also improper under *Tennessee Rule of Civil Procedure* 40 and the Montgomery Circuit Court Local Rule 22. Accordingly, Defendants filed a Motion to Strike the "Respond to Defendant Answer" and to Cancel the Evidentiary Hearing on April 6,

2022.[4] (TR 35-43). On April 22, 2022, Defendants served and fax filed the notice setting their motion for hearing on May 6, 2022. (TR Vol. 4, 03-04).

Plaintiff filed a response to the Motion to Strike and Cancel the Hearing and a reply in support of appointment of counsel. (TR 44-46). He admitted that he filed his hearing notice to set the case for trial and objected to the trial's cancellation and striking of his "Respond to Defendant" Answer. (TR 44-45). The admission prompted Defendants to file a supplement to their motion on May 2, 2022, to note that they (and Plaintiff) had demanded a jury trial and to reiterate the matter was not ripe for trial anyhow. (TR 47-48).

On May 3, 2022, Defendants filed the Motion for Judgment on the Pleadings and a supporting Memorandum. (TR 49-116). Since the hearing on the aforementioned non-dispositive matters was set for May 6, 2022, the Rule 12.03 dispositive motion was not noticed for hearing pending resolution of those motions. Plaintiff's grievance in his brief that the Rule 12.03 Motion was served the night before the May 6, 2022 hearing is completely immaterial – the Rule 12.03 Motion was not ripe for hearing on May 6. The Court only heard arguments on the non-dispositive motions on May 6, 2022.

As reflected in the Court's Order entered on May 18, 2022, the Court denied the motion for appointment of counsel. (TR. 119-120).[5] The

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[4] Defendants also objected to the Motion for Appointment of Counsel. (TR 35-36).

[5] The Order inadvertently lists the May 6 hearing date as May 13.

Court found the case was not ready for trial and granted the motion to cancel. (*Id.*) The Court granted the motion to strike because the "Respond to Defendant Answer" did not comply with the *Tennessee Rules of Civil Procedure.* (TR 120). The Court allowed the document to remain in the record but confirmed it would not be recognized as an amended complaint or a response to a pleading. (TR 120). The Court ordered Defendants to notice the Rule 12.03 Motion for a hearing with adequate notice of the date to Plaintiff. (*Id.*). Neither party utilized a court reporter for this hearing – there is no record content to support Plaintiff's assertion in his Brief that the Court told him could simply amend his pleading.

While not memorialized in the record, the Court advised Plaintiff he could move for leave to amend (not simply amend) during the hearing.[6] He did just that, serving a bare bones motion to amend his Complaint on May 9, 2023. (TR 118). On May 24, 2022, he served a notice setting his motion to amend for July 14, 2022. (TR April Supplement, 001).

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[6] Plaintiff contends at page 22 of his brief that Defendants confirmed that the Court advised him he could amend at the May 2022 hearing in their Response to his Motion to Supplement Record with Statement of Evidence. **This is another example of Plaintiff's tenuous relationship with the record and candor to the tribunal**. What Plaintiff contends is a confirmation is actually bullet point restatement of his own assertion in the Motion to Supplement which is then followed by a Defendants' response that the Court told Plaintiff he "could move to amend." *See* Exhibit B, p. 6 to Defendants' Jan. 25, 2023 Notice of Filing in the Court of Appeals.

On June 1, 2022, Plaintiff filed another motion for appointment of counsel (TR 125), his "Opposition to the Motion for Judgment on the Pleadings," (TR 127-28), and his Memorandum in Support of Opposition to the Motion for Judgment on the Pleadings. (TR 129-33).

On June 10, 2022, Defendants noticed the hearing on their Rule 12.03 Motion and served the notice on Plaintiff by mail to his last known address, the Bledsoe County Correctional Complex in Pikeville, Tennessee. (TR April Supp., 002-006). Defendants set the Rule 12.03 Motion for the *same* hearing date, July 14, 2022, that Plaintiff had previously selected for his motions. (TR April Supp., 002-006).

E. Motion for Judgment on the Pleadings and Motion to Amend Complaint

Defendants sought judgment on the pleadings pursuant to Rule 12.03 on three grounds:

First, Plaintiff failed to adequately plead fraud and breach of contract in accordance, including with particularity under *Tennessee Rule of Civil Procedure* 9.02 as to the fraud claim.

Second, Plaintiff's claims, in actuality, were legal malpractice claims that were not timely asserted under Tenn. Code Ann. § 28-3-104. Plaintiff explicitly pleaded that he discovered his "claims" on December 7, 2020 but he did not filed until December 14, 2021. (TR 2 ¶ 11, 4 ¶ 18).

Plaintiff's criminal prosecution record also reflected that he knew of the OP Case Temporary Order when it was entered in October 2018 and certainly by late 2019. Houbbadi filed a motion in the Montgomery Circuit Court to dismiss indictment Counts 2 and 3 on December 26, 2019. (TR 80-81). He argued in his motion:

> The defendant would submit that it is undisputed that he was served with an Ex Parte Order of Protection filed by Leila Chanane on September 28, 2018. The Ex Parte Order of Protection (Case Number 63GS1-20180CV-7756) was extended by agreement of the parties during a court appearance on October 9, 2018 to November 13, 2018.

(TR 80- 81, ¶ 5). Defendants asked the Court to take judicial notice of this Motion and other items, as discussed *infra*, and determine that the limitations period began to run by December 26, 2019. (TR 54-55, 62-64).

Lastly, Plaintiff's claimed "damages," i.e. his arrest and indictment on murder charges and the various resulting ramifications on his life, were not the result of *any* action or inaction by Defendants as required by the elements of *any* cause he attempted to assert in the Complaint.

Although dismissal under Rule 12.03 was warranted from the face Complaint, Defendants additionally requested the Court take judicial notice of certain Montgomery County Court records in the OP Case and Plaintiff's criminal case, including Houbbadi's sentencing hearing transcript, and the docket reflecting Plaintiff's already pending Davidson County divorce case:

> Exhibit 1 (TR 68-73) – Petition for Order of Protection and Order for Hearing, *Chanane v. Houbbadi*, Montgomery General Sessions Court, No. GS 2018-CV-7756, 9/26/2018;
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> Exhibit 2 (TR 74-76) – Temporary Order of Protection, *Chanane v. Houbbadi*, Montgomery General Sessions Court, No. GS 2018-CV-7756, 9/26/2018;
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> Exhibit 3 (TR 77) - Order (amending Temporary Order of Protection), *Chanane v. Houbbadi*, Montgomery General Sessions Court, No. GS 2018-CV-7756, 10/9/2018;

Exhibit 4 (TR 78) – Docket; *Houbbadi v. Chanane*, Davidson Circuit Court, No. 15D516;

Exhibit 5 (TR 79) - True Bill, Montgomery Circuit Court, 4/2019;

Exhibit 6 (TR 80-82) – Motion to Dismiss Count 2 and 3 of Indictment, *State of Tennessee v. Houbbadi*, No. CC-19-CR-400, 12/26/2019;

Exhibit 7 (TR 83-88)– Judgments, *State of Tennessee v. Houbbadi*, No. CC-19-CR-400, 3/11/2022;

Exhibit 8 (TR 89-96) – Transcript of Sentencing Hearing, *State of Tennessee v. Houbbadi*, No. CC-19-CR-400, 3/11/2022.

The prosecution materials reflected that Plaintiff was tried and convicted on three counts in February 2022. (TR. 83-88). He was sentenced on March 11, 2022. *Id.* During the sentencing, Plaintiff gave a soliloquy because he did not "get a chance to tell the jury about" his story. (TR 91, p. 9, l. 16-17). He stated, "**I just want to say, I'm sorry for what I did. And nobody deserves to be hurt or be killed.**" (TR 91, p. 9, l. 15-17). He then recounted a story claiming that his wife had broken into his safe, stolen money and then obtained the Order of Protection pursuant to which he had to leave the marital residence on September 27, 2018. (TR 91, pp. 11-12). He sought to hire Kennedy "for my divorce and for the order of protection." (TR 91, p. 12, l.4-7). Regarding the initial meeting, Houbbadi recounted:

> I was talking to Mr. Kennedy he mentioned to me he know my wife. And when – he told me it would be 2,500 for both case. I told him, okay. I told him, I will give you one-thousand down payment and pay 500 each month. He told me, Okay. And I

> give him my card. He leave the room. And he came back with another attorney. And he told me, this is Mr. Gordon [Rahn]. Just repeat to him what you just told me. I repeated to Mr. Gordon what I just told Mr. Kennedy. And my hearing for the order of protection it was October the 9th. I came to the court. Kevin Kennedy was there. My wife and her attorney and Ms. (indiscernible) and Mr. Gordon. Mr. Gordon came and talk to me and he told me, Look they push your hearing to the 27 – to the 13 of November, I told him, Why. He told me, Because the judge was not there and the interpreter she have another job, she can't wait. I left.

(TR 91, p. 12, l. 8-25).

Houbbadi returned to Clarksville on October 19 to pick up a prescription, a trip he reviewed in the soliloquy:

> When I went to the pharmacy they told me it would be like fifteen minutes, when it gets ready. That's when I decide to go to my home looking for my money. I was (indiscernible) **I went to my car first. I said, No somebody will call the police because I'm not allowed to go there**. So I will call Uber...Then I went to my house looking for the money."

(TR 92, p. 13, l. 7-12 (emphasis added)). When Houbbadi arrived at the home *knew* he was not supposed to visit (which undermines his Complaint claim that he did not know of the extended Temporary Order terms (TR 74-76)), he found a "magazine with Kennedy's name and number on it." (TR 13, p. 13, l. 14-17). He stated:

> That's why I decided to wait for my wife to talk to her about that because, I lost it. I see my money go, she keep me from the house, and my attorney, my attorney to hate me. His – I don't know what his relationship with my wife ... I wish I never gone to my house. I wish I never did go to my house ... I'm sorry. That's what I can say. I'm sorry."

(*Id.*). After the admission that he was prohibited from the home, having "lost it" and apologizing for murdering his wife, the Court sentenced Houbbadi to life in prison . (*Id*; TR 83-88).

In Plaintiff's response Memorandum, he tried to resuscitate his inadequately pleaded fraud claim. He cited *Nobes v. Earhart*, 769 S.W.2d 868 (Tenn. Ct. App. 1988), which he referred to as a federal case as establishing the elements of fraud (it does not). He also listed a portion of Tennessee's fraud elements but made no effort to articulate how his Complaint pled such elements or otherwise satisfied the requirement *Tennessee Rule of Civil Procedure* 9 that a fraud claim be stated with particularity. He instead focused on *Nobes*, characterizing it as being similar to the present case because involved a situation in an attorney represented one spouse while in a relationship with the other and did not disclose the relationship. By this point in the Trial Court proceedings, Plaintiff had concocted his new, but unpleaded, "belief" that counsel was involved with his wife. He did not explain how such a circumstance had any bearing on his claimed damages.

Plaintiff's response regarding breach of contract was similarly deficient and cited to South Carolina case law. In response to Defendants' statute of limitations arguments, Plaintiff self-servingly claimed, in direct contravention of his Complaint, that he did not actually discover his claim on December 7, 2020 and thus his December 14, 2021 Complaint was timely.

Lastly, Plaintiff expounded on his sentencing remarks. These affirmed the propriety of Rule 12.03 relief:

Plaintiff would not be charge and convicted with murder if defendants did their job in good faith. This is how Plaintiff find out that his wife after she stole Plaintiff she went put on order of protection. At Plaintiff murder trial the state witness an employ with YWCA women shelter in Nashville testified that Plaintiff wife was living at YWCA from the day she stole the money which is September 26, 2018 to October 11, 2015 . That the day the order agreement state Plaintiff will return to the house. Defendants know of should know that Plaintiff will return to the house. Defendants delay the order of protection hearing in the best interest of Plaintiff wife who defendant Kennedy know. They did not seek possession of the house defendant Kennedy who delay hearing for the best interest of Plaintiff wife who defendant Kennedy mention that he know Plaintiff wife. Plaintiff strongly belief that defendant Kennedy was having an affair with Plaintiff wife because defendant Kennedy request the delay and lie to Plaintiff and to this court. Plaintiff wife attorney did not request the delay. What was the purpose of the delay? Defendant Kennedy relationship to Plaintiff is more than just he seen her at the store where she work. Did not make sense that defendant Kennedy defrauded his client the Plaintiff just because he see her. **If Plaintiff get his house and Plaintiff wife stay where she was or Plaintiff would pay for her rent and for her moving cost she will still be alive and Plaintiff would not be charge for her murder. If was not the defendant Kennedy's name and phone number Plaintiff find at the house Plaintiff would left but because of this Plaintiff stay in the house which ended up in jail.**

Plaintiff would submite evidence to prove the evil intention and to provide to this honorable court that defendants destroyed Plaintiff and they are responsible of Plaintiff wife death. Plaintiff money requested for his injury will never compensate the lose of Plaintiff wife and life and property.

(TR 132-33). Defendants filed a reply on July 12, 2022. (TR 149).

Defendants responded to Plaintiff's Motion for Leave to Amend on July 11, 2022. The motion was defective because Plaintiff did not tender a proposed amended pleading in compliance with Tennessee case authority much less provide a description of the basis for seeking amendment. (TR 145-46). Further, amendment would be futile given the arguments set forth in the Rule 12.03 Motion, particularly the fact that the Complaint was untimely and that the claimed damages were patently not the result of any action or inaction by Defendants. (TR 145-48). In other words, regardless of what may or may not have occurred with Defendants' representation of Plaintiff, the damages he claimed flowed directly from the fact that Plaintiff killed his wife.

F. Hearing on the Rule 12.03 Motion and Motion for Leave to Amend

Plaintiff, via videoconference, and counsel for defendants appeared before Judge Kathryn Olita on July 14, 2022 to argue the Plaintiff's Second Motion for Appointment of counsel and Motion for Leave to Amend and Defendants' Motion for Judgment on the Pleadings. (TR Vol. 3, p. 1). An interpreter was present for Plaintiff. (*Id.*)

The Court heard from both parties. While Plaintiff now self-servingly claims he did not know the Rule 12.03 Motion would be heard on July 14, 2022, he advised the Court of this on July 14, 2022. Plaintiff also stated no objection to proceeding with arguments. Accordingly, the hearing proceeded.

Defendants began with their Rule 12.03 Motion arguments since the issue of futility of amendment was derived from them. (TR Vol. 3,

generally, pp. 6-7). Plaintiff's responsive generally failed to substantively address the Rule 12.03 Motion, including the fact that his damages did not flow from any of Defendants' actions. He instead tried to convince the Court that the pleaded date of discovery, December 7, 2020, was not the date of discovery in an effort to avoid his limitations problem. (TR Transcript 27-28).

On July 18, 2022, Plaintiff filed a Motion asking for 45 days to file to file a "supplemental response" or reply to the Rule 12.03 Motion and in support of amendment. (TR 156-59). He complained that he had not received Defendant's reply in support of the Rule 12.03 Motion and making all manner of unfounded assertions regarding counsel. He additionally attached a variety of documents he believed supported the validity of his claim. (TR 160-79). None of these, however, addressed the issue of whether the Complaint failed to state a claim upon which relief can be granted or whether and how Plaintiff's wife's death and his criminal prosecution (i.e. his "damages") were the result of anything other than his own actions. Plaintiff also made no assertion that he had not known known that the Rule 12.03 Motion would be argued on July 14 or that he was somehow prejudiced by the arguments occurring on this date. (TR 156-59).

G. Trial Court's Memorandum Order and Notice of Appeal

On August 8, 2022, the Trial Court entered a Memorandum Order taking judicial notice of the items identified by Defendants, granting the Motion for Judgment on the Pleadings, denying leave to amend, and denying Plaintiff's request for further briefing. (T.R. 182-88).

The Court denied the Motion for Leave to Amend because Plaintiff failed to articulate his alleged "new evidence" or what his proposed amendment would assert. (TR 184). The Court also determined that any amendment would be futile in that facts discerned at his murder trial in February of 2022 do not change the facts underlying his claims for breach of contract and fraud, nor would any such evidence impact the applicable statute of limitations. (TR 184).

As to the Rule 12.03 Motion, the Court first found that Plaintiff had, at best, alleged an agreement for general legal representation but had failed to demonstrate a breach of an agreement for general representation. (TR 185). Because he had not alleged a contract for specific agreed upon legal actions in the representation, he had failed to state a claim for an unfiled motion as to exclusive possession of his home. (*Id.*). The Court concluded the breach of contract claim must be dismissed. (TR 186).

The Court next found that Plaintiff failed to adequately plead fraud, including that a knowingly false representation had been made to Plaintiff, that he reasonably relied upon it and suffered damage. (TR 186). The Court further observed that Plaintiff had argued during the hearing that Defendant's actions led him to murder his wife and be tried and convicted of the crime and lose his possessions, job and sustained non-economic damages. (TR 187). The Court rejected the contention that reliance on Defendants' representations caused these damages. (*Id.*) The Court concluded Plaintiff failed to state a claim for fraud and that the claim must be dismissed. (*Id*).

Lastly, the Court found that Plaintiff's claims sounded in the tort

of legal malpractice for which the one year limitation of Tenn. Code Ann. § 28-3-104(c) applied. The Court found that Plaintiff knew or should have known of the alleged unauthorized agreement to continue the Temporary Order of Protection and that a motion for exclusive possession of the marital residence had not been pursued as of October 2018. (TR 187). The Court also found that even if Plaintiff did not discover the alleged unauthorized agreement until December 7, 2020, something inconsistent with his December 2019 indictment dismissal motion, his December 14, 2020 Complaint was still untimely. (TR 187).

The Court denied all other motions or claims for relief including the supplemental briefing request. (TR 187). The Trial Court dismissed all claims. (TR 187). Plaintiff filed his Notice of Appeal on August 25, 2022. (T.R.193).

ARGUMENT

A. Law and Argument

1. Standard of Review for Rule 12 Dismissal

A complaint which fails to state a claim upon which relief can be granted is subject to dismissal pursuant to Rules 12.02(6) and/or 12.03 of the *Tennessee Rules of Civil Procedure*. A 12.02(6) motion asserts that the allegations in the complaint, if accepted as true, fail to establish a cause of action for which relief can be granted. *Leach v. Taylor*, 124 S.W.3d 87, 90 (Tenn. 2004). Such motions challenge "only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). A trial court should grant a Rule 12 motion to

dismiss when it appears "that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Willis v. Dept. of Corrections*, 113 S.W.3d 706, 710 (Tenn. 2003); *see also Waldron v. Delffs*, 988 S.W.2d 182, 184 (Tenn. Ct. App. 1998).

Although a trial court is to construe the factual allegations in a plaintiff's favor on a motion to dismiss, and therefore accept the allegations of fact as true, a court is not required to give the same deference to conclusory legal allegations. *See Riggs v. Burson*, 941 S.W.2d 44, 48 (Tenn. 1997). Additionally, the trial court is not required to accept as true the inferences to be drawn from conclusory allegations. *Id.* Further:

> The proper way for a defendant to challenge a complaint's compliance with T.C.A. § 29-26-121 is to file a Tenn. R. Civ P. 12.02 motion to dismiss. In the motion, the defendant should state how the plaintiff has failed to comply with the statutory requirements by referencing specific omissions in the complaint and/or by submitting affidavits or other proof. Once the defendant makes a properly supported motion under this rule, the burden shifts to the plaintiff to show either that it complied with the statutes or that it had extraordinary cause for failing to do so. Based on the complaint and any other relevant evidence submitted by the parties, the trial court must determine whether the plaintiff has complied with the statutes. If the trial court determines that the plaintiff has not complied with the statutes, then the trial court may consider whether the plaintiff has demonstrated extraordinary cause for its noncompliance.

Myers v. Amisub (SFH), Inc., 382 S.W.3d 300, 307 (Tenn. 2012).

The appellate standard of review applicable to a trial court's decision on a motion to dismiss filed pursuant to Rule 12.02(6) or 12.03

is also settled law. The appellate court shall "review the trial court's decision without a presumption of correctness" and "construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief." *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003) (citing *Stein v. Davidson Hotel Co.*, 945 S.W.3d 714, 716 (Tenn. 1997).

2. Judicial Notice of Court Documents Was Appropriate

Tenn. R. Evid. 201 establishes the procedure for taking judicial notice and the type of information of which a court (trial or appellate) may take judicial notice: "[a] judicially noticed fact must be one not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

While a Rule 12 motion is generally converted to a motion for summary judgment where a court considers matters outside the pleadings, *see Woodruff by & through Cockrell v. Walker*, 542 S.W.3d 486, 493 (Tenn. Ct. App. 2017), a court "may consider 'items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case ... without converting the motion [to dismiss] into one for summary judgment.'" *Karr v. Saint Thomas Midtown Hosp.*, No. M202000029COAR3CV, 2021 WL 457981, at *3 (Tenn. Ct. App. Feb. 9, 2021) (citing *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016) (quoting *Haynes v. Bass*, No. W2015-01192-COA-

R3-CV, 2016 WL 3351365, at *4 (Tenn. Ct. App. June 9, 2016)).

In particular, judicial consideration of an existing or past pleading or court filing does not convert a motion into a motion for summary judgment. *See Stephens*, 529 S.W.3d at 73; *see also Counts v. Bryan*, 182 S.W.3d 288, 293 (Tenn. Ct. App. 2005) (authorizing taking judicial notice of the date that the prior lawsuit was filed without converting a motion to dismiss into a motion for summary judgment); *Cochran v. City of Memphis*, No. W2012-01346-COA-R3-CV, 2013 WL 1122803, at *2 (Tenn. Ct. App. Mar. 19, 2013) (concluding that consideration of the existing complaint, a prior complaint, and various orders did not require conversion to a motion for summary judgment). The recent legal malpractice case of *Coffee Cnty v. Spining* is particularly on point as it clearly underscores the fact that a Court may take notice of its files or records, including those of past proceedings underlying a current proceeding:

> In interpreting Rule 201, this court has held that a trial judge may take judicial notice of those facts capable of "accurate and ready determination by referencing the court's files." *Counts v. Bryan*, 182 S.W.3d 288, 293 (Tenn. Ct. App. 2005). Significantly, this court has also recognized that it is appropriate to consider not only the record of the present proceeding, but those of earlier proceedings and judgments. *See id.* at 291, 293.

Coffee Cnty. v. Spining, No. M202001438COAR3CV, 2022 WL 168145, at *5 (Tenn. Ct. App. Jan. 19, 2022), appeal denied (May 18, 2022).

Here, <u>all</u> of the items for which Defendants requested judicial notice are court records in the underlying OP Case, the divorce case, and

the criminal murder prosecution. These records and their content are subject to judicial notice under *Tennessee Rule of Evidence* 201 - their content is "not subject to reasonable dispute," in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," i.e. the Montgomery County General Sessions and Circuit Courts and Davidson court, as demonstrated by relevant case law. Further, ***Plaintiff did not dispute the content of the noticed records or question their accuracy,*** instead erroneously arguing, as he also does in his appellate brief, that the Court cannot take judicial notice of court records. The trial court properly took judicial notice. (TR 182).

3. Rule 12.03 Motion Properly Granted

a. Breach of Contract is Inapplicable and Inadequately Pleaded

Tennessee authority holds that "[t]he essential elements of any breach of contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (citations omitted)).

Plaintiff's Complaint failed to plead the elements of breach of contract relating to Defendants' representation. He did not clearly allege that an enforceable contract existed which required Defendants to perform any specific action outside of generally providing legal representation in the OP Case or pending divorce. Likewise, there is no pleading content alleging that Houbbadi explicitly contracted with any

Defendant to prosecute a motion for exclusive possession of his residence. He only avers he "asked" them to pursue such motion. (TR 2 ¶ 8, 4 ¶ 18). To the extent Plaintiff asserted a contract existed with Defendants, he alleged agreement for general representation and failed to allege of breach of same as the Trial Court correctly found.

Next, to the extent Defendants allegedly took unauthorized actions at the OP Case hearing and/or failed to seek exclusive possession, such actions sound in the tort of legal malpractice, not a contract breach. *See Meyer v. Pellegrin*, No. 3:19-CV-00413, 2019 WL 5727579, at *1 (M.D. Tenn. Nov. 5, 2019) adopting the Report & Recommendation in *Meyer v. Pellegrin*, 2019 WL 5777759 (M.D. Tenn. October 10, 2019); *see also Ferrell v. Long*, No. 2009 WL 1362321, at *2 (Tenn. Ct. App. May 14, 2009); *Swett v. Binkley*, 104 S.W.3d 64, 67 (Tenn. Ct. App. 2002).

In *Meyer*, the plaintiff pleaded a legal malpractice and a breach of contract claim against his counsel for a failing to take certain actions he "requested." The defendant argued the claims sounded only in malpractice, that the plaintiff failed to allege facts supporting contract breach and that a breach of contract claim could not, therefore , proceed. *Id.* at *2, 4. The U.S. District Court, relying on Tennessee authority, agreed:

> Plaintiff's allegations are insufficient to assert a plausible breach of contract claim under the circumstances of this case. While Plaintiff's allegations may show the existence of a contract between with Defendant pursuant to which Defendant ostensibly agreed to generally represent Plaintiff in his criminal defense in exchange for payment, Plaintiff has not shown that activities with respect to obtaining a court hearing for his halfway house placement was a specifically

> contracted duty that it would support a breach of contract claim if not performed. *See Jordan v. Clifford*, 2010 WL 2075871 at *4 (Tenn. Ct. App. May 25, 2010) (breach of contract claim stated when plaintiffs specifically contracted with attorney to file a lawsuit and attorney failed to file the lawsuit); *Byrd & Assoc., PLC v. Siliski*, 2007 WL 3132929 at *6 n.5 (Tenn. Ct. App. Oct. 26, 2007) (same). **Allegations that Defendant failed to adequately perform any of the various duties encompassed within the general criminal defense agreement do not support an independent breach of contract claim and, as argued by Defendant, are simply theories of the ... malpractice claim.**

Meyer, 2019 WL 5777759 at *4 (emphasis added). The District Court dismissed the contract breach claim and only allowed the malpractice claim to proceed.

The same determination by the Trial Court here, dismissal of a contract breach claim and determination the claims sounded in malpractice (albeit untimely claims), was proper given the pleaded content and Plaintiff only "asking" for an exclusive occupancy motion.

b. Fraud Was Inapplicable and Inadequately Pleaded

Actions for fraud contain four elements:

> (1) intentional misrepresentation of a material fact; (2) knowledge that the representation was false—that the misrepresentation was made knowingly or recklessly or without belief or regard for its truth; (3) reasonable reliance on the misrepresentation by the plaintiff and resulting damages; (4) "that the misrepresentation relates to an existing or past fact[.]"

Stacks v. Saunders, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990) (citations

omitted). If the claim is one for promissory fraud, "then the misrepresentation must 'embody a promise of future action without the present intention to carry out the promise [.]'" *Id.* (quoting *Keith v. Murfreesboro Livestock Mkt., Inc.*, 780 S.W.2d 751, 754 (Tenn.Ct.App.1989)(citing *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590 (Tenn.Ct.App.1980)). "'When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief. Otherwise any breach of contract would call for such a remedy.'" *Houghland v. Security Alarms & Servs., Inc.*, 755 S.W.2d 769, 774 (Tenn. 1988)(quoting Prosser and Keeton on The Law of Torts, § 109 (5th ed.1984)).

To assert any claim, a party must, at minimum, provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Tenn. R. Civ. P. 8.01. Fraud claims require even more under Tennessee's Rules of Civil Procedure and the common law. As stated in *Homestead Group, LLC. v. Bank of Tennessee*, 307 S.W.3d 746, 751 (Tenn. Ct. App. 2009), "[f]raud is never presumed, and where it is alleged, facts sustaining it must be clearly made out." *Homestead Group, LLC. v. Bank of Tennessee*, 307 S.W.3d 746, 751 (Tenn. Ct. App. 2009). Thus, Rule 9 requires that "in all averments of fraud or mistake [in a pleading], the circumstances constituting fraud or mistake shall be stated with particularity." *See* Tenn. R. Civ. P. 9.02; *see also Kincaid v. SouthTrust Bank*, 221 S.W.3d 32 (Tenn. Ct. App. 2006).

While the Complaint purports to assert a "claim for fraud," fraud

elements are entirely indecipherable. This neither satisfies notice pleading of Rule 8, the "purpose of which is ... to provide notice of the issues presented to the opposing party and court" per *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011), nor Rule 9's particularity requirement. Even if Plaintiff somehow managed to asserted a fraud claim, he did not plead any content to explain how such "fraud" resulted in his arrest for his wife's murder, the loss of his credit rating, house, car, furniture and personal property, job, enjoyment of life or the development of mental and physical issues. Plaintiff's patently absurd "damages" are not damages at all; they are the natural result of the murder he committed. The Trial Court correctly rejected the fraud claim.

c. Plaintiff's Claims Were Untimely

Tennessee Code Annotated § 28-3-104 governs causes of action against attorneys, among other professionals. In particular, subsection (c)(1) specifies that "[a]ctions and suits against ... attorneys for malpractice shall be commenced within one (1) year after the cause of action accrued, whether the action or suit is grounded or based in contract or tort." Tenn. Code. Ann. § 28-3-14(c)(1)[7], *see also Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). The one (1) year limitations

[7] TCA § 28-3-104(c) was formerly numbered as 28-3-104(a). TN LEGIS 618 (2014), 2014 Tennessee Laws Pub. Ch. 618 (S.B. 1506) and *Swett v. Binkley*, 104 S.W.3d 64, 67 (Tenn. Ct. App. 2002) ("Tenn. Code Ann. § 28-3-104(a)(2) governs 'actions and suits against attorneys or licensed public accountants or certified public accountants for malpractice, whether the actions are grounded or based in contract or tort.'")

period applies regardless of whether the legal malpractice claim sounds in tort or contract. *See Ferrell v. Long*, 2009 WL 1362321, at *2 (Tenn. Ct. App. May 14, 2009) (citing *Swett v. Binkley*, 104 S.W.3d 64, 67 (Tenn. Ct. App. 2002)). Further, fraud, which Tennessee defines as a tort, *see Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 130 (Tenn. 1995), is likewise subject the one (1) year limitations period. This was explicitly articulated by the Court of Appeals in *Ferrell v. Long*, involving a suit against an attorney for breach of contract, fraud, theft by deception and conversions. The Court held that "[s]ince Tenn. Code Ann. § 28-3-104(a)(2) [now subsection (c)] applies to torts ... it also controls ... claims for fraud" and applied the one-year limitations period to bar the claim.

Plaintiff ignores the foregoing in his brief, instead relying upon *Alexander v. Third Nat. Bank*, 915 S.W.2d 797, 799 (Tenn. 1996), *Vance v. Schulder*, 547 S.W.2d 927 (Tenn. 1977), and *Am. Fid. Fire Ins. Co. v. Tucker*, 671 S.W.2d 837 (Tenn. Ct. App. 1983) to try to convince this Court that Tenn. Code Ann. § 28-3-105's three (3) year limitations period for injuries to *property* applies here. This is a professional liability case, i.e. a case involving damage to a person arising under Tenn. Code Ann. § 28-3-104, not a property damage case. Further, and to the extent these cases involve fraud in the inducement claims, Plaintiff did not assert a fraud in the inducement claim much less adequately plead any sort of fraud.

Next, the accrual of a cause of action under the applicable statute of limitations, Tenn. Code. Ann. § 28-3-104(c), is governed by the "discovery rule." The discovery rule has two elements. First, the plaintiff

"must suffer an actual injury as result of the defendant's negligence" and, second, the plaintiff "must have known or in the exercise of reasonable diligence should have known that [the] injury was caused by the defendant's negligence. *Id.* at 28; *see also Story v. Bunstine*, 538 S.W.3d 455, 464-65 (Tenn. 2017); *Tanaka v. Mears*, 980 S.W.2d. 210, 213 (Tenn. 1998). "An actual injury occurs when there is a loss of a legal right, remedy or interest, or the imposition of liability." *PNC Multifamily Cap. Inst. Family Fund v. Bluff City Comm. Dev. Corp.*, 387 S.W.3d 525, 544 (Tenn. Ct. App. 2012). An actual injury also exists when a plaintiff is "forced to take some action or otherwise suffer 'some actual inconvenience,' such as incurring an expense, as a result of the defendant's negligent or wrongful act." *PNC*, 387 S.W.3d at 544 (citation omitted). For the second element, a plaintiff's knowledge of an injury may be **actual or constructive.** *Story*, 538 S.W.2d at 469. In other words, a plaintiff may either become aware or reasonably should have become aware of facts sufficient to put a reasonable person on notice that an injury has been sustained as a result of the defendant's negligent or wrongful conduct. *Id.* (citing *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 532 (Tenn. 1998)).

A Rule 12 motion is an appropriate vehicle to invoke the statute of limitations as grounds for dismissing a complaint. *Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 456 n. 11 (Tenn. 2012) (citing *Hawk v. Chattanooga Orthopaedic Grp., P.C.*, 45 S.W.3d 24, 28 (Tenn. Ct. App. 2000).

Plaintiff's claims, to the extent they are claims at all, are governed

by the one (1) year limitations period of Tenn. Code Ann. § 28-3-104(c). This is true of the claim that Defendants committed the tort of fraud and the remaining claims, which sound in malpractice, for the purported failure to file a motion for exclusive possession of the marital residence in October 2018 and allegedly unauthorized agreement to continue the Order of Protection hearing and extend the Temporary Order of Protection in the interim. Each claim accrued in October 2018 and Plaintiff knew or reasonably should have known of the claims at that time. October 2018 was nearly 3½ years prior to the filing of this action in December 2021, making this case patently untimely under the one (1) year limitations period. Even if Plaintiff did not discover the allegedly unauthorized written agreement and order to extend the Temporary Order of Protection until December 7, 2020, as he averred in the Complaint, or somehow fail to discover that Defendants did not file a motion for exclusive possession until December 2020, his claims remain untimely. Again, the Complaint was not filed until December 14, 2021, over a year after the "discovery" date Plaintiff specifies in his pleading.

Ultimately, Plaintiff *did* know of the agreement and extension of the Temporary Order of Protection in October 2018. This was demonstrated by his discussion of the agreement and order extension in his 2019 motion to dismiss two criminal indictment counts that he filed in his criminal prosecution proceeding. (TR 80-82). Plaintiff wrote on December 26, 2019 with regard to the OP Case:

> The defendant would submit that it is undisputed that he was served with an Ex Parte Order of Protection filed by Leila Chanane on September 28, 2018. The ex parte Order of Protection (Case Number 63GSI-208-CV-7756) **was**

extended by agreement of the parties during a court appearance on October 9, 2018 to November 13, 2018.

Id. (emphasis added).

Plaintiff's contention that he did not know about his own December 2019 indictment dismissal motion in his murder prosecution is nonsensical. The Court of Appeals historically rejects such arguments. Much like Houbbadi, the plaintiff the 2010 malpractice case of *Lufkin v. Conner* attempted to avoid the one-year limitations period by claiming he did not discover the malpractice in the motion filed by his attorney at the time the motion was filed. *Lufkin v. Conner*, 338 S.W.3d 499, 504 (Tenn. Ct. App. 2010). The litigant claimed he did not read a motion filed by his attorney that would have put him on notice of his claim. *Id.* The Court of Appeals rejected this. It held that factual information in a motion is enough to put a reasonable person on notice and it is sufficient that a plaintiff reasonably should have become aware of the lawyer's conduct at issue via the filing. *Id.* at 504-05. Accordingly, Plaintiff cannot plead ignorance of his own motion filings to escape the statute of limitations.

d. Plaintiff's Claimed Damages are Not the Result of Defendants' Action or Inaction

Regardless of what "titles" apply to his claims, Houbbadi's ultimate contention remains the same - but for Defendants' action or inaction he would not have been arrested for and charged with murder in fall 2018 and then sustained the so-called "damages" he claims. He even reiterates this theory of his case in his brief. (*See* Appellant's Brief, p. 25).

Plaintiff's theory is preposterous. There is simply no causal link between purported deficiencies in legal representation and Defendant

killing his wife. Unsurprisingly, the Complaint is necessarily devoid of content explaining how any act or failure to act by Kennedy or Rahn in representing Plaintiff in the OP Case or in pursuing exclusive possession of a residence could possibly have caused him kill his wife and then be arrested and charged with a murder.

Even if one ignores the pleading deficiencies and instead analyzes Houbbadi's claim from the basic perspective of the damages elements of breach of contract, fraud or legal malpractice,[8] i.e. the requirement of damages caused by the alleged breach, fraud and/or malpractice, the conclusion is the same. Actions for breach of contract require the existence of damages caused by the breach of the contract. *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005). Fraud requires reasonable reliance upon a misrepresentation and resulting damages. *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990). Malpractice requires that the breach of an attorney's duty to the plaintiff was both "the cause in fact of the plaintiff's damages" and that the "attorney's negligence was the proximate, or legal, cause of the plaintiff's damages." *Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001) (citations omitted).

Houbbadi pleads nothing to explain how a contract breach, some unknown misrepresentation for purposes of fraud or breach of an attorney's duty could possibly cause Houbbadi's claimed "damages" i.e. his diminished credit score, the loss of his job and real and personal

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[8] Defendants also more broadly argued the Plaintiff cannot satisfy the various elements of the claims and not simply damages as more fully set forth herein.

property, his "lost enjoyment of life," and purported development of mental and physical disabilities, as required by the elements of each claim. Houbbadi's "damages" are wholly the progeny of him killing his wife, a crime for which he was arrested, charged, and found guilty following a jury trial and effectively admitted to committing at sentencing soliloquy. (TR 87-96).

4. **Plaintiff's Due Process and Other Miscellaneous Arguments are Unavailing**

Plaintiff devotes a significant portion of his brief complaining about his purported delayed receipt or non-receipt of service copies of documents and the fact Defendants filed and served the Motion for Judgment on the Pleadings just ahead of the motion hearing on other matters on May 6. These complaints are not a basis for relief.

First, Defendants mailed all documents filed to Plaintiff at his last known addresses (all of which are jails or prisons) in compliance with the requirements of Rule 5 as shown on the certificates of service throughout the record. They were not required to do more, including inquiring as to whether he received the materials. Second, the new complaint about the timing of the filing of the Rule 12.03 motion just ahead of a May 6 hearing on entirely different motions has no bearing here.

Plaintiff also complains that the Trial Court did not consider his "evidence" that Kennedy knew Ms. Chanane, that he was purported tricked into signing a contract as if it was a receipt, did not discuss a payment Plaintiff made to Defendants, and did not address why Rahn did not sign the Temporary Order in the OP Case if he had had reviewed and approved (versus Chanane's counsel signing for Rahn). Plaintiff fails

to grasp that none of these things, even if they might constitute some sort of deficiency in the lawyer-client relationship, did not result in Plaintiff's arrest, prosecution and conviction. Those events occurred as a result of Plaintiff killing his wife.

Plaintiff complains that he did not receive filings ahead of the July 14, 2023, claims he did not know the July 14 hearing would address the Rule 12.03 Motion, and assumes all manner of ill-will and impropriety by Defendants. Relative to service of responses and replies, he cites to *Tennessee Rule of Civil Procedure* 6.04, for the first time on appeal, as requiring earlier service. Rule 6.04 does not apply anyhow. It addresses the time for filing hearing notices and affidavits in opposition to motion. The rule is not applicable to responses motions or replies in support of motions – even the rule was applicable and responses and replies were considered "affidavits," they were served more than one (1) day before the July 14 hearing on the Motion for Leave to Amend and the Rule 12.03 Motion.

With regard to the claim Plaintiff did not know the July 14 hearing would include arguments in the Rule 12.03 motion, Plaintiff failed to assert or preserve this issue in the Trial Court. He neither advised the Trial Court of this at the hearing nor raised the issue in his motion after the hearing. A party may not offer a new issue for the first time on appeal. Failure to assert an issue constitutes waiver. *See Lane v. Becker*, 334 S.W.3d 756, 764 (Tenn. Ct. App. 2010) (noting in this appeal of a Rule 12.02(6) dismissal that a party waives an issue when it raises it for the first time on appeal); *see also Campbell County Bd. of Educ. v. Brownlee–Kesterson, Inc.*, 677 S.W.2d 457 (Tenn. Ct. App. 1984). Plaintiff has

asserted his unpreserved "due process" claim for the first time on appeal in an eleventh-hour appellate attempt to resuscitate his case against Defendants. However, the issue has been waived.

Ultimately, Plaintiff has failed to demonstrate on appeal that he is entitled to relief.

CONCLUSION

The Trial Court properly reviewed, considered and granted the Defendants' Rule 12.03 Motion for Judgment on the Pleadings and denied Plaintiff's Motion for Leave to Amend his Complaint in accordance with Tennessee law and case authority. Accordingly, Defendants respectfully request that the Trial Court's denial of leave to amend and dismissal of this matter be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2023, a true and correct copy of the foregoing Brief of Defendants-Appellees has been sent to the following:

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P.O. Box 5000
Mountain City, Tennessee 37683
Pro Se Plaintiff
Via Regular Mails and Certified Mail, Return Receipt Requested

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

By: /s/Joshua A. Powers

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Defendants-Appellees complies with the requirements set forth in *Tennessee Rule of Appellate Procedure* 30(e). The number of words contained in this brief is 10,291, including footnotes.

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

By: /s/Joshua A. Powers

Appendix "F"

IN THE SUPREME COURT FOR TENNESSEE

Hamid Houbbadi	}	
Plaintiff/Appellant	}	
vs.	}	**Case No: M2022-01166-COA-R3-CV**
Kennedy Law Firm, PLLC, Kevin	}	**Montgomery County NO. CC21-CV-2457**
Kennedy, and Gordon Rahn	}	
Defendant/Appellee	}	

APPLICATION FOR PERMISSION TO APPEAL

Appellant Hamid Houbbadi, pro-se, and pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, makes application to this Court for appeal by permission from final decision of the court of appeals for the Middle section of Tennessee. In support of this application and as required by Rule 11(b) of Tennessee Rules of Appellate procedure, the following statements are provided:

PROCEDURAL HISTORY

The court of appeals for the Middle District of Tennessee in Nashville, entered a judgment on January 9, 2024, affirming the judgment of the Trial Court of Montgomery County. Appellant presented the following question for review in the court of appeals:

1. Whether the trial court erred in granting defendants judgment on the pleading?
2. Whether the trial court committed reversible error by taking judicial notice of disputed facts?
3. Whether the trial court erred in holding that plaintiff failed to state a claim?
4. Whether the trial court in holding that plaintiff claim barred by the applicable statute of limitations?
5. Whether the trial court erred in holding that plaintiff claim sounded in tort of legal malpractice claim?
6. Whether the trial court erred in denying plaintiff motion for leave to amend?

7. Whether the trial court denied plaintiff due process?

QUESTIONS PRESENTED FOR REVIEW

(a) Whether the court of appeal erred in not addressing all of appellant raised issues?

(b) Whether every claim Challenging the conduct of lawyers is a professional malpractice?

STATEMENT OF THE FACTS

The facts stated in the Court of Criminal Appeals opinion, the most of it is incorrectly stated and misleading. Here, the Court's Opinion is in conflict with statute, prior decisions, and other principles of law.

REASONS SUPPORTING REVIEW

The court of appeals determined that only two issues are dispositive in this appeal all the other issues appellant raised on appeal are pretermitted and not dispositive. The court of appeals agree with the trial court that appellant action is untimely and that appellees are entitled to a judgment on the pleading. The court of appeals also agree with the trial court that appellant action sounded in legal malpractice claim without explaining the difference between fraud, breach of contract, or legal malpractice. The court of appeals incorrectly stated that the gravamen in this appeal.

(1) fraud

In most general fraud is a trick or artifice other use false information that induces a person to act in way he or she would not otherwise acted. Rawlings v. John Hancock Mut. Life Ins, 78 S.W.3d 291, 301 (Tenn. Ct. App. 2001). Fraud occurs when a person intentionally misrepresents a material fact to mislead another to obtain unfair advantage. Brown v. Birman Care Ins, 42 S.W.3d 62, 66 (Tenn.2001).

(2) Breach of Contract

This Court Has explained, in a breach of contract claimant must prove the existence of a valid enforceable contract deficiency in performance amounting to breach damages caused by the breach. Fed Ins. Co v. Winters, 354 S.W.3d 287, 291 (Tenn. 2001).

(3) legal malpractice

Legal malpractice claim requires proof of the following element (1) that the accused attorney owed a duty to plaintiff. (2) the attorney breached that duty. (3) the plaintiff suffered damages. (4) That the breach cause in fact of the plaintiff damages. (5) That attorney negligence was proximate, or legal cause of plaintiff damages.

Due process issue

The court of appeals mention, that the trial court resolved this case on a motion for judgment on the pleading.

On 08/25/2022 the court of appeals sent appellant a "Notice -Initiating Document" the court of appeals order appellant to (return the form of DOCKETING STATEMENT FOR CIVIL APPEALS to the Appellate Court clerk office with 15 days). See a copy attached. appellant clearly stated that the proposed issue to be raised in appeals is "**Denial of Due Process**"

Procedural due process requires "that individuals be given an opportunity to have their legal claims heard at the meaningful time and in meaning manner" Manning v. City of Lebanon, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003).

Regarding due process this court instructed that "the very nature of a fraud claim often requires the actual hearing and viewing of witnesses whose credibility is paramount concern for the trier of facts." Volunteer Beer, Inc v. Johnson, 1997 WL 675456. Fraudulent intent is an issue best determined by a careful examination of the underlying facts and an evaluation of credibility of the parties and witnesses. Schorr v. Schorr 1992 WL 108617. If a witness has made false or fraudulent misrepresentations or has participated in a scheme of fraud and subsequently, is called to the witness stand, under oath, to answer questions about such activities, regardless of his or her answers, his or her demeanor under such circumstances will provide some indication as to whether the charge are true, or not.

The court of appeals ignored appellant due process issue. See appellant brief page 22 appellant said "he sent a letter to trial court on February 02, 2022, informing the trial court that

after 48 days still no answers from Defendants. Plaintiff filed on the same day a notice of hearing setting May 09, 2022 hearing (Vol.I.P.29). plaintiff also served four witnesses with a subpoena to appear at May 09, 2022 hearing, they are: Ali Sadif, Hebba Abulsaad, Beverly Sharp, Kevin Fowler. Plaintiff received a letter and copy of defendant answer from the trial court clerk dated February 08, 2022. See a copy of the letter in the supplement appellate record (Vol.III)"

Appellant also in his appellant brief page 23 said. "certificate of service of defendant answer stated a copy of the answer was sent to plaintiff on January 14, 2022. This claim is false".

On the same page appellant said" on February, 23 2022, plaintiff filed a counterclaim reply to defendants false service claim titled "Response to Defendant Answer" (Vol.P.30-34) plaintiff request the court to order defendants to submit proof that they served plaintiff with an answer".

On April 06, 2022 appellees filed a motion to strike appellant "response to defendant answer" and to cancel or continue May 09, 2022 evidentiary hearing. On April 06, 2022 appellees filed a notice of hearing sitting May 06, 2022 for a hearing three day before the May 09, 2022 hearing were the appellant four subpoenaed witnesses were to appear. The trial court did not continue the hearing but held a hearing three days early on May 06, 2022 canceling appellant hearing and strike appellant motion. At May 06, 2022 hearing appellant informed the trial court that the appellees never serve appellant with an answer as they claim in their certificate of service that was filed with the trial court clerk. Appellant showed the trial court the clerk letter, the trial court informed appellant that he could move to amend his complaint when it strikes appellant motion. Appellant also informed the trial court that he received appellees three motion the night before the May 06, 2022 hearing. the record show that appellees put the three motions in the mail on May 03, 2022 they are (1) supplement to motion to cancel or continue evidentiary hearing (2) motion for judgment in pleading (3) memorandum in support of a motion for judgment on the pleading. (Vol.P.47-48, 49-51, and 52-116) the trial court and court of appeal know that this act by appellees is a violation of TRCP 6.04 and 6.05. but they choose to ignore it. The court of appeals did not even mention that there was a

hearing held on May 6, 2022. Appellant in his DESCRIPTION AND DESIGNATION OF RECORD ON APPEAL request the audio recording and transcript of testimony. Appellant filed a motion to supplement the record with 4 items (1) a letter from Wendy Davis, Clerk of the court dated February 8, 2022 to appellant (2) A subpoena to Kevin Fowler, legal aid, issued February 8, 2022 and (3) notice of hearing setting a May 6, 2022 in the case with certificate of service dated the 22nd of April, 2022, (4) May 06, 2022 hearing transcripts. The trial court granted the supplement motion in part the first three items and denied the transcript of the May 06, 2022 hearing because there was no court reporter present. On February 10, 2023 appellant renew his request for the audio record of the May 06, 2022 hearing. Appellees filed a motion objecting to this request because they don't want to convey what occurred at the May 06, 2022 hearing the audio recording of May 06, 2022 would show that the court informed appellant that he could move to amend. Appellant also filed a statement of evidence but the trial court denied it too. Appellant filed His motion for leave to amend on May 13,2022, the court approved appellees proposal order on May 18, 2022 granting appellees motion to strike and to cancel or continue May 09, 2022 evidentiary hearing, but did not address appellant motion for leave to amend.

Appellees again three day before July 14, 2022 hearing. On July 11, 2022 they filed another three motions (1) response to motion for appointment of counsel (2) response to motion for leave to amend (3) reply in support of motion for judgment on the pleading. (Vol.II.P. 142-144, 145-148, and 149-154) the certificate of those motions show that appellees put the motions in the mail on July 11, 2022 appellees know that it's impossible for appellant to receive the motions before the July 14, 2022 hearing, the trial court showed its bias by this leeway not ones but twice to appellees on May 6, 2022, and on July 14, 2022 hearings. On July 21, 20222 appellants filed a request of time to file supplement response motion for judgment on the pleading and amendment because he did not receive appellant motion until the July 14, 2022 hearing is over (Vol.II.P.156-160). the trial court also did not address appellant May 18, 2022 discovery motion, nor the request of time to supplemental response to appellees July 11, 2022 motions. Appellant clearly was denied his due process right.

The court of appeals did not address this important issue regarding Denial of due process.

Leave to Amend motion.

Tennessee law has a history of favoring amendment as noted by Supreme Court and reflected in this state rules of civil procedure, the court states that the rule of Civil procedure "were designed to simplify and ease the burden of procedure under sometimes harsh and technical rules of common law pleading" Branch v. Warren, 527 S.W.2d 89, 91 (Tenn.1975). regarding amendment in particular, the court has adopted an expansive view that favors party seeking to amend: leave to amend shall be freely given. The court of appeal ignored appellant issue regarding Leave to amend motion. Appellant was attempting to amend his complaint with Mr. Kevin Fowler testimony at appellant criminal trial. Which would prove the allegation of fraud and breach of contract. Mr. Fowler was the opposing party attorney on the order of protection at October 09, 2018 hearing. Appellant respectfully request this honorable court to take judicial notice of Mr. Keven Fowler testimony transcript.

Judicial Notice.

See State v. Lawson, 291 S.W.3d 864, headnotes number 7: [the rule that the court may take judicial notice whether requested or not, and **at any stage** of the proceeding, applies to both trial court and **appellate court**].

This court may (and is requested to) take judicial notice of court filing containing information pertinent to this appeal and arising from the **case at Montgomery county Circuit court Case No: CC19-CR-400.**

The contents of these items are subject to judicial notice under rule 201 of Tennessee rules of Evidence as their content is "not subject to reasonable dispute," in that it is "capable of accurate and ready determination by resort to source whose accuracy cannot reasonably be questioned," the court of appeal and Montgomery county Circuit court. In this application, the court is requested to consider and take judicial notice of the following case at Montgomery county Circuit court Case No: CC19-Cr-400. Appellees did file a judicial notice for eight items which the trial court considered, appellant pray the same that this court consider Mr. Fowler testimony transcript.

(a) Whether the court of appeal erred in not addressing all of appellant raised issues?

The court of appeals said in its analysis that "we must always look to the substance of the pleading rather than to its form" "the choice of the correct statute of limitations is made by considering the gravamen of the complaint".

In this case the court of appeals stated "appellant did not claim that appellees failed to represent him or did not fulfill a certain aspect of their general representation". This claim is entirely incorrect. the appellant clearly show that appellees did not represent appellant but were representing the opposing party, appellee Kevin Kennedy toke appellant case just to take care of the opposing party, appellant clearly show how appellees defrauded him at October 1, 2018 and at October 9, 2018. See appellant brief page 13 paragraph 2said "in plaintiff case defendant defrauded plaintiff in several ways. First allegation of fraud occurred on October 01, 2018 when plaintiff and his friend Ali Sadif meet with defendant Kevin Kennedy at his law firm, Defendant Kennedy mentioned to plaintiff ad his friend Ali Sadif that he knew plaintiff's wife Leila Chanane. Plaintiff and defendant Kennedy agree that the fee for representation on the order of protection and divorce would be $2.500. plaintiff paid defendant Kennedy $1000 and agree to pay $500 a month until paid off". Appellant received a copy of the forgery contract with appellees answer to appellant complaint with the board of professional responsibility see (Vol.I.P.173) that when he finds out that he did not signed a receipt but an hourly rate contract of $250 per hour instead of total fee of $2500. And the contract was in the name of appellees Gordon Rahn which he never discusses the fee with appellant. Appellant clearly show that defendant defrauded appellant in the presence of Mr. Ali Sadif October 09, 2018. Appellee Kennedy trick appellant in signing the contract as a receipt, never read the contract or informed appellant that the contract under the name of Gordon Rahn, appellee Kennedy never informed appellant that he signed an hourly rate contract instead of a flat fee. Appellee Kennedy did not include the $1000 appellant paid toward the fee of $2500.

The gravamen is that Kevin Kennedy took appellant case only to take care of the opposing party who he knows and carry an affair with. What appellee's Gordon Rahn did is a complete to what appellee Kennedy started. The continue of the order of protection it would be not the

issue if there was a conflict of scheduling at the court that day October 09, 2018 as they claim, but the issue is the false statement they made regarding the continue. They claim two story about the reason of continuing the October 09, 2018. The first one they claim that Mr. Kevin Fowler Request interpreter for his client see (Vol.II.P.167.P.5-7) the other claim when they answer to this action, this time they blame it on the judge running late see (Vol.I.P.14.P.10). the third reason come from Mr. Fowler testimony See (Testimony transcript on Judicial notice) Mr. Fowler that said appellant attorney Mr. Gordon who request the continue he also did not know why appellee Rahn requested the continue. There was no need of continue all the parties were present the interpreter was present, there was no good cause for continue. Appellee Kennedy was working for his best interest and the opposing party interest because appellant wife was living in Nashville at the time of October 09, 2018 hearing, he requests that she move back to the house on October 11, 2018 and intentionally refuse not to file the motion for exclusive possession of the appellant house which he is the sole owner. This what the evidence shows. And appellant nor reason to question appellees faithfulness at October 09, 2018 hearing because they withheld the truth from him and made a false statement which he relayed on and left the court room.

In the court of appeals opinion in this case see (page # 1) said: "according to his complaint, Hamid Houbbadi (Appellant) hired the Kennedy Law firm". This statement is incorrect, see (TR.P.1.P.3) appellant said: "on October 1, 2018 complaint Hamid Houbbadi, and his friend Ali Sadif went to Kennedy Law Firm **to hire Mr. Kevin Kennedy**" see also appellant brief (page # 13. P.2) appellant clearly said that he hired appellee Kevin Kennedy and agree about the fee with Kevin Kennedy. And that Kevin Kennedy admitted he know appellant's wife which was the opposing party on the order of protection and divorce. The gravamen in this case is that Kevin Kennedy Know appellant wife and toke appellant case just to take care of her. By analyzing that appellant hired the law firm is misleading and incorrect. The Kennedy Law firm did not know appellant wife, appellee's Gordon Rahn did not Know appellant wife, but Kevin Kennedy who know her and he admitted it at October 1, 2018 meeting in the presence of appellant friend Ali Sadif and in his answer to the board of professional responsibility (vol.II.P.166.P.1)

In the court of appeals opinion (page 2) said "appellant hired Defendants" again this is incorrect. **appellant hired Kevin Kennedy only**.

The court of appeals also said "Mr. Rahn attended the October 9, 2018 court date" this also incorrect. see appellant complaint (TR. P.1.P.10) said "on October 9, 2018 was the hearing for the order of protection **both defendants. Mr. Kennedy and Mr. Rahn were at the court Room".**

The court of appeal said "appellant avers that scheduling issue occurred with the court interpreter and that the hearing was reset to November 13, 2018" this also incorrect see appellant complaint (TR.P.2.P.10) appellant said "defendant Rahn came to complaint Houbbadi and informed him they reset the hearing on November 13, 2018". There was no scheduling issue both parties were present the interpreter also was present. What happened that Kevin Kennedy want the appellant wife to take possession of the house, she was living in Nashville, he wants her in Clarksville, he was working for his and her best interest.

The court of appeal in its opinion said "appellant also avers that Mr. Rahn agreed to reset the hearing and continue the ex-parte order of protection without discussing the continue with appellant" this also incorrect and misleading. appellant said that Mr. Rahn informed him they reset the hearing but he withheld that the continue was by agreement of the parties and also the amendment on the October 9, 2018 order see (TR.P.2.P.12) appellant said " Complaint Houbbadi did not know anything about the agreement. He falsely been told they reset the hearing because the judge was not at the court". See the (TR.P.175) the order did not mention any thing that the continue due to the Judge running late.

The court of appeals again said in page two on its opinion that "the complaint seems to allege that defendants defrauded appellant when appellant hired them" again appellant hired Kevin Kennedy not both of appellees.

On page 3 of the court of appeals opinion said: "on May 3, 2022 appellees filed a motion for judgment on the pleading and supporting memorandum". But for unknown reason the court of appeals did not mention the appellees others motion Supplement to Motion to cancel or continue Evidentiary Hearing, which also filed on May 3, 2022. The hearing on those motion

was on May 6, 2022. See the certificate of service of the above mention motions were put in the mail on May 3, 2022, and the hearing was held on May 6, 2022. Court of appeal did not address if the appellees violated the T.R.C.P. 6.04 and 6.05. see appellant brief page 24. Nor the court of appeals addresses the cancelation of Appellant May 9, 2022 where he subpoenas four (4) witnesses to appear at the hearing. Appellees request the cancelation or continue, and schedule the hearing three day early on May 6, 2022 for one reason to escape facing the witnesses, the trial court should have not cancelled May 9, 2022 and schedule a hearing three day early on May 6, 2022. And the court of appeal should address this issue under Due process.

(b) Whether every claim Challenging the conduct of lawyers is a professional malpractice?

***BREACH OF CONTRACT CLAIM**

Tennessee courts have made a clear distinction between a breach of contract action against an attorney and legal malpractice action. Jordan v. Clifford, 2010 WL 2075871, (Tenn.2010) Mr. Jordan sued his former attorney for breach of contract. Mr. Jordan alleged that the defendant attorney had failed to perform his contract. The former attorney argued that the case sound in legal malpractice claim. The court found that this allegation stated a cause of action for breach of contract. It is clear that the issues in a breach of contract and legal malpractice action are distinct and separate each requiring proof of different element both as to liability and damages. Consequently, the plaintiff does not have to establish the standard of care in a breach of contract action.

It's clear in appellant case he hired Kevin Kennedy not Gordon Rahn, appellee Kennedy did not performed the job appellant paid him for which is to represent him at October 9, 2018 hearing, and to file a motion for exclusive possession of appellant house, instead he order appellee Gordon to request the continue and order him to not file a motion for exclusive positions of appellant home instead he move the opposing party back to the home and used Gordon Rahn to make agreement with the opposing party attorney to continue the hearing until November 13, 2018 for no good cause as required by law. They made false statement that judge was running late that day and the interpreter cannot wait. See and compare (TR.P.15.P.12) and (TR.P.167.P.5-6) those are both appellees answer which are totally in

conflict with each other and with the opposing attorney testimony regarding the order of protection agreement .

appellant request this court to take a judicial notice of transcript of Mr. Fowler testimony.

Judicial Notice.

See State v. Lawson, 291 S.W.3d 864, headnotes number 7: [the rule that the court may take judicial notice whether requested or not, and **at any stage** of the proceeding, applies to both trial court and **appellate court**].

The appellees request judicial notice in trial court and the court granted it, the court of appeal ignored to addressee appellant issue regarding that judicial notice.

This court may (and is requested to) take judicial notice of court filing containing information pertinent to this appeal and arising from (1) **Case No: CC19-CR-400.**

The contents of these items are subject to judicial notice under rule 201 of Tennessee rules of Evidence as their content is "not subject to reasonable dispute," in that it is "capable of accurate and ready determination by resort to source whose accuracy cannot reasonably be questioned," i.e. the court is requested to consider and take judicial notice of this item at Montgomery county Circuit court Case No: CC19-Cr-400. as follow:

* transcript of Mr. Kevin Fowler testimony at appellant criminal trial regarding the order of protection.

In Lewis v. Caputo, 2000 WL 502833. Mr. Lewis sued his former attorney for legal malpractice and breach of contract. The court of appeals determined in Lewis case that his complaint has a cause of both, a cause of action for legal malpractice and a cause for breach of contract. in Lewis case the court of appeals said "the complaint makes out an allegation of breach of contract. This allegation is not premised on a belief that the defendant failed to adhere to the professional standard of care required of Tennessee Attorneys. Therefor, it is not controlled by the statute of limitations found in T.C.A 28-3-104(a)(2) governing malpractice actions. Rather, it is controlled by the statute of limitations found in T.C.A 28-3-109(a)(3), which governs actions for breach of contract not otherwise expressly provided for in the code. Accordingly, the plaintiff malpractice claim is subject to a one-year statute of limitations and his breach of contract claim is subject to a six-year statute of limitations.

***FRAUD CLAIM**

This court had explained that not every claim challenging the conduct of lawyer is a professional malpractice claim. See Vazeen v. Sir 2021 WL 832043. In Vazeen case he filed an action against his former attorney involve fraud and legal malpractice claim. The trial court in Vazeen case grant summary judgment for the attorney. Vazeen appeal.
On appeal the court of appeals confirmed in part and vacated in part. The court of appeals find that legal malpractice was not timely brought. The court of appeals reject that the fraud claim sounded in legal malpractice.

In Appellant case he clearly shows how appellee Kennedy defrauded him in signing the contract as a receipt, and how he defrauded appellant on the fake contract that did not included the $1000 appellant paid toward the total fee of $2,500 see (TR.P.173) also the contract continues three handwriting appellee Kennedy who wrote appellant name and the fee. Appellee Rahn signature on the bottom right. Appellant Houbbadi signature in the left bottom of the contract. The contract it was an hourly rate of $250. that appellant never agrees to such rate in the presence of appellant friend Ali Sadif. Appellee Kennedy never read or show the appellant the contract or informed him that appellee Rahn is his attorney, but he tricks appellant to sign the contract as a receipt. The court of appeals never mention Vazeen v. Sir, 2021 WL 832043 case nor it mention Kennedy Fraud, all its focuses was on the October 09, 2018 continue. Appellant was injured by the false statemen and the trick appellee Kennedy Made. And when appellant find appellee Kennedy name and phone number at the house if not appellee Kennedy name and phone number he would never stayed at the house to talk to his wife. If the appellee Kennedy did his job and not made false statement through appellee Rahn and to move the opposing party back to the house appellant would never be charge and convicted of murder the opposing party would still be alive. Appellant did everything right he call the police to report that his wife stole his money, went, and hire an attorney to divorce from her, that attorney was appellee Kevin Kennedy who was working for appellant wife not for appellant.

At appellant criminal trial the state presents the October 09, 2018 to the jury and showed the jury it was a continue by the appellant authorization, the evidence here show that is

incorrect. appellant did not know that appellees make an amendment and agree to continue. Instead was lied too that the continue was rescheduled. Appellant ended up convicted of Especially aggravated burglary, felony murder on the term of "amendment" this is another injury, the state also used the October 09. 2018 order to show premeditated first-degree murder, appellees action and inaction destroy appellant's life. Trial court and the court of appeal give too much weight to the appellees argument the damages appellant suffered if any it because he murdering wife. Appellant did not murder his wife it was a fight and crime of passion not a murder. The appellees destroyed appellant life if not them appellant would never be charge with those three mentioned counts. The court of appeal should give more weight to the evidence and the witnesses not to appellees argument which is not supported by evidence. Appellant claims are for Fraud and breach of contract, there was trick and misleading statements to take advantage of appellant, and intentionally appellee Kennedy was not working for appellant, but was working for appellant wife the opposing party, and for his best interest. Those elements support claim of fraud and breach of contract, there is no negligent or that appellees failed to adhere to the professional standard of care required of Tennessee attorneys.

For the forgoing reason appellant pray for this court to grant this application for review.

Respectfully submitted,

Hamid Houbbadi # 637286
NECX
P.O, Box 5000
Mountain City, TN 37683

CERTEFECT OF SERVICE

I certify that I Have served a true and correct copy of this application has been served upon the State of Tennessee by U.S. Mail via prison legal system this 22nd day of January, 2024 to the following address:

Mr. Nora A. Koffman
602 Sevier St, Suite 300
Johnson City, TN 37604

Certificate of Compliance

In accordance with Rule of Appellate Procedure, Rule 30 (e) this application did not exceed 4900 words exclusive the brief and court of appeal opinion and amended rehearing petition and exhibited attached.

Hamid Houbbadi #637286
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Appendix "G"

IN THE TENNESSEE SUPREME COURT

HAMID HOUBBADI,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. M2022-01166--SC-R11-CV
	)	
KENNEDY LAW FIRM, PLLC, KEVIN KENNEDY, and GORDON RAHN,	)	Tenn. Court of Appeals Case No. M2022-01166-COA-R3-CV
	)	
Defendants-Appellees.	)	Circuit Court, Montgomery County, No. CC-21-CV-2457
	)	

ANSWER OF DEFENDANTS-APPELLEES, KENNEDY LAW FIRM, PLLC, KEVIN KENNEDY, AND GORDON RAHN TO PLAINTIFF-APPELLANT'S RULE 11 APPLICATION FOR PERMISSION TO APPEAL

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Defendants-Appellees Kennedy Law Firm, PLLC ("KLF") and attorneys Kevin Kennedy ("Kennedy") and Gordon Rahn ("Rahn") (collectively "Defendants") Answer in Opposition to *pro se* Plaintiff-Appellant's ("Houbbadi" or "Plaintiff") Application for Permission to Appeal **("Application")** the Court of Appeals' judgment in *Houbbadi v. Kennedy Law Firm, PLLC, et al.*, No. M2022-01166-COA-R3-CV, 2024 WL 95872 (Tenn. Ct. App. Jan. 9, 2024).

COUNTERSTATEMENT OF THE FACTS[1]

Tennessee Rule of Appellate Procedure 11(b)(3) requires an application to contain "the facts relevant to the questions presented, with appropriate references to the record." However, "facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application." *Id.* **Plaintiff's "Statement of Facts" is entirely devoid of factual discussion and references to the record**, instead it vaguely and nonsensically contains the following:

> The facts stated in the Court of Criminal Appeals opinion, the most of it [sic] is incorrectly stated and misleading. Here the Court's Opinion is in conflict with statute [sic], prior decisions and other principles of law.

See Application, p. 2. Plaintiff's Application does not comply with the mandatory requirements of Rule 11 or operates as a waiver of any objection to opinion's fact recitation.

---

[1] The Technical Record contains three volumes. The first two volumes and cited pages are referred to as "TR __"; the third volume and cited pages are referred to as "TR3 __."

Defendants find it unnecessary to reiterate the factual history as the Court of Appeals' factual recitation in the opinion affirming the trial is entirely accurate.

ARGUMENT

I. LEGAL STANDARD

Tennessee Rule of Appellate Procedure 11 lists the reasons to grant appeal permission:

> An appeal by permission may be taken from the final decision of the Court of Appeals ... only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

Tenn. R. App. P. 11(a). Thus, review is warranted **only** where a case presents a significant legal question, either because the law is unclear or unexplored, because the matter is one of great public interest, or the Court of Appeals appears to have clearly erred.

"[O]btaining permission to appeal pursuant to Rule 11 is not, by any means, automatic." *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997). The Supreme Court "must be convinced that an important consideration justifies granting review." *Id.*; *see also Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017) (granting interlocutory appeal in the exercise of supervisory authority to prevent needless litigation and

eliminate confusion concerning an at-will employment relationship); *State v. Frazer*, 558 S.W.3d 145 (Tenn. 2018)(granting Rule 11 application to consider whether good-faith exception to the exclusionary rule applied as argued before the lower court). The Advisory Commission Comment explains that "[t]he essential purpose of the rule, therefore, is to identify those cases of such ***extraordinary importance*** as to justify the burdens of time, expense and effort associated with double appeals." *Tenn. Rule App. P.* 11, Adv. Comm. Cmt. (emphasis added).

II. PLAINTIFFS' APPLICATION SHOULD BE DENIED

A. The Court of Appeals Correctly Affirmed

The Circuit Court of Montgomery County correctly found Defendants' Rule 12.03 motion well-taken, particularly the arguments that Plaintiff's claims sounded in malpractice and were barred by the expiration of the limitations period, and dismissed the action. Additionally, the Court correctly denied Plaintiff's Motion for Leave to Amend his Complaint as futile (and procedurally deficient). Quite simply, the new factual information he sought to add to his pleading did not alter the effect of the limitations period on his claim.

On appeal, the Court of Appeals distilled the appellate issues to two dispositive issues and pretermitted the remainder raised by Plaintiff:

> 1. Whether the Trial Court erred in concluding that Appellant's claims sounded in malpractice; and
>
> 2. Whether the trial court erred in concluding that Appellant's cause of action was untimely under Tennessee Code Annotated section 28-3-104.

In affirming, the Court of Appeals correctly determined that Plaintiff's fraud and breach of contract claims sounded in legal malpractice under applicable case authority, and accordingly, the claims were subject to the one (1) year limitation period of Tenn. Code Ann. § 28-3-104(c)(1). *Houbbadi,* 2024 WL 95872 at *4-5.

Having found that Tenn. Code Ann. § 28-3-104(c)(1) governed, the Court then considered whether the December 14, 2021 complaint was filed within a year of the action's accrual. The Court of Appeals concurred with the Trial Court's determination that Plaintiff was on notice of his claim by late October 2018 and, if not then, by December 7, 2020. Regardless of the date, this meant his December 14, 2021 Complaint was filed outside the one (1) year limitation period, rendering it untimely and time-barred. The Court of Appeals affirmed the Trial Court's grant of judgment on the pleadings. *Houbbadi*, 2024 WL 95872 at *6.

Plaintiff now hopes to add additional materials from his criminal murder trial to the record on appeal and asks this Court to grant discretionary review to determine:

a. Whether the Court of Appeals "erred in not addressing all of appellant raised issues?"

b. Whether every claim challenging the conduct of lawyers is a professional malpractice?

Neither request implicates any of the reasons identified in *Tenn. R. App.* 11 supports review. First, the Court of Appeals is not required to resolve every "issue" raised by an appellant, but rather the issues that are dispositive of the appeal. Further, and more importantly, ample Tennessee case authority clearly addresses the fact that the gravamen of

a complaint, not labels applied by a plaintiff, controls the action and the applicable statute of limitations. *See Houbbadi*, 2024 WL 95872 at *3-5 Further, *Ferrell v. Long*, No. M2008-02232-COA-R3-CV, 2009 WL 1362321 (Tenn. Ct. App. May 14, 2009) and *Swett v. Binkley*, 104 S.W.3d 64 (Tenn. Ct. App. 2002), referenced therein, are analogous to the facts of this case and direct the outcome reached below. And, of course, the one-year statute of limitations, Tenn. Code Ann. § 28-3-104(c)(1), applies to contract and tort actions (such as fraud) against attorneys.

This case raises no discrepancy in uniformity of decisions, disputed question of law, or matter of public interest. Rather, the Court of Appeals' ruling is supported by, and does not contradict, existing Tennessee authority. The ruling does not threaten to unsettle Tennessee law or adversely affect the public interest. This Court's supervisory authority is not demanded.

CONCLUSION

There is no need for Supreme Court review. The Application should be denied.

Respectfully submitted,

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

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Counsel for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2024, a true and correct copy of the foregoing Answer of Defendants-Appellees has been sent via email and first class mail to the following:

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

By:_____

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Tennessee Supreme Court Rule 46, Section 3, Rule 3.02 and *Tenn. R. App. P.* 11(d). Excluding the title page, the table of contents, the table of authorities, the attorney signature block, the certificate of compliance, and the certificate of service, this brief contains 1614 words, based upon the word count of the word processing system used to prepare this brief.

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC

By:_____

Appendix "H"

DOCKETING STATEMENT FOR CIVIL APPEALS

(Return form to the Appellate Court Clerk's Office within 15 days)

HAMID HOUBBADI v. KENNEDY LAW FIRM, PLLC ET AL.
Appeal No.: M2022-01166-COA-R3-CV

Court Appealed to: ☒ Court of Appeals
☐ Supreme Court
(Workers' Compensation cases are appealed to the Supreme Court)

Appellant: Hamid Houbbadi
County/Court: Montgomery County Circuit Court
Trial Judge: Kathryn Wall Olita
Trial Court Number(s): CC21-CV-2457

1. **Nature of case:** ☐ Juvenile ☐ Termination of Parental Rights
☐ Workers' Compensation ☒ Other

2. **Jurisdiction:**

A. Date of entry of judgment appealed from: August-08-2022
B. Is the order appealed from a final order, i.e., **does it dispose of the action as to all claims by the parties?**
C. If the judgment/order is not a final disposition as to all claims by all parties, did the trial judge direct the entry of judgment in accordance with T.R. Civ.P. 54.02?
Date of order, if applicable: _____
D. Date of any post-trial motion filed: _____
E. Date of disposition of any post-trial motion filed: _____
F. Will there be: ☒ Transcript of Evidence
☐ Statement of Evidence
☐ Neither

3. Concise statement of the issues proposed to be raised. You are not bound by this statement. Avoid general statements such as "the judgment is not supported by the evidence".
(Use reverse side if necessary) Denial of due process.

prose ☒ Name of Party Represented

Hamid Houbbadi
Address: N.E.C.X P.O.Box 5000
Mountain City, TN 37683
Phone: _____

Attorney for Appellant Pro Se

☒ Hamid Houbbadi
Date: August-31-2022
BPR#: _____
Phone: _____

Hamid Houbbadi

Court of Appeals - Middle Division
Appellate Court Clerk's Office - Nashville
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401 7th Avenue North
Nashville, TN 37219-1407
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Appendix "I"

Kevin C. Kennedy
Bruce A. Kennedy
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October 1, 2021

Ms. Beverly P. Sharpe, Esq.
Director of Consumer Assistance Program
Board of Professional Responsibility
of the Supreme Court of Tennessee
10 Cadillac Drive, Suite 220
Brentwood, TN 37027

RE: Complaint Number 68472c-6
Complaint Number 68473c-6
Complainant: Hamid Houbbadi

Dear Ms. Sharpe:

Your letter dated September 27, 2021 addressed to Kevin Chambliss Kennedy and Gordon Wade Rahn in reference to the above complaint(s) was received by Mr. Kennedy and Mr. Rahn on September 29, 2021. In response, Mr. Kennedy and Mr. Rahn jointly submit the following:

Mr. Houbbadi initially met with Mr. Kennedy on October 1, 2018 to discuss representation of Mr. Houbbadi in an Order of Protection matter as well as a divorce from his wife. Mr. Kennedy will often refer prospective clients to other attorneys associated with The Kennedy Law Firm, PLLC, based upon the issues and complexities of the individual's case. In this instance, Mr. Kennedy discussed the matter with Gordon Rahn, an attorney with The Kennedy Law Firm, who then met with Mr. Houbbadi.

Mr. Rahn and Mr. Houbbadi discussed the Temporary Order of Protection, the grounds for the Order, allegations he made that his wife had stolen money from him, the procedure for the hearing scheduled for October 9, 2018, and moving forward with a complaint for divorce. Mr. Kennedy was not present during the discussions between Mr. Rahn and Mr. Houbbadi. Mr. Houbbadi then executed a Contract for Legal Services with Mr. Rahn dated October 1, 2018, which was also signed by Mr. Rahn. Mr. Houbbadi paid $1,000.00 for his retainer on that date. Please see enclosed Contract for Legal Services. Mr. Rahn advised Mr. Houbbadi he would be at the Order of Protection hearing on October 9 with him.

3 Mr. Kennedy acknowledged in the initial meeting with Mr. Houbbadi that he knew who his wife was. However, she had never been a client of Mr. Kennedy or any other attorney at The Kennedy Law Firm. She worked at a local store where Mr. Kennedy often had his clothes tailored and he had seen her in that shop.

4 Mr. Rahn appeared with Mr. Houbbadi in the General Sessions Court for Montgomery County, Tennessee on October 9, 2018. Mr. Rahn met with Mr. Houbbadi before court and again explained the procedure and purpose of the hearing. Mr. Rahn learned at court that day that Mr. Houbbadi's wife, Leila Chanane, was represented by Mr. Kevin Fowler of the Legal Aid Society located in Clarksville.

5 Mr. Rahn and Mr. Fowler discussed the matter at length that morning. It is Mr. Rahn's recollection that Mr. Fowler requested an interpreter on behalf of Ms. Chanane.

6 Throughout the morning, Mr. Rahn had discussions with Mr. Houbbadi to keep him apprised of what was happening. Mr. Rahn distinctly remembers during one conversation that Mr. Houbbadi told him that his wife spoke English and did not need an interpreter. Based upon that specific comment, and other questions and statements Mr. Houbbadi made, Mr. Rahn was confident Mr. Houbbadi understood everything that was happening that morning.

7 As the morning passed, it became evident a hearing with an interpreter present was not going to happen that day. Mr. Rahn and Mr. Fowler negotiated an amendment of the Ex Parte Temporary Order of Protection that would allow Mr. Houbbadi to return to the marital home to retrieve personal affects and medicine. Mr. Rahn discussed the proposal with Mr. Houbbadi, who approved the agreement.

8 The parties' case was one of the last, if not the last, case remaining on the Court's docket that morning. It is Mr. Rahn's recollection that he and Mr. Fowler announced the agreement. He also believes both parties were present at the time. The hearing was reset for November 13, 2018, and Mr. Fowler agreed to prepare the necessary order. That particular date was given to the parties by the Court.

9 Mr. Fowler drafted the Order later that day and presented it to Mr. Rahn for approval. Mr. Rahn reviewed the order and, with it being consistent with the agreement, gave his approval. The order was submitted to the Court, signed by Judge Ken Goble, and filed on October 9, 2018. A copy of the Order is enclosed.

10 In regard to the divorce, Mr. Houbbadi advised Mr. Rahn on October 1, 2018 that he had hired an attorney in Nashville, Tennessee in 2015 or 2016 to file a divorce complaint. Mr. Rahn tried calling the attorney (Ramsdale O'DeNeal) several times but was unsuccessful in reaching him, so Mr. Rahn sent a letter dated October 18, 2018. A copy of said letter is enclosed.

Mr. Rahn has reviewed his notes from the October 1, 2018 meeting with Mr. Houbbadi and there is nothing in his notes about Mr. Houbbadi requesting immediate possession of the marital home.

11 Mr. Houbbadi states in his letter that he was living in the street at the time. However, Mr. Rahn's notes reflect that he was staying with a friend in Franklin, Tennessee, although no specific address was given.

Unfortunately, just days after the October 9, 2018 court date, Ms. Chanane was found in a neighbor's driveway with multiple stab wounds and died at the scene. Mr. Houbbadi was found inside the marital home with what was described as self-inflicted wounds. See enclosed news report.

12 The Kennedy Law Firm, PLLC, at Mr. Houbbadi's request, refunded the entire $1,000.00 Mr. Houbbadi had paid toward his retainer on October 1, 2018. That refund check was issued to Mr. Houbbadi on January 8, 2021. Please see enclosed copy of endorsed check.

13 Mr. Kennedy and Mr. Rahn are confident Mr. Houbbadi knew on October 1, 2018 that Mr. Rahn would represent Mr. Houbbadi at the hearing on the Temporary Order of Protection on October 9, 2018, and that Mr. Rahn would represent Mr. Houbbadi in his divorce proceedings. Furthermore, Mr. Rahn is confident, based upon discussions with Mr. Houbbadi, as well as comments and statements made by Mr. Houbbadi throughout the morning, that Mr. Houbbadi understood and approved the agreement reached on October 9, 2018. Mr. Rahn would not, and did not, announce an agreement without the full understanding and approval of his client.

We want to wish Mr. Houbbadi the very best in the future. Please dismiss the complaint filed by Mr. Houbbadi. Should you have further questions or need additional information, please contact us at the above address or (931) 645-9900.

Sincerely,

Kevin C. Kennedy
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grahn@klflaw.net

CC: Mr. Hamid Houbbadi

enclosures

Appendix "J"

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, TENNESSEE

STATE OF TENNESSEE	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 2018-CR-400
	)	
HAMID HOUBBADI	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF PROCEEDINGS - Jury Trial

Volume 2 of 4

January 25th, 2022

Before the Honorable Robert Bateman

APPEARANCES:

For the Plaintiff: ROBERT NASH, ESQUIRE
District Attorney General's Office
200 Commerce Street, Suite A
Clarksville, TN 37040

For the Defendant: CHASE SMITH, ESQUIRE
118 Franklin Street
Clarksville, TN 37040

JAZLYN SIMON

Digital Court Reporter

Post Office Box 801

Decherd, Tennessee 37324

(931) 636-5871

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INDEX OF EXAMINATION

WITNESS:

INDEX OF EXHIBITS

THE COURT: We are now taking up case 2019-CR-400 State of Tennessee v. Hamid Houbbadi. Anybody that is a potential witness, the Rule is in effect which means that you would need to wait outside. I don't believe anybody here is a witness. General, any of these folks your witnesses?

GEN. NASH: No, sir.

THE COURT: Any other preliminary matters before we have the jury in?

MR. SMITH: Not on behalf of Mr. Houbbadi, Your Honor.

GEN. NASH: If the Court wants to review these two, I have got certified copies of what the Court has ruled admissible.

THE COURT: If you will show Mr. Smith so that everybody is on the same page.

MR. SMITH: I have reviewed those in preparation for this morning's proceedings, Your Honor.

THE COURT: Do we know if the technology works? We're going to put three chairs out here for jurors 13, 14, and 15. Let's talk about this a little bit before we bring the jury in. Without revealing your trial

strategy, you're going to have to use the screen off and on all day or -- my preference -- let me tell you, my preference would be that while we're using the screen, we would move the jurors up here and then when we're not using the screen, we would put them back on the bench because it keeps everybody from being -- walking amongst the jury. But I don't know if every witness is going to have a video that may not work. So that's my question.

GEN. NASH: I believe I can run through the series of witnesses that are either going to admit the video, authenticate the video, or identify certain things on the videos. I think I will have a stretch of people early this morning.

THE COURT: Okay.

GEN. NASH: I think I can work that so where we don't have to.

THE COURT: So here's -- the court officers are making a very good point. The issue we've got your first witnesses are going to use it but where it's sitting right now we can't set anybody on the bench. So the way you

think you're going to present your proof we need to set Jurors 13, 14, and 15 out front to begin proceedings and you will use the video. The only thing I know we can do is put a chair -- another row right over there. See what I mean?

UNIDENTIFIED SPEAKER: Yes.

THE COURT: Maybe COVID will be over some day.

Are you Mr. Omar?

MR. OMAR: Yes.

THE COURT: Could you stand and raise your right hand?

(Atef Omar was sworn as the interpreter.)

THE COURT: Mr. Omar, for the record would you state your full name and for the court reporter's benefit spell it.

MS. ARNOLD: Atef Omar. A-t-e-f O-m-a-r.

THE COURT: Thank you.

I will ask everybody to be aware that since we have got the jurors out in the open here, don't sit in their lap. I would kind of give you latitude to walk away from the podium some but be mindful that the jurors are right in front of you.

General, do you need some more time or are you ready for the jury?

GEN. NASH: I need some more time, Judge.

THE COURT: Okay.

Mr. Smith, I'm going to pass down, while we're waiting, a waiver for the jury affixing the fine in this matter.

MR. SMITH: That's fine. I explained that to Mr. Houbbadi.

GEN. NASH: There's one question I had.

THE COURT: All right.

GEN. NASH: If I need the witness to come out of the box to view it closer --

THE COURT: They can. Probably Mr. Smith and Mr. Houbbadi are going to move a little bit over. If the witness walked around, they can come around this way in front of the podium and come around to you.

GEN. NASH: Thank you.

MR. SMITH: In addressing -- for the record, Your Honor, in Case No. 2019-CR-400 I have reviewed the waiver of the right for the jury to fix the fine with Mr. Houbbadi with the assistance of the interpreter. I explained to him the constitutional implications and what I

typically see courts do in these matters in regards to fines after convictions as well as my own past experience of one client that did not execute this and what happened to him. So based on that conversation we had, I believe Mr. Houbbadi fully understands the waiver of the right to have a jury fix the fine and we tender a waiver as executed to the Court.

THE COURT: All right. Thank you. That will be accepted.

Everybody ready for the jury?

MR. SMITH: Yes, sir.

GEN. NASH: I have got two witnesses. One is Kevin Fowler and one is the deputy who served Mr. Houbbadi with the petition. Now, that doesn't require any video. If we could do those two first and then I will run right through all the video.

THE COURT: All right.

GEN. NASH: Does that sound reasonable to you?

MR. SMITH: Yes, sir.

THE COURT: All right. Bring in the jury, please.

(Jury entered the courtroom.)

THE COURT: We have had to move your chairs around just a little bit. I appreciate y'all getting here. Any problems with the admonitions or the rules we talked about?

All right. Let the record reflect that there were no issues and that the jury is present.

Ladies and gentlemen, let me kind of tell you -- you have probably figured this out -- if it were normal times pre-COVID everybody would be sitting in the box back here, but we're trying to spread you out a little bit and Ms. Rabbid, Ms. Lynch, and Ms. Bridge [phonetic spellings] we have moved you where you are because we are going to have some video a little bit later this morning. Once that's done, we will move you back over where you were seated.

All right. General, call your next witness.

GEN. NASH: State calls Kevin Fowler.

KEVIN FOWLER,

being first duly sworn, was examined and testified as follows:

THE COURT: Once you get situated, tell us

your full name and spell it for the benefit of the court reporter, please.

THE WITNESS: Yes, Your Honor. My name is James Kevin Fowler. That is spelled J-a-m-e-s K-e-v-i-n F-o-w-l-e-r.

THE COURT: You may ask.

DIRECT EXAMINATION

BY GEN. NASH:

Q Mr. Fowler, where are you employed, sir?

A I am employed with Legal Aid Society of Middle Tennessee and the Cumberland.

Q Do you have an office here in Clarksville?

A We do.

Q Where is that located?

A It's located across the street at 109 South 3rd.

Q Okay. What legal matters and what type of clients do the Legal Aid Society help?

A Well, we are public nonprofit that represents low income individuals with civil legal matters. That ranges from housing issues to divorce issues that involve physical abuse or domestic violence. We also assist with orders of protection and health care issues.

Q Okay. And was Leila Chanane one of your clients?

A She was.

Q And what services did you provide for Ms. Chanane?

A She was assisted with the filing of a petition for an order of protection. We have victim advocates and other individuals in our office that assist individuals with that. Then when they're going to have a court appearance or get involved with the Court, then I represent them. And I acted as her attorney in that capacity.

Q And did you file a petition on her behalf?

A Yes, there was a petition filed.

Q Let me pass you that. Do you recognize the document that's been handed to you?

A I do.

Q And what is that document?

A It is the temporary order of protection that was issued in her case.

Q Okay. And she is the petitioner?

A That's correct. Leila Chanane is the petitioner.

Q And who was the respondent?

A Hamid Houbbadi I believe is how it's pronounced.

GEN. NASH: The state would seek to move that document as the exhibit next numbered, please.

MR. SMITH: No objection, Your Honor.

THE COURT: That will be Exhibit 40.

(Exhibit No. 40 - Temporary Order of Protection)

GEN. NASH: I may have the witness refer to that if necessary.

Q Tell the jury about -- how does an ex parte or a temporary order of protection, how does that work?

A Well, after it's prepared the individual will state what happened. That is then included on the petition a narrative of what occurred to that person. It was filed with the Court. The Court has two options -- well, actually, three options. The Court can dismiss the petition because it doesn't have sufficient information on it to grant a temporary order; it can grant an order which provides protection to the individual for at least 15 days in which a hearing has to occur within that period of time; and the last is the Court cannot dismiss it but not issue an order protecting them for 15 days but allow them to have the hearing that is required within 15 days.

It's often called an ex parte order for the first 15 days because that's Latin for "without party." So that order can actually be initially entered without the party knowing about it. Then that individual has to be served in order for the hearing to occur.

Q And in this case what did the Court do?

A The Court granted the ex parte order and then set the hearing for, I believe, it was October 9th.

Q Okay.

A Yes, that's correct. And then after that's entered what traditionally -- of course what has to happen is then the individual has to be served with it to be notified that the order exists and that their hearing date is on a very certain date at typically 9:00 on Tuesdays here in Montgomery County.

Q All right. Specifically what protections, as you called them, did that order -- that ex parte order of protection provide Ms. Chanane?

A On the second page of the document it indicates -- what it states is orders to the respondent -- which, of course, is the person on the other side of the petition. It's all typewritten and provides checkmarks for what is ordered by the judge and then the judge signed it. In this case it was Judge Raymond Grimes, but -- do you want me to read all of the --

Q Well, specifically are there any provisions about marital residence if one was shared?

A Yes. In addition to several things about the individual being told not to come about the other person that petitioned for the protection it specifically references and is marked that if the parties shared a residence respondent must immediately and temporarily vacate the residence shared with the petitioner pending a hearing on the matter.

Q Okay. Now, according to that you mentioned another provision. Is Mr. Houbbadi to be around Ms. Chanane after that?

A That's correct.

Q Yes or no?

A Yes.

Q He can be around her?

A No, he cannot. I'm sorry.

Q That was poor wording.

So supposed to vacate the marital residence and not be around or have any contact with Ms. Chanane?

A That's correct. And that order would specifically tell the individual -- or Mr. Houbbadi -- not to do that until the hearing which was scheduled for October 9th.

Q Okay. Now, were you present on October 9th for the hearing?

A I was.

Q And what occurred during the October 9th hearing?

A Mr. Houbbadi was represented by Gordon Rahn who is an attorney and he and I discussed the status of the case and what they were wanting. I then would communicate that to my client and try to determine if we had at least a temporary agreement or if we needed to go forward with the trial that day. And so that's what was initially going on.

Q What was -- what did Mr. Houbbadi want as

represented to you by his counsel?

A Mr. Rahn indicated that he would agree to have the order extended but that he was concerned with medication and clothing and things of that nature. After speaking with Ms. Chanane she was agreeable to him entering for a certain period of time to retrieve those items while she was not present; then she was going to return to the residence and he would then, of course, have to stay -- leave the residence.

Q At this time do you know where Ms. Chanane was staying?

A I'm not certain where she was at that time. I know off and on she stayed at the shelter.

MR. SMITH: Objection, Your Honor.

THE COURT: Sustained.

GEN. NASH: If I may pass this up.

THE COURT: You may.

Q You were handed up another document. Do you recognize that document?

A I do.

Q What is that document?

A It was the order that was signed by the judge on October 9th following discussions with Mr. Houbbadi's lawyer with what we agreed on as being a temporary order before the hearing was going to occur.

Q Okay. And what did this extension and the order that it contained, what did that provide?

A It provided that the original order would continue with an amendment and then the amendment was prepared by me and written by me which indicated what Mr. Houbbadi could do with regard to the residence.

Q Okay. And can you read that for us?

A Sure. Under the court orders it's checkmarked that respondent may return to the marital home between 12:00 p.m. on October 9, 2018, and 5:00 p.m. October 10, 2018, to gather and retrieve his personal clothing and medication. Petitioner will return to the home following this period of time.

Q So when -- the respondent was Mr. Houbbadi?

A That's correct.

Q The petitioner was Ms. Chanane?

A That's correct.

Q So after October 10 at 5:00 p.m.?

A That's correct.

Q Okay. Was it the intent that Ms. Chanane then takes possession of the residence?

A That's what it states. That he was to be there for that period of time is what the language indicates and then the last sentence was "Petitioner will return to the home following this period of time."

Q Okay. Now, that amendment, did that keep in place the prior orders of the Court?

A It does. There's a specific provision that states that. Each section has a line where it can be checked by the judge or checked by us and then the judge approves it, and there's a specific line that states that the ex parte shall remain in full effect until said hearing is held. Along with the amendment was an indication that the hearing would occur on the 12th of November, 2018.

Q Okay. Now, one other date I meant to ask you is when was the original petition filed? What date was that?

A The original petition was filed on September 26.

Q Now, that amendment on October 9th, that is your handwriting?

A That's correct.

GEN. NASH: And if we haven't admitted that, we would admit that second order.

THE COURT: Without objection that will be Exhibit 41.

(Exhibit No. 41 - Temporary Order of Protection Amended Order)

GEN. NASH: If I may publish those.

THE COURT: You may.

GEN. NASH: I'm publishing Exhibit 40.

Q This is the petitioner, Ms. Chanane; is that

right?

A That's correct.

Q And this is where it has the respondent information?

A That's correct.

Q And the address?

A Yes.

Q Who filled this part out?

A The advocate oftentimes will fill that out at the petitioner's direction.

Q This stamp right here, that indicates when it was filed?

A Correct.

Q September 26, 2018. This is where you were talking about these are the orders to the respondent by the Court?

A That's correct. That's where the judge -- along the side there you will see lines next to each statement. The judge can either choose not to checkmark those or order those.

Q And they're all checkmarked?

A They were all ordered in this case.

Q This last provision here, is that what was pretty much put in the order extending the ex parte; right?

A Essentially that's one of the sections that is

allowed. We were going to do that independent of that clause and then specify specifically when he could return to the residence.

Q And the next to the last provision, that deals with the marital residence?

A That's correct.

GEN. NASH: I'm publishing Exhibit 41.

Q This is your writing?

A That's correct.

Q Okay. That was done on the spot in the courthouse?

A That's correct.

Q And these checkmarks here indicate what's going on at that --

A That's right.

Q What's taking place in reference to the prior petition; right?

A What has taken place and what the attorney and I discussed would be agreeable as a bridge order so to speak until we had the full hearing which was rescheduled in November.

Q And, again, this is the actual date of the hearing?

A That's right, October 9th.

Q Now, this was, as you say, agreed to by you and

Mr. Rahn?

A Yes, his attorney.

Q This gives the future hearing date of November 13th?

A That's correct.

Q What is this particular checkmark here, this sentence? What does that mean?

A Unfortunately, my eyesight is not as good even with glasses, but I think that's the section where it says that the ex parte will be extended and in full effect until the hearing occurs. And what that means is it's referring to any orders that the Court issued in its original temporary order would stay in full effect subject to whatever amendments that we provided, and I'm using -- I should explain, I'm using "ex parte" and "temporary" interchangeably. Because when an order of protection was originally done, they just called them ex parte orders. And that's Latin so it's not very understandable. So then they amended it to include temporary. So they often use that interchangeably even though technically they're very different words.

Q This is the amendment and that allows for Mr. Houbbadi to enter the residence during this time frame to gather some personal clothing and medication?

A And medication.

Q From 12:00 p.m. on October 9th to 5:00 p.m. on October 10th, 2018?

A That's correct. And the hearing that morning was at 9:00. So it was intended that by noon she would vacate so that he could then enter the residence, because otherwise he would be violating it because he was present around her. So then she vacated the residence to allow him to get those items and then the expectation was for him to leave by the time indicated. But that gave him, I think, roughly 12 hours or so if I remember correctly or more to do that. And then, of course, we included the last sentence to make sure that then she would return to the home and then be subject to all the orders that were originally issued.

GEN. NASH: I pass the witness. Thank you.

THE COURT: Mr. Smith.

MR. SMITH: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. SMITH:

Q Mr. Fowler, there was no hearing on that on October 9th; correct?

A That's correct.

Q Was the interpreter present on that day? Do you recall?

A There was an interpreter present.

Q Do you know which one it was?

A I don't recall her name. It was a woman.

Q Did you ever make contact with her?

A Either after or before the hearing?

Q During the --

A During the hearing, yeah, I was there. Or at the court date, yes, I --

Q You did make contact with her?

A Right. She provided us interpretive services with Ms. Chanane.

Q Okay. So the temporary order of protection was, again, as you have testified to, was issued by Judge Grimes and then you show up on October 9th and then there was no hearing on that day?

A That's correct.

Q Then your testimony is that there was this order that was entered and that shows the date and times of which Mr. Houbbadi was supposed to have done that; correct?

A After consulting with his attorney, his attorney had requested that. I spoke with Ms. Chanane and she did not have any disagreement with him getting personal items and specifically medication.

Q But his attorney never signed this. You signed it for him; correct?

A With his permission.

Q Do you have any correspondence or anything like that? I mean, Mr. Rahn wasn't in the courtroom when this was tendered to the Court?

A As I recall he might have been. I don't recall that. I just know that he told me that I could sign with his permission which of course is often done.

Q Right. So that was him telling you at some point during the court proceeding that you could sign with his permission and then he vacated the courtroom and you turned it in?

A Once he reviewed what I had written, he told me -- or once we come up with that, he told me that it would be okay to sign with his permission.

Q So Mr. Houbbadi was brought forward and the Court read this amendment to him through the interpreter?

A I don't recall exactly how it transpired once we entered it.

Q Okay. So once it was entered you have no personal knowledge of anything after that?

A I don't know about "anything," but I don't recall exactly what -- at what point Mr. Houbbadi might have been present or what he heard.

MR. SMITH: Yes, sir. Thank you.

THE COURT: Any redirect?

GEN. NASH: No, sir.