

**IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
EASTERN GRAND DIVISION**

**IN RE: DEMITRUS MEKHI TYLER,  
a child under 18 years of age, WAYNE  
TYLER, KELLY COOK, AND  
THUNDER NORRIS, b/n/f KELLY  
COOK,**

**Claimants,**

**v.**

**STATE OF TENNESSEE,**

**Defendant.**

**Claims Commission No. 20050569  
Regular Docket**

**FILED**  
**OCT 05 2009**  
Tennessee Claims Commission  
CLERK'S OFFICE

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**FINAL JUDGMENT**

**THIS CAUSE** came on to be heard before the Commission on April 30 and May 1, 2009, sitting in Johnson City, Tennessee.

Present and representing the Claimants at the trial was Arthur M. Fowler, III, Esq., of the Washington County Bar. Present for the State of Tennessee was P. Robin Dixon, Esq., of the Office of the Attorney General, Nashville, Tennessee.

Based upon the stipulations of the Parties, the evidence presented at trial, the testimony of the Parties, the statements of Counsel, and the record as a whole, the Commission **ORDERS** Judgment in favor of the Defendant be entered.

**The Facts.**

The facts in this case, although fairly simple, contain various conflicts depending which witness is testifying. In an effort to facilitate the understanding of the facts in this case, the testimony will be broken down into various subsections.

**I. The Testimony of Kelly Cook, Wayne Tyler, Robin Adams, and Inez Cole.<sup>1</sup>**

Wayne Tyler and Kelly Cook met in Asheville, North Carolina in 2002. (TR 190, 195-96, 321.) Ms. Cook, a native of Johnson City, Tennessee, was working at the desk of a large hotel in that city. Mr. Tyler had just been released from the North Carolina penal system where he had spent a short period of time as a result of a probation violation regarding previous misdemeanor convictions. (TR 201-02.)

Ms. Cook was at the time still married to Jeremy Cook from who she had separated several years before. According to Ms. Cook, Mr. Cook was abusive and for that reason, she left Johnson City, moved to Myrtle Beach, South Carolina, and eventually returned to Asheville where she was working at the time she met Mr. Tyler. (TR 321.)

However, prior to Ms. Cook meeting Mr. Tyler, she became pregnant by a man named Bobbie Joe Rollins and delivered her son, Thunder Norris, the half-brother of the deceased child in this case, Demitrus M. Tyler. (TR 132, 319.) Mr. Rollins lives in the Knoxville area at this time.

Ms. Sherika Hamilton had been a friend of Ms. Cook and her family in Johnson City and, in fact, had visited with Ms. Cook in Asheville. She is seven years younger than Ms. Cook. (TR 320.) Mr. Tyler and Ms. Hamilton met initially in Asheville, North Carolina. Ms. Hamilton is the godmother to Ms. Cook's son, Thunder.

Mr. Tyler and Ms. Cook developed a romantic relationship approximately a week

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<sup>1</sup> The Testimony in this trial took place over a two day period and references to that testimony will be "TR \_". Additionally, the parties stipulated that the testimony of Department of Children's Services employee, Rita Crumly, taken at a pretrial deposition, would be introduced as evidence since Ms. Crumly was unavailable and un-subpoenaed on the dates of the trial. References to her testimony will be to "RC \_". Finally, references to exhibits will be to "EXH \_". References to exhibits to Ms. Crumly's deposition are "RC EXH \_".

after they met in Asheville. Because of problems Ms. Cook was having with a former girlfriend of Mr. Tyler in Asheville, they moved to Johnson City in 2002.

Demitrus Tyler, the son of Wayne Tyler and Kelly Cook, was born on April 25, 2004, at the Johnson City Medical Center. (TR 161.) Tragically, Demitrus drowned in a bathtub at the home of a relative of Ms. Sherika Hamilton on November 10, 2004. Ms. Hamilton had been caring for Demitrus since November 4, 2004, pursuant to a Child Safety Plan initiated on that date between Cook, Tyler, and the Department of Children's Services ("the Department"). Thunder Norris was also covered by this Plan, but he was already at Ms. Hamilton's home and had been visiting with her for several days prior to November 4, 2004.

Following Demitrus' death, Cook and Tyler terminated their relationship in January of 2005. Mr. Tyler is now working in a chicken processing plant in North Carolina. Ms. Cook is currently enrolled in a training program for the medical field in Johnson City.

As set out above, Mr. Tyler has a history of minor criminal offenses in North Carolina. (TR 201.) However, Mr. Tyler also had college training in a computer related field in Maryland. Ms. Cook studied social work at East Tennessee State University for two years where she had a 3.6 grade point average. (TR 317-18.) She too has a misdemeanor criminal history, having been found guilty of shoplifting and forgery in the last ten years. (TR 316-17.) As indicated above, Ms. Cook is still married to Jerry Cook but has not seen him since 1998. (TR 318.)

The proof seems to show that around the time Demitrus was born, Tyler and Cook were living at a Section 8 housing development in Johnson City known as Tyler

Apartments. In fact, Ms. Cook testified that for eight months in 2002 and 2003, she was the night manager of that development. Ms. Cook's name was on the lease for the apartment at Tyler Apartments. (TR 352.) For some unknown reason, Tyler and Cook moved from Tyler Apartments and eventually, to a used mobile home located on Unaka Avenue in Johnson City after Demitrus' birth. (TR 352-53.) The job at Tyler Apartments was the last job Ms. Cook held before Demitrus was born. Ms. Cook testified that the mobile home was not nice and did not heat well, but that she did not recall there being a smell of garbage in the home. (TR 300-01.)

At the time Ms. Cook delivered Demitrus, hospital authorities determined that both she and the child had evidence of marijuana in their systems. Accordingly, this fact was reported to the Department, and the family first came into contact with Michael Flanary, a case manager for the Department. According to the testimony, Mr. Flanary is in his fifties and had relatively recently come over to Child Protective Services from the Adoption division within the Department. Following Demitrus' drowning death on November 10, 2004, Mr. Flanary tendered his resignation effective December 1, 2004, because of stress related to his job. The State claims it has no idea where Mr. Flanary is now, and he did not testify. (TR 153.) A few days after the child's birth, Ms. Cook spoke with Mr. Flanary regarding the marijuana test results. At trial, she admitted she had used marijuana during her pregnancy but claimed it was used to alleviate morning sickness symptoms. (TR 290-91.) Mr. Tyler claimed to have met Mr. Flanary on three separate occasions. The first was with regard to the positive marijuana test results; the second occasion was when he came by the trailer home on Unaka Avenue in September of 2004; and finally, on November 4, 2004, when a meeting occurred regarding

development of the seven day Child Safety Plan for Demitrus and Thunder at Department offices on that date. (TR 254.)

In addition to seeing Mr. Flanary on those three occasions, Ms. Cook testified she talked with him in July of 2004, after she had attempted suicide and was hospitalized at Woodridge in Johnson City and Peninsula Hospital in Knox County. (TR 323.) Ms. Cook testified that she had been diagnosed as bi-polar in 1995 but was not taking her medications at the time of the suicide attempt. (TR 299.) Following delivery of Demitrus, Ms. Cook testified that she was also affected by postpartum depression and was supposed to be on her medications but was not taking them. (TR 342.) Ms. Cook stated that following her suicide attempt she spoke with Mr. Flanary while she was in the hospital, and that he wanted to know where Thunder was at the time. (TR 294.) She had previously seen Mr. Flanary after Demitrus was born. (TR 322.) Following the suicide attempt, the next time she saw Mr. Flanary was at the mobile home on Unaka Avenue in September of 2004. The suicide attempt took place in the yard of her grandmother's home.

Ms. Cook testified that after she was released from the hospital following the suicide attempt, she went to the Department and told personnel there where she was living. She testified that she never received a call from the Department after that or was told to come back for a visit. She did not talk to Mr. Flanary on this visit. (TR 295.)

On cross-examination, Ms. Cook testified she did not know for sure whether the Department told her to stay in touch with it following the suicide attempt. (TR 294.)

Mr. Tyler testified that in late summer of 2004, he came into contact with Mr. Flanary but did not recall being told that the trailer was unsuitable. He did testify that

Mr. Flanary told them that if they needed anything to call him. (TR 213.) His testimony also indicated that Mr. Flanary came across Tyler and Cook by happenstance as he was in the neighborhood on another matter.

The next important event in this case occurred, according to Mr. Tyler, around November 2, 2004, when Sherika Hamilton tried to get Kelly Cook to give her a Power of Attorney with regard to her godson, Thunder Norris. Although Mr. Tyler does not know when this request took place, he testified Ms. Cook was very upset about the request. (TR 175.) Ms. Cook testified that on November 3, 2004, Ms. Hamilton attempted to obtain her signature on a Power of Attorney which had been provided to her by Mr. Flanary. Although Ms. Cook testified that she did not trust Ms. Hamilton, on November 3, 2004, her son Thunder was at Ms. Hamilton's home. (TR 270-71.)

It also appears that in October of 2004, Ms. Cook's maternal aunt, Robin Adams, moved into Tyler Apartments. Ms. Adams has suffered with depression problems. Ms. Sherika Hamilton also lived at Tyler Apartments in relative proximity to the apartment where Ms. Adams lived.<sup>2</sup> Subsequently, around the second week of October 2004, Mr. Tyler testified that he, Ms. Cook, Thunder, and Demitrus moved into Ms. Adams' apartment. Accordingly, Mr. Tyler testified that they were not homeless. (TR 165.) The move to Ms. Adams' apartment took place since, Ms. Cook testified, the Unaka Avenue mobile home did not heat well, and her family was having a difficult time making ends meet. (TR 303.)

Ms. Adams testified that on November 4, 2004, Mr. Flanary came to her home, saw Demitrus asleep in a bedroom, and told her that the child seemed fine where he was.

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<sup>2</sup> In his case recordings, Michael Flanary spelled Ms. Hamilton's first name as Sharkeika rather than Sherika, which appears to be the correct spelling.

(TR 117.) Mr. Tyler and Ms. Cook were out shopping at the time.

However, shortly after Mr. Flanary left Ms. Adams' apartment, Sherika Hamilton came there and told Ms. Adams that Mr. Flanary wanted her to take Demitrus, and that Tyler and Cook needed to meet with him by 4:30 p.m. that day at the Department's offices. (TR 117-18.)

Ms. Cook testified that as she and Tyler returned to Tyler Apartments on November 4th she saw Sherika Hamilton carrying Demitrus toward her apartment. (TR 271.) Mr. Tyler testified he thought he saw Mr. Hamilton carrying Demitrus' car seat.

Later that day, Ms. Cook and Mr. Tyler went to the Department's offices where they met with Mr. Flanary. He wanted them to set up a seven day Child Safety Plan during which both children would stay with a third party while Tyler and Cook attempted to locate suitable housing for the family. Ms. Cook testified that Mr. Flanary did not want the family to stay with Ms. Adams, who she had suggested, during this period. (TR 243-44.) Ms. Cook testified there was no discussion with Department personnel regarding Ms. Adams' mental problems on November 4. She testified that she was not comfortable with the children staying with Sherika Hamilton because a few days prior to that meeting, Ms. Hamilton had attempted to obtain a Power of Attorney over her son, Thunder Norris. She also testified that Mr. Flanary said that either the children would stay with Ms. Hamilton during the seven day period or that they would be placed in "the system". (TR 276.)

Ms. Cook testified that she believed Ms. Hamilton had brought Mr. Flanary into this situation because she would not sign a Power of Attorney regarding Thunder. She also stated that she had "knowledge" that Mr. Flanary and Ms. Hamilton had some sort of

relationship. She testified that Mr. Flanary appeared to be about fifty years old. (TR 326-327.)

Mr. Tyler stated that the subject of the meeting on November 4, 2004, regarded obtaining adequate housing, and he was told the children would be returned once such facilities were located. (TR 170-171.)

The presenting problem identified on the Child Safety Plan was that the family was homeless and the two children were staying with a friend and a family member. (TR 312-313 and RC EXH 1.)

Ms. Cook testified that it was her opinion that her views at the meeting would not be taken into account regarding where the children should be during the seven day period so she did not discuss this topic with Mr. Flanary. (TR 311.) Mr. Tyler did not recall either supervisor Rita Paris or Mr. Flanary suggesting names of people who could care for the children. (TR 230.) According to Mr. Tyler, Flanary never suggested Robin Adams' name on November 4<sup>th</sup> as an option. (TR 243.)

Cook testified that although it may have been Mr. Tyler's unexpressed opinion that Robin Adams and Sherika Hamilton were options for the seven day period, that was his opinion based on his desire for the two boys to stay together. She wanted the family to stay with her aunt Robin Adams, but stated that according to Flanary that was not an option. (TR 306.)

On the other hand, Mr. Tyler testified that Ms. Hamilton's home would have been acceptable to him since Thunder Norris previously had stayed there, and that even Demitrus on an occasion or two had stayed with Ms. Hamilton with Mr. Tyler present. (TR 244.)

Ms. Cook admitted at trial that her memory of what supervisor Rita Paris may have said at the meeting could be faulty. (TR 312.)

Ms. Cook said that Mr. Flanary vetoed the option of staying at Ms. Adams home. (TR 276, 309.)

Ms. Cook testified that there was no impediment to Demitrus staying with her aunt between November 4 and November 10, 2004. (TR 285.)

The Child Safety Plan states the Tyler family was currently without a home, and that the children were staying with friends and family members. According to the Plan, the children would stay at Ms. Hamilton's home while Ms. Cook and Mr. Tyler located a suitable home. During that period, Cook and Tyler would maintain contact with the Department's case manager and not move into another "unacceptable" (sic) home. The Plan also anticipated that before the children were returned to the parents at the new home, the utilities would have to be turned on, and the building determined to be structurally sound. Ms. Cook and Mr. Tyler signed this Plan. (TR 222-25.)

It was Mr. Tyler's opinion that he was free not to sign the Plan if that was his preference. (TR 226-27.) Mr. Tyler testified that he "thought the kids were being taken" (TR 172) but that he recommended Ms. Hamilton's home since she was Thunder's godmother and his preference was not to have the children separated during this period. (TR 227-28, 242.) He believed that Mr. Flanary considered Ms. Adams to be unacceptable option. (TR 243.)

Although Mr. Tyler testified that he felt free not to sign the Safety Plan, (TR 226-27) he stated that with regard to placing the children with Sherika Hamilton, he did not have a choice. (TR 174.) He could not recall whether anyone at the meeting suggested

Robin Adams. (TR 174.) Ms. Cook agreed that Mr. Flanary chose Ms. Hamilton. (TR 344.) Although at one point Mr. Tyler testified he felt that he was free not to sign the Safety Plan, at yet another juncture, he said that he felt he had no choice but to sign that document. (TR 176.)

Mr. Tyler testified that Flanary never told him the Plan was voluntary, and he believed that if he did not sign it, the children would be removed for “quite a while” or that the seven day Plan would be extended. (TR 238-239.)

Ms. Cook testified that departmental supervisor Rita Paris never came into the room on November 4, 2004, while the Plan was being discussed. (TR 286.) She also testified that following the completion of the Plan with Flanary, she does not recall Ms. Paris saying anything at all in the meeting. (TR 309.)

Ms. Cook, contrary to what Mr. Tyler testified to, said that she specifically suggested Robin Adams as an alternative venue for the children at the meeting, and that Mr. Flanary rejected that suggestion. (TR 347.) She understood Mr. Flanary’s statement regarding placement of the children in “the system” as meaning that they would be taken somewhere where she could not see them. (TR 305.)

Ms. Cook testified that Mr. Flanary explained that the Plan would have to be approved, and the utilities on before the children could be returned. She agreed to the Plan, she testified, because she wanted to know where her children were. (TR 340.)

The following day, November 5, 2004, Cook and Tyler located an apartment and asked for the children back. However, Mr. Flanary turned down their request to return the children since the utilities were not yet connected. Mr. Tyler testified that if he simply went to Ms. Hamilton’s home and got the children, he believed he would

encounter problems with the law. (TR 178.)

On November 6, 2004, Ms. Cook spoke once again with Mr. Flanary, and they set up a meeting at the proposed new apartment for November 8, 2004. That meeting took place on the 8<sup>th</sup>. Cook gave Mr. Flanary the deposit for the apartment, but he declined to return the children at the time since the landlord had been unable to attend the meeting, and the utilities were not yet connected. (TR 179, 277-78.)

On November 9, 2004, Mr. Flanary began a trip to Massachusetts for his sister's funeral. However, prior to leaving, he delivered Tyler and Cook's deposit to their new landlord since they had no means of transportation. He also called Tyler and told him he had done this. That same day, Sherika Hamilton was cited by the Johnson City Police Department for child endangerment. It appears that children under her care in her home, including Thunder, had been wandering around in the street. (TR 246.) However, Ms. Hamilton had Demitrus with her at the time. After she got the citation, Ms. Hamilton went to Ms. Adams' apartment in Tyler Apartments and left Demitrus with Mr. Tyler and Ms. Adams while she handled the paperwork with the police. Apparently, Ms. Hamilton had been at her mother's and grandmother's home, also in Tyler Apartments, at the time police arrived and cited her for child endangerment. (TR 245-46.)

Mr. Tyler called Mr. Flanary who was traveling to Massachusetts that same day. Mr. Tyler borrowed Inez Cole's cell phone and told Mr. Flanary about the charges against Ms. Hamilton. Flanary allegedly said there was nothing he could do about the situation since he was involved with a family emergency. (TR 181.) Apparently, Mr. Flanary either hung up on Mr. Tyler or the phone went dead during the course of the call. (TR 181-82.) Ms. Adams testified that when Sherika Hamilton was cited for child

endangerment on November 9, 2004, Wayne Tyler called Michael Flanary from her home and told him that he wanted his children back. She stated Mr. Tyler was very angry at the time and according to Tyler, Flanary rejected the proposal. (TR 122-23.) The child, Demitrus, stayed with Mr. Tyler and Ms. Cook at Ms. Adams' home until around 10:00 o'clock that night when Ms. Hamilton took Demitrus across town to her cousin Felicia's home where Demitrus subsequently drowned on November 10, 2004. Mr. Tyler and Ms. Cook testified that they did not feel they could retain possession of the children on November 9<sup>th</sup> since they were still under the Plan and felt like they might go to jail if they kept them. (TR 183, 245, 261.)

According to Mr. Tyler, the utilities in the new apartment were going to be activated on November 10, 2004. (TR 183-84.) Ms. Cook testified she was told on November 9<sup>th</sup> that she could not keep Demitrus after Ms. Hamilton had been cited. (TR 340.) November 9, 2004, is the last time that Cook and Tyler saw their son alive.

On November 10, 2004, Cook and Tyler received a call to go across town to the home of Sherika Hamilton's cousin Felicia where they saw a large number of police cars and an ambulance. Mr. Tyler testified that he knew something was dramatically wrong following which he and Ms. Cook went to the Johnson City Medical Center where Demitrus was pronounced dead as a result of drowning in a bathtub. Ms. Hamilton claimed to have left the child in the tub and gone into another room to make a bed.

Although Mr. Tyler testified he believed that if he did not participate with the Plan the children could be taken from him and Ms. Cook for an extended period of time, he admitted that no one from the Department ever told him the Plan could be extended or the children placed in foster care. (TR 240.)

## **II. Testimony of Richard Ray.**

Mr. Richard Ray, Certified Public Accountant and Financial Consultant, testified from a purely economic point of view, assuming Demitrus had graduated from high school, his projected earnings over his work life would be Three Hundred Thirty-Six Thousand Two Hundred Seventy-One Dollars (\$336,271.00). (TR 66, 69.) On the other hand, based on Mr. Ray's analysis, should Demitrus matriculate through some college his projected net earnings would be Three Hundred Ninety-Five Thousand Thirty-Two Dollars (\$395,032.00). (TR 66, 70.) These figures account only for damages involving lost earnings.

## **III. Testimony of Rita Paris.**

Ms. Paris is a twenty year veteran of the Department and its predecessor. Prior to that, she taught school for six years and holds a Masters Degree. (TR 364-65.) In 2004, she was a Case Manager, IV (CM IV) with five individuals working under her. One of those individuals was Ms. Rita Crumly, a Case Manager III, and also Michael Flanary, who she testified was a Case Manager I (CM I) involved in a learning period with a limited case load at the time. She believed Mr. Flanary had been working in this Division of the Department for some one to one and a half years. (TR 366-367.)<sup>3</sup>

Ms. Paris testified that CM I's and II's investigate referrals to the Department which have not been screened out. (TR 372.) Ms. Paris testified that the Department's purpose is to protect children. (TR 368.) According to her, the Department is not in a home unless there is "some imminent risk of harm or danger to the child". (TR 428.) It was her testimony that case managers do not have "control" of a child before a court

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<sup>3</sup> Although Ms. Paris testified that Mr. Flanary was a CM I, his letter of resignation, RC EXH 3, indicates he was a Case Manager II, apparently a higher level position.

order is entered. (TR 405.)

Ms. Paris went on to testify that once a child was determined to be at risk, a team meeting is held with a Departmental employee and the family. These meetings were designed to resolve problems, and this procedure had just begun in 2004 in an effort to avoid removing children completely from their normal environment by placing them with family members or friends. (TR 374-375.)

Demitrus Tyler, according to Ms. Paris, was an Early Intervention case because of his marijuana exposure who would be monitored in terms of his growth. (TR 425.) Ms. Paris testified that in 2004 there were only voluntary Child Safety Plans developed jointly at child and family team meetings. There were no involuntary safety plans at that point. (TR 377-379.) According to Ms. Paris, a family could refuse to enter into a safety plan. (TR 379.) However, if a family did refuse to enter into such an arrangement, the Department would conduct a risk assessment to determine if the threat to the child was high enough to warrant the filing of a formal court petition. (TR 379.)

Ms. Paris testified that in 2004, the child's immediate family made the decision as to where he would go during the life of a safety plan. As a part of that placement, the Department would conduct a face-to-face encounter with the person considered for placement; a law enforcement background check would be carried out; a protective service check would be conducted by the Department to determine whether or not there had been prior reports on a proposed individual; and finally, a NCIC check would be carried out. (TR 381-382.)

Ms. Paris testified that she estimated between nine and twenty referrals were made monthly to each of the five case managers working in Johnson City and

Washington County in 2004. (TR 408.)

Ms. Paris testified that the Department became involved in a child's life through a Child Safety Plan, and that in late April of 2004, a report was received from a hospital in Johnson City indicating that a child born there and his mother were positive for marijuana. Accordingly, a case manager, in this particular instance Michael Flanary, was required to visit with the mother within five days of the notification. (TR 384.) At the time, although the child had evidence of drugs in its system, he had a place to live in Tyler Apartments with his parents. (TR 425, 429-30.) Because of the drug referral, the plan was to involve Demitrus in the Tennessee Early Intervention Program. (TR 425.)

Ms. Paris testified that the sole reason for the Child Safety Plan in 2004 in this case was to keep the Tyler family in one place and to get them suitable housing. (TR 393, 423.)

In connection with the placement of Demitrus and Thunder with Sherika Hamilton, Ms. Paris conducted a referral background check in the Department's records and found no reportings on Ms. Hamilton. (TR 383-84.) She testified that a case recording made by Mr. Flanary on September 15, 2004, for September 13, 2004, stating that he had been "able to locate the family again" meant that previously, from time to time, Flanary had not been able to locate the Tyler/Cook family, and that they were not being cooperative about their whereabouts. (TR 388-90.) These case recordings for September 13, 2004, and September 15, 2004, were entered by Mr. Flanary on November 4, 2004, prior to Demitrus' death. The recording for September 13<sup>th</sup> comments on the structural integrity of the mobile home, the presence of rats, and the smell of trash. Mr. Flanary went on to note that he also had discussed moving expenses and landlord issues

with Ms. Cook and Mr. Tyler. The entry from September 15, 2004, indicates that Ms. Cook signed a form for Mr. Flanary on that date, but that he never heard from the family again after that. (TR 390-92.) These entries also document that Mr. Flanary told Tyler and Cook that the Department could help with housing and moving expenses but after September 15, 2004, he never heard from them until November 4, 2004.

The next interaction Flanary had with Tyler and Cook family was a visit to the home of Sherika Hamilton on November 3, 2004, to assure himself that the child Thunder was in a safe place. (TR 392.) During that visit, Flanary asked Hamilton to tell Cook to call him. His notes state that he never received such a call. (TR 392-93.) On the following day, Flanary went to the home of Robin Adams to determine whether or not Demitrus was in a safe place. (TR 393.) The case notes also indicate Flanary asked Ms. Adams to have Cook call him. Otherwise, additional actions would be taken. (TR 393.) Notes from Mr. Flanary also stated that in September 2004, he asked Ms. Cook to come into the Department and begin the Tennessee Early Intervention Program since the Department did not know where the family was and because they were “perpetually moving”. (TR 393.)

At the team meeting on November 4, 2004, Ms. Paris testified that she spoke directly to Tyler and Cook – not in a whisper – and told them they needed to get the children “stabilized”. (TR 399.) She also testified that she “underscored” what needed to be done and perceived her job at the meeting to be “the heavy”. She testified further that she talked to Tyler and Cook about both Robin Adams’ and Sherika Hamilton’s homes as being appropriate places to keep the children. (TR 400.) According to Ms. Paris, one of the Claimants stated that Ms. Adams had “some mental health issues”. (TR 401.) Ms.

Paris was not present when the actual Safety Plan was drawn up. (TR 414.) She testified clearly that she never said that unless Demitrus was given to Ms. Hamilton the child would be placed in the so-called "system". (TR 402.)

Ms. Paris also testified that the Department was never informed by the Johnson City Police Department about any child endangerment charges lodged against Ms. Hamilton on November 9, 2004. Additionally, no referral was ever received by the Department regarding any endangerment charges against Ms. Hamilton. (TR 402-03.) Ms. Paris testified that Ms. Hamilton was not an employee or agent of the Department or the State of Tennessee. (TR 407.)

Ms. Paris testified that if Mr. Flanary temporarily left Johnson City and his immediate supervisor, Ms. Crumly, did not know of that departure, the ultimate responsibility would fall on her to make sure Flanary's cases were covered. She had no such conversation with Mr. Flanary. (TR 412.)

Ms. Paris went on to testify that she objected to Robin Adams as the placement for the Tyler and Cook children because of her history of mental health issues, but that she has no personal knowledge that either Mr. Tyler or Ms. Cook had said anything to her about that during the course of the November meeting with the family. (TR 417.) She testified that the two names on the table on November 4, 2004, were Adams and Hamilton, and she does not know who chose Hamilton since she was not in the room at the time the choice was made. (TR 420-21.)

Ms. Paris did testify that certain handwritten notes, which were at one time in the case file, were never found. (TR 415.) These notes were requested during the course of the Crumly deposition, but never produced. (TR 360, EXH 14.)

Ms. Paris testified that Mr. Flanary retired in January of 2005, and was unhappy at Child Protective Services because of the stress level. He had been with the State of Tennessee for only approximately one and one half years. (TR 366-67, 452.)

#### **IV. Testimony of Kimberly Crumly.**

As previously indicated, the parties stipulated that Ms. Crumly's deposition testimony from November 15, 2007, could be introduced as evidence at this trial. Currently, Ms. Crumly is a CPS Team Leader in Washington County. In 2004, Rita Paris was Ms. Crumly's team leader in Johnson City. Ms. Paris now works out of the Bristol, Tennessee, office as a result of a Departmental reorganization. Although Ms. Crumly was formerly Mr. Flanary's supervisor in 2004, she had just taken over that position from Ms. Paris at the time and Ms. Paris had more supervisory experience with Mr. Flanary. (RC 9.) She did not have first-hand knowledge of what Mr. Flanary did in this case except that he asked her to sign the Safety Plan and was attempting to help Tyler and Cook get into an apartment with their family. Ms. Crumly testified that these efforts, per Departmental regulations, had to be documented in the TennKids computer system or on paper hard copy. (RC 95-97.) It was Ms. Crumly's opinion that Mr. Flanary would discuss matters either with her, Ms. Paris, or perhaps Sam Rutherford, who was the Team Coordinator above her and Ms. Paris.

Exhibit 7 to Ms. Crumly's deposition testimony are case recordings from the TennKids computer system prepared by both Mr. Flanary and Ms. Crumly. On November 4, 2004, Mr. Flanary prepared a note indicating that on September 13, 2004, he had met with Cook and Tyler at a mobile home on Unaka Avenue in Johnson City. Mr. Flanary deemed the home "unexceptable" (sic) and told the couple that they needed

to find a new home. On September 15, according to these notes, Flanary returned to the Unaka Avenue address to get a release signed by Ms. Cook in connection with the Early Intervention Program. After that, Mr. Flanary's note indicates that he never heard from Tyler and Cook again.

In another note prepared by Flanary on November 4, 2004, he recorded that on November 2, 2004, Sherika Hamilton contacted him and stated that she was a friend of the Tyler/Cook family, and that Ms. Cook had brought her son Thunder to her and taken Demitrus to Robin Adams' home because the family was homeless. The following day, Mr. Flanary conducted a home visit with Sherika Hamilton and the child Thunder was present at that time. On the following day, November 4, 2004, in a note prepared that same day, Mr. Flanary documented that he visited Ms. Adams' home and told her to have Cook and Tyler contact him, or he would have to take further action. That same day, case recordings indicate Flanary met with Cook and Tyler and told them that he was not trying to break up the family, but they needed to stop running and that the children should be placed under a Safety Plan. The recording goes on to note that a Safety Plan was signed and that Tyler and Cook wanted the children to stay with Ms. Hamilton since Ms. Adams had mental health problems. However, Tyler and Cook would not tell Mr. Flanary where they were staying. The following day, November 5, 2004, the case recording notes that Sherika Hamilton signed the Safety Plan as did Flanary's supervisor, Ms. Crumly, and Ms. McArdle, a Department staff attorney.

On November 15, 2004, Flanary writes in his case recordings that on November 8, 2004, he conducted a walk-thru of a proposed apartment with Tyler and Cook. The following day, Flanary documented that although he was off work in connection with a

trip to Massachusetts because of his sister's death, he met with the landlord for Tyler and Cook's new home and got an okay on the lease and delivered a One Hundred Dollar (\$100.00) deposit since the Claimants did not have transportation. After having done this, he called Mr. Tyler and informed him of what he had done.

A note in RC EXH 7 prepared on November 15, 2004, indicates that on November 4, 2004, during the child and family team meeting, Rita Paris came into the room and told Tyler and Cook they needed to stop running and work with Mr. Flanary. The note goes on to state that the Claimants said they wanted the children to stay with Ms. Hamilton since Ms. Adams had mental problems. Again, the parents, Tyler and Cook, would not reveal to the Department where they were staying.

In another note prepared on November 15, 2004, Flanary wrote that Tyler called him on November 10 as he was traveling to Massachusetts and told him that Demitrus had drowned. The following day, Tyler again left a message that the Department would not be getting Thunder, and that they would never find him. Mr. Flanary wrote that Tyler's tone was threatening during the phone conversation. On November 15, 2004, Mr. Flanary recorded another note stating that Tyler had called him again that day and wanted to know if he could still get assistance with housing.

In a note dated November 10, 2004, Ms. Crumly stated that she received a call from the Johnson City Police Department who had a copy of the Safety Plan. The note also states that Sherika Hamilton told her that she knew Cook and Tyler had been staying at the Tyler Apartment complex with Robin Adams. Mr. Crumly then went to the hospital and met with the Claimants who stated that they appreciated what Mr. Flanary had done for them. The police officer on the scene told Ms. Crumly that the child

drowned when Sherika Hamilton left the bathroom in order to make a bed. (RC EXH 7.)

Exhibit 4 to Ms. Crumly's testimony is a document from the Department captioned "Section 14.8 – Administrative Policies and Procedures – Child Protective Services Safety Plans and Non-Custodial Petitions – Effective 4/1/01". Section 14.8 B states that a safety plan can be voluntary or court ordered. This subsection goes on to state that "a temporary safety plan is an intrusive course of action that parents/caregivers agree to follow to ensure the safety of the child". Paragraph C4 of this document cites that such plans may in part deal with parents being asked to make significant changes in their lifestyles or living arrangements. This subsection goes on to state that the case manager must consult with legal counsel in such a situation. Subsection C states that if an emergency intervention is needed because of a threat of imminent harm, then the team leader will consult with the legal staff. The individual case manager is not empowered to implement an emergency safety plan without conferring with the team leader and legal counsel. Subsection E sets out the proper process to go through if the child cannot remain safely in the home. This could result in filing a petition and adjudication. In this situation, a case manager seeks the assistance of family members or "other possible caregivers".

According to Ms. Crumly's testimony, November 2, 2004, was the first time that the Department knew that the Tyler/Cook family was homeless. (RC 132.) She went on to testify that in 2004 there were regulations in place regarding CPS investigations but not for safety plans.

Exhibit 6 to Ms. Crumly's deposition was the Tennessee Department of Children's Services Standards of Professional Practice for Serving Children and Families

as of November 2003. Standard 11-302(A) provided that in all cases where a child was in an immediate risk of harm, a safety plan would be developed and implemented in consultation with a Department attorney. In this case, attorney Erin McArdle signed the Safety Plan. (RC 46.) Here, Ms. Crumly testified, the steps taken to help this family were assisting them in finding a place to live and providing funding for that apartment. (RC 16.) Ms. Crumly testified that this Safety Plan was voluntary, and that Mr. Flanary could not have dictated that Tyler/Cook could not have their child at that point. (RC 121.) The problem that caused implementation of the Safety Plan in this case was that the children were not in a stable environment because the family was homeless. (RC 120.) The Safety Plan with regard to Demitrus and Thunder was marked as Exhibit 1 to Ms. Crumly's testimony. That Plan, entered into by the family and the Department, was directed at keeping the children in a stable environment until a proper home could be located. (RC 19.) According to Ms. Crumly, a family chooses the person they want their child to stay with during the interim (RC 66), and that it was her understanding the Tyler/Cook family wanted Ms. Hamilton to be that person. (RC 140.) If Ms. Hamilton was not acceptable, then Ms. Crumly testified that alternative arrangements should have been made. (RC 140.)

In order to stabilize the situation, Ms. Crumly testified that a safety plan can involve anything from cleaning up the home environment to no contact with the children. (RC 67.)

The November 4, 2004, meeting was called a child and family team meeting because it was the job of everyone present there to ensure the safety of Thunder and Demitrus. (RC 68.) The responsibility to ensure the children's safety was shared by the

parents, the Department, and Ms. Hamilton. (RC 69.) She testified that if a background search was done on Ms. Hamilton, it should have been documented. (RC 21.) An ideal documentation situation would be to find some indication in the TennKids computer system. (RC 22.) If there was no computer documentation, then written investigation notes should have been kept in the file. As a late filed Exhibit 2, Claimants requested that a copy of the request for a background check on Sherika Hamilton be filed. However, there is no such late filed exhibit in this record. (RC 21-23.)

Ms. Crumly testified that removing custody from a parent required a court action, and that there was no such action filed in the case of Demitrus. (RC 24.) She went on to testify that Tyler and Cook had full access to both children at all times and that, in fact, they could have moved in with Ms. Hamilton with no objection from the Department. (RC 24-25.) There were no restrictions on their visitation with the children. (RC 44-45.)

Ms. Crumly testified that Demitrus under the Plan had to stay with Ms. Hamilton until the parents found a home. (RC 25.) It was her opinion that Ms. Hamilton was responsible for the child's death and not the State, and that it was the parents who had chosen the place where Demitrus would stay during the seven day Plan. (RC 26.) According to Ms. Crumly, Mr. Flanary unilaterally could not have chosen where the children would stay during the Safety Plan. (RC 27.) She went on to testify that if, in fact, the State had chosen Sherika Hamilton without agreement from the parents, then the State ultimately would be responsible. (RC 28.) Ms. Crumly also testified, however, that something had to be done on November 4, 2004, since Ms. Hamilton had informed Flanary on November 2, 2004, that Ms. Cook had brought Thunder to her and therefore, he was familiar with Ms. Hamilton and the children's situation. Because of this

exigency, Mr. Flanary chose Sherika to care for the children pending the development of a Safety Plan.

Ms. Crumly emphasized that the State did not have the final say as to where Demitrus would be placed and that, in her opinion, the children could have been placed with Robin Adams if that's what the parents actually wanted. Ms. Crumly emphasized that this was a "voluntary" plan between the parents and the Department, and that even if Ms. Hamilton picked up Demitrus before the Safety Plan was in place, his parents, for example, could still take him to Gatlinburg on an outing. (RC 33.) However, Ms. Crumly testified that if the parents did not abide by the Safety Plan once implemented, then the situation would have to be re-evaluated. Once the parents had re-located to a new home, then the children should have been returned to them. (RC 35.) Further, it was Ms. Crumly's opinion that during the seven days Demitrus was with Ms. Hamilton, he was not in the custody of the State, and the Department was not responsible for his care. (RC 37.) If the placement was not working, Cook and Tyler could have called Flanary and the situation would have been re-evaluated. (RC 38.) Again, it was her understanding that Tyler and Cook were the individuals who chose placement with Ms. Hamilton.

Ms. Crumly said that in 2003 the State's Standards of Professional Practice for Serving Children and Families, A Model of Practice, had just been released and that the Department was in transition to this "Best Practices" model at that time. (RC 42.) The Administrative Policy and Procedure 14.08 previously discussed set out guidelines and procedures for safety plans. Policy and Procedure 14.08 did not require placement with a blood related relative. Rather, placement was based on the relationship to the family

rather than a pure blood related relationship. These Policies and Procedures became effective in 2002.

Ms. Crumly went on to testify that any history of abuse and negligence should have been documented in the TennKids system and that when a case is closed, Form 770 (CPS Strength and Risk Assessment) should be included in the file. The State was asked to file this document but it is not in the record before the Commission.

Ms. Crumly testified that there was no requirement that face-to-face contact between the Department and a caregiver was required during the life of a safety plan. However, any contacts with Ms. Hamilton during the planned period should have been documented. The most important thing for Mr. Flanary was to get the Tyler/Cook family into a home so that the children could be returned as soon as possible. (RC 71.) Steps in this process, if not documented, according to the State, did not happen. (RC 71.) During this Safety Plan, if Ms. Hamilton needed help, she could have contacted the Department. (RC 72.) Ms. Hamilton was not paid for services rendered during this situation. (RC 107.) Pursuant to Policy and Procedure 14.8(C)(3) [RC EXH 4] a case manager should not implement a temporary emergency safety plan without conferring with a team leader and Department counsel. Ms. Crumly was not aware of whether or not this was done in this case. She testified that this should have been done before everyone signed off on the Plan. Legal counsel signed the following day after the previous day's late afternoon meeting with the family, Ms. Paris, and Mr. Flanary on November 4, 2004. Not doing this would be a technical violation of Policy and Procedure 14.8. (RC 77-79.)

Ms. Crumly testified that Sherika Hamilton was responsible for the child's death since she left Demitrus in a situation which resulted in his drowning. (RC 80.)

Ms. Crumly testified that if Demitrus was actually in the custody of the State, then a whole other set of circumstances would appertain. If that was the case, then a foster home would have been involved along with the background checks carried out during setting up a safety plan.

In further explanation of the "Best Practices" manual, she testified that it was a road map to where the State wanted some day to be, but that at the time of Demitrus' death, some provisions had not yet been implemented.

Ms. Crumly testified that in November of 2004, the "Best Practices" manual was in place in a broad sense in Washington County. Apparently, this road map is implemented in different fashions in different counties and regions of the State. For example, in Washington County, she testified, safety plans are not taken to court. Sections 303(A) and 304(A) were at that time being observed in Washington County. Section 304(A) required safety plans to be implemented in the most familiar and least disruptive fashion. (RC 87-89.) In the case of Demitrus Tyler, the least disruptive plan was implemented since the mother still had contact with her children, and the children were familiar with the placement source. (RC 94.) Ms. Crumly testified that if children are in a stable home, they do not have to be moved but that in this case, the Department did not know where the parents were staying but did know that Demitrus was with Robin Adams and Thunder was with Sherika Hamilton. (RC 98.) Ms. Crumly insisted that Demitrus had not been removed from his home but that his living arrangements had been changed. (RC 100.) Ms. Crumly also stated that once handwritten notes are entered into the TennKids computer system they are destroyed. (RC 103, 105.)

Ms. Crumly went on to testify that Mr. Flanary would have had to have called

another child and family team meeting in order to return Demitrus to his parents. The Department would have re-evaluated the situation if Tyler and Cook were not willing to voluntarily participate in the CPS Safety Plan. (RC 111.)

It was Ms. Crumly's belief that the family wanted the children to stay with Sherika Hamilton and made that request to the Department at the time.

Ms. Crumly testified the Child Protective Service unit did have the right to veto a child and family team meeting decision "if the safety of the child is not being addressed". (RC 117.)

Regarding the child endangerment citation against Ms. Hamilton on November 9, 2004, Ms. Crumly testified that Mr. Flanary should have looked into that citation and checked with law enforcement and then met with the parents regarding a possible new course of action. (RC 127.) Ms. Crumly stated that on November 9, 2004, if Mr. Flanary was not working or his cell phone connection with Mr. Tyler was bad, then Mr. Tyler should have been told to contact someone else at the Department. The information regarding the incident should have been relayed to someone else in the office and Mr. Tyler told to speak with another case manager. (RC 128-129.) Ms. Crumly could find no record of Mr. Flanary passing along the information regarding Ms. Hamilton's citation. (RC 130.)

Since Mr. Flanary was out of town between November 9 and November 15, 2004, Ms. Crumly handled the paperwork regarding funding for the apartment. (RC 141-42.)

Ms. Crumly was dispatched to the hospital by the Department after Demitrus drowned. She testified that Mr. Flanary tendered his resignation on December 1, 2004, effective that date, citing stress in connection with performing the CM II job. (EXH 3.)

**Sherika Hamilton.**

Sherika Hamilton was the godmother of Demitrus M. Tyler's half-brother, Thunder Norris. (TR 107.) The child Demitrus was, of course, with Sherika Hamilton when he drowned on November 10, 2004, at the home of Ms. Hamilton's cousin. According to the proof, at the time of the child's death, Ms. Hamilton was approximately twenty-eight to twenty-nine years old. (TR 104.)

Mr. Tyler testified that he met Ms. Hamilton in Asheville, North Carolina, where he and Ms. Cook were living at the time. Ms. Hamilton came to North Carolina to see her friend, Ms. Cook.

In 2002, Tyler and Cook moved from Asheville because Ms. Cook was having problems with a former girlfriend of Mr. Tyler. (TR 205-06.)

When Tyler and Cook arrived in Johnson City in 2002, they in fact stayed with Ms. Hamilton's aunt before they were able to obtain an apartment in Tyler Apartments. Wayne Tyler testified it was in Johnson City where he got to know Sherika Hamilton better. (TR 249.)

Ms. Cook testified that Ms. Hamilton, who was also pregnant at the time, lived with her when Thunder Norris was born. Ms. Hamilton miscarried around that time.

According to Ms. Cook's aunt, Robin Adams, Ms. Hamilton lived close to the new apartment which she had moved into at Tyler Apartments in October of 2004. (TR 129.) Ms. Adams testified that Ms. Hamilton was friends with her daughter and son and "seemed like a nice person". (TR 136.) Ms. Adams also testified that Wayne Tyler, Kelly Cook, and Sherika Hamilton were friends. (TR 131.)

Inez Cole testified that Ms. Hamilton, from time-to-time, cared for Thunder

Norris. (TR 109.) Mr. Tyler testified that Ms. Hamilton and young Thunder Norris were close, and that Thunder loved her. Thunder had been staying with Ms. Hamilton a few days before November 4, 2004. (TR 221.) Ms. Cook testified that she felt comfortable having Thunder go to Ms. Hamilton's home. (TR 350.) In July of 2004, Ms. Cook attempted suicide. Following the attempt, a friend (Rebecca Rowe) took Thunder Norris to Sherika Hamilton. Subsequently, Ms. Cook's sister picked Thunder up from Ms. Hamilton. (TR 297, 295.) Ms. Cook did not know where Mr. Tyler was at the time. Mr. Tyler and Ms. Cook both testified that prior to November 4, 2004, Demitrus had never spent the night at Ms. Hamilton's home. (TR 187, 237, 276.)

Mr. Tyler testified that during the two years after he and Ms. Cook moved from Asheville to Johnson City, they would go to Sherika Hamilton's home. (TR 254.) Mr. Tyler also testified that Ms. Hamilton made her living selling "weed". (TR 247.) In fact, he testified candidly that he went to Ms. Hamilton's home "if I needed to get some herb". (TR 255.)

Ms. Adams testified that after the children were placed with Ms. Hamilton on November 4, 2004, Mr. Tyler and Ms. Cook visited with both children at Ms. Hamilton's home. (TR 133.)

Ms. Cook testified it was her opinion that Case Manager Flanary and Ms. Hamilton had some sort of relationship. (TR 305-06.)

Ms. Crumly testified that Ms. Hamilton was not paid by the State for keeping Thunder Norris and Demitrus Tyler after November 4, 2004.

**Issues Presented.**

- 1) Does the Commission have jurisdiction of this claim under Tennessee Code Annotated, section 9-8-307(a)(1)(E)?
- 2) Were the actions of the State of Tennessee regarding the care and control of Demitrus M. Tyler the cause in fact and the legal cause of his death?

**Decision on Jurisdiction.**

First, the Commission has before it yet again the persistently difficult issue of whether or not it has jurisdiction of a claim involving the Tennessee Department of Children's Services pursuant to Tennessee Code Annotated, Section 9-8-307(a)(1)(E), a part of the jurisdictional grant to the Commission by the General Assembly.

Section 9-8-307(a)(1)(E) provides as follows:

**9-8-307. Jurisdiction Claims Waiver of actions  
Standard for tort liability Damages Immunities  
Definitions Transfer of claims.**

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

(E) Negligent care, custody and control of persons;...

There has been an extensive amount of litigation involving this issue, although to date no published decision, under Tennessee Supreme Court Rule 4, has been found.<sup>4 5</sup>

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<sup>4</sup> See *Mullins v. State*, No. M2008-01674-COA-R3-CV, 2009 WL 1372209 (Tenn. Ct. App. May 15, 2009); *Holloway v. State*, No. W2005-01520-COA-R3-CV, 2006 WL 265101 (Tenn. Ct. App. Feb. 3, 2006); *Draper v. State*, No. E2002-02722-COA-RV-CV, 2003 WL 22092544 (Tenn. Ct. App. Sept. 4, 2003); and most recently, *Spicer v. State*, Tennessee Claims Commission No. 20051235, En Banc Decision filed July 20, 2009, Commissioner Reeves dissenting. (This Decision may be viewed on the Commission's website at <http://tennessee.gov/treasury/claims/2009Opinions.html>.)

The opinions in the cases referenced in footnote 1, and in particular, the Commission's most recent holding in its en banc decision in *Spicer*, set out the contours of this jurisdictional controversy involving attempts to determine at what point this Commission obtains jurisdiction over claims of misfeasance or non-feasance by employees of the Tennessee Department of Children's Services.

There can be no doubt whatsoever that the case load burden and responsibilities of employees of the Tennessee Department of Children's Services (hereinafter "TDCS") throughout the State are daunting and at times even overwhelming. Reliable statistical information indicates that TDCS receives one hundred referrals daily and some thirty-seven thousand (37,000) calls for its services annually.<sup>6</sup>

However, the United States Supreme Court's decision in *Deshaney v. Winnebago County Dep't. of Soc. Servs.*, 409 U.S. 189 (1989), makes it clear that an injured child, or his/her representative, may not bring a federal civil rights action under the Due Process Clause of the Fourteenth Amendment to the United States Constitution against a state in a case where an injured child is not in the actual custody of a state agency. *Id.* at 197. The *Deshaney* decision went on to note that a state could acquire a duty, under its traditional tort law, to provide a child with "added protection" by voluntarily undertaking such a

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<sup>5</sup> The rules of the Supreme Court of the State of Tennessee, specifically Rule 4(G)(1) provides as follows:

**Rule 4. Publications of opinions - Not for citation designation - Precedential value and citation of unpublished opinions.**

(G)(1) An unpublished opinion shall be considered controlling authority between the parties to the case when relevant under the doctrines of the law of the case, res judicata, collateral estoppel, or in a criminal, post-conviction, or habeas corpus action involving the same defendant. Unless designated "Not for Citation," "DCRO" or "DNP" pursuant to subsection (E) of this rule, unpublished opinions for all other purposes shall be considered persuasive authority. Unpublished opinions of the Special Workers' Compensation Appeals Panel shall likewise be considered persuasive authority.

<sup>6</sup> See statistics at <http://www.tn.gov/youth/childsafety.html>.

duty either through its state court system or by legislative action. *Id.* at 201-202. The Supreme Court reached this conclusion referencing Restatement (Second) of Torts, Section 323 (1965).<sup>7</sup>

Neither the state court decisions from Tennessee nor the *DeShaney* case provide a crystal clear answer as to whether or not this Commission has jurisdiction of a claim based on facts such as those in this case.

There does seem to be a real tension between the provisions of Tennessee Code Annotated, Section 9-8-307(a)(1)(E), usually relied upon by the State, as it is read in conjunction with Tennessee Code Annotated, Section 9-8-307(c), which provides as follows:

**9-8-307. Jurisdiction Claims Waiver of actions  
Standard for tort liability Damages Immunities  
Definitions Transfer of claims.**

.....  
(c) The determination of the state's liability in tort shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care.

The Claimants here, as well as the undersigned in *Spicer, supra*, have argued that identification of a duty owed (and its possible breach) by the state to a child warrants assumption of original jurisdiction when Tennessee Code Annotated, subsections 9-8-307(a)(1)(E) and (c) are read *pari materia*. Those positions rely on our state supreme court's decision in *Stewart v. State*, 33 S.W.3d 785 (Tenn. 2000), where the Court wrote:

[L]iberally construing this statute, therefore, we conclude that the Claims Commission could properly assert jurisdiction under section 9-8-307(a)(1)(E) if [a state trooper] had a legal duty to control local police authorities at an arrest scene – irrespective of whether he had actual

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<sup>7</sup> For an insightful analysis of the legal alternatives available on behalf of an injured child who has had some connection with an agency such as TDCS; see Kannan, "But Who Will Protect Poor Joshua DeShaney, A Four-Year Old Child With No Due Process Rights", 39 U. Mem. L. Rev. 3, 543 (2009).

care and custody over the deputies – and that he was negligent in the fulfillment of that duty. *Id.* at 792.

The importance of the entire duty concept in Tennessee tort law has been further accented by three recent decisions of the Tennessee Supreme Court in *Satterfield v. Breeding Insulation*, 256 S.W.3d 347 (Tenn. 2008), *Downs, ex rel. Bush*, 263 S.W.3d 812 (Tenn. 2008), and *Giggers v. Memphis Housing Authority, et al.*, 273 S.W.3d 359 (Tenn. 2009). Potentially appropriate to the discussion at hand in the case is the *Satterfield* Court's discussion of the creation of a duty where special relationships between parties are identified. See *Satterfield* at 359-361.

Of some interest with regard to this case is the fact that motions for summary judgment were heard in Knoxville, Tennessee, on the same day in this case and in the *Spicer* case, *supra*. In *Spicer*, the Commission recently, as noted, rendered an en banc decision on the jurisdictional issue. TDCS's involvement in the life of Demetrius Tyler was much clearer at that time than in *Spicer* where the facts at issue were somewhat sketchy.

Commissioner Miller-Herron wrote the majority opinion in the Commission's en banc decision in *Spicer*. That opinion, with additional observations, agreed with the undersigned's Decision at the summary judgment stage in that case. Commissioner Reeves filed a very thoughtful as well as insightful dissent.

The undersigned's views on this important jurisdictional issue were fully set out in my Order Denying State's Motion to Dismiss in *Spicer*, in the Order on State's Motion to Alter or Amend, or In the Alternative, Motion for Rehearing En Banc, in that same case, and my concurrence with Commissioner Miller-Herron's majority Decision after en

banc review there. Of particular importance here is the analysis set out at certain pages of each of those Orders.

At pages 9 through 16 of the original Order Denying State's Motion to Dismiss in *Spicer*, the Commission, speaking through the undersigned, wrote as follows:

### **III. Sovereign Immunity**

The core issue in this case is whether the State's sovereign immunity against suit has been waived, pursuant to Tennessee Code Annotated section 9-8-307(a)(1)(E), in light of the allegations and other materials concerning the severe abuse suffered by Haley Elizabeth Spicer that are presently before the Commission.

"[A]t common law, the [S]tate was absolutely immune from tort liability, as were cities and counties . . ."<sup>8</sup> Lucas v. State, 141 S.W.3d 121, 125 (Tenn. 2004). "This doctrine of sovereign immunity 'has been a part of the common law of Tennessee for more than a century[,] and [it] provides that suit may not be brought against a governmental entity unless that governmental entity has consented to be sued.'" Stewart v. State, 33 S.W.3d 785, 790 (Tenn. 2000) (quoting Hawks v. Westmoreland, 960 S.W.2d 10, 14 (Tenn. 1997)) (second alteration in original). Hence, "[i]t is now a well-settled principle of [both] constitutional and statutory law in this state that '[t]he State of Tennessee, as a sovereign, is immune from suit except as it consents to be sued.'" Stewart, 33 S.W.3d at 790 (quoting Brewington v. Brewington, 387 S.W.2d 777, 779 (Tenn. 1965)) (third alteration in original).

"The longstanding tradition in this state has been that governmental entities may prescribe the terms and conditions under which they consent to be sued including when, in what forum, and in what manner suit may be brought." Cruse v. City of Columbia, 922 S.W.2d 492, 495 (Tenn. 1996) (citation omitted). This is because "our legislature has always had the authority to waive its protections." Id. The Constitution of the State of Tennessee accordingly provides that "[s]uits may be brought against the State in such manner and in such

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<sup>8</sup> "The immunity of the [S]tate and the separate immunities of cities and counties developed along different paths through statutory modifications and partial abrogations of immunity." Lucas, 141 S.W.3d at 125.

courts as the Legislature may by law direct.” Tenn. Const. art. I, § 17. “Pursuant to [this] constitutional power to provide for suits against the [S]tate, the legislature created the Tennessee Claims Commission in 1984 to hear and adjudicate certain monetary claims against the State of Tennessee.” Stewart, 33 S.W.3d at 790. However, the Claims Commission’s “jurisdiction is limited only to those claims specified in Tennessee Code Annotated section 9-8-307(a). If a claim falls outside of the categories specified in section 9-8-307(a), then the [S]tate retains its immunity from suit, and [the] claimant may not seek relief . . . .”<sup>9</sup> Id.; cf. Tenn. Code Ann. § 20-13-102(a) (1994).

“[T]he entire statutory purpose of the Tennessee Claims Commission Act is to establish the state’s liability in tort based on the traditional tort concepts of duty and the reasonably prudent persons’ standard of care.” Lucas, 141 S.W.3d at 130. The statute, however, works as a limitation on liability; it provides, “For causes of action arising in tort, the [S]tate shall only be liable for damages up to the sum of three hundred thousand dollars (\$300,000) per claimant and one million dollars (\$1,000,000) per occurrence.” Id. (quoting Tenn. Code Ann. § 9-8-307(e)). Moreover, “[t]he [S]tate may assert any and all defenses, including common law defenses, [and] any absolute common law immunities available.” Id.

“The courts of this [S]tate have [also] held that any statute granting jurisdiction to hear a claim against the [S]tate must be strictly construed, as any such statute is in derogation of the common law rule of sovereign immunity.” Stewart, 33 S.W.3d at 790. However, the legislature amended section 9-8-307(a) in 1985 to reflect “its intention as to the jurisdictional reach of the Claims Commission . . . .” Id. at 791. The provision established “the intent of the general assembly that the jurisdiction of the Claims Commission be liberally construed to implement the remedial purposes of this legislation.” Tenn. Code Ann. § 9-8-307(a)(3). Therefore, “courts [must] defer to this expressed intention in cases where the statutory language legitimately admits

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<sup>9</sup> “We are not concerned in this case with the separate statutory development of the limited abrogation of sovereign immunity made applicable to cities and counties by the Tennessee Governmental Tort Liability Act [since t]his act is not and never has been applicable to the State of Tennessee or its agencies and departments.” Lucas, 141 S.W.3d at 126 (citing Tenn. Dep’t of Mental Health v. Hughes, 531 S.W.2d 299 (Tenn. 1975)).

of various interpretations.” Stewart, 33 S.W.3d at 791. This “policy of liberal construction of statutes, however, only requires th[e] court to give ‘the most favorable view in support of the petitioner’s claim,’ and . . . ‘does not authorize the amendment, alteration[,] or extension of its provisions beyond [the statute’s] obvious meaning.” Id. (quoting Pollard v. Knox County, 886 S.W.2d 759, 760 (Tenn. 1994); Brady v. Reed, 212 S.W.2d 378, 381 (Tenn. 1948)). A liberal construction in favor of jurisdiction should be given “only so long as (1) the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the ‘most favorable view in support of the petitioner’s claim’ is not clearly contrary to the statutory language used by the [g]eneral [a]ssembly.” Stewart, 33 S.W.3d at 791.

#### **IV. Additional Law Relevant to Ruling on Defendant’s Motion.**

The threshold issue in this case is whether the State’s long-established sovereign immunity, vis-à-vis the factual circumstances surrounding Haley Elizabeth Spicer’s horrific injuries, has been waived such that these facts can be evaluated under the narrowly construed provisions of Tennessee Code Annotated section 9-8-307(a)(1)(E), concerning the alleged negligent care, custody, or control of her by virtue of the State’s failure to remove her from an abusive situation after receiving notification of the alleged abuse.

The “care, custody, or control” concept has been addressed in several appellate decisions. In Learue v. State, 757 S.W.2d 3, 5 (Tenn. Ct. App. 1997), the court indicated in dicta that the State can be held to have the care, custody, or control of individuals housed in either state residencies or healthcare facilities.<sup>10</sup> Likewise, in Cox v. State, 844 S.W.2d 173 (Tenn. Ct. App. 1992), the court held that the Claims Commission had jurisdiction of a case where a work-release prisoner kidnapped and raped a Memphis woman, even though the claimant was not able to successfully establish proximate cause. Id. at 176. Furthermore, the Cox court pointed out that Tennessee Code Annotated section 9-8-307(a)(1)(E) does “not limit recovery to persons who suffer injury while in the care, custody, and control of the State” but provides an avenue for redress to third parties who had suffered damages at

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<sup>10</sup> In Learue, the State was not found to have had the care, custody, or control of a young man who suffered a neck injury while swimming at a state park. Learue, 757 S.W.2d at 3.

the hands of persons in the state's care, custody, and control. Id. at 176.

In Hembree v. State, 925 S.W.2d 513 (Tenn. 1996), a case where a mental patient who was permitted to enter a rehabilitation program outside a State hospital shot four people and killed two of them, the court held that the case could proceed under Tennessee Code Annotated section 9-8-307(a)(1)(E). Affirming the court of appeals, the supreme court held that confinement in a literal sense was not necessary to invoke section 9-8-307(a)(1)(E) jurisdiction. Justice Birch wrote:

The Cox holding, while not perfect guidance, does indeed suggest that the [S]tate may be liable under [section] 9-8-307 for certain decisions regarding persons for whom it is responsible. Liability in this regard comes not so much from physical custody or control; rather, it is the decision to reduce or terminate control or supervision that is scrutinized and may result in liability if that decision is made without due care.

Id. at 517.<sup>11</sup>

The State has also been held liable to a bank, which failed to receive notification that its collateral was seized and would be disposed of in a forfeiture proceeding since the notice was sent to another bank. Cmty. Bank of East Tenn. v. Tenn. Dep't of Safety, No. E-2004-00975-COA-R3-CV, 2004 WL 1924018, at \*1 (Tenn. Ct. App. Aug. 30, 2004). The Court in that case held that the State had control over the collateral, pursuant to Tennessee Code Annotated section 9-8-307(a)(1)(E), even though it did not have physical possession of the vehicle, because the vehicle could not be forfeited under state law unless the State had control of it.<sup>12 13</sup> Id. at \*2.

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<sup>11</sup> However, compare Conley v. State, 141 S.W.3d 591 (Tenn. 2004), a case where the State was found not to have had the care, custody, or control of a psychotic patient at a nursing home who beat a fellow patient to death. Although the State was required to screen Medicaid patients prior to admission at a privately operated nursing home, the Conley court noted that the actual screening was not conducted by State employees. Id.

<sup>12</sup> The vehicle was actually in the possession of the Campbell County Sheriff's Department. Cmty. Bank of East Tenn., 2004 WL 1924018 at \*2.

<sup>13</sup> The Supreme Court of Tennessee has held that the Government may be held liable for the actions or inactions of a public employee where a special duty is found. A special duty exists when "(1) officials, by their actions, affirmatively undertake to protect the plaintiff, and the plaintiff relies upon the undertaking; (2) a statute specifically provides for a cause of action against an official or a municipality for injuries resulting to a particular class of individuals of which the plaintiff is a member, from failure to enforce certain laws; or (3) the plaintiff alleges a cause of action involving intent, malicious, or reckless misconduct." Ezell v. Cockrell, 902 S.W.2d 394, 403 (Tenn. 1995) (emphasis added).

In addition, the issue of care, custody, and control of allegedly abused children was considered by the court of appeals in two unreported cases, Draper v. State, No. E2002-02722-COA-R3-CV, 2003 WL 22092544, at \*1 (Tenn. Ct. App. Sept. 4, 2003) and Holloway v. State, No. W2005-01520-COA-R3-CV, 2006 WL 265101, at \*1 (Tenn. Ct. App. Feb. 3, 2006). These two cases will be discussed in greater detail later in this opinion.

In the instant case, the claim made by Haley Elizabeth Spicer and her mother is founded on Tennessee Code Annotated section 9-8-307(a)(1)(E) which provides:

**§ 9-8-307. Jurisdiction; waiver of causes of action; limits on state's liability; immunities; transfer of claims.**

(a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

(E) Negligent care, custody and control of persons . . . .<sup>14</sup>

As it usually does in cases involving alleged “negligent care, custody, and control” of children, the State relies on Draper, 2003 WL 22092544, at \*1 and Holloway, 2006 WL 265101, at \*1.<sup>15</sup>

Of course, Draper involved the death of a child in Sullivan County, Tennessee. In the original action that was filed against various medical providers in the Sullivan County Circuit Court, the defendants alleged in the Answer that a DCS employee failed to properly investigate an abuse allegation and, therefore, failed to protect the child in that case. The Claimant’s mother then

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<sup>14</sup> Originally, this claim appeared to fall under this section of the Tennessee Claims Commission Act as well as Tennessee Code Annotated section 9-8-307(a)(1)(N), which deals with “negligent deprivation of statutory rights created under Tennessee law.” At the hearing on the motion in this case, the Claimant appeared to concede that there is no viable cause of action under subsection (N) since counsel was unable to identify a statute expressly conferring a private right of action to his clients. See Daley v. State, 869 S.W.2d 338 (Tenn. Ct. App. 1993); Draper, 2003 WL 22092544, at \*1.

<sup>15</sup> No appeal was taken from the court of appeal’s decision in Draper. An Application for Permission to Appeal was granted in Holloway on August 21, 2006, but the case apparently was settled because no further action was taken in the supreme court after the court granted the application.

filed an action with the Tennessee Claims Commission and asserted that the State should be found liable in connection with her daughter's death since DCS owed a duty to remove the child from the home where she was being abused and failed to carry out its duty to "protect abused children under the statutory scheme." Id. at \*2. Other than these brief facts, the opinion is sparse in terms of illustrating the factual circumstances of that claim. See id.

When it affirmed Commissioner Cheek's dismissal of the case for lack of subject matter jurisdiction, the Draper court distinguished Stewart, which was relied upon by the claimant. The court noted that the Stewart claimant might have been succeeded if he proved that the Trooper owed a duty to control the actions of county deputies responding to an accident scene or, alternatively, that the state officer assumed such a duty and was negligent in the exercise of that assumed duty such that the State should be held liable. The Draper court, applying Stewart, also wrote that "[t]here is no similarity between this limited factual scenario[,] which the Stewart Court entertained and this case, because there has been no showing of control, care, or custody of any person that was exercised negligently." Draper, 2003 WL 22092544, at \*2. Today, the Draper case continues to be a reliable authority for the State in subsequent matters involving alleged negligence on the part of DCS.

In Holloway, the court of appeals, again, relied on Draper in affirming Commissioner Miller-Herron's finding that there was no viable cause of action under Tennessee Code Annotated section 9-8-307(a)(1)(E). Holloway involved the death of a Memphis child who was treated at a hospital for serious injuries on two occasions before he was pronounced dead at that same facility on June 17, 2003. The child's earlier visits to the hospital were for the treatment of "severe traumatic physical injuries . . . to his head" and "for [a] left forearm fracture[.]" which occurred on April 5, 2003, and April 10, 2003 respectively.<sup>16</sup> Holloway, 2006 WL 265101, at \*1. The Holloway court accordingly stated, "In Draper, as in the case at bar, there was no proof nor allegation that the State had taken the child into its custody, care, and control." But, "[t]he substance of the complaint [in

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<sup>16</sup> Although the details of any notification to DCS about these two events are not discussed in the decision, the Claimant alleged DCS had been "notified of the injuries and circumstances of the child . . . by one or more of his relatives." Id. at \*1.

Draper] was that the State should have done so.” Id. at \*4. The Holloway court, therefore, interpreted Draper to say that Tennessee Code Annotated section 9-8-307(a)(1)(E) does not confer jurisdiction over a claim of “failure to remove” or over claims involving negligence in failing to take a child into custody. Id. The court said:

We agree with the Commissioner in the instant case that there is neither allegation nor proof that the deceased child in this case was ever in the **care, custody, and control** of the State. To the contrary, Appellant’s action is premised on the failure of the State to take care, custody, and control of the minor decedent.

Id. at \*4 (emphasis added).

Prior to the decisions in both Draper and Holloway, the Stewart court clearly indicated that the care, custody, and control components of Tennessee Code Annotated section 9-8-307(a)(1)(E) are meant to be read disjunctively. As Justice Anderson put it:

[I]t is difficult to conceive that the legislature intended to deny jurisdiction in cases where negligent control of a person by a state employee resulted in injury, even though the injured person was not actually within the care or custody of the state employee.

Stewart, 33 S.W.3d at 792 (emphasis added).

Whether the State negligently breached any duty it owed to Haley Elizabeth Spicer or her mother requires this Commission to apply “traditional tort concepts of duty and the reasonably prudent person standard of care” under our own empowering statute. Tenn. Code Ann. § 9-8-307(c). Identifying a duty is the initial step in analyzing any tort case. See McClenahan v. Cooley, 806 S.W.2d 767 (Tenn. 1991). “[T]he imposition of a legal duty ‘reflects society’s contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another’s act or conduct.’” Stewart, 33 S.W.3d at 791 (quoting McClung v. Delta Square Ltd. P’ship, 937 S.W.2d 891, 894 (Tenn. 1996)).

The Middle Section Court of Appeals addressed the duty concept in Lucas v. State. Although Lucas dealt with subsections (I) and (J) of Tennessee Code Annotated section 9-8-307(a)(1), the language Judge Cain used is

applicable to the issue now before the Commission. Judge Cain wrote:

Under generally applicable principles of tort law, all persons have a duty to use reasonable care under the circumstances to refrain from conduct that will foreseeably cause injury to others . . . . In determining whether, in a particular situation, there is a duty to act reasonably so as to protect others from unreasonable risks of harm, Tennessee has adopted an approach that balances the foreseeable probability and severity of harm against the burden upon the defendant to engage in alternative conduct that would have prevented the harm . . . . In determining whether a risk is an unreasonable one, the Court must consider several factors, including “the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct, and the relative safety of alternative conduct.”

Thus, under general tort law principles, the feasibility and costs associated with correcting a dangerous condition or taking other steps to avoid injury because of that condition would be factors relative to a determination of duty, not a bar to recovery by an injured plaintiff. Our Supreme Court has applied traditional tort theories to claims under the Claims Commission Act, pursuant to Tennessee Code Annotated [section] 9-8-307(c).

Lucas, 141 S.W.3d at 142 (internal citations omitted) (emphasis added).

As explained in this opinion, the jurisdictional grant given to the Tennessee Claims Commission by its empowering statute must be narrowly construed since the Act represents a waiver of the State of Tennessee’s innate sovereign immunity. That much is well-established by case law. However, the Act was amended in 1985 to establish that its provisions must be given a liberal construction “to implement the remedial purposes of this legislation.” Tenn. Code Ann. § 9-8-307(a)(3). In interpreting that provision, the Stewart court held that a liberal jurisdictional construction should be given only where (1) the particular grant of jurisdiction is ambiguous

and admits of several constructions, and (2) the “most favorable view in support of petitioners claim” is not clearly contrary to the statutory language used by the “[g]eneral [a]ssembly.” Stewart, 33 S.W.3d at 791.

Finally, in DeShaney v. Winnebago County Dep’t of Soc. Servs., 409 U.S. 189 (1989), a case disturbingly similar to the one at bar, the United States Supreme Court held that the State of Wisconsin’s gross failure to protect a young child from severe abuse that resulted in devastating brain damage did not constitute grounds for a suit under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Specifically, the Court wrote, “If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the clause for injuries that could have been averted had it chosen to provide them.” Id. at 197.

However, the Court, citing Restatement (Second) of Torts § 323 (1965), also noted that a state could acquire a duty under tort law to provide a child with “adequate protection” by voluntarily undertaking such a duty; “[a] State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes.” DeShaney, 409 U.S. at 201-02 (emphasis added).

Additionally, in the Order Granting En Banc review in *Spicer*, the Commission, again speaking through the undersigned, referenced three recent decisions of our Supreme Court regarding the issue of duty and wrote the following:

Recently, in *Satterfield v. Breeding Insulation*, No. E2006-00903-SC-R11-CV, 2008 WL 4135605 (Tenn.), our Supreme Court, speaking through Justice Koch, undertook a thorough discussion of the concept of duty as it has evolved in Tennessee jurisprudence.<sup>17 18</sup>

*Satterfield* arose in the context of the question of what duty an employer had to prevent the exposure of third parties to asbestos fibers transferred to them by an employee of the defendant employer. *Satterfield* sadly presented a factual scenario in which an Aluminum

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<sup>17</sup> Chief Justice Holder filed a concurring and dissenting opinion in the *Satterfield* case.

<sup>18</sup> The Supreme Court as recently as September 10, 2008, speaking through Chief Justice Barker, in *Downs v Bush*, M2005-01498-CS-R11-CV, 2008 WL 47588 (Tenn.) has again undertaken a thorough discussion of the concept of duty and when it arises.

Company of America (later known as ALCOA, Inc.) worker in Alcoa, Tennessee, transmitted asbestos fibers to his infant daughter who was, because she was a premature baby, hospitalized for five months at the University of Tennessee Medical Center in Knoxville. According to the facts in *Satterfield*, the father would visit the child immediately after he got off work without showering or changing clothes. There also were indications, in the *Satterfield* case, that ALCOA knew of the danger of asbestos fibers and did little or nothing to protect its employees and persons outside the plant from being exposed to those fibers. Eventually, Mr. Satterfield's daughter developed mesothelioma, a deadly form of cancer, which took her life at a very young age.

Justice Koch undertook in *Satterfield* to thoroughly examine the concept of duty as it is currently understood under Tennessee tort law. This led Justice Koch and his colleagues to discuss at length what constitutes both misfeasance and non-feasance which, the Court observed, were in actuality not mutually exclusive concepts.

In reaching its decision that in fact a duty was owed to Mr. Satterfield's daughter, the Court commented, albeit obliquely, on the role of stare decisis in the context of tort cases.

At 2008 WL 4135605 \*7, the Court said the following:

In most cases today, prior court decisions and statutes have already established the doctrines and rules governing a defendant's conduct. Generally, the presence or absence of a duty is a given rather than a matter of reasoned debate, discussion, or contention. The common law, however, must and does grow to accommodate new societal realities and values-or simply better reasoning-as it moves toward refinement and modification with the aim of improving while maintaining a sufficient stability so as to seek, and one hopes, find prudent reformation as opposed to anarchic revolution.

The Court correctly noted a well-established principle that duty arises when the degree of foreseeability of a possible risk and its potential degree of harm outweigh any burden placed on the defendant to engage in conduct which would have avoided the harm. *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545 at 551 (Tenn. 2005). In carrying out that balancing process, courts are permitted "to consider the contemporary values of Tennessee citizens". *Satterfield* at \*12.

Duty represents a legal obligation to observe a reasonable person standard of care “in order to protect others against unreasonable risks of harm”. *Satterfield* at \*4. Although frequently a strict dividing line has been drawn between acts of misfeasance and non-feasance, the *Satterfield* court, relying on Restatement (Third) of Torts, Section 37 CMT.C, at 711, observed that even though a negligent act might constitute an omission, “the entirety of the [particular] conduct may still be misfeasance that created a risk of harm”. *Satterfield* at \*5.

The Court acknowledged that Tennessee, so far, has not adopted a so-called duty to act or “rescue rule”. However, the Court went on to note there are exceptions in this state to this rule:

These exceptions arise when certain special relationships exist between the defendant and either the person who is the source of the danger or the person who is foreseeably at risk from the danger. ... These relationships create an affirmative duty either to control the person who is the source of the danger or to protect the person who is in danger. *Satterfield* at \*7.

These special relationships arise when a particular relationship results in such a significant obligation that “there is an enforceable expectation of reasonable action rather than unreasonable indifference”. *Id.* at \*7.

In attempting to set out the parameters of the presence of a duty which may arise if the actor does not act, the Court referenced the Restatement (Second) of Torts. Two concepts from the Restatement (Second) are set out in *Satterfield* at \*7-8.

First, the Court, at \*7, cites Chapter 12, Topic 4, Scope Note at p. 66, for the proposition that:

...where the negligence of the actor consists in a failure to act for the protection or assistance of another, there is normally no liability unless some relationship between the actor and the other, or some antecedent act on the part of the actor, has created a duty to act for the other’s protection or assistance.

Further, quoting Section 302 of the Restatement (Second), Section 302, cmt.a., at 82, the Court noted the following:

[i]n general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely

omits to act are restrictive, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty. *Satterfield v. Breeding* at \*8.

The decision in favor of the Claimant in *Satterfield* held that ALCOA did owe a duty to the infant child of its employee to avoid her exposure to the asbestos which eventually led to her death. The Court ruled that liability in that case would be based upon a determination as to whether or not ALCOA had engaged in any acts of misfeasance. Consequently, since liability for acts of misfeasance extend to any person who might reasonably be anticipated to be harmed by the defendant's conduct, it was unnecessary for the Court to analyze the *Satterfield* facts on the basis of non-feasance since liability there requires a definite relationship between the parties such that a social policy justifies the imposition of a duty. See *Satterfield* at \*11, quoting on the Law of Torts, Section 56 at 374.

Finally, the Court observed that the determination of the existence and scope of a particular duty reflects "society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct". After all, the concept of duty is largely an expression of policy considerations. Accordingly, our consideration of the existence and scope of [defendant's] duty must also include an analysis of the relevant public policy considerations." *Satterfield* at \*11, quoting *Bradshaw v. Daniel*, 854 S.W.2d at 870.

Finally, in my concurrence in *Spicer*, I wrote, in part:

There was heavy emphasis in my original Opinion on the concept of duty. Since my decision the Supreme Court of this State has issued three decisions, *Satterfield v. Breeding Insulation*, 256 S.W.3d 347 (Tenn. 2008), *Downes, ex rel v. Bush*, 263 S.W.3d 812 (Tenn. 2008), and *Giggers v. Memphis Housing Authority, et al.*, 273 S.W.3d 359 (Tenn. 2009), which clarify the process which this Commission must utilize in determining whether or not a duty is present.

The *Giggers v. Memphis Housing Authority* decision is of particular interest since it sets out several factors which may serve as a basis for ascertaining the presence or absence of a duty. These seven factors, found at page 8 of the Court's decision, were first

enumerated in *McCall v. Wilder*, 913 S.W.2d 150, 153 (1995). In my August, 2008, decision, I cited the case of *Lucas v. State* 141 S.W.3d 121 (Tenn. Court App. 2004) which likewise cited, at page 142, those same seven factors identified by the court in *Giggers* as guideposts for determining whether or not a duty is present.

The Supreme Court's three most recent pronouncements on the duty concept serve to reinforce the views expressed in my original decision on the State's Motion to Dismiss.

Therefore, at this point in the proceedings, I continue to believe that that State's Motion to Dismiss should be denied.

I also welcome my colleague's observations regarding the precedential value, if any, of *Holloway v. State*, 2006 WL 265101 (Tenn. Court App., Feb. 3, 2006) and *Draper v. State*, 2003 WL 22092544 (Tenn. Court App. 2003) in light of Rule 4 of the Rules of the Tennessee Supreme Court.

The State also argued that by failing to follow the Courts of Appeals' rulings in *Holloway* and *Draper*, *supra*, I failed to acknowledge controlling precedent. I do not believe that is the case. In *Satterfield v Breeding*, *supra*, Justice Koch wrote the following:

"Generally, the presence or absence of a duty is a given rather than a matter of reasoned debate, discussion, or contention. The common law, however, must and does grow to accommodate new societal realities and values – or simply better reasoning – as it moves toward refinement and modification with the aim of improving while maintaining a sufficient stability so as to seek, and one hopes, to find, prudent reformation as opposed to anarchic revolution.

When the existence of a particular duty is not a given or when the rules of the established precedents are not readily applicable, courts will turn to public policy for guidance. Doing so necessarily favors imposing a duty of reasonable care where a 'defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property.' " *Id* at 365 citing *McCall v. Wilder*, *supra*, at 153.

I believe that is the situation now before the Commission.

Refining the concept of duty as it applies in our modern society is a task which the Tennessee appellate courts have not been hesitant to take on. I believe that

clarification of this concept as it applies in cases such as this is an area which deserves attention by the Courts of Appeal, the Supreme Court, and potentially by the General Assembly.

Finally, in the original Order the undersigned drafted denying the State's Motion to Dismiss, I referenced the United States Supreme Court decision in *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189 (1989) [Incorrectly cited in my August 4, 2008, Order as 409 U.S. 189 (1989)]. That decision held, inter alia, that the plaintiff there did not have grounds for suit brought on the basis of a violation of the Due Process Clause of the Fourteenth Amendment. However, the Court went on to suggest a possible remedy under state tort law since state courts and legislatures might impose "such affirmative duties of care and protection upon its agents as it wishes". *DeShaney* at 201-02.

The most recent issue of the University of Memphis Law Review contains an article titled "But Who Will Protect Poor Joshua DeShaney, a Four-Year Old Child With No Positive Due Process Rights?" 39 U. Mem. L. Rev. 3 at 595 (2009). I believe this article is aptly named for children such as Joshua DeShaney and now, unfortunately, Haley Spicer. The author writes there as follows regarding the court's holding in *DeShaney*:

Federal judicial power under the Due Process Clause of the Fourteenth Amendment was held not to extend to protection of due process liberty interests of individuals from invasion by states in any case in which a state's actions can be characterized as the failure of the State to protect an individual from harm not inflicted by the State itself. The only exception is for in-custody cases. *Id.* at 587.

The analysis set out in the undersigned's original Order, I believe, offers the only forum for possible relief for a child such as Haley Spicer who perhaps is not in the actual formal custody of the State of Tennessee.

In the *Spicer* majority opinion, Commissioner Miller-Herron characterized the controversy as being whether questions of jurisdiction and duty should be bifurcated in Claims Commission cases. The pertinent question in her view is whether or not the issue

of duty comes into play in determining whether the Commission has original jurisdiction in a particular case. Such a duty analysis, if applicable, she argues, involves determining whether TDCS either possessed or assumed a duty to protect Haley Spicer, who, at the point she was injured, obviously was not in the physical custody of the State.

In her majority decision in *Spicer*, Commissioner Miller-Herron also discussed the Court of Appeals' decisions in both *Draper* and *Holloway*.<sup>19</sup> She pointed out that the Court's decision in *Draper* was decided chiefly through an analysis of Tennessee Code Annotated, Section 9-8-307(a)(1)(N), which provides as follows:

**9-8-307. Jurisdiction Claims Waiver of actions  
Standard for tort liability Damages Immunities  
Definitions Transfer of claims.**

(a) (1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of state employees, as defined in 8-42-101(3), falling within one (1) or more of the following categories:

....

(N) Negligent deprivation of statutory rights created under Tennessee law, except for actions arising out of claims over which the civil service commission has jurisdiction. The claimant must prove under this subdivision (a)(1)(N) that the general assembly expressly conferred a private right of action in favor of the claimant against the state for the state's violation of the particular statute's provisions; . . .

Commissioner Miller-Herron correctly observed that jurisdiction of the Commission could not be found under subsection (N) since the Claimant was unable to identify any statute affording her a private right of action against the State and one of its agencies as explicitly required by subsection (N). *Holloway*, according to Commissioner

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<sup>19</sup> Commissioner Miller-Herron was the Commissioner who rendered the trial level decision in *Holloway* which was affirmed on appeal by the Western Section Court of Appeals. Permission to appeal that Court's decision was granted, but the case apparently was settled before the Supreme Court had an opportunity to consider the case on its merits.

Miller-Herron, relied on *Draper*, although under the provisions of Tennessee Supreme Court Rule 4, *Draper* provides persuasive but not precedential authority. In her *Spicer* opinion, Commissioner Miller-Herron discussed *Stewart, supra*, and inquired, for jurisdictional purposes, whether or not the State in *Spicer* had assumed a duty to care for or control the circumstances of Haley Spicer. She went on in her opinion to discuss the three recent “duty” decisions from our Supreme Court, and their holdings regarding the creation of a duty.

Again, at least for jurisdictional purposes, Commissioner Miller-Herron opined that TDCS, through its functions of receiving calls and deciding which ones to follow-up on, may well have assumed a duty with regard to Haley Spicer regarding whom it had received five to six fairly detailed separate reports of abuse.

In her thoughtful dissent in *Spicer*, Commissioner Reeves pointed out that *Draper, Holloway, and Mullins* were decided subsequent to the Tennessee Supreme Court’s decision in *Stewart* and in none of those cases had the respective court of appeals found jurisdiction under Tennessee Code Annotated, Section 9-8-307(a)(1)(E) in the face of allegations of negligent investigation of child abuse.

Commissioner Reeves argues in her dissent that the majority in *Spicer* undertook an expansive construction of the supreme court’s decision in *Stewart*. She argues that denominating duty as the linchpin of jurisdiction effectively strips the State of any immunity from suit on the simple basis of a negligence allegation since duty is a necessary element of every negligence cause of action. Commissioner Reeves then goes on to argue that even if a duty is isolated, the relevant consideration remains whether the State, through its duly elected representatives, has waived sovereign immunity and

consented to being sued in a case such as this simply because a common law duty may have arguably been breached. Commissioner Reeves also observed that if duty alone is the basis for the Commission's assertion of jurisdiction, then many of the twenty-two (22) categories of suit for which sovereign immunity has been waived under Tennessee Code Annotated, Section 9-8-307(a)(1) become superfluous. Specifically, she discusses subsection (a)(1)(N) set out above.

Commissioner Reeves goes on to point out that theoretically, under the majority's position in *Spicer*, a case could be brought under subsection (a)(1)(N) if a claimant is able to identify any duty placed on a particular employee or state agency. This, Commissioner Reeves believes, could result in "an enormous expansion of state liability and Claims Commission jurisdiction".

Commissioner Reeves disagrees with the majority in *Spicer* that the mere decision making process engaged in by TDCS employees in deciding which claims of abuse to follow up on constitutes the assumption of a duty by the State. She asks why the Commission would have jurisdiction in a situation where allegedly an employee either acted or failed to act in a particular situation when the General Assembly has neither statutorily imposed such a duty nor waived sovereign immunity. Consistent with that position, Commissioner Reeves goes on to argue that only the General Assembly, under long-established principles of sovereign immunity, can waive immunity, and that neither individual employees nor agencies can assume duties which impose potential liability on the State.

Here, there appears to be a consensus that the State never had custody of Demitrus Tyler. As Ms. Paris testified, custody issues are decided by the courts. (TR

403-04.)

However, in Tennessee Code Annotated, Section 9-8-307(a)(1)(E), as *Stewart v. State*, 33 S.W.3d 785, 792 (Tenn. 2000) clearly held, there are found two additional jurisdictional pegs – care and control. Therefore, in solving this jurisdictional inquiry, the Commission must look to the record to determine whether the State exercised care or control over the child Demitrus. Black's Law Dictionary, Sixth Ed. (1990) defines “control” as the “power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. The ability to exercise a restraining or directing influence over something.” See *Cnty Bank of East Tenn.*, 2004 WL 192408, at \*3. The record here seems to be replete with indicia of both care and control in connection with the Department’s oversight of Demitrus Tyler’s welfare. For example, Ms. Paris testified that the Department was involved with the child’s life through the implementation of a Child Safety Plan. (TR 411.) In fact, Ms. Crumly testified that “just getting a referral and opening a file means that you’re involved in their lives”. (RC 67.) Ms. Crumly also indicated the extent of the Department’s involvement in this case through her testimony that if a child was in a stable home, then the Department would not have to consider moving him. However, here, because Demitrus and his brother, Thunder, were staying in separate households and the Department did not know where the parents were residing, the implication is clear that the Department would be forced to intervene in the family’s life. (RC 98.) The power and involvement of the Department is further evidenced by the fact that if Demitrus and Thunder were to be returned to their parents, a separate child and family team meeting would have to be held to evaluate the situation. (RC 111.) In fact, Ms. Crumly testified that the Children’s Protective Service unit has the right to veto

a child and family team decision “if the safety of the child is not being addressed”. (RC 117.) Further, while the Safety Plan was in effect, should the parents fail to abide by its provisions, then the Department would re-evaluate the situation. (RC 34.) Also, if the child’s placement was changed, Ms. Crumly testified that Mr. Flanary again would have had to have gone through the same procedural steps carried out on November 4, 2004. (RC 116.)

The pure bureaucratic process set out in Regulation 14.8(C)(3) is indicative of the extent of the involvement of the Department in a Demitrus’ life. That provision directs that a temporary emergency safety plan could not be implemented without the case manager conferring with his team leader and departmental legal counsel. (RC 75.)

Further, Ms. Crumly testified that in Demitrus’ case, it was a requirement that he stay with Ms. Hamilton until his parents located and set up a home with utilities activated. (RC 25.) She went on to state that the parents, Ms. Hamilton, and the Department all had a responsibility to try and ensure the safety of Demitrus Tyler. (RC 69.)

On November 4, 2004, when Mr. Flanary met with Tyler and Cook, he told them they needed to be under a safety plan. (EXH 7, entry of 11/4/04.) In fact, prior to that, Ms. Paris testified that the case recordings indicated that Flanary told Ms. Cook’s aunt at her home that unless Cook called him that day, further action would be taken. (TR 393.)

These terms and conditions of the Department’s dealings with Demitrus Tyler are clear evidence that it was involved in his day in–day out care and control to a very large extent. In fact, this intervention into his life and on his behalf, began shortly after his birth when Mr. Flanary justifiably sought to involve he and his mother in the Tennessee

Early Intervention Program in order to monitor his growth because of Ms. Cook's use of marijuana during her pregnancy.

These powerful indicia of the Department's involvement meet the jurisdictional requirements of Tennessee Code Annotated, section 9-8307(a)(1)(E).

Further, the relationship between the Department and Tyler/Cook family fits within that category of special relationships resulting in the creation of a duty, discussed by the Court in *Satterfield*. These connections which the Department developed vis-à-vis Demitrus Tyler, through its actions almost from birth, "create[d] a sufficiently significant obligation that there [was] an enforceable expectation of reasonable action rather than unreasonable indifference". *Id.* at 360. The creation of this sort of affirmative duty, the Commission finds, based on the facts in this case, fits the Claimants' allegations into the care and control criteria set out in Tennessee Code Annotated, section 9-8-307(a)(1)(E).

This is not to say that every time the Department has any sort of interaction or contact with a family and a child, it will set itself up for a potential claim under Tennessee Code Annotated, section 9-8-307(a)(1)(E). However, where the involvement of departmental personnel is as pervasive and intense as it was in this case, the Department cannot avoid an analysis of its actions or inactions by simply claiming that it did not have formal custody of a child.

The inquiry into the situation must be more sophisticated than that.

Having found that the Commission does have jurisdiction over Tyler and Cook's claims in this case, the Commission must now determine whether the actions or inactions of departmental personnel were the cause in fact and legal or proximate cause of Demitrus' death.

**Important Preliminary Evidentiary Issues Regarding Hearsay and Relevancy.**

In this case, the State offered as evidence certain CPS Investigation Case Recordings prepared by Case Manager Flanary and team leaders Crumly and Paris. The Claimants object to the admissibility of these documents on the ground that they constitute hearsay under the Tennessee Rules of Evidence, Rules 801<sup>20</sup> and 802.<sup>21</sup> The Claimants also contend that much of the content of some of these recordings should not be admitted because it is not relevant under Tennessee Rules of Evidence, Rules 401<sup>22</sup>, 402<sup>23</sup>, 404<sup>24</sup> and 405<sup>25</sup>. If admissible, Claimants contend its relevance is outweighed by

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<sup>20</sup> Tenn. R. Evid. R. 801 provides as follows:

**Rule 801. Definitions.** – The following definitions apply under this article:

- (a) Statement. – A ‘statement’ is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.
- (b) Declarant. – A ‘declarant’ is a person who makes a statement.
- (c) Hearsay. – ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

<sup>21</sup> Tenn. R. Evid. R. 802 provides as follows:

**Rule 802. Hearsay Rule**

Hearsay is not admissible except as provided by these rules or otherwise by law.

<sup>22</sup> Tenn. R. Evid. R. 401 provides as follows:

**Rule 401. Definition of ‘relevant evidence.’** – ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

<sup>23</sup> Tenn. R. Evid. R. 402 provides as follows:

**Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.** – All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible.

<sup>24</sup> Tenn. R. Evid., R. 404 provides in pertinent part as follows:

**Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.**

- (a) Character evidence generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity with the character or trait on a particular occasion except:

. . .

the prejudice it could generate with the fact-finder and therefore, should be excluded under Rule 403 of the Rules of Evidence.<sup>26</sup>

The State counters that even though some of the recordings do constitute hearsay, they are admissible under the Tennessee Rules of Evidence, Rule 803(6) and

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- (3) Character of a witness. Evidence of the character of a witness as provided in Rules 607, 608, and 609.
  - (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:
    - (1) The court upon request must hold a hearing outside the jury's presence;
    - (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
    - (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
    - (4) The court must exclude the evidence if its probative is outweighed by the danger of unfair prejudice.

<sup>25</sup> Tenn. R. Evid., R. 405 provides as follows:

**Rule 405. Methods of proving character.** – (a) Reputation or Opinion. – In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony to reputation or by testimony in the form of an opinion. After application to the court, inquiry on cross-examination is allowable into relevant specific instances of conduct. The conditions which must be satisfied before allowing inquiry on cross-examination about specific instances of conduct are:

- (1) The court upon request must hold a hearing outside the jury's presence,
- (2) The court must determine that a reasonable factual basis exists for the inquiry; and
- (3) The court must determine that the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effects on substantive issues.

(b) Specific Instances of Conduct. – In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

<sup>26</sup> Tenn. R. Evid. R. 403 provides as follows:

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.** – Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

perhaps, Rule 803(8).<sup>27</sup> The State concedes that in those recordings where hearsay within hearsay is found, absent a specific hearsay exception required under Rule 805,<sup>28</sup> the second tier hearsay cannot be admitted. Of course, the State argues that the case recordings are relevant.

The contested recordings are found in Collective Exhibit 3 and also in Exhibit 7 to the Deposition testimony of team manger Kimberly Crumly. There is a good deal of overlap between the case recordings introduced as Exhibit 3 and Exhibit 7 to Ms. Crumly's Deposition. However, entries from May 6, 2004, and July 29, 2004, prepared by Mr. Flanary are not contained in Exhibit 7 to Ms. Crumly's Deposition. Additionally, the entry from November 11, 2004, from Washington County DCS

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<sup>27</sup> Tenn. R. Evid. R. 803(6) and (8) provide as follows:

**Rule 803. Hearsay Exceptions.** – The following are not excluded by the hearsay rule:

(6) Records of Regularly Conducted Activity. – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification, indicate the lack of trustworthiness. The term "business" as used in this paragraph includes every kind of business, institution, occupation, and calling of every kind, whether or not conducted for profit.

(8) Public Records and Reports. – Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

<sup>28</sup> Tenn. R. Evid. R. 805 provides as follows:

**Rule 805. Hearsay Within Hearsay**

Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law.

personnel directed to Department officials in Nashville is not included in Exhibit 7 to Ms. Crumly's Deposition.

**1.) The Content of the Case Recordings.**

These case recordings, if admissible under the Rules of Evidence, are interesting.

The first entry from May 6, 2004, documents Mr. Flanary's contact with the family following notification by the Johnson City Medical Center that both Ms. Cook and Demitrus showed traces of marijuana in their systems following the child's birth and Flanary's subsequent notification to the family that it would be enrolled in the TennKids Early Intervention program; and that finally, Department personnel "would be assigned to come into the home and monitor the child's health and development".

The case recordings also establish that on July 29, 2004, team leader Rita Paris received a report that Ms. Cook had attempted to hang herself. In an entry made by Mr. Flanary on July 30, 2004, he documents comments relayed to him by a social worker at the Johnson City Medical Center, as well as additional information provided to that social worker by Ms. Casteel, Ms. Cook's mother, regarding the suicide attempt. Mr. Flanary also documented that on July 29, 2004, he obtained from Ms. Cook names and phone numbers of persons and places where the children were at the time.

In a case recording prepared on November 4, 2004, before Demitrus' death, Mr. Flanary entered a note that on September 13, 2004, he again had located the Tyler/Cook family living in an unacceptable mobile home on Unaka Avenue in Johnson City with indications of rodent infestation and the smell of garbage present. Also, according to this record, on September 15, 2004, Mr. Flanary returned to the Unaka

Avenue address where he obtained Ms. Cook's signature on a release of information document. After that date, according to this note, he "never heard from them again about finding an apartment or anything else".

A note from November 4, 2004, also prior to the child's death, indicates that Mr. Flanary visited with Ms. Hamilton on November 3 to make sure that Thunder Norris was in a safe environment. At that time, Mr. Flanary asked Ms. Hamilton to contact Ms. Cook and tell her that she needed to get in touch with the Department of Children's Services.

On November 15, 2004, after the child's death, Mr. Flanary prepared a recording indicating he had received a telephone call from Mr. Tyler on November 4, 2004. The note goes on to state that Tyler and Cook then came to the DCS office around 4:00 p.m. that same day where the need for a safety plan was discussed. This note also states that Tyler and Cook "both agreed to work with CM Flanary" to resolve the homelessness issue. Further, the entry states that Tyler and Cook were asked where they wanted the children to stay pending the location of a suitable home, and they indicated Ms. Hamilton's home would be acceptable since Ms. Cook's aunt, Ms. Adams, had a history of mental health problems. At that time, both Tyler and Cook signed the Child Safety Plan. The recording goes on to state that "Ms. Williams (sic) [has] the children at her house".

A case recording completed on November 15, 2004, documents that on November 5, 2004, departmental legal counsel, Ms. Crumly, and Ms. Hamilton reviewed and signed the Safety Plan, and that Mr. Tyler called with the information that he had located an apartment, and wanted Mr. Flanary to inspect that apartment three days later on the following Monday, November 8, 2004.

A case recording prepared on November 15, 2004, following the child's death, reports that on November 8, 2004, Mr. Flanary and Tyler and Cook walked through the new apartment, and that Mr. Flanary found it to be acceptable. This recording goes on to state that before leaving for a family member's funeral in Massachusetts, on November 9, 2004, Mr. Flanary met with the landlord for the property located by Cook and Tyler and delivered their check for One Hundred Dollars (\$100.00) since Cook and Tyler did not have a means of transportation. Following that meeting with the landlord, Mr. Flanary called Tyler and told him what he had done. Mr. Hitechew's statements to Mr. Flanary, as discussed above, are not admissible.

A recording dated November 15, 2004, documenting events of November 10<sup>th</sup>, notes that Mr. Flanary received a cell phone message while he was traveling to Massachusetts from Mr. Tyler informing him that Demetrius had drowned. The following day, on November 11<sup>th</sup>, Tyler once again left a message on Mr. Flanary's cell phone stating that the Department would never find Thunder again. According to this recording, Mr. Tyler was angry and "almost threatening". However, on November 15, 2004, Tyler again called Flanary and wanted to know if he could still help the family with getting assistance.

Exhibit 7 to Ms. Crumly's Deposition contains basically the same case recordings discussed above with the exception of entries prepared by Ms. Crumly on November 30, 2004, regarding work she did on November 10 and 11, 2004, following the child's death. These entries contain recitations of conversations Ms. Crumly had with numerous out of court declarants. However, the contents of these case recordings, although not admissible under any exception to the hearsay rule, are not critical to a decision in this case.

## 2.) The Admission of Hearsay Testimony.

Clearly, many of the case recording entries introduced as Collective Exhibit 3 and as Exhibit 7 to Ms. Crumly's Deposition contain statements made by out of court declarants and are being offered for the truth of matters contained therein.

Absent an exception to the hearsay rule, these recordings would be excluded from evidence and therefore from consideration in this case.

At trial, the Commission excluded statements made to Mr. Flanary, an out of court declarant himself, by other out of court declarants. In other words, reports by these third parties to Flanary and testified to by a live witness constitute hearsay within hearsay. Under Tennessee Rules of Evidence, Rule 805, this hearsay within hearsay is admissible provided it falls within an exception to the hearsay rule. Unfortunately, the Commission can identify no exception which would permit the admission of statements made to Ms. Paris and Mr. Flanary by out of court declarants and recorded in the case recordings entries for July 29 and 30, 2004. However, much of the information contained in those hearsay statements was testified to independently by Ms. Cook at trial.

Additionally, the entry recorded by Mr. Flanary on November 4, 2004, documenting information relayed to him by Ms. Hamilton, in a contact occurring on November 2, 2004, is not admissible since no exception to the hearsay rule permitting the admission of this hearsay within hearsay has been identified. Again, this exclusion in all likelihood is not critical since testimony at trial established that Tyler and Cook had left Thunder with Ms. Hamilton and that Demitrus was staying with Robin Adams at the time. The statement made in this November 2, 2004, entry to the effect that

Tyler and Cook had “no place to live” at the time, is not admissible and was vigorously objected to by the Claimants at trial.

Finally, the entry made by Mr. Flanary on November 15, 2004, documenting his contact with Jerry Hitechew and the rental arrangements for the proposed new home for Tyler, Cook, and the children, is not admissible. However, this information is not critical to the resolution of this case and there was other proof at trial indicating that in fact on November 9, 2004, Mr. Flanary met with the new landlord before leaving for his sister’s funeral in Massachusetts.

However, utilizing the hearsay exception found in the Tennessee Rules of Evidence, Rule 803(6), sometimes referred to as the business record exception, those other case recording entries prepared by Mr. Flanary and admitted at trial are indeed admissible since they were identified by foundational witnesses Paris and Crumly and were prepared within relative proximity to the dates of the events recounted therein. These reports appear to the Commission to be typical of reports regularly prepared by DCS case workers – such as Flanary – in fulfillment of their normal job responsibilities. Preparing such reports clearly appears to be a proper exercise and implementation of those powers granted DCS under Tennessee Code Annotated, section 37-5-106(1) as the Department through its employees, attempted here to attain the purpose for which it was created as set out in Tennessee Code Annotated, section 37-5-102.

Significantly, in large part, what Mr. Flanary recorded was also testified to by the Claimants. In those few instances where case recording entries in the two exhibits were excluded, the Commission was not able to identify an exception to the hearsay rule permitting the introduction of hearsay within hearsay.

Additionally, Tennessee Rules of Evidence, Rule 803(8), provides a second avenue for the admissibility of some of these allegedly hearsay statements. That rule states:

**Rule 803. Hearsay Exceptions**

The following are not excluded by the hearsay rule:

(8) Public Records and Reports. – Unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel. (Emphasis supplied.)

Here, the records sought to be introduced by the State are “records [and] reports” made by an agency charged with protecting the welfare of children and “setting forth the activities of [that] office”.

The Commission FINDS that with the exceptions noted above, the majority of the statements contained in Collective Exhibit 3 and Exhibit 7 to Ms. Crumly’s Deposition are admissible under the provisions of Tennessee Rules of Evidence, Rules 803(6), (8), and 805 as exceptions to the hearsay rule.<sup>29</sup>

**3.) The Relevance Issue.**

Evidence regarding certain events in the lives of the Claimants prior to Demitrus’ death, presents challenging issues for Tyler and Cook, as well as the State. The Claimants contend that notations in the DCS case recordings regarding marijuana

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<sup>29</sup> For a thorough discussion of Tenn. R. Evid. R. 803(6) and (8), see Cohen, et. al, Tennessee Law of Evidence (5<sup>th</sup> Ed. 2005), sections 8.11 and 8.12, and Kay and Weissenberg, Tennessee Law of Evidence, 2009 – 2010 Courtroom Manual at pp. 231 – 232; see also *Cobbins v. Tennessee Department of Transportation*, 566 F.3d 582, 586 – 588 (6<sup>th</sup> Cir. 2009) for a good discussion of Rules 803(6) and (8) of the Federal Rules of Procedure in a case involving the admissibility of a promotion application filed with the Tennessee Department of Transportation in a race discrimination case.

in the physical systems of Cook and Demitrus at the time of the child's birth, Cook's suicide attempt, the conditions in which the family was living in September of 2004, prior involvement of both Claimants with the criminal justice system, and the fact that Ms. Cook was still married to another man when Demitrus was born are not only irrelevant under Tennessee Rules of Evidence, Rules 401 and 402, but should be excluded under the provisions of Rule 403 because of a danger of "unfair prejudice" and "confusion of the issues". Those objections were explicitly preserved for the record at trial and particularly, contested with reference to matters regarding the mother's marijuana usage while pregnant, her suicide attempt, and the family's housing situation in September of 2004. Additionally, although there is no mention in the case recordings regarding the prior criminal history of the Claimants or the fact that Ms. Cook was married to another individual at the time she and Tyler's son Demitrus was born, Claimants insist that those considerations too were irrelevant and should not have been admitted into evidence since the sole issue at the time the Child Safety Plan was implemented revolved around the family's homelessness and their contention that the State forced Sherika Hamilton on them as a placement resource for the children..

A decision on the relevancy issues thus created is obviously important to both parties.

However, in addition to the hearsay and relevancy issues involved with these factual allegations, claimants must face the fact that only through acknowledging that DCS was involved in the family's life by helping them deal with several of those situations, can they establish that the State had care and control over Demitrus thus establishing jurisdiction under Tennessee Code Annotated, Section 9-8-307(a)(1)(E).

For this reason alone, the Commission believes the admission into evidence of matters set out in the case notations is not only necessary but fair to all parties, and that it would be disingenuous for the Commission to decide on the one hand that it would use matters contained in those notes to hold that it has jurisdiction because of the State's involvement in the family's life and yet on the other hand, deny the State the right to introduce evidence of several of those factors in measuring whether or not the State has been negligent in its care and custody of Demitrus during his brief life.

Under well-established principles of Tennessee evidence law, questions of relevancy and probative value are well within a Commissioner's discretion. *State v. Leath*, 744 S.W.2d 591, 593 (Tenn. Ct. App. 1987); see also *Gray v. State*, 235 S.W.2d 20 (1950).

Although the Claimants did not cite the Commission to the Tennessee Rules of Evidence, Rule 404, in arguing against the admission of evidence of prior troubling aspects of the Claimant's lives, the Commission FINDS and HOLDS that under Rule 404(b) these background factors are admissible since they were not only introduced into consideration by the Claimants in arguing for Commission jurisdiction, but also assist the Commission in understanding why the Tyler/Cook family was homeless in November of 2004, thus necessitating the development and implementation of a Child Safety Plan. The homelessness here cannot be viewed in a vacuum and the matters leading up to that homelessness, the Commission FINDS, informed the decisions made by DCS and its employees in November of 2004.

Here, the State, through the introduction of evidence regarding the backgrounds of Tyler and Cook, was not attempting to show that Ms. Cook was still using marijuana at the time or that she continued to be suicidal in November of 2004, or that

either party was engaging in criminal conduct then or even that Ms. Cook's pre-existing marriage was somehow, at that point, impacting the family's life. To that extent, the State was not trying to introduce these prior episodes, contrary to the provisions of Rule 404, to show that the Claimants were acting "in conformity" with a particular character trait at the time. Had the State introduced discreet evidence to show that either of the Claimants had, in the past, engaged in a certain activity in order to illustrate that they had a propensity to engage in that same sort of activity again, then a stronger argument could be made that this sort of character evidence should be excluded under Rule 404. (See Cohen, et al., Tennessee Law of Evidence (5<sup>th</sup> Edt.), § 4.04(3) at p. 4-77; see also *Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 907 – 908 (Tenn. 1996).) However, that does not appear to have been the case.

Because the jurisdiction of this Commission is warranted here, in part because of those matters documented in Collective Exhibit 3 and Exhibit 7 to the Crumly deposition and because the State through introduction of that evidence is not attempting to show that the Claimants had a propensity to commit those specific acts again, but rather was trying to explain why the homelessness problem eventuated and why a safety plan was needed,, the Commission FINDS that the case recordings are not only admissible through exceptions to the hearsay rule, as previously discussed, but also relevant in deciding the issues now before it.

As for Claimants' objection under the Tennessee Rules of Evidence, Rule 403 that the probative value of any of these episodes "is substantially outweighed by the danger of unfair prejudice," the Commission is convinced and FINDS that it can fairly and analytically evaluate this sort of evidence in ruling on both the jurisdictional and liability issues. The Commission further FINDS the matters contained in the case

recordings, where admissible, as well as evidence regarding Claimants' usage of marijuana, Ms. Cook's marital status, and Mr. Tyler's prior criminal record (admissible pursuant to the Tennessee Rules of Evidence, Rule 609) are probative on the issue of the family's homelessness and why that occurred. (See Cohen, et al., Tennessee Law of Evidence (5<sup>th</sup> Edt.), § 4.03(5), p. 4-62 and Kay and Weissenberg, Tennessee Evidence, 2009 – 2010 Courtroom Manual, at p. 67.)

The Claimants also argue these entries should be excluded on the basis of the so-called "Palmer" doctrine. See *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). The Claimants contend the entries were made with probable litigation in mind and therefore are not trustworthy even though they might be construed as business records otherwise admissible.

There are three answers to this contention. First, with the exception of those entries made after the date of the child's death on November 10, 2004, the entries relevant to the Tyler/ Cook family were made prior to the date of the child's death when any motivation to supposedly "cover up" state actions arguably contributing to that death would not have been a consideration. Secondly, it would take the most cynical of views to conclude that the only reason the entries were made was to control any possible legal damage following Demetrius' death. This Commission FINDS no evidence supporting such a conclusory "cover-up" assumption in this case. It is clear that these records were a normal part of case documentation procedures at DCS.

The decision as to whether or not the business records appear to have been created only for a self-serving purpose is left to the discretion of the trial judge under the *Palmer* decision. The Commission, while cognizant of the fact that the death of a child with whom the Department had become involved was in all likelihood a concern

of the highest magnitude at that agency, FINDS no proof to substantiate such a misanthropic view of the content of these entries.

**4.) Admissibility of Misdemeanor Criminal Convictions.**

Finally, on cross-examination, counsel for the State elicited from Mr. Tyler that within the preceding ten years he had been convicted twice for misdemeanor possession of stolen property.<sup>30</sup> Apparently, these convictions occurred in 2000 and 2001. (TR 195 - 204.) The proof shows further that Ms. Cook had been found guilty of shoplifting and misdemeanor forgery. However, the dates of those convictions are not revealed in the record.

Rule 609(a)(2) provides that an impeaching crime must be one punishable by death or imprisonment in excess of one year or involving dishonesty or false statement". Additionally, under subsection (b) of that same rule, the impeaching offense is not admissible unless it is shown that less than ten years have elapsed since the date of release from confinement or if the witness was not confined, less than ten years from the date of conviction.

Using these standards, the Commission FINDS that Mr. Tyler's convictions, although both misdemeanors, are admissible for impeachment purposes. Obviously in so holding, the Commission FINDS further that Mr. Tyler's convictions involve

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<sup>30</sup> Tenn. R. Evid., R. 609 addresses the admissibility of evidence of prior convictions for impeachment purposes. That Rule provides, in pertinent part, as follows:

- Rule 609. Impeachment by evidence of conviction of crime.** - (a) General Rule. - For the purpose of attacking the creditability of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:
- (1) The witness must be asked about the conviction on cross-examination,...
  - (2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement. ....

dishonesty since he was found guilty, on two occasions, of having stolen property in his possession, and eventually spent four months, following a probation revocation, in the custody of the North Carolina prison system.

However, the State did not establish when Ms. Cook's convictions for shoplifting and fraud occurred. Therefore, the Commission is not informed as to whether the requirements of Rule 609(b) have been met and these convictions are not admissible for impeachment purposes.

**Applicable Tennessee Tort Law Principles.**

A decision in this case requires the application of traditional and well-established Tennessee negligence law principles.

Of course, a Claimant in any negligence case before the Commission must prove a duty owed by the Defendant State to the Claimant, a breach of that duty, damages or losses flowing from the breach, causation in fact, and legal cause (formerly known as proximate cause). *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005); *West v. East Tennessee Pioneer Oil Co.* 172 S.W.2d 545, 549 (Tenn. 2005) *Timmons v. Metropolitan Government of Nashville and Davidson Co.*, No. M2008-015A1-COA-R3-CV, 2009 WL 1684662 (Tenn. Ct. App.).

Duty has been defined as “the legal obligation owed by [a] defendant to [a] plaintiff to conform to a reasonable person standard of care for ... protection against unreasonable risks of harm”. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

A breach of that duty occurs when the State, through one of its employees, in Claims Commission cases, fails to exercise reasonable care. What a defendant, or its employees, acting in the scope of their employment, must do, or must not do, “is a question of the standard of conduct required to satisfy the duty”. *McCall, supra*, at

153. The standard of conduct in each situation confronted is the “standard of reasonable care in light of the apparent risk”. *Id.*; see also *Timmons* at \*5. The failure to exercise such reasonable care constitutes a breach of the duty owed. *Id.* at 153 – 54 (citing *Doe v. Linder Const. Co., Inc.*, 845 S.W. 2d 173, 178 (Tenn. 1992)).

The third element of any negligence action, an injury or a loss, is self-evident in this case which involves the death of a six to seven month old child.

Finally, and important for the decision here, are determinations of whether the claimant has shown by a preponderance of the evidence causation in fact and legal or proximate cause. These two requirements are distinct and not interchangeable. *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993).

Causation in fact is “the cause and effect relationship that must be established between the [State’s] conduct and the [Claimant’s] loss before liability for that particular loss will be imposed. . . . [The State’s] negligent conduct is the cause in fact of the plaintiff’s injury if, as a factual matter, it directly contributed to the [claimants’] injury and without it [claimants’] injury would not have occurred.” *Robbins, et al v. Perry Co.*, No. M2008-00548-COA-R3-CV, 2009 WL 1162579, \*3 (Tenn. Ct. App.), citations omitted.

Another court defined cause in fact as follows:

“An inquiry into cause in fact is not metaphysical; it is rather, ‘a common sense analysis of the facts that lay persons can undertake as competently as the most experienced judges’. . . . Courts often determine cause in fact using the ‘but for’ test: [t]he defendant’s conduct is a cause in fact of the event if the event would not have occurred but for that conduct; conversely, the [State’s] conduct is not a cause of the event, if the event would have occurred without it. . . . It is only necessary that [the State’s] conduct be a cause of the [claimant’s] injury; it need not be the sole cause of the injury.” *Watts v.*

*Morris*, No. W2008-00896-COA-R3-CV, 2009 WL 1228273, \*9 (Tenn. Ct. App.).

Even if Claimants are able to establish that the State's conduct, under the principles just set out, was a cause in fact of the damage, they then must go on to show that such actions or inactions were also the legal or proximate cause of their damages. *West v. East Tennessee Pioneer Oil Co.*, 172 S.W.3d 552, 553 (Tenn. 2005).

A well understood and often cited definition of legal cause has been in place in Tennessee for a number of years. This definition sets out a three part test for establishing proximate or legal cause:

(1) the tort-feasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. *Haynes v. Hamilton County*, 883 S.W.2d 606, 612 (Tenn. 1994), quoting *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)

Several other decisions provide additional insight on the subject of legal cause and serve to explicate the three part test set out by the Court in *McClenahan*.

For example, the Middle Section Court of Appeals, in *Soloman v. Hall, et al.*, 676 S.W.2d 158 (Tenn. Ct. App. 1989), wrote:

The proximate cause of an injury generally is that act or omission which immediately causes or fails to prevent the injury or an act or omission occurring or concurring with another which, but for that act or omission, the injury would not have occurred. And the proximate cause is not necessarily that which is next or last in time or place, but that which is a procuring, efficient, and predominant cause; the term means closeness in causal relation.

The proximate cause of an injury is the act or omission which immediately causes or fails to prevent injury which

would not have been inflicted in the absence of such an act or omission occurring or concurring with another.

A proximate cause of an injury is a cause that produced the result in continuous sequence and without which it would not have occurred. *Id.* at 161. (Emphasis supplied. Citations omitted.)

Further, “[t]here is no requirement that a cause to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result.” *McClenahan* at 775.

The determination of whether or not legal or proximate cause has been established does not involve purely a mechanistic process. Rather, reaching a conclusion as to whether legal cause has been shown involves a varied and necessarily complex and frequently difficult decisional process. As Justice Koch put it, while sitting on the Middle Section Court of Appeals, “[t]hese decisions are based on considerations of logic, common sense, policy, precedent, and other more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient”. *Rains v. Bend of the River*, 124 S.W.3d 580, 592 (Tenn. Ct. App. 2003).

#### **Comparative Fault Considerations.**

A part of the State’s defense here is that at least a part, if not all, of the fault for Demitrus’ death is attributable to the Claimants themselves and Sherika Hamilton. Therefore, considerations of comparative fault are potentially raised in this case.

This is a wrongful death case brought by the natural parents of Demitrus Tyler and by his mother, Kelly Cook, on behalf of his half-brother, Thunder Norris.

Wrongful death actions in Tennessee have been described as follows:

A wrongful death action in Tennessee is a hybrid survivor/wrongful death action, which (a) preserves and continues the existence of the cause of action that was vested in the victim at the time of death, and (b) compensates the decedent's survivors for their losses consequent upon the injuries received by decedent. See Pivnick, Vol. 1, Tennessee Circuit Court Practice, section 1:19 at 144, citing *Jordan v. Baptist Three Rivers Hop.*, 984 S.W.2d 593 (Tenn. 1999) and *Ki v. State*, 78 S.W.3d 876 (Tenn. 2002).

In this hybrid survivor/wrongful death action provided for in Tennessee Code Annotated, Section 20-5-113, there is but one right of action and that action is the one possessed by the decedent had he survived, along with any recovery which might be forthcoming in that action. *Rogers v. Donelson/Hermitage Chamber of Commerce*, 807 S.W.2d 242, 246 (Tenn. Ct. App. 1990). The right to bring and prosecute the action passes, pursuant to Tennessee Code Annotated, Section 20-5-106(a), to the personal representative or next of kin and any recovery forthcoming from such an action "passes to the beneficiaries named in the statute not in their own right 'but because it passes to them in the right of the deceased'." *Id.* at 246, citing *Herrell v. Haney*, 341 S.W.2d 574 (1960).

In this case, the State has alleged comparative fault on the part of Mr. Tyler and Ms. Cook as a defense as a part of its defense.<sup>31</sup>

If the Commission finds that there are relative percentages of comparative fault assessable against Mr. Tyler, Ms. Cook, Ms. Hamilton, and the State, an interesting and as yet unresolved issue appears to present itself at this point in the evolution of comparative fault jurisprudence in Tennessee. Perhaps the leading treatise on the law of comparative fault in Tennessee is Day, Caperella, and Woods, Tennessee Law of

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<sup>31</sup> Obviously, the Claimant, Thunder Norris, a four year old child, was not at fault in connection with the circumstances of his brother's death.

Comparative Fault, 2008 – 2009 Ed. (West). There the authors make the following observation:

Can fault be assigned against a parent who is a beneficiary of a wrongful death claim on behalf of a deceased child for the negligent supervision by the parent of the child that contributed to cause the child's death? *Id.* at section 15:8, 354 – 55.

In 1992, the Supreme Court of this State in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn.) began a revolutionary and evolutionary process in the law applying to negligence cases in Tennessee. Of course, that case, for the first time, adopted a system of modified comparative fault for application in tort cases in this State.

As the appellate courts have refined comparative fault jurisprudence in Tennessee, they continue to elucidate the philosophical underpinnings of the changes *McIntyre* initiated in this State. In the 2000 decision of *Carroll v. Whitney*, 29 S.W.3d 14 (Tenn.), the Court observed that by rejecting contributory negligence in *McIntyre*, it was seeking “a tighter fit between liability and fault” and that under “the new system a defendant would only be liable for the percentage of damages caused by that defendant’s negligence”. *Id.* at 16 – 17.

Had Demitrus Tyler survived the episode of November 10, 2004, in the bathtub at Sherika Hamilton’s home, he, or someone on his behalf, theoretically could have brought an action against not only the State of Tennessee but also against his parents under the holdings of our Supreme Court in *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994).<sup>32</sup> In this connection, see also Saba, “Parental Immunity from Liability

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<sup>32</sup> In *Broadwell*, the Court said:

However, the relationship between parents and their children is not exclusively that of parent-child. A parent’s conduct that injures a child may be outside the scope of their relationship as parent-child,

in Tort: Evolution of a Doctrine in Tennessee”, 36 U. Mem. L. Rev. 829 (2006), and Note, 62 Tenn. L. Rev. 183.

**Decision on Liability of the State.**

All parties involved in this case, as well as the Commission, obviously acknowledge that the death of young Demitrus Tyler was a tragedy. There can be no doubt whatsoever regarding that proposition. The issue now before the Commission is whether or not the State of Tennessee was negligent in causing that death and therefore, is liable to the Claimants under the Tennessee Claims Commission Act.

The proof presented throughout the trial of this matter shows clearly that both Demitrus and his older half-brother, Thunder Norris, were living in a chaotic situation.

Demitrus was born to a mother who chose to use a controlled substance while she was pregnant with him. The Commission finds no evidence whatsoever in this record that the use of marijuana has ever been found to be indicated in connection with an expectant mother’s pregnancy related symptoms. In fact, the Commission categorically does not believe Ms. Cook’s testimony that this is why she was using marijuana while she was pregnant with Demitrus.

Further, at the time of Demitrus’ death, neither of his parents was working and, in fact, Mr. Tyler testified that he “wasn’t around a lot” during the pregnancy. (TR 218.)

Following revelation by medical personnel at the Johnson City Medical Center that both Ms. Cook and her infant son had evidence of marijuana in their systems, Mr. Flanary of DCS contacted Ms. Cook in connection with the TennKids Early Intervention

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and a child may be injured by a parent’s conduct that is not in the exercise of parental authority, supervision, or care or custody. Consequently, the scope of the exemption from liability should be limited or defined by the purpose for granting the immunity and the definition of the duty alleged to have been breached will disclose whether there is immunity. *Id.* at 476.

Program. Apparently, this program is designed to monitor the development of at risk children following birth. The program seems to be directed at assessing a child's growth in light of adverse birth circumstances, which here involved the mother's drug abuse while pregnant. A case recording from November 15, 2004, which the Commission found to be both admissible and relevant, also documents Mr. Flanary's frustration with the parents for not staying in touch with him after he became involved in their lives. In fact, a case recording prepared by Mr. Flanary on November 4, 2004, before the child's death, indicates that he found the family by happenstance on September 13, 2004, and returned the following day to obtain Ms. Cook's signature on a release which was needed in connection with his work with the family. The fact that Mr. Flanary was still attempting to obtain signatures on documents from the family in connection with DCS's efforts on their behalf nearly five months after the child's birth is indicative of their failure to maintain contact with him following Cook's release from the hospital after Demitrus' birth and placement in the TennKids Early Intervention Program.

Additionally, it is abundantly clear from the proof in this case that both parents were abusing marijuana, or as Mr. Tyler called it "herb" or "weed", which he testified he sometimes bought from Sherika Hamilton. The Commission finds that Cook certainly was using marijuana before the birth of her child Demitrus and, along with Tyler, in all likelihood, both before and after Demitrus' birth.

Further, the Commission does not believe Claimants' testimony that they objected to the placement of the two children with Sherika Hamilton during the seven day period called for by the Child Safety Plan which they voluntarily signed on November 4, 2004. Both parties had known Ms. Hamilton for an appreciable period of time. She had visited

with them in Asheville, North Carolina, before they moved to Johnson City. Either Tyler or Cook and Tyler had lived with a relative of Ms. Hamilton's when they first moved to Johnson City. Ms. Hamilton lived in the same apartment complex (Tyler Apartments) where Cook had, in 2002 and part of 2003, been the night manager, and where Claimants also lived before inexplicably leaving that apartment and eventually moving into a ramshackle trailer in Johnson City where they were residing with five to six month old Demitrus and his older half-brother, Thunder, until mid-October 2004, when they were forced to leave that home because of insufficient heat.

At that point, Thunder was deposited by Tyler and Cook with Ms. Hamilton with whom Ms. Cook had lived while she was pregnant with Thunder Norris, and who she had chosen to be Thunder's godmother. At the same time, Demitrus was in the home of Ms. Cook's aunt, Robin Adams, who had just recently moved into the Tyler Apartments where Ms. Hamilton lived. Ms. Adams' own two children were, according to her, friends of Ms. Hamilton, and Ms. Adams described Ms. Hamilton as being "nice". Even while the Safety Plan was in effect, the proof is that Cook and Tyler visited with the children after November 4, 2004, at Ms. Hamilton's home. In fact, when Ms. Hamilton was cited by the Johnson City Police for child endangerment on November 9, 2004, for leaving children unattended at Tyler Apartments, she went to Ms. Adams' apartment to report what had happened, leaving both Demitrus and Thunder there while she completed the legal paperwork with the police officers.

Both of these Claimants have a significant amount of college education. In fact, Ms. Cook had studied social work at East Tennessee State University where she had a 3.6 average. The Commission does not believe that Departmental personnel forced Sherika

Hamilton on Cook and Tyler as a placement choice on November 4, 2004, or that they did not understand that there were legal options available to them if they did not agree with the contents of what the evidence shows was a voluntary plan.

These Claimants are both far too intelligent to have meekly accepted Ms. Hamilton as a seven day placement resource if in fact they actually had sincere objections to their longtime friend's home as a place for the children to live until they were able to locate adequate housing.

The proposition that there was something dramatically awry in the Tyler/Cook family unit in November of 2004, is also borne out by other facts in this case. Although Mr. Tyler has college training in a technical area, the proof shows that he was convicted two times in the last ten years of being in possession of stolen property. In fact, he had just been released from the State of North Carolina's penal system shortly before he met Ms. Cook in Asheville in 2002.

Further, when Tyler and Cook began their relationship in 2002, Ms. Cook was still legally married, and still is, to a man she claims not to have seen since 1998. Additionally, following her separation from that gentleman, she had become pregnant by another man, who is the father of her son, Thunder Norris.

Further, shortly after Demitrus' birth in 2004, Ms. Cook attempted suicide. Following this frightening event, it was not Mr. Tyler who was summonsed to care for Demitrus and Thunder while Cook was hospitalized in Johnson City and Knoxville, Tennessee. Rather, friends and family of Ms. Cook stepped in to assist with the children's care during Cook's hospitalizations. In fact, initially, Cook's good friend, Rebecca Rowe, first took Thunder Norris to Sherika Hamilton's following the suicide

attempt. Eventually, Cook's sister picked Thunder up. During this entire period, the children's caregivers changed some three to four times and there is no proof that Mr. Tyler was involved with the two boys' care during this very disturbing episode.

There is also no proof in this record that Sherika Hamilton was being paid by the State of Tennessee for caring for her friends' two children under the CPS Safety Plan. In fact, the State presented testimony that it did not pay her anything for taking care of the children.

Although Ms. Hamilton's conduct in leaving six and one-half month old Demitrus in a bathtub alone obviously was quite negligent, in other respects Ms. Hamilton's actions appear to be admirable. The Claimants themselves had permitted Thunder Norris to stay with Ms. Hamilton in the past, and he was with her before November 4, 2004, when Claimants were having shelter problems. Mr. Tyler testified that Thunder loved Ms. Hamilton. The proof is also unrebutted that beginning on November 4, 2004, Ms. Hamilton agreed to open her home to both children – apparently on a completely uncompensated basis – while the Claimants attempted to rectify their housing problems.

The fact of the matter is that both of these educated, intelligent Claimants voluntarily signed a Plan which provided that the children would stay with Ms. Hamilton for at least seven days. Their signatures on the Plan, therefore, are more telling than

perhaps would be the case with less intelligent and less educated individuals.<sup>33</sup>

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<sup>33</sup> It is understandable that the State had concerns about the suitability of Ms. Adams' home as a placement source for the children. First of all, the proof clearly shows that Ms. Adams herself had just moved into her apartment. Ms. Adams also candidly admitted that she had suffered, since 2002, with depression problems which according to the State's witnesses, was reported to the case workers during development of the CPS Safety Plan. Additionally, although Tyler and Cook claimed they were living with Ms. Adams in November of 2004, some of the case recordings, which the Commission has found to be both admissible and relevant, document that Cook and Tyler were not forthcoming about where they

The Claimants, at trial, obviously objected to the actions of Case Manager Michael Flanary and have alleged that those actions “partially” (TR 306.) caused the death of their son.<sup>34</sup>

However, the proof shows undeniably that throughout Demitrus’ brief life, Mr. Flanary tried to better his circumstances. From the outset, Mr. Flanary attempted to enroll the child in the TennKids Early Intervention Program because of the possible after-effects of his mother’s use of marijuana while she was pregnant with him. In July of 2004, when his mother attempted suicide, Mr. Flanary contacted Ms. Cook while she was hospitalized. Even later, in September of 2004, in connection with his work with another family, Mr. Flanary encountered the Tyler/Cook family living in a sub-standard mobile home in urban Johnson City. The proof also indicates that Flanary had difficulties keeping in contact with the family because of their failure to apprise him of their whereabouts. A case recording prepared on November 4, 2004, again before the child’s death, documents that in light of the circumstances Flanary found the family living in around mid-September of 2004, he gave Cook information regarding possible housing options and of the possibility of State assistance in defraying moving expenses. On September 15, 2004, Flanary returned to the Unaka Avenue mobile home in order to obtain Ms. Cook’s signature on a release which the Commission believes he needed in connection with Demitrus’ participation in the TennKids Early Intervention Program.

The case recordings and proof at trial show that from November 3, 2004, even up

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were staying at the time. And it is not clear at all where they were living at the time. (See Collective Exhibit 3, case recording for 11/04/2004.)

<sup>34</sup> The State makes some attempt to claim that Mr. Tyler is not the father of Demitrus Tyler. The Commission does not believe this to be the case. Mr. Tyler’s name appears on the child’s birth certificate and he and Ms. Cook both adamantly denied that she was involved with any other man who could have been the child’s father. The Commission does not find there is any question whatsoever regarding Demitrus’ parentage.

to the date of the child's death, Mr. Flanary attempted to help the Tyler/Cook family locate and pay for a decent place to live, even to the point that on a day off from work [November 9, 2004] just before leaving for his sister's funeral in Massachusetts, he took a deposit check on the family's new apartment to the landlord since Tyler and Cook had no means of transportation. That these efforts were appreciated is evidenced by Ms. Crumly's testimony that on November 10, 2004, while at the hospital following Demitrus' death, Cook and Tyler told her that they appreciated what Flanary had done for them. On November 15, 2004, Mr. Tyler even contacted Mr. Flanary and inquired as to whether he could still assist the family in finding an apartment.

The Commission FINDS that both Flanary and the Department tried mightily to assist this family, including Demitrus, at a time when their lives were seriously unsettled and the children's welfare clearly in jeopardy. The Commission does not believe that Mr. Flanary's resignation from the Department on December 1, 2004, resulted from anything other than his grief over the child's death. The Commission does not find that this resignation can or should be considered as some sort of admission of guilt by him.

The proof is overwhelming that Flanary engaged in several efforts on behalf of the Tyler/Cook family designed to shelter Demitrus and Thunder from the poor circumstances they were living in.

The Claimants' claim seems to be based on the proposition that since they were not homeless on November 4, 2004, a Child Safety Plan should never have been put in place and that had the plan not been created, the child would not have been with Sherika Hamilton on November 10, 2004, when she temporarily left the bathroom to make a bed and he drowned. Claimants insist that the Commission should isolate its analysis to

whether or not their family was homeless at the time and ignore other evidence regarding why that homelessness occurred. In other words, Claimants allege that since they were not homeless on November 4, 2004, a Child Safety Plan was not necessary and the fact that it was implemented put Demitrus in harm's way by placing him with Sherika Hamilton. Following Claimant's logic, had the child not been with Sherika Hamilton at the time, then she never would have left him in the bathtub alone thus creating an opportunity for a drowning episode. Claimants also rely heavily on the contention that consistently, between November 4 and November 10, 2004, they requested the return of their children and the termination of the Child Safety Plan but were denied even up until November 9, 2004, when Ms. Hamilton was charged with child endangerment, a fact also they relayed to Case Manager Flanary.

Claimants alleged at trial a procedural failing on the part the State since a complete background check was not done on Sherika Hamilton prior to the implementation of the November 4, 2004, Child Safety Plan. However, that plan was voluntarily signed by all parties late in afternoon on November 4, 2004, and the next day by Mr. Flanary's immediate supervisor as well as a departmental attorney. It appears that the Department moved forward with the process as quickly as humanly possible and that immediate action appeared to be necessary in light of the fact the Cook and Tyler had already placed their children in two separate homes and were not forthcoming with Mr. Flanary about where they were living and where the family would live in the coming winter.

Additionally, the claimants fault the Department for not having conducted a complete background check on Sherika Hamilton. However, the proof is abundant that

Cook and Tyler knew Ms. Hamilton well, and that they voluntarily entered into a plan under which both Demitrus and Thunder would live in Ms. Hamilton's home for seven days, a short distance from Ms. Adams' home where claimants contend they were living at the time. Further, although a complete background check apparently was not done, Supervisor Rita Paris testified she reviewed DCS records for any history of problems Ms. Hamilton may have had.

A troublesome issue raised by the claimants is their contention that Mr. Tyler contacted Mr. Flanary by cell phone as Flanary was traveling to Massachusetts for his sister's funeral and informed him, on November 9, 2004, that Hamilton had been charged that day with child endangerment as described above. Tyler claims that Flanary told him he did not have time to deal with that situation as he was on his way home for his sister's funeral. Ms. Crumly testified that Mr. Flanary should, nevertheless, have looked into the situation and that there is no record that he did so after his phone conference with Mr. Tyler. (TR 127-130.) Ms. Crumly also testified that if Mr. Flanary was having problems communicating by cell phone with Tyler, he should have told Tyler to contact someone else at the Department at the time. (TR 141-142.)

The Commission does not believe that these relatively minor procedural mistakes are sufficient to establish Cook and Tyler's claim by a preponderance of the evidence. The proof is overwhelming in this record that Sherika Hamilton had been close to both of these claimants for a number of years. Ms. Hamilton was godmother to Ms. Cook's son Thunder and the testimony shows that Ms. Hamilton visited them in Asheville and that for a period of time, after returning to Johnson City, either one or both of the claimants lived in the home of a relative of Ms. Hamilton. In fact, when Ms. Hamilton was charged

with child endangerment, she went immediately to the apartment where Cook and Tyler were supposedly staying at the time. Also, Cook and Tyler's objections to Ms. Hamilton appear to be quite disingenuous since not only was Ms. Hamilton the godmother of Ms. Cooks' son Thunder but apparently neither Cook or Tyler objected to Thunder staying with Ms. Hamilton even though Tyler testified she was selling marijuana out of her home.

Failings on the part of Mr. Flanary and the Department pale in comparison to the factors which lead the Department to believe that the Tyler/Cook family was homeless and in need of the implementation of a Child Safety Plan for their two children.

The Commission FINDS that the circumstances of Demitrus' death were purely accidental and caused by the negligence of Ms. Hamilton in leaving him in a bathtub unattended while she made the bed in another room. This, quite obviously, was a severe lapse in judgment on her part as all seem to agree that a child six and one half months old should never be left unattended in a bathtub.

Because of this finding, Tyler and Cook's claims fail for three reasons.

First, as discussed above, the duty owed by any defendant, to a plaintiff, is reasonable care under all of the pertinent and relevant circumstances. *West v. East Tennessee Pioneer Oil Co.*, at 552; *Doe v. Linder Const. Co.*, at 177. The level of care necessary in order to avoid breaching a duty is calculated by assessing the probable consequences presented by a particular constellation of factors and must be "commensurate with the risk of injury." *Doe v Linder Const. Co.*, at 177. The risk involved, in order to be actionable if not dealt with appropriately, is one which is foreseeable;

“...a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable. Foreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise and even though the act of the defendant in fact caused the injury, there is no negligence and no liability.” *Id.* See also *West v. East Tennessee Pioneer Oil Co., at 551.* (Emphasis supplied)

Here, the Commission does not believe that claimants have established a breach of the admitted duty owed to Demitrus. There is simply no way that Mr. Flanary or any other state employee could have foreseen that Ms. Hamilton, a longtime friend of the claimants, would be so negligent as to leave a small child alone, for any period of time, in a bathtub of water.

The question of whether or not claimants have proved cause in fact is perhaps a closer one. *Watts v. Morris, supra*, at page 67 describes a cause in fact analysis as involving “common sense” rather than being an exercise in metaphysics. The issue of cause in fact here is close since if the claimant’s position is adopted, it could be argued that but for the implementation of the Child Safety Plan, Demitrus would never have been in the physical custody of Ms. Hamilton and the drowning event would not have occurred. But for the presence of the child in Hamilton’s home, claimants contend, she would not have been giving the child a bath and subjected Demitrus to her negligence by leaving him alone in the bathtub. However, from the State’s perspective, it could be argued that claiming its efforts on behalf of Demitrus caused his death creates a far too attenuated linkage. Therefore, the cause in fact issue is perhaps evenly drawn and does not militate in favor of either parties’ position.

However, it is with the issue of legal or proximate cause that the claimants’ case

clearly fails.

The tripartite definition of legal cause set out in so many cases in Tennessee (See *Haynes v Hamilton Co.*, and *McClenahan v. Cooley*, *supra* at p 71 herein) is relatively easy to comprehend and apply. In *Rains v. Bend of the River*, *supra*, at p 72 herein, Justice Koch wrote cogently that determining whether or not legal cause has been established requires the Commission to think logically, apply its common sense, review policies and precedents, and to factor in our more or less inadequately expressed ideas of what justice demands and what is administratively possible and convenient. Applying that good advice to the facts before the Commission now, it is clear that the claimants have not met prongs one and three of the test. Prong one requires that a tort-feasor's conduct must have been a "substantial factor" in causing the harm complained of. In this situation, given the fact that the Commission believes the cause of Demitrus' death was the unfortunate negligence of Ms. Hamilton, we do not find that any of the activities or alleged failings of the State and its employees in this case were a substantial factor in the child's drowning.

However, it is with prong three that claimant's case fails in its effort to prove legal or proximate cause. Based on the proof before the Commission, there has been no showing that a person of ordinary intelligence and prudence did or could have reasonably foreseen what happened to Demitrus Tyler on the evening of November 10, 2004, while at the home of Ms. Hamilton's cousin. What happened that evening was a pure accident and any actions or inactions on the part of the State or its employees in attempting to remedy the living circumstances of Demitrus by virtue of implementation of a Child

Safety Plan were not a substantial factor in causing his death.<sup>35</sup>

Since proving legal or proximate cause is an absolute necessity for the claimant in a negligence case, on this ground alone, claimant's position in this case fails.

Again, the death of this innocent child was a tragedy.

Applying the Tennessee Claims Commission Act to the admissible proof explicating in this case, the case authorities extricating negligence concepts in Tennessee, the Commission simply cannot find that the State is liable under Tennessee Code Annotated, Section 9-8-307(a)(1)(E) and therefore the claim is **DENIED** and the case **DISMISSED**.

ENTERED this the 30<sup>th</sup> day of September, 2009.



**William O. Shults, Commissioner**  
P.O. Box 960  
Newport, TN 37822-0960

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<sup>35</sup> In this case, there has been a good deal of argument regarding the applicability of comparative fault considerations. In light of the fact that the Commission has found the State not to have been at fault here, it is unnecessary to engage in a comparative fault analysis now. The Commission would note that had a comparative fault analysis been warranted, there is still an extremely interesting, and as yet unresolved issue in Tennessee, in situations such as this. See above herein at pp. 72-75. Had the Commission found the State negligent, certainly a comparative fault analysis may have been necessary and that analysis should have involved not only the fault of the State but also that of Tyler, Cook, and Ms. Hamilton.

**CERTIFICATE**

I certify a true and exact copy of the foregoing Order has been transmitted to:

**Arthur M. Fowler, III, Esq.**  
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**P. Robin Dixon, Esq.**  
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P.O. Box 20207  
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This the 5 day of ~~September~~, 2009.

*Oct*



**Marsha Richeson, Administrative Clerk**