IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20th JUDICIAL DISTRICT, PART III

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CHLORA A. LINDLEY-MYERS, Special Deputy Commissioner of the Tennessee Department of Commerce and Insurance,

Petitioner,

v.

SMART DATA SOLUTIONS, LLC, and others,

Respondents.

No. 10-507-III

"Petition for Contempt v. Posey, Bachman and others"

MOTION FOR RELIEF UNDER RULE 60

COMES NOW the law firm, Evans Petree P.C. ("EP" or the "law firm"), and files this its Motion for Relief under Rule 60 of the Tennessee Rules of Civil Procedure, and prays this Court review its Order as it pertains to the liability on certain matters of the law firm only, separate and apart from William Hendricks, Russell Hensley, Theodore Kitai (collectively "the Individuals"). In support of the Motion, EP would show unto the Court as follows:

I. Introduction

The Court's Order on April 2, 2012 found the three (3) Individuals and EP in contempt of court. The Order concluded that the law firm is liable for contempt damages due to the actions of the Individuals, although the Court found that those actions were in connection with performing the functions of the business of BBA. For the reasons set forth in this Motion, we believe that this conclusion is not supported by the record, and, in the words of Rule 60, constitutes a mistake arising from an oversight or omission.

II. The Evidence Fails to Show Liability as to EP for the $374,000.00 Transferred to BBA.

For the following reasons, EP respectfully submits that it is not liable for the $374,000.00 obtained by BBA.

EP is a professional corporation properly organized and practicing law under the laws of the State of Tennessee. The Individuals were organizers, officers, and directors of BBA, a separate corporation organized in Mississippi. BBA had a separate checking account which was separate and in no way connected to EP. It is well settled in Tennessee that for liability to attach to an employer for the wrongful, intentional acts of its employees, very specific circumstances have to exist. The record does not contain facts sufficient to establish such liability.

Under controlling Tennessee law, in order to hold an employer liable for the intentional, wrongful acts of its agents, the plaintiff must prove (1) that the person who caused the injury was an employee, (2) that the employee was on the employer's business and (3) that the employee was acting within the scope of his employment when the injury occurred. See, Hamrick vs. Spring City Motor Company, 708 S.W. 2d 383, 386 (Tenn. 1986); Tennessee Farmers Mutual and Insurance Company vs. American Mutual Liability Insurance Company, 840 S.W. 2d 933 (Tenn. App. 1992).

Tennessee Farmers adopted the Restatement (Second) of Agency as the correct statement of law for determining whether an employee's conduct is within the scope of his or her employment. *Ibid* at p. 937. The Restatement (Second) of Agency § 228 (1957) cited by Farmers Mutual provides in relevant part as follows:

> (2) Conduct of a servant is not within the scope of employment if it is... too little actuated by a purpose to serve the master.

Restatement (Second) of Agency § 229 (1957) states:

(1) To be within the scope of employment, conduct must be of the same general nature of that authorized, or incidental to the conduct authorized [by the principal].

(2) In determining whether or not the conduct, although authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:

(a) Whether or not the act is one commonly done by such servants;

(b) ... purpose of the act...;

(e) Whether or not the act is outside the enterprises of the master or, if within the enterprise, has not been entrusted to any servant;

(f) Whether or not the master has reason to expect that such an act will be done...

In the current case, the Individuals set up a separate corporation and named themselves as officers and directors of same. Consistent with this fact, the Court found that the Individuals were acting outside of their role as lawyers, but were transacting the business of BBA. On page 24 of the Court's Order, the Court found that:

> "[T]he proof taken as a whole discredit[s] the Attorneys' defense that they were not in league with Posey and Bachman to transact the business of the Companies under the new name of BBA." (emphasis added)

The Court's Order shows that the Individuals engaged in the decision making regarding the disposition of BBA funds, were transacting the business of BBA, and not practicing law. Applying the principles of Tennessee Farmers, this conduct is not within the scope of their employment with the law firm since it was not the kind that they were employed by the law firm to perform. Transacting business of BBA was not performing legal services, and was not actuated for the purpose to serve the law firm. To the contrary, the actions taken by the Individuals in regard to BBA were performed for the benefit of BBA. In this case, the

Individuals were literally transacting the business of a separate corporation. Further, none of the funds ever flowed through EP bank accounts or were under the control of the law firm. By the same token, the Individuals' decisions to become officers and directors of BBA, and later to resign as officers and directors of BBA, were separate and apart from any role they had as lawyers, but were undertaken solely as agents of a separate corporation.

Moreover, the conduct complained of and found contemptuous by the Court is not in the same general nature as that authorized by the law firm or incidental to the conduct of the practice of law. According to the Court's Order, the Individuals carried on a new business in violation of the Court's Order on behalf of BBA.

This important difference is underlined by the law firm's insurance company denying all coverage as to this matter because it was not the practice of law. Accordingly, a finding of liability against EP is not supported by the record in this case nor consistent with Tennessee law.

While there is a paucity of cases dealing with law firm liability based upon the intentional torts of an attorney, the case of Riley vs. LaRocque, (1937) 163 Misc. 423, 297 NYS 756 (Tab A), is instructive. In this case, the Plaintiff sued a law partnership for the breach of trust committed by one of that firm's general partners. The defendant partner and another attorney handled the estate of the Plaintiff's father. After the estate's assets were distributed, the defendant partner induced the plaintiff to "invest" his share of said assets with the firm. The defendant then signed a demand note against his firm to convert the plaintiff's funds to his own use. The New York court found that the unknowing and innocent partners were not liable for the personal misconduct of their co-partner. The court cited the well settled principle of agency law that when an agent commits an independent fraud for his own benefit he ceases to act as an agent for the principal. That court also indicated since it found no purpose or intent to advance any

partnership interests that the misdeeds were not in the ordinary course of the partnerships business as the law firm was not in the usual business of investing people's money while handling their legal affairs. Other jurisdictions have similarly held that innocent co-partners are not liable for the intentional torts of a defendant partner when committed for personal motives or with no purpose or effect to benefit the partnership. See, Wheeler vs. Green (1979) 286 OR. 99, 593 P. 2d 777 (defamation) (Tab B); Kelsey-Seybold Clinic vs. Maclay (Tex. 1971) 466 S.W. 2d 716, reh. denied (alienation of affections) (Tab C); Vrabel vs. Acri, (1952) 156 Ohio State 467, 103 N.E. 2d 564 (battery) (Tab D); Schloss vs. Silverman (1937) 172 Md. 632, 643 (battery) (Tab E).

Further, Tennessee Farmers' adoption of the Restatement (Second) of Agency requires that the court consider whether the actions of the employees were to be expected by the principal. § 2(f) requires consideration of "whether or not the master has reason to expect that such an act will be done." EP could hardly have expected Kitai, Hensley and Hendricks to become BBA's officers or directors, and transact BBA's business and depart from the practices of the profession of law—a practice that would have required obeying the orders of this Court. The law firm's insurance carrier has denied coverage because it has determined that the actions of the Individuals were not the practice of law.

For the reasons set forth herein, EP prays that this Court amend its Order to relieve EP from liability for the actions of the Individuals as they pertain to BBA.

III. The Evidence Concerning CITM's Independent Wires to PlanRx Does Not Support a Finding of Contempt Against Evans Petree and the Individual Lawyers.

Evans Petree, PC adopts by reference the Motion filed on behalf of the Individuals and Evans Petree, PC pertaining to a modification of the Court's Order regarding wires to PlanRx in the amount of $150,000.00.

WHEREFORE, PREMISES CONSIDERED, EVANS | PETREE PC PRAYS that the Court reconsider its decision to hold Evans Petree PC in contempt for funds sent to BBA, and to amend its Order to find that the Individuals were not acting within the scope of their employment, and to relieve Evans | Petree PC of $374,616.79 of the damages awarded for the actions of the Individuals; *and* Evans | Petree respectfully requests that the Court reconsider its decision to hold Evans Petree in contempt with respect to the PlanRx wires and that the Court reduce the damages awarded against Evans Petree and the Individuals by $150,000.

Respectfully submitted,

Evans | Petree PC

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NOTICE OF HEARING: MOVANT ANTICIPATES ASKING THE COURT TO SET THIS MOTION FOR HEARING ON JUNE 14, 2012, AT 9:30 A.M., WHICH IS THE DATE AND TIME FOR WHICH THE COURT HAS SCHEDULED A HEARING ON THE LIQUIDATOR'S FEE APPLICATION IN THIS CASE. FAILURE TO FILE AND SERVE A TIMELY WRITTEN RESPONSE TO THE MOTION MAY RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING.

Certificate of Service

On May 31, 2012, I caused this document to be sent by email and by U.S. Mail to:

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