IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

TENNESSEEANS FOR SENSIBLE ELECTION LAWS,	)	
Plaintiff-Appellee,	)	
v.	)	**M2018-01967-COA-R3-CV**
TENNESSEE BUREAU OF ETHICS AND CAMPAIGN FINANCE, REGISTRY OF ELECTION FINANCE,	)	**Chancery Ct. No. 18-821 Part III**
Defendant-Appellant	)	

ON APPEAL FROM THE JUDGMENT OF
THE DAVIDSON COUNTY CHANCERY COURT

BRIEF OF THE APPELLANT

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

JANET M. KLEINFELTER
Deputy Attorney General

MATTHEW F. JONES
Assistant Attorney General

KELLEY L. GROOVER
Assistant Attorney General
Public Interest Division
Office of Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-7403

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in excluding all the evidence proffered by the State in support of the constitutionality of two campaign-finance statutes.

2. Whether Plaintiff's constitutional challenge to Tenn. Code Ann. § 2-10-121 is moot.

3. Whether the trial court erred in declaring Tenn. Code Ann. § 2-10-117 unconstitutional.

STATEMENT OF THE CASE AND THE FACTS

This is an appeal from the chancery court's judgment striking down two campaign-finance statutes, Tenn. Code Ann. §§ 2-10-117 and 2-10-121.

The Challenged Campaign-finance Statutes.

Both statutes regulate political campaign committees (often referred to as political action committees, or PACs). Under § 2-10-117, "[n]o multicandidate political campaign committee other than a committee controlled by a political party on the national, state, or local level . . . shall make a contribution to any candidate after the tenth day before an election until the day of the election." And under § 2-10-121, "each multicandidate political campaign committee registered with the registry of election finance shall pay a registration fee . . ." except statewide political party PACs.

Events Leading to the Trial-Court Ruling

Plaintiff, Tennesseans for Sensible Election Laws, filed a verified complaint in Davidson County Chancery Court on July 26, 2018, challenging the constitutionality of Tenn. Code Ann. § 2-10-117 and § 2-10-121 and seeking to enjoin enforcement of these statutes. (R. Vol. I, 1-129.) Plaintiff is a registered multicandidate political campaign committee that "initiates strategic impact litigation aimed at reforming outdated and unconstitutional statewide election laws that inhibit the public's participation in the democratic process." (R Vol. II, 156.) The complaint alleged that the two statutes violated Plaintiff's rights under the First and Fourteenth Amendments and art. I, § 19, of the Tennessee Constitution. (R. Vol. I, 1-129.) Defendant is the Tennessee Bureau of

Ethics and Campaign Finance, Registry of Election Finance ("the State"), which is the state agency tasked with enforcing Tennessee's campaign-finance statutes. *See* Tenn. Code Ann. §§ 2-10-201 to -214.

On July 27, the trial court set a temporary-injunction hearing for July 31. (R. Vol. I, 147.) At the July 31 hearing, the court denied Plaintiff's motion for temporary injunction and stated that it would rule on the merits of the suit without the presentation of evidence. (R. Vol. II, 235-237.) A written order was entered on August 1, 2018. (*Id.*)

On August 24, however, the trial court *sua sponte* issued an order finding that "it is unable to decide this matter on the present record and that a brief trial on limited issues is needed." (R. Vol. II, 245.) Accordingly, the trial court modified its previous order by scheduling a conference under Tenn. R. Civ. P. 16 for September 10, 2018, and setting a bench trial for September 26, 2018. (R. Vol. II, 239-48.) The purpose of the conference was to discuss, among other things, "proof the parties expect to present at trial." (R. Vol. II, 247.) The trial court also ordered the State to file "a list of exhibits and witnesses they expect to introduce at trial" by September 12, and ordered the Plaintiff to file a rebuttal list a week later. (*Id.*) This order made no other provision for the exchange of discovery.

On August 27, Plaintiff filed a "Notice" objecting to the trial court's decision to conduct a limited evidentiary trial. (R. Vol. II, 249-61.)[1] Plaintiff argued that the State had waived its right to present any

[1] In its August 24, 2018 order, the court had directed that any objection to its modified order should be filed by August 31. (R. Vol. II, 248.)

evidence and, alternatively, that a trial was not necessary because no amount of evidence could overcome the statutes' constitutional infirmities. (*Id.*) Plaintiff also objected to the scheduling of the Rule 16 conference on the grounds that one of its attorneys was unavailable until shortly before the trial date. (*Id.*)

On September 4, the trial court overruled Plaintiff's objection to the bench trial, finding that "if it were to proceed to rule on the merits of this lawsuit without an evidentiary record, it would be a clear error of law that would require a remand by the Court of Appeals." (R. Vol. II, 277-280.) The trial court did cancel the Rule 16 conference, though. The court also modified its previous order and required the State to file, by September 14, "a list of exhibits and witnesses they expect to introduce at trial with a brief description as to what the Defendants expect the witness will testify about at trial." (*Id.* at 279.)

On September 14, the State filed and served its List of Witnesses and Exhibits, which identified one anticipated witness, Drew Rawlins (described as the Executive Director of the Tennessee Bureau of Ethics and Campaign Finance), and listed 24 exhibits including affidavits, several news articles, the legislative history of the relevant statutes, and one governmental report. (Vol. I-III, Ex. 1-24.)[2] On September 21, Plaintiff filed its Witness and Exhibit List. (Supp. R. Vol. I, 11-12.) Plaintiff also filed a Motion for Summary Judgment (R. Vol. II, 296-7) and three Motions in Limine (R. Vol. III, 325-31).

[2] Defendant's exhibits were bound in three volumes with an index of the exhibits. Citations to these exhibits will be noted by volume and exhibit number, e.g., "Vol. I, Ex. 1."

Plaintiff's first motion in limine sought to exclude the testimony of Drew Rawlins because the State's notice had not included a "brief description as to what the Defendants expect the witness will testify about at trial" in accordance with the trial court's order of September 4. (R. Vol. III, 325-326.) The second motion in limine sought to exclude the affidavits listed on the State's exhibit list on the grounds that they were hearsay and not admissible under the Rules of Evidence. (*Id.* at 327-328.) The third motion in limine sought to exclude the remainder of the State's exhibits "unless the Defendants can first demonstrate that less restrictive means to the Challenged Statutes are unavailable." (*Id.* at 329-331.)

On September 24, the trial court denied Plaintiff's motion for summary judgment and ordered the motions in limine to be heard before the trial. (R. Vol. III, 332-3.) On September 25, less than 24 hours before the trial, Plaintiff filed a fourth motion in limine, seeking to exclude the State's exhibits on the grounds that the State had failed to comply with Local Rule 29.01. (*Id*. at 334.)[3]

On September 26, the scheduled trial date, the trial court heard and granted Plaintiff's motions in limine, finding that the State did not comply with the court's September 4, 2018 order and the Local Rules of Court. (Tr. 22.) Specifically, the court found that "Defendants did not

[3] Local Rule § 29.01 of the Rules of the Circuit, Chancery, Criminal, and Probate Courts for the Twentieth Judicial District provides that opposing counsel shall meet or hold a telephone conference at least 72 hours before the trial of a civil case in order to exchange names of witnesses and to make available and discuss proposed exhibits.

provide a description of the testimony that would be given by their witnesses at trial, and they did not timely provide the Plaintiff the State Defendants' trial exhibits." (R. Vol. III, 345.)

By granting the motions in limine, the court precluded the State from presenting any proof at trial. The trial court then ruled that "the State has insufficient facts of record to withstand the Plaintiff's claims" and that the State had failed to meet its burden of proof as to the constitutionality of Tenn. Code Ann. §§ 2-10-117 and 2-10-121. (R. Vol. III, 339.) In the absence of the proof that the trial court had said was necessary to avoid "a clear error of law that would require a remand by the Court of Appeals" (R. Vol. II, 277-280), the court declared that the statutes, both facially and as applied, violate the First and Fourteenth Amendments to the United States Constitution and art. I, § 19, of the Tennessee Constitution, and it enjoined their enforcement. (R. Vol. III, 339-340.)

On October 18, the trial court entered a final order granting Plaintiff's motion for attorney's fees and costs and awarding Plaintiff the entire amount of fees requested. (R. Vol. III, 410-20.) The State timely filed a notice of appeal on October 29, 2018. (*Id*. at 421-2.)

State's Offer of Proof

After ruling on the motions in limine and granting judgment in favor of the Plaintiff, the trial court did allow the State to make an offer of proof outside the presence of the court. (Tr., 24-25.) The State presented evidence demonstrating that the nine-day blackout period on PAC contributions in Tenn. Code Ann. § 2-10-117 was enacted by the General Assembly in response to a growing concern over the effect—both

real and perceived—of large undisclosed PAC contributions to candidates. Specifically, the State presented newspaper articles reporting on a 1992 primary election in which a PAC made substantial contributions to the non-incumbent candidate, who defeated the multiple-term incumbent. (Tr., 28-30, Vol. I, Ex. 2-4, 7.) However, because the contributions were made during the nine-day period prior to the election, they were not reported to the public until substantially after the election. (Tr., 30, Vol. I, Ex. 4.) These contributions and their delayed disclosure were corroborated by copies of that candidate's campaign financial disclosure reports. (Vol. I, Ex. 5.)

The State presented another newspaper article from January 1995, which reported that then-Representative Matt Kisber, chair of the House Ethics Committee, planned to spend the 1995 session focused on improving ethics regulations due to PACs "brag[ging] about the role their large contributions have played in determining outcomes of some races." (Tr., 31-32, Vol. I, Ex. 7.) The article then notes that the same PAC which donated so heavily in the 1992 state senate race stated in a newsletter that its large contributions "tilted" numerous elections in 1994. (Tr., 32, Vol. I, Ex. 7.)

The State also submitted legislative-history materials for § 2-10-117. [4] That history reflects that the bill sponsor, Rep. Kisber, stated on the House floor: "[I]f there's ever been . . . talk about campaign finance it's usually about what PACs have given and how much they've given and

[4] Section 117 was enacted as part of a comprehensive piece of legislation. *See* 1995 Tenn. Pub. Acts, ch. 531, § 10. The State included only those portions of the legislative history pertaining to Section 117.

why have they given to a candidate." (Tr., 33-34, Vol. I, Ex. 9.) Representative Kisber further stated that the purpose of this section was to ensure that the voting public was informed about PAC donations prior to going to the polls. (Tr., 33-34, Vol. I, Ex. 9.)

The State further presented the affidavit of former-Representative Kisber, in which he reaffirmed that § 2-10-117 was passed in response to concern over PACs making last-minute contributions that were not disclosed to the public until after an election and that "stealth" PAC contributions were a persistent issue in Tennessee elections. (Tr., 34-35, Vol. I, Ex. 10.)

Additionally, the State presented a newspaper article published shortly after § 2-10-117 was enacted. Among other things, that article noted that "[h]istorically PACs have contributed large sums just before an election that aren't reported until after the election. Voters therefore do not know who is contributing." (Vol. I, Ex. 8.) The article specifically concludes that with the enactment of the new legislation, such "stealth contributions" are prohibited for the (then) ten-day blackout period before an election. (*Id.*)

The State also presented a series of recent news articles demonstrating press reliance on campaign financial disclosures to inform the public about PAC contributions to candidates. (Tr., 35-36, Vol. I, Ex. 11-15.) The State submitted an affidavit from Richard H. Williams, the Chairman of the Board for Common Cause Tennessee. (Vol. I, Ex. 16.) Mr. Williams opined that, over his 40 years of experience as a member of Common Cause, voters have become increasingly aware of and concerned about PAC donations. (Tr., 36, Vol. I, Ex. 16.)

The State also submitted an affidavit by a recent candidate for office who opined that campaign budgets are planned well in advance of the last 10 days before an election and that the majority of campaign expenditures are already made by this stage of the election. (Tr., 37, Vol. I, Ex. 17.)

Additionally, the State presented affidavits from three county election officials from across the State explaining what voters and members of the press must do to request candidate campaign financial disclosure reports from their offices. (Tr., 38-39, Vol. III, Ex. 22-24.) The Davidson County Election Commission uses an online filing system, and the public can access campaign financial reports from a website. However, it takes 48 hours for the financial reports to be published on the website after filing. (Tr., 38-39, Vol. III, Ex. 23.) Montgomery County does not have a means of filing or providing disclosures electronically, and all requests for copies of financial reports must be made in person. (Tr., 39, Vol. III, Ex. 24.) Hardeman County also does not have a means of filing or providing copies of disclosures electronically. (Tr., 38, Vol. III, Ex. 22.)

Lastly, the State submitted articles and a public report that describe the lack of broadband internet access across the State and the difficulties that presents to state residents in accessing electronically-filed information. (Tr., 37-38, Vol. I, Ex. 18-20, Vol. II, Ex. 21.)

The State also proffered the testimony of Drew Rawlins, the Executive Director of the Bureau of Ethics and Campaign Finance. (Tr., 40.) Mr. Rawlins has been employed by the Bureau since July 1990. (Tr., 41.) He became the executive director in 2000. (Tr., 41.) Mr. Rawlins

testified that he is responsible for the day-to-day operation of the Bureau. (Tr., 41.) He answers questions from the public about the statutes the Bureau enforces. (Tr., 42.)

Mr. Rawlins testified that he remembered the 1992 primary race in West Tennessee and recalled discussions after the election by legislators about what could be done to prevent PACs from making undisclosed contributions in the last days of an election. (Tr., 44.) Mr. Rawlins also testified that the nine-day blackout period is tied to candidates' final pre-election disclosures, which they are required to file no later than seven days before an election. (Tr., 45.) These reports are to reflect all contributions and expenditures made up to the tenth day before the election. *See* Tenn. Code Ann. § 2-10-105(c). Mr. Rawlins explained that while candidates for state office file their disclosures with the Bureau and can—but are not necessarily required[5] to—file electronically, candidates for local office are required to file with their county election commissions and that only six counties currently allow for electronic filing. (Tr., 47.) Disclosure reports that are submitted by paper are considered "filed" on the date they are postmarked, not the date they are received. (Tr., 50-51.) Sometimes the paper-filed disclosures take "several days" to arrive at the Bureau. (Tr., 50.)

[5] Only candidates who raise above $1,000 are required to file electronically. (Tr., 47-48.) *See* Tenn. Code Ann. § 2-10-211(c).

STANDARD OF REVIEW

A trial court's decision regarding the admissibility of evidence, including a ruling on a motion *in limine*, is reviewed for an abuse of discretion. *Singh v. Larry Fowler Trucking, Inc.* 390 S.W.3d 280, 284 (Tenn. Ct. App. 2012). "An abuse of discretion occurs where the trial court has applied an incorrect legal standard or where its decision is illogical or unreasoned and causes an injustice to the complaining party." *SpecialtyCare IOM Services, LLC v. Medsurant Holdings, LLC*, No. M2017-00309-COA-R3-CV, 2018 WL 3323889, at *3 (Tenn. Ct. App., July 6, 2018) (*perm. app. denied* (Tenn. Nov. 15, 2018) (citing *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004).

Even discretionary decisions "are not left to a court's inclination, but to its judgment, and its judgment is to be guided by sound legal principles." *Id.* (quoting *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)). An abuse of discretion may be found "when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination." *Id.*

The constitutionality of a statute is a question of law. *See, e.g.*, *Gallaher v. Elam*, 104 S.W.3d 455, 460 (Tenn. 2003). The trial court's conclusions regarding questions of law are reviewed "de novo upon the record of the chancery court with no presumption of correctness." *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

ARGUMENT

I. The Trial Court Abused Its Discretion in Excluding All of the State's Evidence.

The trial court abused its discretion when it granted Plaintiff's motions in limine and excluded all the State's proffered evidence. The trial court found that the State did not comply with its September 4, 2018 order requiring that the State's list of witnesses include a brief description of the witnesses' expected testimony. It also found that the State did not comply with a local rule requiring that opposing parties make exhibits available to each other for viewing. (R. Vol. III, 344.)

But insofar as there was any failure by the State to comply with either of these requirements, that non-compliance did not warrant exclusion of the State's evidence.

A. Local Rule 29.01 provided no basis for excluding the State's evidence.

The trial court abused its discretion when it excluded the State's exhibits on the basis of 20th Dist. Local R. § 29.01. That rule provides as follows:

> At least seventy-two (72) hours (excluding weekends and holidays) before the trial of a case, opposing counsel shall either meet face-to-face or shall hold a telephone conference for the following purposes:
>
> a. to exchange names of witnesses, including addresses and home and business telephone numbers . . . ;
>
> b. to make available for viewing and to discuss proposed exhibits.
>
> . . . .

Trial courts have broad discretion over the admission or exclusion of evidence and the enforcement of local rules. *Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. Ct. App. 1983). But Tennessee courts have recognized that "[o]ur system of civil justice favors the just, speedy, and inexpensive determination of every suit on its merits." *Crom-Clark Trust v. McDowell*, No. M2005-01097-COA-R3-CV, 2006 WL 2737828, at *2 (Tenn. Ct. App. Sept. 25, 2006); *see SpecialtyCare IOM Servs., LLC*, 2018 WL 3323889, at *17-19. Accordingly, courts have interpreted procedural rules, including local rules, "in ways that enhance rather than impede, the search of justice and that avoid legal quagmires or traps for the unwitting or unwary." *Crom-Clark Trust*, 2006 WL 2737828, at *2). So where no prejudice exists, procedural rules should not be used to "thwart the consideration of cases on their merits." *Pieny v. United Imports, Inc.*, No. M2004-01695-COA-R3-CV, 2005 WL 2140853, at *3 (Tenn. Ct. App. Sept. 6, 2005); *see also Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn. 1991) ("[I]t is the general rule that courts are reluctant to give effect to rules of procedure which seem harsh and unfair, and which prevent a litigant from having a claim adjudicated upon its merits.").

The trial court's reliance on Local Rule 29.01 to exclude the State's evidence was nothing if not "harsh and unfair." First, the record reflects that since the trial court's September 4 order itself addressed the exchange of witness and exhibit lists, neither party reasonably contemplated the need to resort to this local rule.

Second, given the timing of the trial and the terms of that September 4 order, the parties could not have strictly complied with Local Rule 29.01. The trial was scheduled for 9:00 a.m. on Wednesday,

September 26. (R. Vol. II, 239-48.) Under the 72-hour requirement of the local rule, exhibits should have been made available for viewing by 9:00 a.m. on Friday, September 21, 2018. But the trial court's September 4 order did not require Plaintiff to file its exhibit and witness list until September 21. (R. Vol. II, 277-280.) And Plaintiff did not serve its exhibit and witness list until the afternoon of September 21, i.e., *after* the 72-hour deadline had passed. (Supp. R. Vol. I, 11-12.)

In *Pennington v. Pennington*, No. M2007-00181-COA-R3-CV, 2008 WL 1991117 (Tenn. Ct. App. May 7, 2008), this Court set forth the factors to be considered by a trial court in determining whether evidence should be excluded for failing to comply with a discovery rule like Local Rule 29.01.

> "Generally, where a party has not given the name of a person with knowledge of discoverable matter, the court should consider the explanation given for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance. In the light of these considerations, the court may permit the witness to testify, or it may exclude the testimony, or it may grant a continuance so that the other side may take the deposition of the witness or otherwise prepare to meet the testimony."

Id. at *3 (quoting *Strickland v. Stickland*, 618 S.W.2d 496, 499 (Tenn. Ct. App. 1981)). While *Pennington* involved the failure to disclose witness information under the rule, consideration of the four "*Strickland* factors" is just as apt here. And such consideration leads to the conclusion that the trial court abused its discretion.

With respect to the first factor, there was no expectation by either the parties or the court that Local Rule 29.01 would apply, as the rule's

requirements directly conflicted with the trial court's September 4 order and neither party attempted to arrange either a telephone call or face-to-face conference prior to the 72-hour deadline. The State did timely provide a list of witnesses and exhibits, as required by the September 4 order. (Supp. R. Vol. I, 6-10.)

The next factor is the importance of the State's evidence, and the record reflects that the trial court was fully aware of its importance. In ordering an evidentiary trial to be held, the trial court had previously found that "if it were to proceed to rule on the merits of this lawsuit without an evidentiary record, it would be a clear error of law that would require a remand by the Court of Appeals". (R. Vol. II, 277-280.) Thus, the court held "the Government must show 'evidence of actual corruption or is appearance' and 'sufficient,' 'specific,' 'distinct' evidence to justify the temporal limitation." (R. Vol. II, 241-242.) The State's offer of proof, e.g., the legislative history and newspaper articles concerning the 1992 election, indicates that the State would have provided evidence of "specific" and "distinct" actual corruption or its appearance sufficient to meet its burden of proof. (Tr. at 28-30.)

The third factor is the need for time to prepare to respond to the exhibits. None of the State's exhibits were a surprise to Plaintiff. The State had provided its complete witness and exhibit list by September 14—nearly two weeks before trial and well before the local rule's 72-hour deadline. Plaintiff easily could have requested the State to make the

exhibits available for viewing.[6] Plaintiff did not; instead, it waited until the eve of trial to seek to exclude the State's exhibits on the basis of a procedural rule with which Plaintiff itself had not complied.

The final factor is the possibility of a continuance. The record reflects that the trial court specifically offered Plaintiff the opportunity of a continuance, and Plaintiff declined the offer. (Tr., 7-9.) Moreover, the record is devoid of evidence that Plaintiff was prejudiced in any way by the State's failure to make its exhibits available for viewing prior to the 72-hour deadline.

The trial court failed to consider any of these relevant factors, particularly the importance of the State's exhibits and the lack of prejudice to the Plaintiff. Its exclusion of the evidence on the basis of Local Rule 29.01, effectively depriving the State of an opportunity to defend the constitutionality of the challenged statutes, was thus an abuse of discretion. *See SpecialtyCare IOM Services, LLC*, 2018 WL 3323889, at *3 (holding that an abuse of discretion may be found "when the trial court . . . fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination."); *Pennington*, 2008 WL 199117, at *5 (trial court abused its discretion in failing to consider all relevant factors and thereby reaching an overly harsh result).

[6] Additionally, with the exception of the affidavits, all of the State's exhibits are public records and equally available to and accessible by both parties.

B. The September 4 scheduling order provided no basis for excluding the State's evidence.

The trial court also abused its discretion when it excluded the State's evidence on the basis of its September 4, 2018 order. In this regard, while the State had timely provided a witness and exhibit list as required by the September 4 order, the court granted Plaintiff's motions in limine solely because the State's witness list, which identified but one witness, did not provide a "brief description as to what the Defendants expect the witness[es] will testify about at trial." (R. Vol. III, 338-339.) In excluding this testimony, the trial court once again failed to consider any of the Strickland factors discussed above. *See Pennington*, 2008 WL 199117, at *3.

With respect to the first factor, the State not only timely disclosed Mr. Rawlins as its witness pursuant to the September 4 order, it also identified him as the Executive Director of the Registry. Having so identified the witness, the State believed that the substance of his expected testimony would be self-evident. (Tr., 13.) And Plaintiff, of course, knew that the State would present evidence of its interest in enacting the challenged laws. It stands to reason that the Executive Director of the Registry would be well versed in the history of the enactment of § 2-10-117, including the interests of the State in regulating campaign contributions.

The second factor—the importance of Mr. Rawlins's testimony—is reflected in the State's offer of proof. Not only did Mr. Rawlins have first-hand knowledge of the events surrounding the 1992 primary election and the subsequent enactment of Tenn. Code Ann. § 2-10-117, Mr. Rawlins

testified that this statute's "black-out" period was specifically tied to the date of last campaign financial disclosure reports required to be filed before an election. (Tr., 44-45.)

The third factor is the need for time to prepare to meet the witness's testimony. Mr. Rawlins was not a surprise witness—Plaintiff had been informed that Mr. Rawlins would be a witness twelve days prior to trial, and it could have at any time sought clarification as to the scope of Mr. Rawlins' testimony or even sought to depose Mr. Rawlins.[7] But again, Plaintiff did neither; instead, it waited until shortly before trial to seek to exclude Mr. Rawlins's testimony.

The fourth factor is the possibility of a continuance, and as previously noted, Plaintiff was offered and declined any continuance. (Tr., 7-9.) And just as with the State's exhibits, there is no evidence in the record that Plaintiff was prejudiced as a result of the State's failing to include a brief description of Mr. Rawlins's testimony. Indeed, the record reflects that Plaintiff was more than prepared to meet his testimony. (Tr., 54-100.)[8]

---

[7] The trial court's September 4 order specifically recognized and offered to Plaintiff the opportunity to conduct discovery if, upon receipt of the State's exhibit and witness list, Plaintiff "determine[s] that depositions are needed." (R. Vol. II, 279.)

[8] Not only did Plaintiff's counsel cross-examine Mr. Rawlins for 50 minutes, but counsel questioned Mr. Rawlins about documents that Plaintiff initially sought to introduce as exhibits, but later withdrew after the State objected as not being disclosed on Plaintiff's exhibit list. (Tr., 78-80, 83.)

The trial court excluded the State's evidence, including Mr. Rawlins's testimony, solely as a sanction. While courts have the inherent power to impose sanctions, "the punishment must fit the offense." *Alexander v. Jackson Radiology Assoc., P.A.*, 156 S.W.3d 11, 15 (Tenn. Ct. App. 2004). Accordingly, appellate courts have found that trial courts have acted outside their discretion in imposing sanctions when there is no record of "willful or dilatory conduct" or when the non-moving party's failure to respond to discovery was not sufficiently contumacious. *See SpecialtyCare IOM Services, LLC*, 2018 WL 3323889, at *19.

The record here does not support a conclusion that the State willfully disregarded or flouted the trial court's order. But the court's imposition of a sanction led directly to its finding that the State had failed to present sufficient evidence in defense of the constitutionality of a statute. Legislative acts are presumed constitutional, and courts are directed to "indulge every presumption and resolve every doubt in favor of [a] statute's constitutionality." *State v. Pickett*, 211 S.W.3d 396, 790 (Tenn. 2007). The trial court's exclusion of the State's evidence, as a sanction for the State's noncompliance, was unjustified and an abuse of discretion. *See Pegues v. Illinois Cent. R. Co.*, 288 S.W.3d 350, 354-55 (Tenn. Ct. App. 2008).

C. **No other reason provided a basis for excluding the State's evidence**.

In its order granting Plaintiff's motions in limine, the trial court also pointed to "the additional reasons set forth in the Plaintiff's Motions in Limine and advanced by Plaintiff's counsel during oral argument." (R. Vol. III, 345.) The trial court, however, did not elaborate. And with the

exception of the motion to exclude affidavits, Plaintiff's motions in limine did not claim that any of the evidence was inadmissible under the Tennessee Rules of Evidence. Instead, Plaintiff's main argument was that the State's evidence should be excluded because it failed to comply with the Local Rule and the scheduling order.

With respect to Plaintiff's motion in limine to exclude the State's affidavits, Plaintiff argued that the affidavits were inadmissible because they were hearsay under Tenn. R. Evid. 801(c). (R. Vol. III, 327-328.) As discussed above, trial courts have broad discretion to admit or exclude evidence. But here the trial court never exercised that discretion—it never analyzed the application of Tenn. R. Evid. 801(c) to any of the affidavits. In the absence of any such analysis, it was improper for the court to rely on this "additional reason" for granting Plaintiff's motion.[9] *See, e.g., State v. DuBose*, 953 S.W.2d 649, 642 (Tenn. 1997) (evidentiary ruling of trial court should be afforded no deference unless there has been substantial compliance with the procedural requirements of Rule 404(b)).

II. Plaintiff's Challenge to Tenn. Code Ann. § 2-10-121 is moot.

The trial court ruled that Tenn. Code Ann. § 2-10-121, which requires PACs to pay an annual registration fee, unconstitutionally discriminates against non-political-party PACs because it does not apply to political-party PACs. This statute, however, has recently been amended to require *all* PACs—both political-party and non-political-

[9] The trial court did not mention any "additional reasons" for excluding the State's evidence when it ruled from the bench. The only reason given by the trial court at that time was the State's purported failure to comply with the court's scheduling order and the local rule. (Tr. 21-23.)

party PACs, to pay an annual registration fee. *See* SB 234, 2019 Tenn. Pub. Acts, ch. __ (effective April 1, 2019). In light of this amendment, Plaintiff's challenge to Tenn. Code Ann. § 2-10-121 is moot.

Tennessee courts follow certain rules of judicial restraint so that they stay within their province "to decide, not advise, and to settle rights, not to give abstract opinions." *Hooker v. Haslam*, 437 S.W.3d 409, 417 (Tenn. 2014) (quoting *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam Co.*, 301 S.W.3d 196, 203 (Tenn. 2009)). The mootness doctrine is one such rule. "The mootness doctrine provides that before the jurisdiction of the courts may be invoked, 'a genuine and existing controversy, calling for present adjudication' of the rights of the parties must exist.'" *State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007) (quoting *State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961)). Thus, in order for this Court to render an opinion, it must be faced with a live controversy. *Honeycutt ex rel. Alexander H. v. Honeycutt*, No. M2015-00645-COA-R3-CV, 2016 WL 825852, at *2 (Tenn. Ct. App. Mar. 2, 2016). Such controversy must remain alive, i.e. justiciable, through the course of litigation. *Norma Faye Pyles Lunch Family Purpose LLC*, 301 S.W.3d at 203-04. A case ceases to be justiciable when it "no longer serves as a means to provide some sort of judicial relief to the prevailing party." *Id.* at 204.

There is no longer a live controversy with respect to whether § 2-10-121 discriminates against non-political-party PACs by excluding political-party PACs, because the 2019 amendment removes that statutory distinction. All PACs are now required to pay the annual registration fee, rendering Plaintiff's challenge to the statue moot. *See*

City of Memphis v. Hargett, 414 S.W.3d 88, 97 (Tenn. 2013). Accordingly, the judgment of the trial court declaring Tenn. Code Ann. § 2-10-121 unconstitutional and enjoining its enforcement should be vacated.

III. The Trial Court Erred in Declaring Tenn. Code Ann. § 2-10-117 Unconstitutional.

The trial court also ruled that Tenn. Code Ann. § 2-10-117 is unconstitutional, both facially and as applied, but solely as a result of the court's exclusion of all of the State's evidence. As discussed above, the exclusion of that evidence was an abuse of the court's discretion. Because the State made an offer of proof, however, this Court has a sufficient record on appeal to decide Plaintiff's challenge to the constitutionality of Tenn. Code Ann. § 2-10-117, and it should do so in the interests of judicial economy.

A. Tennessee Code Annotated § 2-10-117 is not subject to strict scrutiny.

Plaintiff asserted that Tenn. Code Ann. § 2-10-117 violates the First Amendment in four different ways: (1) it discriminates on the basis of the speaker; (2) it imposes a temporal ban on campaign contributions; (3) it discriminates on the basis of content; and (4) it discriminates on the basis of political association. Plaintiff further asserted that, with the exception of its temporal-ban argument, these challenges were subject to a strict-scrutiny standard of review. (R. Vol. III, 302-303.) The trial court accepted Plaintiff's argument and applied strict scrutiny to three of the Plaintiff's four claims. (R. Vol. III, 339-340.)

The trial court was wrong, however, to subject § 2-10-117 to strict scrutiny. Beginning with the seminal case *Buckley v. Valeo*, 424 U.S. 1

(1976), the United States Supreme Court has developed a unique body of law analyzing the constitutionality of restrictions on campaign contributions and the appropriate standard of review to be applied. The *Buckley* Court determined that limitations on campaign contributions imposed a lesser restraint on political speech because they "permit[ ] the symbolic expression of support evidenced by a contribution but do[ ] not in any way infringe the contributor's freedom to discuss candidates and issues." 424 U.S. at 21. Accordingly, the Court held that contribution restrictions are subject to a lesser but still "rigorous standard of review." *Id.* at 29. Under that lesser standard, "[e]ven a 'significant interference' with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.'" *Id.* at 25 (quoting *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975)).

Since *Buckley*, the Supreme Court has consistently applied this lesser standard of review with respect to restrictions on campaign contributions—even restrictions that impose a complete ban. For example, in *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003), which involved a constitutional challenge to a ban on direct corporate contributions in federal elections, the Court noted that the level of scrutiny applied to political financial restrictions is based on the importance of the "political activity at issue" to effective speech or political association:

> Going back to *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), restrictions on political contributions

> have been treated as merely "marginal speech" restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression. "While contributions may result in political expression if spent by a candidate or an association . . ., the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley, supra*, at 20-21, 96 S. Ct. 612. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, "a contribution limit involving 'significant interference' with associational rights" passes muster if it satisfies the lesser demand of being "'closely drawn' to match a 'sufficiently important interest.'"

Id. at 161-62 (internal citations omitted); *see also Preston v. Leake*, 660 F.3d 726, 734 (4th Cir. 2011) ("The imposition of a restriction, whether a limit or a ban, on contributions by a specific group of individuals serves only as a channeling device, cutting off the avenue of association that is most likely to lead to corruption but allowing numerous other avenues of association and expression."). And in its most recent case analyzing the constitutionality of a political financial restriction, the Supreme Court expressly declined to revisit "*Buckley*'s distinction between contributions and expenditures and corollary distinction in the applicable standards of review." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 199 (2014).

Thus, despite multiple invitations to do so, the Supreme Court has never deviated from applying *Buckley*'s intermediate standard to contribution restrictions. *Wagner v. FEC*, 793 F.3d 1, 5-6 (D.C. Cir. 2015). Additionally, lower federal courts, including the Sixth Circuit Court of Appeals, have consistently applied the *Buckley* standard when analyzing challenges to laws imposing restrictions on campaign

contributions, including temporal restrictions or restrictions on specific classes of speakers. *See, e.g., F.E.C. v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-10 (1982) (upholding ban on direct contributions by corporations and unions); *Wagner*, 793 F.3d at 21-21 (upholding ban on direct contributions by government contractors); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1121-23 (9th Cir. 2011) (upholding ban on contributions to candidates outside 12-month pre-election window); *Preston v. Leake*, 660 F.3d 726, 737-38 (4th Cir. 2011) (upholding ban on direct contributions by lobbyists); *Gable v. Patton*, 142 F.3d 940, 950-51 (6th Cir. 1998) (upholding a 28-day ban on external contributions to candidates); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645-46 (6th Cir. 1997) (upholding a ban on direct candidate contributions from nonprofit corporations).

Courts have consistently rejected parties' attempts to raise the standard of review for campaign-contribution restrictions by parsing out or tacking on separate legal claims. *See, e.g., Wagner v. FEC*, 793 F.3d 1, 6-7, 32 (2015) ("[D]ressing their argument as an equal protection claim, the plaintiffs insist that we must evaluate [the contribution ban] under strict scrutiny. . . . We reject this doctrinal gambit, which would require strict scrutiny notwithstanding the Supreme Court's determination that the 'closely drawn' standard is the appropriate one under the First Amendment."). Here Plaintiff "dresses" its challenge to Tenn. Code Ann. § 2-10-117 as something more than a challenge to the temporal restriction on direct contributions, in order to subject it to strict-scrutiny review. However, as the plaintiffs in *Wagner* conceded, *no court*

anywhere has ever analyzed a contribution limit in this way.[10] *See* 793 F.3d at 33. And neither the trial court nor the Plaintiff here cited any case analyzing a restriction on campaign contributions under strict scrutiny. The restrictions on campaign contributions under Tenn. Code Ann. § 2-10-117 are properly analyzed only under *Buckley*'s intermediate standard of review.

B. Tennessee Code Annotated § 2-10-117 is not unconstitutional.

Tennessee Code Annotated § 2-10-117 passes muster under the *Buckley* standard of review. As discussed above, even a significant interference with the right of political association would be sustained under this intermediate standard "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. Here, the State has advanced a "sufficiently important interest" in support of § 2-10-117, and it has employed means that are "closely drawn" to avoid unnecessary abridgement of associational rights.

1. The statute serves sufficiently important state interests.

There are two important state interests served by the statute, each of which has been found to be not just "sufficiently important" but compelling. The first is the State's interest in protecting against *quid pro quo* corruption and the appearance of such corruption. The Supreme

[10]Indeed, many cases demonstrate the opposite. *See e.g.*, *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409 (5th Cir.) (analyzing restriction that affected only certain types of PACs under "closely drawn" test), *McConnell v. FEC*, 540 U.S. 93 (2003) (analyzing a ban on minors making contributions under the "closely drawn" test).

Court has repeatedly held that "the Government's interest in preventing *quid pro quo* corruption or its appearance [is] 'sufficiently important'" to justify the regulation of campaign contributions. *McCutcheon*, 572 U.S. at 199 (quoting *Buckley*, 424 U.S. at 26-27). *See also id.* (also labelling this interest "compelling," such that it would satisfy even strict scrutiny).

The second is the State's interest is ensuring a fair, open, and public election process, which the Tennessee Supreme Court recognized in *Bemis Pentecostal v. State*, 731 S.W.2d 897 (Tenn. 1987). In that case, the Court considered a First Amendment challenge to the disclosure requirements of the Campaign Financial Disclosure Act, Tenn. Code Ann. §§ 2-10-101 to -132. In upholding the constitutionality of the Act, the Court held that the Tennessee Constitution (art. I, §5, art. IV, §1, and art. XI, § 10) establishes both a right of the people of Tennessee to "know the extent of . . . financial involvement" of groups making financial contributions during a political campaign "in order to maintain a balanced and informed view of the campaign" and a "compelling state interest" in ensuring that qualified voters enjoy "an informed vote in a fair, open, and public election process."[11] *Bemis Pentecostal*, 731 S.W.2d

[11] *Bemis* analyzed the act in question under strict-scrutiny review. 731 S.W.2d at 903. *Bemis* did cite *Buckley* and recognized its lesser standard; *Buckley* was implicitly distinguished, though, because *Bemis* involved disclosure requirements, not contribution limits. *Id.* Further, the applicable standard of review did not seem to be in dispute. Similarly, in *City of Memphis v. Hargett*, the Supreme Court applied strict scrutiny because the parties agreed to it. But the Court noted that "the United States Supreme Court has rejected the notion that strict scrutiny applies to every statute imposing a burden on the right to vote" and that the

at 907 (emphasis added). The Court reaffirmed the compelling nature of the State's interest in "the integrity of the election process" in *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013), stating that the existence of these constitutional provisions "underscore[s] the magnitude of the state interest at issue." *Id.* at 103.

2. The statute's contribution restriction is "closely drawn."

The campaign-contribution restriction in § 2-10-117 is also "'closely drawn' to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. The United States Supreme Court has held in order for a law to be "closely drawn," what is required is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *McCutcheon*, 572 U.S. at 218 (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) (internal ellipses deleted); *see also Americans for Prosperity v. Becerra*, 903 F.3d 1000, 1011-12 (9th Cir. 2018) (holding that even under an "exacting scrutiny" test, nothing requires the Attorney General to forgo the most efficient and effective means of achieving his goals absent a showing of a significant burden on First Amendment rights).

Tennessee Code Annotated § 2-10-117 was enacted as part of a comprehensive regulatory scheme that is narrowly tailored to serve the

---

strict-scrutiny standard applies only to cases involving "'severe' restrictions." *City of Memphis v. Hargett,* 414 S.W.3d at 102.

State's important interests in informing the electorate and in preventing corruption or the appearance of corruption. In 1980, the General Assembly enacted the Campaign Financial Disclosure Act, Tenn. Code Ann. §§ 2-10-101 to -132, which requires candidates and PACs to regularly file reports disclosing campaign contributions and expenditures. In 1987, when upholding the constitutionality of the Act, the Tennessee Supreme Court observed in *Bemis Pentecostal* that the "recent growth of standing political committees was of concern to the Legislature" and that "[l]arge undisclosed contributions can distort public sensibilities and allow confidence in the electoral system to wane as the perception waxes that elections can be unduly influenced by wealthy special interests and well-financed factions." 731 S.W.2d at 902-03. The Court concluded that, if a group wished to engage in financing outcome-specific election campaigning,

> the people of the State . . . have the right to know the extent of such financial involvement during the campaign in order to maintain a balanced and informed view of the campaign. For each qualified person to exercise an informed vote in a fair, open, and public election process is a compelling state interest for any republican form of government and this interest is expressly provided for in our State Constitution. Effective and meaningful democratic processes ultimately depend on the integrity and reliability of election results.

Id. at 907.

In 1995, the General Assembly added § 2-10-117 to the Financial Disclosure Act when it enacted the Campaign Contribution Limits Act, Tenn. Code Ann. §§ 2-10-301 to -311. *See* 1995 Tenn. Pub. Acts, ch. 531, § 10. The Contribution Limits Act imposes certain limits on the amount

of contributions that individuals and PACs may contribute to a candidate for public office. Section 2-10-117 was obviously meant to work in tandem with existing disclosure requirements.

Specifically, Tenn. Code Ann. § 2-10-105(c)(1) requires all candidates and PACs to file a pre-primary and pre-general-election report disclosing contributions received and expenditures made "through the tenth day before" an election. These reports, which are due seven days before the election, are the last opportunity candidates have to disclose the source of their campaign contributions. More importantly, the reports also provide the last opportunity for voters to be informed about the extent of financial involvement in candidate elections by special-interest PACs. Consistent with the temporal limits of the disclosure requirement, § 2-10-117 imposes a ban on direct contributions to candidates by special-interest PACs during the nine-day period before the election.

The temporal restriction in § 2-10-117 is thus directly tied to the disclosure requirements for candidates and PACs in § 2-10-105(c)(1). Indeed, in urging passage of the bill, the House sponsor stated that § 20-10-117 would "ensure that all PAC contributions are disclosed by a candidate prior to an election being conducted" and would "prevent large amounts of money being put into a campaign in the last few days and [the evasion of] the disclosure prior to an election in order that the public has the opportunity to see what PACs have given and how much they've given before they go vote." (Vol. I, Ex. 9; *see also* Vol. I, Ex. 8 (newspaper article explaining that with the enactment of the new legislation, "stealth

contributions" are prohibited during the (then) ten-day blackout period before an election)).

The evidence reflects that the passage of § 2-10-117 in 1995 was in large part due to a specific instance of "large amounts of money being put into a campaign in the last few days" of an election, without public disclosure. (Vol. I, Ex. 9.) During the 1992 state primary election, a special-interest PAC made significant contributions (approximately $17,000 in cash and in-kind contributions) to a non-incumbent candidate. Because the contributions were made after the deadline for filing the pre-primary disclosure report, the contributions were not disclosed to the public until almost six weeks after the election. (Vol. I, Ex. 4-5.) The PAC's in-kind contributions included the costs of operating a phone bank on behalf of the candidate. Those efforts were successful, as the non-incumbent candidate won, defeating the incumbent candidate, a multi-term legislator. (Vol. I, Ex. 5.) It was reported that this special-interest PAC later claimed that its contributions had tilted several legislative races. (Vol. I, Ex. 7.)

In *Gable v. Patton*, 142 F.3d 940 (6th Cir. 1998), the Sixth Circuit analyzed the constitutionality of a Kentucky statute that prohibited all gubernatorial candidates from accepting contributions during the 28 days preceding a primary or general election. 142 F.3d at 949. The state argued that this statute was an indispensable part of Kentucky's regulatory scheme and that its purpose was to ensure that all contributions were made before the final pre-election reporting date. *Id.* at 949-50. Citing *Buckley*, the Sixth Circuit found the statute constitutional. The court concluded that, while the effect of this 28-day

window was to force candidates to rearrange their fundraising by concentrating it in the period before the 28-day window began, such restriction was justified by Kentucky's interest in combating corruption. *Id.* at 951.

Section 2-10-117 is likewise an integral part of Tennessee's campaign finance regulatory scheme, and its purpose is the same: to ensure that all contributions from special-interest PACs are made before the final pre-election reporting data. The Tennessee statute imposes even less of a burden on contributors and PACs than the Kentucky statute upheld in *Gable*, as it prohibits direct-candidate contributions only during the nine days prior to an election. Furthermore, the State has presented distinct and specific evidence demonstrating that the nine-day blackout period was directly tied to serving the State's interests in preventing corruption or the appearance thereof and in ensuring that voters are fully informed prior to the election.

Finally, Plaintiff's speech is not banned outright under § 2-10-117. Plaintiff is free to make direct contributions before the nine-day blackout period and to make unlimited independent expenditures at any time. *See Thalheimer v. City of San Diego*, 645 F.3d at 1125 (noting that in terms of fundamental First Amendment interests, the ability to make direct contribution to candidate pales in significance to the ability to make unlimited independent expenditures). Plaintiff is restricted only in the most limited way—but a way that preserves Tennessee's important interests—and the interests of the electorate.

Because Tenn. Code Ann. § 2-10-117 serves "sufficiently important," if not compelling, state interests and "employs means closely

drawn to avoid unnecessary abridgement of associational freedoms," it satisfies *Buckley*'s intermediate standard of review. The trial court therefore erred in declaring that the statute was unconstitutional under the First and Fourteenth Amendments to the United States Constitution and Tenn. Const. art. I, § 19.

CONCLUSION

For the reasons stated, that part of the trial court's judgment relating to the constitutionality of Tenn. Code Ann. § 2-10-121 should be vacated, and that part of the trial court's judgment relating to the constitutionality of Tenn. Code Ann. § 2-10-117 should be reversed.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE S. BLUMSTEIN
Solicitor General

JANET M. KLEINFELTER
(BPR 13889)
Deputy Attorney General
Janet.kleinfelter@ag.tn.gov

/s/ Matthew F. Jones
MATTHEW F. JONES (BPR 25825)
Assistant Attorney General
matt.jones@ag.tn.gov

/s/ Kelley L. Groover
KELLEY L. GROOVER (BPR 34738)
Assistant Attorney General
Kelley.groover@ag.tn.gov
Public Interest Division
Office of Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-7403

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been sent by electronic transmission to:

Daniel A. Horwitz
1803 Broadway, Suite #531
Nashville, TN 37203
Daniel.a.horwitz@gmail.com

Jamie R. Hollin
511 Rosebank Avenue
Nashville, TN 37206
j.hollin@me.com

this the 1 day of April, 2019.

/s/ Kelley L. Groover
KELLEY L. GROOVER

Certificate of Compliance

I hereby certify that this brief consists of 8658 words, in compliance with Tenn. Sup. Ct. R. 46.

/s/ Kelley L. Groover
KELLEY L. GROOVER