

IN THE CIRCUIT COURT FOR BRADLEY COUNTY, TENNESSEE

**GUINN GREEN and
HOWARD THOMPSON,**

Plaintiffs,

v.

**DONNA SIMPSON, CLERK OF BRADLEY COUNTY,
and
HERBERT H. SLATERY, III, ATTORNEY GENERAL
AND REPORTER FOR THE STATE OF TENNESSEE,**

Defendants.

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) **Docket No. V-16-073**
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**MEMORANDUM OPINION AND ORDER DENYING MOTION TO STRIKE
HOWARD THOMPSON AS PARTY PLAINTIFF, DENYING MOTION TO DISMISS
FOR PRIOR SUIT PENDING AND DENYING MOTION TO DISMISS**

INTRODUCTION

This case is before the Court upon defendant Donna Simpson’s Motion to Strike Plaintiff Thompson as a Party Plaintiff, Tenn. R. Civ. P. 12.02 Motion to Dismiss for Prior Suit Pending and Tenn. R. Civ. P. 12.02 Motion to Dismiss Amended Complaint. The defendant asserts pursuant to Tenn. R. Civ. P. 12.02(1) and (6): (i) plaintiffs lack standing, (ii) plaintiffs’ request for declaratory relief seeks a non-justiciable advisory opinion, (iii) plaintiffs’ request for injunctive relief presents a non-justiciable political question, and (iv) plaintiffs have failed to state a claim upon which relief can be granted.

PROCEDURAL HISTORY

The plaintiffs filed this declaratory judgment action pursuant to Tenn. Code Ann. § 29-14-101 *et seq.*, seeking a declaration by this court as to the “proper construction” of Tenn. Code

Ann. §§ 36-3-103 and 104, as well as a declaration as to whether Tenn. Code Ann. §§ 36-3-303 and 305 are applicable to them. *See Plaintiff. Amended Compl.* The plaintiffs also seek a declaration as to their rights under Article I, Sections 5, 8 and 23, Article II, Sections 1, 2 and 17 and Article VII, Section 1 of the Tennessee Constitution after the decision in *Obergefell v. Hodges*, 564 U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). In essence, the plaintiffs “seek a declaration that [the above] provisions of the Tennessee law relative to the licensing of marriage are no longer valid and enforceable” due to the United States Supreme Court decision in *Obergefell* and “that continued issuance of marriage licenses... violates their aforesaid rights under the Tennessee Constitution.” *Plaint. Amended Comp., Introduction, p. 1.*

Plaintiff Green is an ordained minister as defined by Tenn. Code Ann. § 36-3-301 and is authorized to “solemnize the rite of matrimony” in Tennessee. He is a minister at a church in Bradley County, as well as a Bradley County resident. Plaintiff Thompson is a duly elected member of the Bradley County Commission and a Bradley County resident. As a county commissioner, plaintiff Thompson is also authorized by Tenn. Code Ann. § 36-3-301 to “solemnize the rite of matrimony” in Tennessee.

The defendants are the Bradley County Clerk, Donna Simpson, whom plaintiffs seek to enjoin from issuing marriage licenses as she is statutorily required to do¹; and, the Attorney General for the State of Tennessee, Herbert H. Slattery, III.²

On February 4, 2016, the plaintiffs filed their original complaint which was later supplanted by the filing of an amended complaint on April 19, 2016. Plaintiffs’ amended

¹ Tenn. Code Ann. § 36-3-104.

² While there are two defendants in this action, the only party who has filed a motion to dismiss was Donna Simpson. Therefore, when this Order refers to ‘defendant,’ it refers to Ms. Simpson alone. The Attorney General has appeared in court at all motion hearings but has advised the court that he takes no position on the issues before the court.

complaint seeks declaratory and injunctive relief. (*See* Pl.’s Amend. Compl.) Specifically, plaintiffs seek a declaration that (i) Tenn. Code Ann. §§ 36-3-103(a) and (c)(1) are invalid and unenforceable; (ii) that the criminal sanction of Tenn. Code Ann. § 36-6-303 is unenforceable if Minister Plaintiffs do not sign or endorse a marriage license issued by the defendant County Clerk or return it to the Clerk; (iii) that the criminal sanction and monetary penalty or judgment provided by Tenn. Code Ann. § 36-3-305 “do not apply to plaintiffs if they officiate marriage ceremonies and that such constitute a marriage at common law,” and (iv) that the issuance of marriage licenses by the County Clerk after June 26, 2015 violates various rights protected by the Tennessee Constitution. They also sought a permanent injunction imposing a blanket prohibition against the Bradley County Clerk, Donna Simpson, issuing marriage licenses.

Prior to the filing of the amended complaint, the defendant filed a Motion to Strike Plaintiff Thompson as a Party Plaintiff, a Tenn. R. Civ. P. 12.02 Motion to Dismiss for Prior Suit Pending and a Tenn. R. Civ. P. 12.02 Motion to Dismiss on various grounds.

Subsequent thereto, the plaintiffs responded and oral argument of the motions was set and heard on July 20, 2016. At oral argument, the court requested supplementation of the briefs/memorandums of law of the parties and the last supplementation was filed on October 21, 2016.³ On November 21, 2016, a number of state legislators sought to intervene and a hearing was scheduled for December 13, 2016. However, on December 9, 2016, an Amended Motion to Intervene was filed. As a result, this court withheld issuing this opinion until the hearing and resolution of the Motion to Intervene.⁴ The court heard oral argument on the Motion to

³ The Attorney General, as has been the course throughout this litigation, has not taken a position as to any of the issues raised and/or argued.

⁴ Simultaneous with the entry of this Order, the court has entered an Order Denying the Motion to Intervene.

Intervene on March 3, 2017 and its' Order Denying Intervention is entered simultaneously herewith.

Motion to Strike Plaintiff Thompson as a Party Plaintiff

The defendant Simpson has moved to strike the plaintiff Thompson as a party plaintiff arguing two grounds. First, Simpson argues that the declaratory judgment action brought by Thompson is not “an appropriate action to be brought by an individual in [his] official capacity as a Bradley County Commissioner.”⁵ Second, it is argued that there exists no authority, stated or actual, permitting Thompson to bring an action in his official capacity to act for or on behalf of the Bradley County Commission.⁶

The plaintiffs argue that their suit is for Declaratory Judgment and that the Declaratory Judgment Act is intended “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal remedies ...” *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000). By filing the instant suit and seeking a declaratory judgment, the plaintiff Thompson insists he is seeking a declaration as to what his rights, status and legal relations are if he were to perform and solemnize a marriage. Thompson argues that his rights, status and legal relations arise from the fact that he is a county commissioner authorized to perform and solemnize marriages in the state of Tennessee. *See generally Compl.*

While it is true, as the defendant Simpson argues, that the plaintiff Thompson is not required to perform and solemnize marriages and that the performance and solemnization of marriages is not part of a commissioner’s duties or responsibilities, it is equally true that the statute vests a county commissioner with the power and authority to perform such marriages. As

⁵ See *Plaint. Motion to Strike*, ¶ 1.

⁶ *Id.*, ¶ 2.

a result, the court is of the opinion that it is permissible for a county commissioner to seek a declaration from the courts as to the exercise of the statutory authority granted unto him in his official capacity as well as declaration as to his duties in performance of the marriage.

Therefore, the defendant Simpson's Motion to Strike Thompson as a Party Plaintiff is DENIED.

Tenn. R. Civ. P. 12.02 Motion to Dismiss for Prior Suit Pending

The defendant has moved to dismiss this case because of the existence of another suit filed by plaintiffs' counsel herein in the Chancery Court of Williamson County alleging identical facts and seeking identical relief filed.

The doctrine of prior suit pending "has prevailed in this jurisdiction for over one hundred years" and stands for the principle that when two courts have concurrent jurisdiction over a matter, the court first taking jurisdiction acquires exclusive jurisdiction over the matter, and the subsequent action must be dismissed. *Metropolitan Development and Housing Agency v. Brown Stove Works*, 637 S.W.2d 876, 878 (Tenn.Ct.App.1982) (hereinafter "*MDHA*").

In *Cockburn v. Howard Johnson, Inc.*, 385 S.W.2d 101 (Tenn. 1964), the Tennessee Supreme Court enumerated the factors necessary for the dismissal of a successive suit based on the doctrine of former suit pending:

The essentials of such a plea are that the two suits must involve the identical subject matter and be between the same parties and the former suit must be pending in a court in this state having jurisdiction of the subject matter and the parties. A plea, whether it be in abatement or in bar, must contain these elements.

Cockburn, 385 S.W.2d at 102 (quoting Caruthers, History of a Lawsuit, Sec. 181, Higgins & Crownover, Tennessee Procedure in Law Cases, Sec. 518(6)); *see also Robinson v. Easter*, 344 S.W.2d 365, 366 (Tenn.1961) (stating that where two courts have concurrent

jurisdiction over a case, “the court which first takes jurisdiction thereby acquires exclusive jurisdiction of the case, and a demurrer will lie upon that ground”).

More recently, our Supreme Court reaffirmed the principles established in *Cochran* stating “there are four essential elements to a defense of prior suit pending: 1) the lawsuits must involve identical subject matter; 2) the lawsuits must be between the same parties; 3) the former lawsuit must be pending in a court having subject matter jurisdiction over the dispute; **and** 4) the former lawsuit must be pending in a court having personal jurisdiction over the parties.” *West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d 618, 623 (Tenn. 2008) (quoting Joseph Carrigan Higgins & Arthur Crownover, Jr., *Tennessee Procedure in Law Cases: A Treatise Setting Forth the Principles, Pleadings, Practice, and Procedure in Lawsuits*, § 518(6) (1937)). (Emphasis added.)

Inasmuch as the complaints filed in this court and Williamson County are virtually identical, save for the parties, there exists no question that both involve identical subject matter such that prong 1 above is satisfied. The defendant relies upon *Fultz v. Fultz*, 175 S.W.2d 315 (Tenn. 1943) and its progeny to argue that the requirement of the “same parties” actually means the functional equivalent of the same parties. However, as noted by the plaintiffs, the *Fultz* court required that a privity relationship exist between the parties in the two lawsuits. The plaintiffs go on to argue that the nature of the privity recognized in *Fultz* was not based upon subject matter but rather, was based upon whether the relationship between the parties in the respective lawsuits was such that the doctrine of *res judicata* would apply to the later-filed suit. The court agrees with the “privity” distinction made by the plaintiffs. And, here, an adjudication by the Williamson County Chancery Court would not have a *res judicata* effect on these proceedings.

As to prong 3, this court is well aware that the Williamson County court dismissed the case before it based upon lack of subject matter jurisdiction. The primary thrust of the dismissal was a lack of standing on the part of the plaintiffs. As will be set out below, this court is of the opinion that the plaintiffs herein do have standing. Therefore, prong 3 of the “prior suit pending” doctrine does not operate as a bar to the pursuit of this case.⁷

Having determined that prongs two (2) and three (3) of the “test” for the application of the doctrine of “prior suit pending” are inapplicable, there is no need to address the final element necessary to apply the doctrine or prior suit pending, namely the issue of personal jurisdiction over the parties.

Therefore, the defendant Simpson’s Motion to Dismiss for Prior Suit Pending is DENIED.

Tenn. R. Civ. P. 12.02(1) Motion to Dismiss for Lack of Standing

STANDARD OF REVIEW

The defendant Simpson argues that the plaintiffs’ complaint should be dismissed for lack of subject matter jurisdiction. *See Def. Mot. to Dismiss*, p. 1. “The lack of subject matter jurisdiction is so fundamental that it requires dismissal whenever it is raised and demonstrated.” Tenn. R. Civ. P. 12.08; *First Am. Trust Co. v. Franklin-Murray Dev. Co., L.P.*, 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001). When subject matter jurisdiction is questioned, the court must “ascertain whether the Tennessee Constitution ... [has] conferred on it the power to adjudicate the case before it.” *Earls v. Mendoza*, No. W2010-01878-COA-R3CV, 2011 WL 3481007, at *5 (Tenn. Ct. App. Aug. 10, 2011) (citing *Staats v. McKinnon*, 206 S.W.3d 532, 542 (Tenn. Ct. App.

⁷ This court is well aware of the fact that this court’s decision on standing is in opposition to that of the Williamson County Chancery Court. This court is of the opinion that the issue of standing is a “close call” and that reasonable minds can differ. In writing this opinion, this court found the opinion of the Williamson County court very helpful and has utilized significant sections of that opinion.

2006)). Tennessee's Constitution restricts the cases a court may entertain to those in which the parties have standing. *Am. Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006). Therefore, without standing, a court has no subject matter jurisdiction.

“Where subject matter jurisdiction is challenged under Rule 12.02(1), the complainant has the burden of proof.” *Chapman v. DaVita, Inc.*, 380 S.W.3d 710, 712 (Tenn. 2012). It is therefore the plaintiffs' responsibility to allege facts demonstrating that they are the proper parties to invoke the exercise of this Court's remedial powers. *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *City of Memphis v. Hargett*, 414 S.W.3d 88, 101 (Tenn. 2013).

Standing

The primary basis for the defendant's subject matter jurisdiction is that the plaintiffs lack standing to bring their causes of action under the Declaratory Judgment Act. Standing is “a judge-made doctrine based on the idea that a court may and properly should refuse to entertain an action at the instance of one whose rights have not been invaded or infringed.” *Mayhew v. Wilder*, 46 S.W.3d 760, 766-67 (Tenn. Ct. App. 2001).⁸ To maintain an action for a declaratory judgment, a justiciable controversy must exist between persons with adverse interests. *Parks v. Alexander*, 608 S.W.2d 881, 891-92 (Tenn.Ct.App. 1980). For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of plaintiff. *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913, (1949). If the controversy depends upon a future or contingent event or involves a theoretical or hypothetical state of facts, the controversy is not justiciable under the Tennessee

⁸ “The doctrine of standing is an important check on the power of the judicial branch in a democracy.” *DeSelm v. Tenn. Peace Officers Standards and Training Comm'n.*, No. M2009-01525-COA-R3-CV, 2010 WL 3959627, at *20 (Tenn. Ct. App. Oct. 8, 2010). Without limitations such as standing, “the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” *Id.* (quoting *Darnell*, 195 S.W.3d at 620).

Declaratory Judgments Act. *Story v. Walker*, 218 Tenn. 605, 607-08, 404 S.W.2d 803, 804 (1966); *United States Fidelity & Guaranty Co v. Askew*, 183 Tenn. 209, 212-13, 191 S.W.2d 533, 534-35 (1946). “The Declaratory Judgments Act does not give the courts jurisdiction to render advisory opinions to assist the parties or to allay their fears as to what may occur in the future.” *Parks*, 608 S.W.2d at 892. The requirements of standing are not changed because plaintiffs seek declaratory judgment. The purpose of the Declaratory Judgments Act, Tenn. Code Ann. § 29-14-101 to 113, is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. The power of the courts was defined by the Declaratory Judgments Act as: “[T]he power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Tenn. Code Ann. § 29-14-102(a). Despite the Declaratory Judgments Act’s liberal construction there still must exist “a justiciable controversy between persons with adverse interests...” *Hester v. Music Vill. U.S.A., Inc.*, 692 S.W.2d 426, 427 (Tenn. Ct. App. 1985) (quoting *Parks v. Alexander*, 608 S.W.2d 881, 891–892 (Tenn. Ct. App. 1980)). “If the controversy depends upon a future or contingent event or involves a theoretical or hypothetical state of facts, the controversy is not justiciable under the Tennessee Declaratory Judgments Act.” *Parks*, 608 S.W.2d at 892. Consequently, a declaratory judgment action presents the same questions of standing as any other action.

The essential purpose of the standing doctrine is to determine whether a plaintiff is “properly situated to prosecute the action.” *Howe*, 2014 WL 5698877 at *6. Consequently, “a standing inquiry focuses on the parties,” *Id.*, and does not depend “upon a plaintiff’s likelihood of success on the merits.” *Darnell*, 195 S.W.3d at 620; see *Howe v. Haslam*, 2014 WL 5698877 at *6 (“Because standing generally depends on the nature of the asserted claims, the determination of whether a plaintiff has standing requires the court to carefully examine the allegations asserted

in the complaint to determine whether a particular plaintiff is entitled to an adjudication of those claims.”).

In order to find that a Plaintiff has standing, three “indispensable elements” must be satisfied: (1) injury-in-fact; (2) causation; and, (3) redressibility. In order to show an injury that satisfies the standing purposes, a plaintiff must demonstrate an injury-in-fact, i.e., “an invasion of a legally protected interest which is (a) concrete and particularized... and (b) actual or imminent,” *Howe*, 2014 WL 5698877 at *6. “Injuries that are conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general citizenry are insufficient in this regard.” *Union Cnty. Educ. Ass’n v. Union Cnty. Bd. of Educ.*, No. E2013-02686-COA-R3-CV, 2014 WL 4260812, at *3 (Tenn. Ct. App. Aug. 28, 2014). The ‘causation’ element requires that a Plaintiff show that the injury sustained is fairly traceable between the alleged injury in fact and the defendant's challenged conduct.” *Darnell*, 195 S.W.3d at 620; *Howe*, 2014 WL 5698877 at *6. The third and final element necessary to establish standing, redressibility, requires a showing that the alleged injury is capable of being redressed by a favorable decision of the court. *Darnell*, 195 S.W.3d at 620.

The plaintiffs argue that they have established standing to sue by virtue of (1) their status as persons authorized by the state to solemnize marriages; (2) they have *justertii* standing; and (3) they have standing as citizens.

As to the first argument, the plaintiffs point to the allegations in their complaint that under Tenn. Code Ann. § 36-3-301(a)(1) they are specifically authorized to “solemnize the rite of matrimony” and, as such, they are not like “ordinary citizens” who do not have such authorization. As a result, such “ordinary citizens” are not subject to the requirements of timely returning the solemnized marriage license or solemnizing a marriage for people who do not have

a valid marriage license. The distinction made by the plaintiffs between those statutorily authorized to perform marriages and “ordinary citizens” is an apt distinction and one with which the court agrees.

The defendant Simpson argues that the “[p]laintiffs have not suffered, nor will they suffer, any direct injury as a result of defendant Simpson issuing marriage licenses.” Def’s. Mem. ¶ 17. As our court stated in *Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827, 836-837 (Tenn. 2008), the stated purpose of the Declaratory Judgments Act “is to settle important questions of law before the controversy has reached a more critical stage” and the party seeking declaratory judgment need not show a present injury.

In *Cummings v. Beeler*, 189 Tenn. 151, 223 S.W.2d 913 (1949), the Court considered an act of the legislature that required a state official, the Secretary of State, to spend public funds to hold a special election. Because the Act had been passed and would otherwise be enforced, the court held that the Act’s constitutionality was not merely a theoretical question. *See id.* at 915. The *Cummings* Court found that a justiciable controversy existed. In that case, the court found that the Secretary of State:

[m]ust either obey the mandatory provisions of this law which the Attorney General has previously publicly declared as unconstitutional or he must disregard the law entirely. If the Secretary of State decides to follow the mandates of the statute and spend the public funds and then it develops that the Attorney General was correct in his opinion in holding that the law was invalid and unconstitutional, the Secretary of State would have spent public funds under the authority of a law which was illegal and without effect.

Id. at 915-16. Here, the plaintiffs are seeking a declaration as to their duties and responsibilities under the statute, one that contains a criminal provision that has not yet been enforced, at least as to them. The plaintiff in *Cummings* also challenged a statute that had not yet been enforced. However, in *Cummings*, there was no doubt that the challenged statute would

have been enforced. Therefore, the threat of enforcement was genuine, not theoretical, creating a justiciable controversy. Here, at least some doubt exists as to whether the statute will be enforced. Certainly, from the plaintiffs' perspective, the potential of being charged with a criminal offense if they perform a marriage not in accord with Tenn. Code Ann. § 36-3-104(a), would constitute a "critical stage" for them.⁹ See *West v. Schofield*, 468 S.W.3d 482 (Tenn. 2015). While it is possible that the plaintiffs will not be criminally charged with violating the duties imposed upon them by Tenn. Code Ann. § 36-3-104(a), this court is unwilling to simply assume that will be the case.

While it is true, as the defendant argues, the plaintiffs are not required to perform marriages, the court agrees with the plaintiffs that such fact is not determinative of the issue. In support of her argument that plaintiffs are not required to perform marriages, the defendant Simpson relies upon *Oldham v. American Civil Liberties Union*, 910 S.W.2d 431 (Tenn. Ct. App. 1995). However, as the plaintiffs note, the statute at issue in *Oldham*, Tenn. Code Ann. § 49-6-1004(c), did not vest the plaintiff, a school principal, with any rights or obligations. Here, there is a specific statute, Tenn. Code Ann. § 36-3-301(a)(1), that specifically vests these plaintiffs with rights, by authorization to conduct marriages, and with obligations that arise when those marriages are conducted or solemnized. As argued by the plaintiffs, this case is more similar to *Cummings* wherein our Supreme Court determined that the Attorney General had a real interest in his official capacity to challenge the directive of the legislature to hold a special election and to seek a declaratory judgment as to the constitutionality of the statute prior to expending public funds to hold that election. The *Cummings* decision formed part of the basis for the ruling in *Oldham*, wherein the court stated that "the plaintiff is a public official who feels

⁹ The court will address the doctrine of elision below.

that a ruling will relieve him from an uncertainty about his duties.” *Oldham*, 910 S.W.2d at 435. While it is true that the plaintiffs herein are not public officials, it is uncontroverted that the statute places upon them public duties and obligations in respect to the solemnization of marriages and subjects them to criminal exposure if they do not do so.

As a result, the court finds that the threat of enforcement of the statute is genuine, not theoretical, and, as a result, a justiciable controversy exists. Therefore, the court finds that the plaintiffs have satisfied the first prong of the standing analysis, that of injury-in-fact and that the plaintiffs have a real interest at issue.

Having found that the plaintiffs have alleged an injury-in-fact sufficient to meet the first prong of the standing analysis, it is necessary to now determine whether the plaintiffs have met the second prong, that of causation. As noted above, to satisfy the causation requirement, the plaintiffs must allege that the alleged injury in fact is fairly traceable to the defendant's challenged conduct. As noted above, Tenn. Code Ann. § 36-3-301(a)(1) specifically vests these plaintiffs with both rights, by authorization to conduct marriages, and obligations that arise when those marriages are conducted or solemnized. Likewise, the statute also proscribes the penalty for failure to adhere to the statute and to meet the obligations of the statute. **If**, as the plaintiffs insist, Tennessee's marriage statutes are no longer valid and operable, then it would seem to logically follow that the actions of the plaintiffs in respect to solemnizing marriages pursuant to those statutes would also be improper and, arguably, subject them to criminal exposure. Therefore, the court finds that the plaintiffs have met the second prong of the standing analysis, that of their claimed injury being “fairly traceable” to the conduct of the defendant Simpson such that, for purposes of a Motion to Dismiss, the causation requirement has been satisfied.

Turning now to the third element or prong of the standing analysis, that of redressibility, the plaintiffs must show that the alleged injury is capable of being redressed by a favorable decision of the court. *Darnell*, 195 S.W.3d at 620. The plaintiffs seek a declaration of the rights and duties pursuant to the statute at issue as well as an injunction preventing the clerk from issuing marriage licenses. It seems rather axiomatic that the issuance of a declaration as to the rights and duties granted to and imposed upon them by the statute and, if appropriate, the issuance of an injunction, would more than suffice to satisfy the prong of redressibility under the standing analysis. Therefore, the court finds the plaintiffs have satisfied the third and final prong of the standing analysis.

Having determined that the plaintiffs have standing as set out above, the court finds it unnecessary to address the other grounds alleged by the plaintiffs to confer standing.

TENN. R. CIV. P. 12.02(6) FAILURE TO STATE A CLAIM/ELISION

The defendant has raised the doctrine of elision as a reason the plaintiffs have failed to state a claim under Tenn. R. Civ. P. 12.02(6). Both parties have fully briefed and argued the issue without objection to consideration under 12.02(6), and the court prepared a section of this order addressing the elision argument. However, this court has found no case in which elision was addressed in the context of a 12.02(6) motion. The appellate cases addressing elision have done so after the trial court dealt with the doctrine either at the summary judgment stage or at the conclusion of a trial. While this court would note that elision is not usually a fact-sensitive determination, the court nonetheless is of the opinion that an elision argument is not proper for consideration in the context of a Tenn. R. Civ. 12 motion. Therefore, the applicability of the doctrine of elision will await another day.

CONCLUSION

For the foregoing reasons, the defendant's Motion to Strike Thompson as a Party Plaintiff is DENIED, the defendant's Motion to Dismiss for Prior Suit Pending is DENIED, and the defendant's Motion to Dismiss based upon the doctrine of elision is DENIED as premature.

Entered this 19th day of May, 2017.



MICHAEL S. PEMBERTON
Circuit Court Judge, 9th Judicial District
(by interchange)

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was delivered to all counsel or parties of interest in this case by hand delivering or by placing same in the United States Mail, with sufficient postage, on this the _____ day of May, 2017.

Gayla Harris Miller, Circuit Court Clerk

By: _____
Deputy Clerk