The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally, you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to laura.blount@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Equity Member; Leitner, Williams, Dooley & Napolitan, PLLC ("LWDN").

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2008; Tennessee Bar # 027445.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee; November 12, 2008. My license is active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Leitner, Williams, Dooley & Napolitan, PLLC; Memphis, TN
Equity Member, January 2017 – Present
Associate, January 2009 – January 2017

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I had not been hired by any firm when I completed law school in May 2008. I did not start with my firm until January 2009. During that interim period, I studied for and took the Tennessee bar exam. I interviewed with several firms but, due to economic conditions, firms wanted to see if I passed the bar exam before making a hiring decision. I found out I had passed the bar exam in October 2008, was hired by LWDN in mid-November 2008, and started in my firm's Memphis

office on January 2, 2009.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My practice is devoted almost entirely to civil litigation. My cases include, but are not limited to, personal injury actions, wrongful death cases, UM/UIM, products liability, healthcare liability, insurance coverage and insurance litigation, commercial litigation, environmental law and toxic torts, professional liability, construction law, trucking cases, and appellate practice. I spend over 90% of my time on litigation matters and the rest advising clients on legal issues or coverage questions.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

In addition to the above answer, I have tried, or assisted in, several trials in Tennessee federal and state courts. I manage cases for clients and supervise our associates and staff on these matters, working collaboratively to obtain the best outcomes for clients.

As an associate, I worked under members and handled the day-to-day matters on my assigned cases and some I was asked to do spot work in. That included answering complaints, written discovery, and drafting detailed case evaluations. I handled all manner of motions from discovery motions, evidentiary motions, motions on Rule 702 experts, Rule 12.02(6), Rule 12.03, and Rule 56 motions, motions to quash, and other types of motions. I have taken numerous depositions of fact witnesses, corporate representatives, and experts across several topical areas.

I have drafted briefs filed in the Tennessee Supreme Court, Tennessee Court of Appeals, Tennessee Special Workers' Compensation Panel, Mississippi Supreme Court, and the Sixth Circuit Court of Appeals. I have orally argued before the Tennessee Supreme Court, the Tennessee Court of Appeals, and the Tennessee Special Workers' Compensation Panel.

As a member, I still do many of these things but am now responsible for the overall legal strategy

approach and advising clients directly. I still do a considerable amount of drafting on dispositive and major motions, and other filings.

On work habits, this has never been a "9-to-5" job. I do what needs to be done to accomplish the goals and obtain the results for the client. That has, from time to time, meant working nights, weekends, or holidays.

Before going to law school, I worked in Nashville for a full-service design firm doing landscape architecture:

Lose & Associates; Nashville, TN
Senior Land Planner / Land Planner, May 2003 - August 2005

While with Lose & Associates, I helped design and plan large-scale residential, commercial, recreational, and mixed-use developments in Davidson County and its surrounds, and helped obtain planning commission and city council approvals for those projects. Projects I worked on included the Indian Lake Village development in Hendersonville, Tennessee; the Stockett Creek subdivision in Franklin, Tennessee; and the Richard Siegel Soccer Complex in Murfreesboro, Tennessee.

A more specific discussion of certain legal matters I have worked on is below in response to Question # 9.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Ghane v. Mid-South Institute of Self-Defense Shooting. Mississippi state court (admitted *pro hac vice*). Defense of private military contractor sued by the mother of a deceased Navy SEAL after her son died in a live-fire training accident at the contractor's training facility. We successfully obtained summary judgment based on the federal Political Question Doctrine. The matter was heard and overturned by Mississippi Supreme Court (on brief).

Britt v. Dyer Employment Agency. Tennessee state court. Conducted trial with successful workers' compensation defense on contested damages claims in matter. Drafted and argued the appeal. After the panel opinion overturned part of the trial verdict, I filed the Motion for Discretionary Review with the full Tennessee Supreme Court. That was granted, and I then wrote the brief and orally argued the matter before the Supreme Court.

Moore v. Indus. Maint. Serv. of Tenn. at al. Western District of Tennessee (Jackson). Personal injury/subrogation matter involving a driver of a roll-off truck who was injured while removing a loaded dumpster from a former job site (dumpster was too heavy; plaintiff's winch lifted his truck cab off the ground, the cable broke, tractor cab slammed into pavement, and plaintiff fractured his back). I handled all the of motion practice, which was considerable in this matter. Drafted the summary judgment motion. The motion was granted on comparative fault grounds. The matter was appealed to Sixth Circuit. I was on brief. Summary judgment was overturned by the Sixth Circuit. The matter subsequently resolved.

Union Ins. Co v. Delta Casket Co. Western District of Tennessee (Memphis). Complex insurance coverage dec action/bad faith counterclaim over CGL policy coverage of an insured

who copied caskets of a major American manufacturer and imported the Chinese-made knockoffs for resale in the USA. Three-week bench trial before Judge Mays. I was a first-year associate but I questioned witnesses (direct and cross) during trial and argued several substantive motions. I handled the motion writing and responses to other motions. We lost on the coverage question but successfully defended the bad faith and TCPA counterclaims.

Hall v. USF Holland. Western District of Tennessee (Memphis). Case involved a motorcyclist who allegedly ran into the side of a USF Holland tractor trailer. Notable matter because we had a question on how the medical expenses would be calculated (based on the amount billed versus what was paid on the bills to settle the charges) certified to the TN Supreme Court. I wrote and filed that brief. TN Supreme Court ultimately declined the question (and later took the same question up in *Dedmon*). Judge Sheryl Lipman ultimately agreed with our position on the medical expense question and granted our motion for partial summary judgment on that issue.

Lloyd's Acceptance Corp., et al. v. Carroll Property Management, LLC, et al. Western District of Tennessee (Memphis). Lawsuit brought by a real estate investor claiming the previous owners/managers of the property misrepresented and hid information on a mold infestation on premises during the due diligence period. This was the second lawsuit brought over the issue, the first having been dismissed and dismissal affirmed by the Sixth Circuit. This Court dismissed all but one of the plaintiffs on a motion to dismiss. The remaining plaintiff settled prior to trial.

Ronnie Saulsberry et al. v. Henry Schein, Inc. et al. Shelby County Circuit Court. Two cases filed over patients of a medical practice who reportedly suffered abscesses after being injected with Depo-Medrol from a multi-use vial. Henry Schein was the distributor through whom the medical practice obtained the Depo-Medrol, which was stored in sealed containers at Henry Schein's facility. The court partially granted a motion for summary judgment that Henry Schein was improperly sued under the Tennessee Healthcare Liability Act as it was not acting as a "health care practitioner" in distributing the vials but allowed the claims to survive under the good faith exception in the THCLA. Henry Schein was non-suited from the cases shortly thereafter.

The Guest House at Graceland Legionnaires' Disease cases. Shelby County Circuit Court, Davidson County Circuit Court, and Western District of Tennessee (Memphis). Series of lawsuits filed over alleged exposure to *Legionella* bacteria by patrons at the Guest House at Graceland hotel. The lawsuits were a mix of personal injury and wrongful death claims. Our client was the manufacturer of the water chemistry controllers used by the hotel to control the chemical balances in the swimming pool and hot tub. The claims against the manufacturer were product liability claims alleging the water chemistry controllers did not properly function as intended. One or two cases were dropped, and the rest were resolved.

West Bend Mutual Insurance Company v. Healy Homes, LLC. Eastern District of Tennessee (Knoxville). A land developer sought coverage after its construction of a residential subdivision on top of a ridge resulted in considerable erosion and sediment runoff through an adjacent stream and into the pond of a downstream property. The developer, among others, was sued by the property owner. West Bend disclaimed coverage on multiple grounds, including application of the total pollution exclusion in the CGL policy form. West Bend sought a judgment in its favor on the pollution exclusion. The District Judge certified two questions on the scope of the total pollution exclusion to the Tennessee Supreme Court as no Tennessee court had ruled on the scope of the exclusion. After briefing, the Tennessee Supreme Court declined to answer the

question.

Union University v. Evanston Insurance Company. Western District of Tennessee (Jackson). Insurance coverage matter of disclaimed coverage sought by Union University related to a Union SRNA administering an incorrect drug to a Vanderbilt University Medical Center patient while on a clinical externship. Union failed to report the incident until the next policy period and only after VUMC's counsel sought indemnification under a written agreement for the clinical externships. Union sued seeking a declaration that a duty to defend and/or indemnify existed and for bad faith failure to pay. Evanston counterclaimed for a declaration that coverage did not exist. The District Judge granted in part and denied in part Evanston's summary judgment motion but held certain questions in abeyance.

Patricia Ramos et al. v. Marten Transport, Ltd. et al. Hamilton County Circuit Court. Series of consolidated cases over a fatal truck wreck in a construction zone outside of Ooltewah, Tennessee. Marten Transport Logistics had brokered a load to an independent motor carrier for transportation from Kentucky to Florida. The carrier's driver hauled the cargo to Florida and successfully delivered the load. The driver, on his own decision and with the acquiescence of his employer, dead-headed empty back to Kentucky. On the way the driver, who tested positive for methamphetamines, ran into slowed or stopped traffic in the construction zone on I-75, killing six and injuring nine. Plaintiffs sued our clients under a litany of theories including agency theories, vicarious liability, statutory employer, and illegal double brokering.

The following are appellate decisions on matters in which I was counsel of record:

Weston v. GP Memphis, LP, No. W2024-01777-COA-R3-CV, 2025 Tenn. App. LEXIS 403 (Tenn. Ct. App. Oct. 24, 2025) (on brief; oral argument)

Denson ex rel. Denson v. Methodist Med. Ctr. of Oak Ridge, No. E2023-00027-SC-R11-CV, 2025 Tenn. LEXIS 433 (Tenn. Oct. 13, 2025) (on brief) (amicus for Tennessee Defense Lawyers Association)

Halliburton v. Ballin, No. W2023-01285-COA-R3-CV, 2024 Tenn. App. LEXIS 240 (Tenn. Ct. App. Sept. 24, 2024) (on brief; oral argument waived)

Kyuhwan Hwang v. Holt, No. W2023-00627-COA-R3-CV, 2024 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 15, 2024) (on brief; oral argument waived).

Allen v. Am. Yeast, Inc., No. W2021-00956-COA-R3-CV, 2023 WL 2520134 (Tenn. Ct. App. Feb. 7, 2023) (on brief; oral argument).

Lyon v. Castle Retail Group, LLC, No. W2019-00405-COA-R3-CV, 2020 WL 1867368 (Tenn. Ct. App. Jan. 15, 2020) (on brief).

Allen v. Am. Yeast, Inc., No. W2017-00874-COA-R3-CV, 2018 Tenn. App. LEXIS 587 (Tenn. Ct. App. Oct. 4, 2018) (on brief; oral argument).

Mack v. Comcast Corp., No. W2017-02326-COA-R3-CV, 2018 Tenn. App. LEXIS 519 (Tenn. Ct. App. Aug. 31, 2018) (on brief; oral argument)

Forest Creek Townhomes, LLC v. Carroll Prop. Mgmt., LLC, 695 Fed. App'x 908 (6th Cir. 2017) (on brief).

Callins v. NSK Steering Sys. Am., Inc., 2015 Tenn. LEXIS 934 (Tenn. Sp. Workers' Comp. Panel Nov. 30, 2015) (on brief).

Mattress Firm, Inc. v. Mudryk, 2015 Tenn. LEXIS 689 (Tenn. Sp. Workers' Comp. Panel Aug. 24, 2015) (on brief; oral argument).

Moore v. Indus. Maint. Serv. of Tenn., 570 Fed. App'x 569 (6th Cir. 2014) (on brief).

Ghane v. Mid-South Inst. of Self Def. Shooting, Inc., 137 So. 3d 212 (Miss. 2014) (on brief).

Britt v. Dyer's Empl. Agency, Inc., 396 S.W.3d 519 (Tenn. 2013) (on brief; oral argument).

Taylor v. Airgas Mid-South, Inc., 2013 Tenn. LEXIS 304 (Tenn. Sp. Workers' Comp. Panel Feb. 26, 2013) (on brief; oral argument).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Since 2017, I have been an equity member of my law firm, which makes me a fiduciary to my fellow members and my firm's business and governance issues. I also serve as a board member for a Memphis-based non-profit, Child Evangelism Fellowship of Memphis, and maintain fiduciary responsibilities as part of my board member duties.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

Commonwealth Attorney's Office, Louisville, Kentucky
Criminal Justice Extern, January - April 2008
Conducted and handled numerous criminal hearings before Circuit Court judges, including probation revocation hearings, plea bargains, and shock probation hearings with a limited-practice license under the supervision of an experienced prosecutor. Successful prosecution with supervising prosecutor of multiple defendants in a felony robbery trial.

Thompson, Miller & Simpson, PLC; Louisville, KY
Law Clerk, May - August 2007

Researched and drafted civil litigation-related documents, including discovery, summary judgment motions, motions to dismiss, *Daubert* motions and in-house memoranda. Assisted in court proceedings and depositions.

United States Attorney's Office; Chattanooga, TN
Volunteer Law Student - Federal Student Intern Litigation Program, May - August 2006
Observed and assisted in all types of federal court criminal proceedings before federal Magistrate and District judges. Researched and drafted motion responses, memoranda, and Sixth Circuit appellate briefs. Experienced other civil proceedings through depositions, court hearings and settlement negotiations.

In addition, my prior profession regularly involved working with local development codes and ordinances, and also coordinating with the local planning commissions and city councils to navigate those codes/ordinances and to obtain design project approvals.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

This is my second such application. I applied in 2024 for the Court of Appeals seat then held by Judge Arnold Goldin. The public meeting was on November 18, 2024. I was not one of the names submitted by the Council to the Governor.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant. and your reason for leaving each school if no degree was awarded.

University of Louisville, Brandeis School of Law; Louisville, KY
Juris Doctor, cum laude, May 2008
University of Louisville Law Review (2006-07). Participant in the National Trial Competition (2007-08), the National Moot Court Competition (2007), and the National Health Law Moot Court Competition (2006). Runner-up in the Pirtle-Washer Oral Advocacy Competition (2007). Highest Grade awards in Legal Research, Evidence, and Constitutional Practice classes.

Ball State University, College of Architecture and Planning; Muncie, IN
Master of Landscape Architecture, May 2003
American Society of Landscape Architects Certificate of Merit (2003).

Taylor University; Upland, IN

Bachelor of Science, Environmental Biology, cum laude, August 2000

Dean's List (1997, 1998, 1999). Intercollegiate Athletics, Golf: MCC All-Conference Team (1997-2000), NAIA All-Regional Team (2000), and NAIA Golf National Championship Qualifier (1998).

PERSONAL INFORMATION

15. State your age and date of birth.

48; [redacted]1977.

16. How long have you lived continuously in the State of Tennessee?

Since January 2009.

17. How long have you lived continuously in the county where you are now living?

Since January 2009.

18. State the county in which you are registered to vote.

Shelby County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

None.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

I was involved in an adoption proceeding in 1999 in Louisville, Kentucky. I was formally adopted and my last name was changed to my current surname. *Bryant Nicoson v. Jeffrey Edward Nicoson*, No. 99 FC 06844 A, Jefferson County (KY) Family Court.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Renewal Church; member since 2019.

Child Evangelism Fellowship of Memphis; board member since 2022. Presently, I am Vice

Chairman of the Board of Directors.

BMW Car Club of America; 2021 to present.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association (uncertain on dates; I have been a member during the last ten years).

Memphis Bar Association (uncertain on dates; I have been a member during the last ten years).

Defense Research Institute (2017-present); I was a member of the Defense of Government Actions sub-litigation group for the Drug and Medical Device Committee.

Federalist Society (2013-2014, 2019-2020, 2023-present).

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

I was named a Mid-South Super Lawyer "Rising Star" in 2018 by Mid-South Super Lawyers magazine, and have been recognized since 2021 by Best Lawyers, including this year in insurance law, health care litigation, product liability defense, medical malpractice defense, and transportation law. In 2024, I was given an Outstanding Advocacy award by Medmarc Casualty Insurance Company for defense efforts on behalf of its insureds.

30. List the citations of any legal articles or books you have published.

RX For The Defense; Defense Research Institute, Drug and Medical Device Committee

Legal Drug Manufacturers as Illegal Drug Dealers: The Recent Attempt To Use The Drug Dealer Liability Act In Tennessee To Recover Directly From Opioid Manufacturers; Volume 27, Issue 2 (May 8, 2019). Examination and analysis of litigation involving the Tennessee Drug Dealer Liability Act, Tenn. Code Ann. § 29-38-101 *et seq.*, and efforts to hold opioid manufacturers liable for the opioid crisis.

RX For The Defense; Defense Research Institute, Drug and Medical Device Committee *False Claims Act Claims and Recoveries in the Age of Escobar;* Volume 26, Issue 2 (May 1, 2018). Examination of the impact of *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), on False Claims Act prosecutions by the Department of Justice and the Department's approaches to the heightened "materiality" requirement from *Escobar*.

University of Louisville Law Review; Louisville, KY. *Note, A Case for Certiorari: Whether Federal Courts Should Consider State Law When Admitting State- Collected Electronic Surveillance Evidence*, 46 U. LOUISVILLE L. REV. 335 (2007). Detailed assessment of various federal appellate court approaches to incorporating state wiretap laws when determining the admissibility of state-collected wiretap evidence in federal proceedings.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Medmarc Medical Device Seminar, June 2025; *All You Ever Wanted to Know About GLP-1 Weight Loss Drugs*. Panel presentation on GLP-1 drugs, discussion of pending litigation on those drugs, and recommendations to counsel related to defending those matters.

Medmarc Medical Device Seminar, June 2024; *The Complete Lawyer's Guide to Memory*. Discussion of the recent developments in the science of memory and demeanor evidence, how those developments apply to litigation, and the attendant impact on legal proceedings and interplay with the Rules of Evidence.

Medmarc Broker Meeting, September 2023; *The Legal Nuisance of Public Nuisance: Past and Present Developments and Why it Matters to Your Business*. Seminar for insurance brokers on public nuisance litigation, recent trends in public nuisance lawsuits, and how brokers can work with their clients to assess insurance coverage needs.

Medmarc Medical Device Seminar, June 2023; *Parens Patriae and Public Policy Through Litigation: Insights and Applications from Opioid Lawsuits*. Focused on the use of public nuisance law along with *parens patriae* standing claims by state and local governments as a basis to sue companies over opioid abuse issues, and lessons litigators can draw from these cases.

I have also taught some legal ethics seminars for the National Business Institute. I co-taught a session in December 2016 and taught the same ethics session alone in December 2017.

32. List any public office you have held or for which you have been candidate or applicant.

Include the date, the position, and whether the position was elective or appointive.

None, and none.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Attached are two briefs, one filed with the Tennessee Supreme Court and the other with the Tennessee Court of Appeals. I alone wrote and edited these.

Antonio Weston, Sr. et al. v. G.P. Memphis, LP et al., No. W2024-01777-COA-R3-CV (June 2025). Appellees' brief on the lack of relation back of an Amended Complaint that added new defendants to the matter.

Healy Homes, LLC v. West Bend Mutual Insurance Company, No. M2021-00902-SC-R23-CV (October 2021). Respondent's brief filed on the scope of the absolute pollution exclusion in a CGL policy for certified questions from the United States District Court for the Eastern District of Tennessee.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

Since pursuing law, I've believed becoming a judge is a natural progression based on my skills and interests. I chose litigation because it put me in front of judges, and it allowed me to argue and wrestle with legal issues of all kinds in front of courts. I see the give and take between lawyers and judges as critical to reasoned decision-making and to identifying core issues, and desire to do that in a different capacity than I do now.

Second, I value the rule of law and desire to help foster that crucial tenet of our society from the bench. I see judging as service to the citizenry to uphold the laws of Tennessee justly, to ensure my decisions follow those laws faithfully, and to promote the trust and confidence of Tennessee's citizens though a fair, thorough, and judicious application of those laws.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have performed some pro bono work while in private practice. My firm also encourages

attorneys to perform pro bono work if they wish to do so.

My practice has allowed me to represent persons across all walks of life, to small businesses, medium-sized entities, insurance companies, and Fortune 500 and publicly traded corporations. Every person or entity has inherent worth, value, and deserves quality legal representation and advocacy regardless of position in life.

On equal justice, Justice Lewis Powell correctly pointed out that "it is fundamental that justice should be the same, in substance and availability, without regard to economic status." This speaks not only to the need for lawyers to provide pro bono services to those who need it, but also that a person or company's station in this world is not outcome determinative before a court of law. That outcome is guided, every time, by what the relevant law is and what the applicable facts are.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

Tennessee Court of Appeals, Western Section.

My selection would place an experienced attorney on the bench, one well-versed in civil litigation, all manner of tort claims, products and medical issues, commercial disputes, and insurance coverage. I am highly familiar with the day-to-day legal issues involved from inception of litigation to its conclusion. That day-to-day familiarity as a litigating attorney would allow me to understand the positions taken not only from a legal perspective but also a practical one. In addition, if you couple that with my approach of fidelity to the law, desire for consistency, judicial restraint when needed, and to see just results are reached, I believe I would assist this Court in guiding the law in Tennessee for years to come.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I serve at my church in various capacities with their tech team, children's ministry, security, and occasionally with the worship team. I also serve on the Board of Directors for Child Evangelism Fellowship of Memphis and am currently the Vice Chairman.

So long as those commitments do not conflict with the Code of Judicial Conduct or any ethical requirements, I intend to continue serving in those capacities if appointed and to further serve in my community as opportunities or needs may arise in the future.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

My siblings and I were brought up to study and to work hard, and to take pride in doing things

right. I had to work for it if I wanted something. That meant cutting lawns in the summer to pay for golf tournament entry fees. I spent long hours working at Valhalla Golf Club in the run-up to the 2000 PGA Championship and was on the crew for that championship. In college, I maintained a heavy academic load while participating in intercollegiate athletics and assisting in planning and putting on biannual leadership conferences.

My strength, I believe, is legal research and writing. I enjoy the process of analyzing how the law and facts impact one's position. I try to research matters as thoroughly as I can. I enjoy getting to the "second" or "third-level" issues to figure out where cases are weak or strong. I brief matters thoroughly in a way that hits what needs to be hit while also engaging the judge(s). And I try not to be boring; being dull is a detriment. Judges need to remember what you wrote.

Finally, if you see me working, my sleeves are rolled up. At the end of the summer of 2006, the U.S. Attorney's Office in Chattanooga presented me with a plaque containing a poem by Kent Anderson, the office Poet Laurate. The title was "You Rolled Up Your Sleeves and Got to Work." I cannot think of a better compliment or description of how I approach things.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. I have no problem doing so. My personal opinions would give way when the law is at issue, and my judgment would be guided by a review and application of constitutional provisions, statutes, regulations, or case law as applicable to the question(s) at hand.

I must advise clients on what the law is and not what I want it to be. That means understanding it and explaining it. I may or may not agree with it; sometimes, my clients do not agree with that law. But my obligation is to know the law so I can properly apply it, advise on it, and then argue for my clients based on that law.

The same approach applies on the bench. One must first know the law to adjudicate a matter; adjudication follows apprehension. Agreeing with that law is not the relevant consideration. I would be an autocrat or a self-actualized legislator if I decided cases based on which laws I thought were disagreeable. Such an approach does damage to legal system, which relies on faithful application of the laws along with judicial restraint. One's personal preferences die at the courtroom door. I will approach the role that way every day.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Greg Grisham, Fisher Phillips LLP, [redacted]

B. Floyd S. Flippin, Flippin Law Group, [redacted]

C. Loys A. "Trey" Jordan, McDonald Kuhn, PLLC, [redacted]

D. Janie Walker, Executive Director, Child Fellowship Evangelism of Memphis [redacted]

E. Chris Bennett, Lead Pastor, Renewal Church, [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Tennessee Court of Appeals, Western Section of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 30, 2025.

Jeff Dickson
Signature

When completed, return this application to Laura Blount at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

ANTONIO WESTON, SR., Individually, and as Father, Next Friend and Personal Representative of A.W., a Deceased Minor, and on behalf of all wrongful death beneficiaries of A.W., a Deceased Minor, *Plaintiff/Appellant,* v. GP MEMPHIS, LP *et al.*, *Defendants/Appellees.*	No. W2024-01777-COA-R3-CV Appeal From: Shelby County Circuit Court No. CT-0300-23

BRIEF OF APPELLEES GP MEMPHIS, LP AND GP MEMPHIS GP, LLC

Respectfully submitted,

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Defendants/Appellees Request Oral Argument Pursuant to Rule 35(a) of the Tennessee Rules of Appellate Procedure

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JURISDICTIONAL STATEMENT

This appeal arises out of the dismissal of the lawsuit of Plaintiff/Appellant Antonio Weston on a Rule 12.02(6) motion to dismiss by Defendants/Appellees GP Memphis, LP and GP Memphis GP, LLC. Deciding all issues, the Trial Court entered its Order Granting Motion to Dismiss on November 22, 2024. (T.R. Vol. III at 359-63.) Appellant filed a Notice of Appeal on November 25, 2024. (*Id*. at 368-69.)

This Court has jurisdiction under Tenn. Code Ann. § 16-4-108(a)(1) and Tenn. R. App. P. 3(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court properly granted the Motion to Dismiss the First Amended Complaint of Appellees GP Memphis, LP and GP Memphis GP, LLC.

STATEMENT OF THE CASE

Plaintiff/Appellant Antonio Weston, Sr. filed his original Complaint on January 25, 2023, against Defendants Park Hotels & Resorts, Inc. ("Park Hotels") and Doubletree Hotel Systems, LLC, incorrectly named as Double Tree Hotel Systems, LLC ("DT Systems"). (T.R. Vol. 1 at 1-6.) On May 22, 2023, Park Hotels and DT Systems moved to dismiss the lawsuit for lack of personal jurisdiction with a supporting declaration. (*Id.* at 10-25.) Plaintiff responded in opposition on August 18, 2023. (*Id.* at 26-46.)

The Trial Court, Judge Carol Chumney presiding, after a hearing, held the Motion to Dismiss in abeyance on September 19, 2023, to allow limited discovery on jurisdictional issues. (T.R. Vol. I at 37-38.) On December 8, 2023, the Trial Court held a hearing on Motions to Compel from Plaintiff on discovery responses from Park Hotels and DT Systems. (*Id.* at 59-60.) On January 2, 2024, the Trial Court entered its order on the Motions to Compel. (*Id.* at 61-62.)

Plaintiff moved to amend his Complaint on March 21, 2024. (T.R. Vol. I at 75-78.) The proposed First Amended Complaint ("FAC") sought to add Appellees GP Memphis, LP and GP Memphis GP, LLC as defendants. (*Id.* at 79-85.) Park Hotels and DT Systems opposed amendment on continuing arguments of lack of personal jurisdiction and their lack of ownership and operation of the hotel in question. (T.R. Vol. II at 234-49.)

On May 8, 2024, Plaintiff filed his First Amended Complaint. (T.R. Vol. II at 284-90.) Eight days later, an order was entered dismissing Park Hotels and DT Systems with prejudice. (*Id.* at 291-92.)

On July 18, 2024, Appellees filed their Motion to Dismiss the First Amended Complaint with a memorandum of law. (*Id*. at 297-315; T.R. Vol. III at 314-333.) Plaintiff responded in opposition on August 15, 2024. (T.R. Vol. III at 339-354.) The hearing for this motion was set for September 9, 2024. (*Id*. at 355-56.)

On November 22, 2024, the Trial Court entered its Order Granting Motion to Dismiss. (T.R. Vol. III at 359-63.) Plaintiff/Appellant filed his Notice of Appeal on November 25, 2024. (*Id*. at 368-69.)

STATEMENT OF FACTS

Appellant filed suit over the January 29, 2022 drowning death of his minor son, A.W., at the DoubleTree Hotel at 5069 Sanderlin Avenue, Memphis, TN 38117 (the "Hotel"). (T.R. Vol. I at 1-6.) Appellant sued Park Hotels and DT Systems in his individual capacity, and as father, next friend, and personal representative of A.W. (*See id.*) He alleges A.W. was attending a birthday party and the children were using the indoor-outdoor pool under adult supervision but with no lifeguard present. (*Id.* at 3 ¶¶ 10-11.) A.W. and another child went to an outdoor section that was not visible from inside. (*Id.* at 3 ¶ 13.) At some point, A.W. and the other child drowned. (*Id.* at 3 ¶¶ 14-15.) A.W. could not be resuscitated and he passed away. (*Id.* at 3 ¶ 16.)

The Complaint confirmed Appellant knew he had neither identified nor sued the owner and/or operator of the Hotel:

> 3. Park Hotels & Resorts, Inc., d/b/a Hilton Hotels Corporation, d/b/a Hilton Hotels Memphis, d/b/a Doubletree by Hilton Hotels Memphis is a foreign corporation doing business within the State of Tennessee and process can be served upon Corporation Service Company, 2908 Poston Avenue, Nashville, TN 37203.
>
> 3. Defendants [sic], Double Tree Hotel Systems LLC, upon information and belief, is a foreign corporation doing business within the State of Tennessee and may be served with their registered agent's address as Corporation Services Company, 2908 Poston Avenue, Nashville, TN 37203-1312.
>
> *4. Unknown XYZ Corporation [sic] 1-5 are the owners, franchisees, property managers, or other entities responsible for maintaining the premises located at Double Tree Hotel, 5069 Sanderlin Avenue, Memphis, TN 38117.*

5. Unknown John Does 1-5 are individuals who were responsible for maintaining the premises located at Double Tree Hotel, 5069 Sanderlin Avenue, Memphis TN 38117.

(*Id.* at 2 ¶¶ 3-5 (emphasis added).) Despite this, Appellant alleged "Defendants," including Park Hotels and DT Systems, negligently failed to provide a safe premises, failed to have a lifeguard on duty, failed to properly warn hotel guests, and that these failures, among others, caused A.W. to lose his life. (*See id.* at 4-5.)

Undersigned counsel appeared as counsel of record for Park Hotels and DT Systems on May 4, 2023. (*Id.* at 7-9.) Park Hotels and DT Systems moved for dismissal on lack of personal jurisdiction on May 22, 2023. (T.R. Vol. I at 10-25.) They asserted, with a supporting declaration from James O. Smith, that they neither owned nor operated the Hotel, that they were not part of any contract related to the Hotel's operation, that they did not employ or control any Hotel employees, and that neither owned nor leased any property in Tennessee. (*See id.* at 10-12, 15.) The Hotel was independently owned by someone else and operated by a third-party franchisee. (*See id.*)

Appellant countered personal jurisdiction existed because Park Hotels and DT Systems were registered with the Tennessee Secretary of State and because Tennessee has several "DoubleTree hotels." (T.R. Vol. I at 28-29.) Appellant also asked for discovery on personal jurisdiction issues and to see if Park Hotels or DT Systems had a franchise agreement for the Hotel. (*See id.* at 30.) The Trial Court permitted limited discovery on personal jurisdiction issues within a forty-five day period and held the dismissal request in abeyance. (*Id.* at 37-28.)

Appellant served written discovery on Park Hotels and DT Systems on September 18, 2023, and responses and objections were served on October 23, 2023. (*Id.* at 41, 51.) Appellant moved to compel further responses and documents on October 30, 2023.[1] (*Id.* at 39, 49.) The focus was on topics related to Hotel ownership and information related to the merits of the case, not personal jurisdiction issues. (*See id.* at 42-45, 52-55.)

The Trial Court held a December 8, 2023 hearing on the Motions to Compel. (T.R. Vol. VI.) During the hearing, the Trial Court commented that ownership information for the Hotel was publicly available:

> THE COURT: Well, you know the reason I was asking is because, you know, it's public record that the assessor's website says that it's owned by Garden Plaza Hotels the third, and then there are various other references online with public newspapers that Cooper Industries, I think, was an owner of the Double Tree. More than one reference of public newspapers online, and nothing online that I see about Park Hotels, but so I didn't know.

(*Id.* at 16:24-17:7.) Later, the Trial Court accessed the public records available on the Shelby County Register of Deeds website and commented as follows:

> THE COURT: All right. The Court would encourage counsel -- the Court's going to rule but the Court would encourage counsel to take a look at some basic public records online and the Shelby County Register's office, Tennessee Secretary State's office, Shelby County Assessor's office. So the records that appear may or may not be -- relate to information sought by the Plaintiff, are Shelby County Register's office document number 22010396, document number

[1] The Technical Record does not contain the written discovery sent to Park Hotels and DT Systems, the filed responses and objections, or the Motion to Compel. Appellees rely on the recitations of Park Hotels and DT Systems in their responses to the Motion to Compel, which are in the record.

> 15067277, document number 08125353, which may or may not be relevant to this case.

(*Id.* at 35:16-36:1.)

The Trial Court partially granted the Motions to Compel. (T.R. Vol. I at 61-62.) It allowed Appellant to send subpoenas to the Tennessee Secretary of State, Shelby County Trustee, Shelby County Tax Assessor, and Shelby County Register of Deeds "solely on the issue of personal jurisdiction," for Park Hotels and DT Systems to produce business records filed with the State of Tennessee in the past five years, and allowed Appellant to depose James O. Smith on personal jurisdiction issues. (*Id.* at 61-62.) The remainder was denied. (*Id.* at 62.)

Counsel for Appellant issued subpoenas duces tecum on January 18 and 26 2024, to Tennessee Secretary of State, Shelby County Trustee, Shelby County Tax Assessor, and Shelby County Register of Deeds. (T.R. Vol. I at 88; T.R. Vol. II at 160-63, 194.) The Shelby County Register of Deeds subpoena sought documents related to who owned the Hotel premises. (T.R. Vol. II at 160-63.) Counsel for Appellant received responses from the Shelby County Register of Deeds and the Shelby County Tax Assessor in late February 2024. (T.R. Vol. II at 164-233.) Those documents showed that GP Memphis, LP owned the Hotel and its premises. (*See* T.R. Vol. I at 89; T.R. Vol. II at 164-93.) Those same instruments were signed on behalf of GP Memphis, LP by GP Memphis GP, LLC, its general partner. (T.R. Vol. II at 192, 232.)

Appellant moved to add Appellees as named defendants based on this information. (T.R. Vol. 1 at 75-156; T.R. Vol. II at 157-233.) Park Hotels and DT Systems acknowledged Appellant could file an amended pleading without

leave of court but noted their opposition based on the lack of personal jurisdiction over them. (T.R. Vol. II at 234-49.) Appellant filed the FAC on May 8, 2024. (*Id.* at 284-90.) He then dismissed Park Hotels and DT Systems with prejudice on May 16, 2024. (*Id.* at 291-92.)

On July 18, 2024, undersigned counsel appeared as counsel of record for Appellees. (*Id.* at 293-94.) That same day, Appellees sought dismissal of the FAC since they had been sued outside of the one-year statute of limitations and because the FAC did not relate back to the original Complaint. (*See id.* at 297-313; T.R. Vol. III at 314-33.) Appellant responded in opposition and asserted the FAC did relate back. (T.R. Vol. III at 339-54.)

On November 22, 2024, the Trial Court entered its written order granting the Motion to Dismiss of Appellees. (*Id.* at 359-63.) The Trial Court incorporated the transcript of its oral ruling as an exhibit (*id.* at 360 ¶ 1) and a copy of that oral ruling, with hand-written corrections by the Trial Court, was made part of this record (*id.* at 364-65; T.R. Vol. V). The written order held as follows:

> 2. The First Amended Complaint, which named GP Memphis, LP and GP Memphis GP, LLC as Defendants for the first time, was filed on May 8, 2024, more than one year after the January 29,2022 incident at issue, outside of the one-year statute of limitations period and is time-barred unless it relates back.
> 3. Plaintiff did not carry his burden to show that the First Amended Complaint related back to the original Complaint, which was filed on January 25, 2023.
> 4. Plaintiff did not show notice of the lawsuit had been given to GP Memphis, LP and GP Memphis GP, LLC within the 120-day commencement period in Tenn. R. Civ. P. 15.03, and did not show that but for a mistake or misnomer concerning the identities of GP

> Memphis, LP and GP Memphis GP, LLC that those entities would have known the action would be brought against them.

(T.R. Vol. III at 360 ¶¶ 2-4.) The Trial Court also disposed of all remaining issues, including dismissal of Defendants XYZ Corp 1-5 and John Does 1-5. (*See id.* at 360-61.)

SUMMARY OF THE ARGUMENT

The Trial Court correctly found the FAC did not relate back. Appellant did not take necessary steps to identify the correct Hotel owner. Instead, intentional decisions were made to sue Park Hotels and DT Systems, two unrelated entities with no ties to the Hotel and no business operations in Tennessee. Appellees were not added as defendants until more than a year after the one-year statute of limitations had passed.

Appellant's lawsuit was properly dismissed when he failed to demonstrate the requirements in Tenn. R. Civ. P. 15.03 were met. The Technical Record lacks evidence showing Appellees received notice of the filed lawsuit within 120 days of commencement. That record contains some evidence of pre-commencement communications with the "Doubletree Hotel" and counsel but not with Appellees, and, even so, such communications cannot establish notice of a later-filed lawsuit. Nor does the fact that counsel for Appellees also represented Park Hotels and DT Systems establish notice.

Appellant also failed to show that Appellees knew there was a mistake or misnomer related to them in the original Complaint within the 120-day commencement period. There was no mistake and there was no misnomer. Park Hotels and DT Systems have no ties with Appellees. Appellant did not use publicly available information on property owners to identify proper parties. He failed to properly investigate who should be sued. Instead, tactical choices were made to sue improper parties and such choices were intentional decisions, and not mistake or misnomers.

STANDARD OF REVIEW

The appeal in this matter involves the dismissal of the First Amended Complaint on a Rule 12.02(6) motion. "The trial court's grant of the motion to dismiss is subject to a *de novo* review with no presumption of correctness because [this Court is] reviewing the trial court's legal conclusion." *Hamilton v. Abercrombie Radiological Consultants, Inc.*, 487 S.W.3d 114, 117 (Tenn. Ct. App. 2014) (collecting cases). Further, court determinations on the relation back of an amendment are also reviewed *de novo*. *Dean v. Weakley Cty. Bd. of Educ.*, No. W2007-00159-COA-R3-CV, 2008 Tenn. App. LEXIS 218, at *31 (Tenn. Ct. App. Apr. 9, 2008).

LAW AND ARGUMENT

The DoubleTree by Hilton Hotel Memphis is tucked away in the East Memphis business district, off Poplar Avenue, behind the Paradiso movie theater, and close to several eateries, local businesses, and establishments. It has 264 guestrooms, a ballroom, conference facilities, and a restaurant on premises. It has several other amenities guests can use, including an indoor-outdoor swimming pool.

The Hotel and its property have been owned by the same company for four decades. Garden Plaza Hotel Company III acquired the Hotel property via Warranty Deed on August 23, 1985. (T.R. Vol. III at 314-19.) On June 25, 1993, articles of amendment were recorded showing Garden Plaza Hotel Company III had been renamed to GP Memphis, LP. (*Id*. at 320-21.) Several subsequent recorded instruments confirm this in the legal description of the premises:

> Being the same property conveyed to Garden Plaza Hotel Company III by Warranty Deed of record at Instrument No. W8 3246, in the Register's Office of Shelby County, Tennessee. Garden-Plaza Hotel Company became GP Memphis, L.P. by articles of amendment dated June 25, 1993, and recorded at Instrument No. DS 2874, in the aforesaid Register's Office.

(T.R. Vol. II at 166, 193; T.R. Vol. III at 330.)

That same description was utilized in Instrument # 22010396, recorded January 26, 2022, showing a Deed of Trust previously executed by GP Memphis, LP had been assigned to a different company. (T.R. Vol. III at 326-30.) These instruments are publicly available through the Shelby County

Register of Deeds and can be readily accessed through an online search. (T.R. Vol. III at 322-25; T.R. Vol. VI at 35:16-36:1.)

Three days after this assignment was recorded, A.W. and several other children attended a birthday party at the Hotel.[2] (T.R. Vol. I at 3 ¶ 10.) The children went to the pool that evening to swim. (T.R. Vol. I at 3 ¶ 11.) The Complaint alleged "A.W. and another child had ventured into the outdoor area of the pool that was not visible from the indoor area of the pool" and that those two "became distressed and began experiencing problems staying afloat." (T.R. Vol. I at 3 ¶¶ 13-14.) Other children witnessed this and ran to get adult help, but A.W. had been underwater for too long, his heart had stopped, and he could not be resuscitated. (T.R. Vol. I at 3 ¶¶ 15-16.)

Appellant filed a wrongful death suit for himself and on behalf of his deceased son. (T.R. Vol. I at 1-6.) This lawsuit was subject to a one-year statute of limitations. *See Smith v. Se. Properties, Ltd.*, 776 S.W.2d 106, 109 (Tenn. Ct. App. 1989) (applying one-year statute of limitations to a wrongful death action over the drowning of a minor child brought by a parent); *Collier v. Memphis Light, Gas & Water Div.*, 657 S.W.2d 771, 774 (Tenn. Ct. App. 1983) ("There is no specific statute of limitation contained in the Tennessee wrongful death statutes . . . but our courts have uniformly applied the one-year statute of limitation contained in § 28–3–104 governing actions for personal injuries to actions for wrongful death."). Appellant filed suit on January 25, 2023, less than a week before the statute ran. (T.R. Vol. I at 1.)

[2] Appellees' recitation of facts is pulled from the pleadings of Appellant since this appeal arises from a Rule 12 motion. Discovery was never reached on the substantive allegations.

But the Complaint did not sue Appellees. (*See id.*) For reasons known to himself, Appellant instead sued Park Hotels and DT Systems (*See id.*) While the Complaint generally alleged the "Defendants" were negligent, the Complaint conceded Appellant *had not identified the actual owner and/or operator of the Hotel*:

> 4. Unknown XYZ Corporation [sic] 1-5 are the owners, franchisees, property managers, or other entities responsible for maintaining the premises located at Double Tree Hotel, 5069 Sanderlin Avenue, Memphis, TN 38117.

(T.R. Vol. at 2 ¶ 4.) In other words, Appellant filed suit knowing Park Hotels and DT Systems lacked sufficient connections to the Hotel to be liable.

Park Hotels and DT Systems confirmed their lack of ownership and involvement on May 22, 2023, less than 120 days after suit had been filed. (T.R. Vol. I at 10-25.) And, after some protracted discovery on jurisdictional issues, Appellant did not move to amend his Complaint until March 21, 2024 (T.R. Vol. I at 75-233), and did not file the FAC until May 8, 2024 (T.R. Vol. II at 284-90), which he could have done at any time since a responsive pleading had never been filed by Park Hotels or DT Systems. *See Mosley v. State*, 475 S.W.3d 767, 774 (Tenn. Ct. App. 2015) ("It is well-settled in Tennessee that a motion to dismiss is not a responsive pleading.").

Appellees were thus not timely sued and the FAC does not relate back to the Amended Complaint. "Plaintiffs who file their lawsuit at or near the end of the statute of limitations period face a difficult predicament if they make a mistake regarding the name of the defendant." *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 796 (Tenn. Ct. App. 1997). Discovery rule cases state "a plaintiff has a duty to act with reasonable

diligence to ascertain the identity of a defendant." *Strine v. Walton*, 323 S.W.3d 480, 492 (Tenn. Ct. App. 2010). A plaintiff "cannot simply wait for information regarding a potential defendant to come to" him as he has "a duty to investigate and discover pertinent facts 'through the exercise of reasonable care and due diligence.'" *Grindstaff v. Bowman*, No. E2007-00135-COA-R3-CV, 2008 Tenn. App. LEXIS 323, at *18-19 (Tenn. Ct. App. May 29, 2008) (quoting *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 520 (Tenn. 2005)). The subsequent discovery of the proper party does not save a statute of limitations problem if that information "'reasonably should have discovered' much earlier." *Grindstaff*, 2008 Tenn. App. LEXIS 323, at *19.

There is no dispute that Appellees were not sued within the statute of limitations. The dispute instead hinges on a mechanism designed to ameliorate the stringency of the one-year limitations period: relation back under Tenn. R. Civ. P. 15.03. "[T]he relation back doctrine embodied in Rule 15.03 does not extend or enlarge the applicable statute of limitations period" and "does not compromise the protections afforded by the statute of limitations[.]" *Doyle v. Frost*, 49 S.W.3d 853, 860 (Tenn. 2001). Instead, "*amendments pursuant to the rule are considered filed on the date of the original, timely pleading*, and such amendments only may be made if the Rule's notice requirements are met." *Fortenberry v. George*, No. E2000-02984-COA-R3-CV, 2002 Tenn. App. LEXIS 466, at *16 (Tenn. Ct. App. July 3, 2002) (emphasis in original). Appellant bears the burden of showing the requirements in Rule 15.03 are satisfied. *Johnson v. Trane U.S. Inc.*, No. W2011-01236-COA-R3-CV, 2013 Tenn. App. LEXIS 537, at *9 (Tenn. Ct. App. Aug. 19, 2013) (collecting cases).

Appellant argues Judge Chumney improperly granted Appellees' Motion to dismiss because the FAC related back to the original pleading. (*See* Appellant's Br.) This Court "review[s] the trial court's legal conclusions regarding the adequacy of the complaint de novo." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). *Webb* also sets forth the governing analysis of Rule 12 motions. *See id.* at 427. Further, "courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Id.* (citing and quoting *Riggs v. Burson*, 941 S.W.2d 44, 47-48 (Tenn. 1997)). Also, since it is germane to this determination, "[c]ourts resolving a motion to dismiss may consider 'items subject to judicial notice, *matters of public record*, *orders, [and] items appearing in the record of the case* . . . without converting the motion into one for summary judgment.'" *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 74 (Tenn. Ct. App. 2016) (quoting *Haynes v. Bass*, No. W2015-01192-COA-R3-CV, 2016 Tenn. App. LEXIS 404, at *4 (Tenn. Ct. App. June 9, 2016)) (emphasis added).

I) The First Amended Complaint Did Not Relate Back To The Original Complaint

Judge Chumney was correct; the FAC did not relate back and was correctly dismissed. "Pursuant to Rule 15.03 of the Tennessee Rules of Civil Procedure, only under certain conditions will an amended complaint relate back to a previously-filed complaint to comply with the statute of limitations." *Mack v. Cable Equip. Servs.*, No. W2020-00862-COA-R3-CV, 2022 Tenn. App. LEXIS 51, at *34 (Tenn. Ct. App. Feb. 9, 2022) (quoting

Black v. Mula Khel, No. W2020-00228-COA-R3-CV, 2020 Tenn. App. LEXIS 600, at *5 (Tenn. Ct. App. Dec. 30, 2020)). Those conditions are:

> "(1) the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading . . . if, within the period provided by law for commencing the action against him, the party to be brought in by amendment (2) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (3) knew or should have known that, but for a misnomer or other similar mistake concerning the identity of the proper party, the action would have been brought against him."

Mack, 2022 Tenn. App. LEXIS 51, at *35 (quoting *Floyd v. Rentrop*, 675 S.W.2d 165, 167-68 (Tenn. 1984)). Rule 15.03 states these requirements must be satisfied "within 120 days after commencement of the action." Further, "Tenn. R. Civ. P. 15.03 should not be used to breathe life into claims that are plainly time-barred." *Townes v. Sunbeam Oster Co.*, 50 S.W.3d 446, 450-51 (Tenn. Ct. App. 2001).

The parties do not dispute the first element. The FAC makes the same allegations seen in the original Complaint with the sole difference being the addition of Appellees as putative tortfeasors. (*Compare* T.R. Vol. I at 1-6 *with* T.R. Vol. II at 284-90.) Appellant does not, and did not below, contest that the allegations against Appellees were brought beyond the one-year statute of limitations. (*See* Appellant's Br. at 2; T.R. Vol. II at 339-54.) Analysis of the remaining two elements requires affirmation of dismissal.

A) Appellant Fails To Show Appellees Received Sufficient Notice Of This Lawsuit Within The 120-Day Time Period

The Trial Court accurately concluded Appellees did not receive proper notice of the Complaint. "[T]he new party must have received sufficient notice

of the action within the specified time-frame so that it will not be prejudiced in maintaining its defense." *Sallee v. Barrett*, 171 S.W.3d 822, 830 (Tenn. 2005) (collecting cases). That Appellees "may have had notice of the incident out of which this action arose is insufficient." *Smith*, 776 S.W.2d at 109 (collecting cases). "'Notice' means *notice that a lawsuit asserting a legal claim has been filed*." *Id.* (emphasis added).

The Technical Record contains no evidence that Appellees received that notice within 120 days of the Complaint's filing. Notice can occur through service. *See Jones v. Montclair Hotels Tenn., LLC*, No. M2006-01767-COA-R3-CV, 2007 Tenn. App. LEXIS 751, at *15 (Tenn. Ct. App. Dec. 5, 2007). The record shows no effort to serve the original Complaint on Appellees. Additionally, Appellees did not use the registered agents Park Hotels and DT Systems use. Park Hotels and DT Systems use Corporation Services Company in Nashville, Tennessee. (T.R. Vol I at 2.) GP Memphis uses a registered agent in Memphis while GP Memphis GP uses one in Wilmington, Delaware. (T.R. Vol. II at 285-86.) And "[s]imply amending the complaint to name [the actual owner] without any evidence in the record suggesting an attempt to actually serve process on that entity's agent did not impart actual or constructive notice to the proper defendant." *Jones*, 2007 Tenn. App. LEXIS 751, at *15.

Prior communications in the Technical Record are also not sufficient. Appellant pointed the Trial Court to correspondence between counsel in 2022 related to the incident. (T.R. Vol. III at 348-52.) On March 1, 2022, Tameko Purnell sent a letter to the "DoubleTree Hotel" at the Hotel's address.[3] (*Id.* at

[3] This letter is not in the Technical Record. (*See* T.R. Vol. 348-52.) The recitation is drawn from the response letter, which is. (*See id.*)

348.) Undersigned counsel responded a week later to advise he represented the "hotel." (*Id.*) Another lawyer for Appellant, Ariel Smith, sent a policy limits demand to undersigned counsel on July 26, 2022, and that demand was declined. (*Id.* at 350-52.) Appellant makes no mention of these in his Brief but does point out Park Hotels and DT Systems had the same legal counsel as Appellees. (Appellant's Br. at 10.)

This information only shows, at most, notice of the incident and not notice of the lawsuit. This Court dealt with that type of distinction in *Hensley v. Stokely*, No. E-2109-02146-COA-R3-CV, 2020 Tenn. App. LEXIS 404 (Tenn. Ct. App. Sept. 9, 2020). The *Hensley* plaintiff relied on prior communications with a hotel through its website where she had engaged counsel and would be pursuing medical treatment. *See id.*, at *9-10. This Court disagreed because those communications were made prior to suit being filed and "[n]othing in her statements provides notice that an action had been instituted or a lawsuit had been filed against Stokely or anyone else." *Id.*, at *10. This Court also distinguished *Hensley* from *McCracken* as *McCracken* involved a communication where "the defendant church received a telephone call from a reporter seeking comment on a lawsuit filed against the church" after "a lawsuit had actually been filed." *Hensley*, 2020 Tenn. App. LEXIS 404, at *11-12 (citing *McCracken*, 958 S.W.2d at 796).

These communications preceded the filing and service of the Complaint. (T.R. Vol. III at 348-52.) The initial correspondence advised of retention as counsel and the latter correspondence involved a settlement demand. (*See id.*) No specific reference is made to filing a lawsuit; at most, there is an implied threat of potentially doing so given the policy limits demand. (*See id.*) And no

other documents in the Technical Record show post-filing service or delivery to Appellees.

Commonality of defense counsel does not help Appellant. Undersigned counsel only appeared for Park Hotels and DT Systems when suit was filed. (T.R. Vol. I at 7-9.) While undersigned counsel acknowledged prior retention by GP Memphis when asked by the Trial Court (T.R. Vol. IV at 18:22-19:11), he did not appear for Appellees until July 18, 2024, two months after the FAC had been filed and after Park Hotels and DT Systems had been dismissed with prejudice (T.R. Vol. II at 284-92, 334-35). There was no overlap in representation before the Trial Court.

This Court dispensed with a similar agency-type theory in *Smith*. The *Smith* plaintiff sued an apartment complex after his "minor son drowned in the [complex] swimming pool." 776 S.W.2d at 107. That plaintiff, as happened here, sued the wrong ownership entity. *See id.* at 107-08. Two months after the statute of limitations ran, the incorrectly-named entity moved to dismiss on lack of ownership. *Id.* at 110. Plaintiff was permitted to amend the complaint to add the correct owner along with other new defendants. *Id.* at 108. The new defendants, using the same counsel, moved to dismiss and prevailed. *Id.* On appeal, the plaintiff tried to establish Rule 15.03(1) notice through the defense counsel who represented both the incorrectly named entity and the actual owner. *See id.* at 110. This Court said that was insufficient given that attorney did not appear in the case until well after the statute of limitations had run. *See id.*

That also occurred here. Simply appearing for prior defendants before appearing for the proper defendant is not sufficient. Counsel first appeared for

Park Hotels and DT Systems on May 4, 2023, more than three months after the statute of limitations had run. (T.R. Vol. I at 7-9.) Park Hotels and DT Systems moved to dismiss for lack of personal jurisdiction on May 22, 2023, based in part on their lack of ownership or control of the Hotel. (T.R. Vol. I at 7-9; *id.* at 10-25.) That matches what happened in *Smith*, which this Court said "would in no way meet the requirement of Rule 15.03." *Smith*, 776 S.W.2d at 110. Likewise, counsel is not the registered agent for Appellees and one cannot presume the required notice occurred merely by using the same attorney. (T.R. Vol. IV at 18:16-21.)

Finally, there is no common linkage between Appellees and Park Hotels and DT Systems. *Hensley* further found the notice requirement was not met since there was "no connection" between the original, misnamed defendant and the later-added defendant. 2020 Tenn. App. LEXIS 404, at *10-11. Appellees have no ties to Park Hotels and DT Systems. They are all separate corporate entities who do not share registered agents. (T.R. Vol I at 2; T.R. Vol. II at 285-86.) There was no contractual relationship between Appellees and Park Hotels and DT Systems; the Hotel was owned and operated by a third-party franchisee. (T.R. Vol. I at 10-12.) Park Hotels and DT Systems had no franchise agreement with Appellees. (*Id.*; *see id.* at 43, 53.) That lack of connection means knowledge cannot be imputed to Appellees. *See Hensley*, 2020 Tenn. App. LEXIS 404, at *11; *see Ward v. Wilkinson Real Est. Advisors, Inc.*, No. E2013-01256-COA-R3CV, 2013 WL 6200179, at *3 (Tenn. Ct. App. Nov. 26, 2013) ("Defendants also did not have a relationship or an identity of interest with Glazer that could have given rise to knowledge of the complaint and its inapplicability to Glazer. With these considerations in mind, we

conclude that the trial court did not err in holding that Plaintiff failed to meet the requirements of Rule 15.03.").

Appellant, in turn, does not cite any record evidence showing Appellees had sufficient notice within the required time period. (*See* Appellant's Br.) Appellant chooses to focuses his argument on the second prong of Rule 15.03. (*See id*. at 8-10.) Appellees now turn to that issue.

B) Appellant Fails To Show Appellees Knew They Would Have Been Sued But For A Mistake Or a Misnomer

Even if notice was satisfied, the FAC still did not relate back. "Rule 15.03 *requires more* than simply showing that the potential new defendant had been made sufficiently aware of the commencement of the action." *Sallee*, 171 S.W.3d at 830 (emphasis added). "The second requirement is that each potential new party must have known that but for a misnomer or mistake concerning his or her identity, the action would have been brought against him or her." *Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 821 S.W.2d 938, 941 (Tenn. Ct. App. 1991) (citing *Lease v. Tipton*, 722 S.W.2d 379, 380 (Tenn. 1986)). This also must occur within the 120-day commencement period. Tenn. R. Civ. P. 15.03.

What occurred was neither a mistake nor a misnomer. "A 'mistake' within the meaning of this rule does not exist merely because a party who may be liable for conduct alleged in the original complaint was omitted as a party defendant." *Sallee*, 171 S.W.3d at 830 (quoting *Smith*, 776 S.W.2d at 109). This is consistent with the with Rule 15.03's purpose "to enable parties to correct the 'mislabeling of a party they intended to sue,' *not to add a new party who was simply overlooked*." *Shockley v. Mental Health Coop., Inc.*, 429

S.W.3d 582, 591 (Tenn. Ct. App. 2013) (internal citation omitted) (emphasis added).

Appellant overlooked Appellees. He intentionally sued Park Hotels and DT Systems while knowing they did not own or control the Hotel:

> 4. Unknown XYZ Corporation [sic] 1-5 are *the owners, franchisees, property managers, or other entities responsible for maintaining the premises* located at Double Tree Hotel, 5069 Sanderlin Avenue, Memphis, TN 38117.

(T.R. Vol. I at 2 ¶ 4 (emphasis added).) Ownership information was readily available through the Shelby County Register of Deeds. (T.R. Vol. III at 314-15, 322-25.) One can run an online search to identify property owners. (*Id.*) The database will then show the listed owner and link PDF and TIF copies of filings recorded for that address or parcel. (*See id.*)

A search for "5069 Sanderlin" produces several hits. (*Id.* at 322-25.) It shows the Hotel property was transferred to Garden Plaza Hotel Company III via a Warranty Deed on August 23, 1985. (T.R. Vol. III at 315-19.) On June 25, 1993, Articles of Amendment were recorded renaming Garden Plaza Hotel Company III to GP Memphis, LP. (*Id.* at 320-21.) From 1993 forward, many instruments tied to the Hotel contain a recitation of this history:

> Being the same property conveyed to Garden Plaza Hotel Company III by Warranty Deed of record at Instrument No. W8 3246, in the Register's Office of Shelby County, Tennessee. Garden-Plaza Hotel Company became GP Memphis, L.P. by articles of amendment dated June 25, 1993, and recorded at Instrument No. DS 2874, in the aforesaid Register' s Office.

(T.R. Vol. II at 166, 193; T.R. Vol. III at 330.)

The Trial Court demonstrated how quickly this type of search can be performed during the December 8, 2023 Motion to Amend hearing. Judge Chumney opened a web browser, ran a search, and commented:

> THE COURT: All right. The Court would encourage counsel -- the Court's going to rule but the Court would encourage counsel to take a look at some basic public records online and the Shelby County Register's office, Tennessee Secretary State's office, Shelby County Assessor's office. So the records that appear may or may not be -- relate to information sought by the Plaintiff, are Shelby County Register's office document number 22010396, document number 15067277, document number 08125353, which may or may not be relevant to this case.

(T.R. Vol. VI at 35:16-36:1.) The first instrument Judge Chumney mentioned, Instrument # 22010396, was recorded on January 26, 2022, three days before the unfortunate drowning of A.W. (T.R. Vol. III at 326-30.) It showed a Deed of Trust from GP Memphis had been assigned to CVI Loan Sub Holdings V, LLC from CVI WW Loan Holdings 2, LLC. (*Id.* at 328.) This instrument contained the same metes and bounds description referencing GP Memphis as property owner seen in other recorded instruments. (*See id.* at 330.)

This assignment referenced the original Deed of Trust, Instrument # 21112978, recorded on September 10, 2021. (*See id.* at 328; *see also* T.R. Vol. II at 168-93; T.R. Vol. III at 322.) GP Memphis pledged the Hotel as collateral to partially secure a loan. (T.R. Vol. II at 168-93.) The Deed of Trust was released on November 9, 2022, with that instrument specifically referencing "the Property [] also known as the Doubletree Hotel, located at 50679 Sanderlin Avenue, Memphis, Tennessee." (T.R. Vol. II at 164-68.)

Appellant cannot claim ignorance of who owned the Hotel. All of the instruments discussed above were publicly available before Appellant filed suit on January 25, 2023. Again, "a plaintiff has a duty to act with reasonable diligence to ascertain the identity of a defendant." *Strine*, 323 S.W.3d at 492. That did not happen here. And, the same information buttresses the lack of connection between Appellees and the original defendants. The recording history does not list Park Hotels or DT Systems. (T.R. Vol. III at 322-25.)

Appellant argues he tried to identify the owner through written discovery methods. (Appellant's Br. at 9-10.) He argues Park Hotels and DT Systems failed to respond to an interrogatory, Interrogatory No. 5, asking them to identify the owner and further claims the Trial Court compelled Park Hotels and DT Systems to answer to that inquiry. (*Id.* at 9.) But Park Hotels and DT Systems had already responded and said they did not know who the owner was, and the Trial Court denied that specific request to compel since answers were provided. (T.R. Vol. I at 43, 53, 61-62.)

Appellant was also allowed to serve subpoenas to various state and local agencies to obtain records related to property ownership, including the Register of Deeds. (Id. at 61-62.) Yet, Appellant did not need leave of court to issue subpoenas duces tecum. Tenn. R. Civ. P. 45.02, 45.09. Such subpoenas could have been served at any time after initiating litigation. Moreover, as discussed *supra*, the ownership information was already available through the Register of Deeds.

Appellant also accuses counsel of assisting Appellees "in avoiding service of process." (Appellant's Br. at 10.) Such argument has no moorings given the registered agents of Appellees were readily ascertainable when the FAC was

filed and served. (T.R. Vol. II at 285-86 ¶¶ 5-6.) The record makes clear Appellant failed to identify Appellees, chose to sue Park Hotels and DT Systems instead, and there is no evidence of any attempt to serve Appellees with the original Complaint.

These arguments avoid the problem Appellant has: proper effort was not made to identify the Hotel owner and operator before suit was filed. There was no mistake or misnomer. Further, "nothing in Plaintiff's amended complaint provides support under Rule 15.03 by explaining how or why this mislabeling occurred." *Black*, 2020 Tenn. App. LEXIS 600, at *9. And "the amended complaint is merely a replica of the original," *id.*, with the sole exception of adding Appellants and generically proclaiming "Defendants" owned and controlled the Hotel (*compare* T.R. Vol. I at 3 ¶ 10 *with* T.R. Vol. II at 286 ¶ 13).

The Trial Court correctly found Appellant did not satisfy the provisions in Rule 15.03(2). Appellant chose to sue Park Hotels and DT Systems instead of finding the true owner. There are consequences that naturally but unfortunately follow, including statute of limitations and relation back issues, when the correct defendant is belatedly identified. *Cf. Est. of Moore v. Nat'l Health Realty, Inc.*, No. M2006-00233-COAR10CV, 2006 WL 568235, at *2 (Tenn. Ct. App. Mar. 8, 2006) ("There was no mistake concerning the identity of the other seven corporate entities named in the second amended complaint. The plaintiff's first lawyer simply did not name them in the original complaint. The plaintiff and its new lawyers are now constrained by that decision.").

CONCLUSION

For the above-stated reasons, this Court should AFFIRM the decision of the Trial Court in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief complies with the requirements set forth in Section 3.02(a) of Rule 46 of the Rules of the Tennessee Supreme Court. This brief contains 6,690 words, excluding those not to be counted pursuant to the foregoing Rule.

/s/ Jeffrey E. Nicoson
Jeffrey E. Nicoson

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that the foregoing document has been served upon all counsel in this cause by via electronic notification or by placing a true and correct copy of same in the United States mail, postage prepaid, in a properly addressed envelope, or by hand delivering same to each such attorney as follows:

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IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

HEALY HOMES, LLC, *Defendant/Petitioner,* v. WEST BEND MUTUAL INSURANCE COMPANY, *Plaintiff/Respondent.*	}	No. M2021-00902-SC-R23-CV Trial Court Docket No. 3:20-cv-00003-DCLC-HBG, The United States District Court for the Eastern District of Tennessee, Knoxville Division

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF OF RESPONDENT WEST BEND MUTUAL INSURANCE COMPANY

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Respondent Requests and Applies for Oral Argument Per Rule 23, § 7(B) of the Rules of the Supreme Court of the State of Tennessee

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JURISDICTIONAL STATEMENT

This matter is before this Court on certified questions from the United States District Court for the Eastern District of Tennessee, Knoxville Division (the "District Court"). This Court has jurisdiction to hear this matter pursuant to Rule 23 of the Rules of the Supreme Court of the State of Tennessee. The District Court is a proper applicant pursuant to Rule 23, § 1. It certified two question of state law to this Court from the case of *West Bend Mutual Insurance Company v. Healy Homes, LLC*, No. 3:20-cv-00003-DCLC-HBG (E.D. Tenn., filed January 3, 2020), on August 5, 2021. (Pet'r Br. App. 1.) The Clerk of the District Court served copies of this Certification Order upon all counsel of record in this matter and filed the order on August 9, 2021, with the Clerk of the Supreme Court of Tennessee in Nashville under seal along with proof of service.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The District Court certified the following questions of law:

1. Does a standard CGL Form Pollution Exclusion, like the one contained in the insurance Policy executed between West Bend Mutual Insurance Company and Healy Homes, LLC, apply only to traditional environmental pollution into the air, water, and soil, or does it apply equally to negligence involving toxic substances and traditional environmental pollution?

2. Do the materials complained of in the Underlying Lawsuit[1], namely "debris, dirt, top soil, mud, silt, and other waste material" qualify as "pollutants" according to Tennessee's interpretation of the definition for "pollutant" contained in the Policy's CGL Form Pollution Exclusion?

(Pet'r Br. App. 1 at 11-12.)

[1] Per the Order, "[t]he 'Underlying Lawsuit' refers to the action filed by landowners Charles and Shirley Holland against Healy Homes, LLC: *Charles Holland and his wife Shirley Holland, v. Healy Homes, LLC et al.*, No. 2-276-19, Knox County Circuit Court, filed August 1, 2019." (Pet'r Br. App. 1 at 12 n.5.)

STATEMENT OF THE CASE

Plaintiff/Respondent West Bend Mutual Insurance Company ("West Bend") filed a declaratory judgment action against Defendant/Petitioner Healy Homes, LLC ("Healy Homes") in the United States District Court in the Eastern District of Tennessee on January 3, 2021. (*See* Pet'r Br. App. 2.) West Bend sought a declaration that it did not owe a duty to defend and/or a duty to indemnify Healy Homes in a lawsuit filed by Charles and Shirley Holland (the "Hollands") against Healy Homes and other named defendants, styled as *Charles Holland, et al. v. Healy Homes, LLC, et al.*, Case No. 2-276-19, presently pending in the Circuit Court of Knox County, Tennessee (the "Underlying Lawsuit"). (*See id.* at 1-18.) West Bend contended the absolute pollution exclusion in the Commercial General Liability ("CGL") Coverage Form of the Policy bars coverage and indemnification for the Underlying Lawsuit.[2] (*See id.* at 16 ¶¶ 63-64.) Healy Homes answered and denied West Bend was entitled to declaratory relief. (*Id.* App. 3.)

On October 3, 2020, West Bend filed a Motion for Judgment on the Pleadings with an accompanying Memorandum of Law that asked the District Court to declare that the absolute pollution exclusion barred coverage and indemnification for the Underlying Lawsuit. (Pet'r Br. App. 5 & 6.) Healy Homes responded in opposition on December 4, 2020. (*Id.* App. 7 at 1-25.) Healy Homes included an alternative request that the District Court

[2] West Bend also contended a defense and indemnification was not owed under the known loss/loss-in-progress doctrine and due to a material misrepresentation in the insurance application of Healy Homes. (Pet'r Br. App. 2 at 16-17 ¶ 64.) Those issues are not before this Court.

certify a question to the Tennessee Supreme Court on whether the absolute pollution exclusion applies to all pollutants or only to traditional environmental pollutants. (*See id.* at 24.) West Bend filed a Reply in support of its Motion. (Pet'r Br. App. 11 at 1-4.) West Bend also opposed the certification request. (*See id.* at 8-10.)

On August 5, 2021, the District Court granted the request for certification and certified two questions to this Court on the absolute pollution exclusion. (Pet'r Br. App. 1.)

STATEMENT OF FACTS

The Hollands filed the Underlying Lawsuit on August 1, 2019. (Pet'r Br. App 2 at 89-103.) They own real property and reside at 11520 Hardin Valley Road, Knoxville, Tennessee 37932. (*See id.* at 92 ¶ 1 & 94 ¶ 7.) The Hollands had "constructed, at their own expense, a lake on the property which they used to recreate, including stocking the lake with fish." (*Id.* at 94 ¶ 7.) Healy Homes began developing an adjacent plot of land in 2016 to construct a residential subdivision. (*See id.* ¶¶ 8-9.) The development, named "The Highlands at Hardin Valley," sits "on top of a ridge above the [Hollands'] property" and "[s]lopes on the ridge between the site project property Plaintiffs' property exceed 25% in several places." (*Id.* ¶¶ 10-11.) The approved construction plans laid out the substantial excavation and extensive grading needed to build the roads and lots in the subdivision.[3] (*See id.* at 94-95 ¶¶ 11-13.)

The Hollands claim work began on the Highlands at Hardin Valley around August 2016. (*Id.* at 95 ¶ 13.) The earthwork and grubbing denuded the ridgetop to the point that, from August 2016 forward, substantial rains led to "water, mud, silt and debris from the site project property flow[ing] down the ridge into [the Hollands'] lake." (*Id.*) "The flow of water, mud, silt and debris from the site project property into [the Hollands'] lake, which did not occur prior to the commencement of construction, [] caused significant damage to [the Hollands'] lake rendering it unusable for the purposes for which it was originally constructed." (*Id.* ¶ 14.)

[3] The Pipe Doctor, LLC performed the grading and earthwork for Healy Homes. (Pet'r Br. App. 2 at 94-95 ¶ 12.)

The Underlying Lawsuit asserted causes of actions for negligence, nuisance, and trespass against Healy Homes and the other defendants. (Pet'r Br. App 2 at 95-102.) The Hollands alleged Healy Homes negligently failed to control project construction and site grading leading to the flow and "deposit of debris, dirt, top soil, and other waste material" into the Hollands' lake. (*Id.* at 96 ¶ 18(c).) In the nuisance cause of action, the Hollands asserted "an increased flow of water, mud, silt and debris has come on the property . . . in large quantities and has flowed into the [Hollands'] lake in a manner that did not occur prior to the Defendants' actions" and that "[t]he stagnant water, mud, silt and debris has rendered the [Hollands'] pond unusable for its prior purposes, unwholesome and unhealthy." (*Id.* at 100 ¶ 25.) The Underlying Lawsuit asks for $1,500,000 in damages, plus reimbursement of various costs and fees. (*Id.* at 102.) Healy Homes notified West Bend of the Underlying Lawsuit and requested a defense and/or indemnification. (*Id.* at 15 ¶ 58.)

Prior to this, on June 11, 2018, West Bend issued a Commercial Lines Package policy, policy # A4644587 00, effective from June 11, 2018, to June 11, 2019 (the "Policy"), with Healy Homes as the Named Insured. (*Id.* at 8 ¶ 43, 39-88.) The Policy contained a Commercial General Liability Coverage Form (CG 00 01 04 13) (the "CGL Form"). (*Id.* at 8 ¶ 45, 57-72.) The CGL Form extends coverage to Healy Homes to "pay those sums [Healy Homes] becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." (*Id.* at 57 § I(1)(a).) Coverage only exists if the "'property damage' is caused by an 'occurrence[.]'" (*Id.* § I(1)(b)(1).)

The CGL Form contains an Exclusion section with the following relevant exclusion:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **f. Pollution**
>
> **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" . . . .

(*Id.* at 58-59.) "Pollutants" are defined in the Definitions section as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." (*Id.* at 71.)

West Bend agreed to provide a defense to Health Homes subject to a full reservation of rights and sent a detailed Reservation of Rights letter to Healy Homes. (*See id.* at 15 ¶ 59, 104-110.) West Bend filed its Complaint for Declaratory Judgment on January 3, 2020. (*Id.* at 111-113.)

SUMMARY OF THE ARGUMENT

The Certified Questions should be answered in favor of West Bend. First, the absolute pollution exclusion in the CGL form of the Policy is not limited to only excluding traditional environmental pollution. This is a judicially-created limitation that does not draw directly from the exclusionary language. Instead, a "pollutant" refers to "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste," with "waste" referring to "materials to be recycled, reconditioned or reclaimed." The language is inclusive and contains no internal references to environmental laws or specific types of environmental pollution. Instead, a "pollutant" is "any solid, liquid, gaseous or thermal irritant or contaminant" not bound by any environmental limitations.

The main body of the exclusion is written similarly. The absolute pollution exclusion applies when there is an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" There are no limitations within to environmental laws, that the "pollutant" be hazardous, or any reference to a specific kind of pollution. Further, any limitation to "traditional environmental pollution," as it is generally understood, would effectively rewrite the exclusion to remove the "alleged" or "threaten" language.

Numerous courts have examined the plain language of the absolute pollution exclusion, concluded it is unambiguous as written, and found the exclusion is not limited to traditional environmental pollution.

To the second Certified Question, the "debris, dirt, top soil, mud, silt, and other waste material" alleged in the Underlying Lawsuit are "pollutants." The Hollands assert solid and liquid contaminants were loosened by grading on the ridgetop development and flowed into the their lake during rainstorms. Those contaminants meet the definition of a "pollutant" and satisfies the "actual" and "alleged" requirements within the exclusionary text. Further, several courts have concluded that the absolute pollution exclusion applied in similar contexts to construction fill materials or earth loosened during construction activities that then is swept away by stormwater.

Such an approach is consistent with how Tennessee and federal authorities view sediment and silt in waterways. Several analogous laws treat sediment, silt, and contaminated stormwater runoff as pollutants. Land developers like Healy Homes are required to account for these potential pollutants when developing land. A reasonable person in Healy Homes' position would view and understand that sediment-laden stormwater runoff that flows onto a property adjacent to the development would be "pollution."

STANDARD OF REVIEW

The District Court certified two questions to this Court on an insurance policy. Questions on the extent of coverage permitted by a policy of insurance are contractual questions and, therefore, questions of law. *See St. Paul Fire & Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 833 (Tenn. 1994). Additionally, "Rule 23 permits consideration of questions of law only, not questions of fact or controversies as a whole." *Embraer Aircraft Maint. Servs., Inc. v. AeroCentury Corp.*, 538 S.W.3d 404, 409 (Tenn. 2017) (quoting *Seals v. H & F, Inc.*, 301 S.W.3d 237, 241 (Tenn. 2010)). Certified questions of law are reviewed *de novo*. *Id.*

LAW AND ARGUMENT

Soil science is not a terribly exciting discussion topic. Few people would bring it up for fun; most would make a hasty exit if someone did start discussing it *ad nauseum*. Most people do not regularly discuss the composition of soil.[4] They likely do not consider how soil forms through the interaction of several factors, including location and parent material.[5] Nor would they drone on about the various horizons in soil and how those horizons interact with one another.[6] To pretty much everyone, soil is just "dirt."

"Dirt" on its own seems innocuous. Soil the stuff right below the grass and trees. Farmers plant crops to grow in it. Families build houses on top of it. The dog might dig down into the soil to bury a bone or to exasperate its owner. It is not a natural inclination to view soil or its components as a "pollutant." In its natural, undisturbed state, it is not one. But soil can be disturbed and those disturbances can turn soil into a pollutant.

---

[4] "Soil is a naturally occurring mixture of mineral and organic ingredients with a definite form, structure, and composition" comprised of varying amounts of minerals, water, air, and organic matter. Natural Res. Conservation Serv., *Soils 101*, *available at* https://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/edu/7thru12/?cid=nrcseprd885606#form (last accessed Oct. 15, 2021).

[5] "Soils develop as a result of the interactions of climate, living organisms, and landscape position as they influence parent material decomposition over time." *Id.*

[6] "A soil horizon . . . is a layer within a soil sample that exists because of differences in chemical, physical, and biological processes at different depths below the land surface of the soil, measured from the surface of the land downward." *Babel v. Schmidt*, 765 N.W.2d 227, 236 (Neb. Ct. App. 2009).

Developers disturb the soil when they clear, grub, and regrade land to build residential subdivisions and commercial properties. And developers, such as Healy Homes, are fully aware "[d]isturbed soil, if not managed properly, can be washed off-site during storms." Tenn. Dep't of Env't & Conservation, *Tennessee Erosion & Sediment Control Handbook*, at iii, *available at* https://tnepsc.org/TDEC_EandS_Handbook_2012_Edition4/TDEC%20EandS%20Handbook%204th%20Edition.pdf (last accessed Oct. 15, 2021). The Tennessee Department of Environment and Conservation ("TDEC") notes "[e]xcessive silt" from washed-off soil "causes adverse impacts due to biological alterations, reduced passage in rivers and streams, higher drinking water treatment costs for removing the sediment, and the alteration of water's physical/chemical properties, resulting in degradation of its quality" through a process known as "siltation." *Id.* Because of this, developers like Healy Homes must use erosion prevention and sediment control measures and execute stormwater pollution prevention plans to stop disturbed soil and stormwater runoff from polluting waterways, lakes and ponds, sewer systems, and neighboring lands. *See generally id.* at 72-307.

The Hollands assert Healy Homes wanted to build a subdivision on the ridgetop above their property. Healy Homes moved copious amounts of soil when creating what became the Highlands at Hardin Valley. The Underlying Lawsuit[7] states earthmoving by Healy Homes disturbed the soil so much that

[7] Healy Homes pretends the operative underlying complaint is the First Amended Complaint filed by the Hollands. (Pet'r Br. at 10 n.1.) The Underlying Lawsuit is the one attached to the Complaint for Declaratory Judgment. (*Id.* App. 2 at 89-103.) There is, however, no substantive difference between the two pleadings on the relevant allegations against

substantial rains led to "water, mud, silt and debris from the site project property flow[ing] down the ridge into [Hollands'] lake" and this "flow of water, mud, silt and debris from the site project property into [Hollands'] lake . . . caused significant damage to [the Hollands'] lake rendering it unusable for the purposes for which it was originally constructed." (Pet'r Br. App. 2 at 95 ¶¶ 13-14.) The "increased flow of water, mud, silt and debris has come on the property . . . in large quantities and has flowed into the [Hollands'] lake in a manner that did not occur prior to the [Healy Homes'] actions" and "[t]he stagnant water, mud, silt and debris has rendered the [Hollands'] pond unusable for its prior purposes, unwholesome and unhealthy." (*Id.* ¶ 25.)

The certified questions center on the sediment, silt, and waste materials that flowed from the Highlands at Hardin Valley into the Hollands' lake and ask this Court to decide a question of first impression: how extensive is scope of the absolute pollution exclusion in a CGL form policy? "This type [of] pollution exclusion is common in the insurance industry." *State Auto. Mut. Ins. Co. v. Frazier's Flooring, Inc.*, No. 3:08-CV-178, 2009 WL 693142, at *6 (E.D. Tenn. Mar. 13, 2009). "[I]ts applicability depends upon the affirmative confluence of three elements: the bodily injury or property damage in question must have been caused by exposure to a 'pollutant'; that exposure must have arisen out of the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant; and that discharge, dispersal,

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Healy Homes. The allegations in those two pleadings are the same; the only difference is the addition of the so-called "Steele Defendants," who are alleged to have committed the same acts and omissions as Healy Homes on a separate nearby parcel. (*Compare id. with* Pet'r Br. App. 4-1 at 4-19.)

release, or escape must have occurred at or from certain locations or have constituted 'waste.'" *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789, 801 (Ala. 2002).

Courts, however, have split into "two distinct views on the scope of the exclusion." *Sulphuric Acid Trading Co. v. Greenwich Ins. Co.*, 211 S.W.3d 243, 251 (Tenn. Ct. App. 2006). "One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business." *Id.* (quoting *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1208-09 (Cal. 2003)). "The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution." *Id.* (quoting *MacKinnon*, 73 P.3d at 1209). The overriding question on "whether [the exclusion] is interpreted to apply to any kind of pollution or only traditional environment pollution depends upon which state's law is applied." *Frazier's Flooring*, 2009 WL 693142 at *6.

Issues with delineating the outer boundaries of pollution exclusions started after these exclusions were first introduced into insurance policies during times of heightened environmental awareness. *Sulphuric Acid Trading Co.*, 211 S.W.3d at 248-49 (quoting *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997)). In 1966, insurers switched from accident-based policies to occurrence-based policies in response to courts finding the former covered "pollution-related injuries." *See id.* (quoting *Koloms*, 687 N.E.2d at 80). "Despite these changes, courts continued to construe the policy to cover damages resulting from long-term, gradual

exposure to environmental pollution." *Koloms*, 687 N.E.2d at 80. Subsequent environmental legislation at the federal level spurred further changes as the new laws "included provisions for cleaning up the environment, [which] imposed greater economic burdens on insurance underwriters, particularly those drafting standard-form CGL policies." *Sulphuric Acid Trading Co.*, 211 S.W.3d at 249 (quoting *Koloms*, 687 N.E.2d at 80). Insurers began issuing an endorsement to CGL policies in 1970 that excluded coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants . . . but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." *Id.* at 249-50 (quoting *Koloms*, 687 N.E.2d at 80). This endorsement was "incorporated . . . directly into the body of the policy as exclusion 'f'" in 1973. *Id.* at 250 (quoting *Koloms*, 687 N.E.2d at 80). These exclusions were "[o]riginally developed by commercial insurers in response to environmental regulations enacted by Congress in the 1960s and 1970s which exposed them to exponentially greater liability related to claims arising from mass environmental contamination." *Georgia Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422, 425 (Ga. 2016) (citing *Peace ex rel. Lerner v. Northwestern Nat. Ins. Co.*, 596 N.W.2d 429, 445 (Wis. 1999)). Those initial exclusions "were directed specifically at environmental pollution claims." *Id.*

Following this, insurers and insureds frequently litigated what "sudden and accidental" meant. *See Sulphuric Acid Trading Co.*, 211 S.W.3d at 250 (quoting *Koloms*, 687 N.E.2d at 80-81). The so-called "qualified pollution

exclusion"[8] was redrafted in 1985 into the language that exists today and is at issue before this Court. *See id.* (quoting *Koloms*, 687 N.E.2d at 81). Four key changes were made:

- First, the revised language "dropped the phrase 'but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;'"
- Second, the revised language "dropped the phrase 'into or upon the land, the atmosphere or any water course or body of water;'"
- Third, the revised language "restructured the exclusion and added four conditional phrases including the key phrase 'at or from premises you own, rent or occupy;'" and
- Fourth, the revised language "dropped the adjective 'toxic' before the word 'chemicals.'"

Peace, 596 N.W.2d at 445. Once again, the purpose of these changes was to limit potential liability for the emission of "pollutants," but litigation continued apace with respect to the exclusion's scope. *Sulphuric Acid Trading Co.*, 211 S.W.3d at 250-51 (quoting *Koloms*, 687 N.E.2d at 81).

Tennessee courts have not yet decided on scope of the absolute pollution exclusion. The *Sulphuric Acid Trading Company* court came the closest but it took neither side. 211 S.W.3d at 252-54. That case involved the discharge of "1,800 gallons of sulphuric acid . . . into the air and onto the surrounding area" after "a transloading coupling on top of the rail tank car allegedly broke." *Id.* at 245. An employee of a subcontractor to the loading company

[8] Pollution exclusion versions from 1973 to 1985 were commonly called "qualified pollution exclusions" primarily due to the "sudden and accidental" language that added an exception to the exclusion. *See Drexel Chem. Co. v. Bituminous Ins. Co.*, 933 S.W.2d 471, 474-75 (Tenn. Ct. App. 1996) (discussing the history of the "qualified pollution exclusion").

was sprayed with the acid. *Id.* The injured employee sued the owner of the sulphuric acid and the loading company. *See id.* The owner of the acid filed a declaratory judgment action seeking coverage on the insurance policy of the loading company; the insurer contended the absolute pollution exclusion excluded coverage. *See id.* at 246. The Tennessee Court of Appeals affirmed the decision to grant summary judgment to the insurer. *See id.* at 247-55.

The decision was affirmed without deciding on the scope of the absolute pollution exclusion. The insurer argued the exclusion applied regardless of which interpretive approach was adopted and, alternatively, that the exclusion covered both traditional environmental pollution and the negligent release of toxic substances. *Sulphuric Acid Trading Co.*, 211 S.W.3d at 252-53. The insured loading company posited that the exclusion on barred coverage for "classic environmental pollution" only. *Id.* at 251-52. After reviewing the approaches taken in other jurisdictions, the Tennessee Court of Appeals determined the exclusion language was "not ambiguous" and that the sulphuric acid spill was "the type of 'classic environmental pollution' that would trigger the Absolute Pollution Exclusion under *either* of the two lines of reasoning adopted by the various states." *Id.* at 254 (emphasis in original). Thus, the issue was tabled for the time being. *Id.* at 254 ("As to which of the two diverse lines of cases should be adopted in Tennessee, that decision must await another day and another case.")

Now, the District Court has requested that this Court determine the scope of the absolute pollution exclusion in a form CGL policy and if the "debris, dirt, top soil, mud, silt, and other waste material" that flowed into and fouled the Hollands' lake are "pollutants." (Pet'r Br. App. 1.) Healy

Homes claims this exclusion is ambiguous because Tennessee has no controlling precedent and because there is a disagreement among various courts on the scope of the exclusion. (Pet'r Br. at 17-26.) West Bend takes a straight-forward position based on the actual text found in the exclusion: the exclusion language is not limited to traditional environmental pollution and the "debris, dirt, top soil, mud, silt, and other waste material" in the Underlying Lawsuit are "pollutants."

The Certified Questions turn on interpreting contractual provisions in an insurance policy. *See Lammert v. Auto-Owners (Mut.) Ins. Co.*, 572 S.W.3d 170, 172-73 (Tenn. 2019). Tennessee courts "construe insurance contracts in the same manner as any other contract." *Id.* (quoting *Am. Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 814 (Tenn. 2000)). "The language of the policy must be taken and understood in its plain, ordinary and popular sense." *Hutchison*, 15 S.W.3d at 814. "In addition, contracts of insurance are strictly construed in favor of the insured, and if the disputed provision is susceptible to more than one plausible meaning, the meaning favorable to the insured controls." *Lammert*, 572 S.W.3d at 173 (quoting *Garrison v. Bickford*, 377 S.W.3d 659, 664 (Tenn. 2012)). However, "[a] strained construction may not be placed on the language used to find ambiguity where none exists." *Id.* (quoting *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975)).

I) The Absolute Pollution Exclusion In The Standard CGL Form Applies Beyond Traditional Environmental Pollution

The District Court requested a determination if the exclusion is limited to "traditional environmental pollution." But that raises a question: what

does "traditional environmental pollution" refer to? Courts using this as a limiting principle for the absolute pollution exclusion have not settled on a uniform definition. Generally, it appears to refer to "hazardous material discharged into the land, atmosphere, or any watercourse or body of water." *Kim v. State Farm Fire & Cas. Co.*, 728 N.E.2d 530, 535 (Ill. Ct. App. 2000); *see Westchester Fire Ins. Co. v. City of Pittsburg, Kan.*, 768 F. Supp. 1463, 1471 (D. Kan. 1991) ("environmental degradation or contamination . . . such as waste water treatment, smokestack emissions, or dumping at a landfill"); *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.*, 156 A.3d 539, 626 (Conn. Ct. App. 2017) (definition includes "the dumping of hazardous waste"); *Travelers Indem. Co. v. MTS Transp., LLC*, No. 11-CV-01567, 2012 WL 3929810, at *15 (W.D. Pa. Sept. 7, 2012) ("[T]raditional environmental pollution may be defined as the release of a hazardous substance into the water, land, or air of the United States."); *Starr Surplus Lines Ins. Co. v. Star Roofing, Inc.*, No. 1 CA-CV 18-0641, 2019 WL 5617575, at *5 (Ariz. Ct. App. Oct. 31, 2019) ("an unintended toxic chemical spill or during a hazardous waste remediation effort").

Other courts use other definitions. One court says the term only refers to "environmental catastrophe related to *intentional* industrial pollution." *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 937 (N.J. 2005) (quoting *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. Ct. App. 1996)) (emphasis added). Another approach limits the term to "chemical spills that would require massive and costly environmental cleanups under federal environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")."

Amerisure Mut. Ins. Co. v. Paul Howard Constr. Co., No. 1:06CV202, 2007 WL 9747637, at *6 (M.D.N.C. Mar. 27, 2007) (citing *MacKinnon*, 73 P.3d at 1208-09 (Cal. 2003)). Some courts in the same state cannot even agree on a uniform definition. *Compare Kim*, 728 N.E.2d at 534 ("Traditional environmental pollution" defined as "hazardous material discharged into the land, atmosphere, or any watercourse or body of water.") *with Country Mut. Ins. Co. v. Hilltop View, LLC*, 998 N.E.2d 950, 958 (Ill. Ct. App. 2013) ("We find this definition somewhat misleading because many materials can be hazardous to a body of water but beneficial to the land. As a result, the fact a material is hazardous in certain situations does not always justify a label it constitutes a 'hazardous material.'"). One court summed up the lack of clarity by noting, somewhat tongue-in-cheek, that decisions often "applied the standard used by most courts, *i.e.*, the '"[w]e-know-it-when-we-see-it' standard to determine what constitutes traditional environmental pollution.'" *Chubb Custom Ins. Co. v. Standard Fusee Corp.*, 2 N.E.3d 752, 761 (Ind. Ct. App. 2014) (quoting *Conn. Specialty Ins. Co. v. Loop Paper Recycling, Inc.*, 824 N.E.2d 1125, 1138 (Ill. Ct. App. 2005)).

A contract, however, cannot be subjected to such a definition that changes on the whims of those who review it. The lack of precision in defining "traditional environmental pollution" shows it is an improper tipping point for assessing scope and would result a more splintered body of jurisprudence based on what each court decides that term means. When it comes to determining what a "pollutant" is, the CGL form in the Policy "assign[ed] a specific definition and [did] not leave the term 'pollutant' open

to such an interpretation." *Evanston Ins. Co. v. Harbor Walk Dev., LLC*, 814 F. Supp. 2d 635, 648 (E.D. Va. 2011).

Thus, overriding question is not centered on what "traditional environmental pollution" is but what the absolute pollution exclusion text says. There are two crucial components of the exclusion to assess based on the Certified Questions. The first is there must be a "pollutant," that is, a "solid, liquid, gaseous or thermal irritant or contaminant." (Pet'r Br. App. 2 at 71.) The second is there a movement component of that pollutant through an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape[.]" (*Id.* at 59.) Review of these specific exclusion components[9] show the judicial-imposed limitation to "traditional environmental pollution" does not exist in the Policy language and the unambiguous language goes beyond "traditional environmental pollution."

A) The "Pollutants" In The Policy Go Beyond Traditional Environmental Pollutants

The CGL Form defines a "[p]ollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." (Pet'r Br. App. 2 at 71.) "Irritant," "contaminant," and "waste" are not defined terms in the CGL Form. (*See id.* at 69-72.) "When called upon to interpret a term used in an insurance policy

[9] Exclusion (f) also requires that the at-issue "bodily injury" or "property damage" be caused by the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" (Pet'r Br. App. 2 at 59.) West Bend does not address those components as the District Court limited its Certified Questions to the scope of the exclusion and not the causation or injury requirements.

that is not defined therein, courts in Tennessee sometimes refer to dictionary definitions." *Hutchison*, 15 S.W.3d at 815.

Those definitions are useful in examining what is a "pollutant" for purposes of the absolute pollution exclusion. "An '[i]rritant' is defined as 'a source of irritation" and "'[i]rritation' is defined as 'a condition of inflammation, soreness, or irritability of a bodily organ or part.'" *CBL & Assocs. Mgmt., Inc. v. Lumbermens Mut. Cas. Co.*, No. 1:05-CV-210, 2006 WL 2087625, at *7 (E.D. Tenn. July 25, 2006) (quoting *American Heritage Dictionary of the English Language* 926 (4th ed. 2000)). Another court recently noted an "irritant" was "a substance that makes part of your body sore or painful" or was "a cause of an uncomfortable physical reaction." *Love Lang v. FCCI Ins. Co.*, No. 1:19-CV-3902-AT, 2021 WL 1351857, at *9 (N.D. Ga. Mar. 30, 2021) (quoting *Irritant*, Cambridge Online Dictionary (last accessed Mar. 28, 2021)).

"A 'contaminant' . . . is commonly understood to mean a substance that contaminates by making something unfit for use or impure by the introduction of unwholesome or undesirable elements." *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020, 1024 (Colo. 2013) (collecting cases). It is material that "soil[s], stain[s], corrupt[s], or infect[s] by contact or association" or "render[s] unfit for use by the introduction of unwholesome or undesirable elements." *Webster's Third New International Dictionary* 1491 (2002). A federal court sitting in Tennessee that has interpreted the absolute pollution exclusion noted "'[c]ontaminant' is defined as 'one that contaminates'" while "'[c]ontaminate' means 'to make impure or unclean by contact or mixture.'" *CBL*, 2006 WL 2087625 at *7

(quoting *American Heritage Dictionary of the English Language* 396 (4th ed. 2000)).

The *CBL* court also found "'[w]aste' means 'an unusable or unwanted substance or material, such as a waste product,' 'garbage; trash,' or 'the undigested residue of food eliminated from the body; excrement.'" *Id.* (quoting *American Heritage Dictionary of the English Language* at 1942). The Supreme Court of Michigan determined "'[w]aste' is commonly understood to include sewage" along with "countless other substances typically introduced into a sewer system." *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 113 (Mich. 2005) (finding the absolute pollution exclusion barred coverage of an alleged discharge of overflow sewage into a creek). Another court recently stated, "the common use of waste includes material that is purely garbage, but it also includes excrement and sewage" and "waste must include manure (excrement) even if the manure will eventually be used (i.e., recycled/reconditioned) for fertilizer." *Dolsen Companies v. Bedivere Ins. Co.*, 264 F. Supp. 3d 1083, 1090 (E.D. Wash. 2017) (holding the absolute pollution exclusion precluded coverage for the inadvertent seepage of manure out of holding ponds into the surrounding soil and drinking water). The CGL form clarifies "[w]aste includes materials to be recycled, reconditioned or reclaimed." (Pet'r Br. App. 2 at 71.)

These definitions are not constrained to so-called "traditional environmental pollution." A "pollutant" is "*any* solid, liquid, gaseous or thermal irritant or contaminant, *including* smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (*Id.* (emphases added).) The use of

"including" signals a "pollutant" is not strictly limited to the compounds or solids listed. *See Kendrick v. Kendrick*, 902 S.W.2d 918, 924 (Tenn. Ct. App. 1994) ("When used in conjunction with a general definition, the term 'includes' is a term of enlargement, not limitation.") Rather, those are examples of potential qualifying "irritant[s] or contaminant[s]" and do not comprise all of the possible "irritant[s] or contaminant[s]" that fall within the definition. *See id.* ("[T]he use of the term 'includes' in a statutory definition indicates that the enumerated items that follow are illustrative, not exclusive."). Instead, a "pollutant" covers "*any* solid, liquid, gaseous or thermal irritant or contaminant." (Pet'r Br. App. 2 at 71 (emphasis added).)

Neither these definitions nor the policy language itself require the irritant or contaminant to fall within the range of so-called "traditional environmental pollution." The potential "pollutants" do not have to be a defined hazardous substance "in order to be a toxic substance." *Heringer v. Am. Fam. Mut. Ins. Co.*, 140 S.W.3d 100, 106 (Mo. Ct. App. 2004). The definition of "pollutants" does not contain the word "hazardous" or any synonym of that word. (Pet'r Br. App. 2 at 71.) Nor does the language require an insured to "be found in violation of an environmental law for the pollution exclusion to apply." *Heringer*, 140 S.W.3d at 106 (quoting *Cas. Indemn. Exch. v. City of Sparta*, 997 S.W.2d 545, 550 (Mo. Ct. App. 1999)). The language certainly encompasses polluting events that qualify as traditional environmental pollution but it does not limit exclusion to those alone. *See Firemen's Ins. Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779, 796 (E.D. Va. 2007) ("The Pollution Exclusion clause does not say the discharges or dispersals of pollutants must be 'into the

environment' or 'into the atmosphere,' or in any way indicate that environmental 'incidents' are the only conditions that bar coverage under the clause.").

Such limitations could have easily been included. But those were not put in. Instead, the exclusion as currently worded came about as "insurers revised the language of these clauses in form CGL policies to encompass non-environmental pollution claims, thus substantially broadening their application." *Georgia Farm Bureau*, 784 S.E.2d at 425; *see also Peace*, 596 N.W.2d at 445 (detailing the changes made). The "revised provisions . . . extended the application of pollution exclusions beyond the natural environment to premises owned, rented or occupied by the insured, and removed the adjective 'toxic' before the word 'chemicals,' thus expanding the number of chemicals regarded as pollutants." *Id.* (citing *Peace*, 596 N.W.2d at 445). Taken as a whole, a "pollutant" as defined in this Policy "encompasses more than traditional conceptions of pollution." *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 477 (5th Cir. 1996).

B) The Movement Requirements In The Absolute Pollution Exclusion Are Also Not Constrained To Traditional Environmental Pollution

The movement requirements in the exclusion are also not limited to "hazardous material discharged into the land, atmosphere, or any watercourse or body of water." *Kim*, 728 N.E.2d at 535. The CGL form requires an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" (Pet'r Br. App. 2 at 59.) Some courts have taken the view that "discharge, dispersal, seepage, migration, release or escape" are "terms of art in environmental law, generally used to

describe the improper disposal or containment of hazardous waste." *Peace*, 596 N.W.2d at 444 (quoting *Sphere Drake Ins. Co. v. Y.L. Realty Co.*, 990 F. Supp. 240, 243 (S.D.N.Y. 1997)). But, again, this reads something into the Policy language that is not present.

"[D]ischarge, dispersal, seepage, migration, release or escape" can be assessed just as "irritant" and contaminant" were assessed above. *See Hutchison*, 15 S.W.3d at 815. These words focus on similar types of actions:

- "Discharge" means "[t]o release, as from confinement" "[t]o pour forth, emit, or release contents." *Peace*, 596 N.W.2d at 438 (quoting *American Heritage Dictionary of the English Language* 530 (3d ed. 1992)).
- "Dispersal" means ""the condition of being dispersed," "scatter[ed] in different directions," or "strew[n] or distribute[d] widely." *Id.* (quoting *American Heritage Dictionary* at 537).
- "Seepage" means "[t]he act or process of seeping," "ooze," or "[t]o enter, depart, or become diffused gradually." *Id.* (quoting *American Heritage Dictionary* at 1634).
- "Migration" means "'[t]he act or an instance of migrating,' as in moving from one location and settling in another." *Hirschhorn v. Auto-Owners Ins. Co.*, 809 N.W.2d 529, 539 (Wis. 2012) (quoting *Peace*, 596 N.W.2d at 538); *see American Heritage Dictionary* at 1143.
- "Release" means ""liberation" or "[a]n unfastening or letting go[.]" *Peace*, 596 N.W.2d at 538 (quoting *American Heritage Dictionary* at 1524).
- "Escape" means "[a] means of obtaining temporary freedom" or "[a] gradual effusion of an enclosure; a leakage." *Id.* (quoting *American Heritage Dictionary* at 625-26).

Read as a whole, those terms "appear to describe the entire range of actions by which something moves from a contained condition to an uncontained condition." *Peace*, 596 N.W.2d at 438.

These are ordinary words people use in everyday life. The mere fact that environmental scientists use these words when discussing pollution events does not turn these words into technical terminology. "[T]echnical terms and words of art are given their technical meaning when used in a transaction within their technical field." Restatement (Second) of Contracts § 202(3)(b) (1981). This Policy is a contract for insurance and not a scientific treatise. "The intention of the parties is based on the *ordinary* meaning of the language contained within the four corners of the contract." *84 Lumber Co. v. Smith*, 356 S.W.3d 380, 383 (Tenn. 2011) (emphasis added).

Additionally, limiting the exclusion to the discharge of hazardous material into the environment ignores core pieces of the exclusion's language. The CGL form clearly states the movement can be an "*actual, alleged or threatened* discharge, dispersal, seepage, migration, release or escape[.]" (Pet'r Br. App. 2 at 59 (emphasis added.) Any limitation to traditional environmental pollution means the focus is only an "actual" discharge to the exclusion of an "alleged or threatened" discharge. "Alleged or threatened" does not require the "actual" release of a "pollutant" for the exclusion to be triggered. Reduction of the exclusion to traditional environmental pollution only would nullify the "alleged or threatened" language clearly in the contract. *Cf. Fireman's Ins. Co.*, 474 F. Supp. 2d at 796 ("The Pollution Exclusion is quite specific. To hold in favor of the Defendants would require this Court to interject words into the writing

contrary to the elemental rule that the function of the court is to construe the contract made by the parties, and not to reformulate a contract for them.").

Likewise, if the exclusion was designed to only exclude costs for "hazardous material discharged into the land, atmosphere, or any watercourse or body of water," *Kim*, 728 N.E.2d at 535, then the drafters would not have "dropped the phrase 'into or upon the land, the atmosphere or any water course or body of water'" when revising the qualified pollution exclusion into the current absolute pollution exclusion. *See Peace*, 596 N.W.2d at 445. "Modification of this language was clearly intended to expand the pollution exclusion to permit insurers to deny coverage for within-premises contamination, as well as broadly dispersed environmental pollution." *Mount Vernon Fire Ins. Co. v. Valencia ex rel. Viruet*, No. 92 CV 1253 RR, 1993 WL 13150704, at *7 (E.D.N.Y. Aug. 6, 1993).

C) Numerous Courts Have Concluded The Absolute Pollution Exclusion Is Not Limited To Traditional Environmental Pollution

Substantial authority exists that supports this broader scope. A federal court sitting in Tennessee has concluded this Court would not limit the absolute pollution exclusion to only traditional environmental pollution. *See CBL*, 2006 WL 2087625 at *6-8. *CBL* involved a lawsuit by a mall tenant against its landlord over a "plumbing problem . . . that 'caused sewage, debris, waste and water to shoot out of the sink drains and flood [the tenant's space] during rainfalls.'" *Id.* at *1. The "plumbing problem" was an improperly constructed storm sewer system that tied into the building sewer system for the mall. *Id.* The insured landlord's insurance policies contained the same pollution exclusion seen in WBMI's CGL Form. *Id.* at *2. The

insurers relied on the pollution exclusions to decline defending the landlord when the tenant filed suit against the landlord, who maintained the sewer systems. *Id.* at *2-3. The landlord sued the insurers and argued the pollution exclusions "apply only to traditional environmental pollutants and not to sewage and waste." *Id.* at *6.

The *CBL* court disagreed. It acknowledged the disparate lines of cases interpreting the exclusion. *Id.* at *7-8. But it also reviewed the definition of "pollutants" along with common usage definitions for the terms "irritant," "contaminant," and "waste," which were not defined in the policies. *Id.* at *6-7. The *CBL* court reasoned the "sewage, debris, waste, and water" that flooded the tenant's space qualified as "contaminants" and "waste," which triggered the exclusions. *Id.* at *7. The court then found Tennessee courts[10] "would adopt the reasoning of the second line of cases and would conclude that the pollution exclusion applies to all types of pollution, including sewage, and not just to traditional environmental pollutants." *Id.* at *8. It came to this conclusion based on "the Tennessee rules of construction for interpreting insurance policies." *Id.*

The *CBL* court is not the only court to come to this conclusion. According to one court, "[a] majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law

[10] Another federal court in Tennessee has also applied the absolute pollution exclusion but it did not get into any detailed scope analysis as the decision was made on a motion for default judgment. *See Certain Underwriters at Lloyd's, London v. Alkabsh*, No. 09-2711, 2011 WL 938407, at *8-9 (W.D. Tenn. Mar. 15, 2011) (gasoline leaking from an underground storage tank on the insureds' property was a "pollutant" and the exclusion was unambiguous).

and, thus, exclude coverage for all claims alleging damage caused by pollutants." *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112, 118 (Neb. 2001). Consistent with this, numerous other courts have determined the absolute pollution exclusion is not limited to "traditional environmental pollution." *See*, *e.g.*, *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 885 (8th Cir. 2014) (applying Missouri law); *Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821, 826 (4th Cir. 1998) ("That the pollution exclusion at issue here clearly is not limited to atmospheric or environmental pollution further supports the argument that it should be enforced as written.") (applying D.C. law); *Certain Underwriters at Lloyd's v. C.A. Turner Const.*, 112 F.3d 184, 188 (5th Cir. 1997) ("[T]he phenol gas emission constituted bodily-injuring pollution or contamination, and coverage for C.A. Turner's claim is precluded under the pollution exclusion clause.") (applying Texas law); *Nethery*, 79 F.3d at 477 (5th Cir. 1996) ("The pollution exclusion at issue encompasses more than traditional conceptions of pollution.") (applying Mississippi law); *Georgia Farm Bureau*, 784 S.E.2d at 425 ("Georgia courts have repeatedly applied these clauses outside the context of traditional environmental pollution."); *Bituminous Cas. Corp. v. Cowen Const., Inc.*, 55 P.3d 1030, 1035 (Okla. 2002); *Porterfield*, 856 So. 2d at 805-06; *Becker Warehouse*, 635 N.W.2d at 120 ("The language of the policy does not specifically limit excluded claims to traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage."); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779–80 (Minn. 1999) ("The

'absolute pollution exclusion' clause at issue eliminates all language limiting coverage by describing the objects to be affected by the pollutants."); *Peace*, 596 N.W.2d at 437-38; *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998).

The breadth of authority rejecting the "traditional environmental pollution" restriction relies on a plain reading of the exclusionary language without applying any outside influences or implicit assumptions on what the absolute pollution exclusion covers. *Cf. Porterfield*, 856 So. 2d at 800-01 ("To guide our approach to this universe of precedent, we first parse the structure of the absolute pollution-exclusion clause at issue here."). Review of Exclusion (f) in the CGL form of the Policy shows "no distinction between 'traditional environmental pollution' and injuries arising from normal business operations." *Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216, 221 (Iowa 2007) (assessing two Total Pollution Exclusions with Hostile Fire exceptions).

II) The "Debris, Dirt, Top Soil, Mud, Silt, And Other Waste Material" From The Underlying Lawsuit Are "Pollutants" Under The CGL Form Pollution Exclusion

Using Tennessee's contractual interpretation approach in conjunction with authorities using a similar approach, the "debris, dirt, top soil, mud, silt, and other waste material" that flowed into the Hollands' lake are "pollutants" under the absolute pollution exclusion in the CGL form.

A) The "Debris, Dirt, Top Soil, Mud, Silt, And Other Waste Material" Satisfy The Policy Definition Of "Pollutants"

Both conditions from the Certified Questions exist here. The two factors at issue is there must be a "pollutant" and some modicum of movement of

that "pollutant." First, the Underlying Lawsuit shows the Hollands complain of "pollutants." The Hollands state "water, mud, silt and debris" and a "deposit of debris, dirt, top soil, and other waste material" fouled their lake. (Pet'r Br. App. 2 at 95-96 ¶¶ 13-14, 18(c).) The underlying allegations assert the soil, silt, debris, and waste materials made the lake "unusable for the purposes for which it was originally constructed," the lake "was rendered unfit for the purposes previously used," made the lake "unwholesome and unhealthy," and the Hollands suffered "substantial ongoing property damage." (*Id.* at 95 ¶ 14, 100 ¶ 25 & 101 ¶ 32.) This complains of damage by both solid contaminants and liquid contaminants.[11] The soil, silt, debris, and waste material are solids that have turned the lake from a useful body of water into a contaminated body of water that cannot be used as intended. Further, the reference to "water" describes sediment-laden stormwater runoff, in which the colloidal particles from soil and silt are suspended. (*See id.*) This leads to downstream complications "[w]hen sediment is released by construction operations and settles in ponds, lakes, streams, and other water sources, [and] the resulting change can damage wildlife and fish habitats and cause other environmental complications." *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560, 563 (E.D.N.C. 1996). These suspended soil components "do not significantly dissipate or dissolve over time" and "when discharged into a

[11] "Under the policy, a pollutant includes the following: (1) any solid irritant; (2) any liquid irritant; 3) any gaseous irritant; (4) any thermal irritant; (5) any solid contaminant; (6) any liquid contaminant; (7) any gaseous contaminant; and (8) any thermal contaminant." *Peace ex rel. Lerner v. Nw. Nat. Ins. Co.*, 596 N.W.2d 429, 436 (Wis. 1999).

system such as [a] lake[], stay intact over time and thus continue to have roughly the same net polluting effect years or even decades after the time of their deposit." *City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008).

Moreover, the movement requirements are satisfied. Again, there must be an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape[.]" (Pet'r Br. App. 2 at 59.) The Underlying Lawsuit is littered with examples showing movement of the contaminants onto the Hollands' property and into their lake. The Hollands allege the earthwork for the Highlands at Hardin Valley "altered" the natural runoff courses and substantial rains led to flows full of contaminants pouring into their lake. (*Id.* at 95 ¶ 13.) These flows did not happen prior to the development being constructed. (*Id.* ¶ 14.) The allegations in the Underlying Lawsuit emphasize this:

- Healy Homes "wrongfully and willfully diverted from its natural course the rainfall and water falling on the premises belonging to the Defendants and caused the same to be discharged and flow onto the property of the Plaintiffs;"
- Healy Homes "knew or should have known that the above-mentioned development and grading would cause water, mud, silt and debris to flow onto the property of the Plaintiffs and into the Plaintiffs' lake,"
- The work by Healy Homes resulted in an "increased flow of water, mud, silt and debris" onto their premises and "flowed into the [Hollands'] lake in a manner that did not occur prior" to the Healy Homes development; and
- Now, "water flows freely onto the [Hollands'] property during rain events and flows into the [Hollands'] lake, carrying mud, silt and debris."

(*Id*. at 99-10 ¶¶ 23-25, 101 ¶ 33.)

The Hollands clearly allege a "discharge." They even say pollutants were "discharged" onto their property. (*Id.* at 99 ¶ 23.) The Hollands also allege a "release" or "escape" given they assert the project earthwork led to sediment-laden stormwater runoff taking new channels and directions off the property to which it was supposed to remain and entered the Hollands' property and lake. These descriptions by the Hollands satisfy the second prong in the exclusion.

B) Other Courts Agree Sediment, Silt, And Waste That Flow Into Waterways From Earthmoving And Grading Activities Are "Pollutants"

Numerous courts have concluded slurries of "water, mud, silt and debris" and "other waste material" similar to what befell the Hollands are "pollutants." *See, e.g., Triangle Paving*, 973 F. Supp. at 563. *Triangle Paving* is substantially similar to this matter. The insured prime contractor hired a subcontractor to "perform site work for the construction of a shopping center development" but "[d]espite precautions taken by defendant, sediment dislodged by the construction activity escaped the construction site and contaminated downstream water located on private property." *Id.* at 562. Notices of violations were issued to the prime contractor and the downstream property owner complained of damage. *Id.* The insurer sought a declaration that coverage was not owed based on the absolute pollution exclusion. *See id.* at 561-62. The district court in North Carolina examined North Carolina law to assess the scope of the exclusion. *See id.* at 562-63. The *Triangle Paving* court determined the sedimentation was a "solid

contaminant" based on a review of the policy and in conjunction with North Carolina's treatment of sedimentation as pollution. *See id.* at 563-64. It rejected the argument that "the pollution exclusion only encompasses industrial-related contamination" based on the policy terms and North Carolina law. *Id.* at 565-66. In doing so, the court also rejected an attempt by the insured to defeat the exclusion by claiming it did not "regard ordinary sediment runoff to qualify as a pollutant."[12] *Id.*

Other courts have come to similar conclusions when construction excavation material and sediment was not properly corralled and flowed into local waterways. *See*, *e.g.*, *JTO, Inc. v. Travelers Indem. Co. of Am.*, 242 F. Supp. 3d 599, 607 (N.D. Ohio 2017) ("discharge of dredged and fill material into the waterways"); *Essex Ins. Co. v. H & H Land Dev. Corp.*, 525 F. Supp. 2d 1344, 1352–53 (M.D. Ga. 2007) ("Essex has presented persuasive authority that storm water runoff and the resulting sediment deposits are 'contaminants' excluded by the terms of such a pollution exclusion.");

[12] Healy Homes attempts the same maneuver in its Brief. (*See* Pet'r Br. at 27-28.) As the *Triangle Paving* court observed, "[i]f defendant's reasoning was adopted, an insured could always create an ambiguity by claiming that it did not interpret an exclusion to apply to its particular conduct. Ambiguities cannot be manufactured so easily." 973 F. Supp. at 565. Similarly, Healy Homes cannot override the terms and scope of its Policy by now claiming it has a different understanding of "pollutants" after West Bend contested coverage. *Cf. Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 694 (Tenn. 2019) ("Tennessee courts 'give primacy to the contract terms, because the words are the most reliable indicator – and the best evidence – of the parties' agreement when relations were harmonious, and where the parties were not jockeying for advantage in a contract dispute.'" (quoting 21 Steven W. Feldman, *Tennessee Practice: Contract Law and Practice* § 8:14 (June 2018)).

Century Communities of Georgia, LLC v. Selective Way Ins. Co., No. 1:18-CV-5267-ODE, 2019 WL 7491504, at *1 (N.D. Ga. Oct. 25, 2019) ("runoff of water, sediment, silt, mud, and other pollutants" from residential subdivision construction project); *see also Ortega Rock Quarry v. Golden Eagle Ins. Corp.*, 141 Cal. App. 4th 969, 980-90 (Cal. Ct. App. 2006) (discharge of fill material into creek during rainstorms); *New Salida Ditch Co. v. United Fire & Cas. Ins. Co.*, No. 08-CV-00391-JLK, 2009 WL 5126498, at *9 (D. Colo. Dec. 18, 2009) ("unpermitted discharge of fill material into the Arkansas River"). Some courts have concluded *uncontaminated* storm water runoff satisfies the definition of "pollutants." *See Centro Dev. Corp. v. Cent. Mut. Ins. Co.*, 720 F. App'x 1004, 1005 (11th Cir. 2018); *Associated Indem. Corp. v. Hughes*, No. 4:18-CV-00201-HLM, 2019 WL 2713056, at *7 (N.D. Ga. Apr. 25, 2019). These precedents mesh with the terms within the absolute pollution exclusion and show the Hollands complain of "pollutants."

C) Federal And Tennessee Law Treat Contaminated Stormwater Runoff And Sedimentation As Pollutants

Statutes also provide guidance confirming the flow and "deposit of debris, dirt, top soil, and other waste material" in the Hollands' lake are "pollutants." Courts examining absolute pollution exclusions have found "state and federal environmental laws may provide insight into the scope of the policies' definition of pollutants without being specifically incorporated in those definitions." *Ortega Rock Quarry*, 141 Cal. App. 4th at 980. These courts looked at relevant authorities to assess how those states treat unconstrained sediment and fill material from construction sites. *See*, *e,g.*,

JTO, 242 F. Supp. 3d at 607 (looking to Ohio and federal environmental statutes to determine if the allegations in the underlying complaint were of "traditional environmental pollution"); *Triangle Paving*, 973 F. Supp. at 563-64 (examining North Carolina statutes and regulations on sedimentation); *New Salida Ditch Co.*, 2009 WL 5126498 at *8 ("It is [] undisputed that fill material is regulated as a pollutant by both the Clean Water Act and the Colorado Water Quality Control Act and their implementing regulations."). "A review of the extensive state and local commentary on the topic helps to supply the common meaning or understanding." *Triangle Paving*, 973 F. Supp. at 565; *see id.* at 563 ("Recognizing that sedimentation is not excluded as a type of pollutant based on the enumerated examples, the issue becomes whether a reasonable person in the position of defendant would understand the pollution exclusion to encompass sedimentation contamination as a solid contaminant."); *see also New Salida Ditch Co.*, 2009 WL 5126498 at *8 (discussing how consideration of federal and state regulations on fill material "is an important factor in determining the plain meaning of the TPE within the context of this dispute.")[13]

As a land developer operating in Tennessee, Healy Homes was aware, or should have been aware, that it polluted the Hollands' lake. Federal law treats sediment and silt runoff as pollution. Construction sediment and spoil are "pollutants" under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et*

[13] Referencing these types of authorities does not introduce ambiguity into the language of the policy. The lack of incorporation of federal or state statutes defining or discussing types of pollution does not make the policy language ambiguous. *See Ortega Rock Quarry*, 141 Cal. App. 4th at 980-81.

seq. *See*, *e.g.*, *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 676 (E.D.N.C. 2003) (collecting cases). Under the CWA, a "'[p]ollutant' includes not only traditional contaminants like 'radioactive' or 'chemical waste,' but also basic solids like 'dredged spoil, . . . rock, sand [and] cellar dirt.'" *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) (quoting 33 U.S.C. § 1362(6)); *see also* 33 C.F.R § 323.2(e)(2) (defining "fill materials" subject to regulation if placed into the waters of the United States). A federal district court in Tennessee looked at the CWA's definition of "pollutant" in this context. *See Tungett v. Papierski*, No. 3:05-CV-289, 2006 WL 51148, at *2 (E.D. Tenn. Jan. 10, 2006). It held that while "sediment, soil, dirt, trees, and organic debris are not expressly included" in the definition of "pollutant" those items are nevertheless "pollutants" based on the breadth of the term's definition. *See id*. (collecting and quoting cases).

Comparable provisions in the Tennessee Water Quality Control Act ("TWQCA"), Tenn. Code Ann. § 69-3-101 *et seq*., track the federal definition of a "pollutant" since the TWQCA applies the same aims as the CWA. *Cf. Jones v. City of Lakeland*, 224 F.3d 518, 526 (6th Cir. 2000) (en banc) ("The overarching goals of the Clean Water Act and the TWQCA are the same: each seeks to abate existing water pollution, reclaim polluted waters, prevent future pollution, and plan for the future use of water resources."). The TWQCA defines a "pollutant" as "sewage, industrial wastes, or other wastes." Tenn. Code Ann. § 69-3-103(28). "Other wastes" means "any and all other substances . . . including, but not limited to, decayed wood, *sand*,

garbage, *silt*, . . . *dredged spoil*, solid waste, . . . sewage sludge, . . . *biological materials*, . . . rock, and *cellar dirt*." *Id.* § 69-3-103(24) (emphases added). "Pollution" is defined as the "alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state, including, but not limited to, changes in temperature, taste, color, turbidity, or odor of the waters that will . . . [r]esult or will likely result in harm, potential harm or detriment to the health of animals, birds, fish, or aquatic life." *Id.* § 69-3-103(29). Any construction activities that could impact the waters of Tennessee require a permit for the project to proceed. *See* Tenn. Code Ann. § 69-3-108.

TDEC is equally clear on how it views sediment and silt that has escaped construction sites. "Silt is one of the most frequently cited pollutants in Tennessee waterways." *Tennessee Erosion & Sediment Control Handbook* at iii. Elsewhere, TDEC states stormwater runoff "picks up *pollutants like* trash, chemicals, oils, and *dirt/sediment* that can harm our rivers, streams, lakes, and wetlands." Tenn. Dep't of Env't & Conservation, *NPDES Stormwater Permitting Program*, *available at* https://www.tn.gov/environment/permit-permits/water-permits1/npdes-permits1/npdes-stormwater-permitting-program.html (last accessed Oct. 15, 2021) (emphases added). "Operators of construction sites involving clearing, grading or excavation that result in an area of disturbance of one or more acres" must obtain a National Pollutant Discharge Elimination System ("NPDES") Stormwater Construction Permit through TDEC to proceed. *See* Tenn. Dep't of Env't & Conservation, *NPDES Stormwater Construction Permit*, *available at* https://www.tn.gov/content/tn/environment/permit-

permits/water-permits1/npdes-permits1/npdes-stormwater-permitting-program/npdes-stormwater-construction-permit.html (last accessed Oct. 15, 2021). The Highlands at Hardin Valley project comprised twenty acres of land; Healy Homes would have had to obtain a NPDES permit to build the subdivision and the grading plans required approval by the "Knox County Commission." (Pet'r Br. App. 2 at ¶¶ 10-11.)

Knox County shares the same view as TDEC. The Hollands noted the Highlands at Hardin Valley "sits on top of a ridge" in Knox County, Tennessee. (Pet'r Br. App. 2 at 92 ¶ 2, 94 ¶¶ 7, 11.) Knox County has implemented a Hillside and Ridgetop Protection Plan to protect ridgelines and minimize the downstream impact of developing those areas. *See* Knoxville Knox County Metro. Planning Comm'n, *Knoxville • Knox County Hillside and Ridgetop Protection Plan*, *available at* https://archive.knoxplanning.org/plans/taskforce/hrpp_adopted.pdf (last accessed Oct. 15, 2021). Within, Knox County states "[s]ediment is the foremost pollutant in Knox County's waterways" and "[c]onstruction activities, particularly grading and cleared un-stabilized sites are major causes" of this pollution. *Id.* at 16. This "[s]ediment increases flooding, impacts public and private water supply, and destroys aquatic habitat" in part because "runoff that flows across an uncovered lot can release as much as 30 tons of soil during a rain storm." *Id*. The Hollands complained of exactly these types of events when they asserted the negligent clearing and grading led to sediment and silt runoff during major rain events that hit the ridge above their land. (Pet'r Br. App. 2 at 95 ¶ 13.)

The ordinances in Knox County also speak to this. The Hollands assert they made "filed reports with Knox County about the flooding issues" and Healy Homes had been advised it was "not in compliance with the requirements of the Knox County Code." (Pet'r Br. App. 2 at 101 ¶ 31.) Knox County requires land developers to implement and maintain erosion prevention and sediment control measures during grading and construction activities. *See* Knox Co. Code §§ 26-252, -273. Nonconforming measures or failures to implement those measures that lead to "off-site sedimentation or sediment discharges to waters of the state or onto adjacent properties shall be in violation" of that code. *Id.* § 26-251.

These provisions suggest that construction spoil, soil, sediment, and waste swept offsite by stormwater are reasonably understood[14] as "pollutants" in the area Healy Homes operates. Healy Homes was aware its plans required substantial earth movement on a ridgetop site with slopes

[14] Healy Homes relies on *Ryan v. MFA Mutual Insurance Company*, 610 S.W.2d 428 (Tenn. Ct. App. 1980), for the proposition that the "reasonable expectations" of the insured control when an ambiguity is found, thus its declarations should be credited and considered. (Pet'r Br. at 26-27.) This position misconstrues *Ryan*. The portion Healy Homes quotes from is an assessment of how a Delaware court applied Delaware law when deciding if an innocent co-insured could recover when the other co-insured burned the house down. *See id.* at 436 (citing and discussing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398 (Del. 1978)). The Court of Appeals did not decide the case based on Delaware law or the "reasonable expectations" of the innocent co-insured under Tennessee law. *See id.* at 437. This Court, when it examined *Ryan*, also did not adopt a "reasonable expectations of the insured" approach. *See Spence v. Allstate Ins. Co.*, 883 S.W.2d 586 (Tenn. 1994).

exceeding 25% between the Highlands at Hardin Valley parcel and the Hollands' property. (*Id.* ¶ 11.)

A residential developer must account for the potential impact of stormwater runoff carrying silt, sediment, and debris off-site and into bodies of water, as well as the environmental impact of the same to adjacent landowners and downstream waterways. Healy Homes had to prepare detailed plans to demonstrate to Knox County how Healy Homes was going to prevent sediment and stormwater runoff during construction and from impacting downstream properties. These laws and regulations strongly suggest a developer in the same position as Healy Homes would understand and appreciate that a "deposit of debris, dirt, top soil, and other waste material" in the Hollands' lake was a conglomeration of "pollutants" and would be treated as such by governing authorities when violations occurred.

CONCLUSION

For the above-stated reasons, this Court should HOLD as a matter of law that the absolute pollution exclusion in the CGL form of the Policy is not limited to traditional environmental pollution and that the "debris, dirt, top soil, mud, silt, and other waste material" that damaged (or allegedly damaged) the Hollands' lake in the Underlying Lawsuit are "pollutants" as defined in the CGL form of the Policy.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief complies with the requirements set forth in Section 3.02(a) of Rule 46 of the Rules of the Tennessee Supreme Court. This brief contains 10,709 words, excluding those not to be counted pursuant to the foregoing Rule.

/s/ Jeffrey E. Nicoson
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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that the foregoing document has been served upon all counsel in this cause by via electronic notification or by placing a true and correct copy of same in the United States mail, postage prepaid, in a properly addressed envelope, or by hand delivering same to each such attorney as follows:

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