

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 12, 2023 Session

<b>FILED</b> 08/07/2023 Clerk of the Appellate Courts
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**SHARON WEATHERLY v. EASTMAN CHEMICAL COMPANY**

**Appeal from the Circuit Court for Sullivan County  
No. C43750(M) John S. McLellan, III, Judge**

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**No. E2022-01374-COA-R3-CV**

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The plaintiff brought an action seeking damages for diminution of real property value, alleging that the defendant’s steam pipe exploded, causing toxic debris, including asbestos, to fall on the plaintiff’s real property. The plaintiff’s claims included strict liability for ultra-hazardous activity, ordinary negligence, negligence per se, public nuisance, trespass, continuing private nuisance, and medical monitoring. The trial court dismissed the entire amended complaint without prejudice pursuant to Tennessee Rule of Civil Procedure 12.02(6) after finding that the plaintiff failed to comply with the Tennessee Asbestos Claims Priorities Act. The trial court also dismissed the claims for strict liability, negligence per se, trespass, and medical monitoring with prejudice. Upon review, we affirm the trial court’s dismissal of the entire complaint without prejudice, as well as the dismissal of the plaintiff’s negligence per se, trespass, and medical monitoring claims with prejudice. We reverse the trial court’s dismissal of the strict liability claim with prejudice.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed in part, Reversed in part; Case Remanded**

JOHN W. MCCLARTY, J., delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, and KRISTI M. DAVIS, JJ., joined.

Gregory F. Coleman, Louis W. Ringger, III, William A. Ladnier, Virginia Whitener, and Luke Widener, Knoxville, Tennessee, for the appellant, Sharon Weatherly.

Jimmie C. Miller and Joseph B. Harvey, Kingsport, Tennessee, and Robert F. Parsley, Chattanooga, Tennessee, for the appellee, Eastman Chemical Company.

## OPINION

### I. BACKGROUND

The Appellant, Sharon Weatherly (“Plaintiff”), filed this class action lawsuit against the Defendant-Appellee, Eastman Chemical Company (“Eastman”). As alleged in Plaintiff’s amended complaint, Eastman operated a steam pipe that carried steam to and throughout its chemical product manufacturing plant in Kingsport, Tennessee. On January 31, 2022, the pipeline ruptured, causing a loud noise and the release of a massive plume of steam, debris, and various contaminants and toxins into the air. Nearby homes shook. The plume extended high into the sky and continued to release debris and contaminants into the air and surrounding communities. Some of the debris included asbestos-containing material, primarily insulation that covered the piping. Debris from the steam pipe was blown into an approximately two-block area adjacent to Eastman’s facility.

On February 14, 2022, Plaintiff filed a complaint<sup>1</sup> alleging that her property value was diminished due to “reputational harm” because “debris and various contaminants, including asbestos and other toxins” had entered her property. The complaint alleges that “[t]he contaminants released are dangerous and pose significant risks to human health.”

Eastman answered the complaint on April 6, 2022. On June 3, 2022, Eastman moved to dismiss the complaint pursuant to Tennessee Rules of Civil Procedure 12.02(6), failure to state a claim upon which relief can be granted, and 12.03, judgment upon the pleadings, and the Tennessee Asbestos Claims Priorities Act (“TACPA”), Tenn. Code Ann. §§ 29-34-701—29-34-709. Plaintiff’s complaint does not mention TACPA, but Eastman maintained that TACPA was implicated based on the complaint’s allegations.

The parties agreed that Plaintiff could amend her complaint. The June 17, 2022 operative amended complaint sets forth the following claims for relief: (1) strict liability for ultra-hazardous activity; (2) negligence, including ordinary negligence and negligence per se; (3) public nuisance; (4) trespass; (5) continuing private nuisance; and (6) medical monitoring. Plaintiff’s amended complaint acknowledges that, since the days following the explosion, “she has not seen as much visible debris on her property.” However, “[s]he worries . . . that contaminants from the explosion have entered into her home and been deposited into the ground on and around her property, which she worries could negatively

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<sup>1</sup> Plaintiff’s complaint and operative amended complaint seek class certification under Tennessee Rule of Civil Procedure 23. Plaintiff’s proposed class includes “[a]ll persons owning real property within close proximity of the Eastman plant on January 31, 2022, whose property values have been negatively affected due to the Eastman steam line explosion.” Because Plaintiff’s amended complaint was dismissed before a class was certified, generally we will refer only to the allegations made by Plaintiff on her own behalf and not to those made on behalf of the proposed class.

impact her health, her family's health, and her pets' health." Plaintiff further alleges that, "[s]ince the steam line failure, [Plaintiff] is aware that some residents in the community have reported negative health effects, including headaches, nausea, and skin rashes. [Plaintiff] herself experienced nausea and what she describes as a "stomach was on fire" sensation. Plaintiff alleges that:

The steam line explosion released these contaminants, including asbestos and other toxins, into the air in and eventually all around [Plaintiff's] property and other properties throughout her neighborhood.

...

As a result, the value of [Plaintiff's] residence, as well as those of her entire neighborhood, have been negatively affected. And upon information and belief, due to the legitimate concern and public perception that these types of incidents will continue to occur in the future, the property values throughout [Plaintiff's] neighborhood and beyond will be negatively affected for many years to come.

On June 22, 2022, Eastman again moved to dismiss the amended complaint pursuant to Tennessee Rules of Civil Procedure 12.02(6), 12.03, and TACPA. Eastman argued that the claims brought in Plaintiff's amended complaint fall within the definition of an "asbestos action" under TACPA and, because Plaintiff admittedly did not comply with the threshold procedural requirements to bring a claim under TACPA, Plaintiff's amended complaint should be dismissed.

Following a hearing on August 17, 2022, the trial court granted Eastman's motion to dismiss the amended complaint. By order entered August 30, 2022, the trial court found that "the claims asserted in Plaintiff's Amended Complaint arise out of, are based on, and relate to the fear of exposure to asbestos and the health effects of exposure to asbestos." The trial court noted that the amended complaint mentioned asbestos eighteen times "and asbestos is an essential element of Plaintiff's claims." Accordingly, the trial court concluded that the amended complaint, and all the claims asserted therein, met the definition of an "asbestos action" and were subject to dismissal without prejudice under TACPA due to Plaintiff's admitted failure to comply with the procedural requirements of the statute and because she never alleged a physical impairment.

The trial court's order then went further and dismissed four of Plaintiff's six claims with prejudice based on its finding that Plaintiff failed to plead essential elements of those claims. The four claims dismissed with prejudice were: Count 1 for strict liability; Count 2 for negligence per se; Count 4 for trespass; and Count 6 for medical monitoring. According to the trial court, the other claims—Plaintiff's claims for ordinary negligence (also Count 2), public nuisance (Count 3), and continuing private nuisance (Count 5)—

were dismissed without prejudice when the trial court dismissed Plaintiff's amended complaint in its entirety under TACPA. Plaintiff appealed.

## II. ISSUES

We restate the issues on appeal as follows:

- A. Whether the trial court erred in finding that Plaintiff's claims constitute an "asbestos action" as defined under TACPA and dismissing Plaintiff's claims without prejudice for failure to comply with TACPA.
- B. Whether the trial court erred in dismissing Plaintiff's claim for strict liability with prejudice.
- C. Whether the trial court erred in dismissing Plaintiff's claim for negligence per se with prejudice.
- D. Whether the trial court erred in dismissing Plaintiff's claim for trespass with prejudice.
- E. Whether the trial court erred in dismissing Plaintiff's claim for medical monitoring with prejudice.

## III. STANDARD OF REVIEW

Regarding a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss, our Supreme Court has instructed as follows:

A motion to dismiss a complaint for failure to state a claim for which relief may be granted tests the legal sufficiency of the plaintiff's complaint. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011); *cf. Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 406 (Tenn. 2002). The motion requires the court to review the complaint alone. *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief, *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011), or when the complaint is totally lacking in clarity and specificity, *Dobbs v. Guenther*, 846

S.W.2d 270, 273 (Tenn. Ct. App. 1992) (citing *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn. 1986)).

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010); *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d at 700. Accordingly, in reviewing a trial court's dismissal of a complaint under Tenn. R. Civ. P. 12.02(6), we must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d at 894; *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d at 426; Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5-6(g), at 5-111 (3d ed. 2009). We review the trial court's legal conclusions regarding the adequacy of the complaint de novo without a presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d at 895; *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d at 700.

*SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 472 (Tenn. 2012).

To the extent that the appellate issues require us to interpret and apply statutes, we note that statutory interpretation is a question of law, which we review de novo, affording no presumption of correctness to the conclusions of the trial court. *State v. Crank*, 468 S.W.3d 15, 21 (Tenn. 2015); *In re Baby*, 447 S.W.3d 807, 817 (Tenn. 2014); *Mansell v. Bridgestone Firestone N. Am. Tire, LLC*, 417 S.W.3d 393, 399 (Tenn. 2013) (citing *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009)). The principles of statutory interpretation are well established. When reading "statutory language that is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). "The text of the statute is of primary importance, and the words must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012). The court's "duty in construing statutes is to ascertain and give effect to the intention and purpose of the legislature. *Eastman Chem. Co.*, 151 S.W.3d at 507. "[W]e presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing." *SunTrust Bank v. Burke*, 491 S.W.3d 693, 695 (Tenn. Ct. App. 2015) (quoting *Lind v. Beaman Dodge*, 356 S.W.3d at 895). The "wisdom, or unwisdom, of a statute lies solely with the Legislature and is not the concern of the Court." *Lavin v. Jordon*, 16 S.W.3d 362, 369 (Tenn. 2000); *see also Yebuah v. Ctr. for Urological Treatment, PLC*, 624 S.W.3d

481, 489 (Tenn. 2021). “When a statute is clear, we apply the plain meaning without complicating the task.” *In re Baby*, 447 S.W.3d at 817.

#### IV. DISCUSSION

Before turning to the issues raised by the parties, we briefly address the question of appellate jurisdiction and finality of the trial court’s judgment. In a show cause order entered October 21, 2022, we *sua sponte* asked whether this appeal should be dismissed for lack of “a final judgment adjudicating all the claims, rights, and liabilities of all parties” from which an appeal as of right would lie. *See* Tenn. R. App. P. 3(a); *see also Nandigam Neurology, PLC v. Beavers*, 639 S.W.3d 651, 661 (Tenn. Ct. App. 2021) (“A final judgment adjudicates all ‘claims, rights, and liabilities of all the parties,’ and ‘resolves all the issues in the case, leaving nothing else for the trial court to do.’”) (internal citations omitted). Our concern arose from the trial court’s August 30, 2022 order which, in the second through sixth decretal paragraphs, appears not to specifically dismiss Plaintiff’s claims for negligence, public nuisance, and private nuisance. By order entered November 17, 2022, we directed the parties to brief the issue of whether this Court has jurisdiction to consider this appeal.

Although they articulate their positions differently, the parties agree that the order appealed constitutes a final judgment. Upon further review, we agree with their conclusion that the trial court dismissed the entire amended complaint without prejudice for failure to comply with TACPA. This dismissal necessarily included all claims brought in the amended complaint. The trial court then went further by additionally dismissing *with prejudice* certain claims, including Plaintiff’s claims for strict liability, negligence per se, trespass, and medical monitoring. However, the fact that the trial court did not dismiss *with prejudice* Plaintiff’s other claims for ordinary negligence, public nuisance, and private nuisance does not affect the finality of the judgment. These latter claims had already been dismissed without prejudice. Accordingly, we conclude that the trial court’s order dismisses Plaintiff’s amended complaint, and all claims therein, in its entirety and constitutes a final judgment over which this Court has appellate jurisdiction.<sup>2</sup> We turn now to the issues raised by the parties.

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<sup>2</sup> In her appellate briefing, Plaintiff appears to argue that the trial court erred in dismissing certain causes of action with prejudice after it had already dismissed the entire amended complaint without prejudice. Plaintiff contends that once the trial court determined that she failed to meet the requirements of Tennessee Code Annotated sections 29-34-703(a) or (c), the trial court was statutorily required to dismiss the entire amended complaint without prejudice. *See* Tenn. Code Ann. § 29-34-703(b) (“An asbestos action *shall be dismissed without prejudice* upon a finding that the exposed person has failed to make the prima facie showing required by this part.”) (emphasis added); *see also id.* at subsection (f) (“The court, on motion by a defendant, *shall dismiss a plaintiff’s asbestos claim without prejudice* as to all defendants if the plaintiff fails to comply with the requirements of subsection (c).”) (emphasis added).

## A. Application of TACPA

The threshold issue in this case is whether TACPA applies to Plaintiff's claims. If it applies, then Plaintiff has admittedly failed to comply with the statute's procedural requirements for supporting a claim, and her claims must consequently be dismissed. Plaintiff argues that TACPA does not apply to her claims, which she contends are based solely on the diminution in property value arising from the steam pipe explosion. Plaintiff contends that TACPA covers "only very specific asbestos-related bodily injury claims" and that her diminution in property value claims do not implicate TACPA. Eastman insists that TACPA covers all asbestos-related claims and that Plaintiff's failure to comply with the statute's requirements should result in dismissal of the case.

The Tennessee General Assembly passed TACPA, codified at Tenn. Code Ann. §§ 29-34-701—29-34-709, to address a "crisis" stemming from the proliferation of damages claims relating to asbestos. 2016 Tenn. Pub. Acts, Ch. 635, (S.B. 2062), eff. July 1, 2016 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997)). Because "diseases caused by asbestos often have long latency periods," *id.*, the General Assembly recognized that "concerns about statutes of limitations and available funds can prompt unimpaired plaintiffs to bring lawsuits in order to protect against losing their rights to future compensation should they become impaired" and that "the cost of compensating plaintiffs who have no present asbestos-related physical impairment, and the cost of litigating their claims, jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases and adversely affects defendant companies." *Id.* The General Assembly emphasized that "the public interest requires giving priority to the claims of exposed individuals who are sick." *Id.* In enacting TACPA, the General Assembly indicated its intent to:

- (1) give priority to asbestos claimants who can demonstrate actual physical impairment caused by exposure to asbestos;
- (2) toll the running of the statutes of limitations for persons who have been exposed to asbestos, but who have no present physical impairment caused by such exposure;

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However, Plaintiff did not raise this issue before the trial court. A party may not offer a new issue for the first time on appeal. See *Lane v. Becker*, 334 S.W.3d 756, 764 (Tenn. Ct. App. 2010) (citing *Campbell Cnty. Bd. of Educ. v. Brownlee-Kesterson, Inc.*, 677 S.W.2d 457, 466–67 (Tenn. Ct. App. 1984)). "The jurisprudential restriction against permitting parties to raise issues on appeal that were not first raised in the trial court is premised on the doctrine of waiver." *Fayne v. Vincent*, 301 S.W.3d 162, 171 (Tenn. 2009) (citations omitted). Accordingly, this issue has been waived on appeal.

- (3) enhance the ability of the courts to supervise and manage asbestos cases;
- (4) reduce the opportunity for fraud in asbestos litigation; and
- (5) conserve the defendants' resources to allow compensation to present and future claimants with physical impairment caused by exposure to asbestos.

*Id.*

TACPA creates strict threshold requirements for any individual attempting to raise an "asbestos action" in Tennessee. As pertinent here, these requirements include: (1) that a plaintiff "alleging a nonmalignant condition" file within ninety days of the complaint a detailed medical report from a qualified physician, accompanied by test results, supporting the claim, and (2) that a plaintiff alleging a nonmalignant or malignant condition file within thirty days of the complaint an information form attested by the plaintiff stating the evidence that provides the basis for each claim against each defendant. *See* Tenn. Code Ann. § 29-34-703(a), (c). The consequence for failure to provide the required disclosures is dismissal without prejudice. *See id.* at § 29-34-703(b), (e).

Here, Plaintiff does not dispute that she failed to meet these threshold requirements. Rather, Plaintiff points out that she did not bring her claims under TACPA and argues that TACPA is not implicated based on the nature of her claims. Plaintiff contends that the General Assembly only intended for TACPA to apply to bodily injury claims and did not intend for it to apply to diminution in property value claims. Plaintiff argues that "[i]f diminution in property value claims implicate TACPA, then such claims would be precluded by application of the Act" because they could not meet the evidentiary requirements of § 29-34-703(a) and (c).

Whether TACPA applies depends on whether Plaintiff's claims fall within the statutory definition of an "asbestos action":

"Asbestos action" means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on or related to the health effects of exposure to asbestos, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance and any other derivative claim made by or on behalf of a person exposed to asbestos or a representative, spouse, parent, child, or other relative of that person. "Asbestos action" does not include a claim for compensatory benefits pursuant to workers' compensation law or for veterans' benefits[.]



Tenn. Code Ann. § 29-34-602(2); *see also* Tenn. Code Ann. § 29-34-702(3) (referring to Tenn. Code Ann. § 29-34-602(2)).

As an initial matter, we observe that TACPA’s definition of “asbestos action” is broad and does not on its face limit its application only to claims alleging bodily injuries. Rather, it widely encompasses any claim for “damages” whenever such a claim is “presented in a civil action arising out of, based on or related to the health effects of exposure to asbestos. . . .” Tenn. Code Ann. § 29-34-602(2). The statute does not distinguish between claims for bodily injury and claims for property damage. Nothing in the statutory definition limits claims covered by TACPA to claims for personal injury as opposed to property damage. As pertinent here, it includes all civil claims if they arise out of, are based on, or relate to the “risk or fear of disease or other injury” resulting from exposure to asbestos. *Id.* In addition to the broad general definition, the statute also contains a “catch all” provision sweeping within the definition’s scope “any other derivative claim made by or on behalf of a person exposed to asbestos. . . .” *Id.* Likewise, this catch-all provision does not differentiate between claims for bodily injury and claims for property damage. Finally, the definition has two specific exceptions. It excludes claims for workers’ compensation and veterans’ benefits. The inclusion of express exceptions reinforces the conclusion that the statute’s definition of an asbestos action was intended to be broad and include all claims not specifically excluded. With these considerations in mind, we now examine the claims alleged by Plaintiff in her amended complaint.

Plaintiff’s amended complaint alleges six causes of action: (1) “strict liability for ultra-hazardous activity”; (2) negligence, which the trial court found consisted of separate claims for negligence per se and common law negligence; (3) public nuisance; (4) trespass; (5) continuing private nuisance; and (6) medical monitoring. Plaintiff attempts to frame her claims against Eastman as involving only diminution in property value based on the release of “contaminants, including asbestos and other toxins” onto her property and other properties throughout her neighborhood. The amended complaint seeks damages including “all recoverable compensatory, statutory, and other damages . . . allowed under applicable laws”; “establishment of a Court-supervised and administered trust fund and medical monitoring regime to compensate Plaintiff . . . for the costs associated with monitoring the latent injuries caused by exposure to certain contaminants—other than asbestos. . . .”; injunctive relief including requiring Eastman to “repair reputational damage done to Kingsport, Tennessee’s economy as a result of the steam line failure, restore property values impacted by the steam line failure, and . . . requiring Eastman to operate the steam line . . . in such a way to ensure no further failures and resulting losses.” The amended complaint also seeks treble damages, punitive damages, attorney and professional fees, and a declaratory judgment that “Eastman is responsible for past and future costs to remedy the harm caused to Plaintiff, Class members, and their properties. . . .”

The trial court found that Plaintiff's claims "arise out of, are based on, and relate to the fear of exposure to asbestos and the health effects of exposure to asbestos." The trial court noted that Plaintiff's complaint "references asbestos 18 times after being amended, and asbestos is an essential element of Plaintiff's claims." The trial court specifically noted several paragraphs in the amended complaint alleging "concerns related to a risk or hazard to Plaintiff's health, and the focus of those alleged concerns is asbestos and fear of exposure to asbestos." As a result, the trial court found that "Plaintiff's claims constitute 'asbestos actions' as that term is defined [by TACPA]." Accordingly, the trial court dismissed all claims in Plaintiff's amended complaint without prejudice based on her failure to comply with Tennessee Code Annotated sections 29-34-703(a) and (c) and 29-34-704(a).

Upon review, we agree with the trial court. A significant portion of Plaintiff's amended complaint directly relates to her "health concerns" about exposure to asbestos. As the trial court noted, the amended complaint refers to asbestos eighteen times and repeatedly notes the "significant risks to human health," "ongoing risk to health caused by the contaminants," "increased risk of developing cancer," and adverse health effects resulting from exposure to asbestos. The amended complaint observes that asbestos "can be easily inhaled, posing serious risk of damage to the lungs and causing increased risk of developing cancer." The amended complaint alleges that "residents in the surrounding communities were understandably worried and concerned for their and their families' safety" and that Plaintiff "voiced serious concerns for her health, for that of her family, friends, and neighbors, and for that of her pets." It states that Plaintiff "worries . . . that contaminants from the explosion have entered into her home and been deposited into the ground on and around her property, which she worries could negatively impact her health, her family's health, and her pets' health." It relays that Plaintiff "is aware that some residents in the community have reported negative health effects, including headaches, nausea, and skin rashes. She herself experienced nausea and what she describes as a sensation as if her 'stomach was on fire.'"

Although Plaintiff characterizes her claims as solely based on the alleged diminution in value of her real property, that is simply not the case. Many of Plaintiff's claims allege concerns related to a risk or hazard to Plaintiff's health. Specifically, Plaintiff's claims arise out of, are based on, or relate to the health effects of exposure to asbestos, including the risk or fear of disease or other injury. As such, Plaintiff's claims fall under the statutory definition of an "asbestos action" under TACPA.

To the extent that Plaintiff makes claims for alleged reputational damage to her real property, the "risk or fear of disease" from exposure to asbestos is at the core of those claims. The alleged damage, that is, the diminished sale value based on reputational damage, is based on Plaintiff's perception of a prospective purchaser's fear of the health effects from exposure to asbestos. Plaintiff, however, has not articulated her claims for

property damage without referring to asbestos and “risks to human health,” “risk of developing cancer,” and “adverse health effects” resulting from exposure to asbestos. Plaintiff’s reliance on asbestos, and the public fear inherent to that substance, is essential to her claims. Notably, Plaintiff does not allege that she has tried to sell her real property. Rather, she speculates that her property value has been damaged because unidentified “prospective buyers,” at some time in the future, will be deterred from purchasing her property because of their concern about exposure to debris containing asbestos that allegedly fell on her property. Although we understand Plaintiff’s concerns, those concerns, speculative as they may be, are necessarily related to the “risk or fear of disease” from exposure to asbestos and fall squarely within the statutory definition.

Plaintiff attempts to draw a distinction between personal injury claims and property damage claims. She argues that, “[u]nder the TACPA, only very specific asbestos-related bodily injury claims with at least 15-years latency between asbestos exposure and diagnosis can ever meet the Act’s procedural and evidentiary requirements.” *See, e.g.*, Tenn. Code Ann. § 29-34-703(a) (requiring the filing of a written report from a qualified physician within ninety days of the complaint supporting the plaintiff’s asbestos-related injury); *id.* at § 29-34-703(c) (requiring the filing of an information form attested to by the plaintiff within thirty days of the complaint describing, *inter alia*, the specific asbestos-related disease claimed to exist); *id.* at § 29-34-704(a)(1) (describing a plaintiff’s prima facie burden to maintain an asbestos action, including radiological or pathological evidence that the plaintiff exhibits either “asbestosis” or “diffuse bilateral pleural thickening”); *id.* at § 29-34-704(a)(4) (requiring at least a fifteen-year latency period between asbestos exposure and diagnosis of an asbestos-related medical condition before an asbestos action can be maintained.). Plaintiff contends that “no plaintiff claiming diminution in property values could ever meet these requirements . . . because their claims do not include any bodily injury component.”

Plaintiff’s arguments are compelling, but ultimately, we are not persuaded where, as here, the claims asserted are based on the fear or risk of disease from exposure to asbestos. First, the statutory language does not support Plaintiff’s argument. Nothing in the definition of “asbestos action” distinguishes between claims for personal injury and claims for property damage. Indeed, it appears that, in crafting the definition of “asbestos action,” the General Assembly specifically intended “to give priority to asbestos claimants who can demonstrate *actual physical impairment* caused by exposure to asbestos.” 2016 Tenn. Pub. Act, Ch. 635, (S.B. 2062), eff. July 1, 2016 (emphasis added). In other words, the General Assembly prioritized the claims of people with actual physical impairments over those with other types of claims, including property claims. To the extent that Plaintiff failed to meet, or could not meet, the threshold evidentiary requirements of TACPA, her claims were deliberately excluded from the compensatory scheme envisioned by the General Assembly when enacting TACPA.

Second, we decline to create an exception for claims of diminution in property value based on reputational damage. When the General Assembly intended to exclude certain types of claims from the broad definition of “asbestos action,” it knew how to do so. The statute specifically excludes claims for workers’ compensation or veterans’ benefits from the definition of “asbestos action.” Tenn. Code Ann. § 29-34-602(2). Had the General Assembly intended to limit the definition of “asbestos action” to bodily injury claims, or to exclude claims for diminution in property value based on reputational damage due to the fear of exposure to asbestos, it would have said so in the statute. *See, e.g., Effler v. Purdue Pharma L.P.*, 614 S.W.3d 681, 688–89 (Tenn. 2020) (“Presuming that the Legislature means what it says—and does not mean what it does not say—we follow the principle of *expressio unius est exclusio alterius*. This canon of statutory interpretation means that ‘the expression of one thing implies the exclusion of others.’”) (quoting *Rich v. Tenn. Bd. of Med. Exam’rs*, 350 S.W.3d 919, 927 (Tenn. 2011)).

Finally, we disagree with Plaintiff’s assertion that TACPA would foreclose all otherwise valid claims for property damage. As the trial court noted, TACPA does not foreclose a plaintiff from bringing a property damage claim as a derivative claim. *See* Tenn. Code Ann. § 29-34-602(2). Moreover, Plaintiff’s claims here are foreclosed because they are based on her fear of the health effects of exposure to asbestos as well as her assessment of the public’s generalized fear of the health effects of exposure to asbestos. Plaintiff does not allege that the incident caused any physical damage to her real property necessitating costs for clean up or remediation. Plaintiff’s claims for “reputational damage” rely on the public fear associated with asbestos and thus fall within the statutory definition.

Construing TACPA to cover Plaintiff’s claims is consistent with the General Assembly’s intent to prioritize asbestos claims involving actual physical impairment while delaying the assertion of claims that are based only on risk or fear of disease from asbestos exposure. The General Assembly made clear that “the public interest requires giving priority to the claims of exposed individuals who are sick.” *See* 2016 Tenn. Pub. Acts, Ch. 635. Given the exceedingly broad definition that the General Assembly gave to “asbestos action” under TACPA, we conclude that the trial court did not err in concluding that Plaintiff’s claims, however characterized, constitute an “asbestos action” subject to the procedural requirements of TACPA. Accordingly, we affirm the trial court’s dismissal of Plaintiff’s entire amended complaint without prejudice based on her failure to comply with the requirements of Tennessee Code Annotated sections 29-34-703(a) and (c) and 29-34-704(a).

## B. Strict Liability

Plaintiff next argues that the trial court erred in dismissing her claim for strict liability with prejudice. Plaintiff alleges that the operation of a steam pipe “transporting high pressure steam under unsafe conditions through an asbestos-lined steam line” is ultrahazardous as a matter of law. The trial court dismissed the claim after finding that “the operation of a steam pipe . . . is not an ultrahazardous activity. . . .”

Under Tennessee law, “defendants engaged in ultrahazardous activities are held strictly liable for injuries caused to the person or property of another by defendant’s participation in the activity.” *Leatherwood v. Wadley*, 121 S.W.3d 682, 699 (Tenn. Ct. App. 2003) (citing *England v. Burns Stone Co.*, 874 S.W.2d 32, 37 (Tenn. Ct. App. 1993)). The care exercised by a defendant in carrying out said activity is irrelevant. *Id.* (citation omitted). Tennessee courts have traditionally classified ultrahazardous activities as “those presenting an abnormally dangerous risk of injury to persons or their property, including the carrying out of blasting operations, the storage of explosives or harmful chemicals, and the harboring of wild animals.” *Id.* (citation omitted). In *Leatherwood*, this Court applied the factors set out in the Restatement (Second) of Torts for determining whether an activity is abnormally dangerous:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

*Id.* at 700 (quoting RESTATEMENT (SECOND) OF TORTS § 520 (1977)).

Although the trial court cited the above factors, it did not make specific findings with respect to any of the factors. Findings of fact and conclusions of law are not required in resolving a motion to dismiss under Tennessee Rule of Civil Procedure 12.02(6). *See* Tenn. R. Civ. P. 52.01. However, they are helpful, and the lack of an adequate explanation for the trial court’s ruling may hamper appellate review. *See Buckingham v. Tennessee Dep’t of Corrs.*, No. E2020-01541-COA-R3-CV, 2021 WL 2156445, at \*3 (Tenn. Ct. App. May 27, 2021). In this case, the trial court’s finding was conclusory, simply stating that “the operation of a steam pipe . . . is not an ultrahazardous activity.”

A motion to dismiss for failure to state a claim tests the legal sufficiency of the plaintiff's complaint and admits the truth of all the relevant and material factual allegations. *SNPCO, Inc.*, 363 S.W.3d at 472. Here, the trial court's holding addresses only the "operation of a steam pipe." However, Plaintiff's allegations with respect to Eastman's ultrahazardous activity are more specific than the mere operation of a steam pipe. Plaintiff alleges that "Eastman was engaged in ultra-hazardous activities by transporting high pressure steam under unsafe conditions through an asbestos-lined steam pipe." Further, she alleges that the steam pipe operated by Eastman—a manufacturer of chemicals, fibers, and plastics—burst and discharged hazardous toxins, including asbestos, into the nearby community. *See* RESTATEMENT (SECOND) OF TORTS § 520(b) (1977) (citing as a factor the "likelihood that the harm that results from it will be great"). She alleges that, in addition to falling on her own property and that of her neighbors, the debris fell on a nearby elementary school while students were present. *See id.* at § 520(e) (citing as a factor the "inappropriateness of the activity to the place where it is carried on"). Plaintiff alleges that the harm caused was "the kind of harm that would be reasonably anticipated as a result of the risks created by transporting high pressure steam through an asbestos-lined steam line and failing to properly maintain or monitor the steam line in close proximity to the surrounding community." *See id.* at § 520(a) (citing as a factor the "existence of a high degree of risk of some harm to the person, land or chattels of others[.]").

Taking these factual allegations as true, we conclude that Plaintiff has stated a claim sufficient to withstand a Rule 12.02(6) motion to dismiss. The trial court did not specifically analyze the applicable factors so we cannot know how much weight it afforded each factor. However, based on the single finding that the trial court made—i.e., "that the operation of a steam pipe . . . is not an ultrahazardous activity"—we ascertain that the trial court did not "construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true." *See SNPCO, Inc.*, 363 S.W.3d at 472. The trial court oversimplified Plaintiff's allegations by reducing them to the mere operation of an ordinary steam pipe. Such a construal against Plaintiff's version of the facts is contrary to the court's mandate when reviewing a Rule 12.02(6) motion. The trial court's order ignores the specific, detailed allegations that Plaintiff makes as to whether Eastman's operations constituted an ultrahazardous activity. In our view, Plaintiff's allegations directly address the applicable factors, and when taken as true, plausibly state a claim for strict liability. Whether Plaintiff can ultimately prove the alleged facts sufficient to sustain her claim that the activity was abnormally dangerous so as to mandate strict liability is another matter. For purposes of the Rule 12.02(6) motion, we conclude that the allegations are sufficient to state a claim for strict liability based on ultrahazardous activity.

Accordingly, we conclude that the trial court erred in dismissing Plaintiff's strict liability claim with prejudice. As noted above, the trial court properly dismissed all of

Plaintiff's claims without prejudice under TACPA. We reverse only the dismissal of Plaintiff's strict liability claim with prejudice.

### C. Negligence Per Se

Next, Plaintiff argues that the trial court erred in dismissing with prejudice her claim for negligence per se. In the amended complaint, Plaintiff alleges statutory violations of the federal Clean Air Act, 42 U.S.C. § 7401, *et seq.*, and Clean Water Act, 33 U.S.C. § 1251, *et seq.* Plaintiff contends that “Eastman owed a duty to Plaintiff . . . to exercise reasonable and ordinary care” and that the duty arose from the Clean Air Act, Clean Water Act and other “federal, state, and local laws, ordinances, and regulations.”

The trial court found that Plaintiff's amended complaint “does not allege that the federal Clean Air Act, the Clean Water Act, nor any other statute, ordinance or regulation establishes a duty of care in the operation of a steam pipe. . . .” The trial court further found that the amended complaint “does not allege how [Eastman] violated the Clean Air Act, Clean Water Act, and/or any other statute, ordinance, or regulation.” We agree with the trial court.

In Tennessee, a plaintiff must establish three elements to recover under a theory of negligence per se: “(1) [the] defendant violated a statute or ordinance which imposes a duty or prohibits an act for the benefit of a person or the public; (2) the injured party was within the class of persons whom the legislative body intended to benefit and protect; and (3) the negligence was the proximate cause of the injury.” *Roane Cnty. v. Jacobs Eng'g Grp., Inc.*, No. 3:19-cv-206-TAV-HBG, 2020 WL 5836553, at \*7 (E.D. Tenn. Sept. 30, 2020) (citing *Glass v. Nw. Airlines, Inc.*, 761 F. Supp. 2d 734, 746 (W.D. Tenn. 2011) (internal citations omitted); *Smith v. Owen*, 841 S.W.2d 828, 831 (Tenn. Ct. App. 1992)). However, “[t]he negligence per se doctrine is not a magic transformational formula that automatically creates a private negligence cause of action for the violation of every statute.” *Rains v. Bend of the River*, 124 S.W.3d 580, 590 (Tenn. Ct. App. 2003) (internal citation omitted). “To trigger the doctrine, the statute must establish a specific applicable standard of conduct.” *Z.J. v. Vanderbilt Univ.*, 355 F. Supp. 3d 646, 703 (M.D. Tenn. 2018) (citing *Thomas & Assocs., Inc. v. Metro. Gov't of Nashville and Davidson Cnty.*, No. M2001-00757-COA-R3-CV, 2003 WL 21302974, at \*7 (Tenn. Ct. App. June 6, 2003); *see also Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 253 (6th Cir. 2005) (“Under Tennessee law, only statutes that establish a standard of care may support a claim of negligence *per se.*”).

The only specific statutes that Plaintiff cites in the amended complaint as forming the basis for her negligence per se claim are the Clean Air Act and the Clean Water Act. Plaintiff's conclusory allegations that Eastman violated a laundry list of unspecified

“federal, state, and local laws, ordinances, and regulations” are too vague to satisfy even the liberal pleading requirements of Tennessee Rule of Civil Procedure 8.01; *see also* Tenn. R. Civ. P. 8.05(1) (“Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged.”). We conclude that the trial court properly dismissed Plaintiff’s claim for negligence per se under these unidentified statutes.

With respect to Plaintiff’s claim for negligence per se under the Clean Air Act and the Clean Water Act, we likewise conclude that it was properly dismissed because Plaintiff failed to allege *how* Eastman violated either statute. Plaintiff’s amended complaint merely cites to those statutes without identifying any standard of care or duty owed to her under those statutes relevant to Eastman’s alleged actions.

#### D. Trespass

Plaintiff next contends that the trial court erred in dismissing with prejudice her claim for trespass. The trial court based its decision on the lack of an intentional act by Eastman to enter Plaintiff’s property. Specifically, the trial court found that “[t]here is no allegation in the Amended Complaint that [Eastman] intentionally caused the steam pipe to rupture or intentionally caused any asbestos or other debris to enter Plaintiff’s property.”

In dismissing Plaintiff’s trespass claim, the trial court relied on *Twenty Holdings, LLC v. Land South TN, LLC*, in which this Court identified the essential elements of a common law trespass claim as: “(1) an intentional entry or holdover (2) by the defendant or a thing; (3) without consent or legal right.” *Twenty Holdings, LLC v. Land South TN, LLC*, No. M2018-01903-COA-R3-CV, 2019 WL 4200970, at \*8 (Tenn. Ct. App. Sept. 5, 2019) (quoting TRESPASS, PLAINTIFF’S PROOF PRIMA FACIE CASE § 14:24). Regarding intent, we observed that “[d]espite its intentional nature, specific intent is not required” as “[t]respass to realty is an intentional tort in the sense that it involves the intent to commit an act that violates a property right, or would be practically certain to have that effect, although the actor may not know the act he or she intends to commit is such a violation.” *Id.* (citing 75 AM. JUR. 2D TRESPASS § 23). The tort of trespass does not require an intent to trespass but does require an intentional act to enter the plaintiff’s property. *See Barrios v. Simpkins*, No. M2021-01347-COA-R3-CV, 2022 WL 16846642, at \*11 (Tenn. Ct. App. Nov. 10, 2022) (“Plaintiffs posit that as a matter of law, the tort of trespass does not require an intent to trespass but solely an intent to commit the act of entry onto the disputed property. Defendants acknowledge that an intent to trespass is not a required element of the tort, and we agree with the parties on this point.”) (citing *Twenty Holdings, LLC*, 2019 WL 4200970, at \*8). “The intent element of civil trespass only requires proof that the



tortfeasor intentionally entered or remained, or caused a third party or thing to enter or remain, upon the property of another regardless of the tortfeasor's knowledge, lack of knowledge, or good faith mistake as to actual property ownership or right." *Twenty Holdings, LLC*, 2019 WL 4200970, at \*8 (quoting TRESPASS, PLAINTIFF'S PROOF PRIMA FACIE CASE § 14:24).

On appeal, Plaintiff argues that Eastman's "intentional actions of operating and maintaining (or failing to maintain) its steam pipe" was the intentional act giving rise to her trespass claim. However, merely alleging that Eastman intentionally operated the steam pipe itself does not sufficiently plead a trespass claim under Tennessee law. The intentional operation of the steam pipe, despite the steam pipe's ultimate failure, says nothing of Eastman's intent to enter Plaintiff's property in the form of debris from the steam pipe's explosion. For the trespass claim to survive a Rule 12.02(6) motion, Plaintiff must have alleged an intentional act by Eastman to enter her property. She did not do so. Under Plaintiff's theory, a claim for trespass would lie in any situation in which an object enters a plaintiff's real property, regardless of whether the defendant had any intent to cause it to do so. Plaintiff's theory is not supported by *Twenty Holdings, LLC*.

Plaintiff also argues that entries onto her property by Eastman "to take samples and attempt some form of cleanup" were "intentional acts that serve as an additional, alternative basis for [Plaintiff's] trespass claims." Plaintiff points to her amended complaint in which she alleges that "Eastman sent crews in full protective hazmat gear to pick up debris from properties and clean debris off vehicles, houses, and buildings." Plaintiff's argument fails for two reasons. First, the amended complaint does not allege that Eastman entered *her* property, as opposed to other properties in the community, for cleanup efforts. Second, the amended complaint does not allege that Eastman's entry onto other people's property for the purpose of cleanup was without consent or legal right. *See Twenty Holdings, LLC*, 2019 WL 4200970, at \*8 (entry without consent or legal right is an element of a common law trespass claim). For the foregoing reasons, we conclude that the trial court did not err in dismissing Plaintiff's claim for trespass with prejudice.

#### E. Medical Monitoring

Finally, Plaintiff argues that the trial court erred in dismissing her claim for medical monitoring with prejudice. Eastman counters that medical monitoring is not a judicially recognized cause of action in Tennessee.

Plaintiff's amended complaint seeks relief in the form of "a Court-supervised and administered trust fund and medical monitoring regime to compensate Plaintiff . . . for the costs associated with monitoring the latent injuries caused by exposure to certain

contaminants released as a result of this incident.” Plaintiff alleges that she has “already experienced acute symptoms . . . and ha[s] been placed at an increased risk of contracting latent illness and disease, including but not limited to various malignancies, respiratory conditions, neurological conditions, and cardiopulmonary conditions, and as such require[s] medical monitoring which Eastman is responsible for providing and funding.”

The trial court dismissed Plaintiff’s medical monitoring claim after finding that, “[a]lthough some federal court cases have recognized medical monitoring as a possible remedy to an underlying tort, no Tennessee court has ever recognized medical monitoring as a separate cause of action, and it is not a recognized claim under Tennessee law.” In her brief, Plaintiff readily acknowledges that “no Tennessee court has ever articulated that a medical monitoring claim exists under Tennessee common law. . . .” Instead, she invites us to recognize the existence of such a cause of action for the first time. For the reasons stated below, we decline to do so.

As both parties acknowledge, no Tennessee court has yet recognized a common law cause of action for medical monitoring nor set out what the elements of such a claim may be. *See Jones v. Brush Wellman, Inc.*, 2000 WL 33727733, at \*8 (N.D. Ohio, Sept. 13, 2000) (“No Tennessee cases support a cause of action for medical monitoring in the absence of a present injury. . . . [I]n the absence of Tennessee case law or a statute authorizing this relatively new and controversial type of claim, this Court will not create a new cause of action for Tennessee plaintiffs.”).

Federal courts considering the issue under Tennessee law have observed that “medical monitoring” is a type of remedy, rather than a separately recognized cause of action. In *Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 572 (6th Cir. 2005), the Sixth Circuit explained that “medical monitoring is more properly considered one of a number of possible remedies to an underlying tort, rather than a separately actionable tort.” Courts of other jurisdictions recognize medical monitoring as a form of remedy rather than an independent cause of action. *See, e.g., Olden v. LaFarge Corp.*, 383 F.3d 495, 510 n.7 (6th Cir. 2004) (“A number of courts have treated requests for medical monitoring as a form of damage relief.”) (collecting cases); *see also Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991) (“A claim for medical surveillance costs is simply a claim for future damages.”).

Plaintiff argues that TACPA explicitly recognizes the existence of a cause of action for medical monitoring in its definition of “asbestos action.” *See* Tenn. Code Ann. § 29-34-602(2) (“‘Asbestos action’ means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on or related to the health effects of exposure to asbestos, including . . . *costs of medical monitoring or surveillance.* . . .”) (emphasis added). Plaintiff contends that by referencing the “costs of medical monitoring or

surveillance,” the General Assembly “directly acknowledges the existence of such claims under Tennessee law.”

However, Plaintiff does not contend that the amended complaint in fact states a claim for medical monitoring under TACPA. As detailed above, Plaintiff failed to meet the procedural requirements to state a claim under TACPA, and indeed did not plead a statutory claim for medical monitoring under TACPA. Consequently, whether TACPA creates a statutory cause of action for medical monitoring is not an issue before us. However, we expressly decline Plaintiff’s invitation to extrapolate that TACPA recognizes or otherwise acknowledges the existence of a common law claim for medical monitoring in Tennessee. No such conclusion is warranted by the statute’s language.

For the reasons stated above, we conclude that the trial court did not err when it dismissed Plaintiff’s claim for medical monitoring with prejudice for failure to state a claim.

## V. CONCLUSION

We affirm the trial court’s dismissal of the entire complaint without prejudice, and we affirm the dismissal of Plaintiff’s negligence per se, trespass, and medical monitoring claims with prejudice. We reverse the trial court’s dismissal of Plaintiff’s strict liability claim with prejudice. The case is remanded for such further proceedings as may be necessary and consistent with this opinion. Costs of the appeal are taxed one-half to the appellant, Sharon Weatherly, and one-half to the appellee, Eastman Chemical Company.

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JOHN W. McCLARTY, JUDGE