T H E

T E N N E S S E E

L A W

I N S T I T U T E

PRESENTS

THE

FIFTIETH ANNUAL

REVIEW SEMINAR

SPEAKERS

Sarah Y. Sheppeard, of Knoxville is a shareholder of Lewis, Thomason PC, whose practice includes domestic relations, estates and probate, and other civil areas. She is a Rule 31 Mediator and a member of the National Academy of Distinguished Neutrals. She is a past President of both the Tennessee and Knoxville Bar Associations and a Fellow of the American, Tennessee and Knoxville Bar Associations.

Lucian T. Pera of Memphis is a member of Adams and Reese LLP. His practice includes commercial litigation and media law, as well as counseling and representing lawyers and law firms on questions of legal ethics. He chaired the TBA committee that drafted Tennessee current ethics rules and served on the committee that substantially revised the ABA Model Rules of Professional Conduct in 2002. He has served as Treasurer of the ABA and as President of the TBA.

Wade V. Davies is the Managing Partner at Ritchie, Dillard, Davies & Johnson, P.C. in Knoxville. His practice is primarily criminal defense. He is a Fellow of the American College of Trial Lawyers. He has served two terms as a member of the Board of Professional Responsibility, is serving his third term on the Board of Directors of the Tennessee Association of Criminal Defense Lawyers, and is a past President of the Knoxville Bar Association.

Edward D. Lanquist, Jr. of Nashville's Patterson Intellectual Property Law is TLI's 2021 Guest Speaker. His practice involves patent, trademark and copyright litigation, intellectual property counseling, trademark prosecution and technology law. He is extremely active in the legal community and with charitable organizations, is a frequent CLE lecturer on a wide variety of topics, a Rule 31 mediator, and is General Counsel for the Tennessee Bar Association.

THE ONES WE MISS

Donald F. Paine started the Tennessee Law Institute in 1972 and was our mentor, chief researcher, beloved leader and great friend to the bench and bar alike, even as he fought cancer for over 34 years. His death in November of 2013 left a huge void in our hearts, but his research techniques and teaching style have continued, making TLI the quality program it has been for over five decades.

John A. Walker, Jr. joined TLI in its second year and was an integral part of the commercial law aspects of our program until his retirement for health reasons in 2011. John passed away in September 2016.

John M. Smartt, although never a lecturer, was TLI's administrator for fifteen years. He was our ringmaster, cheerleader, and was even known to talk a legal secretary into pulling an attorney out of a deposition for an important message: "Joe, I see you haven't signed up for the seminar yet, and I sure wouldn't want you to miss it!" Ironically, John's death was within a week of Don's.

We miss them all, as we continue to carry on the mission of TLI.

PROGRAM

FIRST DAY

8:30-10:00	DOMESTIC RELATIONS, JUVENILE LAW AND EDUCATION LAW
10:00-10:15	BREAK
10:15-10:45	COMMERCIAL LAW
10:45-12:15	CRIMINAL LAW AND PROCEDURE
12:15-1:30	BREAK
1:30- 2:30	EVIDENCE
2:30-2:45	BREAK
2:45-4:15	ETHICS AND PROFESSIONALISM
4:15-4:30	BREAK
4:30-6:00	ETHICS AND PROFESSIONALISM

SECOND DAY

8:30-10:00	TORTS, WORKERS' COMPENSATION, INSURANCE
10:00-10:15	BREAK
10:15-11:15	CONTRACTS, BUSINESS ORGANIZATIONS, GOVERNMENT LAW
11:15-12:15	CIVIL PROCEDURE, ALTERNATIVE DISPUTE RESOLUTION
12:15-1:30	BREAK
1:30-2:15	ESTATES, CONSERVATORSHIPS AND TRUSTS, TAXATION
2:15-3:00	INTELLECTUAL PROPERTY, TRADE REGULATION, CONSUMER LAW, ANTITRUST
3:00-3:45	PROPERTY, ENVIRONMENTAL LAW
3:45-4:00	BREAK
4:00-5:00	BANKRUPTCY, CONSTITUTIONAL LAW
5:00-5:45	CIVIL RIGHTS, EMPLOYMENT LAW, SECURITIES LAW, ERISA

In preparation for this program, the faculty reads all statutes and opinions (reported and unreported) directly affecting the Tennessee lawyer in the following sources:

Public Acts of the Tennessee General Assembly

Public Laws of the United States Congress

United States Supreme Court Opinions

Opinions from the Tennessee Supreme Court, Court of Appeals, and Court of Criminal Appeals

Opinions from the Sixth Circuit Court of Appeals

Bankruptcy Reporter

Tennessee Ethics Opinions

We subscribe to several state and national secondary sources, including the following:

Tennessee Attorneys Memo

Tennessee Bar Journal

ABA/BNA Lawyers' Manual on Professional Conduct

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DOMESTIC RELATIONS

I. Parental Rights; Termination

A. Abandonment

1. Failure to Visit

In re Jude M., 619 S.W.3d 224 (Tenn. Ct. App., Frierson, 2020), perm. app. denied Jan. 12, 2021.

"This is a termination of parental rights case focusing on Jude M., the minor child ('the Child') of Sarah M. ('Mother') and Andy G. ('Father'). In November 2018, Father and his wife, Jamie G. ('Stepmother'), filed a petition in the Greene County Chancery Court ('trial court'), seeking to terminate the parental rights of Mother and allow Stepmother to adopt the Child. The Child previously had been removed from Mother's custody pursuant to an order entered by the Greene County Juvenile Court ('juvenile court') upon a petition for emergency custody filed by Father. Following a bench trial, the trial court granted the termination petition upon its finding by clear and convincing evidence that Mother had abandoned the Child by failing to visit her during the statutorily determinative period and that conditions leading to the removal of the Child from Mother's custody persisted. The trial court further found by clear and convincing evidence that it was in the Child's best interest to terminate Mother's parental rights. Mother has appealed. Having determined that Petitioners failed to demonstrate the threshold requirement of a petition having been filed in the juvenile court that alleged the Child to be a dependent and neglected child, we reverse the trial court's finding on the ground of persistence of the conditions leading to removal of the Child from Mother's custody. We affirm the trial court's judgment in all other respects, including the termination of Mother's parental rights."

"Mother and Father were never married and never resided together. The Child was born in September 2011, and Father's parentage was subsequently established. The Child resided primarily with Mother throughout the first five years of his life, although testimony demonstrated that Father had visited with the Child at least to some extent and had paid child support during those years.

"Mother testified during the termination hearing that she began to have difficulty coping with her situation when the Child was approximately two years of age. According to Mother, she and the Child were residing with Mother's parents when Mother's father committed suicide while Mother and the Child were at home. Mother acknowledged that during this time period, she developed an addiction to controlled substances. She stated that she had been employed for several years at that time as a psychiatric nursing assistant and had earned $15 an hour as her highest wage. However, Mother explained that she resigned from the position she held at a Veterans Administration Medical Center ('VA Medical Center') one year after her father died because she felt emotionally incapable of 'sit[ting] with suicidal patients,' which her job required. Mother further testified that after resigning, she 'tried to get another job,' but was unsuccessful and 'just wasn't functional.'

"Upon a petition for emergency custody filed by Father, the juvenile court, with Judge Kenneth N. Bailey presiding, conducted a hearing on August 30, 2016, and subsequently entered an order on November 21, 2016, *nunc pro tunc* to the hearing date, awarding 'temporary physical custody' of the Child to Father. We note that Father's juvenile court petition was not presented at trial and is not in the record before us. In its order, the juvenile court permitted Mother to have supervised

visitation with the Child on alternate weekends with the visits to be supervised by the Child's maternal grandmother ('Maternal Grandmother'). In so ordering, the juvenile court found that Mother was 'struggling to care for herself and the parties' minor child'; that Mother did 'not have a stable residence and [was] unemployed,' preventing her from 'provid[ing] for the child financially'; and that Father was 'stable, both financially and emotionally, and [could] provide appropriate care for the minor child.' The juvenile court held Mother's child support obligation in abeyance and directed that upon agreement of the parties, Mother would be able to enjoy unsupervised visitation with the Child in the future. The juvenile court also ordered the parties to participate in mediation with the caveat that Maternal Grandmother would be allowed to participate in mediation as well."

"Father and Stepmother (collectively, 'Petitioners') initiated the instant action by filing a 'Petition for Adoption and Termination of Parental Rights,' on November 19, 2018. They alleged statutory grounds against Mother of abandonment through failure to visit and financially support the Child in the four months preceding the petition's filing and persistence of the conditions leading to the Child's removal from Mother's custody. Petitioners further alleged that termination of Mother's parental rights and adoption by Stepmother would be in the best interest of the Child."

"Tennessee Code Annotated § 36-1-113 (Supp. 2020) lists the statutory requirements for termination of parental rights, providing in relevant part. . . .

> (c) Termination of parental or guardianship rights must be based upon:
> (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.

"The trial court determined that the evidence clearly and convincingly supported a finding of two statutory grounds to terminate Mother's parental rights: (1) abandonment through failure to visit the Child and (2) persistence of the conditions leading to the Child's removal from Mother's custody. We will address each statutory ground in turn."

"Mother does not dispute the trial court's finding that she did not visit the Child during the Determinative Period. Mother contends, however, that the trial court erred in finding clear and convincing evidence of this statutory ground because she purportedly carried her burden to demonstrate by a preponderance of the evidence that her failure to visit was not willful. Effective July 1, 2018, the General Assembly amended Tennessee Code Annotated § 36-1-102(1) to render the absence of willfulness to be solely an affirmative defense for cases filed as of the amendment's effective date. *See* 2018 Tenn. Pub. Acts, Ch. 875, § 2 (H.B. 1856). Inasmuch as the termination petition in the instant action was filed on November 19, 2018, the amendment eliminating 'willfully' from this definition of statutory abandonment applies, *see id.*, as does the following statutory subsection added by the amendment:

> For purposes of this subdivision (1), it shall be a defense to abandonment for failure to visit or failure to support that a parent or guardian's failure to visit or support was not willful. The parent or guardian shall bear the burden of proof that the failure to visit or support was not willful. Such defense must be established by a preponderance of evidence. The absence of willfulness is an affirmative defense pursuant to Rule 8.03 of the Tennessee Rules of Civil Procedure[.]

"Tenn. Code Ann. § 36-1-102(1)(I) (Supp. 2020)."

"Although the trial court did not expressly state that Mother's failure to visit was willful, the court did state that the ground had been proven while also noting Mother's willfulness defense. We therefore determine that the finding of willfulness in the establishment of the ground over Mother's defense was clearly implied within the trial court's order. The trial court specifically found that in failing to visit the Child during the determinative period, Mother had failed to meet the requirements set forth in the juvenile court's December 2016 order to allow resumption of visitation with the Child; that those requirements were not overly onerous; that Father had been reasonable in refusing to accommodate Mother's occasional requests for visits until she could produce a clean drug screen; and that Mother admittedly, even at the time of trial, could not have passed a drug screen as required by the juvenile court's order due to her marijuana use. Upon thorough review of the record, we agree with the trial court on these points.

"In support of her argument that her failure to visit the Child during the Determinative Period was not willful, Mother primarily contends that Petitioners 'thwarted' her efforts to visit 'every step of the way.' We disagree. Our review of the Facebook messages between the parents reveals that although Father was not particularly pleasant or welcoming in response to Mother's occasional requests to visit the Child, he did consistently refer to the visitation requirements of the juvenile court's December 2016 order and inform Mother that she could visit the Child when she met the requirements. A parent's failure to visit a child is not excused by another person's conduct 'unless the conduct actually prevents the person with the obligation from performing his or her duty ... or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child.' *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005) (internal citations omitted)."

"We emphasize that under the applicable version of the statute, the burden of proof for this affirmative defense is upon Mother. *See* Tenn. Code Ann. § 36-1-102(1)(I); *In re Nicholas C.*, No. E2019-00165-COA-R3-PT, 2019 WL 3074070, at *13 (Tenn. Ct. App. July 15, 2019) ('Under Tenn. Code Ann. § 36-1-102(1)[(I)], willfulness is an affirmative defense; thus, the burden is upon [the parent] to establish that his failure to visit was not willful.'). As this Court has previously explained:

> Willfulness in the context of termination proceedings does not require the same standard of culpability as is required by the penal code, nor does it require that the parent acted with malice or ill will. *In re Audrey S.,* 182 S.W.3d at 863; *see also In re S.M.*, 149 S.W.3d 632, 642 (Tenn. Ct. App. 2004). Rather, a parent's conduct must have been willful in the sense that it consisted of intentional or voluntary acts, or failures to act, rather than accidental or inadvertent acts. *In re Audrey S.*, 182 S.W.3d at 863. 'A parent cannot be said to have abandoned a child when his failure to visit or support is due to circumstances outside his control.' *In re Adoption of Angela E.*, 402 S.W.3d [636,] 640 [(Tenn. 2013)] (citing *In re Adoption of A.M.H.*, 215 S.W.3d [793,] 810 [(Tenn. 2007)] (holding that the evidence did not support a finding that the parents 'intentionally abandoned' their child)).

"*In re Alysia S.*, 460 S.W.3d 536, 565-66 (Tenn. Ct. App. 2014). The evidence does not preponderate against a finding that Mother failed to carry her burden of proof to establish lack of willfulness as an affirmative defense.

"We therefore conclude that the evidence does not preponderate against the trial court's finding by clear and convincing evidence that Mother failed to visit the Child during the determinative period. The trial court did not err in terminating Mother's parental rights to the Child based upon this statutory ground."

"Mother contends that Petitioners did not present sufficient evidence to support the trial court's finding by clear and convincing evidence that termination of her parental rights was in the best interest of the Child. We disagree."

"The trial court expressly found that the following factors weighed against maintaining Mother's parental rights to the Child: factor one (whether Mother had made an adjustment of circumstance, conduct, or conditions), factor three (whether Mother had maintained regular visitation or other contact), factor four (whether a meaningful relationship had been established between Mother and the Child), factor five (the effect a change of caretakers and physical environment would have on the Child), factor seven (whether the physical environment of Mother's home is healthy and safe), factor eight (whether Mother's mental and/or emotional status would prevent her from effectively providing safe and stable care and supervision for the Child), and factor nine (whether Mother had paid child support)."

"Based on our thorough review of the evidence in light of the statutory factors, we conclude that the evidence presented does not preponderate against the trial court's determination by clear and convincing evidence that termination of Mother's parental rights was in the best interest of the Child. Having also determined that a statutory ground for termination was established, we affirm the trial court's termination of Mother's parental rights to the Child."

2. Failure to Support; Mother Failed to Prove Affirmative Defense that Failure Not Willful

In re Arianna B., 618 S.W.3d 47 (Tenn. Ct. App., Swiney, 2020), perm. app. denied Jan. 8, 2021.

"This appeal concerns the termination of a mother's parental rights. Amy B. ('Mother') is the mother of the minor child Arianna B. ('the Child'). At Mother's request, Kayla A. ('Petitioner'), the Child's paternal aunt, assumed temporary custody of the Child. Petitioner later filed a petition in the Chancery Court for Knox County ('the Trial Court') seeking to terminate Mother's parental rights. After trial, the Trial Court entered an order finding that Petitioner had proven the ground of failure to support and that termination of Mother's parental rights is in the Child's best interest. Mother appeals, arguing among other things that Tenn. Code Ann. § 36-1-102(1), as amended in 2018, is unconstitutional for shifting the burden of proof on willfulness to parents. As Mother failed to raise this issue below and the statute is not obviously unconstitutional on its face, we decline to consider Mother's tardy constitutional challenge. We find the ground of failure to support was proven by clear and convincing evidence, and, by the same standard, that termination of Mother's parental rights is in the Child's best interest. We affirm."

"The Child, born in 2012, initially lived with her biological father and Mother in Mountain City, Tennessee. In 2013, the Child's father died. Afterward, Mother and the Child lived with Mother's family in West Virginia and Pennsylvania. The Child also spent some time in Delaware with Mother and Mother's boyfriend, Houston S. Mother has a child, Carter S., by Houston S. Mother encountered difficulties in raising the Child. In September 2018, Mother granted Petitioner, the Child's paternal aunt, physical custody of the Child, signing an Authorization Form and Limited

Power of Attorney for Care of Minor Child. Presently, the Child lives with Petitioner and her son in Knox County, Tennessee.

"In July 2019, after Mother informed Petitioner via text that she was revoking the latter's custody of the Child, Petitioner filed her Petition for Adoption by a Relative and for Termination of Parental Rights in the Trial Court. Petitioner alleged three purportedly distinct grounds: (1) failure to visit, (2) failure to support; and (3) failure to make reasonable payments toward support. Petitioner also filed a motion for appointment of emergency guardian, which was granted. The termination petition was tried over the course of three days—December 16 and 18, 2019, and January 27, 2020."

"Having reviewed the applicable standards, we address Mother's first issue of whether she was deprived of fundamentally fair procedures by her trial counsel's failure to seek a continuance or request a recess to contact her when she did not appear on the final day of trial. Mother was present on the first and second days of trial, but not the third. Mother offers no explanation or excuse for her absence that day. She argues simply that, given the profound implications of a parental rights termination hearing, her trial counsel was deficient in not seeking a continuance or recess to try to give Mother another chance to participate.

"We disagree. Mother ultimately must accept responsibility for her failure to appear. This is especially so in the absence of any explanation for why she did not show up; there is no hint that she was, for example, prevented from attending, or lacked notice. It is just as possible Mother simply chose not to appear, for tactical reasons or otherwise. We find that Mother was not denied fundamentally fair procedures just because her trial counsel did not request a continuance or recess when Mother failed to appear for the last day of trial.

"We next address whether Tenn. Code Ann. § 36-1-102(1), as amended in 2018, violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 8 of the Tennessee Constitution by shifting the burden of proof from the petitioner to the parent on the issue of whether the parent's failure to support the child was willful. At the time the petition in this case was filed, July 31, 2019, the statutory ground of abandonment for failure to support read as follows:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g). The following grounds are cumulative and nonexclusive, so that listing conditions, acts or omissions in one ground does not prevent them from coming within another ground:
>
> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;

"Tenn. Code Ann. § 36-1-113(g)(1) (Supp. 2020).

"Effective July 1, 2018, our General Assembly amended Tenn. Code Ann. § 36-1-102(1) to make the absence of willfulness an affirmative defense available to parents for cases filed as of the amendment's effective date. *See* 2018 Tenn. Pub. Acts, Ch. 875, § 2 (H.B. 1856). This amended version of the statute applies to the present matter, which was commenced on July 31, 2019. However, Mother argues that the statute as amended is unconstitutional. For their parts, both Petitioner and the State of Tennessee contend that Mother waived this issue by failing to raise it in the proceedings below."

"As Mother failed to raise this constitutional challenge in the proceedings below, our threshold for considering her issue for the first time on appeal is whether the challenged statute is obviously unconstitutional on its face. Tenn. Code Ann. § 36-1-102(1), as amended in 2018, contends with and is responsive to *In re Swanson*[, 2 S.W.3d 180, 188 (Tenn. 1999),] in that it makes available to parents facing an allegation of failure to support an affirmative defense that their failure to support was not willful. Given this, we conclude that Tenn. Code Ann. § 36-1-102(1) is not obviously unconstitutional on its face. We, therefore, decline to consider Mother's constitutional challenge to Tenn. Code Ann. § 36-1-102(1)."

"We next address whether the Trial Court erred in finding that the ground of failure to support was proven by clear and convincing evidence, and in declining to find that Mother had proven the affirmative defense of lack of willfulness. The relevant four-month window for our analysis is March 31, 2019 through July 30, 2019, the latter being the day before the petition was filed. *See In re Jacob C.H.*, No. E2013-00587-COA-R3-PT, 2014 WL 689085, at *6 (Tenn. Ct. App. Feb. 20, 2014), *no appl. perm. appeal filed.* Mother never rendered any support for the Child. However, Mother makes two separate arguments—that the support she *tried* to render cannot be deemed token in nature because the record is insufficient as to her means at the relevant time, and that otherwise, her failure to support was not willful. With respect to the latter, Petitioner argues that Mother waived the issue of her lack of willfulness because she did not assert it in an answer to the petition. In her reply brief, Mother argues the issue was tried by consent. As we will discuss, even if Mother did not waive the affirmative defense of a lack of willfulness, her arguments on that front are unavailing."

"We disagree with Mother that the record is insufficient as to her means in the relevant time frame. We note that under Tenn. Code Ann. § 36-1-102(1), as amended in 2018, the burden was on Mother to prove her failure to support was not willful. Apart from that, the uncontroverted evidence reflects that Mother was payee on certain Social Security benefits, for which the Child was beneficiary owing to her father's death, of around $900 per month. Mother remained payee until August or September of 2019 when Petitioner had herself designated the new payee so the Child could obtain the benefits. Exhibit 17, a letter from the Social Security Administration to Petitioner, reflects that the Child's benefits from September 2018—when the Child entered Petitioner's custody—to August 2019 were $8,980. The evidence is uncontroverted that, in the interim between the Child entering Petitioner's custody to Petitioner being designated the new payee on the benefits, Mother never passed any of these benefits along to Petitioner for the Child's benefit. Mother offers no explanation for why she never sent any of this money to Petitioner for the Child's benefit when it was intended for the Child's benefit to begin with. Mother does reference being thwarted in her bid to visit and resume custody. However, a parent's duty to support is distinct from her duty to visit. *In re Audrey S.*, 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005). In any event, a texted photograph of a belt and a couple of gifts that never were delivered is not child support under any reasonable definition of the term. Mother's 'child support' was purely notional; it did not rise even to token. Lastly, Mother's 11th hour bid to resume custody was neither a substitute for support nor does it excuse her nonsupport.

"The evidence does not preponderate against any of the Trial Court's findings relative to this issue of Mother's failure to support. Mother failed to prove by a preponderance of the evidence that her failure to support was not willful. We find, as did the Trial Court, that the ground of failure to support was proven against Mother by clear and convincing evidence."

"Perhaps the most relevant factors in this case are factors (7) and (8), and more specifically, as they relate to Mother's addiction to drugs. Mother argues that the testimony at trial about her drug abuse was not contemporaneous to trial or even the filing of the petition and should therefore be discounted. However, Mother points to no evidence in the record establishing that she has since rectified her serious drug problem, a drug problem that severely hampered her ability to parent. Barring rectification of Mother's drug abuse and generally chaotic lifestyle, we are without serious doubt that the Child's best interest would not be served by restoring custody of the Child to Mother. The record shows no turnaround in Mother's conditions such that would make it safe for the Child to be returned to her care and custody any time soon. By contrast, the Child is thriving in Petitioner's home. The evidence does not preponderate against any of the Trial Court's findings made relative to the Child's best interest. We find by the standard of clear and convincing evidence, as did the Trial Court, that termination of Mother's parental rights is in the Child's best interest. We, therefore, affirm the Trial Court's order terminating Mother's parental rights to the Child."

"The Trial Court's judgment terminating Mother's parental rights to the Child is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Amy B., and her surety, if any."

3. Missing Witness Rule

In re Mattie L., 618 S.W.3d 335 (Tenn., Lee, 2021).

"In this parental termination case, we review the trial court's application of the missing witness rule to a party in a non-jury trial, the trial court's reliance on the doctrine of unclean hands, and whether the trial court erred in terminating parental rights on the grounds of abandonment. A mother and stepfather petitioned the trial court to terminate a father's parental rights and allow the stepfather to adopt the child. The trial court terminated the father's parental rights based on a finding of abandonment by willful failure to support, willful failure to make reasonable or consistent support payments, and willful failure to visit. The trial court also found termination was in the child's best interest. In reaching these conclusions, the trial court presumed that because the father—a missing witness—did not appear for trial, his testimony would have been unfavorable to him. In addition, the trial court ruled that under the doctrine of unclean hands, the father should be 'repelled at the courthouse steps' because he made false statements in his interrogatory answers. The Court of Appeals reversed, finding the trial court erred by applying the missing witness rule in a non-jury trial and by applying the doctrine of unclean hands. The Court of Appeals also held the mother and stepfather's evidence of abandonment was less than clear and convincing. We hold: (1) the missing witness rule may apply in a non-jury trial, although here the trial court misapplied the rule; (2) the trial court erred in applying the doctrine of unclean hands to the father because he was defending against a petition for statutory relief while seeking no equitable relief, and his alleged misconduct was collateral to the issue of abandonment; and (3) the evidence of abandonment was not clear and convincing. Thus, we hold the trial court erred in terminating the father's parental rights. We reverse the judgment of the trial court and dismiss the petition to terminate the father's parental rights."

"In December 2016, Mother and Stepfather petitioned the Shelby County Chancery Court to terminate Father s parental rights and allow Stepfather to adopt Mattie. The petition alleged that Father had abandoned Mattie by willfully failing to visit her, willfully failing to support her, and willfully failing to make reasonable or consistent payments toward her support during the four

consecutive months before the filing of the petition. *See* Tenn. Code Ann. § 36-1-102(1)(A)(i) (2017) (amended 2018). Father denied the allegations.

[Footnote:] "The statute in effect when the petition was filed in 2016 provides: For purposes of terminating the parental ... rights of a parent ... of a child to that child in order to make that child available for adoption, 'abandonment' means that [f]or a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent ... of the child who is the subject of the petition for termination of parental rights or adoption, that the parent ... either [has] willfully failed to visit or [has] willfully failed to support or [has] willfully failed to make reasonable payments toward the support of the child[.]Tenn. Code Ann. § 36-1-102(1)(A)(i) (2017) (amended 2018).

"The Legislature amended the statute effective July 1, 2018, and the current version places the burden on the defendant to plead as an affirmative defense that the failure to visit or support was not willful and to establish the lack of willfulness by a preponderance of the evidence. *See* 2018 Tenn. Pub. Acts, ch. 875, § 2 (codified as amended at Tenn. Code Ann. § 36-1-102(1)(I) (Supp. 2020)." [End Footnote]

"Ten days before trial, the trial court denied Father's request to delay the case because he was in the Shelby County jail. When the trial began on October 15, 2018, Father's attorney explained that Father was unable to appear in court because he had to also appear in Shelby County Criminal Court. Father's attorney did not request another continuance but moved the trial court to bifurcate the hearing into two phases: first, grounds for termination, and second, a best interest determination. The trial court denied the request, and the trial proceeded in Father's absence. On the second day of trial, the trial court asked Father's counsel if the trial could go forward without Father. Father's attorney agreed saying, 'I'm here as his attorney of record, and I absolutely believe we can proceed without him.'"

"At the close of proof, the trial court granted Mother and Stepfather's request to apply the missing witness rule and presume that Father's testimony, if he had appeared, would have been unfavorable to him. The trial court also granted Mother and Stepfather's request to apply the equitable doctrine of unclean hands and not allow Father to obtain any relief because he had been untruthful under oath during discovery about his 2005 military service and his 2016 treatment for alcohol addiction. After applying the unclean hands doctrine, the trial court found Father 'should be repelled at the courthouse steps from receiving any relief that he ha[d] requested in this cause.'

"On November 30, 2018, the trial court issued an order finding by clear and convincing evidence that Father's parental rights should be terminated 'due to his willful abandonment of [Mattie] in his failure to visit and failure to pay child support.' The trial court also held termination was in Mattie's best interest.

"The Court of Appeals reversed, finding the trial court erred by applying the missing witness rule in a non-jury trial and by relying on the doctrine of unclean hands. The Court of Appeals also held the evidence on the grounds of abandonment was less than clear and convincing. *In re Mattie L.*, No. W2018-02287-COA-R3-PT, 2020 WL 1867372 (Tenn. Ct. App. Apr. 14, 2020), *perm. app. granted* (Tenn. Aug. 11, 2020)."

"We begin with our review of the trial court's application of the missing witness rule to Father who did not appear at trial. After the trial court denied Father's pretrial motion for continuance, Father's

counsel advised the trial court the case could proceed in Father's absence. At the request of Mother and Stepfather, the trial court applied the missing witness rule after finding that Father was available to testify. Although in jail across the street from the courthouse, Father was available by subpoena. The trial court then 'presumed that [Father's] testimony would have been unfavorable to him.' The Court of Appeals reversed, holding that the missing witness rule applied in jury proceedings, not bench trials. Both courts misapplied the missing witness rule.

"Tennessee's law of evidence recognizes the common law rule that a party 'may comment upon the failure ... to call an available and material witness whose testimony would ordinarily be expected to favor' the opposing party. *State v. Francis*, 669 S.W.2d 85, 88 (Tenn. 1984). The missing witness rule may apply when the evidence shows that a witness who was not called to testify knew about material facts, had a relationship with the party 'that would naturally incline the witness to favor the party,' and the witness was available to the process of the court. *Id.* (quoting *Delk v. State*, 590 S.W.2d 435, 440 (Tenn. 1979)). In civil trials, this rule applies when the missing witness is also a party—with knowledge of material facts, naturally favorable testimony, and availability to judicial process. *See Runnells v. Rogers*, 596 S.W.2d 87, 90–91 (Tenn. 1980); *W. Union Tel. Co. v. Lamb*, 140 Tenn. 107, 203 S.W. 752, 753 (1918)."

"We hold that the missing witness rule may apply in both jury and non-jury trials. The essence of the rule is that the trier of fact, whether it be a jury or a judge, may make a permissible inference from a party's failure to testify. The confusion about the rule's application may arise because most often the rule operates through a set of proper jury instructions."

"The trial court erred in its application of the missing witness rule by applying a presumption against Father rather than a permissive inference. While a presumption tilts the scales of legal reasoning toward a particular result, a permissive inference merely enables the trier of fact to draw on logical leaps that are ordinary to our shared experience. In *Francis*, after enumerating the rule's elements, we emphasized that it is best and 'now generally characterized as authorizing a permissive inference,' rather than a 'presumption.' 669 S.W.2d at 88. Importantly, a plaintiff cannot use the inference to avoid the burden of establishing a prima facie case for the plaintiff's claims. *See Runnells*, 596 S.W.2d at 90 (observing that a defendant need not testify and may avail himself of the plaintiff's failure to carry the burden of proof and that the missing witness rule 'applies ... only "when the plaintiff's proof and the legal deduction therefrom make a prima facie case against the defendant"' (quoting *Davis v. Newsome Auto Tire & Vulcanizing Co.*, 141 Tenn. 527, 213 S.W. 914, 915 (1919))). Nor can the inference 'amount to substantive evidence of a fact of which no other evidence is introduced.' *McReynolds v. Cherokee Ins. Co.*, 815 S.W.2d 208, 210 (Tenn. Ct. App. 1991); *see also* 2 Kenneth S. Broun, et al. *McCormick On Evidence* § 264 (Robert P. Mosteller ed., 8th ed. 2020), Westlaw (database updated January 2020) ('[U]nlike the usual presumption, it is not directed to any specific presumed fact or facts which are required or permitted to be found. The burden of producing evidence of a fact cannot be met by relying on this "presumption."').

"The missing witness rule carries no more legal force than the commonsense inference it permits the trier of fact to apply in weighing the evidence. But the inference is not substantive proof and does not relieve a party of the burden of proving a prima facie case. *In re Estate of Price*, 273 S.W.3d 113, 140 (Tenn. Ct. App. 2008) (quoting *Arnett v. Fuston*, 53 Tenn.App. 24, 378 S.W.2d 425, 428 (1963)).

"Thus, in a non-jury trial, a trial court should not apply the missing witness rule in a mechanical or conclusory fashion to replace evidence. Instead, the court should carefully consider the commonsense inference that withheld testimony is likely unfavorable when the court weighs other available evidence. The missing witness rule alone does not resolve any issue.

"Father's purported testimony facially satisfies the *Francis* elements. He likely knew material facts about the grounds for termination; he was naturally inclined to oppose termination of his parental rights; and although in jail, Father was available to judicial process for at least some portion of the trial through a subpoena or request to transfer his custody to the trial court. But the trial court applied the missing witness rule too broadly. It hardly stands to reason, for example, that Father's testimony about his willingness to care for his child would have been unfavorable, especially given his repeated efforts to exercise his visitation rights during the relevant four-month period. Not only did the trial court mischaracterize the rule as creating a sweeping presumption rather than a permissive inference, the trial court also failed to explain how it applied this inference in determining any particular fact. When the trial court serves as trier of fact, it should explicitly integrate the inference created by the missing witness rule into its findings for the rule to work. In sum, the trial court erred by presuming that Father's entire testimony would have been unfavorable to him."

"We now turn to the trial court's reliance on the equitable maxim of unclean hands, which provides that 'he who comes into a court of equity, asking its interposition in his behalf, must come with clean hands.' *C.F. Simmons Med. Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S.W. 165, 168 (1893); *see also Thomas v. Hedges*, 27 Tenn. App. 585, 183 S.W.2d 14, 16 (1944) (quoting Henry R. Gibson, *Gibson's Suits in Chancery* § 42 (4th ed. 1937)). This maxim protects the integrity of the court, ensuring that any claimant whose requested 'relief grows out of or depends upon or is inseparably connected with his own prior fraud ... will be repelled at the threshold of the court.' *Fuller v. Cmty. Nat'l Bank*, No. E2018-02023-COA-R3-CV, —— S.W.3d ——, ——, 2020 WL 1485696 at *5 (Tenn. Ct. App. Mar. 27, 2020), (emphasis omitted) (quoting *Simmons*, 23 S.W. at 168), *perm. app. denied* (Tenn. Aug. 6, 2020); *see also Hogue v. Kroger Co.*, 213 Tenn. 365, 373 S.W.2d 714, 716 (1963); Henry R. Gibson, *Gibson's Suits in Chancery* § 2.09 (William H. Inman ed., 8th ed. 2004).

"The trial court applied the maxim and ordered that Father 'should be repelled at the courthouse steps from receiving any relief that he ha[d] requested' because Father had made several misrepresentations in sworn answers to interrogatories about his military service and treatment for alcohol dependency.

"We hold that the trial court erred by applying the doctrine of unclean hands. The doctrine applies only to parties who seek an equitable remedy from a court. Mother and Stepfather petitioned the trial court for statutory relief under Tennessee Code Annotated section 36-1-113. Father was in court only to defend against Mother and Stepfather's petition for statutory relief—he sought no equitable relief. Thus, the doctrine of unclean hands does not apply to Father. To compound its error, the trial court relied on Father's conduct that was collateral to the abandonment issue. The doctrine of unclean hands is limited to 'misconduct connected with *the particular matter* in litigation; and does not extend to any misconduct, however gross, which is unconnected therewith, and with which [the opposing party] is not concerned.' *Chappell v. Dawson*, 202 Tenn. 672, 308 S.W.2d 420, 421 (1957) (emphasis added) (quoting Henry R. Gibson & John Alexander Chambliss, *Gibson's Suits in Chancery* § 42 (3d ed. 1929)); *see also In re Estate of Boote*, 265 S.W.3d 402, 417 (Tenn. Ct. App. 2007) (holding that the doctrine 'provides the court with a basis to decline to

grant relief to parties who have willfully engaged in unconscionable, inequitable, immoral, or illegal acts *with regard to the subject matter of their claims*' (emphasis added) (footnote omitted)). Alleged misrepresentations in sworn answers relate to the litigation as a whole, and we do not condone such misrepresentations. Even though Father's misrepresentations about his military service and his course of addiction treatment are troubling, they are not material to whether Father had abandoned his child. In sum, the trial court erred in applying the doctrine of unclean hands."

"We now review the trial court's finding of abandonment by willful failure to support and willful failure to make reasonable or consistent support payments."

"Mother and Stepfather presented no wage statements or other evidence of Father's employment between August 19, 2016, and December 18, 2016. Mother testified that between February and December 2016, Father worked at 'American Airlines, FedEx, PrimeFlight Aviation, Home Depot, several jobs just for a few weeks or months at a time.' But when asked about the time from August to December 2016, Mother testified that Father told her he was working. Yet Mother's testimony, corroborated by the testimony of other witnesses, showed that Father had been untruthful at times. Mother testified she believed Father was 'an able-bodied individual and he was able to hold down a job ... during that time period.' But Mother and Father had a strained relationship and had little to no personal contact from August to December 2016."

"Father's lack of employment and income is supported by his bank and credit union records. Father's banking records from August to December 2016 show minimal funds and no regular income. His checking account statements for September, October, and November 2016 each shows an ending balance of $0.11; the December 2016 statement shows an ending balance of $0.12. Similarly, Father's credit union account statement for July to September 2016 shows an ending balance of $5.70; the statement for October to December 31, 2016, shows an ending balance of $5.71."

"To meet their statutory burden, Mother and Stepfather needed to present evidence about Father's employment, assets, income, and expenses during the relevant four-month period. *In re Francis R.*, 2018 WL 5307887, at *5. Even though it 'need not be an accounting of every dollar earned and spent,' Mother and Stepfather had to show by clear and convincing evidence that Father 'had the capacity to pay support, did not do so, and had no justification for not doing so.' *Id.* (quoting *In re Preston L.*, No. M2016-02338-COA-R3-PT, 2017 WL 4315356, at *5 (Tenn. Ct. App. Sept. 27, 2017)). Mother's belief, without more, that Father was able-bodied and capable of working from August to December 2016 is not enough to prove it is 'highly probable' or to 'eliminate any serious or substantial doubt' that Father was willfully unemployed or could provide support. In sum, Mother and Stepfather failed to prove by clear and convincing evidence that Father willfully failed to pay support."

"The remaining ground for termination is Father's alleged willful failure to visit between August 19, 2016, and December 18, 2016. Tennessee Code Annotated section 36-1-102(1)(E) defines willful failure to visit as 'the willful failure, for a period of four (4) consecutive months, to visit or engage in more than token visitation.' Failure to visit is willful when a parent is aware of the duty to visit, can visit, and with no justifiable excuse makes no attempt to visit. *In re Keri C.*, 384 S.W.3d at 745 (quoting *In re J.G.H., Jr.*, 2009 WL 2502003, at *15 (Tenn. Ct. App. Aug. 17, 2009)). Father had court-ordered visitation on alternate weekends and some holidays, including Christmas 2016. Father did not visit Mattie during the relevant four-month period. Thus, we only need to determine whether Father's failure to exercise his parenting time was willful."

"Emails between Mother and Father about visitation on the weekend of August 19, 2016, confirm that Father would have no visitation if he did not pay child support:

> August 18, 2016, at 6:17 p.m., Mother wrote: 'Anyway, will you have money this weekend? If not, visitation is off. I'm not kidding. You're in a pretty deep financial hole and I'm going to get that money out of you, one way or another.' (Emphasis added).
>
> August 19, 2016, at 2:16 p.m., Mother wrote: 'If you don't have $1000, she won't be dropped off today.... If you can bring $1000 OWED TO US, she can stay. Otherwise, use your weekend to work so that you can start paying off your debt with me. Understand?' (Emphasis added).
> * * *
> August 19, 2016, at 4:14 p.m., Mother wrote: 'Don't bother showing up if you can't pay.... Again, we will not be there so don't bother showing up. I warned you, no money, no kid.' (Emphasis added)."

"Mother's policy of 'no money—no kid' is unacceptable. Failure to visit is not willful if it is the result of coercion. *In re Audrey S.*, 182 S.W.3d at 863. Father's lack of visitation from August to December 2016 resulted from coercion—Mother's refusal to allow visitation unless Father paid support. Failure to visit is not willful if another person's conduct prevents the parent from visiting or 'amounts to a significant restraint of or interference with the parent's efforts to ... develop a relationship with the child.' *Id.* at 864. Such conduct includes 'blocking [the parent's] access to the child,' 'keeping the child's whereabouts unknown,' or 'vigorously resisting a parent's efforts to visit the child.' *Id.* at 864 n.34. Mother's emails show that she vigorously resisted Father's efforts to visit with Mattie, violated the court's order on visitation, and purposefully interfered with Father's efforts to develop a relationship with Mattie. Mother's refusal to respond to Father's emails and text messages is more evidence of her intention to thwart his visitation efforts. Mother admitted she refused to give Father the address where she and Stepfather lived with Mattie, she directed Mattie's school to deny Father access to Mattie, and sometimes she blocked Father's number on her phone so he could not call or send her text messages.

"We find the evidence preponderates against the trial court's findings of fact that Father willfully failed to visit with Mattie. Evidence of Mother's efforts to interfere with Father's relationship and deny visitation precludes a 'firm belief or conviction' that Father had the ability to visit, made no attempt to visit, and had no justifiable excuse for not visiting. *See In re Keri C.*, 384 S.W.3d at 744. Thus, Mother and Stepfather failed to meet their burden of proving willful failure to visit by clear and convincing evidence."

B. Failure to Manifest Ability and Willingness to Personally Assume Legal and Physical Responsibility

In re Neveah M., 614 S.W.3d 659 (Tenn., Clark, 2020).

"We granted this appeal to settle a split of authority in the Court of Appeals concerning the proper interpretation of a statute that requires a person seeking termination of parental rights to prove by clear and convincing evidence that a 'parent or guardian has failed to manifest, by act or omission, an ability and willingness to personally assume legal and physical custody or financial responsibility of the child.' Tenn. Code Ann. § 36-1-113(g)(14) (Supp. 2016); id. (2017 & Supp.

2020). In some decisions, the Court of Appeals has interpreted this language as requiring clear and convincing proof that a parent was both unable and unwilling to personally assume legal and physical custody or financial responsibility of a child. See, e.g., *In re Ayden S.*, No. M2017-01185-COA-R3-PT, 2018 WL 2447044, *7 (Tenn. Ct. App. May 31, 2018). In other decisions, the Court of Appeals has construed this statute as requiring clear and convincing proof that a parent was either unable or unwilling to personally assume legal and physical custody or financial responsibility of a child. See, e.g., *In re Amynn K.*, No. E2017-01866-COA-R3-PT, 2018 WL 3058280, *14 (Tenn. Ct. App. June 20, 2018). We hold that the statute is ambiguous and that the latter interpretation—the *In re Amynn K.* interpretation—best effectuates legislative intent. Therefore, we overrule *In re Ayden S.* and all other Court of Appeals' decisions inconsistent with our holding herein. Additionally, we reverse the decision of the Court of Appeals herein, which applied the *In re Ayden S.* interpretation, and reinstate the judgment of the trial court terminating mother's parental rights based solely on Tennessee Code Annotated section 36-1-113(g)(14). In all other respects, the trial court's judgment remains intact and is reinstated."

"Therefore, we conclude that section 36-1-113(g)(14) places a conjunctive obligation on a parent or guardian to manifest both an ability and willingness to personally assume legal and physical custody or financial responsibility for the child. If a person seeking to terminate parental rights proves by clear and convincing proof that a parent or guardian has failed to manifest either ability or willingness, then the first prong of the statute is satisfied. *In re Amynn K.*, 2018 WL 3058280, at *13."

C. Disability of Parent "Shall Not Be Considered"

Chapter 235, Public Acts 2021, adding T.C.A. § 36-1-113(r) eff. July 1, 2021.

"(r) The disability of a parent or guardian alone shall not be considered for or against termination of parental or guardian rights unless the disability impacts the parent's ability to care for the physical or psychological welfare of the child."

D. Amended Best Interest Factors

Chapter 190, Public Acts 2021, amending T.C.A. § 36-1-113(i) eff. Apr. 22, 2021.

"(1) In determining whether termination of parental or guardianship rights is in the best interest of the child, the court shall consider all relevant and child-centered factors applicable to the particular case before the court. Those factors may include, but are not limited to, the following:

(A) The effect a termination of parental rights will have on the child's critical need for stability and continuity of placement throughout the child's minority;
(B) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological, and medical condition;
(C) Whether the parent has demonstrated continuity and stability in meeting the child's basic material, educational, housing, and safety needs;
(D) Whether the parent and child have a secure and healthy parental attachment, and if not, whether there is a reasonable expectation that the parent can create such attachment;
(E) Whether the parent has maintained regular visitation or other contact with the child and used the visitation or other contact to cultivate a positive relationship with the child;
(F) Whether the child is fearful of living in the parent's home;

(G) Whether the parent, parent's home, or others in the parent's household trigger or exacerbate the child's experience of trauma or post-traumatic symptoms;
(H) Whether the child has created a healthy parental attachment with another person or persons in the absence of the parent;
(I) Whether the child has emotionally significant relationships with persons other than parents and caregivers, including biological or foster siblings, and the likely impact of various available outcomes on these relationships and the child's access to information about the child's heritage;
(J) Whether the parent has demonstrated such a lasting adjustment of circumstances, conduct, or conditions to make it safe and beneficial for the child to be in the home of the parent, including consideration of whether there is criminal activity in the home or by the parent, or the use of alcohol, controlled substances, or controlled substance analogues which may render the parent unable to consistently care for the child in a safe and stable manner;
(K) Whether the parent has taken advantage of available programs, services, or community resources to assist in making a lasting adjustment of circumstances, conduct, or conditions;
(L) Whether the department has made reasonable efforts to assist the parent in making a lasting adjustment in cases where the child is in the custody of the department;
(M) Whether the parent has demonstrated a sense of urgency in establishing paternity of the child, seeking custody of the child, or addressing the circumstance, conduct, or conditions that made an award of custody unsafe and not in the child's best interest;
(N) Whether the parent, or other person residing with or frequenting the home of the parent, has shown brutality or physical, sexual, emotional, or psychological abuse or neglect toward the child or any other child or adult;
(O) Whether the parent has ever provided safe and stable care for the child or any other child;
(P) Whether the parent has demonstrated an understanding of the basic and specific needs required for the child to thrive;
(Q) Whether the parent has demonstrated the ability and commitment to creating and maintaining a home that meets the child's basic and specific needs and in which the child can thrive;
(R) Whether the physical environment of the parent's home is healthy and safe for the child;
(S) Whether the parent has consistently provided more than token financial support for the child; and
(T) Whether the mental or emotional fitness of the parent would be detrimental to the child or prevent the parent from consistently and effectively providing safe and stable care and supervision of the child.

"(2) When considering the factors set forth in subdivision (i)(1), the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

"(3) All factors considered by the court to be applicable to a particular case must be identified and supported by specific findings of fact in the court's written order.

"(4) Expert testimony is not required to prove or disprove any factor by any party.

"(5) As used in this subsection (i), 'parent' includes guardian."

E. No Parental Rights to Father Convicted of Rape Crime or Lesser Included Offense Resulting in Conception of Child

Chapter 164, Public Acts 2021, amending T.C.A. § 36-6-102(a) eff. July 1, 2021.

"(a)(1) Except as provided in subsection (b), a person who has been convicted of aggravated rape pursuant to § 39–13–502, rape pursuant to § 39–13–503, rape of a child pursuant to § 39–13–522, aggravated statutory rape pursuant to § 39–13–506, or statutory rape by an authority figure pursuant to § 39–13–532, from which crime a child was conceived shall not have custody or visitation rights, or the rights of inheritance with respect to that child.

"(2) A person who is originally charged with an offense listed in subdivision (a)(1), but is convicted of or pleads guilty or no contest to a lesser included offense, from which crime a child was conceived shall not have custody or visitation rights, or the rights of inheritance with respect to that child."

II. Adoption

A. Surrender to a Designated Facility

Chapter 311, Public Acts 2021, amending T.C.A. § 36-1-102(1)(A)(v) eff. July 1, 2021.

The definition of abandonment applicable when a mother voluntarily surrenders her infant to a facility pursuant to T.C.A. § 68-11-255 has been modified. The infant must be aged two weeks or less, rather than 72 hours or less.

B. Assistance Recipients; Medical or Full-Time School Enrollment Verification

Chapter 163, Public Acts 2021, adding T.C.A. § 37-5-133 eff. July 1, 2021.

"By July 1, 2022, and every year thereafter, the department of children's services shall require any person receiving federal or state-funded adoption assistance from the department for adopting a child to provide the department with verification from the adopted child's current medical or mental health professional provider or verification of full-time school enrollment from the school the child attends. The medical or full-time school enrollment verification shall consist of a form or forms developed by the department, but must not require any records from those providing the verification. The department may initiate a visit to ascertain the well-being of the child if the person fails to provide the required documentation."

C. Contact Veto Registry Deleted

Chapter 101, Public Acts 2021, amending numerous sections in Title 36, Chapter 1 eff. July 1, 2022.

Statutory provisions regarding the contact veto registry and advance notice registry have been deleted. The statutory requirements about the sealing of adoption records have been modified. No longer are records sealed after orders of dismissal of termination proceedings, revocation of a surrender or parental consent, or modification of an order of guardianship.

D. Contract for Post-Adoption Contact Cannot be Mandated by Court

In re Rosylyn W., No. E2019-01838-COA-R3-PT (Tenn. Ct. App., Swiney, Oct. 13, 2020).

"Sarah E. ('Mother') and Scott W. ('Father') appeal the termination of their parental rights to their minor child, Roslyn W. ('the Child'). In September 2018, Michael D. ('Uncle') and Megan D. ('Aunt') (collectively, 'Petitioners') filed a petition to terminate the parental rights of the parents to the Child in the Hawkins County Chancery Court ('Trial Court'). The Trial Court conducted a trial in August 2019. Following the close of Petitioners' proof, the Trial Court involuntarily dismissed the statutory ground of abandonment for failure to visit against both parents upon oral motion by the parents, pursuant to Tennessee Rule of Civil Procedure 41.02. At the conclusion of the trial, the Trial Court terminated Mother's parental rights based on the statutory grounds of abandonment by failure to support the Child and failure to manifest an ability and willingness to assume custody or financial responsibility of the Child. The Trial Court terminated Father's parental rights on the ground of abandonment by failure to support the Child. The Trial Court further found that termination of Mother's and Father's parental rights to the Child was in the Child's best interest. Upon its termination of the parents' rights to the Child, the Trial Court ordered that Petitioners and the parents must enter into an agreed order or a 'preadoption contract' that will survive the adoption to allow for reasonable visitation between the Child and the parents to continue their relationship. Both Mother and Father timely appealed the Trial Court's judgment. The Petitioners raise two additional issues. We reverse the Trial Court's involuntary dismissal of the statutory ground of abandonment by failure to visit pertaining to Father at the conclusion of Petitioner's proof, as well as the requirement that the parties enter into an agreed order or 'preadoption contract' allowing reasonable visitation between the parents and the Child after the adoption. We affirm the Trial Court's judgment in all other respects, including the termination of Mother's and Father's parental rights."

"Finally, we address Petitioners' issue concerning the Trial Court's order requiring that the parties submit to an agreed order or a 'preadoption contract' allowing for reasonable visitation to continue the visitation relationship between the parents and the Child. Petitioners argue that the Trial Court erred by mandating such an agreed order or contract. In their brief, the parents also question the Trial Court's authority to require such an order.

"Tennessee Code Annotated § 36-1-121(f) (Supp. 2019) states that '[a] final order of adoption of a child cannot require the adoptive parent to permit visitation by any other person, nor can the final order of adoption place any conditions on the adoption of the child by the adoptive parent.' The Trial Court's requiring the parties to enter into an agreed order as part of the adoption proceedings directly conflicts with such prohibition in section 36-1-121(f).

"We note, however, that this statute does not prohibit the parties from entering into a contract for post-adoption contact as provided in Tennessee Code Annotated § 36-1-145 (Supp. 2019). *See* Tenn. Code Ann. § 36-1-121(f) (Supp. 2019). A trial court also may enforce or modify a contract for post-adoption contact already entered into by the parties. *Id.* Tennessee Code Annotated § 36-1-145 specifically allows adoptive parents to 'voluntarily enter into' a contract with a biological parent, and a child if the child is over the age of fourteen years old, permitting continued contact between the child and his or her relatives after the adoption is finalized. This contract for post-adoption contact must be in writing and is enforceable. *See* Tenn. Code Ann. § 36-1-145(c) (Supp. 2019).

"The issue of whether a trial court can order a party to enter into a contract for post-adoption contact is a matter of first impression. As with any contract, a contract for post-adoption contact

is valid only if entered into voluntarily. *See Cummings Inc. v. Dorgan*, 320 S.W.3d 316, 331 (Tenn. Ct. App. 2009) ('[A] contract is valid only if it is entered into freely, with the voluntary assent of the parties making it.'). In fact, Tennessee Code Annotated § 36-1-145 allows the adoptive parents and biological parents to 'voluntarily enter into' such a contract for post-adoption contact. We acknowledge that Aunt testified during trial that she intended to allow a continuing relationship between the Child and the biological parents after adoption. Even so, the Trial Court's order requiring the parties in this case to enter into a contract allowing visitation after the adoption in order to continue the visiting relationship between the Child and the biological parents is hardly voluntary. A parties' testimony of intent to allow continued contact is much different than a legally binding contract requiring such contact. While we understand what the Trial Court was attempting to do and why, we agree with Petitioners that the Trial Court did not have the authority to require the parties to enter into a contract for post-adoption contact. We, therefore, reverse the Trial Court's judgment as to this requirement."

III. Parentage; Voluntary Acknowledgment of Parentage Gives Father Standing to Sue for Visitation Rights

Baxter v. Rowan, 620 S.W.3d 889 (Tenn. Ct. App., Goldin, 2020), no appl. perm. app.

"This case involves an unwed father's right to visitation with his minor child. After an initial denial of Father's request for visitation, the trial court later granted Father and Father's mother visitation rights following the filing of a Rule 60 motion. In granting relief, the trial court found that Father had standing, having previously executed a voluntary acknowledgment of paternity. Mother filed a timely appeal arguing that the trial court erred in granting Father relief. Notably, Mother contested Father's standing to sue for visitation, arguing that the voluntary acknowledgment of paternity did not vest Father with standing to sue. For the reasons contained herein, we affirm in part and vacate in part the trial court's order granting Father relief. Further, we reverse the portion of the trial court's order granting visitation rights to Father's mother."

"At issue is whether the trial court erred in granting Father's Rule 60.02 motion and in particular whether or not Father had standing to even pursue visitation. Specifically, Mother asserts that Father has no standing to sue for parental rights as there has been no order establishing parentage entered in this case. Respectfully, we disagree with Mother's assertion that a voluntary acknowledgment of paternity does not confer standing on Father to sue for visitation with Child.

"Tennessee Code Annotated section 24-7-113 provides for a simplified procedure in which unmarried fathers may legally establish their paternity over a child without 'further order of the court.' Tenn. Code Ann. § 24-7-113(a). This is otherwise known as a voluntary acknowledgment of paternity or VAP. Notably, the statute maintains that this VAP, 'unless rescinded ... shall be conclusive of that father's paternity without further order of the court.' *Id.* There is a sixty-day period provided for in the statute in which the VAP may be rescinded. Tenn. Code Ann. § 24-7-113 (c)(1). However, if the VAP is not rescinded pursuant to subsection (c), '[it], may only be challenged on the basis of fraud, whether extrinsic or intrinsic, duress, or material mistake of fact' within five years of the VAP's execution. Tenn. Code Ann. §§ 27-7-113 (e)(1), (2). Based on our review of the record, the VAP in this case was filed in 2011. There is no evidence nor assertions set forth by Mother indicating that the VAP has been rescinded, nor does she appear to challenge its validity. Therefore, '[t]he acknowledgment, unless rescinded pursuant to subsection (c), shall

be conclusive of that father's paternity without further order of the court.' Tenn. Code Ann. § 24-7-113(a).

"Mother largely relies on this Court's language in *Milton v. Harness*, No. E2017-00092-COA-R10-CV, 2017 WL 837704 (Tenn. Ct. App. Mar. 3, 2017), to support her contention that the VAP does not vest Father with standing and that instead the trial court must enter an order of parentage before he may sue for custody and visitation rights. Mother predicates her argument by specifically citing language used by the *Milton* court, which explained,

> [a] biological father who has signed an 'acknowledgment of paternity' is declared the legal father with the obligation to pay support and the right to be given notice in the event of litigation or attempted termination of parental rights/adoption. The acknowledgment does not vest any custody rights or visitation rights upon the legal father.

"*Id.* at *5 (quoting *In re Hailey S.*, No M2016-00387-COA-R3-JV, 2016 WL 7048840, at *9 (Tenn. Ct. App. Dec. 5, 2016)) (emphasis added). While we agree with *Milton*'s statement that a VAP does not vest any custody rights or visitation rights upon the legal father, we cannot agree that the execution of the VAP does not vest Father with standing to sue for custody and visitation rights."

IV. Custody/Co-Parenting

A. Written Findings of Fact and Conclusions of Law

Chapter 311, Public Acts 2021, amending T.C.A. § 36-6-101(a)(2)(A)(i) eff. July 1, 2021.

"Unless both parents have agreed to a custody arrangement and parenting plan, orders for custody arrangements must include written findings of fact and conclusions of law to support the basis for the order."

B. Disability of Parent "Shall Not Be Considered"

Chapter 235, Public Acts 2021, amending T.C.A. § 36-6-106(e) eff. July 1, 2021.

"(e) The disability of a parent alone shall not be considered for or against awarding custody to such a party unless the disability impacts the parent's ability to meet the needs of the child."

V. Child Support

A. Recipient Mother's Income Under Child Support Guidelines Does Not Include Alimony from Father or Payments of His Divided Military Retired Pay

Baker v. Baker, No. M2020-00374-COA-R3-CV (Tenn. Ct. App., Bennett, Jan. 28, 2021), perm. app. denied May 12, 2021.

"Mother filed the present action for divorce in June 2016 on grounds of irreconcilable differences and inappropriate marital conduct. After a hearing in November 13, 2019, the trial court entered

an order on December 4, 2019, awarding Mother a divorce based upon inappropriate marital conduct and taking the remaining issues under advisement. In a memorandum opinion entered on January 17, 2020, the trial court made detailed findings of fact and conclusions of law, which it then incorporated into the final order entered on February 20, 2020. The trial court named Mother the primary residential parent and ordered Father to pay child support in the amount of $1,064.00 a month pursuant to the child support guidelines. Based upon the relevant statutory factors, the trial court awarded Mother alimony in futuro in the amount of $1,300.00 a month until she began receiving payments from Father's retirement pay. The court found Father dissipated the parties' marital assets in the total amount of $159,367.61 and adopted most of Mother's proposed division of assets and liabilities. The court also awarded Mother her attorney fees, as described in her attorney fee affidavit, as alimony in solido."

"The first step in determining child support is to calculate the gross income of each parent. *See* Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(1); *Stack v. Stack*, No. M2014-02439-COA-R3-CV, 2016 WL 4186839, at *9 (Tenn. Ct. App. Aug. 4, 2016). Gross income is generally defined to 'include all income from any source ..., whether earned or unearned.' Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(1). In the present case, the trial court determined Mother's gross monthly income to be $1,500.00 and Father's to be $8,390.00. Father asserts that the trial court erred in failing to give him credit for money he paid for alimony and retirement benefits.

"In its final divorce decree, the trial court awarded Mother a portion of Father's military retirement equal to '50% times a fraction, the numerator of which is 186 months of marriage ... during the [Father's] creditable military service, divided by [the] total number of months of [Father's] creditable military service, projected to be 20 years, 6 months and 9 days.' At the time of the divorce, Father had not yet retired, but he expected to do so in May 2020. The trial court awarded Mother alimony in futuro in the amount of $1,300.00 a month until she began receiving payments directly from the DFAS ('Defense Financing Accounting Service') for her portion of Father's military retirement pay. Moreover, in the event the monthly payments from DFAS did not total $1,300.00, the trial court ordered that Father 'shall make up the difference' as alimony in futuro.

"Immediately after the entry of the divorce decree, Mother was entitled to receive alimony of $1,300.00 a month. Father argues that the trial court erred in failing to give him credit for this amount in its calculation of his and Mother's gross monthly income for child support purposes. We disagree. The definition of gross income contained in the child support guidelines contains a list of items to be included in the calculation, and one of these subsections addresses alimony. *See* Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(1)(xxii). Thus, gross income includes '[a]limony or maintenance received from persons other than parties to the proceedings before the tribunal.' *Id.* The alimony payments at issue here were received from Father, a party to the proceedings before the court. This court has previously interpreted this provision of the child support guidelines to 'exclude[ ] from the recipient's income for child support purposes those alimony payments paid by the other party to the current proceeding.' *Ghorashi-Bajestani v. Bajestani*, No. E2013-00161-COA-R3-CV, 2013 WL 5406859, at *7 (Tenn. Ct. App. Sept. 24, 2013); *see also Rentz v. Rentz*, No. E2013-02414-COA-R3-CV, 2014 WL 3748562, at *3-4 (Tenn. Ct. App. July 30, 2014). Thus, the trial court did not err in failing to include Father's alimony payments in calculating Mother's gross income for child support purposes.

"The next issue is the impact of Father's retirement in May 2020, when Mother began receiving direct payments out of Father's military retirement from DFAS. Father argues that he should receive credit for the DFAS payments received by Mother. We disagree. The child support guidelines

provide that gross income includes income from '[p]ensions or retirement plans including, but not limited to, Social Security, Veterans Affairs Department, Railroad Retirement Board, Keoughs, and Individual Retirement Accounts (IRAs).' Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(1)(viii). However, '[u]nder Tennessee law, [Father's] military retired pay is marital property subject to equitable distribution.' *Johnson v. Johnson*, 37 S.W.3d 892, 895 (Tenn. 2001), *abrogated on other grounds by Howell v. Howell*, —— U.S. ——, 137 S. Ct. 1400, 197 L.Ed.2d 781 (2017). Thus, as previously stated, the trial court divided Father's military retirement as part of the property division. Tennessee Code Annotated section 36-4-121(b)(1)(E), part of the provisions concerning the division of marital property, states that 'assets distributed as marital property will not be considered as income for child support or alimony purposes, *except to the extent the asset will create additional income after the division.*' (Emphasis added)."

"Father also argues that he should receive credit for healthcare expenses in the calculation of his gross income for child support purposes. Pursuant to the parenting plan incorporated into the final decree, Father is required to provide the two children of the parties' marriage with health insurance, with the parties dividing uncovered expenses 'on a pro rata basis in accordance with their respective incomes.' Although healthcare expenses are not considered in calculating gross income under the child support guidelines, Father is correct that such expenses may be deducted in determining child support. *See Stack*, 2016 WL 4186839, at *11. The guidelines provide for the deduction of each parent's portion of the children's health insurance premium. *See* Tenn. Comp. R. & Regs. §§ 1240-02-04-.04(8)(b), 1240-02-04-.08(2)(d)(1)(i). Under the guidelines, '[o]nly amounts actually paid are included in the calculation.' Tenn. Comp. R. & Regs. § 1240-02-04-.08(2)(d)(1)(iii). Thus, '[p]ayments that are made by a parent's employer, but not deducted from the parent's wages, shall not be included.' *Id.* Father's income and expense statement shows that health insurance is provided by his employer at zero cost to him. Thus, we find no abuse of discretion in the trial court's failure to credit Father for such an expense."

B. Modification

Chapter 227, Public Acts 2021, amending T.C.A. §§ 36-5-101(g) and -103(f)(1)(B) eff. July 1, 2021.

36-5-101(g).

"(5) When the department of human services becomes aware of a change in circumstances of either party to a Title IV–D child support case, the department may review and seek an adjustment to the support obligation to the extent required by the child support guidelines."

A significant variance for purposes of modification of child support is fifteen percent. The lower 7.5% variance for persons within certain low income categories has been deleted.

C. Life Insurance; Children Are Entitled to Entire Amount Listed in Parenting Plan, Not Amount Sufficient to Secure Child Support

McGrath v. Hester, No. M2019-02147-COA-R3-CV (Tenn. Ct. App., Swiney, Apr. 14, 2021).

"Kimberly Anne McGrath ('Mother') and Brian Wayne Hester ('Father') were married in 2002. The parents had two children during the marriage and divorced in 2009. Father obtained a term life

insurance policy for $500,000 in 2005. From 2005 through 2014, Mother was designated as the direct beneficiary of this policy under her former married name."

"In 2014, Father designated his wife, Ms. Hester, as the direct beneficiary of his life insurance policy."

"During this appeal, the parties have agreed that the children had a vested interest in the proceeds of Father's life insurance policy and that the 2017 permanent parenting plan is controlling in this case. We need not address that issue any further. The life insurance provision in that permanent parenting plan stated as follows:

> Both shall insure his/her own life in the minimum amount of $300.000.00 by whole life or term insurance. Until the child support obligation has been completed, each policy shall name the child/children as sole irrevocable primary beneficiary, with the ☒ other parent _____, as trustee for the benefit of the child(ren), to serve without bond or accounting.

"The Trial Court found that the children were not entitled to the entire $300,000 of Father's life insurance policy but only the amount sufficient to cover Father's remaining child support obligation. However, Mother contends on appeal that the children were entitled to the entire $300,000 policy. Based on the language in the 2017 permanent parenting plan, we agree with Mother.

"The life insurance provision is clear that the parents were to each keep a $300,000 insurance policy for the children so long as the child support obligation continued. According to the 2017 plan, the children were to be named as the sole beneficiaries to the $300,000 life insurance policy with the other parent to be named as the trustee for the children. Therefore, Mother was to be the trustee for the children's benefit on Father's life insurance policy. Although Ms. Hester's attorney argued during oral argument that equity demands the result by the Trial Court limiting recovery of the life insurance proceeds due to Mother's noncompliance with the life insurance provision in the plan, we note that the children are the intended beneficiaries for the policy, not Mother. Mother is only the trustee for the children's benefit. The children, as the actual beneficiaries of the policies, should not be punished for Mother's noncompliance with this provision.

"Additionally, we note that both parents had agreed to insure their respective lives with a $300,000 life insurance policy to benefit the children '[u]ntil the child support obligation has been completed.' Mother had an obligation to provide such a life insurance policy for the children, not just Father. Although Mother had not complied, she was required by the plan to insure her life with an equal life insurance policy despite her not having a child support obligation under any permanent parenting plan in the record. If the life insurance provision was intended to secure only the amount of Father's child support obligation, it is unlikely that the same provision of the plan would have required Mother to have an equivalent life insurance policy in the absence of a child support obligation.

"Furthermore, Ms. Hester argues that the total amount of remaining child support when the initial 2009 permanent parenting plan was entered into totaled close to $300,000. However, that amount had not been changed or lowered to correlate to the remaining child support in any subsequent plan. We note that Father's child support obligation was $547 per month in the April 2017 permanent parenting plan. When the 2017 plan was developed, the children were ages 12 and 10. At the time, Father's remaining child support obligation would have been substantially less than the agreed upon

$300,000 life insurance policy provision, supporting that the life insurance provision was not meant solely to secure the remaining child support obligation."

"In this case, we simply hold that the most recent permanent parenting plan, which the parties agreed on appeal was controlling in this case, does not limit the children's life insurance proceeds to only the amount of Father's outstanding child support obligation. If the parents intended for the life insurance policy to secure only the child support obligation still owed at Father's death, the parties could have easily stated that in the plan. By limiting the children's proceeds from the life insurance policy, the Trial Court was reading into the provision what simply was not there. We must give effect to the literal meaning of the clear and unambiguous language of the life insurance provision of the parenting plan. The judgment is modified so that the children are entitled to $300,000 of the life insurance proceeds as required by the agreed permanent parenting plan."

VI. Marriage; Who May Solemnize

A. Notaries

Chapter 255, Public Acts 2021, amending T.C.A. § 36-3-301(a) eff. Apr. 28, 2021.

Notaries Public have been added to the list of those authorized to solemnize marriages.

B. Members of General Assembly Who Opt In

Chapter 119, Public Acts 2021, amending T.C.A. § 36-3-301 eff. Apr. 13, 2021.

"(l) In order to solemnize the rite of matrimony pursuant to subdivision (a)(1):
(1) A member of the general assembly must first opt in by filing notice of the member's intention to solemnize the rite of matrimony with the office of vital records; and
(2) A former member of the general assembly must have filed notice pursuant to subdivision (l)(1) while serving in the general assembly."

VII. Divorce; Antenuptial Agreement Signed by Unrepresented Spouse Eleven Days Before Wedding Upheld Due to Her Knowledge and the Absence of Coercion

Howell v. Howell, No. M2019-01205-COA-R3-CV (Tenn. Ct. App., Clement, Feb. 5, 2021), perm. app. denied May 12, 2021.

"This appeal concerns a prenuptial agreement that protected each spouse's premarital property and waived the right to alimony. The couple signed the agreement on the day it was drafted, 11 days before their wedding. Seven years later, after the husband filed for divorce, the wife sought to set aside the agreement, asserting that she did not sign it knowledgeably and freely. The wife alleged that the husband took her to the attorney's office without notice or an opportunity to seek independent counsel. The trial court concluded that the agreement was valid because the couple lived together for six years before getting engaged, the wife knew the husband would not marry her without a prenuptial agreement, and the wife was not pressured or coerced into signing the agreement. We affirm."

"Tennessee Code Annotated § 36-3-501 requires courts to enforce agreements between prospective spouses concerning their separate, premarital property if the court finds that the spouses entered into the agreement 'freely, knowledgeably and in good faith and without exertion of duress or undue influence.' *See Randolph v. Randolph*, 937 S.W.2d 815, 819 (Tenn. 1996). The same applies to agreements waiving or limiting a spouse's right to alimony. *Cary v. Cary*, 937 S.W.2d 777, 782 (Tenn. 1996). 'Whether each element is established "is a question of fact to be determined from the totality of the circumstances surrounding the negotiation and execution of the ... agreement."' *Walker v. Walker*, No. M2018-01140-COA-R9-CV, 2020 WL 507645, at *4 (Tenn. Ct. App. Jan. 31, 2020) (quoting *Boote* [*v. Shivers*], 198 S.W.3d [732] at 741 [(Tenn. Ct. App. 2005)]), *appeal denied* (July 20, 2020). As Wife correctly asserts, '[t]he burden of proof to establish these elements rests with the party seeking to enforce the antenuptial agreement,' not on the one challenging its validity. *Boote*, 198 S.W.3d at 741 (citing *Randolph*, 937 S.W.2d at 821).

"Our courts have identified several factors relevant to whether a spouse had 'independent knowledge of the full nature, extent, and value of the proponent spouse's holdings,' including but not limited to, '[1] the parties' respective sophistication and experience in business affairs, [2] the duration of the relationship prior to the execution of the agreement, [3] the time of the signing of the agreement in relation to the time of the wedding, and [4] the parties' representation by, or opportunity to consult with, independent counsel.' *Randolph*, 937 S.W.2d at 822."

"Wife contends the trial court erred by conflating the parties' 'legal background' with their 'sophistication and experience in business affairs' and by finding that neither party had a 'legal advantage over the other.' Wife also contends that the court ignored several other facts, such as the disparity in age, education, business experience, and financial acumen at the time of the marriage.

"It is undisputed that Wife was 26 years old and in college when she signed the agreement, while Husband was significantly older and had worked as a retail pharmacist for 28 years; thus, Husband had more sophistication and experience in business affairs. The evidence in the record, however, does not preponderate in favor of a finding that Husband's age and business experience placed him in an advantageous position. To the contrary, Wife was very bright; she graduated from high school with honors, had worked as a pharmacy technician and substitute teacher, and was pursuing a pharmacy degree at the time she signed the agreement. Moreover, neither sophistication nor experience in business affairs was needed to understand the terms of the agreement because they were very straight forward. Simply put, the agreement clearly and unambiguously stated what Husband owned would remain his separate property, what Wife owned would remain her property, and neither would be entitled to alimony. . . ."

"The trial court found that Wife was 'obviously aware of the [Husband's] assets prior to marriage' because of the length of their relationship. The evidence does not preponderate against, and Wife does not dispute, this finding."

"Wife contends that she was under duress when she signed the agreement because it was presented to her 11 days before the wedding, she knew Husband would not go forward with the marriage if she did not sign the agreement, she was financially dependent on Husband, and she was experiencing pancreatitis symptoms that day. The trial court found that 'Wife entered into the prenuptial agreement freely and without pressure and/or coercion' because 'Husband was not going to force [her] out of his home, or stop supporting [her] if the parties did not marry.'

"As stated above, to be enforced, the parties must enter into a prenuptial agreement 'without exertion of duress.' Tenn. Code Ann. § 36-3-501. This court has recognized that '[d]uress consists of unlawful restraint, intimidation, or compulsion that is so severe that it overcomes the mind or will of ordinary persons.' *Boote*, 198 S.W.3d at 745 (citing *Johnson v. Ford*, 245 S.W. 531, 538 (Tenn. 1922); *Dockery v. Estate of Massey*, 958 S.W.2d 346, 348 (Tenn. Ct. App. 1997)). That said, circumstantial evidence of pressure may still be relevant to the totality-of-the-circumstances analysis."

"[I]n *Ellis v. Ellis*, we concluded that the wife did not sign a prenuptial agreement 'freely' when she did not know that the husband wanted a prenuptial agreement until three days before the wedding. No. E2013-02408-COA-R9-CV, 2014 WL 6662466, at *1, 11 (Tenn. Ct. App. Nov. 25, 2014). When presenting the agreement, the husband also showed the wife her wedding ring and explained 'that she could not have the ring without signing the agreement.' *Id.* at *1. Moreover, the wife had recently moved in with the husband 'after discovering she was three months pregnant' and after quitting her job at the husband's insistence. *Id.* at *11. Although we disagreed that the timing and circumstances met the 'stringent' definition of duress, we found the evidence supported a finding that the wife had not 'freely' entered the agreement. *Id.*

"The circumstances in this case are not comparable to those in *Ellis*. Here, Wife lived with Husband for five years before they became engaged. She was educated, employable, had no children, and was not pregnant. Further, Wife knew for several years that Husband would not marry without a prenuptial agreement in place. Moreover, there is no evidence that Husband insisted Wife sign the prenuptial agreement on the day it was drafted. Accordingly, the evidence does not preponderate against the trial court's finding that Wife entered into the agreement 'freely and without pressure and/or coercion.'"

"It is undisputed that Wife was not represented by independent counsel; however, the attorney who drafted the agreement explained each term to both parties prior to their signing the agreement. Moreover, Wife makes no allegation that the attorney misrepresented the terms of the agreement; she merely alleges that she did not understand it 'at all.' The terms of the agreement, however, were clear and unambiguous, and Wife was more than sufficiently educated to understand the full import of their meaning. As the trial court noted, Wife had known for years that Husband was going to require a prenuptial agreement to protect his assets or there would be no wedding, and the couple had been engaged for a year prior to going to the attorney's office to execute the agreement. Moreover, as we noted earlier, the terms of the agreement were clear and unambiguous. Thus, as the trial court correctly found, Wife had ample time and a sufficient opportunity to seek independent counsel, yet she chose not to do so."

VIII. Property Division

A. Missing Gold and Silver

Dailey v. Dailey, No. E2019-00928-COA-R3-CV (Tenn. Ct. App., Swiney, July 13, 2020).

"Douglas D. Dailey ('Husband') and Violet L. Dailey ('Wife') had been married for approximately forty years. They had divorced once before in 1978 but had gotten back together and remarried. It is undisputed that Husband purchased gold coins during the marriage. Husband testified at trial that he had purchased approximately 400 ounces of gold during a ten-year span. During his deposition,

Husband testified that he had spent approximately 'half a million dollars' on silver and gold, but he testified at trial that he did not think it was that much. Wife testified that Husband told her the value of the gold was $750,000 on one occasion and $750,000 to $1,000,000 on another occasion. Husband testified that he purchased gold throughout the course of the marriage from 1997 or 1998 through 2008 or 2009. Husband kept no records of the gold he purchased during the marriage."

"Husband subsequently began keeping the gold he purchased in a safe deposit box at CBBC Bank where he stored approximately 100 ounces of gold. In November 2009 when Husband sold his company, Underground Technology, he bought a large amount of gold but is unsure of the amount. This gold was stored in a safe deposit box at Peoples Bank. He had not bought gold since that time. He estimated that there was over 200 ounces of gold in the safe deposit box at Peoples Bank.

"Husband testified that he subsequently moved the gold from Peoples Bank back to the marital home shortly before 'Trump's election' in 2016 upon Wife's request after their church 'had a prophecy that President Obama would never come out of office' and Wife feared that they 'wouldn't be able to get in the bank to get it.' Wife confirmed that a prophesy existed about 'the signs of the times' but stated that she was only referring to removing the money they had in the bank and that she did not know the gold was being kept in the bank. After Husband removed the gold from the bank, the gold was stored in the safe room in the downstairs of the home.

"While both parties were living at the home prior to the divorce, Wife was living in the upstairs portion of the home and Husband lived in the downstairs portion of the home. The downstairs portion of the home was connected to the upstairs portion only by an elevator. There was also an outside door to access the downstairs of the home. It is undisputed that Husband often would leave the elevator door open downstairs so that the individuals upstairs could not access the downstairs portion of the home where Husband resided. Only Husband and his mother, who lived 'across the field,' had keys to the outside door accessing the downstairs of the home.

"Wife admitted that she had access to the downstairs of the home when Husband was not home on a few occasions to get meat out of the freezer in the basement. She testified that on those occasions, she went to Husband's mother's home and borrowed the key to the outside door in order to access the downstairs portion of the home. The lock on the safe room required a separate key. According to Wife, Husband's mother never gave her a key to the safe room. Wife testified that she never had a key to the safe room and had been inside the safe room only when Husband opened the door. Husband testified that he sometimes left his keys in the door to the safe room because a dehumidifier had to be emptied often. Wife, however, testified that she never observed Husband's key in the safe room door. Wife further testified that Husband's key ring was a 'huge thing of keys' the size of a 'dinner plate' with approximately three hundred keys on it. Husband acknowledged that the key ring had several keys on it and that it would not fit comfortably in your pocket.

"Husband and Wife were both living in the marital home until Husband filed a petition for an order of protection in May 2016, and Wife was required to leave the home. According to Wife, the petition for an order of protection alleged in part that Wife had taken money from the parties' joint bank account but did not mention the gold being missing. Wife admitted that she had taken $93,000 from the parties' joint bank account because she was afraid Husband would make her leave the home and she would be left with no money. Husband further testified that about the same time, Wife had taken $15,000 hidden in a cinder block in the basement.

"Husband testified that he learned the gold was missing around the time he filed for divorce but that he did not contact law enforcement because he was waiting to retrieve the video footage from the hard drive of the video surveillance equipment that recorded the entrance to the safe room. According to Husband, he planned to contact law enforcement about the missing gold after he had the video. However, Husband testified that the company and individual he had hired to retrieve the video footage were unable to retrieve it."

"In October 2018, the parties informed the court that they had reached an agreement on the pending motions before the court and a partial distribution of the marital property, which they stipulated was a fair and equitable distribution of the property. This agreement was memorialized in a court order entered November 2018. The partial distribution of property disposed of all property except for the missing gold and silver. Following a motion to alter or amend filed by Wife, the Trial Court subsequently modified the property distribution slightly due to the unavailability of an item of property to be awarded to Wife."

"During trial, Husband argued that he had not taken the missing gold and that it was either Wife or the parties' son, Brent, who took the gold. Husband argued during trial that because Wife had taken some gold and sold it at one point during the marriage, she must have necessarily taken this gold as well. As part of his argument on appeal, Husband states that Wife 'had stolen the parties' gold before and sold it' and refers to Wife as a thief. During oral arguments, Husband's counsel stated that Wife 'had stolen in the past from the marital estate.' First, we point out that the gold sold by Wife during the marriage was marital property belonging jointly to both Husband and Wife. Thus, Wife had not stolen the gold as Husband alleges. Second, other than his own uncredible testimony, Husband offered no proof that Wife had taken the missing gold at issue from the safe room.

"Husband alternatively argued that their son, Brent, was responsible for the missing gold. Husband testified that Brent had, in the past, taken gold coins, money from his wallet, and guns from Husband. Brent admitted to taking two gold coins when he was a teenager, which was approximately fifteen years prior, but denied taking any gold since. Brent also acknowledged that he had stolen from Walmart and, on one occasion, his grandmother. Other than Husband's speculative testimony, which the Trial Court deemed as not credible, Husband provided no other evidence to prove that Brent was actually the individual to take the gold from the safe room.

"The evidence presented during trial supported the Trial Court's finding that Husband had control over the gold at the time it disappeared. The Trial Court found that the gold at issue was kept in the safe room in the marital home that was occupied and controlled by Husband. At the time the divorce was filed, Wife was not residing in the home. Prior to filing the divorce complaint, Husband had filed a petition for an order of protection, which resulted in Wife being required to leave the marital home. Even when Wife was residing in the home, Husband had almost exclusive access to the downstairs except that Wife had borrowed a key from his Mother a couple of times and Husband had sometimes allowed Wife to access the downstairs when he was home."

"Additionally, as the Trial Court noted, Husband had a 'cavalier attitude' during his testimony. Husband testified at trial that he first began investigating the missing gold around the time he discovered that the money was missing from the parties' joint checking account. However, Husband did not contact law enforcement to report the gold as stolen or mention the missing gold in his petition for an order of protection, wherein he alleged in part that Wife had taken money from the parties' joint bank account. Although Husband testified that he did not report the gold as

missing or mention it in the petition because he expected to find who took the gold on the security system, Husband was not credible. The Trial Court found that Husband was 'responsible for this marital asset being gone and missing,' and the evidence presented during trial does not preponderate against that finding. We, therefore, find Husband's argument in this regard to be without merit and determine that the evidence presented supports the Trial Court's findings that Husband had control over the gold and the safe room where the gold was located and that Husband was responsible for the gold being missing."

"We next address Husband's final two issues regarding whether the Trial Court erred by classifying the missing gold, which he alleges did not exist, as marital property and awarding half of the value of the gold to Wife. Although Husband raises these as two separate issues, we will address them together as they are interrelated. According to Husband, the gold at issue was missing when the divorce case was initiated and therefore did not exist to be classified as marital property subject to equitable distribution. Husband relies on *Flannary v. Flannary*, 121 S.W.3d 647 (Tenn. 2003) to support his argument that the Trial Court erred by treating the missing gold as marital property. Wife, however, argues that the present case is distinguishable from *Flannary*."

"We determine this case to be distinguishable from *Flannary*. In *Flannary*, the trial court found that the money was not in existence when the divorce action began. *Id.* The trial court in *Flannary* further found that neither party knew what happened to the missing money. *Id.* Because the missing money was not owned by either party at the time of the divorce action, the Tennessee Supreme Court determined that the money was not marital property and was not subject to division as part of the marital estate. *Id.*

"Conversely, the Trial Court in this case found that the missing gold existed, that it was within Husband's exclusive control, and that Husband was responsible for the gold being missing. Although Husband claims on appeal that the missing gold did not exist, the Trial Court found that it did exist. The only evidence to the contrary was Husband's testimony that the Trial Court found to be not credible.

"Husband argues in his appellate brief that the present case is similar to *Flannary* because '[i]n both instances, something of value went missing with no explanation as to where it went' and one spouse was awarded half the value of the missing items. However, this argument mischaracterizes the Trial Court's findings in the present case. The Trial Court in this matter found that the gold existed and that Husband was responsible for the gold being missing. As such, this case is not a situation where there is 'no explanation as to where [the gold] went' as Husband argues. Based on the foregoing, we find Husband's argument in this regard to be without merit and that the Trial Court did not err by determining the missing gold was a marital asset subject to division as marital property. Additionally, the Trial Court did not err by awarding to Wife one-half the value of the missing gold upon its determination that Husband was responsible for the gold's disappearance."

B. Transmutation; Husband's Premarital Residence Became Marital Property by Parties' Actions

Dover v. Dover, No. E2019-01891-COA-R3-CV (Tenn. Ct. App., Davis, Dec. 8, 2020).

"Following a bench trial, the Chancery Court for Knox County ('trial court') granted the divorce of Louise Helen Pack Dover ('Wife') from Norris L. Dover ('Husband') on the basis of inappropriate marital conduct. The trial court classified several real properties, largely purchased by Husband before the marriage, as Husband's separate assets and concluded that no transmutation

occurred during the marriage. The trial court also classified Husband's 401(k), which was established before the marriage, as a marital asset and ordered the parties to divide it equally. The trial court then awarded Wife alimony in solido in the amount of $5,000.00 per month for thirty-six months. We conclude that the trial court erred in the classification of the real properties at issue as well as its classification of Husband's 401(k). Because the division of marital property will change substantially as a result of this opinion, we vacate the trial court's division of the parties' marital estate and the alimony award. We therefore reverse in part, affirm in part, vacate in part, and remand for further proceedings."

"We look to the following factors to determine whether a home owned by a spouse prior to marriage has become marital property through transmutation:

> (1) the use of the property as a marital residence; (2) the ongoing maintenance and management of the property by both parties; (3) placing the title to the property in joint ownership; and (4) using the credit of the non-owner spouse to improve the property.

"*Hayes* [*v. Hayes*], 2012 WL 4936282 [(Tenn. Ct. App., Oct. 18, 2012)], at *12 (citing *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at *5 (Tenn. Ct. App. Sept. 1, 2006)). No single factor is determinative, and whether transmutation has occurred depends on the particular facts and circumstances of each case. *Id.*"

"On appeal, Husband argues that the trial court correctly classified the Lookout Point residence as his separate property, while Wife asserts that the home became a marital asset through transmutation. Addressing the Lookout Point residence, the trial court found, in relevant part, the following:

> This Court finds the residence located at 10900 Lookout Point was owned by the Husband prior to the marriage and was purchased by him in 1989 for approximately $339,000.00. The mortgage for the Lookout Point residence was paid off approximately three years into the marriage. The Court finds that Husband never transferred nor intended to transfer title of this property to Wife. This Court also finds that Wife's credit was never used to purchase, or improve the marital residence.... The monies used for the upkeep and maintenance in the operation of the marital home came from the parties' joint funds which were earned by the Husband during the marriage and prior to the time of the separation.
>
> This Court finds Husband has continued to pay the taxes on the marital residence since the time of the parties' separation in October of 2010. Also, approximately $169,911.20 was spent on renovations and improvements of the marital residence during the time of the marriage. The most recent appraised value of the marital residence was $600,000.00.
>
> The marital residence was purchased by Husband in 1989 as separate marital property and Husband has continued to treat it as separate marital property and no transmutation or co[m]mingling has occurred.

"Addressing the increased value of the Lookout Point residence, the trial court explained:

> As the Court has previously noted, [the funds for renovation] were expended from the parties' marital funds which were earned by Husband with Wife making no monetary contribution, but contributions in the form of helping to pick out fabrics and other design elements of the

renovation and remodeling. No proof of any substantial contribution by Wife to the increase in value was presented.

"Having thoroughly reviewed the record, we must conclude that the evidence preponderates against the trial court's finding that the Lookout Point residence remained Husband's separate property. First, it is undisputed that the parties used the Lookout Point residence as their family home. Second, both parties contributed to ongoing management and maintenance of the property, both during the marriage and during the period of separation before trial. It is undisputed that when the parties resided together, Husband worked long hours and Wife cared for the home as well as the parties' children. The record demonstrates that Wife paid bills for the home out of the parties' joint bank account, helped plan renovations on the home, planted flowers, etc. Wife was also ordered by the trial court early in the litigation to pay for the utilities and maintenance expenses on the home while she and the children continued residing there. The record clearly reflects that Wife contributed greatly to the ongoing management and maintenance of the Lookout Point residence.

"The third transmutation factor, whether the home is titled jointly, obviously militates against a finding of transmutation in this case because the Lookout Point residence is titled in Husband's name only. However, it is well-established that 'record ownership of an asset does not always control its classification.' *Malmquist v. Malmquist*, No. W2007-02373-COA-R3-CV, 2011 WL 1087206, at *25 (Tenn. Ct. App. Mar. 25, 2011); *see also Altman v. Altman*, 181 S.W.3d 676, 680–81 (Tenn. Ct. App. 2005) ('[T]he classification of property does not depend on the state of its record title but on the conduct of the parties.'). Moreover, the fourth factor strongly favors a finding of transmutation in light of the proof that the parties did substantial renovations on the Lookout Point residence with marital funds. Wife was heavily involved in the improvement process and often wrote checks out the parties' joint bank account to pay for the improvements. Wife also testified that many of the renovations were done to make the Lookout Point residence more amenable to Wife and the children. For instance, Wife testified that the master bathroom and the laundry room were completely renovated to her specifications and that a play space for the children was added near the laundry room. Although both the trial court and Husband make much of the fact that Wife's credit was never used to fund the improvements, this is inapposite in light of the fact that no party's credit was needed because the renovations were paid for outright with marital funds.

"While Husband asserts that he never intended for the Lookout Point residence to become a marital asset, the only evidence offered to this effect was Husband's testimony, which Wife disputed. Absent any additional evidence from Husband, it appears his 'intent to keep [the home] as his separate property surfaced only after the demise of the marriage.' *Phipps v. Phipps*, No. E2014-00922-COA-R3-CV, 2015 WL 335843, at *5 (Tenn. Ct. App. Jan. 27, 2015). Indeed, Husband's conduct during the marriage suggests otherwise. Under all of these circumstances, we must conclude that the evidence in the record preponderates against the trial court's finding that the Lookout Point residence remained Husband's separate property. We hold that the evidence preponderates in favor of a finding that the Lookout Point residence became marital property and should have been included in the parties' marital estate for purposes of the trial court's division of property."

C. Improper to Award Lien Against, or Division of Asset of, LLC Owned by Husband

Barton v. Barton, No. E2019-01136-COA-R3-CV (Tenn. Ct. App., Goldin, Nov. 10, 2020).

"In 2005, Husband began doing private government contract work with the United States Army in Iraq. He subsequently began his own business, entering into contracts directly with the United States Government involving security, vehicle maintenance, and logistics. In 2007, he started Vanquish Worldwide, LLC ('Vanquish Worldwide'), a company that contracted with National Afghan Trucking to transport government goods to 400 military bases in Iraq. The business was very successful, and the parties amassed considerable assets during the years 2011-2015 until the contract was terminated in December 2015, a year before it was set to expire. Husband also started many other businesses and acquired significant real estate during the course of the marriage."

"In the Final Judgment for Divorce, which incorporated the Memorandum and Order, the trial court granted Wife a divorce on the ground of Husband's inappropriate marital conduct and classified, valued, and divided the marital estate, with Wife receiving approximately 55 percent and Husband 45 percent. Husband was ordered to pay Wife the sum of $7,294,570.30 as alimony *in solido* to adjust the marital distribution in the estate, payable over a period of 10 years, with 119 monthly payments of $30,394.04 and a final balloon payment of $3,677,679.54. The Final Judgment also confirmed that the court awarded a lien on real property 'whether the property is titled in the name of Eric Wayne Barton, Lexlin Gypsy Ranch,Vanquish Worldwide, LLC, and/or Vanquish Leasing' to secure payment of the alimony *in solido* award. Wife was also awarded her attorney's fees in the amount of $43,571.57 as additional alimony *in solido.*

"The trial court also concluded, as it had in its Memorandum and Order, that a certain 'contingent contractual claim' of Vanquish Worldwide against the U.S. Government, potentially worth $32 million dollars, was a marital asset subject to division. The court then proceeded to allocate the first $6,664,000.00 of any recovery from Vanquish Worldwide's claims, after litigation expenses were paid, to Husband, and allocated 'any recovery beyond the first $6,664,000.00 as 55% to the Wife, and 45% to the Husband, net after reasonable litigation expenses.'"

"We affirm the trial court's classification of Husband's ownership interest in Vanquish Worldwide as a marital asset.

"However, the real issue, as we perceive it, is whether the court had jurisdiction to act on the assets of the LLCs themselves once Husband was awarded his full membership interest in the LLCs as part of the court's division of the assets. Specifically, Husband raises the issue of whether the court erred in classifying an asset of Vanquish Worldwide, i.e., the $32.8 million contractual claim against the United States Government, as marital property and dividing it between the parties and, whether the trial court further erred in awarding Wife a lien to secure her alimony *in solido* payment against various parcels of real property that were owned by the LLCs and not Husband, individually."

"Here, the trial court's judgment attempts to reach the real estate assets of both Husband and of three LLCs owned by Husband to secure his alimony *in solido* obligation. While Tennessee Code Annotated section 36-4-121(f)(2) grants courts the authority to impose a lien to effectuate an equitable distribution, and the court's judgment, once recorded, operates as a lien on the real property owned by Husband, *see* Tenn. Code Ann. § 25-5-101(b)(1), there is no statutory authority here for the court to act upon parcels of real estate owned by the LLCs. Despite Husband's 100 percent ownership interest in the LLCs that owned these parcels of real estate, Tennessee Code Annotated section 48-249-502(a) provides that '[a] member has no interest in specific LLC property. All property transferred to or acquired by an LLC is property of the LLC.' *See also* Tenn. Code Ann. § 48-215-101(a).

"There is no debate that the LLCs were not parties in this case, even though Vanquish Worldwide filed a motion to intervene, which was denied. Thus, the court did not have jurisdiction over these entities and their assets, only the parties' ownership interest in the LLCs themselves. We, therefore, conclude that the real property owned by the LLCs could not be subjected to a lien to guarantee payment of Husband's alimony obligation, and we vacate those portions of the trial court's judgment granting Wife a lien on those parcels of real property owned by the LLCs.

"Next, Husband argues that the trial court erred in finding that Wife has a vested interest in a $32.8 million contractual claim that his business, Vanquish Worldwide, was pursuing against the U.S. Government based on the LLC's work for the government in Afghanistan.

"Husband argues that the contractual claim is the property of a non-party, asserting that the claim belongs solely to the LLC. Though the trial court recited that 'Plaintiff, Eric W. Barton, individually and as President and CEO of Vanquish Worldwide, LLC has a contingent contractual claim,' the evidence does not support such a finding. There was no evidence admitted at trial showing that Husband had pursued this appeal in his individual capacity.

"Because the assets of an LLC are separate from those of its members, we conclude that the contractual claim was not marital property and was therefore not subject to distribution to Wife. We, therefore, vacate the trial court's award to Wife of any interest in the contractual claim of Vanquish Worldwide.

"In view of the fact that the trial court's order clearly reflects that it treated the contractual claim as an asset of Husband, separate from the value of the marital interest in Vanquish Worldwide, the value of Vanquish Worldwide and the net martial business interests have necessarily not been accurately computed. Indeed, the contractual claim of Vanquish Worldwide is relevant to an accurate valuation of Vanquish Worldwide and the total value of the parties' marital business interests. Therefore, we vacate that portion of the trial court's order pertaining to the valuation of the parties' marital business interests and remand this case so that the trial court can consider the impact of the contractual claim on the court's valuation. The trial court is free to take additional proof on the valuation of Vanquish Worldwide."

IX. Alimony; Modification of In Futuro Due to Husband's Change in Income and Subsequent Retirement

Himes v. Himes, No. M2019-01344-COA-R3-CV (Tenn. Ct. App., McBrayer, Apr. 20, 2021).

"In 2011, Randall G. Himes ('Husband') and Elizabeth Bates Himes ('Wife') divorced after a twenty-nine-year marriage. In the final divorce decree, the Wilson County General Sessions Court adopted and incorporated the parties' Marital Dissolution Agreement ('MDA'). Among other things, the parties agreed that Husband would pay Wife $5,000 each month in periodic alimony until her death or remarriage or Husband's death. And, as security for the alimony obligation, Husband agreed to maintain a $500,000 term life insurance policy with Wife as the beneficiary.

"Three-and-a-half years later, Husband petitioned the court to reduce or terminate his alimony obligation, as well as the life insurance requirement. Husband alleged that he had been terminated from his job and was unable to secure comparable employment. The trial court found that a substantial and material change in circumstances had occurred warranting a reduction in alimony.

On April 22, 2016, the court reduced the alimony award to $2,500 per month, retroactive to January 1. The court left the life insurance requirement intact.

"On November 29, 2017, Wife filed both a petition for civil contempt and a petition to modify alimony. She asked the court to hold Husband in contempt for his failure to maintain the life insurance policy required by the MDA. Her modification petition was premised on Husband's increased income since the last modification order. Wife sought a return to the original alimony amount specified in the MDA, retroactive to the date of her petition. Husband filed a counter-petition. He alleged that a dramatic increase in the required life insurance premium and his retirement plans warranted a decrease or termination of his alimony obligation."

"On appeal, Husband challenges the trial court's alimony decisions. Specifically, he contends that the trial court abused its discretion by retroactively increasing the alimony award and in failing to terminate or further reduce his alimony obligation after his retirement. For her part, Wife argues that the trial court erred in partially granting Husband's motion to alter or amend the judgment. She also seeks an award of post-judgment interest and attorney's fees."

"Both parties agree that the MDA provided for alimony *in futuro.* An award of *alimony in futuro* 'remain[s] in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of substantial and material change in circumstances.' Tenn. Code Ann. § 36-5-121(f)(2)(A) (2017). The party seeking modification bears the burden of showing the requisite change in circumstances. *Wiser* [*v. Wiser*], 339 S.W.3d [1] at 12 [(Tenn. Ct. App. 2010)]. A change is material if it occurred after the entry of the last alimony order and was unanticipated at the time of that order. *Jekot v. Jekot*, 362 S.W.3d 76, 83 (Tenn. Ct. App. 2011). A change is substantial if 'it significantly affects either the obligor's ability to pay or the obligee's need for support.' *Bogan v. Bogan*, 60 S.W.3d 721, 728 (Tenn. 2001).

"Proving a substantial and material change is merely the first hurdle. *See id.* at 730; *Wiser*, 339 S.W.3d at 14. The party requesting modification must also show that modification is warranted. *Bogan*, 60 S.W.3d at 730; *Wiser*, 339 S.W.3d at 14. In this second step of the modification analysis, our courts are guided by the statutory factors in Tennessee Code Annotated § 36-5-121(i), to the extent relevant. *Bogan*, 60 S.W.3d at 730; *Wiser*, 339 S.W.3d at 14-15. The two most important factors are need and ability to pay. *Bogan*, 60 S.W.3d at 730. Notably, in a modification proceeding, the recipient's need is not the court's primary concern. *Id.* '[T]he ability of the obligor to provide support must be given at least equal consideration.' *Id.*"

"The last modification order was based on the parties' circumstances in March 2016. At the time of the last trial, Husband had been unemployed for almost a year. The court modified alimony based on an imputed annual income of $60,000.

"At this trial, Husband conceded that he began working for a new employer, Team Payments, on April 4, 2016. His initial base salary of $72,000 increased to $100,000 in February 2017. With commissions, Husband earned approximately $105,700 from his employment in both 2017 and 2018. But Husband's employment ended as of December 3, 2018. And based on his age and health, Husband decided to retire.

"Husband's increased income since the entry of the last modification order significantly impacted his ability to pay. *See Bogan*, 60 S.W.3d at 728. We conclude that this increase constituted a substantial and material change in circumstances.

"To determine whether this change warranted modification, the trial court considered the evidence in light of the statutory factors, particularly the evidence of need and ability to pay. The trial court awarded Wife additional alimony of $1,000 per month for the period between November 2017 and February 2019. Husband challenges the evidentiary basis of the court's decision.

"Husband primarily argues that he did not earn any income in December 2018, or the first two months of 2019. So, he claims his alimony obligation for those months should not have been increased. Our review of the record indicates that Husband received his normal monthly income from Team Payments in December 2018. But we find no indication that he received any income during the following two months.

"Wife counters that Husband had access to other funds from which to pay alimony during those months. Husband's other assets are relevant to the modification analysis. *See Malkin v. Malkin*, 475 S.W.3d 252, 261 (Tenn. Ct. App. 2015) (noting that income is only one factor in the ability-to-pay analysis). But income from the sale of the marital residence should not be considered. *See Norvell v. Norvell*, 805 S.W.2d 772, 775 (Tenn. Ct. App. 1990). Excluding those funds, Husband did not have a significant amount of liquid assets from which to pay additional alimony. Husband needed the funds in his IRA to pay his normal monthly expenses until his social security benefits were available. Wife failed to meet her burden of establishing that Husband had the ability to pay additional alimony in January and February 2019.

"Still, Husband earned a substantial income in 2017 and 2018. His monthly earnings during those years were approximately $2,700 more than the amount imputed at the last trial. There is no evidence in the record that he experienced a corresponding increase in his expenses during this time frame. The evidence supports a finding that, until Husband lost his employment with Team Payments, he had the ability to pay Wife an additional $1,000 per month in alimony.

"Husband also questions Wife's need for additional alimony in 2017 and 2018. Her income and expense statement evidenced a current monthly deficit of $868, without accounting for the expenses she had postponed. And while Husband complains Wife failed to curtail her spending, her expenses, as a whole, are fairly reasonable.

"Although Wife's monthly deficit is less than the amount awarded, this difference is not so substantial as to constitute an abuse of discretion. *See Bogan*, 60 S.W.3d at 727 ('[A] trial court's decision to modify support payments is given 'wide latitude' within its range of discretion.' (citation omitted)). A difference of $131 is well within the range of reasonableness. *See Avaritt v. Avaritt*, No. M2007-01804-COA-R3-CV, 2008 WL 4072087, at *5 (Tenn. Ct. App. Aug. 28, 2008) (noting that the alimony amount awarded was within the range of reasonableness).

"But the evidence preponderates against a finding that Husband had the ability to pay additional alimony during January and February 2019. So we modify the court's retroactive judgment to $14,000, reflecting a $1,000 monthly increase for the period between November 2017 and December 2018."

"Turning to the prospective award, the trial court found that Husband's decision to retire at the end of 2018 was objectively reasonable. This finding has not been challenged on appeal. '[W]hen an obligor's retirement is objectively reasonable, it ... constitute[s] a substantial and material change in circumstances.' *Bogan*, 60 S.W.3d at 729. The trial court reduced Husband's alimony obligation

to $1,500 per month as of the trial date. Husband contends that the proof at trial warranted termination of the alimony award or, at least, a further reduction.

"Contrary to Husband's argument on appeal, we find no reversible error in the trial court's consideration of the parties' separate assets. Wife had no significant assets other than the IRA she received as part of the property division. The remaining balance in her IRA account at the time of trial was $100,000. The court valued Wife's potential inheritance at $400,000. Taken together, the court determined that Wife had $500,000 in separate assets. In comparison, the court found Husband's separate assets had a somewhat higher value. The remaining balance in Husband's IRA was $240,000. And Husband had a half-interest in a $635,000 residential property in Nashville. Husband argues that the court failed to deduct the mortgage from the home's value. Even so, Husband was only responsible for a portion of that debt. And, as the court noted, Husband also had a future inheritance from his uncle.

"The evidence does not preponderate against the court's assessment of Wife's need. Husband points out that Wife's need would be greatly diminished if her actual income and expense figures were replaced with the higher pension benefit and lower monthly expenses she could have enjoyed had she made wiser choices. We recognize, as did the trial court, that if Wife had made different choices over the years, her need might be different. Still, the court's task was to assess Wife's need based on her present circumstances, not a hypothetical scenario. *See* Tenn. Code Ann. § 36-5-121(i)(1). And while Wife admitted she had the ability to work, the record is virtually silent as to her earning capacity. No proof was offered of the type of job Wife might be qualified for or the income she could expect to receive. Husband's bald assertion that Wife could have obtained a part-time job, without more, is insufficient.

"We reach the same conclusion with regard to the trial court's finding that Husband had the ability to pay the reduced alimony amount during retirement. Husband estimated that he would receive $2,650 per month in social security benefits, and, in another year, $3,752 per month from his pension. His projected monthly expenses were $8,742. As noted by the trial court, his only significant expense was his home mortgage, which his uncle paid in part. Husband complains that he cannot pay the amount awarded without prematurely liquidating his retirement funds. On this record, we cannot agree. With his significant earning capacity and valuable separate assets, Husband has other options.

"The trial court did not abuse its discretion in failing to further reduce or terminate Husband's alimony obligation. The court 'properly identified and applied the most appropriate legal principles applicable to the decision.' *See Lee Med., Inc.* [*v. Beecher*], 312 S.W.3d [515] at 524 [(Tenn. 2010)]. The court's findings concerning Wife's need and Husband's ability to pay are 'properly supported by evidence in the record.' *See id.* And the decision to reduce, rather than terminate, the alimony award 'was within the range of acceptable alternative dispositions.' *See id.*"

X. Order of Protection; Time for Service of Ex Parte Order, Lifetime Order of Protection

Chapter 60, Public Acts 2021, adding T.C.A. § 36-3-609(b)(2) and -627 eff. July 1, 2021.

36-3-609(b).

"(2) Notwithstanding § 16–15–902, an ex parte order of protection may be served within one (1) year of issuance."

36-3-627.

"(a)

(1) Notwithstanding § 36–3–608, a victim of a felony offense under title 39, chapter 13, part 1, 2, 3, or 5 may file a petition for a lifetime order of protection against the offender who was convicted of the offense.
(2) As used in this section, 'victim' has the meaning given in § 40–38–203.

"(b) A petition filed by an unemancipated person under eighteen (18) years of age must be signed by one (1) of that person's parents or by that person's guardian. The petition may also be signed by a caseworker at a not-for-profit organization that receives funds pursuant to title 71, chapter 6, part 2 for family violence and child abuse prevention and shelters; provided, however, that a petition signed by a caseworker may not be filed against the unemancipated minor's parent or legal guardian. In such case, unless the court finds that the action would create a threat of serious harm to the minor, a copy of the petition and notice of hearing shall also be served on the parents of the minor child, or if the parents are not living together and jointly caring for the child, upon the primary residential parent. In cases before the juvenile court where the department of children's services is a party or where a guardian ad litem has been appointed for the child by the juvenile court, the petition may be filed by the department or the guardian ad litem.

"(c) Venue for a petition for an order of protection under this section, and all other matters relating to orders of protection, is in the county where the respondent resides or the county in which the offense occurred. If the respondent is not a resident of this state, the petition may be filed in the county where the petitioner resides.

"(d) The court shall cause a copy of the petition and notice of the date set for the hearing on such petition to be served upon the respondent at least five (5) days prior to the hearing. The notice must advise the respondent that the respondent may be represented by counsel. In every case, unless the court finds that the action would create a threat of serious harm to the minor, when a petitioner is under eighteen (18) years of age, a copy of the petition, and notice of hearing must also be served on the parents of the minor child, or in the event that the parents are not living together and jointly caring for the child, upon the primary residential parent, pursuant to the requirements of this section.

"(e) At the hearing on the petition, the court shall, if the petitioner has proved the respondent was convicted of an offense listed in subsection (a) and that the petitioner was the victim of the offense, issue a lifetime order of protection that remains in effect until the death of the petitioner or the respondent. If the petitioner has not provided proof that respondent was convicted of such an offense and that the petitioner was the victim of the offense, the court shall dismiss the petition.

"(f) An order of protection granted under this section must:

(1) Prohibit the respondent from coming about the petitioner for any purpose, from telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly;
(2) Include a statement of the maximum penalty that may be imposed pursuant to § 36–3–610 for violating such order; and

(3) Be valid and enforceable in any county of this state.

"(g) A lifetime order of protection is effective and must be served as provided in § 36–3–609.

"(h)

(1) Upon violation of a lifetime order of protection, the court may hold the defendant in civil or criminal contempt and, following a contempt hearing as provided in § 36–3–612, punish the defendant in accordance with the law. A judge of the general sessions court has the same power as a court of record to punish the defendant for contempt when exercising jurisdiction pursuant to this part or when exercising concurrent jurisdiction with a court of record. A judge of the general sessions court who is not a licensed attorney shall appoint an attorney referee to hear charges of criminal contempt.

(2) In addition to the authorized punishments for contempt of court, the judge may assess any person who violates a lifetime order of protection a civil penalty of fifty dollars ($50.00). The judge may further order that any support payment made pursuant to an order of protection or a court-approved consent agreement be made under an income assignment to the clerk of court. Upon collecting the civil penalty imposed by this subdivision (h)(2), the clerk shall, on a monthly basis, send the money to the state treasurer who shall deposit it in the domestic violence community education fund created by § 36–3–616.

"(i) An arrest for violation of a lifetime order of protection issued pursuant to this section may be with or without warrant. A law enforcement officer shall arrest the respondent without a warrant if:

(1) The officer has proper jurisdiction over the area in which the violation occurred;

(2) The officer has reasonable cause to believe the respondent has violated or is in violation of a lifetime order for protection; and

(3) The officer has verified whether a lifetime order of protection is in effect against the respondent. If necessary, the officer may verify the existence of a lifetime order for protection by telephone or radio communication with the appropriate law enforcement agency."

JUVENILE LAW

I. Foster Care

A. Contact with Siblings

Chapter 567, Public Acts 2021, adding T.C.A. § 37-2-420 eff. July 1, 2021.

"(a) An agency shall provide a child in foster care with contact information for each sibling who is also in foster care and who is not placed in the same home as the child if maintaining contact with the sibling is in the best interests of each sibling.

"(b) A child in foster care must not be punished for behavioral problems by restricting contact with the child's sibling.

"(c) As used in this section, 'sibling' includes full siblings, half siblings, and step-siblings."

B. Kinship Foster Care Program; Placement with Parent

Chapter 311, Public Acts 2021, adding T.C.A. § 37-2-414(d) eff. July 1, 2021.

"(d) When a child has been removed from the home of one (1) parent and is in the care, custody, or guardianship of the department, the department shall consider and evaluate the child's other natural or adoptive parent, if available, for placement before considering any other relative pursuant to subsection (b). The child's other natural or adoptive parent is not eligible for the kinship foster care program or any payments for kinship foster care under the program."

II. Dependency and Neglect; Presumption Regarding Subsequent Children

Chapter 568, Public Acts 2021, adding T.C.A. § 37-1-188 eff. July 1, 2021.

"(a) This section is known and may be cited as 'Eli's law.'

"(b) Notwithstanding this part to the contrary, there is a presumption that any child that is born to a parent, from whose custody a child has previously been removed for being dependent or neglected and the child who was previously removed is in the custody of the department of children's services, may be dependent or neglected and that it is in the best interest of both children that the child's birth be brought to the court's attention.

"(c) Upon learning of the birth of the subsequent child, the department shall notify the court that adjudicated the first child dependent and neglected and any other party entitled to notice of the subsequent child's birth.

"(d) Upon receiving the notice, the court should immediately schedule a hearing to inquire into the effect of the subsequent child's birth upon the case before the court and to address any further needed steps to protect the safety and well-being of the family."

III. Records; Department of Children's Services' Records Regarding Child Abuse or Neglect Are Confidential

Chapter 590, Public Acts 2021, adding T.C.A. § 37-5-107(k) eff. July 1, 2021.

"(k) (1) It is an offense for any person to attempt to access or obtain confidential information from the department regarding alleged child abuse or neglect that the person knows is in violation of state or federal laws and regulations regarding confidentiality.
(2) A violation of this subsection (k) is a Class A misdemeanor."

IV. Severe Child Abuse Definition Expanded

Chapter 508, Public Acts 2021, adding T.C.A. § 37-1-102(b)(27)(F) eff. July 1, 2021.

"[Severe child abuse means:]

"(F) Knowingly allowing a child to be within a structure where any of the following controlled substances are present and accessible to the child:
(i) Any Schedule I controlled substance listed in § 39–17–406;
(ii) Cocaine;
(iii) Methamphetamine; or
(iv) Fentanyl."

V. Detaining Child in Secure Facility Pending Hearing Permitted

A. Theft Crimes

Chapter 105, Public Act 2021, adding T.C.A. § 37-1-114(c)(1)(C) eff. Apr. 7, 2021.

A child may be detained in a secure facility pending a hearing if there is probable cause to believe the child committed:

"(C) Burglary, under § 39–14–402, aggravated burglary, under § 39–14–403, especially aggravated burglary, under § 39–14–404, an offense under title 39, chapter 13, part 4, or theft, under § 39–14–103, of a motor vehicle."

B. Threat of Mass Violence on School Property

Chapter 395, Public Act 2021, adding T.C.A. § 37-1-114(c)(1)(D) eff. July 1, 2021.

A child is likewise subject to detention if probable cause exists to believe the child has committed "[a] threat of mass violence on school property, as prohibited by § 39-16-517. The Court may order a child held under this subdivision (c)(1)(C) to undergo a mental health evaluation under § 37-1-128(e) if appropriate."

VI. Delinquent Child; Possible Commitment for One Year

Chapter 319, Public Acts 2021, adding T.C.A. § 37-1-131(e) eff. July 1, 2021.

"(e) (1) Notwithstanding this section to the contrary, a juvenile who is adjudicated delinquent for conduct that, if committed by an adult, would constitute one (1) of the offenses set out in subdivision (e)(3) may be committed to the department of children's services for a period of one (1) year.

(2) This subsection (e) does not prohibit the court from:

(A) Transferring a juvenile to whom this section applies to adult court to stand trial as an adult as provided in § 37–1–134;

(B) Extending the term of commitment beyond one (1) year; or

(C) Ordering any other dispositional alternative.

(3) The offenses to which this subsection (e) applies are:

(A) Rape, as prohibited by § 39–13–503;

(B) Aggravated rape, as prohibited by § 39–13–502;

(C) Rape of a child, as prohibited by § 39–13–522; and

(D) Aggravated rape of a child, as prohibited by § 39–13–531."

VII. Sex Offender; Limited Contact with Children

Chapter 436, Public Acts 2021, adding T.C.A. §§ 37-1-131(f) and amending -129(a) eff. July 1, 2021.

37-1-131.

"(f) Notwithstanding this section to the contrary, the court shall prohibit a child who is adjudicated delinquent for conduct that, if committed by an adult, would constitute the offense of aggravated rape, under § 39–13–502, rape, under § 39–13–503, rape of a child, under § 39–13–522, or aggravated rape of a child, under § 39–13–531, from accepting employment or volunteering in any capacity that the child knows or reasonably should know will cause the child to be in close and frequent contact with a minor until the child reaches eighteen (18) years of age. This subsection (e) does not prohibit the child from accepting employment or volunteering in a position that involves incidental contact with minors. Notwithstanding this section to the contrary, the prohibition required by this subsection (e) must remain in effect until the child attains eighteen (18) years of age, regardless of the other terms of the child's disposition."

37-1-129(a).

"A child cannot be placed on judicial diversion who committed a delinquent act which, if committed as an adult, would constitute first or second degree murder, rape, aggravated rape, aggravated sexual battery, rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping or especially aggravated kidnapping."

VIII. Illegal Use of Telecommunication Device; Image of Sexual Activity Involving a Minor

Chapter 147, Public Acts 2021, amending T.C.A. § 37-1-148(a) eff. July 1, 2021.

"A minor commits illegal use of a telecommunication device who:

(1) Intentionally or knowingly, by use of a telecommunication device, transmits, distributes, publishes, or disseminates a photograph, video, or other material that contains a sexually explicit image of a minor or an image of sexual activity involving a minor; or

(2) Intentionally possesses a photograph, video, or other material that contains a sexually explicit image of a minor or an image of sexual activity involving a minor."

EDUCATION LAW

I. Special Legislative Session to Address COVID-19 Related Educational Matters

Historic Session to Help K-12 Tennessee Students Come to a Close, Press Release Issued by the Governor's Office, Jan. 22, 2021.

"NASHVILLE, Tenn. – Today, Tennessee Governor Bill Lee, Lt. Gov. McNally, Speaker Sexton and members of the General Assembly closed a historic special session to address learning loss and the negative effects on student proficiency in reading and math marked by time away from the classroom due to COVID-19.

"'COVID-19 has severely disrupted education in Tennessee. Our decisive action to intervene on behalf of Tennessee students will equip them for success, educating our kids better in the future than before the pandemic,' said Gov. Lee. 'I thank the General Assembly for their swift passage of legislation that will benefit our students.'"

"In addition to interventions for Tennessee students, the passed legislation increases the salary component of the education funding formula by 4%.

"'I am grateful for a productive and efficient conclusion to a legislative session focused on helping children, parents and teachers,' said Lt. Gov. McNally (R-Oak Ridge). 'Tennessee has made tremendous improvements in education over the last decade. The coronavirus public health crisis began to put all of that at risk. The steps we took this week will reverse the learning loss that has taken place and prevent any further erosion of our progress. I appreciate Governor Lee calling this special session to draw our attention to the pressing needs of education in this state. The House and the Senate came together to ensure our progress continues. I appreciate the efforts of each and every one of my colleagues for their efforts this week on behalf of our students, teachers and parents.'

"Gov. Lee's slate of education priorities included learning loss, phonics-based reading instruction and accountability measures to inform student progress.

"'This is a momentous day for Tennessee, for our students, and for our parents because our General Assembly has drawn a line in the sand, and we have said we can no longer accept that only one third of our students are proficient in reading and in math,' said Tennessee House Speaker Sexton (R-Crossville). 'We want to be number one in education; I appreciate Gov. Lee for his vision, as well as Lt. Gov McNally, and the House and Senate for their partnership as we all have worked together this week to transform educational outcomes for Tennessee students.'

"The passed legislation includes the following measures:

"**Intervening to Stop Learning Loss** ['Tennessee Learning Loss Remediation and Student Acceleration Act']

[**Chapter 1, Public Acts 2021, First Extraordinary Session**, adding T.C.A. §§ 49-6-1501 et seq. Note: Sections 1, 3 & 4 eff. Feb. 3, 2021, and Section 2 eff. July 1, 2021.]

- Requires interventions for struggling students including after-school learning mini-camps, learning loss bridge camps and summer learning camps, beginning summer 2021
- Program prioritizes students who score below proficient in both reading (ELA) and math subjects
- Creates the Tennessee Accelerated Literacy and Learning Corps to provide ongoing tutoring for students throughout the entire school year
- Strengthens laws around a third grade reading gate so we no longer advance students who are not prepared

"**Building Better Readers with Phonics** ['Tennessee Literary Success Act']

[**Chapter 3, Public Acts 2021, First Extraordinary Session**, amending T.C.A. §§ 49-1-901–902 and adding T.C.A. §§ 49-1-903 et seq. eff. Feb. 3, 2021.]

- Ensures local education agencies (LEAs) use a phonics-based approach for kindergarten through third grade reading instruction
- Establishes a reading screener for parents and teachers to identify when students need help, well before third grade
- Provides training and support for educators to teach phonics-based reading instruction

"**Accountability to Inform**

[**Chapter 2, Public Acts 2021, First Extraordinary Session**, amending various parts of Title 49, Chapter 1 eff. Feb. 3, 2021.]

- Extends hold harmless provisions from the 2019-20 school year to the 2020-21 school year so that students, teachers, schools and districts do not face any negative consequences associated with student assessments
- Provides parents and educators with assessment data including TCAP testing to provide an accurate picture of where Tennessee students are and what supports are needed to offset any learning losses"

[Lawmakers also passed a budget bill to fund the new programs. See **Chapter 4, Public Acts 2021, First Extraordinary Session** eff. Feb. 3, 2021.]

II. School Voucher Program Found Unconstitutional by Tennessee Court of Appeals

Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education, No. M2020-00683-COA-R9-CV (Tenn. Ct. App., Bennett, Sept. 29, 2020), perm. app. granted Feb. 4, 2021.

"Davidson and Shelby counties sued the State of Tennessee to challenge the constitutionality of the Tennessee Education Savings Account Pilot Program. The trial court found that both counties had standing and that the act was unconstitutional under paragraph 2 of article XI, section 9 of the Tennessee Constitution. The State and intervening defendants appealed. We affirm."

[Oral argument was held on June 3, 2021, before the Tennessee Supreme Court.]

III. Curriculum; Posting on Local Educational Association (LEA) Website

Chapter 519, Public Acts 2021, adding T.C.A. § 49-2-138 eff. July 1, 2022.

"(a) As used in this section, 'curriculum' means a list of courses available to students enrolled in the LEA, accompanied by a course description and a list of the materials that will be used to provide instruction for the course.

"(b) An LEA shall publish the LEA's curriculum on the LEA's website. The LEA shall update the website of any curriculum changes at the beginning of each semester."

IV. Family Life Curriculum

A. To Be Adopted in all LEA's

Chapter 290, Public Acts 2021, amending T.C.A. § 49-6-1302 eff. Apr. 30, 2021.

The requirement to develop, adopt and implement a family life education program now applies in each LEA in all counties.

B. Notification of Instruction of Sexual Orientation or Gender Identity Curriculum

Chapter 281, Public Acts 2021, adding T.C.A. § 49-6-1308 eff. May 3, 2021.

"(a) Not less than thirty (30) days prior to commencing instruction of a sexual orientation curriculum or gender identity curriculum, regardless of whether the curriculum is offered as part of a family life program, sex education program, or other program, each LEA or public charter school shall notify the parent or guardian of each student whom the LEA or charter school anticipates will be present for instruction in the curriculum that:

(1) The LEA or charter school is providing a sexual orientation curriculum or gender identity curriculum; and
(2) The parent or guardian may examine the instructional materials and confer with the student's instructor, school counselor, or principal, as designated by the LEA or public charter school, regarding any or all portions of the curriculum.

"(b) A parent or guardian who wishes to excuse the parent's or guardian's student from any portion of a sexual orientation curriculum or gender identity curriculum must submit a request in writing to the student's instructor, school counselor, or principal. A parent or guardian who wishes to excuse the parent's or guardian's student from all portions of a sexual orientation curriculum or gender identity curriculum must submit a request in writing to the student's principal. An LEA or public charter school shall not penalize a student who is excused from any or all portions of a sexual orientation curriculum or gender identity curriculum for grading purposes if the excused student satisfactorily performs an alternative lesson that is assigned to the student.

"(c) An LEA or public charter school is not required to notify a student's parent or guardian prior to a teacher, principal, or other school personnel:

(1) Responding to a question from a student during class regarding sexual orientation or gender identity as it relates to any topic of instruction; or

(2) Referring to the sexual orientation or gender identity of any historic person, group, or public figure, where the referral provides necessary context in relation to a topic of instruction.

"(d) An LEA or public charter school is not required to provide a sexual orientation curriculum or gender identity curriculum.

"(e) As used in this section 'instruction of a sexual orientation curriculum or gender identity curriculum' includes distributing materials, administering tests, surveys, or questionnaires, or instruction of any kind related to sexual orientation or gender identity."

V. Critical Race Theory Banned

Chapter 493, Public Acts 2021, adding T.C.A. § 49-6-1019 eff. May 25, 2021, for the 2021-2022 school year and subsequent years.

"(a) An LEA or public charter school shall not include or promote the following concepts as part of a course of instruction or in a curriculum or instructional program, or allow teachers or other employees of the LEA or public charter school to use supplemental instructional materials that include or promote the following concepts:

(1) One (1) race or sex is inherently superior to another race or sex;

(2) An individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously;

(3) An individual should be discriminated against or receive adverse treatment because of the individual's race or sex;

(4) An individual's moral character is determined by the individual's race or sex;

(5) An individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;

(6) An individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex;

(7) A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress members of another race or sex;

(8) This state or the United States is fundamentally or irredeemably racist or sexist;

(9) Promoting or advocating the violent overthrow of the United States government;

(10) Promoting division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people;

(11) Ascribing character traits, values, moral or ethical codes, privileges, or beliefs to a race or sex, or to an individual because of the individual's race or sex;

(12) The rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups;

(13) All Americans are not created equal and are not endowed by their Creator with certain unalienable rights, including, life, liberty, and the pursuit of happiness; or

(14) Governments should deny to any person within the government's jurisdiction the equal protection of the law.

"(b) Notwithstanding subsection (a), this section does not prohibit an LEA or public charter school from including, as part of a course of instruction or in a curriculum or instructional program, or

from allowing teachers or other employees of the LEA or public charter school to use supplemental instructional materials that include:

(1) The history of an ethnic group, as described in textbooks and instructional materials adopted in accordance with part 22 of this chapter;
(2) The impartial discussion of controversial aspects of history;
(3) The impartial instruction on the historical oppression of a particular group of people based on race, ethnicity, class, nationality, religion, or geographic region; or
(4) Historical documents relevant to subdivisions (b)(1)—(3) that are permitted under § 49–6–1011.

"(c) If the commissioner of education finds that an LEA or public charter school knowingly violated this section, then the commissioner shall withhold state funds, in an amount determined by the commissioner, from the LEA or public charter school until the LEA or public charter school provides evidence to the commissioner that the LEA or public charter school is no longer in violation of this section."

VI. Textbooks and Instructional Materials; No Common Core

Chapter 205, Public Acts 2021, adding T.C.A. § 49-6-2202(b)(5) eff. July 1, 2021.

"(5) The commission shall not publish a list of, or recommend that the state board of education approve for use in the public schools of this state, textbooks or instructional materials created to align exclusively with the Common Core State Standards or that are marketed or otherwise identified as Common Core textbooks or materials. The state board shall not approve for use in the public schools of this state textbooks or instructional materials created to align exclusively with the Common Core State Standards or that are marketed or otherwise identified as Common Core textbooks or materials."

Chapter 471, Public Acts 2021, amending T.C.A. § 49-6-2206 eff. July 1, 2021.

"(a) An LEA shall not use or permit to be used in any school any textbooks and instructional materials upon any subject to the exclusion of the textbooks and instructional materials listed by the commission and approved by the state board of education; provided, that this prohibition does not apply to textbooks and instructional materials previously listed and purchased with public funds. Upon application of the local board of education, the state board of education may waive this restriction when, in the state board's judgment, the unique or unusual needs of the LEA require it. In making waiver determinations, the state board of education must receive assistance from the department of education. The state board shall outline in its rules specific timeframes when waiver applications may be submitted by a local board of education; provided, that the state board shall allow applications to be submitted outside of the established timeframes in emergency circumstances, as defined by the state board in its rules. A public charter school may request a waiver for the use of textbooks and instructional materials in accordance with § 49–13–111.

"(b) (1) If the commissioner of education finds that an LEA knowingly violated this section, then the commissioner shall withhold state funds, in an amount determined by the commissioner, from the LEA until the LEA is in compliance.
(2) (A) A teacher or principal in any of the public schools of this state shall not use or permit to be used in the person's school, whether as a supplement to the LEA's or school's

adopted textbooks and instructional materials or otherwise, textbooks or instructional materials created to align exclusively with the Common Core State Standards or that are marketed or otherwise identified as Common Core textbooks or materials.

(B) The commissioner of education shall withhold a portion of the state education finance funds that an LEA is otherwise eligible to receive if a teacher or principal employed by the LEA intentionally violates subdivision (b)(1) by purposefully using, or permitting to be used, in the person's school, textbooks or instructional materials created to align exclusively with the Common Core State Standards or that are marketed or otherwise identified as Common Core textbooks or materials."

VII. Dissemination of Information Regarding Dangers of Vapor Products

Chapter 157, Public Acts 2021, adding T.C.A. § 68-1-142 eff. Apr. 20, 2021.

"(a) As used in this section:

(1) 'Junior high school' means a school in which any combination of grades corresponding to grade seven through grade ten (7–10) are taught; however, the school must include grade nine (9);

(2) 'Middle school' means a school designed to serve grades five through eight (5–8) only, or any combination of grades five through eight (5–8);

(3) 'Senior high school' means a school in which any combination of grades corresponding to grade nine through grade twelve (9–12) are taught; however, the school must include grade twelve (12); and

(4) 'Vapor product':

(A) Means a noncombustible product containing nicotine or another substance that employs a mechanical heating element, battery, electronic circuit, or other mechanism, regardless of shape or size, that can be used to produce or emit vapor;

(B) Includes an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product, and a vapor cartridge or other container of a solution containing nicotine or another substance that is intended to be used with or in an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or similar product; and

(C) Does not include a product regulated under Chapter V of the federal Food, Drug, and Cosmetic Act (21 U.S.C. § 351 et seq.).

"(b) The department of health, in coordination with the department of education, shall disseminate information from the centers for disease control and prevention concerning the health effects and dangers of using vapor products to students in public middle schools, public junior high schools, and public senior high schools in this state."

VIII. Administrative Matters

A. Human Trafficking Issues Training

Chapter 287, Public Acts 2021, amending T.C.A. § 49-6-3004(c)(1)(B) eff. Apr. 30, 2021.

"Beginning with the 2021-2022 school year, each local board of education shall require that each teacher employed by the board receive, once every three (3) years, in-service training on the

detection, intervention, prevention, and treatment of human trafficking in which the victim is a child, which must be accomplished through the viewing of a video recording approved by the LEA."

B. Child Abuse Reporting; Information Permitted to Parent or Guardian

Chapter 161, Public Acts 2021, amending T.C.A. § 49-6-1601(d)(5) eff. Apr. 20, 2021.

The prohibition against school personnel providing information relevant to suspected child abuse to a child's parent or guardian has been modified:

"This subdivision (d)(5) does not apply when federal law or regulation mandates disclosure, the parent to whom the notification is made is not alleged to be the perpetrator or in any way complicit in the abuse or neglect, and the notification is done in conjunction with the department of children's services."

C. School Term Attendance Issues; Extreme Weather or Serious Illness

Chapter 180, Public Acts 2021, amending T.C.A. § 49-6-3004(e)(1) eff. July 1, 2021.

"The excess instructional time may be accumulated in amounts up to, but not exceeding, thirteen (13) instructional days each year, and applied toward meeting instructional time requirements missed due to dangerous or extreme weather conditions and for serious outbreaks of illness affecting or endangering students or staff. Upon approval by the commissioner, the excess instructional time may be used in case of natural disaster or dangerous structural or environmental conditions rendering a school unsafe for use."

D. Authority to Open or Close School to In-Person Learning During State of Emergency

Chapter 96, Public Acts 2021, adding T.C.A. §§ 49-2-214 and 49-13-115 eff. Apr. 7, 2021.

"(a) During an emergency as defined in § 58–2–101, local boards of education may consult with the state and local health departments when determining whether to open or close a school to in-person learning and instruction.

"(b) Notwithstanding an executive order issued by the governor or an order issued by a local health board or other public health official, a local board of education has the sole authority to open or close a school to in-person learning and instruction during an emergency as defined in § 58–2–101. A local board of education may delegate the authority to open or close a school to in-person learning and instruction to the director of schools.

"(c) Notwithstanding subsection (b), during an emergency as defined in § 58–2–101, if the governor issues an executive order with statewide applicability that requires schools to be open for in-person learning and instruction, then the executive order supersedes the authority granted in subsection (b)."

An analogous provision was enacted addressing charter schools.

E. Transportation

Chapter 146, Public Acts 2021, amending T.C.A. § 49-6-2101(e) eff. Apr. 13, 2021.

The maximum period of time for a contract between a director of schools and a school transportation employee and between a board of education and a person owning equipment for transportation has been increased from four to six years.

F. School Discipline; Use of Reasonable Force

Chapter 188, Public Acts 2021, adding T.C.A. § 49-6-4107(d) eff. July 1, 2021.

"(d) A teacher, principal, school employee, or school bus driver using reasonable force in exercising the person's lawful authority in accordance with this section is immune from civil liability arising from the person's action pursuant to § 39–11–622, unless the teacher's, principal's, school employee's, or school bus driver's conduct is grossly negligent, reckless, or intentional misconduct. A person who is immune under this section is not the proximate cause of any resulting injuries."

IX. Gender Identity Related Issues

A. "Tennessee Accommodations for All Children Act"

Chapter 452, Public Acts 2021, adding T.C.A. § 49-2-801–805 eff. July 1, 2021.

49-2-802.

"As used in this part:

(1) 'Changing facility' means an area in which a person may be in a state of undress in the presence of others, including a locker room, changing room, or shower room;
(2) 'Reasonable accommodation' includes, but is not limited to, access to a single-occupancy restroom or changing facility or use of an employee restroom or changing facility. 'Reasonable accommodation' does not include the following:
    (A) Access to a restroom or changing facility that is designated for use by members of the opposite sex while members of the opposite sex are present or could be present;
    (B) Requesting that a school construct, remodel, or in any way perform physical or structural changes to a school facility; or
    (C) Requesting that a school limit access to a restroom or changing facility that is designated for use by members of the opposite sex, if limiting access results in a violation of state or local building codes or standards;
(3) 'Restroom' means a facility that includes one (1) or more toilets or urinals; and
(4) 'Sex' means a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth. Evidence of a person's biological sex includes, but is not limited to, a government-issued identification document that accurately reflects a person's sex listed on the person's original birth certificate."

49-2-803.

"(a) A public school shall, to the extent practicable, provide a reasonable accommodation to a student, teacher, or employee of the public school who:

(1) Desires greater privacy when using a multi-occupancy restroom or changing facility designated for the student's, teacher's, or employee's sex and located within a public school building, or when using multi-occupancy sleeping quarters designated for the student's, teacher's, or employee's sex while the student, teacher, or employee is attending a public school-sponsored activity; and

(2) Provides a written request for a reasonable accommodation to the school principal. If the student requesting a reasonable accommodation is under eighteen (18) years of age, then the student's parent or legal guardian must provide the written request on the student's behalf.

"(b) The school principal shall evaluate the request on behalf of the public school and, to the extent practicable, provide a reasonable accommodation. The principal shall issue a decision approving or denying the request in writing. If the principal denies the request, then the grounds for denial must be provided in the principal's written decision.

"(c) This section does not prohibit public schools from adopting policies necessary to accommodate persons protected under the Americans with Disabilities Act, (42 U.S.C. § 12101 et seq.), or persons in need of physical assistance when using restrooms or changing facilities located in public schools."

The act establishes an appeals process for use if a written request for reasonable accommodation is denied. It also creates a cause of action against the LEA for violation of the act.

B. Student's Gender for Purposes of Participation in Interscholastic Athletic Activity or Event

Chapter 40, Public Acts 2021, adding T.C.A. § 49-6-310 eff. Mar. 26, 2021, applying to 2021-22 school year and thereafter.

"(a) A student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth, as indicated on the student's original birth certificate. If a birth certificate provided by a student pursuant to this subsection (a) does not appear to be the student's original birth certificate or does not indicate the student's sex upon birth, then the student must provide other evidence indicating the student's sex at the time of birth. The student or the student's parent or guardian must pay any costs associated with providing the evidence required under this subsection (a).

"(b) The state board of education, each local board of education, and each governing body of a public charter school shall adopt and enforce policies to ensure compliance with subsection (a) in the public schools governed by the respective entity.

"(c) As used in this section:

(1) 'High school' means a school in which any combination of grades nine through twelve (9—12) are taught; and

(2) 'Middle school' means a school in which any combination of grades five through eight (5—8) are taught.

"(d) This section does not apply to students in any grade kindergarten through four (K–4)."

X. Higher Education; Name, Image, Likeness (NIL) Compensation for Intercollegiate Athletes

Chapter 400, Public Acts 2021, adding T.C.A. §§ 49-7-2801--2802 eff. Jan. 1, 2022.

49–7–2801.

"As used in this part, unless the context otherwise requires:

(1) 'Athlete agent' has the same meaning as the term is defined in § 49–7–2102;
(2) 'Athletic program' means an intercollegiate athletic program at an institution;
(3) 'Institution' means a four-year public or private institution of higher education located in this state. 'Institution' does not include an institution of higher education governed by the board of regents of the state university and community college system; and
(4) 'Intercollegiate athlete' means a student who is enrolled in an institution and participates in an athletic program."

49–7–2802.

"(a) An intercollegiate athlete at an institution may earn compensation for the use of the athlete's name, image, or likeness. Such compensation must be commensurate with the fair market value of the authorized use of the athlete's name, image, or likeness. To preserve the integrity, quality, character, and amateur nature of intercollegiate athletics and to maintain a clear separation between amateur intercollegiate athletics and professional sports, such compensation may not be provided in exchange for athletic performance or attendance at an institution and may only be provided by a third party. . . .

"(g) (1) An institution may prohibit an intercollegiate athlete's involvement in name, image, and likeness activities that are reasonably considered to be in conflict with the values of the institution.
(2) An institution may prohibit use of the institution's intellectual property, including, but not limited to, its trademarks, trade dress, and copyrights, by the institution's intercollegiate athletes in the athletes' personal name, image, and likeness activities.
(3) Intercollegiate athletes are prohibited from involvement in name, image, or likeness activities that promote gambling, tobacco, alcohol, and adult entertainment.

"(h) An intercollegiate athlete may obtain representation by a third party, including, but not limited to, an athlete agent, for the purpose of securing compensation for the use of the athlete's name, image, or likeness. Any third-party representative of an intercollegiate athlete under this part shall be a fiduciary for the represented intercollegiate athlete. All athlete agents who represent intercollegiate athletes under this part for purposes of securing compensation for the use of the athlete's name, image, or likeness must be licensed under § 49–7–2104 and must satisfy the requirements of title 49, chapter 7, part 21. If the athlete's representative is an attorney who represents an intercollegiate athlete for purposes of securing compensation for the use of her or his name, image, or likeness, then the attorney must also be active and in good standing with the board of professional responsibility or equivalent entity in the state in which the attorney is licensed. . . ."

COMMERCIAL LAW

I. Enforcement of Foreign Judgment Based on Cognovit Note Entitled to Full Faith and Credit

Capital Partners Network OT, Inc. v. TNG Contractors, LLC, 622 S.W.3d 227 (Tenn., McClarty, 2020), perm. app. denied Mar. 17, 2021.

"On April 25, 2017, Defendant Akbar Arab, individually and on behalf of co-Defendants, TNG Contractors, LLC ('TNG'), and M&A Development, LLC ('M&A'), entered into an agreement for the Purchase and Sale of Future Receipts ('the purchase agreement') with Plaintiff Capital Partners Network, OT, Inc. Mr. Arab is the principal member and officer of TNG and M&A, both Tennessee LLCs, and Plaintiff is a Florida corporation. Mr. Arab also executed a personal guaranty and, personally and on behalf of TNG and M&A, he executed an Affidavit of Confession of Judgment ('the affidavit'). The affidavit, a separate document from the purchase agreement, stated, in relevant part:

> The Defendants (referred to hereinafter jointly and severally as the 'Judgment Debtors/Defendants') all jointly and severally hereby Confess Judgment herein, and authorize entry of judgment against them as the Judgment Debtors/Defendants in the sum of (a) $176,250.00, less any receivables delivered, plus (b) interest thereon at 16% per annum from the date of default to the date of the entry of the Judgment, and (c) all of the costs and disbursements, and an additional sum for (d) legal fees to Plaintiff calculated at 33% of the total of all of the aforesaid sums. Such amount shall be set forth in an affidavit under oath by Plaintiff which shall be attached hereto and filed contemporaneously with this Confession of Judgment.
>
> ... Judgment Debtors/Defendants authorize entry of Judgment against each and every one of them in any and all Counties in the State of New York, as well as in each and every State, County and foreign country where they reside and/or do business at any time hereafter, which addresses are not in New York State.
>
> This confession of judgment is for an obligation due to Plaintiff arising from TNG CONTRACTORS, LLC / M & A DEVELOPMENT LLC's failure to deliver to Plaintiff, TNG CONTRACTORS, LLC / M & A DEVELOPMENT LLC's accounts receivable, which were purchased by Plaintiff pursuant to the Agreement for the Purchase and Sale of Future Receipts dated April 25, 2017 (hereinafter, the 'Agreement') and Debtors/Defendants' breach thereof. This Affidavit is made in connection with the Agreement and is solely for the purchase of commercial or business commodities. This Affidavit may be filed *ex parte* by Plaintiff, without further notice. Agreed-upon interest, reasonable attorneys' fees, costs and disbursements, are to be included as agreed upon by Debtors/Defendants, under the secured Agreement, of which supporting documents include a Personal Guarantee of Performance and a UCC-1 financing statement(s).

"The purchase agreement set out the events that constitute a default and included a choice of law and forum selection clause that stated that New York law and courts would govern the agreement and '[a]ny suit, action or proceeding arising hereunder, or the interpretation, performance or breach of this Agreement.'

"On September 6, after Defendants breached the terms of the agreement, Plaintiff filed the affidavit signed by Mr. Arab in the Supreme Court of Orange County, New York, and obtained a judgment by confession for $96,124.23 against Defendants. Judgments by confession are authorized by statute in New York. N.Y. CPLR. 3218 (McKinney). Defendants' New York counsel argued before the New York court that the court lacked jurisdiction and that the judgment was void for failure to designate a New York county in which it could be filed. Counsel was unsuccessful in getting relief from the judgment.

"On November 3, Plaintiff petitioned the Davidson County Circuit Court Clerk to enroll the foreign judgment in accordance with the Uniform Enforcement of Foreign Judgments Act ('UEFJA'), Tennessee Code Annotated section 26-6-101, *et seq.* Defendants answered the petition and moved to dismiss, asserting that the foreign judgment is void as a matter of law under Tennessee Code Annotated section 25-2-101(a), which provides, 'Any power of attorney or authority to confess judgment which is given before an action is instituted and before the service of process in such action, is declared void; and any judgment based on such power of attorney or authority is likewise declared void.' Following a hearing, the trial court denied the motion and held that it was 'required to accord full faith and credit to the foreign judgment at issue.' The trial court stayed execution on the judgment pending appeal. Following Defendants' appeal, this Court reversed and remanded, reasoning:

> In the case at bar, the [trial] court only heard the Defendants' motion to dismiss before enrolling the New York judgment. Pursuant to the UEFJA and [Tenn. R. Civ. P.] 3A, however, Defendants were entitled to a trial on the merits of the defenses to enrollment and enforcement that were raised in their Answer.

"Capital Partners Network OT, Inc. v. TNG Contractors, LLC, No. M2018-00411-COA-R3-CV, 2018 WL 4350065, at *3 (Tenn. Ct. App. Sept. 11, 2018).

"On August 2, 2019, Plaintiff filed a motion for summary judgment to enroll the foreign judgment in Tennessee. There were no material facts in dispute, but, in response, Defendants again argued that the foreign judgment is void in Tennessee and should be denied full faith and credit because, as a judgment obtained by a pre-litigation confession of judgment, it violates Tennessee public policy. Following a hearing in which Defendants presented their defenses to enrollment and enforcement that were raised in their answer, the trial court granted Plaintiff's motion for summary judgment, reasoning that the foreign judgment at issue is valid because it was obtained in accordance with New York law which allows judgment by confession. All Defendants now appeal.

"The sole issue before us is whether the trial court erred in granting summary judgment to Plaintiff, according the foreign judgment full faith and credit in Tennessee."

"Defendants assert that the foreign judgment obtained pursuant to New York law and valid in New York state should not be accorded full faith and credit because it violates the Tennessee public policy set forth in Tennessee Code Annotated section 25-2-101(a), which declares that an authority to confess judgment given before an action is instituted and before the service of process in such action is void. Defendants rely on the language of the statute itself to support their argument, claiming that it 'articulates a clear, unequivocal Tennessee public policy that affidavits confessing judgment – and the judgments on which they are based – are void.'

"Plaintiff points out that Mr. Arab, on behalf of all Defendants, freely and voluntarily signed an affidavit of confession of judgment which granted Plaintiff the right to file it in the event of a breach, and that Tennessee law recognizes a strong public policy of individual autonomy and freedom of contract. Plaintiff states that in accordance with the United States Constitution, Tennessee courts presume that a foreign judgment is valid and that the party seeking to attack a valid foreign judgment bears a heavy burden. Plaintiff further argues that there is no strong public policy implicated by the enrollment and enforcement of a money judgment resulting from a breach of contract, and that Defendants have not specifically identified otherwise."

"Tennessee courts have recognized three situations in which the state may refuse to apply full faith and credit to the judgment of another state: (1) where a judgment is void due to the adjudicating court's lack of subject-matter or personal jurisdiction, (2) where the judgment was based on fraud, and (3) where the enforcement of the judgment would violate the public policy of Tennessee. *E.g. Biogen*, 842 S.W.2d at 256; *Mirage Casino Hotel v. J. Roger Pearsall*, No. 02A01-9608-CV-00198, 1997 WL 275589, at *4 (Tenn. Ct. App. May 27, 1997). It is the third exception that Defendants invoke and that will guide our analysis.

"The U.S. Supreme Court case *Baker by Thomas v. General Motors Corporation* concerned whether the Full Faith and Credit Clause required that a court abide by a sister state's injunction forbidding a certain witness' testimony. 522 U.S. 222, 225–26, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998). Relevant to the case at bar is the summary in *Baker* of the Supreme Court's Full Faith and Credit jurisprudence; regarding the role of public policy, the Court states:

> Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments....
>
> A court may be guided by the forum State's 'public policy' in determining the *law* applicable to a controversy. See *Nevada v. Hall*, 440 U.S. 410, 421–424, 99 S.Ct. 1182, 1188–1190, 59 L.Ed.2d 416 (1979). But our decisions support no roving 'public policy exception' to the full faith and credit due *judgments.* See *Estin* [*v. Estin*], 334 U.S. [541], at 546, 68 S.Ct. [1213], at 1217 [92 L.Ed. 1561 (1948)] (Full Faith and Credit Clause 'ordered submission ... even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it.'); *Fauntleroy v. Lum*, 210 U.S. 230, 237, 28 S.Ct. 641, 643, 52 L.Ed. 1039 (1908) (judgment of Missouri court entitled to full faith and credit in Mississippi even if Missouri judgment rested on a misapprehension of Mississippi law). In assuming the existence of a ubiquitous 'public policy exception' permitting one State to resist recognition of another State's judgment, the District Court in the Bakers' wrongful-death action ... misread our precedent.... We are 'aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require to be given to [a money] judgment outside the state of its rendition.' *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438, 64 S.Ct. 208, 213, 88 L.Ed. 149 (1943).

"*Baker*, 522 U.S. at 232–34, 118 S.Ct. 657 (emphasis in original).

"Notwithstanding the Supreme Court's distinction in *Baker* between the credit owed to foreign laws and to foreign judgments, this Court has recited the public policy exception to the enrollment of foreign judgments in several post-*Baker* cases, *e.g. Guseinov*, 467 S.W.3d at 925; *BancorpSouth Bank v. Johnson*, No. W2012-00452-COA-R3-CV, 2013 WL 3770856, at *3 (Tenn. Ct. App.

July 16, 2013); *Trustmark Nat'l Bank v. Miller*, 209 S.W.3d 54 (Tenn. Ct. App. 2006); *Seiller & Handmaker, LLP v. Finnell*, 165 S.W.3d 273, 276-77 (Tenn. Ct. App. 2004). Even so, we have shown reluctance to actually hold that a foreign judgment sufficiently violates our state's public policy such that the judgment should be denied full faith and credit. We have stated that the party opposing enforcement of a foreign judgment has a 'stern and heavy' burden. *Seiller*, 165 S.W.3d at 277 (citation omitted). Moreover, the fact that the particular cause of action underlying a judgment is not one that is recognized in Tennessee is insufficient to give rise to a public policy exception. *E.g., Seiller*, 165 S.W.3d at 279; *Francis v. Francis*, 945 S.W.2d 752, 753 (Tenn. Ct. App. 1996) (holding that a North Carolina judgment resulting from an alienation of affections suit was entitled full faith and credit even though Tennessee had abolished the cause of action); *Four Seasons*, 688 S.W.2d at 445 ('[T]he judgment of the court of another state does not necessarily violate the public policy of this State merely because the law upon which it is based is different from our law.') Indeed, we have accorded full faith and credit to many judgments that were based on laws directly contrary to our own."

"Tennessee law states, 'Gambling is contrary to the public policy of this state' (Tenn. Code Ann. § 39-17-501(1)), yet foreign judgments for gambling debts amassed in other states are granted full faith and credit in Tennessee:

> [B]oth gambling and the promotion of gambling are misdemeanors, Tenn. Code Ann. §§ 39-17-502 and 503 (1997), and gambling debts incurred in Tennessee cannot be collected in Tennessee's courts. Tenn. Code Ann. § 29-19-102 (2000). However, notwithstanding Tennessee's official antipathy toward gambling, our courts have long held that judgments for out-of-state gambling debts are enforceable in Tennessee. In the words of the Tennessee Supreme Court, reducing a gambling debt to judgment 'purifies the contract from the gaming taint.' *Holland v. Pirtle*, 29 Tenn. (10 Hum.) 167, 169 (1849). Thus, we have consistently enforced foreign judgments for gambling debts. *Robinson Props. Group, L.P. v. Russell*, No W2000-00331-COA-R3-CV, 2000 WL 33191371, at *4 (Tenn. Ct. App. Nov. 22, 2000) (No Tenn. R. App. P. 11 application filed); *Mirage Casino Hotel v. Pearsall*, No. 02A01-9608-CV-00198, 1997 WL 275589, at *4-5 (Tenn. Ct. App. May 27, 1997) *perm. app. denied* (Tenn. Dec. 8, 1997); *Hotel Ramada of Nevada, Inc. v. Thakkar*, No. 03A01-9103-CV-00113, 1991 WL 135471, at *3-4 (Tenn. Ct. App. July 25, 1991) *perm. app. denied* (Tenn. Jan. 6, 1992). In this case, the fact that the casinos have judgments for gambling debts presents no impediment to their enrollment and enforcement by a Tennessee court.

"*Boardwalk Regency Corp. v. Patterson*, No. M1999-02805-COA-R3-CV, 2001 WL 1613892, at *3 (Tenn. Ct. App. Dec. 18, 2001).

"We have identified only one case in which public policy considerations precluded the enforcement of a foreign *judgment* in Tennessee: In *In re Riggs*, concerning a Georgia judgment granting the adoption of a child, this Court held that the foreign judgment was not entitled to full faith and credit because the adoption order was entered without notice of service of process on the biological father. 612 S.W.2d 461, 469 (Tenn. Ct. App. 1980). The Court stated 'For this court to enforce the Georgia judgment, which is fraught with constitutional difficulties, and to deny the natural father due process of laws, would be repugnant to the Federal Constitution and the public policy of Tennessee.' *Id.* We note, however, that even though we stated, 'This state has a strong interest in sustaining the father-child relationship and protecting the family unit,' the Court's actual analysis focused on constitutional due process interests. *Id.*

"The foregoing Tennessee case law suggests an accord, in practice, with the *Baker* distinction between full faith and credit with respect to judgments as opposed to laws. Furthermore, our research has yielded no cases in which either this Court or the Tennessee Supreme Court has denied full faith and credit to a money judgment issued by a sister state."

"There is varied and overlapping terminology used in different jurisdictions when referring to judgments by confession. A judgment by confession, sometimes called a cognovit judgment or 'judgment on warrant of attorney' is 'a grant of authority by one contracting party to the other, upon the happening of a certain event, *i.e.*, a breach of the terms of the agreement wherein the warrant is contained, to enter ... a judgment.' 46 Am. Jur. 2d *Judgments* § 194 (Aug. 2020 update). A judgment by confession may be secured when a debtor has signed a cognovit note, which is a document or contractual clause by which he relinquishes the right to notice, a hearing, or appearance at an action to collect a judgment in the event of breach of contract. 46 Am. Jur. 2d *Judgments* § 201 (Aug. 2020 update). 'The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder.' *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 176, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). Such a provision in a promissory note 'cuts off every defense, except payment, which the maker of the note may have against enforcement of the note.' 46 Am. Jur. 2d *Judgments* § 201 (Aug. 2020 update).

"In Tennessee, a judgment on warrant of attorney is only valid when made *after* an action is instituted and there has been service of process in the action. Tenn. Code Ann. § 25-2-101. Thus, cognovit notes or clauses are void under Tennessee statute. *See id.* Only a few states recognize judgment by confession by means of a cognovit note that waives service of process and a hearing. One of those states is New York, where the cognovit under consideration was executed. New York Civil Practice Laws and Rules, section 3218, states, in relevant part:

> [A] judgment by confession may be entered, without an action ... for money due ... upon an affidavit executed by the defendant[,] stating the sum for which judgment may be entered, authorizing the entry of judgment, and stating the county where the defendant resides.... The judgment may be docketed and enforced in the same manner and with the same effect as a judgment in an action in the supreme court.

"N.Y. CPLR. 3218.

"Tennessee courts have not previously addressed the specific issue of whether to accord full faith and credit to a judgment by confession obtained by means of cognovit from a sister state. When other jurisdictions have confronted the issue, the question has turned on whether the underlying cognovit note or clause denies the debtor due process of law. *E.g., Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 78 N.Y.2d 572, 578 N.Y.S.2d 115, 585 N.E.2d 364, 368 (1991) (stating that for recognition of a foreign cognovit judgment, 'it must be determined that the judgment debtor made a voluntary, knowing and intelligent waiver of the right to notice and an opportunity to be heard'). . . . The U.S. Supreme Court has stated that 'due process rights to notice and hearing prior to a civil judgment are subject to waiver' (*Overmyer*, 405 U.S. at 185, 92 S.Ct. 775); and therefore, 'a cognovit clause [in a contract] is not, per se, violative of Fourteenth Amendment due process,' but that it may be so under some circumstances, such as 'where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision' (*Id. at* 187–88, 92 S.Ct. 775).

"Likewise, we hold that a foreign money judgment resulting from a cognovit note or clause that was entered into with a knowing, voluntary waiver of the right to notice and an opportunity to be heard must enjoy full faith and credit in Tennessee, in accordance with the Constitutional mandate as described in *Baker*.

"The record before us shows that the foreign judgment in the case at bar is a money judgment made by a New York court in accordance with the laws of that state; that the judgment was entered in accordance with the UEFJA procedures; that Defendants were afforded the opportunity to be heard by the trial court on the merits of the defenses to enrollment and enforcement of the foreign judgment, as required by the UEFJA; and that Defendants have not raised a due process issue. Accordingly, we conclude that the New York judgment must be accorded full faith and credit."

II. Uniform Commercial Code; Requirements to be a Holder in Due Course

Harpeth Financial Services LLC v. Pinson, No. M2019-02106-COA-R3-CV (Tenn. Ct. App., McBrayer, May 27, 2021).

"A customer of Harpeth Financial Services LLC wanted to cash a check. The check, signed by Flora E. Morris and payable to 'Jim Tinson Elec Ser,' was for $3,000. Harpeth asked the customer for his identification and Ms. Morris's phone number. The customer identified himself as Jimmy Clay Pinson, Jr. and provided a phone number. But when Harpeth called the number, there was no answer. When Harpeth asked for another number to reach Ms. Morris, Mr. Pinson could not provide one. So Mr. Pinson left without cashing the check.

"He returned less than ten minutes later, providing the same phone number for Ms. Morris as before. But this time, Harpeth got an answer when it called. Harpeth supposedly reached Ms. Morris and verified the check, as well as Ms. Morris's identity. Harpeth then cashed the check, giving Mr. Pinson the $3,000. When Harpeth later tried to collect on the check from Ms. Morris's bank, the check was returned, showing a stop-payment request.

"Harpeth sued both Mr. Pinson and Ms. Morris in general sessions court. Harpeth claimed Ms. Morris fraudulently stopped payment on her check after validating it. *See* Tenn. Code Ann. § 47-29-101(a) (2013) (providing remedies to the holder of a check when the check's maker stops payment on the check with fraudulent intent). From Ms. Morris, Harpeth sought the $3,000 face amount of the check plus interest, treble damages, court costs, and attorney's fees. *See id.* § 47-29-101(a)(1)-(2), (a)(4)-(5), (d).

"Mr. Pinson was never served, and he is not a party to this case. For her part, Ms. Morris claimed that she hired a man named Jim Tinson to perform electrical work at her property. Ms. Morris wrote the check to 'Jim Tinson Elec Ser' on a Saturday. In exchange, Mr. Tinson was supposed to complete the work the following Monday. But he did not show.

"Believing she had been defrauded, Ms. Morris claimed she stopped payment on the check two days before Mr. Pinson cashed it. She insisted that she was justified in doing so and that Harpeth did not verify the check with her. She argued that, if Harpeth had contacted her bank before taking the check, Harpeth would have been aware of the fraud and the stop-payment request. In Ms. Morris's view, Harpeth assumed the risk of taking the check and paying Mr. Pinson.

"After a hearing, the general sessions court dismissed Harpeth's claim against Ms. Morris. Harpeth then appealed to circuit court for a new trial. *See id.* § 27-5-108(a)(1), (c) (Supp. 2020) (allowing a party to 'appeal from a decision of the general sessions court to the circuit court,' where the appeal 'shall be heard de novo'). After a bench trial, the circuit court likewise dismissed Harpeth's claim. The court reasoned that the check was payable to 'Jim Tinson Elec Ser.' Yet Harpeth paid the check to a 'Jimmy Clay Pinson, Jr.' By failing to pay the 'actual payee,' Harpeth acted 'at its own peril' and thus was 'responsible for the loss.' *See McCann Steel Co. v. Third Nat'l Bank*, 337 S.W.2d 886, 891 (Tenn. Ct. App. 1960) (noting the 'general rule of law ... that a bank must, at its peril, pay a check to the actual payee or upon his genuine [i]ndorsement; and, if it fail to do so from mistaking the identity of the payee, or by paying upon a forged [i]ndorsement, it is responsible for the loss')."

"On appeal, Harpeth argues that it was a holder in due course of Ms. Morris's check. Ms. Morris had the right to stop payment on the check. *See* Tenn. Code Ann. § 47-4-403(a) (2001) (allowing a 'customer or any person authorized to draw' on a bank account to 'stop payment of any item drawn on the ... account'). But if Harpeth was a holder in due course, Ms. Morris remained liable on the check. *See id.* cmt. 7 (explaining that a 'drawer remains liable on [an] instrument to [a] holder in due course' (citing *id.* §§ 47-3-305, -414 (2001)).

"A 'holder in due course' is defined by statute. *See id.* § 47-3-302(a) (2001). Whether the facts established in the trial court 'satisfy the statutory standard' is a mixed question of law and fact. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (A mixed question of law and fact is a 'question[ ] in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.'). Cases 'that involve mixed questions of law and fact are subject to de novo review.' *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

"The burden falls on the party claiming holder in due course status to prove the statutory requirements of that status. *Braswell v. Tindall*, 294 S.W.2d 685, 688 (Tenn. 1956). The first requirement is that the party be a 'holder.' *See* Tenn. Code Ann. § 47-3-302(a). . . . A holder is a person '[i]n possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession[.]' Tenn. Code Ann. § 47-1-201(b)(21)(A) (Supp. 2020).

"The parties do not dispute that Harpeth is in possession of Ms. Morris's check and that it is a negotiable instrument. *See id.* § 47-3-104(c), (f) (Supp. 2020) (recognizing a check may be an instrument). But the check was payable only to the order of 'Jim Tinson Elec Ser,' not to Harpeth. *See id.* § 47-3-109(b) (2001).

"A check may become payable to bearer if it is 'indorsed in blank.' *Id.* §§ 47-1-201(b)(5), -3-109(c). The trial court ruled that, because Mr. Pinson was not the actual payee of the check, Harpeth could not recover from Ms. Morris, relying on our decision in *McCann Steel Co. v. Third National Bank*, 337 S.W.2d 886 (Tenn. Ct. App. 1960). Implicit in the court's reliance on *McCann Steel Co.* is a determination that Mr. Pinson was not only the wrong payee, but also not a proper indorser on behalf of Jim Tinson Elec Ser. *See McCann Steel Co.*, 337 S.W.2d at 891 (recognizing the bank may 'pay a check to the actual payee or upon his genuine [i]ndorsement').

"We disagree. In her answer to the civil warrant filed in general session court, Ms. Morris did not specifically deny either the authenticity of Mr. Pinson's signature or his authority to indorse the

check. So 'the authenticity of, and authority to make,' his signature were deemed admitted. Tenn. Code Ann. § 47-3-308(a) (Supp. 2020). More importantly, Ms. Morris complained that Mr. Pinson 'took [her] check on a Saturday and allegedly [i]ndorsed it, cashed it, and did not return to do any of the work for a period of near four years as he had promised.' According to her, Mr. Pinson 'took the money and ran' without calling or reappearing 'to make any amends or refunds.'

"The person or entity to whom a check 'is initially payable is determined by the intent of the person ... signing as ... the issuer of the instrument.' *Id.* § 47-3-110(a) (2001). This is true 'even if that person is identified in the [check] by a name or other identification that is not that of the intended person.' *Id.* By her answer, Ms. Morris acknowledged her intent was to pay Mr. Pinson, although her check was made payable to 'Jim Tinson Elec Ser.' When a check 'is payable to a holder under a name that is not the name of the holder, [i]ndorsement may be made by the holder in the name stated in the instrument or in the holder's name or both.' *Id.* § 47-3-204(d) (2001). In other words, Mr. Pinson properly indorsed Ms. Morris's check in his own name.

"Ms. Morris argues that, even if her check was properly indorsed by Mr. Pinson, Harpeth did not take the check in good faith. To be a holder in due course, the holder must have taken the instrument, here a check, 'in good faith.' *Id.* § 47-3-302(a)(2). Good faith 'means honesty in fact in the conduct or transaction concerned.' *Id.* § 47-1-201(b)(20). 'Honesty in fact,' in turn, means 'an absence of a "knowing or reckless disregard of a customer's rights."' *The Bank/First Citizens Bank v. Citizens & Assocs.*, 82 S.W.3d 259, 264 (Tenn. 2002) (quoting *Glazer v. First Am. Nat'l Bank*, 930 S.W.2d 546, 549 (Tenn. 1996)). A party acts in good faith 'unless [its] conduct amounts to dishonesty and bad faith.' *McConnico v. Third Nat'l Bank*, 499 S.W.2d 874, 881 (Tenn. 1973).

"'Honesty in fact' is a subjective standard in Tennessee. *The Bank/First Citizens Bank*, 82 S.W.3d at 264. Ms. Morris's argument relies on a standard that incorporates 'an objective component'—whether there was an 'observance of reasonable commercial standards of fair dealing.' *See Any Kind Checks Cashed, Inc. v. Talcott*, 830 So. 2d 160, 165 (Fla. Dist. Ct. App. 2002) (citation omitted). The Uniform Commercial Code added this objective component to the definition of good faith in 1990. *The Bank/First Citizens Bank*, 82 S.W.3d at 263-64. But Tennessee has not adopted it. *See id.* at 264. In Tennessee, a holder in due course need not observe reasonable commercial standards 'in addition to 'honesty in fact' to be in good faith.' *McConnico*, 499 S.W.2d at 881.

"In her brief, Ms. Morris lists facts that she claims conclusively establish that Harpeth did not act in good faith:

> [Harpeth] first denied their customer and requested another phone number from their customer to contact [Ms. Morris];
>
> [Harpeth's] customer returned and provided the very same number;
>
> The number [Harpeth's] customer provided was not the number of [Ms. Morris] and had never been her number;
>
> [Harpeth] claims to have verified [Ms. Morris's] social security number and date of birth but never wrote it in their file and admitted that they had no way to know [Ms. Morris's] actual social security number and date of birth to ascertain if it was even accurate;

> [Ms. Morris] claimed she did not speak with [Harpeth] on said date;
>
> [Harpeth] admitted that [it] did not call the bank to check to see if the check had been stopped and that it was not their practice to do so;
>
> [Harpeth] was on notice that their own customer had a bad check history with them on prior occasions;
>
> [Harpeth] wants the Court to believe that all the activities they claim occurred were chronicled in their record in real-time and took place in four minutes; [and]
>
> [Harpeth's] record has the check being cashed and approved prior to the claim that they called and spoke with [Ms. Morris.].

"Although Harpeth concedes that Mr. Pinson 'had previously cashed checks with Harpeth that had been returned "stop payment"' and the statement of evidence supports some of the facts relied on by Ms. Morris, none of the facts independently or in combination would necessarily preclude a finding that Harpeth acted in good faith in taking Ms. Morris's check.

"Harpeth urges us to find that it is a holder in due course. The problem is that the trial court stopped its analysis with the question of whether Harpeth was a holder. Tenn. Code Ann. § 47-1-201(b)(21)(A). Concluding that Harpeth could not be a holder based on an improper indorser, the court did not address the other requirements for being a holder in due course. *See id.* § 47-3-302(a). And the statement of evidence approved by the court does not address Harpeth's proof on those questions.

"Under the circumstances, a remand is necessary for the court to make additional findings of fact and conclusions of law regarding Harpeth's claimed status as a holder in due course. If the court determines that Harpeth is a holder in due course, the court should also make findings of fact and conclusions of law regarding any defenses raised by Ms. Morris that may be available against a holder in due course. *See id.* § 47-3-305(b)."

"Regardless of whether Harpeth was a holder in due course, Harpeth is not entitled to interest, treble damages, court costs, or attorney's fees under Tennessee Code Annotated § 47-29-101, the bad check statute. *See id.* § 47-29-101(a)(2), (a)(4)-(5), (d). That statute requires proof that the drawer, with fraudulent intent, 'stop[ped] payment on the check.' *Id.* § 47-29-101(a).

"Here, Ms. Morris issued the check on a Saturday in exchange for electrical work to be completed the following Monday. When Mr. Pinson did not show on Monday, Ms. Morris stopped payment on the check, two days before Mr. Pinson tried to cash it. Stopping payment on the check only after Mr. Pinson failed to fulfill his obligations was not fraudulent. *See* Tenn. Code Ann. § 39-14-121(a)(1)(B) (2018); *cf. State v. Russell*, 382 S.W.3d 312, 316 (Tenn. 2012) (holding that knowingly 'canceling payment for ... services received when those ... services were as represented' amounts to fraudulent intent)."

"Because Harpeth failed to establish that Ms. Morris fraudulently stopped payment on the check or allowed the check to be dishonored due to insufficient funds, Harpeth cannot recover under the bad check statute. So we affirm the dismissal of its claim based on Tennessee Code Annotated § 47-29-101. We vacate the dismissal of any claim for drawer liability under Tennessee Code

Annotated § 47-3-414. The case is remanded for additional findings of fact and conclusions of law and such further proceedings as may be necessary and consistent with this opinion."

III. Tort of Conversion of Negotiable Instrument; Defendant's Fraudulent Concealment Tolled Statute of Limitations

Pomeroy v. McGinnis, No. E2020-00960-COA-R3-CV (Tenn. Ct. App., Frierson, July 16, 2021).

"In this action for conversion, the plaintiff alleged that the defendant, who is her brother, unilaterally surrendered an annuity fund that had been titled jointly in their names, received a check for the proceeds, endorsed her signature without her permission, and deposited the proceeds in a bank account to which the plaintiff had no access. Upon the defendant's motion for summary judgment, in which he asserted that the plaintiff had been an owner of the annuity in name only and that the three-year statute of limitations had expired well before she filed the complaint, the trial court found that the plaintiff was a titled co-owner of the annuity and that genuine issues of material fact existed as to whether the statute of limitations had been tolled by the defendant's fraudulent concealment of the cause of action from the plaintiff. Following a bench trial, the trial court found that the defendant had fraudulently concealed the cause of action from the plaintiff and that he had committed conversion of the plaintiff's one-half interest in the check representing the annuity proceeds. The trial court awarded to the plaintiff a judgment in the amount of one-half of the annuity proceeds plus pre-judgment interest calculated from the date of the check's endorsement. The defendant has appealed. Having discerned a minor mathematical error in the judgment, we modify the amount to reduce it by $90.00, affirming the trial court's award to the plaintiff in the amount of $59,674.22 rather than $59,764.22. We affirm the trial court's judgment in all other respects."

"In her complaint, Ms. Pomeroy averred that she had no knowledge of the Check until it came to light in 2019 via discovery related to Mr. McGinnis's divorce proceedings from his then-wife, Sondra McGinnis. Alleging that Mr. McGinnis's actions in forging her endorsement on the Check constituted 'willful fraud and willful conversion,' Ms. Pomeroy requested compensatory damages in the amount of $38,568.93, representing one-half of the Check amount, plus prejudgment interest dated from April 26, 2012, and punitive damages for fraud in the amount of $50,000.00. Ms. Pomeroy also alleged that '[i]n the alternative,' Mr. McGinnis had been 'unjustly enriched by his actions in the same amount.'"

"On June 16, 2020, the trial court entered an order awarding a judgment to Ms. Pomeroy in the amount of $59,764.22, consisting of $38,568.93, which represented half of the Check proceeds, plus $21,105.29 in prejudgment interest calculated from April 26, 2012, the date that Mr. McGinnis had cashed the Check. The court incorporated an attached memorandum opinion in which it found that Mr. McGinnis had converted Ms. Pomeroy's half of the annuity proceeds and had fraudulently concealed his actions such that Ms. Pomeroy's complaint was not time-barred by the statute of limitations. The court expressly found Ms. Pomeroy's testimony to be credible and Mr. McGinnis's testimony not to be credible in certain aspects. As to Mr. Fortner's deposition testimony, the court stated that it did not have 'a tremendous amount of confidence that [Mr. Fortner] had great recollection of much of anything' related to the 2006 purchase of the annuity. The trial court did not make a determination regarding Ms. Pomeroy's alternative claim of unjust enrichment. Mr. McGinnis timely appealed."

"Three of the issues raised by Mr. McGinnis involve his contention that the trial court erred in granting a judgment in favor of Ms. Pomeroy on her conversion claim. Specifically, he argues that (1) Ms. Pomeroy did not possess an ownership interest in the proceeds of the Check, (2) Ms. Pomeroy's claim was time-barred by the applicable statute of limitations, and (3) Ms. Pomeroy failed to prove that Mr. McGinnis had fraudulently concealed the facts concerning the annuity surrender from her. Ms. Pomeroy contends that the trial court correctly found that she had an ownership interest in the proceeds of the Check and also properly determined that she could not have reasonably discovered Mr. McGinnis's actions in converting her portion of the Check proceeds sooner because Mr. McGinnis fraudulently concealed those actions from her. Upon thorough review of the record and applicable authorities, we determine that the trial court did not err in granting to Ms. Pomeroy a judgment concerning her conversion claim.

"Regarding the elements of conversion, this Court has explained in relevant part:

> Conversion is the appropriation of tangible property to a party's own use in exclusion or defiance of the owner's rights. *Barger v. Webb,* 216 Tenn. 275, 391 S.W.2d 664, 665 (1965); *Lance Prods., Inc. v. Commerce Union Bank,* 764 S.W.2d 207, 211 (Tenn. Ct. App. 1988). Conversion is an intentional tort, and a party seeking to make out a *prima facie* case of conversion must prove: (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights. *Kinnard v. Shoney's, Inc.,* 100 F. Supp. 2d 781, 797 (M.D. Tenn. 2000); *Mammoth Cave Prod. Credit Ass'n v. Oldham,* 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977).

"*PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 553 (Tenn. Ct. App. 2012)."

"Although Mr. McGinnis acknowledges that Ms. Pomeroy and he were the titled owners of the annuity, he contends that they were owners in name only and that the effect of the transaction establishing the annuity was to create something of a constructive trust for Decedent with Mr. McGinnis's 'legal posture' 'in the nature of a trustee or custodian.' In its final judgment, the trial court determined that no dispute existed concerning the original purpose of the annuity transaction on the part of Decedent and Mr. McGinnis, finding that the purpose was to 'shield this money' in the event that Decedent needed long-term medical care so that she could benefit from Medicaid coverage. The trial court further found that 'in order to represent to the federal government that [Decedent] was eligible for Medicaid, the money could not be hers' because '[t]he ownership had to be with someone else to make that representation and to obtain Medicaid.' The trial court's findings indicate that the evidence relied upon by Mr. McGinnis to argue that a constructive trust had been created by the annuity actually established that through creation of the annuity, Decedent had been divested of ownership over the annuity funds and that equal ownership interest was then held by the annuity owners, Mr. McGinnis and Ms. Pomeroy."

"Inasmuch as the owners were in control of any changes to the annuity and were the individuals to whom the annuity funds were to be paid in the event of a surrender, as occurred here, we determine that the evidence preponderates in favor of the trial court's finding that Mr. McGinnis and Ms. Pomeroy held joint ownership interest in the annuity funds. Additionally, Mr. McGinnis and Ms. Pomeroy were also named beneficiaries of the annuity account, meaning that in the event of Decedent's death, the annuity funds would have been distributed in equal shares to them as beneficiaries. Decedent was divested of her ownership interest as had been the plan testified to by both Mr. McGinnis and Mr. Fortner. The 'proceeds of income streams,' as Mr. Fortner termed

them, never materialized on Decedent's behalf because payments to Decedent were never initiated and because the annuity failed to increase in value prior to its surrender.

"Mr. McGinnis also argues that 'the only means by which Ms. Pomeroy could have obtained an interest in the underlying proceeds of the check would be as a gift to her.' He thereby maintains that without clear and convincing evidence that either Decedent or Mr. McGinnis made an *inter vivos* gift to Ms. Pomeroy in the amount of half of the annuity funds, Ms. Pomeroy could not prove an ownership interest in half of the Check proceeds. *See In re Estate of Greene*, No. W2004-02910-COA-R3-CV, 2005 WL 2978991, at *3 (Tenn. Ct. App. Nov. 7, 2005) (explaining that to establish an *inter vivos* gift, '[t]he donee must prove both intent and delivery by clear and convincing evidence' (citing *Parsley v. Harlan,* 702 S.W.2d 166, 173 (Tenn. Ct. App. 1985))). We disagree with Mr. McGinnis on this point and determine that Ms. Pomeroy did not have to establish an *inter vivos* gift in order to establish her ownership interest in the annuity.

"The fact that Decedent's funds were used to purchase the annuity does not change the fact that the annuity transaction divested Decedent of ownership and placed ownership with the parties to this action. Moreover, as Ms. Pomeroy notes on appeal, Mr. McGinnis's argument concerning lack of evidence of an *inter vivos* gift proffered by Decedent, if successful, would divest Mr. McGinnis of any ownership interest in the annuity funds as well. Furthermore, accepting Mr. McGinnis's assertion that Ms. Pomeroy had failed to prove that he had given her half of the annuity funds as an *inter vivos* gift would require us to make an illogical leap from his position that the funds belonged only to Decedent to the supposition that the funds somehow belonged to Mr. McGinnis to do with as he chose."

"[W]e determine that the individuals possessing ownership interests in the subject annuity were the two individuals listed as owners, Mr. McGinnis and Ms. Pomeroy, who also happened to be the beneficiaries in this instance, and that the annuitant, Decedent, did not possess an ownership interest in the annuity funds once Mr. McGinnis and Ms. Pomeroy were named as owners. We note that as the titled owners of the annuity, Mr. McGinnis and Ms. Pomeroy became the payees of the Check issued by Sun Life upon surrender of the annuity as well. The trial court did not err in determining that Ms. Pomeroy possessed a one-half ownership interest in the annuity funds."

"Insofar as Ms. Pomeroy's claim alleging conversion of her portion of the Check proceeds alleges conversion of a negotiable instrument, we determine that the claim is subject to the specific statute of limitations as set forth in Tennessee's codification of the Uniform Commercial Code ('UCC') at Tennessee Code Annotated § 47-3-118(g) (Supp. 2019). *See C-Wood Lumber Co. v. Wayne Cty. Bank*, 233 S.W.3d 263, 283 n.53 (Tenn. Ct. App. 2007) ('The three-year general statute of limitations for conversion claims in Tenn. Code Ann. § 28-3-105 must yield to more specifically applicable statutes of limitations like Tenn. Code Ann. § 47-3-118(g)....'). Similarly setting forth a three-year statute of limitations, Tennessee Code Annotated § 47-3-118(g) provides:

> Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three (3) years after the cause of action accrues.

"As our Supreme Court has instructed, however, 'whether applying Section 118(g) or Section 28-3-105, the considerations are the same because the claim is the same—conversion of a

negotiable instrument' and additionally because 'the Comments to Section 118(g) provide that the section "follows general law in stating that the period runs from the time the cause of action accrues."' *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 621 (Tenn. 2002)."

"Mr. McGinnis contends that the trial court erred in finding that he fraudulently concealed this cause of action from Ms. Pomeroy. He specifically argues that (1) he 'was under no duty to disclose to Ms. Pomeroy that he had endorsed her name to the Check,' (2) 'there is no evidence that he employed any artifice or deception to prevent Ms. Pomeroy from gaining knowledge of his having signed her name to the check,' and (3) Ms. Pomeroy had opportunities to discover that she may have had a cause of action because she was residing 'in the same household' as Mr. McGinnis and Decedent 'for at least six years after the annuity was purchased and for at least two years after the annuity was surrendered and check was cashed.' Upon careful review, we disagree.

"In initially analyzing fraudulent concealment as it pertains to the statute of limitations in this action, the trial court relied in its summary judgment order on our Supreme Court's analysis in *Pero's Steak & Spaghetti House*, which set forth the elements of fraudulent concealment as follows:

> [T]o establish fraudulent concealment, a plaintiff must prove the following: (1) that the defendant took affirmative action to conceal the cause of action or remained silent and failed to disclose material facts despite a duty to do so; (2) that the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence; (3) that the defendant had knowledge of the facts giving rise to the cause of action; and (4) that the defendant concealed material facts from the plaintiff by withholding information or making use of some device to mislead the plaintiff, or by failing to disclose information when he or she had a duty to do so.

"90 S.W.3d at 625 (citing *Shadrick v. Coker*, 963 S.W.2d 726, 735-36 (Tenn. 1998)). As Ms. Pomeroy acknowledges on appeal, as the plaintiff, it was her burden to prove both that Mr. McGinnis 'took affirmative action to conceal her cause of action from her' and that 'she could not have discovered her cause of action despite exercising reasonable diligence.' *See Hanna v. Sheflin*, 275 S.W.3d 423, 428 (Tenn. Ct. App. 2008)."

"Concerning the first and fourth elements of fraudulent concealment, both of which require that a duty exist on the defendant's part to disclose material facts to the plaintiff, *see Pero's Steak & Spaghetti House*, 90 S.W.3d at 625, Mr. McGinnis argues that he had no duty to disclose to Ms. Pomeroy that he had signed her name to the Check without her permission and deposited the resultant funds in an account to which she had no access. We note that intent aside, Mr. McGinnis's action in signing Ms. Pomeroy's name as an endorsement of the Check without disclosing the existence of the Check to her essentially amounted to forgery. *See* Tenn. Code Ann. § 39-14-114(b)(1)(A)(i) (2018) (defining 'forge' in relevant part as to '[a]lter, make, complete, execute or authenticate any writing so that it purports to [b]e the act of another who did not authorize the act[.]'). We emphasize that we make no determination as to the level of 'intent to defraud' that would be required to meet the full criminal definition of forgery, *see id.*; however, by Mr. McGinnis's own admission, he took it upon himself to endorse the check in Ms. Pomeroy's name when she did not authorize the action and indeed had no knowledge of the Check's existence.

"Mr. McGinnis's argument that he had no duty to disclose his actions to Ms. Pomeroy is based primarily on his contention that Ms. Pomeroy had no ownership interest in the Check proceeds. He asserts that because Ms. Pomeroy's 'participation [was] entirely passive' in becoming a joint title

holder of the annuity, he had no duty 'to disclose facts about the transaction to her.' To the contrary, having determined that Ms. Pomeroy was a co-payee on the Check and possessed a one-half ownership interest in the proceeds, we further determine that Mr. McGinnis had a duty as the other co-payee to inform Ms. Pomeroy of the Check's existence and, of course, to refrain from endorsing the Check in her name without her authorization. We note also that Mr. McGinnis's argument in this regard runs contrary to his insistence at trial that Ms. Pomeroy had signed the original application form for the annuity and particularly his testimony that she had signed the surrender form. The trial court in its final judgment expressly found Mr. McGinnis's testimony not to be credible in this regard."

"Mr. McGinnis also argues that no evidence demonstrated that he had 'employed any artifice or deception to prevent Ms. Pomeroy from gaining knowledge of his having signed her name to the check.' Assuming, *arguendo*, that forging Ms. Pomeroy's signature was not an 'artifice or deception,' we note that 'remain[ing] silent and fail[ing] to disclose material facts despite a duty to do so' satisfies the first element required for fraudulent concealment and that 'failing to disclose information when he ... had a duty to do so' satisfies the fourth element. *See Pero's Steak & Spaghetti House*, 90 S.W.3d at 625. We determine that the evidence preponderates in favor of the trial court's finding that these elements were satisfied by Mr. McGinnis's actions in receiving the Check, endorsing it with both co-owners' signatures, depositing the funds into an account to which the other co-owner had no access, and disbursing the funds from that account.

"We now turn to the second element of fraudulent concealment and the last one at issue: whether Ms. Pomeroy could not have discovered the cause of action despite exercising reasonable care and diligence. *See id.* Mr. McGinnis argues that by virtue of her presence in the household, Ms. Pomeroy could have discovered the material facts leading to this cause of action through reasonable care and diligence. In contrast, the trial court found that Ms. Pomeroy had 'played no role at all in the finances of her mother.' In so finding, the trial court expressly credited Ms. Pomeroy's testimony 'concerning not being present for anything or knowing about anything' regarding the annuity. The court noted a factual dispute regarding Mr. Fortner's initial deposition testimony and Mr. McGinnis's testimony that Ms. Pomeroy had signed an application document for the annuity, as well as Mr. McGinnis's testimony that Ms. Pomeroy had signed the surrender form. However, in addition to finding Mr. McGinnis not to be credible in this regard, the court found that Mr. Fortner's testimony as it related to the initial meeting at Mr. McGinnis's home in 2006 and the signatures on the application form did not inspire confidence, observing that Mr. Fortner had not recollected 'much of anything and was doing his best to review whatever documents he had to give his testimony.' The court thereby found that Ms. Pomeroy 'could not have discovered the cause of action despite exercising reasonable care and diligence because she did not even know the transaction had occurred.'

"We emphasize that the trial court's credibility determinations are not to be disturbed on appeal absent clear and convincing evidence to the contrary. *See Morrison*, 338 S.W.3d at 426. Moreover, we conclude that the evidence preponderates in favor of the trial court's finding that Ms. Pomeroy could not have discovered the cause of this action sooner than she did despite exercising reasonable care and diligence. We therefore conclude that Ms. Pomeroy's conversion claim was not barred by the applicable statute of limitations."

"Having addressed Mr. McGinnis's issues concerning Ms. Pomeroy's conversion claim and having determined that Ms. Pomeroy possessed a one-half ownership interest in the Check proceeds and that her claim was not barred by the statute of limitations, we further determine, upon a thorough

review of the record, that the trial court did not err in granting a judgment in favor of Ms. Pomeroy on her conversion claim. However, we take this opportunity to correct a mathematical error in the judgment.

"The trial court awarded to Ms. Pomeroy $38,568.93, representing half of the Check proceeds, plus $21,105.29 in prejudgment interest. Although the balance of these two amounts equals $59,674.22, the trial court awarded a total judgment in the amount of $59,764.22. We therefore modify the judgment to reduce it by $90.00, awarding to Ms. Pomeroy a total judgment in the amount of $59,674.22."

IV. Unjust Enrichment and Action on Sworn Account Preempted by Airline Deregulation Act

PHI Air Medical, LLC v. Corizon, Inc., S.W.3d (Tenn. Ct. App., McClarty, 2021), no appl. perm. app.

"PHI Air Medical brought suit based on unjust enrichment and action on sworn account against Corizon for air ambulance services it provided without a contract after Corizon paid only a portion of the billed amount, citing its practice of paying according to statutory caps and Medicare rates. The trial court granted summary judgment, finding that the preemption clause of the Airline Deregulation Act, 49 U.S.C. § 41713, which provides that a state 'may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation,' preempts PHI's claims. We affirm the trial court's finding that PHI's claims are preempted and that summary judgment was proper. We reverse the trial court's grant of PHI's voluntary nonsuit of a claim that PHI did not plead."

"Corizon, Inc. of Brentwood, Tennessee, is a provider of healthcare services that contracts with government entities across the country to provide healthcare to individuals in state custody. PHI Air, LLC ('PHI') is an Arizona company that has provided air-ambulance services to inmates at Corizon-serviced correctional facilities.

"PHI filed a complaint in Williamson County Chancery Court in August 2016, alleging that it had provided emergency air ambulance service in Arizona, Indiana, New Mexico, and Maryland to correctional facilities that had contracted with Corizon for medical services; that it billed Corizon its 'customary and usual' rates; and that Corizon refused to pay the full amount. Both parties initially agreed that there was no contract between the parties PHI and Corizon governing the dispute. PHI sought relief based on theories of unjust enrichment and action on sworn account, and asked the court for damages in the amount of $3,307,345.47, plus any additional amount that may accrue prior to the resolution of the case, pre-judgment interest, and attorney's fees.

"In its answer, Corizon denied that PHI was entitled to the damages sought and asserted that the rates applicable to some of PHI's claims were governed by Arizona and Indiana law and that the remaining claims were barred by the doctrines of laches and waiver. According to Corizon, when rates are not set by a contract or capped by a state law that regulates taxpayer-funded correctional healthcare expenses, Corizon reimburses providers a 'default rate' based on the Medicare reimbursement rate. Arizona law statutorily limits provider reimbursement, and Corizon also has a contract with the State of Arizona containing the statutory limitation. *See* Ariz. Rev. Stat. § 41-1608(2). In Indiana, Corizon paid PHI according to the statutory correctional-healthcare rates, which are 104 percent of Medicare reimbursement rates. *See* Ind. Code § 11-10-3-6(c)."

"The outcome of this controversy hinges on the scope of the pre-emption clause of the ADA, which provides that 'a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier....' 49 U.S.C. § 41713(b)(1). PHI argues that the trial court erred in finding that its claims based on unjust enrichment and action on sworn account are pre-empted by the ADA because

> (1) an award of PHI's usual, customary, and reasonable rates under Tennessee's general unjust enrichment common law or action on sworn account statute does not have the requisite 'forbidden significant effect' on air carrier prices, routes, or services to trigger preemption; [ ] (2) ADA preemption is a defense unique to air carriers and which cannot be asserted by non-air carriers, as it was by Corizon in the case below[; and (3) ...] holding that the ADA preempts all unjust enrichment and action on account claims involving air carriers precludes an air carrier's ability to collect from the beneficiaries of its Services in all instances where no contract exists, in contravention of the ADA's intent.

"Conversely, Corizon asserts that PHI's causes of action 'fall squarely within the ADA's broad preemptive reach[, as] [b]oth causes of action seek to use the coercive powers of the State to impose an implied-in-law payment obligation that the parties did not voluntarily undertake.'

"The expressed purpose of the ADA is 'to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services[,]' a goal that 'would ... be[ ] frustrated if state regulations were substituted for ... federal regulations[.]' *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 422–423, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (Stevens, J., dissenting). . . ."

"The Tennessee Supreme Court has only once considered the issue of ADA preemption, in the 1996 case of *Knopp v. American Airlines, Inc.*, 938 S.W.2d 357 (Tenn. 1996). In this pre-*Ginsberg* case, the Court recognized a two-part test, based on *Morales* and *Wolens*, for determining that a state law claim is preempted: '(1) the claim must be related to airline rates, routes, or services, either by expressly referring to them or having a significant economic effect upon them; and (2) the claim must involve the enactment or enforcement of a state law, rule, regulation, standard or other provision.' 938 S.W.2d at 360. Whether federal law preempts a state statute or common law cause of action is a question of law that we review de novo. *Leggett*, 308 S.W.3d at 851."

"1. *Knopp*'s first prong

"Under the first part of the *Knopp* test, we must determine whether PHI's claim is related to air carrier rates or services, 'either by expressly referring to them or having a significant economic effect upon them.' 938 S.W.2d at 360. We will note at the outset, that the U.S. Supreme Court's test is worded more broadly: 'A claim satisfies this requirement if it has "a connection with, or reference to, airline" prices, routes, or services[.]' *Ginsberg*, 572 U.S. at 284, 134 S.Ct. 1422 (quoting *Morales*, 504 U.S. at 384, 112 S.Ct. 2031).

"Because Tennessee's unjust enrichment law does not specifically reference nor is it directed toward air carriers, it does not fall within the first category of preempted state law, and therefore, must have a 'significant economic effect' on air carrier prices, routes, or services to be preempted. *Knopp*, 938 S.W.2d at 360. PHI asserts that '[a]n award of PHI's usual, customary and reasonable rate under any common law theory, including unjust enrichment, does not have a significant effect on PHI's prices, and therefore, is not preempted.' Corizon argues that PHI's claims 'attempt to use

state common law to directly impose "reasonable" prices for air-carrier services,' which would have a significant effect on rates.

"The issue raises the question of how significant must the effect be? To resolve this question, we return to *Morales*, *Wolens*, and *Ginsberg*.

"Morales tells us that some state actions may not have pre-emptive effect because they affect airline fares in too tenuous, remote, or peripheral a manner. 504 U.S. at 390, 112 S.Ct. 2031. State actions may affect fares indirectly, however, and still be preempted. *Id.* at 386, 112 S.Ct. 2031. At issue in *Morales* was the attempted state regulation of airline advertising by states who had adopted the 'Air Travel Industry Enforcement Guidelines' from the National Association of Attorneys General. *Id.* at 379, 112 S.Ct. 2031. The guidelines 'contain[ed] detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers (so-called "frequent flyers"), and the payment of compensation to passengers who voluntarily yield their seats on overbooked flights.' *Id.* Although the regulations had no *direct* effect on fares nor did they dictate fares, this case 'plainly d[id] not present a borderline question.' *Id.* at 390, 112 S.Ct. 2031. The Court reasoned that 'the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge.' *Id.*

"In both *Wolens* and *Ginsberg*, the U.S. Supreme Court found that state law claims challenging frequent flyer programs were sufficiently related to air carrier rates and services. 513 U.S. at 226, 115 S.Ct. 817; 572 U.S. at 284, 134 S.Ct. 1422. The Court explained:

> Like the frequent flyer program in *Wolens*, the Northwest program is connected to the airline's 'rates' because the program awards mileage credits that can be redeemed for tickets and upgrades. *See* 513 U.S. at 226 [115 S.Ct. 817]. When miles are used in this way, the rate that a customer pays, *i.e.*, the price of a particular ticket, is either eliminated or reduced. The program is also connected to 'services,' *i.e.*, access to flights and to higher service categories. *Ibid.*

"*Ginsberg*, 572 U.S. at 284, 134 S.Ct. 1422 (parallel citation omitted). Although the frequent flyer program did not determine the airlines prices generally, it did affect what certain customers paid for services.

"In *Musson Theatrical, Inc. v. Federal Express, Corp*., an ADA case before this Court, shippers sued FedEx for fraud and misrepresentation because of FedEx's practice of charging more for economy two-day service than for one-day service for certain packages. No. W2000-01247-COA-R3-CV, 2001 WL 370035, at *1 (Tenn. Ct. App. Apr. 12, 2001). We held:

> Considering the first prong, we find that the claims of negligent misrepresentation and fraud are directly related to airline rates, routes, or service by ... having a significant economic effect upon rates. Furthermore, the effect is not 'tenuous, remote or peripheral' as would be a prohibition against obscenity in advertising, a 'nonprice' aspect of airline fare advertising. *Morales*, 504 U.S. at 390 [112 S.Ct. 2031] (giving a hypothetical example of a claim that would not be preempted). Plaintiffs' claims specifically involve rates that FedEx charges for packages under eight ounces shipped by second day delivery service. Plaintiffs' allegation of misrepresentation and fraud are directly in reference to the manner in which those rates are represented in advertising in FedEx publications.

"*Id.* at *8 (parallel citation omitted).

"On the basis of the foregoing case law, we find that PHI's claims have a sufficient 'connection to' airline prices such that they are preempted by the ADA. In *Morales*, advertising guidelines were sufficiently connected to prices such that the Court did not find it a 'borderline' case or a 'tenuous' connection, and in *Musson*, this Court found a sufficiently close relationship between the state-law claim and pricing, when the claim involved the manner in which the air carrier advertised its rates. PHI's claims are even more closely related to prices than the claims in *Morales* and *Musson*, because PHI seeks court enforcement of the prices it has set or, alternatively, for the court to determine a reasonable price. As in *Wolens* and *Ginsberg*, the state claims in the case before us may not affect prices paid by all customers, but they do directly affect the prices to be paid by Corizon. Accordingly, we conclude that PHI's claims have the requisite 'significant economic effect' on air carrier prices.

"2. *Knopp*'s second prong

"The second part of *Knopp* test requires that 'the claim [ ] involve the enactment or enforcement of a state law, rule, regulation, standard or other provision.' 938 S.W.2d at 360. Unjust enrichment is such a claim, as it 'is a quasi-contractual theory or is a contract implied-in-law in which a court may impose a contractual obligation where one does not exist.' *B & L Corp. v. Thomas & Thorngren, Inc.*, 162 S.W.3d 189, 217 (Tenn. Ct. App. 2004) (citing *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998)). These implied contracts are not based on the intentions of the parties, but are obligations created by law. *B & L*, 162 S.W.3d at 217. It provides an avenue for recovery when no enforceable contract exists between the parties. *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 524 (Tenn. 2005). In the case at bar, PHI asserted that it provided air ambulance services to inmates and that Corizon was required to financially provide for their healthcare needs. Therefore, Corizon was conferred a benefit for which Corizon was required to pay, contends PHI. Because whether the ADA preempts claims based on unjust enrichment is an issue of first impression in Tennessee, we will consider federal jurisprudence on the matter."

"We find the amassed federal case law on the matter persuasive. *See, e.g.*, *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1068 (10th Cir. 2019) (finding that the ADA prohibited the courts from imposing the equitable remedy of unjust enrichment because it 'would reflect the court's policy judgments, not the parties' mutual assent'); *Gordon v. United Cont'l Holding, Inc.*, 73 F. Supp. 3d 472, 480 (D.N.J. 2014) ('It is well settled that claims against airlines for unjust enrichment fall within the ADA's preemption clause'); *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1169, 1171 (C.D. Cal. 2003) (concluding that unjust enrichment claims involve the enforcement of state law, but under the facts of the case, enforcement 'will not have the effect of regulating [airline] pricing policies' or services). Consequently, we hold that because PHI's unjust enrichment claim is related to air carrier rates or services and is based on a state-imposed obligation rather than a self-imposed one, it is preempted by the ADA."

"We now turn to the question of whether the ADA preempts an action on sworn account based on Tennessee Code Annotated § 24-5-107, which provides:

> (a) An account on which action is brought, coming from another state or another county of this state, or from the county where suit is brought, with the affidavit of the plaintiff or its agent to its correctness, and the certificate of a state commissioner annexed thereto, or the certificate

of a notary public with such notary public's official seal annexed thereto, or the certificate of a judge of the court of general sessions, with the certificate of the county clerk that such judge is an acting judge within the county, is conclusive against the party sought to be charged, unless that party on oath denies the account or except as allowed under subsection (b).

(b) The court shall allow the defendant orally to deny the account under oath and assert any defense or objection the defendant may have. Upon such denial, on the plaintiff's motion, or in the interest of justice, the judge shall continue the action to a date certain for trial.

"The trial court held an action on sworn account was not a remedy available to PHI, as Section 24-5-107 is merely 'a procedural mechanism used to simplify and effectuate a party's remedy in debt collection matters.'"

"We agree that '[t]he statute is not meant to provide an alternative theory of liability to traditional tort or contract actions,' *Chumley*, 2018 WL 3997347, at *2. Therefore, we conclude that Tennessee Code Annotated § 24-5-107 does not create a separate cause of action, but rather establishes a procedure by which a plaintiff may pursue a cause of action."

"PHI argues that ADA preemption cannot be asserted except by air carriers. In support of this notion, PHI cites an opinion from the intermediate appellate court in Texas that stated: 'The Act was intended to pre-empt only those state actions having a regulatory effect upon the airlines rather than to preclude airlines from seeking the benefits and protections of state law to enforce their self-imposed standards, regulations, and contracts.' *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 221 (Tex. App. 2009). Inasmuch as we have identified no other authority that reaches that conclusion, we find it unpersuasive. PHI also cites language from a U.S. Supreme Court opinion which states that '[the ADA] confers on private entities (*i.e.,* covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.' *Murphy v. Nat'l Collegiate Athletic Ass'n*, —— U.S. ——, 138 S. Ct. 1461, 1480, 200 L.Ed.2d 854 (2018). The cited language was used by the Court to give an example of a Congressional statute with preemptive effect in a case that was wholly unrelated to the ADA. Thus, viewing the quotation in its proper context, it would be unreasonable to read that single sentence as determinative of the ADA's preemptive scope. Therefore, we reject the argument that ADA preemption may only be asserted by air carriers."

V. Economic Loss Doctrine

Milan Supply Chain Solutions, Inc. v. Navistar, S.W.3d (Tenn., Clark, 2021).

"We granted permission to appeal primarily to consider how, if at all, the economic loss doctrine, which generally precludes recovery for purely economic losses in tort actions, applies in Tennessee to claims of fraudulent inducement. We hold that when, as here, a fraud claim seeks recovery of only economic losses and is premised solely on misrepresentations or nondisclosures about the quality of goods that are the subject of a contract between sophisticated commercial parties, the economic loss doctrine applies. Accordingly, we affirm the judgment of the Court of Appeals holding that the economic loss doctrine bars the plaintiff's fraudulent inducement claim. We also affirm the judgment of the Court of Appeals holding that the plaintiff's claim under the Tennessee Consumer Protection Act ('TCPA') is barred as a matter of law because the trucks at issue are not 'goods' as that term is defined by the portion of the TCPA on which the plaintiff relied. Tenn. Code

Ann. § 47-18-104(b)(7) (2013 & Supp. 2020). We, therefore, set aside the plaintiff's award of attorney's fees and costs based on the TCPA. In all other respects, we affirm the judgment of the Court of Appeals on the separate grounds stated herein."

[Tennessee Administrative Office of the Courts:]

"In a unanimous opinion . . . , the Tennessee Supreme Court ruled that the economic loss doctrine applies in fraud actions where the parties are sophisticated commercial entities and the claim is based solely on alleged misrepresentations or nondisclosures about the quality of the goods purchased through a contract. The economic loss doctrine states parties cannot recover under civil tort law for purely economic damages suffered under a contract and instead must look to the contract itself for remedies. In addition, the ruling addressed the application of the Tennessee Consumer Protection Act to commercial transactions.

"In the case before the Court, Milan Supply Chain Solutions, Inc. purchased more than 200 commercial trucks that were manufactured by Navistar, Inc. and sold by Volunteer International, Inc. The trucks had MaxxForce engines, which were developed by Navistar to meet the Environmental Protection Agency ('EPA') emissions standards that became effective in 2010. The trucks were subject to Navistar's standard limited warranty, and Milan also purchased an optional service contract, which extended the warranty coverage on certain components.

"Milan began experiencing problems with some of the trucks, and Navistar made all repairs pursuant to the warranties, returning the trucks to service each time. However, the problems continued, and Milan's representative felt that the trucks were not as reliable as Navistar and Volunteer had previously represented they would be. As a result, Milan filed suit, alleging a number of claims including fraud. The damages alleged were for economic losses incurred by having the trucks out of service for repairs and for the likely shorter lifespan of the trucks than Milan anticipated.

"The trial court granted Navistar and Volunteer summary judgment on several claims and the case went to trial on the fraud claim, as well as a claim under the TCPA. The jury awarded Milan over $10,000,000 in compensatory damages, $20,000,000 in punitive damages, and attorney's fees.

"The Court of Appeals reversed the judgments, determining that, because Milan's fraud claims were based on economic loss alone and concerned the quality of the trucks, the fraud claims were barred by the economic loss doctrine under Tennessee law. The intermediate appellate court also held that Milan's claim under the TCPA failed because the trucks at issue did not qualify as 'goods' under the statute. The Supreme Court agreed to hear the case.

"The Supreme Court affirmed the Court of Appeals on separate grounds. The Court declined to adopt a broad exception to the economic loss doctrine and instead concluded that, where a fraud claim seeks recovery of only economic losses and is premised solely on alleged misrepresentations or nondisclosures about the quality of the goods that are the subject of a contract between sophisticated commercial parties, the economic loss doctrine applies. The Court found the quality and reliability of the trucks were matters which the parties could, and actually did, contract. Applying the economic loss doctrine in these circumstances is consistent with its historical underpinnings and with its central purpose of preserving the boundary line between tort and contract law.

"The Court also affirmed the intermediate appellate court's judgment that Milan's TCPA claim was barred as a matter of law because the trucks at issue were not 'goods' as the term is defined under the TCPA. Therefore, the Court set aside the trial court's award of attorney's fees and costs to Milan against Navistar based on the TCPA."

VI. Prompt Pay Act; Retainage Belongs in Separate Interest Bearing Escrow Account

Snake Steel, Inc. v. Holladay Construction Group, LLC, S.W.3d (Tenn., Kirby, 2021).

"This appeal requires us to interpret provisions in the Prompt Pay Act, Tennessee Code Annotated sections 66-34-101 to -704, regarding retainage withheld on construction projects. The Prompt Pay Act requires the party withholding retainage—a percentage of total payment withheld as incentive for satisfactory completion of work—to deposit the funds into a separate, interest-bearing escrow account. Failure to do so results in a penalty of $300 per day. In this case, both parties agree the subcontractor's retainage was not placed into an interest-bearing escrow account, and the retainage was not timely remitted to the subcontractor. Three years after completing its work on the contract, the subcontractor sued the contractor for unpaid retainage plus amounts due under the Prompt Pay Act. The contractor soon tendered the retainage; consequently, only the statutory penalty is at issue in this appeal. Tennessee Code Annotated section 66-34-104(c) states that, for persons required to deposit retainage into a separate interest-bearing escrow account, the penalty is assessed 'per day for each and every day' retainage is not so deposited. Consonant with the statute's language, its objective, the wrong the Prompt Pay Act seeks to prevent, and the purpose it seeks to accomplish, we hold that the $300 per day penalty is assessed each day retainage is not deposited in a statutorily-compliant escrow account. Consequently, while the subcontractor's claim for the statutory penalty is subject to the one-year statute of limitations, if the subcontractor can establish that the contractor was required to deposit the retainage into an escrow account, the subcontractor is not precluded from recovering the penalty assessed each day during the period commencing 365 days before the complaint was filed. Accordingly, we reverse in part the trial court's grant of summary judgment to the contractor and remand to the trial court for further proceedings."

VII. Reformation of Instruments; Equities of Parties

Trent v. Mountain Commerce Bank, 606 S.W.3d 258 (Tenn., Lee, 2020).

"Adren S. Greene and his wife, Pamela W. Greene, defaulted on real estate development loans from Mountain Commerce Bank and People's Community Bank. In March 2010, Mr. and Mrs. Greene, facing possible foreclosure and deficiency actions, asked an attorney to prepare quitclaim deeds transferring other property they owned to limited partnerships in which the Greenes had an interest. The attorney drafted six quitclaim deeds conveying ten parcels of property to either Real Estate Holdings of East Tennessee, L.P. ('Real Estate Holdings') or Real Estate Investments of East Tennessee, L.P.

"On March 10, 2010, Mr. and Mrs. Greene signed the quitclaim deeds at their attorney's office, believing that they had conveyed all of their interest in the ten parcels of property. The Greenes did not review the quitclaim deeds before signing them, trusting that the quitclaim deeds had been properly drafted. Mr. and Mrs. Greene owned property on West First North Street in Morristown ('the Property') as tenants by the entirety. Yet Mrs. Greene was omitted as a grantor on the

quitclaim deed transferring the Property to Real Estate Holdings; only Mr. Greene signed the quitclaim deed, which was recorded on March 18, 2010.

"Mountain Commerce Bank and People's Community Bank separately foreclosed on development property owned by the Greenes and sued them for the deficiency balances. In January 2012, an agreed judgment was entered against Mr. and Mrs. Greene in favor of Mountain Commerce Bank; the judgment was recorded in the Hamblen County Register of Deeds office on October 22, 2013. In August 2012, an agreed order of judgment was entered against Mr. and Mrs. Greene in favor of People's Community Bank, a division of First Community Bank; the judgment was recorded on March 28, 2013, in the Hamblen County Register of Deeds office.

"On August 30, 2016, Scott Trent and Ted C. Trent bought the Property from Real Estate Holdings. Civis Bank financed the purchase. The Trents and their wives signed a Deed of Trust to William E. Phillips, Sr., as Trustee for Civis Bank. Sometime in 2017, the Trents and Civis Bank learned that Mrs. Greene retained an ownership interest in the Property and that Mountain Commerce Bank and First Community Bank, N.A. ('the Banks') had recorded judgment liens against the Property. On March 22, 2017, Mr. and Mrs. Greene signed a corrected quitclaim deed to Real Estate Holdings, which was recorded on March 29, 2017, in the Hamblen County Register of Deeds office. The corrected quitclaim deed explained that Mrs. Greene had intended to convey her interest in the Property to Real Estate Holdings under the 2010 quitclaim deed but had been omitted as a grantor.

"In September 2017, the Trents, along with Civis Bank and Mr. Phillips as Trustee for Civis Bank ('the Petitioners'), petitioned the Hamblen County Chancery Court for a declaratory judgment that the corrected quitclaim deed reformed the original quitclaim deed, vested ownership of the Property in the limited partnership as of the date of the original quitclaim deed, divested Mrs. Greene's interest, and removed the judgment liens. The declaratory judgment action named the Banks as respondents and sought a reformation of the original quitclaim deed based on mutual mistake of the parties.

"After a September 10, 2018 hearing, the trial court declined to reform the 2010 quitclaim deed to add Mrs. Greene as a grantor because she had not been a party to the quitclaim deed and thus there had been no mutual mistake by the parties. The Court of Appeals affirmed, reasoning that because Mr. Greene and Real Estate Holdings intended that Mr. Greene would convey his interest in the Property to Real Estate Holdings, there had been no mutual mistake between the parties to the quitclaim deed—Mr. Greene and Real Estate Holdings. We granted the Petitioners' application for review."

"The 2010 quitclaim deed's omission of Mrs. Greene as a grantor posed a problem because Mr. and Mrs. Greene owned the Property as tenants by the entirety. Only married couples can own property as tenants by the entirety because the tenancy is 'based on the concept that those who are married are not separate persons; rather, they "are but one person."' *Bryant v. Bryant,* 522 S.W.3d 392, 400 (Tenn. 2017) (citations omitted). Under a tenancy by the entirety, after the death of one spouse the surviving spouse owns the property. *Id.* The surviving spouse does not acquire any new or further interest in the property after the other spouse's death because the surviving spouse always had that ownership interest. *Id.* When Mr. Greene conveyed his interest in the Property to Real Estate Holdings, he could not legally convey Mrs. Greene's ownership interest. *See Robinson v. Trousdale Cnty.,* 516 S.W.2d 626, 632 (Tenn. 1974) (explaining that under tenancy by the entirety, one spouse can convey only his or her survivorship interest without the other spouse's consent, and '[a]ny

unilateral attempt will be wholly ... void at the instance of the [other spouse] and any prospective purchaser, transferee, lessee, mortgagee and the like will act at his peril'). Thus, the 2010 quitclaim deed conveyed to Real Estate Holdings only Mr. Greene's interest in the Property. Mrs. Greene retained her interest, which meant that if Mrs. Greene survived her husband, she would own the entire interest in the Property. *See Bryant,* 522 S.W.3d at 400.

"The Banks' judgment liens attached to Mrs. Greene's remaining interest in the Property upon recordation. *See* Tenn. Code Ann. § 25-5-101(b)(1) (2017); Tenn. Code Ann. § 66-26-101 (2015). In short, the Trents acquired the Property subject to Mrs. Greene's interest and the Banks' judgment liens. Thus, the Petitioners sought to have the quitclaim deed reformed to vest Real Estate Holdings with full ownership of the Property as of March 10, 2010, and free from the Banks' recorded judgment liens.

"Courts have jurisdiction under Tennessee law to reform written instruments to accurately reflect the parties' agreement. *Battle v. Claiborne,* 133 Tenn. 286, 180 S.W. 584, 587 (1915) (citation omitted). . . ."

"Reformation, being an equitable remedy, requires us to consider the equities of the parties. *See* 27 Williston on Contracts § 70:24 (4th ed.) (July 2020 Update) (footnotes omitted) ('The court has equitable discretion to grant reformation if it finds that to be in the interests of justice. Since the remedy of reformation is equitable in nature, a court has the discretion to withhold it, even if it would otherwise be appropriate, on grounds that have traditionally justified courts of equity in withholding relief. The major limit to the traditional exercise of equitable discretion is reasonableness.').

"A court should not reform a contract when doing so would unfairly affect the rights of innocent third parties. Restatement (First) of Contracts § 504 (June 2020 Update). . . ."

"Here, reformation of the 2010 quitclaim deed would deprive the Banks of their judgment liens against the Property. The Banks protected their interests by obtaining judgments and recording their liens in the Hamblen County Register of Deeds office after Mr. Greene signed the 2010 quitclaim deed and before the execution of the 2017 corrected quitclaim deed. *See, e.g., In re Cunningham,* 48 B.R. 509, 512 (Bankr. M.D. Tenn. 1985) (stating that under Tennessee law, reformation will not be granted 'where third parties have acquired an interest in real property omitted from a deed without notice of the original grantee's adverse claim'). . . ."

"The Banks protected their interests, but the Trents failed to do so. The Trents bought the Property with constructive notice of the defect in the title and of the Banks' liens, and as such, were not bona fide purchasers for value. *See Henderson v. Lawrence,* 212 Tenn. 247, 369 S.W.2d 553, 556 (1963) (noting that a bona fide 'purchaser is one who buys for a valuable consideration without knowledge or notice of facts material to the title.'. . ."

"Constructive notice is 'implied or imputed by operation of law and arises as a result of the legal act of recording an instrument under a statute by which recordation has the effect of constructive notice.' *Blevins v. Johnson Cnty.,* 746 S.W.2d 678, 682-83 (Tenn. 1988). All recorded instruments such as deeds and judgments 'shall be notice to all the world from the time they are noted for registration, ... and shall take effect from such time.' Tenn. Code Ann. § 66-26-102 (2015). The warranty deed conveying the Property to Mr. and Mrs. Greene as tenants by the entirety was recorded in December 2007; Mr. Greene's 2010 quitclaim deed was recorded in March 2010; the

Banks' judgment liens against the Greenes were recorded in March 2013 and October 2013; and the quitclaim deed of correction was recorded in March 2017. 'The object of registration is to give notice to creditors and subsequent purchasers.' *Blevins,* 746 S.W.2d at 684 (quoting *Moore v. Cole,* 200 Tenn. 43, 289 S.W.2d 695, 698 (1956)). By statute, the Petitioners had notice of Mrs. Greene's ownership interest and the judgment liens when they acquired an interest in the Property.

"Equity does not permit us to correct a mistake—to the detriment of the Banks—that the Petitioners could have avoided with reasonable diligence."

"In sum, after considering the equities of the parties, we find that the Petitioners are not entitled to reformation of the 2010 quitclaim deed. Reformation would work to the detriment of the Banks by effectively extinguishing their recorded judgment liens and would benefit the Petitioners who had constructive notice of Mrs. Greene's interest in the Property and the Banks' judgment liens. Although on different grounds, we affirm the judgment of the trial court and the judgment of the Court of Appeals denying the relief sought by the Petitioners."

VIII. Garnishment on Bank Accounts; Accounts in Name of Separate Entity

Tullahoma Industries, LLC v. Navajo Air, LLC, No. M2019-02036-COA-R3-CV (Tenn. Ct. App., McBrayer, June 29, 2021).

"Navajo Air, LLC won a judgment against Tullahoma Industries, LLC, a Tennessee limited liability company ('Tullahoma Tennessee'). *See Tullahoma Indus., LLC v. Navajo Air, LLC*, No. M2017-00109-COA-R3-CV, 2018 WL 3752305, at *2 (Tenn. Ct. App. Aug. 7, 2018) (describing the underlying litigation). Seeking to satisfy that judgment, Navajo served a garnishment on U.S. Bank, requiring U.S. Bank to determine if it 'possess[ed] or control[led] money or property' of Tullahoma Tennessee and to pay any money into court.

"U.S. Bank's garnishment department identified two deposit accounts that matched the business name and address for Tullahoma Tennessee. So U.S. Bank initially placed a hold on those accounts and answered the garnishment accordingly. U.S. Bank then sought to verify that the accounts belonged to the correct entity. To that end, U.S. Bank asked Navajo's counsel for Tullahoma Tennessee's tax identification number. But the number provided did not match the tax identification number for the two frozen accounts. The two frozen accounts were associated with the tax identification number of a Puerto Rican entity with the same name and address as Tullahoma Tennessee ('Tullahoma Puerto Rico').

"Navajo's counsel, in a letter to U.S. Bank, clarified that the garnishment 'should NOT attach' to assets owned by Tullahoma Puerto Rico. Navajo's counsel advised that Tullahoma Tennessee was the only entity subject to the garnishment. But the letter went on to confirm that U.S. Bank would 'file an answer to the garnishment ..., paying the money into Court.'

"Instead, U.S. Bank released the hold it had placed on the two accounts associated with Tullahoma Puerto Rico's tax identification number. Because it found no accounts associated with Tullahoma Tennessee's tax identification number, U.S. Bank amended its garnishment answer to 'No Accounts Found.'

"Later, Navajo filed a Motion to Show Cause, seeking to require U.S. Bank 'to show cause why a judgment should not be entered against it ... for failing to honor [the garnishment].' Discovery revealed that the funds in the Tullahoma Puerto Rico accounts were funds payable only to Tullahoma Tennessee under government contracts. Tullahoma Tennessee's majority owner, who also owned Tullahoma Puerto Rico, had directed the funds into the Tullahoma Puerto Rico accounts. Discovery also revealed that, at the time the garnishment was served, U.S. Bank had a Tullahoma Tennessee escrow account.

"According to Navajo, the funds in the Tullahoma Puerto Rico deposit accounts and the Tullahoma Tennessee escrow account were subject to garnishment. So, Navajo claimed, U.S. Bank answered the garnishment inaccurately and failed to pay money belonging to Tullahoma Tennessee into court. U.S. Bank countered that it accurately answered the garnishment. It argued that funds in the accounts associated with Tullahoma Puerto Rico's tax identification number could not be garnished to satisfy Navajo's judgment against Tullahoma Tennessee. U.S. Bank also argued that the escrow account benefiting Tullahoma Tennessee was not subject to garnishment.

"The trial court ruled in favor of U.S. Bank."

"On appeal, Navajo argues that U.S. Bank failed to honor the garnishment. As it did in the trial court, Navajo contends that the funds in the deposit accounts associated with Tullahoma Puerto Rico's tax identification number and the escrow account benefiting Tullahoma Tennessee were subject to garnishment. U.S. Bank maintains that none of those funds could be garnished to satisfy Navajo's judgment against Tullahoma Tennessee. U.S. Bank also takes issue with Navajo's Motion to Show Cause as 'procedurally inappropriate.'"

"U.S. Bank argues that the trial court's judgment may be affirmed solely because Navajo's 'Motion to Show Cause' was improper procedurally. A court may require a garnishee 'to show cause why [final judgment] should not be rendered' after a conditional judgment has been entered against the garnishee. Tenn. Code Ann. § 26-2-209 (2017). But a conditional judgment is appropriate only '[i]f the garnishee fails to appear or answer.' *Id.*; *see also id.* § 29-7-114 (2012); *Smith*, 165 S.W.3d at 294-95. *But see* Tenn. R. Civ. P. 69.05(4) ('If the garnishee fails to timely answer *or pay money into court*, a conditional judgment may be entered against the garnishee....') (emphasis added). Here, U.S. Bank did answer, claiming that it had '[n]o accounts' of Tullahoma Tennessee subject to garnishment.

"Still, a garnishee's answer 'is not conclusive.' *See* Tenn. Code Ann. § 26-2-205 (2017). The garnishment statutes allow for a garnishee to be examined even after it has answered. *See id.* §§ 26-2-204 (2017), 26-2-206 (2017), 29-7-103 (2012); *see also Dexter Ridge Shopping Ctr., LLC v. Little*, 358 S.W.3d 597, 606 (Tenn. Ct. App. 2010). . . . The examination can extend beyond whether the garnishee had possession or control of 'any property, debts, or effects belonging to the [judgment debtor].' Tenn. Code Ann. § 26-2-204(a)(2). It may also include an inquiry into the 'property, debts, and effects' of the judgment debtor held by others. *Id.* § 26-2-204(a)(3). So we treat the motion to show cause as a request to examine U.S. Bank following its answer."

"After obtaining a judgment, the judgment creditor 'may seek enforcement or satisfaction [of the judgment] by any method permitted by law.' *See Advanta Bus. Servs. Corp. v. McPherson*, No. W1999-02682-COA-R9-CV, 2000 WL 371194, at *3 (Tenn. Ct. App. Apr. 11, 2000) (emphasis omitted) (quoting *McCall v. Johnson*, No. 01A01-9408-CH-00392, 1995 WL 138898, at *2 (Tenn. Ct. App. Mar. 31, 1995)). One method of satisfaction permitted by law is by 'attachment.' *See*

Tenn. Code Ann. § 29-6-101 (2012). And when 'third persons are indebted to [the judgment] debtor, the attachment may be by garnishment.' *Id.* § 29-7-101 (2012); *see id.* §§ 26-2-202 (2017), 29-7-112 (2012); *Smith*, 165 S.W.3d at 293 (explaining that a garnishment 'is in the nature of an attachment of a debt due the judgment debtor from the garnishee' (citation omitted)). So a garnishment action is a proceeding in which the judgment creditor 'seeks to subject to his claim ... money owed by [a] third person to [the judgment debtor].' *Stonecipher v. Knoxville Sav. & Loan Ass'n*, 298 S.W.2d 785, 787 (Tenn. Ct. App. 1956). The third person, 'in whose hands such effects are attached[,] is the garnishee.' *Id.*

"Once the judgment creditor serves the garnishment, the garnishee 'may be required' to answer it. Tenn. Code Ann. § 26-2-204(a). Among other things, the answer may 'determine ''the proper amount of the garnishee's indebtedness to the judgment debtor.''' *Rogers Grp., Inc. v. Gilbert*, No. M2015-01044-COA-R3-CV, 2016 WL 2605651, at *4 (Tenn. Ct. App. May 3, 2016) (quoting *Smith*, 165 S.W.3d at 293). If the garnishee is indebted to the judgment debtor, the judgment creditor may win a judgment against the garnishee. *See J.C. Mahan Motor Co. v. Lyle*, 67 S.W.2d 745, 746 (Tenn. 1934) ('[I]t must appear that there is a debt ''existing in favor of the debtor, which ... the debtor could sue the garnishee for and recover.''' (citation omitted)); *Rowland v. Quarles*, 100 S.W.2d 991, 994 (Tenn. Ct. App. 1936) ('Test of right of judgment creditor to judgment against garnishee is existence of indebtedness owing by garnishee to judgment debtor.' (citation omitted)).

"As relevant here, 'a bank/depositor relationship is treated as a debtor/creditor relationship.' *Rogers v. First Nat'l Bank*, No. M2004-02414-COA-R3-CV, 2006 WL 344759, at *9 (Tenn. Ct. App. Feb. 14, 2006) (citing *Wagner v. Citizens' Bank & Tr. Co.*, 122 S.W. 245, 247 (Tenn. 1909); *Macon Cty. Livestock Mkt., Inc. v. Ky. State Bank, Inc.*, 724 S.W.2d 343, 349 (Tenn. Ct. App. 1986)). The bank 'acquires title to the money deposited, and becomes the depositor's debtor for the amount deposited.' *Id.* (quoting 9 C.J.S. *Banks & Banking* § 270 (1996)); *see Hamilton Nat'l Bank of Chattanooga v. Swafford*, 376 S.W.2d 470, 477 (Tenn. 1964); *Grissom v. Commercial Nat'l Bank*, 10 S.W. 774, 776 (Tenn. 1889); *First Am. Nat'l Bank of Nashville v. Commerce Union Bank of White Cty.*, 692 S.W.2d 642, 646 (Tenn. Ct. App. 1985); *Gardner v. Supreme Camp of the Am. Woodmen*, 11 Tenn. App. 52, 59 (1929).

"Here, Navajo, the judgment creditor, sought to satisfy its judgment against Tullahoma Tennessee, the judgment debtor, by garnishment. If U.S. Bank, the garnishee, controlled funds of Tullahoma Tennessee, it was to surrender them to the court. *See* Tenn. Code Ann. § 26-2-208 (2017) ('As soon as the property is declared to be the property of the [judgment debtor] ..., it shall be delivered up to the officer serving the garnishment, on demand.'). U.S. Bank answered that it had '[n]o accounts' of Tullahoma Tennessee subject to garnishment. Navajo claims that U.S. Bank actually had three accounts subject to garnishment, two deposit accounts and an escrow account.

"Navajo bore the burden of proving that U.S. Bank was indebted to Tullahoma Tennessee. *See In re Rice's Appeal*, 219 S.W.2d 177, 180 (Tenn. 1949) (reasoning that 'a garnishee is [not] required to carry the burden of showing that he is not indebted to the judgment creditor'); *see also In re Jefferson's Appeal*, 219 S.W.2d 181, 184 (Tenn. 1949) (Neil, J., concurring). Although the deposit accounts bore the business name and address of both Tullahoma Tennessee and Tullahoma Puerto Rico, the accounts only included the tax identification number for Tullahoma Puerto Rico. Navajo failed to show that Tullahoma Tennessee, instead of Tullahoma Puerto Rico, was the customer on these accounts. *See* Tenn. Code Ann. § 47-4-104(a)(5) (Supp. 2020) (defining 'customer' as the 'person having an account with a bank'). So Navajo could not garnish those funds to satisfy a

judgment against Tullahoma Tennessee. *See id.* § 29-7-101; *J.C. Mahan Motor Co.*, 67 S.W.2d at 746.

"Navajo suggests we ignore that Tullahoma Puerto Rico was the customer. Because the funds in the accounts were truly those of Tullahoma Tennessee, Navajo argues, U.S. Bank 'ha[d] property and effects of [Tullahoma Tennessee] subject to the attachment.' *See* Tenn. Code Ann. § 29-7-112. This argument misunderstands the nature of bank accounts. Tullahoma Puerto Rico did not own the funds in its accounts, much less Tullahoma Tennessee. U.S. Bank did. *See Rogers*, 2006 WL 344759, at *9. Once deposited, the funds were no longer the depositor's property or effects, even if the depositor was Tullahoma Tennessee. *See Rowland*, 100 S.W.2d at 994."

"Navajo failed to carry its burden to show that U.S. Bank was indebted to Tullahoma Tennessee. U.S. Bank only maintained deposit accounts of Tullahoma Puerto Rico, a separate entity, and an escrow account of which Tullahoma Tennessee was a beneficiary. Because the accounts were not subject to garnishment as money owed to Tullahoma Tennessee, we affirm the denial of further relief to Navajo on its garnishment."

IX. Miscellaneous Statutes

A. Banking; Sale of Personal Property Acquired in Satisfaction of Loan

Chapter 78, Public Acts 2021, amending T.C.A. § 45-2-607(b)(1) eff. Mar. 31, 2021.

The period of time in which to sell personal property acquired in satisfaction of a loan has been increased from six to twelve months.

B. Motor Vehicle Liens

1. Temporary

Chapter 171, Public Acts 2021, amending T.C.A. § 55-3-126(f)(1) eff. Apr. 20, 2021.

"A first lienholder or the first lienholder's designee may file an application for motor vehicle temporary lien with the secretary of state."

2. Notice of Discharge of Lien

Chapter 240, Public Acts 2021, amending T.C.A. § 55-3-114(c) eff. July 1, 2021.

"lf the certificate of title shows on its face one (1) or more liens or encumbrances still outstanding, then the lienor shall deliver the certificate of title to the next prior lienor, either in person or by registered mail. lf there are no more liens or encumbrances still outstanding, then the lienor shall deliver the certificate of title to the owner within seven (7) business days from the discharge of the lien or encumbrance. On the date the lien is discharged, the lienor shall send notice of the discharge to the department by registered mail with return receipt demanded. lf the department is not notified within seventy-two (72) hours from the date of discharge, then the lienor is subject to the penalty described in § 55-3-127(c) [Class C misdemeanor]."

CRIMINAL LAW

I. Assaultive Offenses

A. Boating Under the Influence

Chapter 434, Public Acts 2021, amending T.C.A. §§ 39-13-106, -115, -213, -218 and Title 69, Chapter 9, Part 2 eff. July 1, 2021.

This act aligns penalties for boating under the influence with the penalties for driving under the influence and clarifies that the offenses of vehicular assault, aggravated vehicular assault, vehicular homicide, and aggravated vehicular homicide may be committed by a person boating under the influence.

B. Attempted First Degree Murder Committed Against Law Enforcement Officer

Chapter 394, Public Acts 2021, adding T.C.A. § 39-13-202(d) and renumbering accordingly and amending § 40-35-501(h)(3) eff. July 1, 2021.

39-13-202.

"(d) Notwithstanding § 39–12–107, a person convicted of attempted first degree murder may be sentenced to imprisonment for life without possibility of parole if the court finds the person committed the offense against any law enforcement officer, correctional officer, department of correction employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter, who was engaged in the performance of official duties, and the person knew or reasonably should have known that the victim was a law enforcement officer, correctional officer, department of correction employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic, or firefighter engaged in the performance of official duties."

40-35-501(h).

"(3) There shall be no release eligibility for a defendant receiving a sentence of imprisonment for life without possibility of parole for first degree murder, attempted first degree murder, or aggravated rape of a child."

C. Assault Against First Responder or Nurse

Chapter 458, Public Acts 2021, amending T.C.A. § 39-13-116 eff. July 1, 2021.

The statute regarding assault and aggravated assault of a first responder now also applies to a nurse discharging official duties.

D. Reckless Endangerment; Discharge of Firearm from Within Motor Vehicle

Chapter 505, Public Acts 2021, adding T.C.A. § 39-13-103(b)(4) and renumbering accordingly eff. July 1, 2021.

"(4) Reckless endangerment by discharging a firearm from within a motor vehicle, as defined by § 55–1–103, is a Class C felony."

II. Sex Crimes

A. Sexual Offenders; Predatory Offense

Chapter 210, Public Acts 2021, adding T.C.A. § 39-13-523(a)(5)(G) eff. July 1, 2021.

["Predatory offense" means: . . .]

"(G) Trafficking for commercial sex act under § 39–13–309."

B. Sexual Exploitation of Children; Definition of Sexual Activity

Chapter 371, Public Acts 2021, amending T.C.A. § 39-17-1002(8)(G) eff. May 11, 2021.

The definition of "sexual activity" for purposes of the offense of sexual exploitation of a minor has been modified to include:

"(G) Exhibition of the breast, genitals, buttocks, anus, or pubic or rectal area of any minor that can be reasonably construed as being for the purpose of the sexual arousal or gratification of the defendant or another."

C. Sexual Abuse of a Corpse

Chapter 402, Public Acts 2021, amending T.C.A. §§ 39-17-312(a) and 40-39-202(20)(A) eff. July 1, 2021.

The offense of abuse of a corpse, a Class E felony, now includes when a person knowingly "[e]ngages in sexual contact, as defined in § 39-13-501, with a corpse." Offenders must register as sex offenders.

D. Sexual Battery; Victim Being Treated or Counseled Cannot Consent

Chapter 509, Public Acts 2021, adding T.C.A. § 39-13-505(c) and renumbering accordingly eff. July 1, 2021.

"(c) For purposes of this section, a victim is incapable of consent if:
(1) The sexual contact with the victim occurs during the course of a consultation, examination, ongoing treatment, therapy, or other provision of professional services described in subdivision (c)(2); and
(2) The defendant, whether licensed by the state or not, is a member of the clergy, healthcare professional, or alcohol and drug abuse counselor who was treating the victim for a mental, emotional, or physical condition.

"(d) Sexual battery is a Class E felony."

E. Prostitution; Notice to DCS if Suspect Taken into Custody Is a Minor

Chapter 246, Public Acts 2021, amending T.C.A. § 39-13-513(d) eff. July 1, 2021.

A law enforcement officer must notify the department of children's services when a person under 18 years of age is taken into custody for suspicion of committing the offense of prostitution.

F. Rape Kits

Chapter 362, Public Acts 2021, amending T.C.A. § 39-13-519 and adding T.C.A. §§ 39-13-519(e) and (f) and 40-38-119 eff. July 1, 2021, and 38-6-128 eff. May 11, 2021.

This act revises procedures with regard to the handling of rape kits. Within seven days of being notified by a health care provider that the kit is ready for release, the applicable law enforcement agency shall pick up the kit. Within thirty days, the kit shall be submitted to the TBI or other qualified lab.

If the victim elects not to report the offense, the kit becomes a hold kit, which now must be stored for ten years [formerly three]. The statute also creates a tracking system:

"(e) Beginning July 1, 2022:

(1) A law enforcement agency, the state crime lab, and any other similar qualified laboratory that receives, maintains, stores, or preserves sexual assault evidence collection kits or hold kits must participate in the electronic tracking system administered by the Tennessee bureau of investigation pursuant to § 38-6-128;

(2) A law enforcement agency receiving a sexual assault evidence collection kit after the conclusion of the forensic medical examination must provide the victim with a tracking number for the sexual assault evidence collection kit, and a copy of the pamphlet created by the Tennessee bureau of investigation pursuant to § 38-6-128 explaining how to access and use the tracking system and the victim's right to receive testing status updates of the victim's sexual assault evidence collection kit generated by the Tennessee bureau of investigation or similar qualified laboratory; and

(3) A law enforcement agency receiving a sexual assault evidence collection kit or hold kit from a healthcare provider must enter the sexual assault evidence collection kit or hold kit into the tracking system within ten (10) days of receipt of the evidence from the healthcare provider. The location and status of the evidence must be updated in the tracking system by the law enforcement agency and the state crime lab or other similar qualified laboratory taking possession of the kit at each step of the process, including submission of the evidence to the laboratory for testing, laboratory testing status, and evidence disposition following laboratory testing.

"(f) Upon receipt of DNA data analysis results from the Tennessee bureau of investigation pursuant to § 38–6–113(d) or similar qualified laboratory, the investigating agency must, upon a victim's request and within a reasonable time, notify the victim of whether a DNA sample was obtained from the analysis and whether the analysis resulted in a match to a DNA profile in state or federal databases, unless disclosure of the information would impede or compromise the investigation."

T.C.A. § 40-38-119 also provides various rights to victims of sexually-oriented crimes.

G. Uniform Code of Military Justice; Statute of Limitations; Rape

United States v. Briggs, 141 S.Ct. 467 (U.S., Alito, 2020).

"The Uniform Code of Military Justice (UCMJ) has long provided that a military offense, 'punishable by death, may be tried and punished at any time without limitation.' 10 U.S.C. § 843(a). Other military offenses are subject to a 5-year statute of limitations. § 843(b). Respondents are three military service members, each convicted of rape. When they were charged, the UCMJ provided that rape could be 'punished by death.' § 920(a) (1994 ed.). Because this Court held that the Eighth Amendment forbids a death sentence for the rape of an adult woman, *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982, respondents argue that they could not, in fact, have been sentenced to death, and therefore the UCMJ's 5-year statute of limitations applies and bars their convictions. Agreeing, the Court of Appeals for the Armed Forces set aside their convictions.

"Held: Respondents' prosecutions for rape under the UCMJ were timely."

"Respondents contend that the UCMJ phrase 'punishable by death' means capable of punishment by death *when all applicable law is taken into account*. By contrast, the Government sees the phrase as something of a term of art, meaning capable of punishment by death *under the penalty provisions of the UCMJ*."

"For three reasons, the phrase's context—appearing in a statute of limitations provision for prosecutions under the UCMJ—weighs heavily in favor of the Government's interpretation."

"First, the UCMJ is a uniform code. As such, a natural referent for a statute of limitations provision within the UCMJ is other law in the UCMJ itself. The most natural place to look for Congress's answer to whether rape was 'punishable by death' within the meaning of § 843(a) is § 920's directive that rape could be 'punished by death.' That is so even if the UCMJ's separate prohibition on 'cruel or unusual punishment,' § 855, would have been held to provide an independent defense against the imposition of the death penalty for rape."

"Second, respondents' interpretation of § 843(a) is not the sort of limitations provision that Congress is likely to have chosen. Statutes of limitations typically provide clarity, see *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752, and it is reasonable to presume that clarity is an objective when lawmakers enact such provisions. But if 'punishable by death' means punishable by death after all applicable law is taken into account, the deadline for filing rape charges would be unclear. That deadline would depend on an unresolved constitutional question about *Coker*'s application to military prosecutions, on what this Court has described as 'evolving standards of decency' under the Eighth Amendment, *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525, and on whether § 855 of the UCMJ independently prohibits a death sentence for rape."

"Third, the ends served by statutes of limitations differ sharply from those served by provisions like the Eighth Amendment or UCMJ § 855. Factors legislators may find important in setting a statute of limitations—such as the difficulty of gathering evidence and mounting a prosecution—play no part in the Court's Eighth Amendment analysis. Thus, it is unlikely that lawmakers would want to tie a statute of limitations to judicial interpretations of such provisions."

H. Sexual Offender Treatment

Chapter 204, Public Acts 2021, adding T.C.A. §§ 39-13-704(d)(5), -705(d), -706(c) and -707(b) eff. Apr. 22, 2021.

39-13-704(d)(5).

"(5) The board shall compile and make available on the board's website a list of approved sex offender evaluation providers and a list of approved sex offender treatment providers that the board deems fit, based upon the provider's specific training, experience, and professional licensure, to fulfill the objectives set forth in this section."

39-13-705(d).

"(d) Any evaluation required by this section must be performed by an individual or entity on the sex offender treatment board's list of approved providers compiled pursuant to § 39–13– 704(d)(5)."

39-13-706(c).

"(c) Any treatment required by this section must be provided by an individual or entity on the sex offender treatment board's list of approved providers compiled pursuant to § 39–13–704(d)(5)."

39-13-707(b).

"(b) An individual or entity shall not provide sex offender evaluation or treatment services pursuant to this part unless the individual or entity is on the sex offender treatment board's list of approved providers compiled pursuant to § 39–13–704(d)(5). Unapproved providers who conduct sex offender evaluation or treatment services must be referred to the relevant licensing board for disciplinary action."

Chapter 365, Public Acts 2021, adding T.C.A. 39-13-703(3) eff. May 11, 2021.

["Sex offense" includes:]

"(C) The commission of any act that, on or after July 1, 2021, constitutes the criminal offense of:
- (i) Trafficking for commercial sex act, as prohibited by § 39-13-309;
- (ii) Patronizing prostitution from a person who is younger than eighteen (18) years of age or has an intellectual disability, as prohibited by § 39-13-514;
- (iii) Promoting the prostitution of a minor, as prohibited by § 39-13-515;
- (iv) Criminal attempt, conspiracy, or solicitation to commit any of the offenses specified in this subdivision (3)(C); and
- (v) Criminal responsibility for the facilitation of a felony when the specific felony facilitated is any of the offenses specified in this subdivision (3)(C); and. . . ."

III. Vulnerable Victims

A. "Safe Seniors Act of 2021"

Chapter 500, Public Acts 2021, amending T.C.A. § 39-13-202(a)(2) and various provisions of T.C.A. Title 39, Chapter 15 and Title 40, Chapter 11, Part 1 eff. Oct. 1, 2021.

This act modifies a number of provisions in Title 39 designed to protect elderly and vulnerable adults as defined in T.C.A. § 39-15-501. Additionally, the definition of first degree murder now includes a killing of another in the perpetration of aggravated abuse of an elderly or vulnerable adult in violation of T.C.A. § 39-15-511.

B. TBI Silver Alert Program

Chapter 350, Public Acts 2021, amending T.C.A. § 38-6-121 eff. May 11, 2021.

The Tennessee Bureau of Investigation is required to implement a program to assist in the locating of missing, vulnerable citizens. Entitled the "Silver Alert" program, it replaces the Care Alert Program.

C. Child Endangerment; Placing Child in Imminent Danger; Controlled Substances

Chapter 511, Public Acts 2021, adding T.C.A. § 39-15-401(d) and renumbering accordingly eff. July 1, 2021.

"(d) (1) Any person who negligently, by act or omission, engages in conduct that places a child in imminent danger of death, bodily injury, or physical or mental impairment, commits a Class A misdemeanor; except that, if the abused child is eight (8) years of age or less, the penalty is a Class D felony.

(2) For purposes of this subsection (d), a person engages in conduct that places a child in imminent danger of death, bodily injury, or physical or mental impairment if the person's conduct related to the controlled substance methamphetamine or any other controlled substance listed in chapter 17, part 4 of this title, except a Schedule VI controlled substance, exposes the child to the controlled substance and an analysis of a specimen of the child's blood, hair, fingernail, urine, or other bodily substance indicates the presence of methamphetamine or any other controlled substance listed in chapter 17, part 4 of this title, except a Schedule VI controlled substance, in the child's body."

D. Failure to Report Missing Child; Evelyn Boswell's Rule

Chapter 107, Public Acts 2021, amending T.C.A. § 37-10-202 eff. July 1, 2021.

"(a) Except as provided in subsection (b), whenever a parent knows, learns, or believes that a child under the parent's charge and care is missing, the parent shall report the child as being missing to a law enforcement agency or the Tennessee bureau of investigation.

"(b) Whenever the parent knows, learns, or believes that a minor child under the parent's charge and care is missing, the parent shall make the report under subsection (a) within a reasonable time after determining that the child is missing, but in no event more than twenty-four (24) hours after determining that the child is missing. As used in this section, 'minor child' means a person who is twelve (12) years of age or younger.

"(c) (1) A parent who is subject to the duty imposed by subsection (b) commits the offense of failure to report a missing child if the parent fails to make, or fails to cause to be made, the report required under subsection (b) with intentional or reckless disregard for the safety of the minor child.
(2) Failure to report a missing child is a Class A misdemeanor.

"(d) This section does not prohibit prosecution under any other law.

"(e) It is a defense to prosecution under this section that the parent made reasonably diligent efforts to verify the whereabouts and safety of the minor child during the period of any delay in making the report required by subsection (b).

"(f) A person who knowingly makes a false allegation against a parent of failure to report a missing child as required by this section, in addition to any other penalties provided for by law, may be prosecuted for the offense of false reports under § 39–16–502, and the court may order the accuser to pay all litigation expenses, including, but not limited to, reasonable attorney's fees, discretionary costs, and other costs incurred by the wrongly accused party in defending against the false allegation."

IV. Invasion of Privacy

A. Drones

Chapter 462, Public Acts 2021, amending T.C.A. § 39-13-609(d)(2) and (e)(2) eff. May 18, 2021, terminating July 1, 2024.

39-13-609(d)(2).

"[A drone may be used without a search warrant:]

(H) To provide aerial coverage of public property, or private property with the consent of the private property owner, when deployed for the purpose of providing or enhancing security for an event open to the public, including, but not limited to, music concerts, athletic events, festivals, protests, and other outdoor events;
(I) To provide aerial coverage in case of a natural disaster when a state of emergency is declared; or
(J) To investigate the scene of a crime that is occurring or has occurred."

39-13-609(e)(2).

"[Any evidence, information or data collected or obtained because of use of a drone shall:]

(A) Be deleted within fifteen (15) business days of collection unless the evidence, information, or other data is directly relevant to the lawful reason the drone was being used or to an investigation or criminal prosecution. If the evidence, information, or other data is directly relevant to either, the evidence must be retained and deleted by the collecting law enforcement agency in accordance with the same criteria, policies, and procedures used by the agency for evidence collected by methods other than a drone;

(B) Not be admissible as evidence in a criminal prosecution in any court of law in this state if it was collected or obtained in violation of subsection (c) or (d); and
(C) Not be used as probable cause to obtain a search or arrest warrant or reasonable suspicion to detain a person or vehicle if evidence, information, or other data was collected or obtained that was, at the time of collection, in violation of this section."

B. Unlawful Photographing

Chapter 354, Public Acts 2021, amending T.C.A. § 39-13-605 eff. July 1, 2021.

"(a) It is an offense for a person to knowingly photograph, or cause to be photographed, an individual without the prior effective consent of the individual, or in the case of a minor, without the prior effective consent of the minor's parent or guardian, if the photograph:
(1) (A) Would offend or embarrass an ordinary person if the person appeared in the photograph; or
(B) Is focused on the intimate area of the individual and would be considered offensive or embarrassing by the individual; and
(2) Was taken for the purpose of sexual arousal or gratification of the defendant.

"(b) As used in this section:
(1) 'Photograph' means any photograph or photographic reproduction, whether taken using digital media or conventional film, still or moving, or any videotape, live television transmission, or social media broadcast of any individual; and
(2) 'Intimate area' means the naked or clothed genitals, pubic area, anus, buttocks, or female breast of a person."

C. Release of Donor Information

Chapter 516, Public Acts 2021, adding T.C.A. § 39-13-612 eff. Oct. 1, 2021.

This act criminalizes the release of personal donor information to 501(c) organizations, subject to certain restrictions. Violation of the act is a Class B misdemeanor.

V. Aggravated Burglary and Especially Aggravated Burglary; Crimes Against Person

Chapter 545, Public Acts 2021, adding T.C.A. §§ 39-13-1001 et seq. eff. July 1, 2021.

Aggravated burglary and especially aggravated burglary are now classified as crimes against the person.

VI. Self-Defense and Defense of Others

A. Use of Deadly Force by One in Imminent Danger of Grave Sexual Abuse

Chapter 83, Public Acts 2021, adding T.C.A. § 39-11-106(18) and renumbering accordingly and amending T.C.A. §§ 39-11-504, -611 and -620 eff. Apr. 7, 2021.

39-11-106(18).

"'Grave sexual abuse' means:
(A) Aggravated rape, pursuant to § 39–13–502;
(B) Rape, pursuant to § 39–13–503;
(C) Rape of a child, pursuant to § 39–13–522; or
(D) Aggravated rape of a child, pursuant to § 39–13–531."

The provisions of T.C.A. § 39-11-611 that allow use of deadly force in self-defense and defense of others have been expanded to include situations involving grave sexual abuse, as defined above.

B. Use of Deadly Force by Victim of Human Trafficking

Chapter 115, Public Acts 2021, amending T.C.A. § 39-11-611 eff. July 1, 2021.

39-11-611(b).

"(3) For purposes of this subsection (b), a person is not engaged in conduct that would constitute a felony or Class A misdemeanor or in a place where the person does not have a right to be if the person is engaged in the activity or in the place due to the person's status as a victim of human trafficking. The person must prove the person's status as a victim of human trafficking by clear and convincing evidence. The person may provide clear and convincing evidence of the person's status as a victim of human trafficking through testimony."

39-11-611(d).

"(3) (A) Notwithstanding § 39–17–1322, the person using force is engaged in conduct that would constitute a felony or Class A misdemeanor or is using the dwelling, business, residence, or occupied vehicle to further an unlawful activity;
(B) For purposes of subdivision (d)(3)(A), a person is not engaged in conduct that would constitute a felony or Class A misdemeanor or using a dwelling, business, residence, or occupied vehicle to further unlawful activity if the person is engaged in the activity or using the dwelling, business, residence, or occupied vehicle due to the person's status as a victim of human trafficking. The person must prove the person's status as a victim of human trafficking by clear and convincing evidence. The person may provide clear and convincing evidence of the person's status as a victim of human trafficking through testimony; or. . . ."

C. Justification for Use of Force; Stay of Civil Proceedings

Chapter 387, Public Acts 2021, amending T.C.A. § 39-11-622 eff. July 1, 2021.

"(c) (1) If a criminal investigation or criminal proceeding is conducted based upon the defendant's use or threatened use of force, a civil action that is based upon the defendant's use or threatened use of force or the results of the defendant's use or threatened use of force may not proceed until the conclusion of the criminal investigation or criminal proceeding, if a stay of the proceedings is requested by the defendant. If the defendant requests a stay of proceedings and the court determines that a relevant criminal investigation or criminal proceeding is

ongoing, the court shall grant a stay of proceedings until the conclusion of the criminal investigation or criminal proceeding."

"(e) (4) The burden of proof at the hearing is initially on the defendant to present sufficient admissible evidence to fairly raise the issue of whether the use of force was justified under §§ 39–11–611– 39–11 –614 or § 29–34–201. If the court finds that the permissible use of force has been fairly raised, a presumption of immunity is created and the burden of proof shifts to the plaintiff to demonstrate that civil liability is not barred by this section.

(5) (A) If the court determines by a preponderance of evidence that the defendant's use of force or threatened use of force was justified under §§ 39–11–611 – 39–11–614 or § 29–34–201, the court shall dismiss the civil action with prejudice for failure to state a claim upon which relief can be granted and may issue other orders consistent with the defendant's immunity from civil liability conferred by subsection (a).

(B) If the court determines that the defendant is not entitled to immunity from civil liability under this subsection (e), the action shall remain stayed pursuant to subdivision (c)(1). Once the criminal investigation or criminal proceeding is concluded and the stay is lifted, the civil action may continue. The defendant is not precluded from asserting at any other point in the civil action that the use of force was justified.

"(f) If the court dismisses the civil action pursuant to subdivision (e)(5)(A) or otherwise determines that the defendant is entitled to immunity from civil liability under this section, the court shall award the defendant attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of the civil action."

VII. Offenses Against Property

A. Aggravated Cruelty to Animals

Chapter 580, Public Acts 2021, amending T.C.A. § 39-14-212(a) eff. July 1, 2021.

"(a) A person commits aggravated cruelty to animals when, with no justifiable purpose, the person intentionally or knowingly:

(1) Kills, maims, tortures, crushes, burns, drowns, suffocates, mutilates, starves, or otherwise causes serious physical injury, a substantial risk of death, or death to a companion animal; or

(2) Fails to provide food or water to the companion animal resulting in a substantial risk of death or death."

B. Mail Theft

Chapter 364, Public Acts 2021, adding T.C.A. § 39-14-129 eff. July 1, 2021.

"(a) As used in this section:

(1) 'Addressee' means the person to whom a piece of mail is addressed;

(2) 'Curtilage' has the same meaning as defined in § 39–11–611; and

(3) 'Mail' means a letter, postal card, package, bag, or other sealed article that:

(A) Is delivered by a common carrier or delivery service and not yet received by the addressee; or
(B) Has been left to be collected for delivery by a common carrier or delivery service.

"(b) It is an offense to take mail from a residential mailbox or from the curtilage of a dwelling without the consent of the addressee and with the intent to deprive the addressee of the mail.

"(c) (1) A first offense of mail theft is punished as theft under § 39–14–105, after determining value under § 39–11–106.
(2) A second or subsequent offense of mail theft is punished as theft under § 39–14–105, after determining value under § 39–11–106. However, in no event shall punishment for a second or subsequent offense of mail theft be less than a Class E felony."

C. Critical Infrastructure Vandalism

Chapter 418, Public Acts 2021, amending T.C.A. § 39-14-411 eff. July 1, 2021.

"Critical infrastructure vandalism" now specifically includes damage and destruction on a farm, punishable as at least a Class E misdemeanor.

VIII. Gambling; Antique Coin Machine Exception

Chapter 65, Public Acts 2021, adding T.C.A. § 39-17-501(1) and renumbering accordingly and T.C.A. §39-17-505(a)(6) eff. July 1, 2021.

"(1) 'Antique coin machine' means a gambling device or record that is at least twenty-five (25) years old and that is operated, played, worked, manipulated, or used by inserting or depositing a coin, slug, token, or thing of value to play a game, see pictures, hear music, or provide any other form of entertainment and includes, but is not limited to, antique slot machines, antique gambling devices, or antique gaming machines."

"(6) (A) It is not an offense for a person to own, possess, buy, or sell an antique coin machine if:
(i) The antique coin machine is not used for gambling purposes; and
(ii) Members of the public are not permitted to operate any antique coin machine that is displayed in public.
(B) A person selling an antique coin machine shall indicate to all prospective buyers that the antique coin machine is not to be used for gambling purposes."

IX. Controlled Substances; Marijuana

Chapter 230, Public Acts 2021, amending T.C.A. § 39-17-402(16) eff. Apr. 22, 2021.

"(D) The term 'marijuana' does not include a product approved as a prescription medication by the United States food and drug administration. Such product shall be designated, rescheduled, or deleted as a controlled substance pursuant to § 39–17–403."

X. Money Laundering; Double Jeopardy

State v. Allison, 618 S.W.3d 24 (Tenn., Bivins, 2021).

"We granted permission to appeal to the Defendant to examine the propriety of his convictions for money laundering based on his receipt of payment for drugs he 'fronted' to a confidential informant. On separate occasions, the Defendant delivered a quantity of marijuana to the informant. At the time of delivery, the informant paid the Defendant for a portion of marijuana, but the Defendant also fronted additional marijuana to the informant, meaning the Defendant had an expectation that he would be paid later with proceeds from the informant's sale of the drugs. The Defendant subsequently received payment. Based on these actions, the Defendant was charged with and convicted of two counts of delivering marijuana and two counts of money laundering. See Tenn. Code Ann. § 39-14-903(c)(1) (2006); Tenn. Code Ann. § 39-17-417(a)(2) (2006 & Supp. 2008). The Defendant challenged whether the evidence supported his money laundering convictions, whether those convictions violated double jeopardy protections, and whether the money laundering statute was unconstitutionally vague. The trial court rejected the Defendant's challenges, and the Court of Criminal Appeals affirmed the trial court's judgments. We hold that the evidence supporting one of the money laundering convictions was legally sufficient, because the proof supported an inference that the Defendant purchased marijuana with the proceeds he had received with the intent to promote the carrying on of the sale of marijuana. With respect to the second money laundering conviction, we hold that the evidence was insufficient, because the proof showed only that the Defendant received payment for drugs he had fronted. We further hold that the Defendant's punishment for both delivery of marijuana and money laundering does not violate double jeopardy protections and that the money laundering statute is not unconstitutionally vague by virtue of its use of the undefined phrase 'carrying on.' Accordingly, we affirm in part and reverse in part the decision of the Court of Criminal Appeals."

"The criminal offense of money laundering is perhaps most commonly understood to refer, generally speaking, to financial transactions that are aimed at concealing the nature or source of funds that resulted from criminal activity. Indeed, Tennessee law prohibits this very conduct. See, e.g., Tenn. Code Ann. § 39-14-903(a)(1) (prohibiting the use of criminally derived proceeds to conduct a financial transaction with the intent to conceal or disguise the nature, location, source, ownership or control of the criminally derived proceeds). However, there is another form of money laundering that is less well known but no less illegal. This form of money laundering criminalizes certain acts involving criminally derived proceeds that, rather than being done with the intent to conceal aspects of the criminally derived proceeds, are undertaken with the intent to promote the carrying on of unlawful activity. See Tenn. Code Ann. § 39-14-903(b)(1), (c)(1). See generally *United States v. Reed*, 264 F.3d 640, 650 (6th Cir. 2001) (identifying 'two different kinds of money laundering: the "concealment" of the underlying illegal activity, which is the more traditional form of laundering[,] ... and the "promotion" of illegal activity'); *United States v. Skinner*, 946 F.2d 176, 177-78 (2d Cir. 1991) (noting that the less traditional form of money laundering was intended 'to reach conduct that went beyond the concealment of proceeds of criminal activity' and 'to make unlawful a broad array of transactions designed to facilitate' criminal activity). This latter conduct is often referred to in caselaw as 'promotional' money laundering. See, e.g., *United States v. Warshak*, 631 F.3d 266, 317 (6th Cir. 2010) (identifying the elements of the offense of promotional money laundering).

"In this appeal, we review the Defendant's two convictions for promotional money laundering that resulted from his knowing acceptance of two cash payments for fronted drugs, each represented to him to be the proceeds of illegal drug sales. In this Court, the Defendant argues:

(1) the evidence was legally insufficient to support his money laundering convictions;
(2) his money laundering convictions run afoul of double jeopardy protections; and
(3) the money laundering statute is unconstitutionally vague in its use of and failure to define 'carrying on.'"

"In this Court, the Defendant does not contest that he acted knowingly. Nor does the Defendant contest that the January 13 and 20 cash payments he received from the CI were represented to him to be the proceeds of specified unlawful activity, in this case the sale of marijuana. Instead, the Defendant contends that he did not conduct a financial transaction separate and apart from the exchange of drugs for money. The Defendant argues that there must be another financial transaction—beyond what occurred on January 13 and 20 (which he asserts was merely the completion of what began on January 9 and 16, respectively)—to support a conviction for money laundering. Stated another way, the Defendant argues that without proof he made a disposition of the proceeds he accepted from the CI (with the intent to promote the carrying on of the sale of marijuana), there was insufficient evidence to support his money laundering convictions."

"We are persuaded that the Defendant's mere receipt of payment for marijuana he fronted to the CI, standing alone, would not support a conviction for promotional money laundering, even assuming sufficient evidence to establish that the Defendant accepted payment with intent to promote the carrying on of specified unlawful activity. See [*United States* v.] *Dovalina*, 262 F.3d [472] at 476 [(5th Cir. 2001)]. We observe that the Act, in pertinent part, makes it an offense for a person to initiate, conclude, participate in, or negotiate a 'payment' (assuming the other elements of the offense are also met). Tenn. Code Ann. §§ 39-14-902(2), (6); 39-14-903(c)(1). We question whether the Defendant's receipt of payment from the CI as compensation for the fronted drugs falls within the ambit of this statutory language.

"Furthermore, the Act does not use 'conduct, conspire to conduct, or attempt to conduct a financial transaction' in isolation. Rather, the Act makes it an offense to conduct a financial transaction 'or make *other disposition*' involving property or proceeds represented to be criminally derived. Tenn. Code Ann. § 39-14-903(c)(1) (emphasis added). In our view, the General Assembly's use of this language supports our conclusion that, in the context of the offense of promotional money laundering, the Defendant's mere receipt of payment for fronted drugs, standing alone, is not sufficient to establish the element of conducting a financial transaction or making other disposition involving proceeds represented to the Defendant to have been derived from the sale of marijuana.

"With these principles in mind, we turn to examine the entirety of the evidence supporting that the Defendant conducted a financial transaction or made other disposition involving proceeds represented to have been derived from the sale of marijuana. On January 13, the Defendant received $3,000 in cash from the CI. Four days earlier on January 9, the Defendant had delivered marijuana to the CI and offered tips on how best to market and sell it. The Defendant does not contest that the cash payment on January 13 consisted of funds represented to the Defendant to have been derived from the sale of marijuana.

"On January 13, when the Defendant received cash payment from the CI, he stated that he was 'tryin' to get [his] money together' because he needed to 'try to get somethin' else.' During the

discussion, the Defendant had a telephone conversation with his supplier—the 'dude right there with the scrill.' After that conversation, the Defendant informed the CI that he believed he would have more marijuana the following night.

"The proof further showed that just three days later on January 16, the Defendant delivered marijuana to the CI and again offered tips on how best to sell it. The Defendant confirmed that he had received the marijuana in question the previous night and prepared it for distribution, complaining that it 'took forever to break 'em up.' The Defendant also confirmed on January 16 that he had already paid his supplier for this marijuana. Thus, he expressed to the CI that he was not in a rush to be paid for fronted drugs and would accept payment 'whenever [the CI was] ready.'

"From this proof, we conclude a rational juror could infer that the cash received by the Defendant on January 13, in fact, had been used by the Defendant to obtain the marijuana he delivered to the CI on January 16. Of note, when the Defendant was arrested on January 21, none of the $3,000 in currency provided by the CI to the Defendant on January 13 was found in the Defendant's possession. In our view, these facts reflect the 'paradigmatic example' of promotional money laundering—that of 'a drug dealer using the proceeds of a drug transaction to purchase additional drugs and consummate future sales.' *Warshak*, 631 F.3d at 317."

"As to the Defendant's first money laundering offense, we believe the record is replete with evidence establishing the requisite intent to promote the carrying on of the sale of marijuana. The Defendant, who already had delivered marijuana to the CI on January 9—while offering tips on how best to market and sell the product—specifically commented when he received payment from the CI on January 13 that he was 'tryin' to get [his] money together' so that he could 'try to get somethin' else.' The Defendant then gave the CI a timeline of when he would have more marijuana. True to his word, the Defendant had more marijuana three days later on January 16. He provided the CI multiple pounds of marijuana, again offering her tips on how to effectively sell the drugs, and told her he would accept payment for the fronted drugs 'whenever [the CI was] ready.' Considering all of these facts, we conclude the evidence supports a reasonable and legitimate inference that, for purposes of his first money laundering offense, the Defendant intended to promote the carrying on of the sale of marijuana."

"Based on a careful review of the proof in this case, we conclude that the evidence was legally sufficient to support the Defendant's conviction for promotional money laundering under count five of the indictment. The proof showed that the Defendant knowingly conducted a financial transaction or made other disposition within the meaning of the Act, that the transaction or other disposition involved proceeds represented to him to have been derived from the sale of multiple pounds of marijuana, and that he did so with the intent to promote the carrying on of the sale of multiple pounds of marijuana.

"Having concluded that the evidence was sufficient to support the Defendant's first money laundering offense (count five), we now turn to examine the evidence supporting the second money laundering offense (count six). We already have set forth the background facts about the circumstances leading up to January 20. On January 20, the Defendant again received cash payment from the CI of funds represented to have been derived from the sale of marijuana. At that time, the Defendant was in possession of a sample of 'new scrill' that had 'just come off the truck.' There was no proof that the Defendant already had paid for the 'new scrill.'

"The Defendant gave the CI a small amount of the sample—enough for a 'joint'—and mentioned coming to see her later to confirm whether she wanted to purchase some of this new marijuana at a price of $850 per pound. The Defendant stated that he would be obtaining 'fifty' of the new marijuana, but he also told the CI that he knew '[they would] go quick.' The Defendant further stated that his supplier was 'cutting' the product out of what it was transported in at that time. Thus, the jury reasonably could infer that although the Defendant was in possession of the sample of the new marijuana, he had not yet acquired the 'fifty.' Additionally, the jury reasonably could infer the Defendant's comments that the 'fifty' would 'go quick' to be a reference to plans to sell the marijuana.

"The following day, January 21, when law enforcement officers arrested the Defendant, he was in possession of fourteen bricks of marijuana, weighing approximately forty-five pounds. The CI had paid the Defendant $3,000 on January 20. Of that amount, $2,480 was discovered in the Defendant's possession when he was arrested on January 21. However, the Defendant stated that he had obtained the marijuana in his possession on January 21 'on credit,' meaning that he had been fronted the drugs and still needed to pay his supplier.

"To support the second money laundering offense, the Act requires proof that the Defendant conducted a financial transaction or made other disposition involving proceeds represented to him to have been derived from specified unlawful activity, in this case the sale of marijuana. Those proceeds, with respect to this count of money laundering, were comprised of the $3,000 the Defendant received from the CI on January 20. The proof showed that the Defendant was still in possession of $2,480 of those funds when he was arrested on January 21. The proof does not reveal what happened to the remaining $520, but it does demonstrate that the Defendant had not used it to pay for the marijuana discovered on January 21. Thus, the record reflects only that the Defendant received payment on January 20 for drugs he had fronted to the CI, and he was still in possession of the majority of those funds when he was arrested the next day. Based on these circumstances, even affording the State the strongest legitimate view of the evidence, we conclude that the evidence was not legally sufficient to establish that the Defendant conducted a financial transaction or made other disposition involving the January 20 proceeds. Therefore, we reverse his conviction for promotional money laundering under count six of the indictment."

"Based upon the contention that his acceptance of cash payments on January 13 and 20 was 'merely the continuation of the sale of marijuana that occurred on January 9th and 16th respectively,' the Defendant claims that his convictions for money laundering operate to punish him twice for a single action, his sales of marijuana to the CI. The Defendant maintains that with respect to each sale of marijuana to the CI, 'there is only a single financial transaction, the exchange of money for marijuana,' 'the statutes encompass this single set of facts and transactions,' and 'both statutes are criminalizing a single course of conduct.' The Defendant therefore argues that convicting him for money laundering on January 13 and 20 in addition to his drug offenses of January 9 and 16, respectively, violates the double jeopardy protections of the United States and Tennessee constitutions."

"In this case, we need look no further than the language of the Act itself. The Act provides: 'A defendant charged with a violation of one (1) or more offenses within § 39-14-903 may also be jointly charged, tried and convicted in a single prosecution for committing any related specified unlawful activity, *which shall be separately punished.*' Tenn. Code Ann. § 39-14-904 (2006) (emphasis added). Given the facts adduced at trial, the Defendant's offenses for delivery of marijuana and money laundering share a logical connection. The Act, however, specifically directs

that money laundering offenses shall be separately punished from any related specified unlawful activity. Accordingly, the General Assembly's intent to permit multiple punishments is clear. As a result, we conclude that there is no need to apply the *Blockburger* test.

"Accordingly, we agree with the trial court and the Court of Criminal Appeals that the General Assembly intended to permit multiple punishment under these circumstances. Thus, the Defendant's conviction of both offenses—the January 9 delivery of marijuana and the January 13 promotional money laundering—does not violate double jeopardy protections."

"The Defendant argues that Tennessee Code Annotated section 39-14-903 is 'void for vagueness as applied in this case.' As previously stated, the Act proscribes knowingly conducting a financial transaction or making other disposition involving property or proceeds represented to be property or proceeds derived from a specified unlawful activity 'with the intent to promote the carrying on of a specified unlawful activity.'Tenn. Code Ann. § 39-14-903(c)(1). In arguing that the statute is unconstitutionally vague, the Defendant asserts that the undefined phrase 'carrying on' in section 39-14-903 'fails to alert someone as to what constitutes a prohibited action under the statute.' The Defendant does not offer a construction of the statutory language that excludes his conduct from its reach."

"As we evaluate the Defendant's vagueness challenge to section 39-14-903, we begin with the well-established principle that an act of the General Assembly is presumed to be constitutional. See, e.g., [*State v.*] *Pickett*, 211 S.W.3d [696] at 700 [(Tenn. 2007)]. Thus, we must 'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.' Id. (quoting *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003)).

"As the Defendant points out, the Act does not define the phrase 'carrying on.' We have observed that in evaluating a statute for vagueness, a court may consider the plain meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language. [*State v.*] *Crank*, 468 S.W.3d [15] at 23 [(Tenn. 2015)]. Unfortunately, the legislative history sheds only marginal light on the issue. As we previously described, the General Assembly certainly was cognizant of problems associated with drug trafficking when it enacted the Act, and it sought to address those problems through the Act. Beyond that general point, however, there is nothing in the legislative history as to the legislative intent behind 'carrying on' in what became section 39-14-903."

"We conclude that the common understanding of the phrase plainly encompasses the Defendant's conduct in this case. As to his money laundering conviction under count five, the Defendant previously had delivered marijuana to the CI with an expectation that she would sell the product and pay him with proceeds from the sales. The Defendant later received cash payment with a stated intent to purchase more marijuana, which he would then sell to the CI for her to re-sell to customers. The Defendant then, in fact, did purchase more marijuana, a portion of which he delivered to the CI for her to re-sell. In our view, the Defendant's intent readily falls within the statutory proscription. We agree with the trial court that, under the common understanding of the phrase, the Defendant had fair warning 'that using illegal proceeds to promote further criminal activity violates § 39-14-903.' Accordingly, we hold that section 39-14-903 is not unconstitutionally vague as applied to the Defendant."

"We hold that the evidence adduced at trial was legally sufficient to support the Defendant's conviction for promotional money laundering under count five of the indictment, but the evidence

was insufficient with respect to count six. Therefore, we reverse and dismiss the Defendant's conviction for money laundering under count six. We further hold that the Defendant's convictions for both delivery of marijuana and money laundering do not violate double jeopardy protections and that the Act is not unconstitutionally vague by virtue of its use of and failure to define 'carrying on.'"

XI. Underage Consumption; Allowing Minor to Consume Alcohol on One's Premises

Chapter 430, Public Acts 2021, amending T.C.A. § 39-15-404(a)(3) eff. July 1, 2021.

"(A) It is an offense for any owner, occupant, or other person having a lawful right to the exclusive use and enjoyment of property to knowingly allow a person to consume alcoholic beverages, wine, or beer on the property if the owner, occupant, or other person knows that the person consuming is a minor;

"(B) It is an affirmative defense to prosecution under subdivision (a)(3)(A) that the defendant acted upon a reasonably held belief that the minor was twenty-one (21) years of age or older; . . ."

A violation carries a mandatory minimum fine of one thousand dollars ($1,000).

XII. Weapons

A. Firearms; Carrying Without Permit Permitted for Most

Chapter 108, Public Acts 2021, adding T.C.A. §§ 39-17-1307(g) and (h) and amending T.C.A. §§ 39-14-105(a) and (d) and 39-17-133 eff. July 1, 2021.

39-17-1307.

"(g) It is an exception to the application of subsection (a) [carrying weapon with intent to go armed] that a person is carrying, whether openly or concealed, a handgun and:

(1) (A) The person is at least twenty-one (21) years of age; or
(B) The person is at least eighteen (18) years of age and:
(i) Is an honorably discharged or retired veteran of the United States armed forces;
(ii) Is an honorably discharged member of the army national guard, the army reserve, the navy reserve, the marine corps reserve, the air national guard, the air force reserve, or the coast guard reserve, who has successfully completed a basic training program; or
(iii) Is a member of the United States armed forces on active duty status or is a current member of the army national guard, the army reserve, the navy reserve, the marine corps reserve, the air national guard, the air force reserve, or the coast guard reserve, who has successfully completed a basic training program;
(2) The person lawfully possesses the handgun; and
(3) The person is in a place where the person is lawfully present.

"(h) (1) A person commits an offense who carries, with the intent to go armed, a firearm and:

(A) Has been convicted of stalking as prohibited by § 39–17–315;
(B) Has been convicted of the offense of driving under the influence of an intoxicant in this or any other state two (2) or more times within the prior ten (10) years or one (1) time within the prior five (5) years;
(C) Has been adjudicated as a mental defective, judicially committed to or hospitalized in a mental institution pursuant to title 33, or had a court appoint a conservator for the person by reason of a mental defect; or
(D) Is otherwise prohibited from possessing a firearm by 18 U.S.C. 922(g) as it existed on January 1, 2021.

(2) An offense under subdivision (h)(1) is a Class B misdemeanor."

39-17-1313.

The statute allowing permit holders to transport and store a firearm or ammunition in one's personal vehicle has been extended to those legally carrying without a permit.

39-14-105(a).

Theft of a firearm valued at less than $2,500 is now a Class E felony.

39-14-105(d).

"Theft of a firearm shall be punished by confinement for not less than one hundred eighty (180) days in addition to any other penalty authorized by law."

B. Crime of Violence Includes Aggravated Rape of a Child

Chapter 443, Public Acts 2021, amending T.C.A. 39-17-1301(3) eff. May 13, 2021.

This act clarifies that the term "crime of violence" in regard to weapons offenses includes aggravated rape of a child rather than especially aggravated rape of a child.

XIII. Evading Arrest; Serious Bodily Injury or Harm or Death to Law Enforcement Officer

Chapter 278, Public Acts 2021, amending T.C.A. § 39-16-603 eff. July 1, 2021.

"(d) (1) A violation of subsection (a) [evading arrest] is a Class A misdemeanor.
(2) (A) A violation of subsection (b) [evading arrest in a motor vehicle] is a Class E felony and shall be punished by confinement for not less than thirty (30) days.
(B) If the flight or attempt to elude creates a risk of death or injury to innocent bystanders, pursuing law enforcement officers, or other third parties, a violation of subsection (b) is a Class D felony and shall be punished by confinement for not less than sixty (60) days.
(3) A violation of subsection (a) or (b) that results in serious bodily injury to a law enforcement officer is a Class C felony.
(4) A violation of subsection (a) or (b) that results in the death of a law enforcement officer is a Class A felony."

XIV. Interference with Government Operations; Threat to Commit Act of Mass Violence on School Property or at School-Related Activity

Chapter 395, Public Act 2021, adding T.C.A. § 39-16-517 eff. July 1, 2021.

"(a) As used in this section:

(1) 'Mass violence' means any act which a reasonable person would conclude could lead to the serious bodily injury, as defined in § 39-11-106, or the death of two (2) or more persons;

(2) 'Means of communication' means direct and indirect verbal, written, or electronic communications, including graffiti, pictures, diagrams, telephone calls, voice over internet protocol calls, video messages, voice mails, electronic mail, social media posts, instant messages, chat group posts, text messages, and any other recognized means of conveying information;

(3) 'School' means any public or private elementary school, middle school, high school, college of applied technology, postsecondary vocational or technical school, or two-year or four-year college or university; and

(4) 'School property' means any school building or bus, school campus, grounds, recreational area, athletic field, or other property owned, used, or operated by any local education agency, private school board of trustees, or directors for the administration of any school.

"(b) A person who recklessly, by any means of communication, threatens to commit an act of mass violence on school property or at a school-related activity commits a Class A misdemeanor.

"(c) As a condition of bail or other pretrial release, the court may, in its discretion, order the defendant to undergo an evaluation, under § 33-7-301, to determine whether the defendant poses a substantial likelihood of serious harm to the person or others.

"(d)

(1) Any person who has knowledge of a threat of mass violence on school property or at a school-related activity shall report the threat immediately to:
(A) The local law enforcement agency with jurisdiction over the school property or school-related activity; and
(B) The school that is subject to the threat of mass violence.

(2) The report must include, to the extent known by the reporter, the nature of the threat of mass violence, the name and address of the person making the threat, the facts requiring the report, and any other pertinent information.

(3) Any person who has knowledge of a threat of mass violence on school property or at a school-related activity and knowingly fails to report the threat commits a Class B misdemeanor.

"(e) In addition to any other penalty authorized by law, a sentencing court may order a person convicted under subsection (b) to pay restitution, including costs and damages resulting from the disruption of the normal activity that would have otherwise occurred on the school property or at the school-related activity but for the threat to commit an act of mass violence."

XV. Aggravated Riot

Chapter 440, Public Acts 2021, amending T.C.A. § 39-17-303 eff. July 1, 2021.

This act adds that a person commits the Class E felony of aggravated riot who knowingly participates in a riot and:

(1) Traveled from outside the state with intent to commit a criminal offense; or
(2) Participated in a riot in exchange for compensation.

This bill also increases the mandatory minimum sentence for aggravated riot from 45 days to 60 days when a person knowingly participated in a riot and also engaged in conduct that constitutes two or more of the other elements of the offense.

XVI. Contraband in a Penal Institution; Telecommunications Device

Chapter 236, Public Acts 2021, amending T.C.A. § 39-16-201 eff. July 1, 2021.

39-16-201(b)(2).

It is unlawful to knowingly and with unlawful intent possess, in a penal institution:

"(C) Any telecommunication device."

39-16-201(c).

"(3) A violation of subdivision (b)(2)(C) is a Class E felony. A first violation is punishable only by fine. A second or subsequent violation is punishable only by a fine of three thousand dollars ($3,000)."

XVII. Computer Fraud and Abuse Act; Scope of "Exceeds Authorized Access" Clause

Van Buren v. United States, 141 S.Ct. 1648 (U.S., Barrett, 2021).

"Former Georgia police sergeant Nathan Van Buren used his patrol-car computer to access a law enforcement database to retrieve information about a particular license plate number in exchange for money. Although Van Buren used his own, valid credentials to perform the search, his conduct violated a department policy against obtaining database information for non-law-enforcement purposes. Unbeknownst to Van Buren, his actions were part of a Federal Bureau of Investigation sting operation. Van Buren was charged with a felony violation of the Computer Fraud and Abuse Act of 1986 (CFAA), which subjects to criminal liability anyone who 'intentionally accesses a computer without authorization or exceeds authorized access.' 18 U.S.C. § 1030(a)(2). The term 'exceeds authorized access' is defined to mean 'to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.' § 1030(e)(6). A jury convicted Van Buren, and the District Court sentenced him to 18 months in prison. Van Buren appealed to the Eleventh Circuit, arguing that the 'exceeds authorized access' clause applies only to those who obtain information to which their computer

access does not extend, not to those who misuse access that they otherwise have. Consistent with Eleventh Circuit precedent, the panel held that Van Buren had violated the CFAA.

"Held: An individual 'exceeds authorized access' when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off-limits to him."

"The parties agree that Van Buren 'access[ed] a computer with authorization' and 'obtain[ed] ... information in the computer.' They dispute whether Van Buren was 'entitled so to obtain' that information. Van Buren contends that the word 'so' serves as a term of reference and that the disputed phrase thus asks whether one has the right, in 'the same manner as has been stated,' to obtain the relevant information. Black's Law Dictionary 1246. He also notes that the only manner of obtaining information already stated in the definitional provision is by a computer one is authorized to access. Thus, he continues, the phrase 'is not entitled so to obtain' plainly refers to information one is not allowed to obtain *by using a computer that he is authorized to access*. The Government argues that 'so' sweeps more broadly, reading the phrase 'is not entitled so to obtain' to refer to information one was not allowed to obtain *in the particular manner or circumstances in which he obtained it*. And the manner or circumstances in which one has a right to obtain information, the Government says, are defined by any 'specifically and explicitly' communicated limits on one's right to access information. Van Buren's account of 'so' best aligns with the term's plain meaning as a term of reference, as further reflected by other federal statutes that use 'so' the same way."

"The Government contends that Van Buren's reading renders the word 'so' superfluous. 'So' makes a valuable contribution, the Government insists, only if it incorporates all of the circumstances that might qualify a person's right to obtain information. The Court disagrees because without 'so,' the statute could be read to incorporate all kinds of limitations on one's entitlement to information."

"The dissent accepts Van Buren's definition of 'so,' but would arrive at the Government's result by way of the word 'entitled.' According to the dissent, the term 'entitled' demands a 'circumstance dependent' analysis of whether access was proper. But the word 'entitled' is modified by the phrase 'so to obtain.' That phrase in turn directs the reader to consider a specific limitation on the accesser's entitlement: his entitlement to obtain the information 'in the manner previously stated.' And as already explained, the manner previously stated is using a computer one is authorized to access. To arrive at its interpretation, the dissent must write the word 'so' out of the statute."

"The Government contends that in 'common parlance,' the phrase 'exceeds authorized access' would be understood to mean that Van Buren 'exceed[ed] his authorized access' to the law enforcement database when he obtained license-plate information for personal purposes. The relevant question, however, is not whether Van Buren exceeded his authorized access but whether he exceeded his authorized access *as the CFAA defines that phrase*. For reasons given elsewhere, he did not. Nor is it contrary to the meaning of the defined term to equate 'exceed[ing] authorized access' with the act of entering a part of the system to which a computer user lacks access privileges."

"The statute's structure further cuts against the Government's position. Subsection (a)(2) specifies two distinct ways of obtaining information unlawfully—first, when an individual 'accesses a computer without authorization,' § 1030(a)(2), and second, when an individual 'exceeds authorized

access' by accessing a computer 'with authorization' and then obtaining information he is 'not entitled so to obtain,' §§ 1030(a)(2), (e)(6). Van Buren contends that the 'without authorization' clause protects computers themselves from outside hackers, while the 'exceeds authorized access' clause provides complementary protection for certain information within computers by targeting so-called inside hackers. Under Van Buren's reading, liability under both clauses stems from a gates-up-or-down inquiry—one either can or cannot access a computer system, and one either can or cannot access certain areas within the system. This treats the clauses consistently and aligns with the computer-context understanding of access as entry. By contrast, the Government proposes to read the first phrase 'without authorization' as a gates-up-or-down inquiry and the second phrase 'exceeds authorized access' as dependent on the circumstances—a reading inconsistent with subsection (a)(2)'s design and structure. The Government's reading leaves unanswered why the statute would prohibit accessing computer information, but not the computer itself, for an improper purpose.

"Another structural problem for the Government: § 1030(a)(2) also gives rise to civil liability, § 1030(g), with the statute defining 'damage' and 'loss' to specify what a plaintiff in a civil suit can recover. §§ 1030(e)(8), (11). Both terms focus on technological harms to computer data or systems. Such provisions make sense in a scheme aimed at avoiding the ordinary consequences of hacking but are ill fitted to remediating 'misuse' of sensitive information that employees permissibly access using their computers."

"The Government's claims that precedent and statutory history support its interpretation are easily dispatched. This Court's decision in *Musacchio v. United States*, 577 U.S. 237, 136 S.Ct. 709, did not address the issue here, and the Court is not bound to follow any dicta in the case. As for statutory history, the Government claims that the original 1984 Act's precursor to the 'exceeds authorized access' language—which covered any person who, 'having accessed a computer with authorization, uses the opportunity such access provides for purposes to which such authorization does not extend'—supports its reading. But that Congress removed any reference to 'purpose' in the CFAA cuts against reading the statute to cover purpose-based limitations."

"The Government's interpretation of the 'exceeds authorized access' clause would attach criminal penalties to a breathtaking amount of commonplace computer activity. For instance, employers commonly state that computers and electronic devices can be used only for business purposes. On the Government's reading, an employee who sends a personal e-mail or reads the news using a work computer has violated the CFAA. The Government speculates that other provisions might limit its prosecutorial power, but its charging practice and policy indicate otherwise. The Government's approach would also inject arbitrariness into the assessment of criminal liability, because whether conduct like Van Buren's violated the CFAA would depend on how an employer phrased the policy violated (as a 'use' restriction or an 'access' restriction)."

XVIII. Abortion; Disposition of Fetal Remains

Chapter 348, Public Acts 2021, adding T.C.A. §§ 39-15-219 and 62-5-502 and amending various sections eff. July 1, 2021.

This act requires that the disposition of fetal remains from a surgical abortion performed at an abortion facility be by interment (i.e., burial or entombment) or by cremation. It gives the pregnant woman having an abortion the right to select the disposition method and creates a Class A

misdemeanor if an abortion facility violates various sections of the act. It also requires operators of a crematory facility to act in compliance with the law and requires the department of health to promulgate certain rules and forms.

XIX. Defenses; Intellectually Disabled Defendants; Death Penalty Prohibited

Chapter 399, Public Acts 2021, amending T.C.A. § 39-13-203 eff. May 11, 2021.

"(a) As used in this section, 'intellectual disability' means:
(1) Significantly subaverage general intellectual functioning;
(2) Deficits in adaptive behavior; and
(3) The intellectual disability must have manifested during the developmental period, or by eighteen (18) years of age."

"(g) (1) A defendant who has been sentenced to the death penalty prior to the effective date of this act and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.
(2) A defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits."

XX. Rules of the Road

A. Driver with Communication Difficulty

Chapter 55, Public Acts 2021, adding T.C.A. §§ 55-21-301–304 eff. Jan. 1, 2022.

55-21-301.

"This section is known and may be cited as the '2021 Precious Cargo Act.'"

55-21-302.

"The purpose of this section is to empower citizens to communicate specific needs to law enforcement and first responders."

55-21-303.

"(a) At the time of initial application for the registration of a motor vehicle under this part, or upon renewal, an owner or lessee of a motor vehicle who needs assistance with expressive language or communicating needs to a first responder, including a law enforcement officer, or assistance with exiting a motor vehicle during a traffic stop or welfare check, may request that the department include a designation of such need for assistance in the Tennessee Vehicle Title and Registration System (VTRS) database. The registrant's request must be accompanied by a written statement from a licensed physician, psychiatrist, psychologist or senior psychological examiner, or

neurologist, stating that an operator of the person's motor vehicle has an intellectual disability, a developmental disability, or a medical condition that may impede communications with, or impact the operator's encounter with, a first responder. Upon receipt of such a request accompanied by a written statement, the department shall cause the registrant's status to be entered into the VTRS database, and ensure such designation is associated with the applicant's motor vehicle and registration.

"(b) Information submitted to the department under this section must be supplied to law enforcement to assist in identifying the operator of the vehicle as possibly needing such assistance. Information collected pursuant to this section must only be available to law enforcement for the purpose of ensuring safe and efficient interactions between law enforcement and persons who have such need for assistance, and must not be used for any other purpose.

"(c) All law enforcement officers charged with the enforcement of this title and emergency call takers and public safety dispatchers, as described in § 7–86–205, shall receive instruction in the identification of such designation included in the VTRS database as provided for in this section."

55-21-304.

"(a) The commissioner is authorized to adopt policies and procedures as necessary to effectuate the purposes of this section.

"(b) The commissioner of revenue is authorized to promulgate rules in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, necessary to carry out this section."

B. Motorized Wheelchair Exception

Chapter 56, Public Acts 2021, adding T.C.A. § 55-8-101(41)(C)(v) and renumbering accordingly eff. Mar. 29, 2021.

The statutory definition of "motor vehicle" for purposes of rules of the road, accidents, and crimes involving motor vehicles now specifically excludes motorized wheelchairs.

C. License Plate; Determination Regarding Whether License Plate Is Clearly Visible

Chapter 174, Public Acts 2021, amending T.C.A. § 55-4-110(b) eff. Apr. 20, 2021.

"The mounting or placement of a trailer hitch ball in front of a registration plate shall not be considered when making a determination whether the registration plate is clearly visible. If a motorcycle is equipped with vertically mounted license plate brackets, its license plate shall be mounted vertically with the top of the license plate fastened along the right vertical edge."

D. Helmets

Chapter 176, Public Acts 2021, amending T.C.A. § 55-9-308 eff. July 1, 2021.

This chapter clarifies that helmets are required on an autocycle that is not fully enclosed.

E. Drag Racing

Chapter 573, Public Acts 2021, amending T.C.A. § 55-10-502(a) eff. July 1, 2021.

"(a) Drag racing is a Class A misdemeanor, and any person who operates a motor vehicle upon the public highways of this state, or while on the premises of any shopping center, trailer park, any apartment house complex, or any other premises generally frequented by the public at large, or who is a participant therein, for the purpose of drag racing commits the offense of drag racing unless the premises are properly licensed for this purpose."

XXI. Qualified Immunity; POST-Certified Law Enforcement Officers Outside of Jurisdiction

Chapter 336, Public Acts 2021, adding T.C.A. § 38-3-113(b) eff. May 4, 2021.

"(b) A POST-certified law enforcement officer in this state who is employed full-time by a county, municipality, or metropolitan form of government and authorized to make arrests shall, when making an arrest in this state for a crime that was committed outside of the law enforcement officer's jurisdiction, have the same legal status and immunity from suit as a state or local law enforcement officer making an arrest within the state or local law enforcement officer's jurisdiction if the arrest is made under the following circumstances:

(1) The officer reasonably believes that the person arrested has committed a felony in the officer's presence or is committing a felony in the officer's presence;
(2) The officer reasonably believes the person arrested has committed a misdemeanor that amounts to a breach of the peace in the officer's presence or is committing a misdemeanor that amounts to a breach of the peace in the officer's presence; or
(3) The officer is rendering assistance to a law enforcement officer of this state in an emergency or at the request of the officer."

XXII. Felon-in-Possession Conviction; Standards for Review

Greer v. United States, 141 S.Ct. 2090 (U.S., Kavanaugh, 2021).

"In *Rehaif v. United States*, 588 U.S. ——, the Court clarified the *mens rea* requirement for firearms-possession offenses under 18 U.S.C. § 922(g). After *Rehaif*, the Government in a felon-in-possession case must prove not only that the defendant knew he possessed a firearm, but also that he knew he was a felon when he possessed the firearm. See 588 U.S., at ——. Prior to *Rehaif*, Gregory Greer and Michael Gary were separately convicted of being felons in possession of a firearm in violation of § 922(g)(1). Greer's conviction resulted from a jury trial during which Greer did not request—and the District Court did not give—a jury instruction requiring the jury to find that Greer knew he was a felon when he possessed the firearm. Gary pled guilty to two counts of being a felon in possession of a firearm. During Gary's plea colloquy, the District Court did not advise Gary that, if he went to trial, a jury would have to find that he knew he was a felon when he possessed the firearms. On appeal, both Greer and Gary raised new *mens rea* arguments based on *Rehaif*. Greer requested a new trial based on the District Court's failure to instruct the jury that Greer had to know he was a felon to be found guilty. Applying plain-error review, the Eleventh Circuit rejected that argument. Gary argued that his guilty plea must be vacated because the District

Court failed to advise him that, if he went to trial, a jury would have to find that he knew he was a felon. The Fourth Circuit agreed with Gary, holding that the failure to advise him of that *mens rea* element was a structural error that required automatic reversal even though Gary had not raised the argument in the District Court.

"Held: In felon-in-possession cases, a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.

"Under Rule 51(b) of the Federal Rules of Criminal Procedure, a defendant who has 'an opportunity to object' to an alleged error and fails to do so forfeits the claim of error. If, as with Greer and Gary here, a defendant later raises the forfeited claim on appeal, Rule 52(b)'s plain-error standard applies. See *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266. To establish eligibility for plain-error relief, a defendant must show (i) that there was an error, (ii) that the error was plain, and (iii) that the error affects 'substantial rights,' *i.e.,* that there is 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.' *Rosales-Mireles v. United States*, 585 U.S. ——, ——, 138 S.Ct. 1897, 1904–05. If the defendant satisfies those three prongs, an appellate court may grant relief only if it also concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.' *Ibid.* (internal quotation marks omitted).

"Here, it is undisputed that *Rehaif* errors occurred during Greer's and Gary's district court proceedings and that the errors were plain. To satisfy the 'substantial rights' prong, Greer must show that, if the District Court had correctly instructed the jury on the *mens rea* element of a felon-in-possession offense, there is a 'reasonable probability' that he would have been acquitted. Gary must show that, if the District Court had correctly advised him of the *mens rea* element of the offense, there is a 'reasonable probability' that he would not have pled guilty.

"Greer and Gary have not carried that burden. Both had been convicted of multiple felonies prior to their respective felon-in-possession offenses. Those prior convictions are substantial evidence that they knew they were felons. And neither defendant argued or made a representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon when he possessed a firearm.

"Greer's and Gary's counterarguments are unpersuasive. Greer primarily argues that an appellate court conducting plain-error review of a *Rehaif* instructional error may examine only the trial record, and may not consider, for example, information about a defendant's prior convictions contained in a pre-sentence report. But the undisputed fact that Greer was a felon is in the trial record. In any event, that argument contravenes both logic and precedent. See, *e.g., United States v. Vonn*, 535 U.S. 55, 58–59, 122 S.Ct. 1043, 152 L.Ed.2d 90.

"Gary argues that he is exempt from ordinary plain-error review under Rule 52(b) for one of two alternative reasons. Gary first argues that a narrow 'futility' exception to Rule 52(b) applies because it would have been futile to object to the omission of the *mens rea* element from his plea colloquy given the pre-*Rehaif* state of the law. For that reason, Gary argues that his claim should be governed by the more lenient harmless-error standard of Rule 52(a) rather than the more exacting plain-error standard of Rule 52(b). Gary's proposed futility exception lacks any support in the text of the Federal Rules of Criminal Procedure or in this Court's precedents, which distinguish between harmless-error and plain-error review based on preservation. See, *e.g., Johnson v. United States*,

520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718. Gary also asserts that *Rehaif* errors are 'structural' and require automatic vacatur in every case without regard to whether a defendant can otherwise satisfy the plain-error test. The Court disagrees. *Rehaif* errors fit comfortably within the 'general rule' that 'a constitutional error does not automatically require reversal of a conviction.' *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302."

CRIMINAL PROCEDURE

I. Law Enforcement Use of Force; No "No Knock" Warrants

Chapter 489, Public Acts 2021, amending T.C.A. §§ 38-3-121, 38-8-101 and -113, and adding §§ 38-8-128 through -131 and 40-6-105 eff. May 18, 2021.

38-3-121.

"A law enforcement officer shall not use a choke hold, as defined in § 38–8–101, with or without the use of a police baton, on any person unless the officer reasonably believes that deadly force is authorized pursuant to § 39–11–620."

38-8-101.

"(2) 'Choke hold' means an intentional use of pressure or constriction to the neck, throat, or windpipe intended to inhibit breathing. . . ."

38-8-113.

"Use of a choke hold, with or without the use of a police baton, must be taught to candidates at state law enforcement training facilities as a method of restraint to be used only if the officer reasonably believes that deadly force is authorized pursuant to § 39–11–620."

"38-8-128. De–escalation.

"By January 1, 2022, each law enforcement agency shall develop a policy regarding de-escalation. Each agency shall provide training to officers on de-escalation techniques, including, but not limited to:

(1) Verbal de-escalation and the effective delivery of verbal instructions to prevent the need for physical use of force;
(2) Application of reasonable and proportional use of force based upon the totality of the circumstances;
(3) De–escalation in circumstances of decreased resistance or compliance by a subject;
(4) Allowing a suspect time to submit to arrest before force is used, when possible; and
(5) Tactical repositioning, requesting additional personnel, and other similar techniques to decrease the need for physical use of force."

"38-8-129. Duty to intervene.

"(a) A law enforcement officer who directly observes or has knowledge of excessive use of force by another law enforcement officer in violation of state or federal law shall, within the officer's scope of training, knowledge, and authority, intervene when the officer has an opportunity and means to prevent the harm from occurring. A law enforcement officer who intervenes during an excessive force incident shall report the circumstances to a supervisor as soon as practical.

“(b) A law enforcement officer who has direct knowledge of excessive use of force by another law enforcement officer in violation of state or federal law shall, as soon as practical, report the excessive use of force to a supervisor.

“(c) A law enforcement agency is prohibited from retaliating against any officer who intervenes against excessive use of force, reports excessive use of force, or cooperates in an internal investigation related to the excessive use of force.”

“38-8-130. Shooting at moving vehicles.

“By January 1, 2022, each law enforcement agency shall develop a policy that limits the circumstances under which an officer may discharge a firearm at or from a moving vehicle, motorcycle, or bicycle to when the officer reasonably believes that deadly force is authorized as provided in § 39–11–620.”

“38-8-131. Use of force reporting.

“(a) By January 1, 2022, each law enforcement agency shall establish a use of force reporting system that allows for the agency to effectively review and analyze all use of force incidents.

“(b) The reporting system must be designed to help the agency identify trends, improve officer training and safety, collect data, and provide timely and accurate information.

“(c) By January 1, 2022, each law enforcement agency shall implement the use of force reporting system established pursuant to subsection (a) to collect data on use of force incidents.

“(d) Beginning January 1, 2022, each law enforcement agency shall report monthly to the Tennessee bureau of investigation all use of force data consistent with the requirements, definitions, and methods of the federal bureau of investigation's National Use of Force Data Collection. The bureau shall compile the information reported by each agency pursuant to this subsection (d) and submit an annual report to the chair of the judiciary committee of the senate and the chair of the criminal justice committee of the house of representatives by July 1, 2023, and by July 1 of each year thereafter. The report must include statewide and countywide aggregate data, but must not include any personally identifying information of law enforcement officers. The bureau shall also make the report available to the public on the bureau's website.”

40-6-105.

“(a) The magistrate, if satisfied of the existence of the grounds of the application, or that there is probable ground to believe their existence, shall issue a search warrant signed by the magistrate, directed to the sheriff, any constable, or any peace officer, commanding the sheriff, constable, or peace officer immediately to search the person or place named for the property specified, and to bring it before the magistrate.

“(b) A magistrate shall not issue a ‘no knock’ search warrant, which expressly authorizes a peace officer to dispense with the requirement to knock and announce the peace officer's presence prior to execution of the warrant.”

II. Warrants; Disclosure of Stored Wire or Electronic Communications and Data

Chapter 421, Public Acts 2021, adding T.C.A. § 40-6-109 eff. July 1, 2021.

"(a) A law enforcement officer, a district attorney general or the district attorney's designee, or the attorney general or the attorney general's designee may require the disclosure of stored wire or electronic communications, as well as transactional records pertaining to the communications, to the extent and under the procedures and conditions provided for by the laws of the United States.

"(b) A provider of electronic communication service or remote computing service shall provide the contents of, and transactional records pertaining to, wire and electronic communications in the provider's possession or reasonably accessible to the provider when a requesting law enforcement officer, a district attorney general or the district attorney's designee, or the attorney general or the attorney general's designee complies with the provisions for access to the communications as set forth by the laws of the United States.

"(c) Search warrants for production of stored wire or electronic communications and transactional records pertaining to the communications shall have statewide application or application as provided by the laws of the United States when issued by a judge with general criminal jurisdiction over the criminal offense under investigation and to which such records relate. A judge with general criminal jurisdiction over the criminal offense under investigation may also issue orders for production of stored wire or electronic communications and transactional records pertaining to the communications to the extent and under the procedures and conditions provided for by the laws of the United States.

"(d) A subpoena for the production of stored wire or electronic communications and transactional records pertaining to the communications may be issued under the procedures for the issuance of subpoenas and to the extent and under the procedures and conditions provided for by the laws of the United States.

"(e) Criminal process that authorizes or commands the seizure or production of papers, documents, records, or other things from a recipient may be served by:

(1) Delivering a copy to the recipient personally; or

(2) Sending a copy by:

(A) Certified or registered mail, return receipt requested;

(B) Express mail; or

(C) Facsimile or electronic transmission, if the copy is sent in a manner that provides proof of delivery.

"(f) A recipient-provider who seeks to quash or otherwise challenge the criminal process must seek relief from the court of general criminal jurisdiction in the county from which process issued within the time required for production. The court shall hear and decide the issue as soon as practicable.

"(g) When criminal process is served under subsection (e) of this section, the recipient-provider shall provide all of the papers, documents, records, or other things described in the criminal process within twenty (20) business days from the date the criminal process is received, unless:

(1) The court, for good cause shown, includes in the process a requirement for production within a period of time that is less than twenty (20) business days;

(2) The court, for good cause shown, extends the time for production to a period of time that is more than twenty (20) business days; or
(3) The applicant consents to a request from the recipient-provider for additional time to comply with the process.

"(h) Criminal process issued under this section must contain a notice on the first page of the document that indicates:
(1) That the process was issued under this section;
(2) The date before which the recipient-provider must respond to the process; and
(3) That the deadline for seeking relief is not altered by the applicant's consent to additional time to respond to the process.

"(i) As used in this section, 'criminal process' means a subpoena, search warrant or other court order, or such other process authorized under the procedures and conditions provided for by the laws of the United States for the disclosure of stored wire or electronic communications and transactional records pertaining to the communications.

"(j) A failure to comply with criminal process issued pursuant to this section by a recipient-provider is punishable as contempt."

III. Search and Seizure

A. Warrantless Search of Residence

1. "Community Caretaking" Exception Inapplicable

Caniglia v. Strom, 141 S.Ct. 1596 (U.S., Thomas, 2021).

"During an argument with his wife, petitioner Edward Caniglia placed a handgun on the dining room table and asked his wife to 'shoot [him] and get it over with.' His wife instead left the home and spent the night at a hotel. The next morning, she was unable to reach her husband by phone, so she called the police to request a welfare check. The responding officers accompanied Caniglia's wife to the home, where they encountered Caniglia on the porch. The officers called an ambulance based on the belief that Caniglia posed a risk to himself or others. Caniglia agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. But once Caniglia left, the officers located and seized his weapons. Caniglia sued, claiming that the officers had entered his home and seized him and his firearms without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment to the officers. The First Circuit affirmed, extrapolating from the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, a theory that the officers' removal of Caniglia and his firearms from his home was justified by a 'community caretaking exception' to the warrant requirement.

"Held: Neither the holding nor logic of *Cady* justifies such warrantless searches and seizures in the home. *Cady* held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. In reaching this conclusion, the Court noted that the officers who patrol the 'public highways' are often called to discharge noncriminal 'community caretaking functions,' such as responding to disabled vehicles or investigating accidents. 413 U.S. at 441, 93 S.Ct. 2523. But searches of vehicles and homes are constitutionally different, as the *Cady* opinion

repeatedly stressed. *Id.,* at 439, 440–442, 93 S.Ct. 2523. The very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or her home and 'there be free from unreasonable governmental intrusion.' *Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495. A recognition of the existence of 'community caretaking' tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere."

2. Inevitable Discovery Doctrine Clarified

State v. Scott, 619 S.W.3d 196 (Tenn., Page, 2021).

"Defendant, Samantha Grissom Scott, pleaded guilty to possession with the intent to deliver more than twenty-six grams of methamphetamine and possession of drug paraphernalia but specifically reserved a certified question of law pursuant to Rule 37(b)(2)(A) of the Tennessee Rules of Criminal Procedure. The trial court, Defendant, and the State all agreed that the certified question is dispositive of the case. The question pertained to the legality of the initial search of Defendant's house during which law enforcement discovered illegal contraband. In a split opinion, the Court of Criminal Appeals dismissed the appeal after determining that the certified question is not dispositive because the evidence would have been admissible under the inevitable discovery doctrine notwithstanding the search in question. We conclude that the certified question is dispositive of the case, that the inevitable discovery doctrine does not apply, that exigent circumstances did not exist, that Defendant's consent to the search was involuntary, and that the case against her should be dismissed. We, therefore, reverse the judgment of the Court of Criminal Appeals and dismiss Defendant's convictions."

"The matter began when the White County Sheriff's Office asked the neighboring Warren County Sheriff's Office to look for a male named Ronald Dishman who had multiple outstanding warrants for his arrest from White County. An employee of White County told an employee of Warren County that Mr. Dishman was likely armed with a handgun or a rifle and gave an address of a home where Mr. Dishman was supposedly located. About twenty minutes later, with this limited information and without any independent corroboration, nine Warren County deputies converged on the given address, which was Defendant's home.

"Upon arrival, Deputy Derek Bowles, who did not testify at the suppression hearing, saw a white male standing on the porch of the house. After seeing Deputy Bowles, the man went inside the house and shut the door behind him. For reasons that are not entirely clear, Deputy Bowles assumed that the man he saw on the porch was the intended arrestee, Mr. Dishman. The events that followed apparently flowed from Deputy Bowles' initial determination that the man on the porch 'matched the description' that he had been given of Mr. Dishman. The record reflects Deputy Bowles was told that Mr. Dishman was a man and possibly located at Defendant's address.

"After the man on the porch went inside, the deputies surrounded the house armed with weapons (including shotguns and rifles). Deputy Tyler Glenn testified that he had a clear view of the front door of the house and could see several silhouettes running through the house. The deputies began yelling over loudspeakers toward the house, 'Subjects in the residence, please come out with your hands up; we have the house surrounded.' This stand-off went on for approximately twenty to thirty minutes until Defendant eventually exited her home. Once she came out of her house, Defendant was told to put her hands above her head, get down on her knees, and 'walk' backwards from her front porch to the edge of the woods by her house.

"Defendant explained to the deputies that the man they were searching for, Ronald Dishman, was not inside the home. She offered to phone Mr. Dishman for them, but the deputies refused and continued to command the male subject to come out of the house. After five or ten more minutes, the male who had been seen on the porch emerged from the home. He was not Mr. Dishman, but rather a friend of Defendant named Scott Bell.

"Apparently believing that there was still someone inside the home, the deputies pressed Defendant repeatedly for consent to enter her home and look for Mr. Dishman. Defendant refused, and she and Mr. Bell insisted that Mr. Dishman was not in the house. After approximately one hour had passed from the time law enforcement surrounded her home, Defendant finally relented and gave written consent allowing law enforcement to search her home for Mr. Dishman. The deputies then entered with weapons drawn to 'clear' the house and returned outside after determining that neither Mr. Dishman nor anyone else was inside.

"After Investigator Aaron Roberts left the house, he said that he had seen a bag of methamphetamine on the floor of a bedroom. Another deputy testified that the inside of the house had a 'strong chemical smell' and that the air was 'foggy.' When confronted with this information, Defendant refused to consent to any further search of the house. The deputies then took several hours and obtained a search warrant for the home based on the information they saw during the sweep. While executing the search warrant, the deputies found methamphetamine, drug paraphernalia, and cash. As a result, Defendant was charged with one count of possession of a schedule II controlled substance, methamphetamine greater than twenty-six grams, with intent to deliver; one count of tampering with evidence; and one count of possession of drug paraphernalia."

"Defendant argued that because the 'consent' was obtained by the deputies through illegal coercive conduct, the consent was invalid, and any observations made by the deputies 'while in the home based on that initial consent must be stricken from the affidavit used to obtain the search warrant.' Without the observations by the deputies while they were inside the home illegally, there was no probable cause for the subsequent search warrant, and the 'subsequent search must fall and all evidence obtained from the search must be suppressed as fruit of the poisonous tree.'"

"After hearing the evidence, the trial court denied Defendant's motion to suppress. The trial court's oral ruling indicated that the judge believed that the deputies had exigent circumstances to justify their actions after seeing Mr. Bell, whom they believed to be Mr. Dishman, quickly go back in the home after he saw law enforcement. In light thereof, the trial court held that if the deputies were legitimately able to stay and surround the home, then Defendant's subsequent consent to search the home was not coerced. However, the court noted that '[i]f the Court of Criminal Appeals finds otherwise ... that one incident with regard to the gentleman that they saw on the porch and his activity did not give exigent circumstances, then certainly at that point forward, any consent would not be valid.'"

"As set forth above, the State argued for the first time in the Court of Criminal Appeals that Defendant's certified question of law is actually not dispositive because the drugs in her home would have been inevitably discovered, and therefore not suppressed, regardless of whether her consent to search the home was legally obtained."

"The State maintains that '[t]he record reflects that, even without the defendant's consent to the search of her home, law enforcement officers *would have* obtained a search warrant for her home and discovered the contraband anyway.' (Emphasis added). The Court of Criminal Appeals held

that '[t]he deputies *could have* obtained and executed a search warrant without Defendant's consent in order to search the home for Mr. Dishman, and the drug-related evidence would have been inevitably discovered.' [*State* v.] *Scott*, 2020 WL 262992 [(Tenn. Crim. App., Jan. 16, 2020)], at *5 (emphasis added). We agree with Judge McMullen that the majority of the intermediate court appears to 'misapprehend' the inevitable discovery doctrine. *See Scott*, 2020 WL 262992, at *6 (McMullen, J., dissenting). The ultimate test is whether the evidence would have been discovered through an independent, proper avenue that comports with the Fourth Amendment. Whether law enforcement could have obtained a search warrant is not the same inquiry as whether law enforcement ultimately would have obtained that search warrant or whether law enforcement inevitably would have discovered the evidence through lawful means. We must not conflate these important distinctions.

"Tennessee courts have long interpreted the inevitable discovery doctrine as requiring more than a mere showing that evidence *could have* been obtained through independent and lawful means; rather, the proof of inevitable discovery must show, with a level of certainty, that the evidence *would have* been obtained based on 'no[n-]speculative elements ... focuse[d] on demonstrated historical facts capable of ready verification or impeachment.' *State v. Hill*, 333 S.W.3d 106, 123 (Tenn. Crim. App 2010) (quoting *Nix* [*v. Williams*], 467 U.S. [431] at 444 n.5, 104 S.Ct. 2501 [(1984)]); *see also State v. Cothran*, 115 S.W.3d 513, 525 (Tenn. Crim. App. 2003) (reasoning that proof of the later consensual search of the defendant's residence was sufficient to show that evidence 'would have been inevitably discovered'); *State v. Carpenter*, 773 S.W.2d 1, 6–7 (Tenn. Crim. App. 1989) (determining that the doctrine did not apply because a witness's statements regarding the unknown location of evidence in a landfill created uncertainty that the evidence would have been inevitably discovered). This fact-specific inquiry requires this Court to examine if the record provides sufficient proof that the evidence *would have*, not just *could have*, been inevitably discovered through independent lawful means."

"Despite the State's assertions to the contrary, there is nothing in the record to establish that the State either could have or would have obtained a search warrant for Defendant's home. The record is devoid of probable cause for the deputies to obtain a search warrant for Defendant's home without relying on the information they gathered during the initial search. The inevitable discovery doctrine requires the State to show that they would have discovered the evidence through a later, *lawful* seizure that is *genuinely independent* of an earlier, tainted one. The record lacks any evidence indicating why the White County Sheriff's Department believed Mr. Dishman would be at Defendant's home on that date, and Deputy Glenn admitted he had no independent information about Mr. Dishman concerning his whereabouts or his physical appearance. The only information law enforcement had at the time they surrounded Defendant's home was that Mr. Dishman was a male, he was potentially armed, and he had multiple arrest warrants from White County. Based on these facts, there was no probable cause by which the deputies could have secured a search warrant for Mr. Dishman even if they had tried—which they did not. Therefore, the record is insufficient to show that the evidence would have been inevitably discovered.

"As a result of the foregoing, we conclude that the Court of Criminal Appeals erred in holding that the inevitable discovery doctrine applied to this case and thus the certified question is not dispositive."

"We, therefore, move on to the merits of the certified question of law, which bears repeating:

> Was the consent provided by the Defendant to conduct a warrantless search of her home invalidated by the warrantless seizure and constructive search of her home and curtilage in violation of the Fourth Amendment to the Constitution of the United States of America and Article 1 § 7 of the Constitution of the State of Tennessee, or did the officers have exigent circumstances to constructively seize and remain on the property while they obtained consent because there were facts which led them to believe that an exigent circumstance existed — which was that they possessed an arrest warrant for a person they believed to be inside the residence.

"A search without a warrant is presumed to be unreasonable unless one of the exceptions to the warrant requirement applies. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997). Moreover, without exigent circumstances, the Fourth Amendment generally requires that police obtain a search warrant to execute an arrest warrant in the home of a third person. *See Steagald v. United States*, 451 U.S. 204, 213–22, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981). There is no dispute that the State conducted a warrantless search of Defendant's home. The State argues, however, that two exceptions to the warrant requirement apply in this case that excuse this failure—(1) exigent circumstances existed to justify the constructive seizure of Defendant's home, and (2) Defendant's consent."

"One possible 'exigent circumstance' in this case would be if the officers were acting 'in response to an immediate risk of serious harm to the police officers or others.' [*State* v.] *Meeks*, 262 S.W.3d [710] at 723 [(Tenn. 2008)]. The record does not support this theory. Mr. Bell did not threaten the officers with a weapon. He simply went inside and closed the door when he saw the deputies. Although law enforcement had been alerted that the intended arrestee may have a gun, we cannot determine under these circumstances that exigent circumstances existed that would justify the armed seizure of Defendant's home and person. As to the arguable exigent circumstance of preventing the destruction of evidence, there is simply nothing in the record to support it.

"The State also asks this Court to find an exception to the warrant requirement because Defendant ultimately gave consent for law enforcement to search her home for Mr. Dishman. Consent to conduct the search or seizure is another exception to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). However, for the consent to be valid, the State has the burden of proving that it was 'freely and voluntarily given.' *Id.* (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968))."

"After consideration of . . . the record as a whole, we determine that Defendant's consent was not voluntarily given and was therefore invalid. At least nine armed law enforcement officers converged on Defendant's home with guns drawn. For thirty minutes Defendant refused orders to come outside because she was having a panic attack due to the armed deputies in her yard. After she finally exited her residence, Defendant was detained by deputies who continued to ask her for another thirty minutes for consent to search her home for Mr. Dishman. This continued even after Mr. Bell—who was apparently thought to have been Mr. Dishman—exited the home and was clearly not Mr. Dishman. The testimony at the suppression hearing described Defendant as being extremely upset, crying, and ultimately relenting to the officers' requests only after being detained for nearly an hour. Under these circumstances, Defendant's consent to search the home was not freely and voluntarily given. This determination is consistent with the trial court's finding that in the absence of exigent circumstances Defendant's consent 'would not be valid.' Accordingly, because we determine that there were no exigent circumstances to justify detaining Defendant, and because we determine that Defendant's consent was not freely and voluntarily given, we hold that

the initial search of Defendant's home was unlawful. As a result, the subsequent search of Defendant's home pursuant to the search warrant obtained by the deputies using evidence viewed during the initial unlawful search was tainted, and the evidence collected during that search is inadmissible. The motion to suppress should have been granted."

B. Authority of Indian Police Officer to Detain and Search Non-Indian Person on Tribal Land

United States v. Cooley, 141 S.Ct. 1638 (U.S., Breyer, 2021).

"Late one night Officer James Saylor of the Crow Police Department approached a truck parked on United States Highway 212, a public right-of-way within the Crow Reservation in the State of Montana. Saylor spoke to the driver, Joshua James Cooley, and observed that Cooley appeared to be non-native and had watery, bloodshot eyes. Saylor also noticed two semiautomatic rifles lying on Cooley's front seat. Fearing violence, Saylor ordered Cooley out of the truck and conducted a patdown search. Saylor also saw in the truck a glass pipe and a plastic bag that contained methamphetamine. Additional officers, including an officer with the federal Bureau of Indian Affairs, arrived on the scene in response to Saylor's call for assistance. Saylor was directed to seize all contraband in plain view, leading Saylor to discover more methamphetamine. Saylor took Cooley to the Crow Police Department where federal and local officers further questioned Cooley. Subsequently, a federal grand jury indicted Cooley on drug and gun offenses. The District Court granted Cooley's motion to suppress the drug evidence. The Ninth Circuit affirmed. It reasoned that a tribal police officer could stop (and hold for a reasonable time) a non-Indian suspect if the officer first tries to determine whether the suspect is non-Indian and, in the course of doing so, finds an apparent violation of state or federal law. The Ninth Circuit concluded that Saylor had failed to make that initial determination here.

"Held: A tribal police officer has authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way running through a reservation for potential violations of state or federal law."

"As a 'general proposition,' the 'inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.' *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245. The Court identified in *Montana* two exceptions to that general rule, the second of which fits almost like a glove here: A tribe retains inherent authority over the conduct of non-Indians on the reservation 'when that conduct threatens or has some direct effect on ... the health or welfare of the tribe.' *Id.*, at 566, 101 S.Ct. 1245. The conclusion that Saylor's actions here fall within *Montana*'s second exception is consistent with the Court's prior *Montana* cases. See *Strate v. A–1 Contractors*, 520 U.S. 438, 456 n. 11, 117 S.Ct. 1404; see also *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651, 121 S.Ct. 1825. Similarly, the Court has held that when the 'jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.' *Duro v. Reina*, 495 U.S. 676, 697, 110 S.Ct. 2053. Ancillary to the authority to transport a non-Indian suspect is the authority to search that individual prior to transport, as several state courts and other federal courts have held. While that authority has sometimes been traced to a tribe's right to exclude non-Indians, tribes 'have inherent sovereignty independent of th[e] authority arising from their power to exclude,' *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 425, 109 S.Ct. 2994 (plurality opinion), and here *Montana*'s second exception recognizes that inherent authority. In addition, recognizing a tribal officer's authority to investigate potential violations of state or federal laws that apply to non-Indians whether outside a reservation or on a public right-of-way within the reservation

protects public safety without implicating the concerns about applying tribal laws to non-Indians noted in the Court's prior cases. Finally, the Court doubts the workability of the Ninth Circuit's standards, which would require tribal officers first to determine whether a suspect is non-Indian and, if so, to temporarily detain a non-Indian only for 'apparent' legal violations. 919 F.3d 1135, 1142. The first requirement produces an incentive to lie. The second requirement introduces a new standard into search and seizure law and creates a problem of interpretation that will arise frequently given the prevalence of non-Indians in Indian reservations."

"Cooley's arguments against recognition of inherent tribal sovereignty here are unpersuasive. While the Court agrees the *Montana* exceptions should not be interpreted so as to 'swallow the rule,' *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330, 128 S.Ct. 2709, this case does not raise that concern due to the close fit between *Montana*'s second exception and the facts here. In addition, the Court sees nothing in existing federal cross-deputization statutes that suggests Congress has sought to deny tribes the authority at issue. To the contrary, existing legislation and executive action appear to operate on the assumption that tribes have retained this authority."

C. Exigent Circumstances; Flight of Suspected Misdemeanant Not Always Justification for Warrantless Entry

Lange v. California, 141 S.Ct. 2011 (U.S., Kagan, 2021).

"This case arises from a police officer's warrantless entry into petitioner Arthur Lange's garage. Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer began to follow Lange and soon after turned on his overhead lights to signal that Lange should pull over. Rather than stopping, Lange drove a short distance to his driveway and entered his attached garage. The officer followed Lange into the garage. He questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange's blood-alcohol content was three times the legal limit.

"The State charged Lange with the misdemeanor of driving under the influence. Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The Superior Court denied Lange's motion, and its appellate division affirmed. The California Court of Appeal also affirmed. It concluded that Lange's failure to pull over when the officer flashed his lights created probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. And it stated that Lange could not defeat an arrest begun in a public place by retreating into his home. The pursuit of a suspected misdemeanant, the court held, is always permissible under the exigent-circumstances exception to the warrant requirement. The California Supreme Court denied review.

"Held: Under the Fourth Amendment, pursuit of a fleeing misdemeanor suspect does not always—that is, categorically—justify a warrantless entry into a home."

"The Court's Fourth Amendment precedents counsel in favor of a case-by-case assessment of exigency when deciding whether a suspected misdemeanant's flight justifies a warrantless home entry. The Fourth Amendment ordinarily requires that a law enforcement officer obtain a judicial warrant before entering a home without permission. *Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430. But an officer may make a warrantless entry when 'the exigencies of the situation,' considered in a case-specific way, create 'a compelling need for official action and

no time to secure a warrant.' *Kentucky v. King*, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865; *Missouri v. McNeely*, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696. The Court has found that such exigencies may exist when an officer must act to prevent imminent injury, the destruction of evidence, or a suspect's escape.

"The *amicus* contends that a suspect's flight always supplies the exigency needed to justify a warrantless home entry and that the Court endorsed such a categorical approach in *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300. The Court disagrees. In upholding a warrantless entry made during a 'hot pursuit' of a felony suspect, the Court stated that Santana's 'act of retreating into her house' could 'not defeat an arrest' that had 'been set in motion in a public place.' *Id*., at 42–43, 96 S.Ct. 2406. Even assuming that *Santana* treated fleeing-felon cases categorically, that statement still does not establish a flat rule permitting warrantless home entry whenever a police officer pursues a fleeing misdemeanant. *Santana* did not resolve the issue of misdemeanor pursuit; as the Court noted in a later case, 'the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established' one way or the other. *Stanton v. Sims*, 571 U.S. 3, 8, 10, 134 S.Ct. 3, 187 L.Ed.2d 341.

"Misdemeanors run the gamut of seriousness, and they may be minor. States tend to apply the misdemeanor label to less violent and less dangerous crimes. The Court has held that when a minor offense (and no flight) is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. See *Welsh v. Wisconsin*, 466 U.S. 740, 742–743, 104 S.Ct. 2091, 80 L.Ed.2d 732. Add a suspect's flight and the calculus changes—but not enough to justify a categorical rule. In many cases, flight creates a need for police to act swiftly. But no evidence suggests that every case of misdemeanor flight creates such a need.

"The Court's Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. When the totality of circumstances shows an emergency—a need to act before it is possible to get a warrant—the police may act without waiting. Those circumstances include the flight itself. But pursuit of a misdemeanant does not trigger a categorical rule allowing a warrantless home entry."

"The common law in place at the Constitution's founding similarly does not support a categorical rule allowing warrantless home entry whenever a misdemeanant flees. Like the Court's modern precedents, the common law afforded the home strong protection from government intrusion and it generally required a warrant before a government official could enter the home. There was an oft-discussed exception: An officer, according to the common-law treatises, could enter a house to pursue a felon. But in the misdemeanor context, officers had more limited authority to intrude on a fleeing suspect's home. The commentators generally agreed that the authority turned on the circumstances; none suggested a rule authorizing warrantless entry in every misdemeanor-pursuit case. In short, the common law did not have—and does not support—a categorical rule allowing warrantless home entry when a suspected misdemeanant flees."

D. Application of Physical Force with Intent to Detain is Seizure

Torres v. Madrid, 141 S.Ct. 989 (U.S., Roberts, 2021).

"Respondents Janice Madrid and Richard Williamson, officers with the New Mexico State Police, arrived at an Albuquerque apartment complex to execute an arrest warrant and approached petitioner Roxanne Torres, then standing near a Toyota FJ Cruiser. The officers attempted to speak

with her as she got into the driver's seat. Believing the officers to be carjackers, Torres hit the gas to escape. The officers fired their service pistols 13 times to stop Torres, striking her twice. Torres managed to escape and drove to a hospital 75 miles away, only to be airlifted back to a hospital in Albuquerque, where the police arrested her the next day. Torres later sought damages from the officers under 42 U.S.C. § 1983. She claimed that the officers used excessive force against her and that the shooting constituted an unreasonable seizure under the Fourth Amendment. Affirming the District Court's grant of summary judgment to the officers, the Tenth Circuit held that 'a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim.' 769 Fed. Appx. 654, 657.

"Held: The application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' This Court's precedents have interpreted the term 'seizure' by consulting the common law of arrest, the 'quintessential' seizure of the person. *Payton* v. *New York*, 445 U.S. 573, 585; *California* v. *Hodari D*., 499 U.S. 621, 624. In *Hodari D.*, this Court explained that the common law considered the application of physical force to the body of a person with the intent to restrain to be an arrest—not an attempted arrest—even if the person does not yield. *Id*., at 624–625. A review of the pertinent English and American decisions confirms that the slightest touching was a constructive detention that would complete the arrest. See, *e.g., Genner* v. *Sparks*, 6 Mod. 173, 87 Eng. Rep. 928.

"The analysis does not change because the officers used force from a distance to restrain Torres. The required 'corporal seising or touching the defendant's body,' 3 W. Blackstone, Commentaries on the Laws of England 288 (1768), can be as readily accomplished by a bullet as by the end of a finger. The focus of the Fourth Amendment is 'the privacy and security of individuals,' not the particular form of governmental intrusion. *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528.

"The application of force, standing alone, does not satisfy the rule recognized in this decision. A seizure requires the use of force with intent to restrain, as opposed to force applied by accident or for some other purpose. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 844. The appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain. *Michigan* v. *Chesternut*, 486 U.S. 567, 574. This test does not depend on either the subjective motivation of the officer or the subjective perception of the suspect. Finally, a seizure by force lasts only as long as the application of force unless the suspect submits. *Hodari D.*, 499 U.S., at 625."

"In place of the rule that the application of force completes an arrest, the officers would assess all seizures under one test: intentional acquisition of control. This alternative approach finds support in neither the history of the Fourth Amendment nor this Court's precedents."

"The officers attempt to recast the common law doctrine recognized in *Hodari D*. as a rule applicable only to civil arrests. But the common law did not define the arrest of a debtor any differently from the arrest of a felon. Treatises and courts discussing criminal arrests articulated a rule indistinguishable from the one applied to civil arrests at common law."

"The officers' contrary test would limit seizures of a person to 'an intentional acquisition of physical control.' *Brower* v. *County of Inyo*, 489 U.S. 593, 596. While that test properly describes

seizures by control, seizures by force enjoy a separate common law pedigree that gives rise to a separate rule. A seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. But as common law courts recognized, any such requirement of control would be difficult to apply to seizures by force. The officers' test will often yield uncertainty about whether an officer succeeded in gaining control over a suspect. For centuries, the rule recognized in this opinion has avoided such line-drawing problems."

"The officers seized Torres by shooting her with the intent to restrain her movement. This Court does not address the reasonableness of the seizure, the damages caused by the seizure, or the officers' entitlement to qualified immunity."

E. Google's Hash Matching of Child Pornography Attached to Email Is Not "Unreasonable Search"

United States v. Miller, 982 F.3d 412 (6th Cir., Murphy, 2020).

"Courts often must apply the legal rules arising from fixed constitutional rights to new technologies in an evolving world. The First Amendment's rules for speech apply to debate on the internet. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017). The Second Amendment's rules for firearms apply to weapons that did not exist 'at the time of the founding.' *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). The Supreme Court has made the same point for the rights at issue in this criminal case: The Fourth Amendment right against 'unreasonable searches' and the Sixth Amendment right to confront 'witnesses.' *See Kyllo v. United States*, 533 U.S. 27, 34–36 (2001); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 315–17 (2009). We must consider how the established rules for these traditional rights should apply to a novel method for combatting child pornography: hash-value matching.

"A hash value has been described as 'a sort of digital fingerprint.' *United States v. Ackerman*, 831 F.3d 1292, 1294 (10th Cir. 2016). When a Google employee views a digital file and confirms that it is child pornography, Google assigns the file a hash value. It then scans Gmail for files with the same value. A 'match' signals that a scanned file is a copy of the illegal file. Here, using this technology, Google learned that a Gmail account had uploaded two files with hash values matching child pornography. Google sent a report with the files and the IP address that uploaded them to the National Center for Missing and Exploited Children (NCMEC). NCMEC's systems traced the IP address to Kentucky, and a detective with a local police department connected William Miller to the Gmail account. Miller raises various constitutional challenges to his resulting child-pornography convictions.

"He starts with the Fourth Amendment, arguing that Google conducted an 'unreasonable search' by scanning his Gmail files for hash-value matches. But the Fourth Amendment restricts government, not private, action. And while Google's hash-value matching may be new, private searches are not. A private party who searches a physical space and hands over paper files to the government has not violated the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). That rule covers Google's scan of virtual spaces and disclosure of digital files.

"Miller next argues that the police detective conducted an 'unreasonable search' when he later opened and viewed the files sent by Google. This claim implicates another settled rule: Under the private-search doctrine, the government does not conduct a Fourth Amendment search when there is a 'virtual certainty' that its search will disclose *nothing more* than what a private party's earlier

search has revealed. *United States v. Jacobsen*, 466 U.S. 109, 119 (1984). So we must ask whether the detective's manual search would disclose anything more than what Google's hash-value search showed. Critically, Miller does not dispute the district court's finding about a hash-value match's near-perfect accuracy: It created a 'virtual certainty' that the files in the Gmail account were the known child-pornography files that a Google employee had viewed. Given this (unchallenged) reliability, *Jacobsen*'s required level of certainty is met.

"Miller thus asks us to depart from *Jacobsen*'s idiosyncratic definition of a Fourth Amendment 'search,' noting that the Supreme Court recently clarified that such a 'search' also occurs when the government trespasses onto property to obtain information. *United States v. Jones*, 565 U.S. 400, 404–08 (2012). At the least, Miller says, the detective's opening of the files qualifies as a search in this 'trespass-to-chattels' sense. He raises a legitimate (if debatable) point. The Supreme Court has long required the government to obtain a warrant to open sealed letters, the equivalent of modern emails. *Ex parte Jackson*, 96 U.S. 727, 732–33 (1877). Yet, well before *Jacobsen*, the Court also allowed the government to rely on letters illegally taken and opened by private parties. *Burdeau*, 256 U.S. at 474–75. And Google arguably 'opened' the files and committed the 'trespass' here. In the end, though, we need not resolve this debate. We find ourselves bound by *Jacobsen* no matter how this emerging line of authority would resolve things.

"Miller lastly argues that the admission of NCMEC's report at trial violated his Sixth Amendment right to confront 'witnesses.' This right's basic rule (that a defendant must have the opportunity to cross-examine those who make testimonial statements) certainly applies to new types of witnesses, such as forensic analysts. *Melendez-Diaz*, 557 U.S. at 313–21. But the rule's reach is nevertheless limited to statements by 'witnesses'—that is, people. And NCMEC's automated systems, not a person, entered the specific information into the report that Miller challenges. The rules of evidence, not the Sixth Amendment, govern the admissibility of this computer-generated information.

"For these reasons and those that follow, we affirm Miller's convictions."

IV. *Miranda* Rights; Victim Has Burden of Proving Custody

State v. Moran, 621 S.W.3d 249 (Tenn., Dyer, 2020), perm. app. denied Mar. 23, 2021.

"On April 13, 2017, the defendant was indicted for rape (count 1), aggravated sexual battery (count 2), kidnapping (count 3), and domestic assault (count 4) stemming from actions committed against the victim, the defendant's girlfriend. Prior to his arrest, the defendant gave a statement to responding officers regarding his involvement in the crimes. The defendant subsequently filed a motion to suppress this statement, and the trial court conducted a pre-trial hearing on April 20, 2018."

"Officer Sam Lin with the Memphis Police Department ('MPD') testified he and his partner, Officer D'Andre Johnson, responded to a criminal assault call at the defendant's residence on July 17, 2016. When they arrived at the defendant's apartment building, Officer Lin saw the victim sitting outside on the curb. The victim told the officers she had been raped and informed them that the defendant was inside the residence. Officer Lin knocked on the front door, and the defendant answered, identified himself, and told the officers that the victim was his girlfriend.

"At that point, Officer Lin placed the defendant in handcuffs and escorted him to the back seat of his police car. Although no decision had been made as to whether the defendant should be placed under arrest, Officer Lin testified, once the defendant was handcuffed and placed in the police car, he was detained for further investigation. Officer Lin then asked the defendant 'what happened,' and the defendant 'told [the officers] his side of the story.' Though he could not recall the defendant's entire statement, Officer Lin specifically remembered the defendant stating that he was unable to maintain an erection and began rubbing his penis on the victim's vagina. Regarding Officer Lin's demeanor during their conversation, he testified that he spoke in the same volume and tone that he used during the hearing. Additionally, Officer Lin agreed the defendant remained calm and was not aggressive or defensive during their interaction.

"Following the defendant's statement, Officer Lin went back and forth between the defendant and victim several times to see if their stories were similar and agreed their stories matched. Although he probably asked the defendant additional questions during this time, at the hearing, Officer Lin could not recall what those questions were. At some point, the defendant asked to speak with the victim, and Officer Lin brought the victim over to the police car. However, while he remained close by, Officer Lin did not listen to their conversation. Additionally, Officer Lin testified the door to the police car remained open throughout his conversation with defendant, but it was closed when the defendant was speaking with the victim.

"Following his initial investigation, Officer Lin requested backup, and Lieutenant Charles Mowery arrived and made the decision to place the defendant under arrest. Officer Lin acknowledged, because he was a new officer at the time and had just completed training, he did not include any information regarding the defendant's statement in his report. On cross-examination, Officer Lin agreed the defendant was not free to leave once he was handcuffed, and he did not *Mirandize* the defendant prior to speaking with him."

"Initially, we must address the defendant's contention that the trial court applied the incorrect burden of proof in denying the motion to suppress. The defendant argues the trial court incorrectly held that the defendant bears the burden of establishing custody for the purposes of *Miranda*. Although the State acknowledged the trial court's ruling on this issue in its brief, the State contends it is not necessary for this Court to determine whether the trial court correctly placed the burden on the defendant.

"The question of who has the burden of establishing custody for the purposes of *Miranda* appears to be one of first impression in Tennessee. The majority of other jurisdictions that have addressed this issue have held a defendant bears the initial burden of proving custody. In *Herrera v. State*, 241 S.W.3d 520, 526 (Tex. Crim. App. 2007), the Texas Court of Criminal Appeals held

> [t]he mere filing of a motion to suppress does not thrust a burden on the State to show compliance with *Miranda* ... warnings *unless and until* the defendant proves that the statements he wishes to exclude were the product of custodial interrogation. Thus, the State has no burden at all unless '*the record as a whole clearly establishe[s]*' that the defendant's statement was the product of custodial interrogation by an agent for law enforcement. It is the defendant's initial burden to establish those facts on the record.

"(quoting *Wilkerson v. State*, 173 S.W.3d 521, 532 (Tex. Crim. App. 2005)) (emphasis in original). *See also* *258 *United States v. Julian Lawrence*, 892 F.2d 80, 1989 WL 153161, at *5 (6th Cir. Dec. 18, 1989); *United States v. Jorgensen*, 871 F.2d 725, 729 (8th Cir. 1989); *United States v.*

Davis, 792 F.2d 1299, 1309 (5th Cir. 1986); *United States v. Charles*, 738 F.2d 686, 692 (5th Cir. 1984); *United States v. Crocker*, 510 F.2d 1129, 1135 (10th Cir. 1975); *Finch v. State*, 518 So.2d 864, 871 (Ala. Crim. App. 1987); *State v. Castillo*, 329 Conn. 311, 186 A.3d 672, 682 (2018); *State v. Rippe*, 119 Hawai'i 15, 193 P.3d 1215, 1222 (Haw. Ct. App. 2008); *State v. Godwin*, 164 Idaho 903, 436 P.3d 1252, 1264 (2019); *Moody v. State*, 209 Md.App. 366, 59 A.3d 1047, (Md. Ct. Spec. App. 2013); *Commonwealth v. Medina*, 485 Mass. 296, 149 N.E.3d 747, 752 (2020); *State v. Antwine Gomez*, No. L-17-1130, 2019 WL 647552, at *7 (Ohio Ct. App. Feb. 15, 2019); *Gardner v. State*, 306 S.W.3d 274, 294 (Tex. Crim. App. 2009); *State v. Kolts*, 209 Vt. 351, 205 A.3d 504, 509 (2018). We see no reason to depart from the majority view on this issue. Therefore, we conclude the defendant bears the initial burden of proving custody for the purposes of *Miranda* before the burden shifts to the State to prove the voluntariness of the statement."

"After carefully reviewing the proof at the motion hearing and trial, we conclude the trial court erred in finding the defendant was not in custody at the time of his statement. Upon arriving at the scene, Officer Lin observed the victim outside of the apartment building, and the victim told Officer Lin that she had been raped by the defendant, her boyfriend. Officer Lin knocked on the defendant's residence and asked him to identify himself and his relationship to the victim. Officer Lin then immediately handcuffed the defendant and placed him in the back of the police car, which was parked in front of the defendant's apartment. Once the defendant was detained, Officer Lin asked him, 'What happened?' In response, the defendant admitted, in part, that, because he was unable to maintain an erection, he rubbed his penis on the victim's vagina. During the questioning, Officer Lin never told the defendant that he was not under arrest or that he did not have to answer any questions. Viewing this matter in the totality of the circumstances, we conclude a reasonable person in the defendant's position would have considered himself or herself deprived of freedom of movement to a degree associated with formal arrest. *See Walton*, 41 S.W.3d at 83 (finding custody when defendant was questioned while handcuffed in the back of a police car); *People v. McCabe*, 182 A.D.3d 772, 122 N.Y.S.3d 757 (N.Y. App. Div. 2020) (finding custody when officers handcuffed the defendant, placed him in the back of a police car, and asked, 'What happened?').

"Although the State argues, and the trial court concluded, the purpose of Officer Lin's questioning was to clarify the nature of a potentially volatile situation, we disagree. It is true that 'on-the-scene' questioning, where officers are simply trying to understand a confusing situation, does not require a *Miranda* warning. *Miranda*, 384 U.S. at 477-78, 86 S.Ct. 1602. However, at the time of Officer Lin's questioning, the incident was completed, the parties were identified and separated, and the defendant was cooperative and responsive. '[W]here criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation.' *People v. Rifkin*, 289 A.D.2d 262, 263, 733 N.Y.S.2d 710 (N.Y. App. Div. 2001)."

"Considering the evidence presented at trial as a whole, the trial court's error was harmless, as it did not 'more probably than not [affect] the judgment or ... result in prejudice to the judicial process.' Tenn. R. App. P. 36(b). Even in the absence of the defendant's statement that he rubbed his penis on the victim's vagina, the State introduced ample evidence of the defendant's guilt at trial. The victim testified she confessed to the defendant that she had cheated on him during a recent vacation. The defendant then stripped the victim, forced her outside in an effort to embarrass her, held her down on the bed, and digitally penetrated her. The defendant also attempted penile penetration, but, because he was unable to maintain an erection, he rubbed his penis on the victim's vagina. The victim's mother testified she was speaking with the victim on the phone prior to the assault and heard the victim scream as the line went dead. The victim's mother asked Mr. Seals, the victim's

brother-in-law, to check on her. Mr. Seals arrived at the defendant's apartment, and the victim told him that the defendant had raped and beaten her. Officer Lin responded to the victim's 911 call and spoke to the victim, who was sitting outside the apartment. Officer Lin described the victim's demeanor as 'crying, emotional and upset' as she told him that she had been raped by the defendant. Ms. Sublette performed the victim's physical examination, and she observed several bruises on the victim's arm and torso, which Ms. Sublette testified were consistent with the victim's story. Agent Stoner analyzed the evidence collected in this case and testified the victim's underwear contained spermatozoa matching the defendant's DNA. Additionally, the right-hand swab from the defendant contained a mixture of DNA matching both the defendant and the victim. The overwhelming evidence outlined above proves beyond a reasonable doubt that the error did not contribute to the verdict. Thus, the defendant is not entitled to relief on this issue."

V. Protective Order Prohibiting Publication of Victim, Informant or Witness's Information or Statement

Chapter 586, Public Acts 2021, adding T.C.A. § 40-17-104 eff. July 1, 2021.

"(a) If a district attorney general is required to disclose to the defendant information including the name, contact information, or statements of a victim of a sexual offense under title 39, chapter 13, part 5; law enforcement informant, or witness who is expected to testify against a defendant charged with a crime involving a weapon or the use of force, then the district attorney general may petition the court for a protective order prohibiting the defendant and the defendant's counsel from publishing the victim, informant, or witness's name, contact information, or statements at any time prior to or during the trial. The petition must:

(1) Be certified or supported by an affidavit of the victim, informant, or witness;
(2) Identify the specific information that should be subject to prohibition from publication; and
(3) Show good cause for issuing the protective order, which may include that allowing the defendant to publish the information is likely to result in coercion, intimidation, or harassment designed to discourage the victim, informant, or witness from testifying at trial or appearing as a witness.

"(b) If, after reviewing the petition, the court finds there is good cause for prohibiting the publishing of the information, then the court shall issue the protective order expressly limiting the publication of the victim, informant, or witness's information at any time prior to or during the trial.

"(c) This section does not restrict the right of a defendant or defendant's counsel to conduct an investigation or interviews to be used at trial.

"(d) A person who knowingly violates a protective order issued pursuant to this section commits a Class E felony."

VI. Statute of Limitations; Removed for Sex Trafficking for Commercial Sex Act Against a Child

Chapter 363, Public Acts 2021, adding T.C.A. § 40-2-101(r) eff. July 1, 2021.

"(r) Notwithstanding subsections (k) and (q), a person may be prosecuted, tried, and punished for any offense committed against a child on or after July 1, 2021, that constitutes the offense of trafficking for commercial sex act under § 39–13–309, at any time after the offense is committed."

VII. Witnesses; Remote Testimony by Forensic Analyst

Chapter 501, Public Acts 2021, adding T.C.A. § 40-17-102 eff. July 1, 2021.

"(a) As used in this section:
(1) 'Forensic analyst' means an expert in the scientific detection of crime; and
(2) 'Remote testimony' means any method by which a forensic analyst testifies from a location other than the location where the hearing or trial is being conducted and outside the physical presence of a party or parties.

"(b) The court may permit remote testimony by a forensic analyst in any criminal proceeding only if:
(1) The state has provided a copy of any report produced by the forensic analyst that the state is seeking to admit into evidence through remote testimony to the defendant at least fifteen (15) days prior to the proceeding;
(2) The defendant agrees to permit remote testimony;
(3) The court finds that the defendant's agreement was knowing and voluntary; and
(4) The court and the state agree to permit remote testimony.

"(c) Any remote testimony conducted under this section must allow all parties to observe the demeanor of the analyst as the analyst testifies in a similar manner as if the analyst were testifying in the location where the hearing or trial is being conducted. The court shall ensure that the defendant has a full and fair opportunity for examination and cross-examination of the analyst."

VIII. Motion for Judgment of Acquittal; Standard of Review

State v. Weems, 619 S.W.3d 208 (Tenn., Bivins, 2021).

"This case examines a trial court's decision to grant, in part, a motion for judgment of acquittal in a criminal case. A Davidson County jury convicted Shalonda Weems of aggravated child neglect and reckless homicide following the death of her six-month-old daughter, Kar'mn. The autopsy investigation determined that Kar'mn's primary cause of death was malnutrition and dehydration and that the circumstances of her death were neglect. Ms. Weems was adamant in her statements to law enforcement that she fed Kar'mn, and medical records showed Ms. Weems took Kar'mn to all of her regularly scheduled doctors' appointments. After the jury's verdict, Ms. Weems filed a motion for judgment of acquittal as to both charges. The trial court granted the motion as to the aggravated child neglect charge but denied the motion as to the reckless homicide charge. The State appealed the trial court's decision to partially grant the acquittal, and the Court of Criminal Appeals affirmed. Because we conclude that a reasonable jury could have found all the necessary elements of the crime of aggravated child neglect, Tennessee Code Annotated section 39-15-402 (2003), beyond a reasonable doubt, we reverse the judgment of the Court of Criminal Appeals and vacate the trial court's decision to grant the motion for judgment of acquittal as to the aggravated child

neglect charge. As a result, Ms. Weems' conviction for aggravated child neglect is reinstated. We remand this case to the trial court for further proceedings."

"The defendant, Shalonda Weems, found her six-month-old daughter, Kar'mn Weems, in her crib the morning of March 3, 2005, barely breathing and turning blue. Emergency responders transported Kar'mn to Vanderbilt Hospital where she was pronounced dead at 8:45 a.m. Kar'mn's body was then transported to the Davidson County Medical Examiner's Office for an autopsy. The medical examiner's report concluded that Kar'mn's cause of death was 'dehydration and malnutrition' with 'interstitial pneumonitis' as a contributory cause. Her manner of death was 'homicide,' and the circumstances of her death were 'neglect.' In June of 2015, more than ten years after Kar'mn passed away, Ms. Weems was indicted for aggravated child neglect, Tennessee Code Annotated section 39-15-402 (2003), and felony murder, Tennessee Code Annotated section 39-13-202(a)(2) (2003), related to Kar'mn's death. The case proceeded to a three-day jury trial in which Ms. Weems was convicted of aggravated child neglect and reckless homicide, a lesser-included offense of felony murder. Ms. Weems filed two motions for judgment of acquittal, one after the conclusion of the State's proof and one after the jury announced its verdict. The trial court denied the first motion but granted the second motion as to the aggravated child neglect charge only. The trial court denied the motion as to the reckless homicide charge and entered a judgment of conviction. The State appealed the trial court's decision to partially grant the second motion for judgment of acquittal."

"This case paints a troubling and contrasted picture. On one hand, Ms. Weems, a teenage mother of three, appeared to provide for Kar'mn by taking her to all scheduled doctor appointments and bringing her to the emergency room when she had an unexpected illness. Additionally, at least two witnesses testified that both Ms. Weems and Kar'mn were sick in the days leading up to Kar'mn's death and that Kar'mn had a history of spitting up after feeding. Over the course of the investigation, Ms. Weems was adamant that she fed Kar'mn regularly up until the time she put Kar'mn to bed on March 2, 2005. On the other hand, Dr. Hawes' autopsy investigation uncovered multiple indicators that Kar'mn suffered from chronic malnutrition and severe dehydration, including the unsettling discovery that Kar'mn had almost no food or waste in her gastrointestinal tract, meaning she had been without food or liquids for a twenty-four-hour period or more. Moreover, the daycare provider had to address Ms. Weems for not bringing sufficient food for Kar'mn, and Ms. Weems admitted to medical professionals that she watered down formula with her previous child to make it last longer."

"Based on our review of the record, the jury could have made a reasonable and legitimate inference from the evidence that Ms. Weems' statements that she fed Kar'mn were not credible based on the medical and scientific evidence provided by Dr. Hawes and Kar'mn's medical records. The medical and scientific evidence alone provides proof that Ms. Weems knew how to feed her child and that her child needed to eat often, that Kar'mn was able to gain and maintain weight, and that Kar'mn died as a result of chronic malnutrition and dehydration. There is certainly no 'smoking gun' in this case, and Ms. Weems did not admit that she failed to feed Kar'mn. However, Tennessee courts have long recognized that a defendant's mental state, often an essential element in criminal statutes, is often proved by circumstantial evidence, which by its very nature requires the jury to make inferences and draw conclusions based on all of the evidence presented. See *Hall v. State*, 490 S.W.2d 495, 496 (Tenn. 1973); *State v. Burns*, No. M1999-01830-CCA-R3-CD, 2000 WL 1520261, at *3 (Tenn. Crim. App. Oct. 13, 2000). Accordingly, a reasonable jury could have concluded that Ms. Weems knowingly neglected Kar'mn by not feeding her and Kar'mn died as a result of that neglect."

"Whether or not the trial court agreed with the credibility determinations of the jury, the weight the jury assigned specific testimony and evidence, or the conclusions the jury drew from the evidence is not of consequence to this appeal only because that is not what the trial court must do when ruling on a motion for judgment of acquittal. Those determinations are relevant only to the trial court's decision to accept the jury's verdict in its role as thirteenth juror. See *State v. Ellis*, 453 S.W.3d 889, 898–901 (Tenn. 2015) (differentiating the trial court's role when reviewing the legal sufficiency of the evidence and the trial court's role as thirteenth juror, the latter inquiry not requiring the 'trial judge ... to view the evidence in the light most favorable to the prosecution' and permitting the trial judge to 'weigh the evidence himself as if he were a juror and determine for himself the credibility of the witnesses' (quoting *State v. Johnson*, 692 S.W.2d 412, 415 (Tenn. 1985) (Drowota, J., dissenting))). The record does not reflect any ruling by the trial court on a motion for new trial. Therefore, we express no opinion and make no determination on this issue.

"In this case, the State was not required to prove that Ms. Weems knew Kar'mn was going to die or that Ms. Weems intended for Kar'mn to die for the jury to find all of the necessary elements of aggravated child neglect beyond a reasonable doubt. See *State v. Prater*, 137 S.W.3d 25, 33–32 (Tenn. Crim. App. 2003) ('[I]t is the actual act of treating a child in an abusive manner that must be knowing conduct; a defendant need not know that his or her conduct will result in serious bodily injury.'). Accordingly, we reverse the Court of Criminal Appeals' decision to affirm the trial court's partial grant of the motion for judgment of acquittal as to the aggravated child neglect charge, and we vacate the trial court's order as to that charge only. As a result, Ms. Weems' conviction for aggravated child neglect is reinstated."

IX. Sentencing

A. Armed Career Criminal Act; Crimes Involving Recklessness Are Not "Violent Felonies"

Borden v. United States, 141 S.Ct. 1817 (U.S., Kagan, 2021).

"The Armed Career Criminal Act (ACCA) mandates a 15-year minimum sentence for persons found guilty of illegally possessing a firearm who have three or more prior convictions for a 'violent felony.' An offense qualifies as a violent felony under ACCA's elements clause if it necessarily involves 'the use, attempted use, or threatened use of physical force against the person of another.' 18 U.S.C. § 924(e)(2)(B)(i). In *Leocal* v. *Ashcroft*, 543 U.S. 1, the Court held that offenses requiring only a negligent *mens rea* fall outside a relevantly identical definition. *Id.,* at 9. The 'critical aspect' in determining the relevant *mens rea*, the Court explained, was the statute's demand that the perpetrator use physical force '*against the person or property of another*.' *Ibid* (emphasis in original). Then in *Voisine* v. *United States*, 579 U.S. 686, the Court held that reckless crimes fall within a different statutory definition—this one requiring the 'use of physical force,' but lacking the 'against' phrase *Leocal* deemed 'critical.' In both decisions, the Court left open whether reckless offenses would satisfy ACCA's elements clause.

"Petitioner Charles Borden, Jr., pleaded guilty to a felon-in-possession charge, and the Government sought an enhanced sentence under ACCA. One of the three convictions alleged as predicates was for reckless aggravated assault in violation of Tennessee law. Borden argued that this offense is not a violent felony under ACCA's elements clause because a mental state of recklessness suffices for conviction. In his view, only purposeful or knowing conduct satisfies the clause's demand for the

use of force 'against the person of another.' The District Court disagreed and sentenced Borden as a career offender. The Sixth Circuit affirmed.

"Held: The judgment is reversed, and the case is remanded."

B. First Step Act; Low-Level Crack Cocaine Dealer Not Eligible for Resentencing

Terry v. United States, 141 S.Ct. 1858 (U.S., Thomas, 2021).

"Petitioner Tarahrick Terry contends that he is eligible to receive a sentence reduction for his 2008 crack cocaine conviction. In 1986, Congress established mandatory-minimum penalties for certain drug offenses. That legislation defined three relevant penalties for possession with intent to distribute cocaine. The first two carried mandatory minimum sentences based on drug quantity: a 5-year mandatory minimum (triggered by either 5 grams of crack cocaine or 500 grams of powder cocaine) and a 10-year mandatory minimum (triggered by either 50 grams of crack or 5 kilograms of powder). 100 Stat. 3207–2, 3207–3. The third penalty differed from the first two: it did not carry a mandatory minimum sentence, did not treat crack and powder cocaine offenses differently, and did not depend on drug quantity. *Id.*, at 3207–4. Petitioner was subjected to this third penalty when he pleaded guilty in 2008 to possession with intent to distribute an unspecified amount of crack. The District Court determined that his offense involved about 4 grams of crack.

"Two years later, Congress passed the Fair Sentencing Act of 2010, which increased the crack quantity thresholds from 5 grams to 28 for the 5-year mandatory minimum and from 50 grams to 280 for the 10-year mandatory minimum. § 2(a), 124 Stat. 2372. But Congress did not make this change retroactive until 2018, when it enacted the First Step Act. After that, Petitioner sought resentencing on the ground that he was convicted of a crack offense modified by the Fair Sentencing Act. The District Court denied his motion, and the Eleventh Circuit affirmed.

"Held: A crack offender is eligible for a sentence reduction under the First Step Act only if convicted of a crack offense that triggered a mandatory minimum sentence. The First Step Act makes an offender eligible for a sentence reduction only if the offender previously received 'a sentence for a covered offense.' § 404(b), 132 Stat. 5222. The Act defines 'covered offense' as 'a violation of a Federal criminal statute, the statutory penalties for which were modified by' certain provisions in the Fair Sentencing Act. § 404(a), *ibid*. The Fair Sentencing Act modified the statutory penalties for offenses that triggered mandatory minimum penalties because a person charged with the same conduct today no longer would face the same statutory penalties that they would have faced before 2010. For example, a person charged with knowing or intentional possession with intent to distribute at least 50 grams of crack was subject to a 10-year mandatory minimum before 2010. Now, he would be subject only to a 5-year mandatory minimum. But the Fair Sentencing Act did not modify the statutory penalties for petitioner's offense. Before 2010, a person charged with petitioner's offense—knowing or intentional possession with intent to distribute an unspecified amount of a schedule I or II drug—was subject to statutory penalties of imprisonment of 0-to-20 years and up to a $1 million fine, or both, and a period of supervised release. After 2010, a person charged with this conduct is subject to the exact same statutory penalties. Petitioner thus is not eligible for a sentence reduction."

C. "Void and Illegal" Versus "Voidable" Sentence

State v. Reid, 620 S.W.3d 685 (Tenn., Clark, 2021).

"On June 24, 2015, Terrell Lamont Reid ('the Petitioner') pleaded guilty to possession of cocaine with intent to sell and possession of a firearm by a convicted felon. Pursuant to the criminal gang enhancement statute, the firearm offense was enhanced from a Class C to a Class B felony. See Tenn. Code Ann. § 40-35-121(b) (2014). On April 7, 2016, the Court of Criminal Appeals declared the criminal gang enhancement statute unconstitutional as a violation of substantive due process. See *State v. Bonds*, 502 S.W.3d 118, 158-60 (Tenn. Crim. App. 2016), perm. app. denied, (Tenn. Aug. 18, 2016). The Petitioner did not file a post-conviction petition challenging his guilty plea. Instead, the Petitioner filed a motion to correct an illegal sentence under Tennessee Rule of Criminal Procedure 36.1 ('Rule 36.1'), arguing that the intermediate appellate court's decision declaring the criminal gang enhancement statute unconstitutional rendered his sentence illegal. The trial court denied his motion, concluding it did not state a claim for relief, but the Court of Criminal Appeals reversed, holding that the *Bonds* decision rendered the Petitioner's sentence for the firearm conviction void and, thus, illegal under Rule 36.1. In accordance with this Court's holding in *Taylor v. State*, 995 S.W.2d 78, 83-85 (Tenn. 1999), we hold that the Petitioner's sentence was voidable, not void and illegal. Accordingly, we reverse the Court of Criminal Appeals's decision and reinstate the trial court's order denying the Petitioner's motion.

"We granted this appeal to clarify whether a petitioner states a colorable claim for relief under Tennessee Rule of Criminal Procedure 36.1 when he pleads guilty and is sentenced pursuant to a statute that is presumptively constitutional at the time of his sentencing but is later declared unconstitutional. We hold that such a sentence is voidable, not void, and, therefore, is not illegal within the meaning of Rule 36.1. Thus, for the reasons stated herein, we reverse the decision of the Court of Criminal Appeals and reinstate the judgment of the trial court dismissing the motion."

"On appeal, the State argues that the Court of Criminal Appeals erred when it failed to conform to this Court's holding in *Taylor*—that a sentence is not rendered void merely because the statute under which the sentence was imposed is later declared unconstitutional. See *Taylor*, 995 S.W.2d at 85-86. In other words, the State asserts that the Petitioner's sentence is *voidable* as a result of the intermediate appellate court's holding in *Bonds*, and, thus, 'subject to being corrected only if challenged in a timely post-conviction petition,' id. at 83, as opposed to *void* and *illegal*, thus entitling him to relief under Rule 36.1. We agree.

"Tennessee Rule of Criminal Procedure 36.1 'was adopted in order to incorporate within the Rules of Criminal Procedure the procedure for correcting illegal sentences, including those arising from plea bargains.' Tenn. R. Crim. P. 36.1, 2016 advisory comm'n cmt. Rule 36.1 provides, in pertinent part, that '[e]ither the defendant or the state may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered.' Tenn. R. Crim. P. 36.1(a)(1). The Rule defines an 'illegal sentence' as 'one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.' Tenn. R. Crim. P. 36.1(a)(2).

"As this Court explained at length in *State v. Wooden*, 478 S.W.3d 585, 589-95 (Tenn. 2015), 'the definition of 'illegal sentence' in Rule 36.1 is coextensive with, and not broader than, the definition of the term in the habeas corpus context.' Thus, in order to further clarify what it means for a sentence to be 'illegal,' it is appropriate for us to consider principles articulated in cases decided before and after the enactment of Rule 36.1."

"As described in *Taylor*, '[a] void judgment is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment.' 995 S.W.2d at 83. It follows that

'[a] sentence imposed in direct contravention of a statute is illegal and thus void.' *Williams v. State*, No. W2006-00875-CCA-R3-HC, 2007 WL 2822904, at *3 (Tenn. Crim. App. Sept. 27, 2007); see also Tenn. R. Crim. P. 36.1. Only void and illegal judgments are subject to being corrected at any time and may be challenged via a habeas corpus petition or motion to correct an illegal sentence pursuant to Rule 36.1. See *Taylor*, 995 S.W.2d at 83; *Wooden*, 478 S.W.3d at 591-95. Among the sentences considered void are 'sentences imposed pursuant to an inapplicable statutory scheme, sentences designating release eligibility dates where early release is statutorily prohibited, sentences that are ordered to be served concurrently where statutorily required to be served consecutively, and sentences not authorized by any statute for the offenses.' *Wooden*, 478 S.W.3d at 595 (citing *Davis v. State*, 313 S.W.3d 751, 759 (Tenn. 2010)).

"In contrast, '[a] voidable conviction or sentence is one which is facially valid and requires the introduction of proof beyond the face of the record ... to establish its invalidity.' *Taylor*, 995 S.W.2d at 83. Both void and voidable judgments can be challenged through the filing of a petition for post-conviction relief. Id. However, 'unlike habeas corpus, there is a statute of limitations which governs the filing of post-conviction petitions.' Id. at 83-84; see also Tenn. Code Ann. § 40-30-102(a)-(b). As noted above, there is no indication that the Petitioner in this case ever filed a petition for post-conviction relief challenging his sentence or guilty plea."

"[W]e take this opportunity to reaffirm the principles underpinning this Court's holding in *Taylor*—that a statute is presumed constitutional and that a sentence imposed in accordance with a statute in effect at the time of its imposition is voidable and not void."

"Applying these principles of law to the facts in this case, we conclude that the Petitioner's enhanced sentence is voidable as opposed to void and illegal. When the judgments were entered in the Petitioner's case on July 15, 2015, the criminal gang enhancement statute was presumptively constitutional. This remained true until the statute was declared unconstitutional by the intermediate appellate court in *Bonds* nearly one year later. While the trial court would have had 'no legal authority to impose a sentence that [was] contrary to governing law,' the sentence imposed in this case, in accordance with the statute in effect at the time of its imposition, is not void merely because the statute was later declared unconstitutional. See *Taylor*, 995 S.W.2d at 85-86. Because the Petitioner's sentence is voidable, not void and illegal, he has not stated a colorable claim for relief under Tennessee Rule of Criminal Procedure 36.1."

D. Murder

1. Aggravating Circumstances; Life Without Parole; Victim Good Samaritan

Chapter 215, Public Acts 2021, adding T.C.A. § 39-13-204(i)(19) eff. July 1, 2021.

"(19) The victim of the murder was acting as a Good Samaritan at the time of the murder and the defendant knew that the person was acting as a Good Samaritan. For purposes of this subdivision (i)(19), 'Good Samaritan' means a person who helps, defends, protects, or renders emergency care to a person in need without compensation."

2. Juvenile Convicted of Murder; Life Without Parole; Discretionary Sentencing System

Jones v. Mississippi, 141 S.Ct. 1307 (U.S., Kavanaugh, 2021).

"A Mississippi jury convicted petitioner Brett Jones of murder for killing his grandfather. Jones was 15 years old when he committed the crime. Under Mississippi law at the time, murder carried a mandatory sentence of life without parole. The trial judge duly imposed that sentence, which was affirmed on direct appeal. This Court subsequently decided *Miller* v. *Alabama*, 567 U.S. 460, which held that the Eighth Amendment permits a life-without-parole sentence for a defendant who committed a homicide when he or she was under 18, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment. In the wake of that decision, the Mississippi Supreme Court ordered that Jones be resentenced in accordance with *Miller*. At the resentencing, the sentencing judge acknowledged that he had discretion under *Miller* to impose a sentence less than life without parole. The judge determined, however, that life without parole remained the appropriate sentence for Jones. Jones again appealed his sentence, citing both *Miller* and the then-recently decided case of *Montgomery* v. *Louisiana*, 577 U.S. 190, which held that *Miller* applied retroactively on collateral review. Jones contended that, under *Miller* and *Montgomery*, a sentencer must make a separate factual finding that a murderer under 18 is permanently incorrigible before sentencing the offender to life without parole. The Mississippi Court of Appeals rejected Jones's argument.

"Held: In the case of a defendant who committed a homicide when he or she was under 18, *Miller* and *Montgomery* do not require the sentencer to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole. In such a case, a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient."

"A sentencer need not make a separate factual finding of permanent incorrigibility before sentencing a murderer under 18 to life without parole. In *Miller*, the Court mandated 'only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence. 567 U.S., at 483. And in *Montgomery*, the Court stated that 'a finding of fact regarding a child's incorrigibility ... is not required.' 577 U.S., at 211. *Miller* and *Montgomery* require consideration of an offender's youth but not any particular factual finding. *Miller* and *Montgomery* therefore refute Jones's argument that a finding of permanent incorrigibility is constitutionally necessary."

"Nor must a sentencer provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility before sentencing a murderer under 18 to life without parole. An on-the-record sentencing explanation is not necessary to ensure that a sentencer considers a defendant's youth. Nor is an on-the-record sentencing explanation required by or consistent with *Miller* or *Montgomery*, neither of which said anything about a sentencing explanation."

"The Court's decision does not disturb *Miller*'s holding (that a State may not impose a mandatory life-without-parole sentence on a murderer under 18) or *Montgomery*'s holding (that *Miller* applies retroactively on collateral review). The resentencing in Jones's case complied with *Miller* and *Montgomery* because the sentencer had discretion to impose a sentence less than life without parole in light of Jones's youth. The Court's decision today should not be construed as agreement or disagreement with Jones's sentence. In addition, the Court's decision does not preclude the States from imposing additional sentencing limits in cases involving murderers under 18. Nor does the Court's decision prohibit Jones from presenting his moral and policy arguments against his life-without-parole sentence to the state officials who are authorized to act on those arguments."

E. Aggravated Rape of a Child by a Juvenile

Chapter 104, Public Acts 2021, amending T.C.A. § 39-13-531(b) and adding T.C.A. § 40-35-501(i)(2)(L) eff. July 1, 2021.

39-13-531.

"(b) Aggravated rape of a child is a Class A felony and shall be punished as follows:
(1) If the defendant was a juvenile at the time of the commission of the offense, then the sentence must be from within Range III, as set forth in title 40, chapter 35; and
(2) If the defendant was an adult at the time of the commission of the offense, then the sentencing provisions of title 40, chapter 35, apply except:
(A) A sentencing hearing shall not be conducted as required by § 40–35–209; and
(B) After a defendant is found guilty of aggravated rape of a child, the judge shall sentence the defendant to imprisonment for life without the possibility of parole."

40-35-501(i)(2).

"(L) Aggravated rape of a child, if the defendant was a juvenile at the time of the commission of the offense."

F. Offenses Involving Firearms

Chapter 108, Public Acts 2021, adding T.C.A. §§ 40-35-114(29) and -501(y)(1) eff. July 1, 2021.

40-35-114.

"(29) The offense involved the theft of a firearm from a motor vehicle, as defined in § 55–1–103."

40-35-501.

"(y)(1) For the offenses listed in subdivision (y)(2) committed on or after July 1, 2021, there shall be no release eligibility until the person has served eighty-five percent (85%) of the sentence imposed by the court, less sentence credits earned and retained. However, no sentence reduction credits authorized by § 41–21–236, or any other law, shall operate to reduce below seventy percent (70%) the percentage of sentence imposed by the court such person must serve before becoming release eligible.
(2) The offenses to which this subsection (y) applies are:
(A) Unlawful possession of a firearm by a person convicted of a felony crime of violence, an attempt to commit a felony crime of violence, or a felony involving use of a deadly weapon, under § 39–17–1307(b)(1)(A);
(B) Unlawful possession of a firearm by a person convicted of a felony drug offense, under § 39–17–1307(b)(1)(B);
(C) Unlawful possession of a handgun by a person convicted of a felony, under § 39–17–1307(c); and
(D) Unlawfully providing a handgun to a juvenile or permitting a juvenile to possess a handgun, under § 39–17–1320."

G. Release Eligibility; None for Various Sexual and Other Crimes

Chapter 563, Public Acts 2021, adding T.C.A. § 40-35-501(aa) eff. July 1, 2021.

"(aa)

"(1) Notwithstanding any provisions of this section to the contrary, there shall be no release eligibility for a person committing an offense, on or after July 1, 2021, that is enumerated in subdivision (aa)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court undiminished by any sentence reduction credits the person may be eligible for or earn. The person shall be permitted to earn any credits for which the person is eligible and the credits may be used for the purpose of increased privileges, reduced security classification, or for any purpose other than the reduction of the sentence imposed by the court.

"(2) The offenses to which subdivision (aa)(1) applies are:

(A) Female genital mutilation, as defined in § 39–13–110;
(B) Domestic assault, as defined in § 39–13–111, when the offense is a felony offense;
(C) Trafficking for a commercial sex act, as defined in § 39–13–309;
(D) Advertising commercial sexual abuse of a minor, as defined in § 39–13–315;
(E) Rape, as defined in § 39–13–503;
(F) Aggravated sexual battery, as defined in § 39–13–504;
(G) Sexual battery, as defined in § 39–13–505;
(H) Aggravated statutory rape, as defined in § 39–13–506(c);
(I) Indecent exposure, as defined in § 39–13–511, when the offense is a felony offense;
(J) Patronizing prostitution, as defined in § 39–13–514(b)(3);
(K) Promoting prostitution, as defined in § 39–13–515;
(L) Public indecency, as defined in § 39–13–517(d)(3);
(M) Continuous sexual abuse of a child, as defined in § 39–13–518;
(N) Sexual battery by an authority figure, as defined in § 39–13–527;
(O) Solicitation of a minor, as defined in § 39–13–528, when the offense is a felony offense;
(P) Soliciting sexual exploitation of a minor, as defined in § 39–13–529;
(Q) Statutory rape by an authority figure, as defined in § 39–13–532;
(R) Promoting travel for prostitution, as defined in § 39–13–533;
(S) Unlawful photographing in violation of privacy, as defined in § 39–13–605, when the victim is under thirteen (13) years of age;
(T) Observation without consent, as defined in § 39–13–607(d)(2);
(U) Incest, as defined in § 39–15–302;
(V) Child abuse or child neglect or endangerment, as defined in § 39–15–401;
(W) Aggravated child abuse or aggravated child endangerment or neglect, as defined in § 39–15–402;
(X) Using a minor to produce, import, prepare, distribute, process, or appear in obscene material, as defined in § 39–17–902(b);
(Y) Unlawful sale, distribution, or transportation with intent to sell or distribute of a child-like sex doll, as defined in § 39–17–910(f);
(Z) Sexual exploitation of a minor, as defined in § 39–17–1003;
(AA) Aggravated sexual exploitation of a minor, as defined in § 39–17–1004;
(BB) Especially aggravated sexual exploitation of a minor, as defined in § 39–17–1005;
(CC) Conspiracy, under § 39–12–103, to commit any of the offenses listed in this subdivision (x)(2);
(DD) Criminal attempt, under § 39–12–101, to commit any of the offenses listed in this subdivision (aa)(2); or
(EE) Solicitation, under § 39–12–102, to commit any of the offenses listed in this subdivision (aa)(2)."

X. Post-Conviction Matters

A. Post-Conviction Procedures Act; Issues Not Addressed Are Waived

Holland v. State, 610 S.W.3d 450 (Tenn., Bivins, 2020).

"Marty Holland ('the Petitioner') waived his right to a grand jury on December 9, 2015, and was charged by criminal information with attempted first-degree murder and especially aggravated robbery. These charges arose from an incident in which a masked man attacked Michael Druan with a 'chrome tire tool' while he was leaving his restaurant. The attacker also stole the restaurant's cash bag and shouted, 'I'm going to kill you,' while attacking Mr. Druan. Mr. Druan sustained injuries to the right side of his face and head and was airlifted to Regional Medical Center in Memphis. Despite the attacker wearing a mask, Mr. Druan recognized his stature and voice as that of the Petitioner, a former employee of Mr. Druan's restaurant. The Petitioner pled guilty to the charges and agreed to serve a seventeen-year sentence. Additionally, as a condition of the plea agreement, the Petitioner agreed to serve the sentence concurrent with his previously imposed federal sentence for an unrelated bank robbery charge and consecutive to a state sentence for an unrelated theft charge."

*"*At the time of the Petitioner's plea hearing in this case, he was in the custody of the Federal Board of Prisons and was transferred to the Hardeman County Circuit Court to take part in the proceeding. During the plea hearing, the trial court asked the Petitioner if he understood he did not have to plead guilty, if he was pleased with his counsel's representation, and if he felt that his counsel had 'properly investigated' his case. The Petitioner answered in the affirmative. Additionally, the trial court asked the Petitioner if he had any concerns or complaints about his representation or if he was being forced to plead guilty. The Petitioner answered in the negative. The court determined that the Petitioner 'underst[oo]d the consequences both directly and indirectly for entering such pleas' and that the Petitioner 'freely, voluntarily, and intelligently' made the decision to plead guilty."

"On October 17, 2016, the Petitioner filed a pro se petition for post-conviction relief in the Hardeman County Circuit Court. The Petitioner raised the following issues in his petition: 1) his conviction was the result of an unlawful search and seizure, 2) his conviction was the result of an unlawful bench warrant, 3) he lacked effective assistance of counsel, 4) he had newly discovered evidence, and 5) the evidence used in the conviction was obtained illegally. He also claimed 'other grounds.' In support of his claims, the Petitioner stated he was arrested based on a 'fictious' bench warrant that he ultimately never received, and the search warrant in this case was defective because it was signed four to six hours after his home was searched. He also requested to have counsel appointed. The Petitioner did not raise any issues related to the voluntariness of his guilty plea or his concurrent state and federal sentences."

"Ultimately, the post-conviction court denied the Petitioner's post-conviction petition and determined that the Petitioner's counsel provided adequate assistance during the plea negotiation process. Moreover, the post-conviction court concluded that the Petitioner 'failed to establish the factual allegations contained in the petition by clear and convincing evidence.' The post-conviction court held that 'the [Petitioner] actually understood the significance and consequences of the particular decision to plea[d] guilty and the decision was not coerced,' that '[t]he [Petitioner] was fully aware of the direct consequences of the plea, including the possibility of the sentence actually received[,]' and that he was 'informed at the plea hearing of the sentence.' The post-conviction

judge took note that the 'plea form indicated that [the Petitioner] would be facing seventeen years at eighty-five percent (85%) [and] that these sentences would run concurrently with each other and with the federal charges.' Other than taking note of the plea form and that it indicated the concurrent state and federal sentences, the post-conviction court did not otherwise address this fact or make any specific findings or conclusions related to it."

"The Petitioner timely appealed the denial of his post-conviction petition to the Court of Criminal Appeals. He claimed that the post-conviction court erred when it concluded that he received effective assistance of counsel. *Holland v. State*, No. W2018-01517-CCA-R3-PC, 2019 WL 1418278, at *1 (Tenn. Crim. App. Mar. 27, 2019), perm. app. granted, (Tenn. Aug. 21, 2019). Additionally, he argued that 'but for trial counsel's failure to investigate (1) a coerced confession; (2) the validity of a bench warrant concerning an unrelated offense; and (3) a search warrant executed at [his] home concerning an unrelated case, he would not have entered his guilty pleas.' Id. at *5. The Petitioner did not raise any issues related to his concurrent state and federal sentences. The State argued that the post-conviction court properly denied the petition."

"In this case, the Court of Criminal Appeals affirmed the post-conviction court's decision to deny the Petitioner's petition. *Holland*, 2019 WL 1418278, at *8. However, the court did not end its review there. Rather, the Court of Criminal Appeals raised an issue sua sponte regarding the Petitioner's concurrent state and federal sentences and whether he was fully aware of the consequences of this agreement. The court remanded this case to the post-conviction court for consideration of this issue even though the Petitioner failed to raise it in any version of his post-conviction petition, and he did not argue the issue at the post-conviction hearing. Additionally, the post-conviction court did not decide the issue in any form or fashion, and neither party raised or argued the issue to the Court of Criminal Appeals.

"The State argues that this issue was waived and, therefore, cannot be a basis for relief under the Act. The State contends that the Court of Criminal Appeals did not have the authority to consider the issue because it exceeds the scope of review available under the Act, and plain error review under Tennessee Rule of Appellate Procedure 36(b) is not available in post-conviction proceedings.

"While the Petitioner acknowledges that he failed to raise or argue the concurrent sentencing issue and that the post-conviction court did not decide the issue, he argues that the Court of Criminal Appeals had the authority under Tennessee Rules of Appellate Procedure 2, 13(b), and 36(b) to consider the issue sua sponte. In support of his argument, the Petitioner points to a 'trend' in Tennessee appellate courts where an issue not originally raised in the post-conviction petition may still be heard on appeal, and he argues that what the Court of Criminal Appeals did in this case is the natural extension of that 'trend. The Petitioner also argues that this Court's precedent in *Grindstaff v. State*, 297 S.W.3d 208, 219 (Tenn. 2009), which states that plain error review is not available in post-conviction proceedings, does not apply to this case because it is factually distinct from the case at hand and because Grindstaff did not expressly acknowledge the plain error rule under Tennessee Rule of Appellate Procedure 36(b). In the alternative, the Petitioner argues that *Grindstaff* should be overruled and that this Court should hold that plain error review is available in post-conviction proceedings. We agree with the State.

"The Post-Conviction Procedure Act of 1995 offers criminal defendants a unique form of relief that is 'entirely a creature of statute' and whose 'availability and scope ... lies within the discretion of the General Assembly.' *Bush v. State*, 428 S.W.3d 1, 15–16 (Tenn. 2014) (citing *Pike v. State*, 164 S.W.3d 257, 262 (Tenn. 2005)). A person seeking relief under the Act must file a petition with the

court of record where the conviction occurred that 'include[s] all claims known to the petitioner for granting post-conviction relief[,]' and the petitioner 'shall verify under oath that all the claims are included.' Tenn. Code Ann. § 40-30-104(d) (2018)."

"During the post-conviction hearing, the court acknowledged that the plea form indicated an agreement to serve concurrent state and federal sentences, and the Petitioner testified that he had a paper 'from the Feds' that showed the sentences would be served concurrently. We hold that any of the brief references to the matter and the Petitioner's general claim that he did not understand the nature and consequences of his plea agreement do not constitute 'develop[ing] the issue in any meaningful way' or preserving the issue for appellate review."

"Nothing in the language of the Act, or our case law interpreting the Act, gives a reviewing court in post-conviction proceedings the authority to raise an issue sua sponte that has been waived. We hold that the language of the Act controls the scope of review in this instance, and the Court of Criminal Appeals did not have the authority under the Act to consider the issue or raise it sua sponte for consideration on remand to the post-conviction court. See Tenn. Code Ann. §§ 40-30-104(d), 106(g); *Grindstaff*, 297 S.W.3d at 218–19 . . . ."

"Because the Petitioner did not raise the concurrent sentencing issue in his petition for post-conviction relief, during his post-conviction hearing, or on appeal, the issue was waived, and the Court of Criminal Appeals was without authority to remand the Petitioner's case to the post-conviction court for consideration of the issue. Therefore, we reverse the decision of the Court of Criminal Appeals to remand this case for a post-conviction hearing and reinstate the post-conviction court's decision to deny the Petitioner's petition."

B. Report of Discovery of Potentially Exculpatory Evidence

Chapter 355, Public Acts 2021, adding T.C.A. §§ 40-30-123 and 40-30-401–413 eff. July 1, 2021.

40-30-123.

"Whenever a law enforcement agency discovers new evidence deemed potentially exculpatory by the chief law enforcement officer of the agency, the agency shall report the evidence to the district attorney currently serving in the jurisdiction in which the case was prosecuted, the trial court in which the conviction was obtained, the individual convicted in the case in which the evidence was secured, and that individual's attorney, if such individual is represented by counsel, within thirty (30) days of the discovery of the evidence."

This chapter also adds the "Post-Conviction Fingerprint Analysis Act of 2021." It is substantially analogous to the Post-Conviction DNA Analysis Act of 2001, but addresses analysis of possible exculpatory fingerprint evidence in certain circumstances.

XI. 2021 Changes to Tennessee Rules of Appellate Procedure

A. Interlocutory Appeal; Specific Issues Certified

Tennessee Rule of Appellate Procedure 9(b) amended eff. July 1, 2021.

"(b) Procedure in the Trial Court. The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the specific issue or issues the court is certifying for appeal and the reasons for its opinion. The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal. The appellate court may in its discretion allow an appeal from the order."

"Advisory Commission Comment [2021]
Rule 9(b) is amended to add a requirement that a trial court's order certifying as appealable an interlocutory order of the court shall state the specific issue or issues for consideration by the appellate court. The word "thereupon" is deleted from the last sentence of the Rule as surplusage."

B. Filing of Papers; Commercial Delivery Service or USPS

Tennessee Rule of Appellate Procedure 20(a) amended eff. July 1, 2021.

"(a) Filing. Papers required or permitted to be filed in the appellate court shall be filed with the clerk. Filing shall not be timely unless the papers are received by the clerk within the time fixed for filing or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing. Filing will also be timely if placed for delivery with computer tracking, either through a commercial delivery service or the United States Postal Service, within the time fixed for filing.

"Official drop boxes for filing of papers shall be located at the Supreme Court Buildings in Knoxville, Nashville, and Jackson and shall be maintained by agents of the Clerk of the Appellate Courts. These boxes shall be opened at the beginning of each business day. Papers found therein will be deemed filed on the last business day preceding opening of the box."

"Advisory Commission Comment [2021]
Subdivision (a) is amended to clarify that, as with commercial delivery services, filing is timely if placed for delivery with computer tracking with the United States Postal Service within the time fixed for filing."

XII. Release and Parole

A. Release Plan to be Created

Chapter 381, Public Acts 2021, amending T.C.A. § 40-35-503(d)(1) eff. May 11, 2021.

"Within one (1) year prior to an incarcerated individual's release eligibility date, an employee of the department of correction shall meet with the incarcerated individual to create a release plan. The board of parole shall conduct a hearing within a reasonable time prior to or upon the individual's release eligibility date to determine the individual's fitness for parole."

B. Active Detainer Plan in Foreign Jurisdiction

Chapter 353, Public Acts 2021, adding T.C.A. § 40-28-116(c) eff. July 1, 2021.

"(c) (1) The board shall consider granting parole to a prisoner who has reached the release eligibility date for the prisoner's combined state sentences and has an active detainer commitment to serve a term of imprisonment in a foreign jurisdiction if:

(A) The term of imprisonment in the foreign jurisdiction is greater than the period of imprisonment left to serve on the prisoner's combined state sentences;

(B) The prisoner would otherwise be eligible for parole consideration; and

(C) The prisoner is a good candidate for parole release upon application of any release decision-making guidelines in use by the board.

(2) When a prisoner has a parole hearing, the department of correction must provide information to the board regarding filed active detainer commitments in which the prisoner is to serve a term of imprisonment.

(3) If parole release is granted to a detainer in a foreign jurisdiction, then the entity having custodial authority over the prisoner must file a notification request with the foreign jurisdiction for the remainder of any Tennessee sentence, prior to parole release."

C. Chronically Debilitated Elderly Inmate

Chapter 282, Public Acts 2021, adding T.C.A. § 40-35-501(x) eff. Apr. 30, 2021.

"(1) Notwithstanding this part of title 40, chapter 28, part 1 to the contrary, the commissioner of correction may certify as eligible for parole a chronically debilitated or incapacitated inmate who:

(A) Is at least seventy (70) years of age;

(B) Has served a minimum of five (5) years in custody;

(C) Is not serving a sentence for:

(i) A violent sexual offense, as defined in § 40-39-202; or

(ii) More than one (1) conviction for first degree murder, pursuant to § 39-13-202, or facilitation of first degree murder;

(D) Is not serving a sentence of imprisonment for life without possibility of parole; and

(E) Has two (2) sworn statements from physicians, at least one (1) of whom is the department of correction's director of medical services, certifying that the condition of the inmate is chronic, incurable, and will likely result in the inmate's death.

"(2) If a person is granted parole pursuant to this subsection (x), the board of parole shall send the notice required by § 40-28-505(c) to the members of the general assembly who represent the district where the offender last resided prior to incarceration."

XIII. Expunction of Record

A. Various Provisions Made Easier

Chapter 539, Public Acts 2021, amending T.C.A. §§ 8-21-401 and 40-32-101(g) and adding § 40-6-204 eff. July 1, 2021.

This act authorizes a clerk to charge a fee of less than $100 for expunction and expands the offenses for which expunction is permitted. Additional changes include the following:

40-6-204.

"(b) The affidavit of complaint must contain instructions informing the defendant that if the defendant's charge is dismissed, a no true bill is returned by a grand jury, the defendant is arrested and released without being charged with an offense, or the court enters a nolle prosequi in the defendant's case, the defendant is entitled, upon petition by the defendant to the court having jurisdiction over the action, to the removal and destruction of all public records relating to the case without cost to the defendant."

40-32-101(g).

"(4) (A) Both the petitioner and the district attorney general may file evidence with the court relating to the petition.
(B) The district attorney general may file evidence relating to the petition under seal for review by the court. Evidence filed under seal by the district attorney general is confidential and is not a public record."

"(5) (A) The court shall enter an order granting or denying the petition no sooner than sixty-one (61) days after service of the petition upon the district attorney general. Prior to entering an order on the petition, the court shall review and consider all evidence submitted by the petitioner and the district attorney general, including any evidence submitted by the district attorney general under seal pursuant to subdivision (g)(4)(B).
(B) In making a decision on the petition, the court shall weigh the interest of the petitioner against the best interests of justice and public safety; provided, that if the petitioner is an eligible petitioner pursuant to subdivision (g)(1)(A), (g)(1)(B), (g)(1)(C), (g)(1)(D), or (g)(1)(E) and meets the requirements of subdivision (g)(2), then there is a rebuttable presumption that the petition should be granted."

"(15) A person is not an eligible petitioner for purposes of this subsection (g) if the person was convicted of an offense involving the manufacture, delivery, sale, or possession of a controlled substance and at the time of the offense the person held:
(A) A commercial driver license, as defined in § 55–50–102, and the offense was committed within a motor vehicle, as defined in § 55–50–102; or
(B) Any driver license and the offense was committed within a commercial motor vehicle, as defined in § 55–50–102."

B. Misdemeanor Assault Committed on or After July 1, 2000

Chapter 494, Public Acts 2021, amending T.C.A. § 40-32-101(g)(1)(B)(i) eff. July 1, 2021.

Record of a conviction of misdemeanor assault committed on or after July 1, 2000, is eligible for expunction.

C. Non-Violent Offense Committed Prior to January 1, 1980, for Which Pardon Was Received

Chapter 361, Public Acts 2021, amending T.C.A. § 40-32-101(h)(1) eff. July 1, 2021.

A person who was convicted of a non-violent offense committed prior to January 1, 1980, and received a pardon for the offense may now have the criminal records related to the offense expunged.

D. Notice at Time of Sentencing to Defendant Convicted of Misdemeanor or Felony

Chapter 358, Public Acts 2021, amending T.C.A. § 40-35-324 eff. July 1, 2021.

"(a) If practicable, a judge shall, at the time of sentencing, notify a person convicted of an offense that is eligible for expunction of:
(1) The person's eligibility to have all public records of the conviction destroyed in the manner set forth in § 40–32–101; and
(2) The time period after which the person can petition for expunction of the offense."

XIV. Criminal Justice Reform

A. Alternatives to Incarceration

Chapter 409, Public Acts 2021, amending various provisions of T.C.A. Titles 4, 8, 16 and 39-41 eff. July 1, 2021.

This legislation makes various changes and additions to prior law concerning incarceration. It allows the department to contract with entities and organizations, including local governments, to create or operate community-based alternatives to incarceration. It also rewrites various provisions regarding community corrections, probation, probation revocation, and release on bail.

B. Reentry Success Act of 2021

Chapter 410, Public Acts 2021, amending numerous sections of T.C.A. eff. July 1, 2021.

The Reentry Success Act of 2021, part of Governor Bill Lee's Criminal Justice Reform initiative, is intended to facilitate inmates applying for licenses, certificates or registrations. Among other things, it decreases the amount of time between parole hearings and creates mandatory supervision programs for individuals released from prison. It also provides protection from liability for employers who hire individuals previously convicted of a criminal offense.

XV. Miscellaneous New Statutes

A. Victim Compensation

Chapter 413, Public Acts 2021, amending T.C.A. §§ 40-24-105(a), 40-35-304(d) and 29-13-108(a) eff. Jan. 1, 2022.

40-24-105.

"The following shall be the allocation formula for moneys paid into court in matters adjudicated on or after January 1, 2022: the first moneys paid in a case shall first be credited toward the

payment of restitution owed to the victim, if any, and once restitution has been paid in full, the next moneys shall be credited toward payment of litigation taxes, and once litigation taxes have been paid, the next moneys shall be credited toward payment of costs; then additional moneys shall be credited toward payment of the fine."

40-35-304.

"(d) In determining the amount and method of payment or other restitution, the court may consider the financial resources and future ability of the defendant to pay or perform."

T.C.A. § 29-13-108(a) now extends the time within which a victim of a crime may file a claim with the criminal injuries compensation fund from one year to two years.

B. Care of Inmates

Chapter 168, Public Acts 2021, adding T.C.A. § 41-21-204(g) eff. July 1, 2021.

"(1) (A) A female inmate who is fifty (50) years of age through seventy-four (74) years of age must be offered a mammogram, primary screening, or other appropriate early breast health screening every two (2) years at no cost to the inmate.
(B) A female inmate who is forty (40) years of age through forty-nine (49) years of age must be offered a consultation with a physician to seek professional care as to when to receive a mammogram or other appropriate early breast health screening.
"(2) (A) A correctional institution shall, to the best of the correctional institution's ability, provide inmates with educational programs focused on the importance of preventative healthcare measures that include, but are not limited to, breast self-examination.
(B) As used in this subdivision (g)(2), 'correctional institution' means a facility under the authority of this state that has the power to detain or restrain, or both, a person under the laws of this state. A 'correctional institution' does not include a county or city jail."

EVIDENCE

I. Rulings of Evidence; Rule 103(d); Failure to Object to Hearsay; No Plain Error

State v. Davis, No. E2019-01819-CCA-R3-CD (Tenn. Crim. App., Ogle, June 7, 2021).

"The Appellant, Ricky Allen Davis, was convicted in the Knox County Criminal Court of first degree premediated murder and unlawful possession of a firearm and received concurrent sentences of life and eight years, respectively. On appeal, the Appellant contends that the evidence is insufficient to support the convictions and that the trial court committed plain error by admitting a witness's hearsay statement into evidence, by allowing a witness to testify that she saw the Appellant with a gun prior to the shooting when there was no evidence that it was the same gun used in the shooting, and by allowing a witness to testify that low-income people often shared cellular telephones and did not help the police due to fear of retribution. Based upon the record and the parties' briefs, we affirm the judgments of the trial court."

"The Appellant claims that the trial court committed plain error by (1) admitting Ms. McDowell's written statement into evidence because the statement was hearsay, (2) allowing Ms. McDowell to testify that she saw the Appellant with a gun prior to the shooting when there was no evidence that it was the same gun used in the shooting, and (3) allowing Investigator Washam to testify that low-income people often shared cellular telephones and did not help the police due to fear of retribution. The State contends that the Appellant has waived the issue regarding Ms. McDowell's testimony about the gun because he failed to address that issue in his appellate brief and that he is not entitled to plain error relief on the remaining issues. We agree with the State.

"The Appellant did not object to the testimony of Ms. McDowell or Investigator Washam at trial. Therefore, the issues are waived. See Tenn. R. App. P. 36(a) (nothing in the rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error). At the hearing on the motion for new trial, the Appellant argued that the trial court should review the issues for plain error. See *State v. Vance*, 596 S.W.3d 229, 253 (Tenn. 2020) (stating that '[t]he clear implication of [Tennessee Rule of Evidence] 103(d) is that evidentiary objections not brought to the trial court's attention at the appropriate time will not be considered under plenary review'). The trial court found that given the testimony of Ms. McDowell and Mr. Dobbins, who both stated that the Appellant confessed to shooting the victim, any error did not rise to the level of plain error.

"We may consider an issue as plain error when all five of the following factors are met:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'

"*State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); see also Tenn. R. App. P. 36(b). Furthermore, the '"plain error" must be of such a great magnitude that it probably changed the outcome of the trial.' Id. at 642 (quoting *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988)). It is the appellant's burden to demonstrate plain error. *State v. Gomez*, 239

S.W.3d 722, 727 (Tenn. 2007). We do not need to consider all five factors if we determine that a single factor does not warrant relief. *State v. Smith*, 24, S.W.3d 274, 283 (Tenn. 2000)."

"First, the Appellant contends that it was plain error for the trial court to admit Ms. McDowell's written statement into evidence as an exhibit. The Appellant asserts that the statement was 'textbook' hearsay and that no exceptions to the hearsay rule allowed the statement to be admitted. The State argues that no unequivocal rule of law was breached because, in the absence of an objection by the Appellant, the statement was admissible as substantive evidence and because the Appellant has not shown that consideration of the error is necessary to do substantial justice. We agree with the State.

"Ms. McDowell testified that on the morning after the shooting, the Appellant told her that he shot the victim because the victim owed him money for pills. He also told her that he intended to shoot the victim and that he tried to shoot the victim in the head. Later that day, the police asked Ms. McDowell to write down the conversation she had with the Appellant. The State showed Ms. McDowell her written statement and had her read the statement to the jury.

"Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Tenn. R. Evid. 801(c). Generally, hearsay is inadmissible. See Tenn. R. Evid. 802. However, when hearsay evidence is admitted without objection 'it is ... rightly to be considered as evidence in the case and is to be given such weight as the jury think[s] proper.' *State v. Smith*, 24 S.W.3d 274, 280 (Tenn. 2000) (quoting *State v. Bennett*, 549 S.W.2d 949, 950 (Tenn. 1977)).

"We agree with the State that the Appellant cannot demonstrate that a clear and unequivocal rule of law was breached. Although Ms. McDowell's prior statement was hearsay, '[a] party may consent to the admissibility of evidence which is otherwise prohibited by the Rules, so long as the proceedings are not rendered so fundamentally unfair as to violate due process of law.' *State v. Tedarrius Lebron Myles*, No. E2016-01478-CCA-R3-CD, 2017 WL 2954690, at *6 (Tenn. Crim. App. at Knoxville, July 11, 2017) (quoting *Smith*, 24 S.W.3d at 279). Therefore, '[w]hile the evidence was certainly subject to exclusion or to a limiting instruction, no rule of law required it to be excluded if the parties consented to its admissibility.' Id. In this case, the defense did not object to the admissibility of the statement, and we do not think that the admission of the statement rendered the proceedings so fundamentally unfair as to violate the Appellant's right to due process, particularly since Ms. McDowell herself testified about the Appellant's confession. Therefore, no clear and unequivocal rule of law was breached.

"We also agree with the State that consideration of the error is not necessary to do substantial justice. As noted by the State, Ms. McDowell's prior statement was cumulative to her testimony about her conversation with the Appellant. Moreover, during defense counsel's cross-examination of Ms. McDowell, defense counsel established that Ms. McDowell did not like the Appellant and that she had a motive to lie about his confessing to the shooting. Therefore, we conclude that the Appellant is not entitled to plain error relief."

II. Relevance

A. Rule 403 Balancing; Evidence of Victim's 9-1-1 Calls Properly Admitted; Probative Value Was Not Outweighed by Danger of Unfair Prejudice

State v. Estes, No. W2019-01676-CCA-R3-CD (Tenn. Crim. App., Dyer, Jan. 6, 2021), perm. app. denied Apr. 7, 2021.

"A Gibson County jury convicted the defendant, Torey Jay Estes, of attempted voluntary manslaughter, attempted first-degree murder, aggravated assault, and false imprisonment for which he received an effective sentence of thirty-five-years, eleven months, and twenty-nine days. On appeal, the defendant challenges the sufficiency of the evidence supporting his conviction for attempted first-degree murder and an evidentiary ruling regarding the admissibility of the victim's 9-1-1 call into evidence. After a thorough review of the record, we affirm the judgments of the trial court."

"On November 17, 2015, the defendant stabbed the pregnant victim, Amanda Kafer, multiple times in the face, chest, and stomach with a pocket knife. As a result of his actions, a Gibson County grand jury indicted the defendant for attempted first-degree murder of the victim (count 1), attempted first-degree murder of the victim's unborn child (count 2), aggravated assault (count 3), and especially aggravated kidnapping (count 4). The defendant proceeded to trial on March 18, 2019, where the following evidence emerged.

"The victim testified she and the defendant dated for approximately nine years beginning in 2006 and had a daughter together in 2009. Prior to her relationship with the defendant, the victim had a son with whom the defendant regularly spent time. In February 2015, the victim and the defendant ended their relationship but maintained daily contact. In July 2015, the victim began dating Justin Freeman, and the two were expecting a child by October 2015. The victim subsequently informed the defendant that she was pregnant and planned to learn the gender of the baby during an ultrasound appointment on November 17, 2015.

"A few days before the appointment, the defendant told the victim that if the baby was a girl, he wanted the victim to break up with Mr. Freeman in order for the defendant and the victim to raise the baby together. But, the defendant stated if the baby was a boy, he 'wanted [the victim] to have an abortion' because 'he wasn't raising another bastard boy.' The victim stated she would not have an abortion, and the defendant responded, if she did not 'have an abortion that he was just going to have to kill us both.'

"At the ultrasound appointment, the victim learned she was having a boy. After the appointment, the defendant continuously called the victim to learn the gender of the baby. When the victim answered the defendant's call, she told the defendant she was having a boy and asked him to leave her alone. The defendant continued calling the victim, stating 'If it's really over, then it's over.... It's a boy. It's really over. Just come over and let's talk about what we're going to do about [our daughter] and get some of her belongings.' The victim agreed and drove to the defendant's trailer around 12:00 p.m. The victim left the keys in her car's ignition before entering the trailer.

"Once inside, the victim quickly hid her cell phone in her pants, and the defendant began telling her to break up with Mr. Freeman. During their discussion, the defendant asked where the victim's cell phone was, and the victim stated she did not have it with her. At one point, the defendant left the trailer. When he returned, the defendant asked the victim to lay down with him 'one last time,' but she declined. The defendant then entered the bedroom, and the victim went outside to try to leave because 'something wasn't right.' However, when she returned to her car, she discovered her keys were no longer in the ignition.

"The victim returned to the trailer and asked the defendant for her keys. The defendant claimed he did not have them and asked the victim to sit on the couch with him. The victim again declined. When the victim stated she was leaving, the defendant told her she was not going to leave. The victim felt threatened but questioned the defendant as to what he meant by his statement. In response, the defendant stated, 'I'll show you.' The defendant then pulled a knife out of his pocket, 'flipped it open[,] and shoved [the knife] in [the victim's] gut.' The victim grabbed her stomach and fell to the floor. The defendant told the victim 'to pull [her] shirt up so he could see what the f*** he was doing,' that 'he was going to cut [her] baby out of [her],' and she 'was going to watch [the baby] die.' The victim begged the defendant to stop, explaining they could make the initial stabbing look like an accident. Instead, the victim saw 'rage' in the defendant's eyes as he told her no one would find her body.

"The defendant forced the victim into the bathroom, turned on the shower, and told her that he 'was washing the blood down the drain.' The defendant continued to stab the victim, and the victim continued to beg the defendant to change clothes so they could make the attack look like an accident. The defendant, however, continued cutting, hitting, and fighting the victim. The victim noted that although the defendant remained calm, he also 'just got angrier and angrier' throughout the attack, stating 'he would feed [her] to the hogs and that one hog could devour a human body in seven minutes.'

"The defendant eventually exited the bathroom. The victim shut the door and called 9-1-1. When the defendant returned, the victim again begged him to change clothes and expressed her concern for her children if she died and he went to prison. Regarding the victim's other children, the defendant replied that he would 'take care of them too.' After the defendant exited the bathroom a second time, the victim 'wedged [herself] between the commode and the door.' She again called 9-1-1 as the defendant attempted to get back inside.

"During the victim's testimony, the trial court listened to a recording of the 9-1-1 calls outside of the presence of the jury and determined the recordings were admissible. The State then played portions of the 9-1-1 calls. Throughout the initial call, the victim is heard screaming, and the defendant is heard telling the victim to stop fighting him. The victim explained she ended the first 9-1-1 call because she thought she was dying.

"Portions of the second call were also played during which the victim is heard telling the operator the defendant's name and that he stabbed her. The victim is also heard telling the defendant that she called 9-1-1 and that the police were likely outside the trailer which caused the defendant to open the front door. Johanna Harrell, the Director of 9-1-1 operations for Gibson County, identified the incident call sheet created for the victim's initial 9-1-1 call made at 1:54 p.m. The incident call sheet was entered into evidence."

"The defendant argues the trial court erred in admitting portions of the victim's 9-1-1 calls, asserting the admission of the calls violated Rule 403 of the Tennessee Rules of Evidence because the recordings were unduly prejudicial, cumulative, and 'did not provide any relevant information to resolve a dispute of fact.' The admissibility of evidence, however, rests within the sound discretion of the trial court, and this court will not overturn the trial court's decision absent an abuse of that discretion. *State v. Clayton*, 535 S.W.3d 829, 859 (Tenn. 2017). An abuse of discretion occurs when the trial court 'applies an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.' ' *State v. Lewis*, 235 S.W.3d 136, 141 (quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)).

"Relevant evidence is evidence 'having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Tenn. R. Evid. 401. 'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' Tenn. R. Evid. 403. Unfair prejudice is defined as '[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978) (internal quotation omitted). Further, '[p]rejudice becomes unfair when the primary purpose of the evidence at issue is to elicit emotions of "bias, sympathy, hatred, contempt, retribution, or horror."' *State v. Young*, 196 S.W.3d 85, 106 (Tenn. 2006) (citations and internal quotation marks omitted); *see also State v. Wooten*, No. E2018-01338-CCA-R3-CD, 2020 WL 211543, at *7-8 (Tenn. Crim. App. Jan. 13, 2020), *appeal denied* (June 3, 2020).

"Here, the defendant has failed to show the trial court abused its discretion by admitting portions of the victim's 9-1-1 calls into evidence. The trial court, however, determined the probative value of the calls was not outweighed by the danger of unfair prejudice, and we agree. The victim detailed the attack during trial and explained what was happening during the 9-1-1 calls as portions of the calls were played for the jury. The defendant has failed to establish that this combination of proof presented by the State elicited emotions of bias, sympathy, hatred, contempt, retribution, or horror. *See Young*, 196 S.W.3d at 106. Rather, the record indicates the portions of the calls played for the jury merely corroborated the victim's testimony regarding the attack and how she utilized the calls to escape the trailer. The defendant is not entitled to relief."

B. Rule 404(b) Prior Bad Acts

1. Prior Convictions (Rape and Assault of Victim) and Escape Attempts Admissible to Show Motive, Consciousness of Guilt

State v. Rimmer, 623 S.W.3d 235 (Tenn., Kirby, 2021), reh'g denied May 21, 2021.

"This is a direct appeal in a capital case. The defendant had one prior trial. In the second trial, a Shelby County jury found the defendant guilty of first degree premeditated murder, murder in the perpetration of robbery, and aggravated robbery. He was sentenced to death plus a consecutive eighteen years of incarceration. The Court of Criminal Appeals affirmed the convictions and the sentence. We now consider the appeal on automatic review pursuant to Tennessee Code Annotated section 39-13-206(a)(1). We hold the following: (1) based on sequential jury instructions given in the first trial, the first jury did not have a full opportunity to consider the felony murder count, so double jeopardy principles did not bar retrial on the felony murder count; (2) alleged prosecutorial misconduct in the first trial did not trigger double jeopardy protections and did not bar retrial of the defendant; (3) because the State did not have a duty to preserve the defendant's vehicle, the trial court did not err in denying the defendant's motion to suppress DNA evidence from the vehicle; (4) the trial court did not err under Tennessee Rule of Evidence 404(b) in admitting evidence of the defendant's prior convictions for rape and assault of the victim; and (5) the trial court did not err under Rule 404(b) in admitting evidence of the defendant's escape attempts and corroborating evidence of homemade shanks in his cell. We hold further that imposition of the death penalty is not arbitrary, given the circumstances of the crime; that the evidence supports the jury's finding that the State proved one aggravating circumstance beyond a reasonable doubt; that the evidence supports the jury's conclusion that the aggravating circumstance outweighed any mitigating

circumstances beyond a reasonable doubt; and that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. As to the remaining issues raised by the defendant, we agree with the conclusions of the Court of Criminal Appeals and attach as an appendix to this opinion the relevant portions of the intermediate court's decision. We affirm the convictions and the sentence."

"On February 8, 1997, the victim in this case, Ricci Lynn Ellsworth, disappeared from the Memphis Inn in Shelby County. She left behind her purse, her wedding band, her car, and a chaotic and bloody crime scene. Although the victim was a dependable employee and devoted wife, grandmother, mother, and daughter, neither her employer nor her family ever heard from her again. The victim's body was never located, and she is presumed dead."

"The Defendant next asserts the trial court erred under Tennessee Rule of Evidence 404(b) in admitting evidence of his prior convictions and escape attempts because the danger of unfair prejudice outweighed the probative value of the evidence. As a result, the Defendant contends, the jury was permitted to convict him based on his bad character rather than the circumstantial evidence presented at trial.

"In response, the State argues the prior crimes against the victim were relevant to establish the Defendant's motive and intent, and the prior escape attempts indicated the Defendant's consciousness of guilt. It maintains that the related jury instructions minimized the prejudicial impact of the evidence. We agree with the State."

"Rule 404(b) of the Tennessee Rules of Evidence provides that evidence of other crimes, wrongs, or acts is not admissible to show conformity with the character trait at issue but may be admissible for other purposes, such as motive, intent, or identity. *See State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004). Rule 404(b) seeks to prevent convictions based on mere propensity evidence. To that end, before a trial court may admit evidence of other crimes, wrongs, or acts, Rule 404(b) requires it to utilize the following procedural safeguards:

(1) The court upon request must hold a hearing outside the jury's presence;
(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

"Tenn. R. Evid. 404(b)(1)–(4); *State v. James*, 81 S.W.3d 751, 758 (Tenn. 2002).

"In the context of Rule 404(b), this Court has defined 'unfair prejudice' as an 'undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' [*State v.*] *DuBose*, 953 S.W.2d [649] at 654 [(Tenn. 1997)] (quoting *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978)). Rule 404(b) analysis of material evidence requires trial courts to balance probative value against the danger of unfair prejudice; the more probative the evidence, the lower the chance of unfair prejudice becomes. *State v. Mallard*, 40 S.W.3d 473, 488 (Tenn. 2001)."

"In this case, the Defendant filed a motion to suppress evidence admitted in his first trial relating to his convictions for rape and aggravated assault. Pursuant to Rule 404(b), the State then filed notice of its intent to introduce certain evidence at the retrial, including: (1) evidence of the Defendant's January 1989 assault and rape of the victim, the Defendant's guilty plea, and the sentence imposed by the trial court; and (2) evidence of the Defendant's attempts to escape jail after his arrest for first degree murder and burglary.

"Prior to trial, the trial court held a Rule 404(b) hearing at which it heard testimony from two witnesses—the victim's daughter, Tracye Ellsworth Brown, and the MPD officer who responded to the victim's call for help during the attack, Clifford Freeman. Ms. Brown was six years old at the time of the attack in January 1989. She was at home when the Defendant assaulted and raped her mother, and she testified about her recollection of the events. Officer Freeman testified about the victim's state when he arrived at the scene, statements the victim made about the attack, and the subsequent apprehension of the Defendant.

"The trial court held that the Defendant's guilty plea, conviction, and incarceration for the 1989 rape and assault of the victim were admissible under Rule 404(b). It found the State had proven the rape and assault by clear and convincing evidence. The trial court noted that the evidence included proof of the relationship between the Defendant and the victim as well as proof of the Defendant's malice and hostility toward the victim. This evidence was probative of identity, motive, intent, and premeditation, all non-propensity reasons for its admission. The trial court then held that the danger of unfair prejudice to the Defendant did not outweigh the probative value of the evidence.

"Likewise, after reviewing the initial trial testimony of Mr. Lescure and Mr. Conaley, the trial court found their statements about the Defendant's intent to harm the victim after his release from prison were probative of intent, motive, identity, and premeditation. It held that the danger of unfair prejudice to the Defendant did not outweigh the probative value of the statements. The trial court ruled the testimony of Mr. Lescure and Mr. Conaley would be admissible under Rule 404(b) so long as it was consistent with the evidence presented at the first trial.

"Nevertheless, the trial court excluded proffered evidence of the details of the Defendant's attack on the victim. It decided that evidence of those details presented a strong risk of inflaming the passions of the jury and a danger of unfair prejudice to the Defendant. The trial court also excluded the testimony of Ms. Brown as to the underlying events because she was a young child at the time of the rape and her recollection was hazy; the trial court held it did not meet the clear and convincing standard.

"The Court of Criminal Appeals affirmed the trial court's admission of evidence relating to the rape and assault of the victim. It concluded the trial court had properly found the evidence was probative of issues other than the Defendant's bad character or propensity to commit murder and had carefully balanced the probative value of the evidence against the danger of unfair prejudice. [*State v.*] *Rimmer*, 2019 WL 2208471 [(Tenn. Crim. App. May 25, 2001)] at *15."

"Clearly the evidence at issue has probative value and also presents potential for unfair prejudice. The trial court found explicitly that the evidence was probative of identity, motive, intent, and premeditation and held that its probative value outweighed the danger of unfair prejudice to the Defendant. The trial court also acted to mitigate the risk of unfair prejudice by excluding evidence of the details of the 1989 rape and assault. The trial court then took a further step by giving the following limiting instruction to the jury:

> If from the proof you find that the defendant has been convicted of Rape or Aggravated Assault, you may not consider such evidence to prove his disposition to commit such a crime as that on trial. The evidence may only be considered by you for the limited purpose of determining whether it proves motive; that is, such evidence may be considered by you if it tends to show a motive of the defendant for the commission of the offenses for which he is presently on trial.
> ....
> Such evidence of other crimes, if considered by you for any purpose, must not be considered for any purpose other than those specifically stated in this instruction.

"We presume the jury followed these instructions. *See State v. McKinney*, 74 S.W.3d 291, 310 (Tenn. 2002) (presuming the jury followed the trial court's limiting instructions regarding the consideration of victim impact evidence).

"Considering the entire record, we must conclude the trial court did not abuse its discretion. We affirm its decision to admit evidence of the Defendant's prior convictions for rape and aggravated assault, including the statements made to Mr. Conaley and Mr. Lescure during his subsequent incarceration for those offenses."

"The State also sought to introduce evidence of the Defendant's escape attempts in Indiana, Ohio, and Tennessee for the purpose of showing consciousness of guilt. The Defendant moved to exclude this evidence under Rule 404(b) as well."

"It is well established that evidence of escape or attempted escape after the commission of a crime can be relevant and admissible at trial to show guilt, knowledge of guilt, and consciousness of guilt. *State v. Burton*, 751 S.W.2d 440, 450 (Tenn. Crim. App. 1988). . . ."

"The evidence at issue concerned the Defendant's flight in a prisoner transport van, his attempted escape in Indiana, homemade shanks found in his cell, and his attempted escape in Tennessee. After reviewing the record, we agree with the Court of Criminal Appeals that the trial court properly analyzed this evidence under Rule 404(b). We note as well that the trial court mitigated any potential for unfair prejudice by giving the jury two limiting instructions."

"Again, we presume the jury followed these instructions. *McKinney*, 74 S.W.3d at 310.

"Under all of these circumstances, we conclude the trial court's decision to admit evidence of the Defendant's escape attempts was not an abuse of its discretion."

2. T.C.A. § 24-7-125; Prior Bad Acts Not Admissible to Prove Character of "Any Individual," Including Defense Witness

State v. Moon, No. M2019-01865-CCA-R3-CD (Tenn. Crim. App., Holloway, Feb. 12, 2021), perm. app. granted May 13, 2021.

"A Coffee County jury convicted William Eugene Moon, Defendant, of attempted second degree murder and unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony. On appeal, Defendant argues that the trial court erred by allowing the improper impeachment of a defense witness, that there was insufficient evidence to support his convictions,

and that he was denied the right to a speedy trial. After a thorough review of the record and applicable case law, the judgments of the circuit court are affirmed."

"On February 11, 2019, the State dismissed counts two, three, and four of the indictment and proceeded to trial on count one, attempted second degree murder, and count five, unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony.

"Officer Michael Wilder testified that, in December 2017, he was employed with the Tullahoma Police Department ('TPD'). During his patrol around noon on December 17, 2017, he saw a black SUV outside some apartments where he had once executed a search warrant for drug trafficking. As he passed by the SUV, he noted that there were four individuals inside and that the windows were 'spray painted.' Officer Wilder recalled that he parked on a side alley and observed the SUV. He saw that the occupants of the SUV 'kept getting in and out of the vehicle and walking over to the trailer park on the opposite side of the road.' Officer Wilder decided to drive through the trailer park to try 'to figure out what [wa]s going on.' Once Officer Wilder was inside the trailer park, 'one person lowered his head and ran through the crowd and ran up into the trailer.' Officer Wilder spoke with the trailer park manager, Mr. Larry Woods, who told Officer Wilder that the man who just ran through the crowd was Defendant. Officer Wilder knew that there were 'aggravated assault warrants' against Defendant and asked Mr. Larry Woods to ask Defendant to come out and speak with him. Mr. Larry Woods yelled for Defendant to come outside. When Defendant came outside, Officer Wilder asked Defendant his name. Defendant first lied about his identity before admitting his real name. Officer Wilder asked Defendant to come with him and Defendant stepped down from the porch. Officer Wilder recalled that Defendant began to 'get kind of fidgety' and 'nervous' and that his 'breathing start[ed] to pick up.' Officer Wilder testified that Defendant's reactions were 'signs [that] evasion [wa]s about to happen or violence, possible violence[.]' During the subsequent conversation, Officer Wilder noticed a plastic bag in Defendant's mouth that Officer Wilder believed contained methamphetamine. Officer Wilder placed his 'right hand up against the side of [Defendant's] throat' and told Defendant to 'spit it out.' Officer Wilder continued:

> I asked him repeatedly to spit it out. He finally [did].... I push[ed] him back down on the steps with my knee and like my side. . . .
>
> At this point, I'm still just trying to watch [Defendant] because I haven't patted him down. I mean, he was wearing a black T shirt and black shorts. I c[ould] hear the door shut by the other police officer, and at this point, I just glance[d] over to my right, and I sa[id], 'Hurry up. Hurry up,' and as soon as I did that, I could feel the lower right side of [Defendant], his right hand lower down, and as I c[a]me back with my eyes, he pulled a gun from somewhere. It was directly at my ribs and my stomach.

"Officer Wilder stated that his 'last resort' was to push Defendant off and 'start firing as soon as [he] could.' He said, 'At this point, there [was] no other choice. I knew I had to shoot or be shot.... I fired until basically [Defendant's] head rolled backwards slightly, and I could see his eyes go up, and he rolled off of the steps.'"

"Officer Wilder testified that, based upon his training and experience, there was no doubt in his mind that Defendant was attempting to use deadly force against him. He explained, 'There's no doubt in my mind. I mean, you pull a firearm on a police officer that's trying to scuffle with you, I mean, there is no other intent that I can see.'"

"Mr. Larry Woods testified that he knew Defendant for 'twelve or thirteen years' and that he was present when Defendant was shot. Mr. Larry Woods stated that, on December 17, 2017, Defendant asked Mr. Larry Woods if Defendant could use his restroom, and Mr. Larry Woods agreed. Mr. Larry Woods explained that Officer Wilder then pulled into the trailer park. Mr. Larry Woods walked over to Officer Wilder's vehicle and asked Officer Wilder if he could help. Mr. Larry Woods heard the name 'William Eugene Moon' come over Officer Wilder's car radio. Officer Wilder then asked Mr. Larry Woods if the man who went into the trailer was Defendant, and Mr. Larry Woods said yes. While Officer Wilder was still in his vehicle, he asked Mr. Larry Woods if he could speak to Defendant. Mr. Larry Woods agreed to retrieve Defendant from his residence. Mr. Larry Woods testified that, after he 'walked up two stairs' towards his trailer, Defendant exited the front door. Mr. Larry Woods informed Defendant that Officer Wilder wanted to speak with him, and Defendant agreed to speak to Officer Wilder.

"Mr. Larry Woods stated that he stepped about three feet away. He said that he did not hear Defendant upset or 'cussing' and that he did not see a gun on Defendant. Mr. Larry Woods recalled that Mr. Beck handed Defendant a beer and that Mr. Beck then approached Mr. Larry Woods. He said that he never heard anyone say anything about arresting Defendant. Mr. Larry Woods saw that Officer Wilder 'seemed like he had ahold of [Defendant] ... by his throat or something.' He stated that he heard Defendant say, 'Why have you got to be like that?' Mr. Larry Woods testified that he did not see Defendant 'actively fighting' Officer Wilder. Mr. Larry Woods said that he heard Officer Wilder say, '"Stop, or I'm going to taze you," and then [Officer Wilder] jumped back and shot [Defendant].' Mr. Larry Woods stated that he never saw a gun in Defendant's hand. He said that, after Officer Wilder shot Defendant five times, Officer Wilder turned the gun on Mr. Larry Woods and told him to put his hands up, but Mr. Larry Woods said that his hands were already up. Mr. Larry Woods feared that Officer Wilder would shoot him and said, 'My hands are up. Don't shoot me. What's wrong with you? Call the ambulance, call the ambulance.' Mr. Larry Woods testified that he never saw a gun on the ground near Defendant after the shooting."

"Mr. Larry Woods denied that Defendant was at his trailer to buy methamphetamine. He denied that he sold methamphetamine from his residence. Defense counsel objected to the line of questioning, and the jury was excused.

"During a jury-out hearing, trial counsel argued that the State had no good faith basis to ask Mr. Larry Woods about selling methamphetamine to Defendant. The State responded that Defendant had methamphetamine in his mouth when he was shot and that Mr. Larry Woods had been indicted for selling methamphetamine at his residence to a confidential informant three months before the present offense. Defense counsel argued that the question violated Tennessee Rule of Evidence 404(b) and 'the Channon Christian Act, which generally prohibits throwing prior bad acts at either a defendant or, in this case, a witness.' The prosecutor responded,

> Your Honor, it's not about impugning character. It's about establishing that Mr. [Larry] Woods has motivation to not be completely honest with what happened that day, and the fact that he is a drug dealer selling drugs from that location would suggest maybe he is not going to be fully cooperative with the police. It would also go to explain how that meth got in [D]efendant's mouth that day and what they were doing there, and so I think it's relevant, and any potential unfair prejudice is minimal to [D]efendant and certainly is outweighed by the probative value.

"Defense counsel responded that Mr. Larry Woods's alleged prior bad acts had not been established by clear and convincing evidence. The trial court overruled the objection and explained,

> Given this is a witness and given the fact that meth has already been shown and proven at the scene and given that there has been shown a good faith basis in regards to the question, the [c]ourt finds that any prejudice is not -- any prejudice is outweighed by the probative value to give a complete story of what was going on at the time of the crime. The [c]ourt will not exclude the evidence because it bears on a material issue aside from character.

"The trial court then allowed the State to introduce the indictments against Mr. Larry Woods for identification purposes only. The trial court explained to Mr. Larry Woods his Fifth Amendment right against self-incrimination, and Mr. Larry Woods stated that he wanted to speak to an attorney before he answered any further questions. The trial court expressed concern about having Mr. Donald Woods, Mr. Larry Woods's son, testify before he understood his Fifth Amendment right against self-incrimination. The trial court recessed for the day so that the witnesses could consult legal counsel.

"The following day, defense counsel renewed his objection to relevance and stated that the defense witnesses' prior bad acts would serve only to 'inflame the jury.' The trial court again overruled his objection. It stated:

> I ruled under rule 404 yesterday that the matter of meth being present was already in front of the jury, so I don't really think the additional question of, was there a meth transaction going on is unfairly prejudicial, and even if it was somewhat prejudicial, the probative value of the question as it gives a complete story of motivations, bias, and other things that involve witnesses and a complete story of the crime, I think it's relevant, so I have repeated most of what I said yesterday."

"Impeachment of Witness Based on Alleged Prior Bad Acts

"Defendant claims the trial court improperly permitted impeachment of defense witness Mr. Larry Woods with prior bad acts of alleged drug dealing. He contends that the court did not substantially comply with the requirements of Tennessee Code Annotated section 24-7-125 and Tennessee Rule of Evidence 404(b) because it made its ruling without hearing any evidence and thus could not have found that the prior bad acts occurred by clear and convincing evidence.

"The State responds that the trial court substantially complied with the procedural requirements of Rule 404(b) and properly exercised its discretion in allowing the State to cross-examine Mr. Larry Woods regarding prior bad acts. It contends that the impeachment evidence was properly admitted to show Mr. Larry's Woods's bias against the State. It also asserts that the probative value of the evidence of prior bad acts outweighed its prejudicial effect because the record already showed Defendant was using methamphetamine at the time of the offense.

"Tennessee Rules of Evidence Rule 404(b)

"Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury's presence;
(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

"In *State v. Stevens*, 78 S.W.3d 817, 837 (Tenn. 2002), our supreme court held that 'a person' for purposes of Rule 404(b) meant only the defendant. In 2014, the General Assembly enacted Tennessee Code Annotated section 24-7-125. The statute and Rule 404(b) were identical, except the for the following italicized language of the statute: '*[i]n a criminal case*, evidence of other crimes, wrongs, or acts is not admissible to prove the character of *any individual, including a deceased victim, the defendant, a witness, or any other third party*, in order to show action in conformity with the character trait.' (emphasis added). Since the enactment of section 24-7-125, two opinions of this court have addressed the impact of section 24-7-125 on Rule 404(b). *See State v. Christian Blackwell*, No. W2018-01233-CCA-R3-CD, 2019 WL 2486228, at *6 (Tenn. Crim. App. June 13, 2019) *perm app. denied* (Tenn. June 5, 2020); *State v. Devin Buckingham*, No. W2016-02350-CCA-R3-CD, 2018 WL 4003572, at *14 (Tenn. Crim. App. Aug. 20, 2018) *perm app. denied* (Tenn. Jan. 16, 2019). In both cases, the trial courts' decisions were based on Rule 404(b), and this court reasoned, citing Tennessee Code Annotated section 24-7-125, that even though our supreme court previously determined that Rule 404(b) applied only to the accused, the rules governing Rule 404(b) now applies to 'any individual.' *Christian Blackwell*, 2019 WL 2486228, at *6; *Devin Buckingham*, 2018 WL 4003572, at *14."

"Clear and Convincing Evidence

"Here, the trial court held a jury-out hearing where it agreed to admit evidence of Mr. Larry Woods's prior bad acts to show the 'complete story,' and it stated that the probative value of the evidence was not outweighed by unfair prejudice. The court allowed the State to cross-examine Larry Woods about whether he sold methamphetamine at the location where the shooting occurred. The court did not state on the record at the time of its ruling that it found the prior bad acts were established by clear and convincing evidence. However, the trial court did make that finding the next day, saying, 'So just for the record, just to make sure that's clear for the record, I find that by clear and convincing evidence, those incidents did happen.' Regardless of its subsequent finding on the day after the 404(b) hearing, the trial court '"had an obligation at the time of the hearing to state on the record whether the prior act was proven by clear and convincing evidence," and, therefore, there was no substantial compliance' with Rule 404(b). *State v. Sexton*, 368 S.W.3d 371, 404 (Tenn. 2012), *as corrected* (Oct. 10, 2012).

"Thus, we conclude that the trial court did not substantially comply with the procedural requirements of Rule 404(b), and we review the trial court's decision de novo. *See DuBose*, 953 S.W.2d at 652; *see also State v. Willie J. Cunningham*, No. 02C01-9801-CR-00022, 1999 WL 395415, at *2 (Tenn. Crim. App. June 15, 1999) (finding that a trial court did not substantially

comply with the requirements of Rule 404(b) where it failed to make a finding of clear and convincing evidence and where there was a dispute as to whether the prior bad act occurred).

"Rule 404(b) Error

"Initially, we note that there is little evidence in the record to support admission of the prior bad acts under Rule 404(b). Officer Wilder testified that he saw a suspicious SUV with 'painted windows' whose occupants walked over to the trailer park where Mr. Larry Woods lived. Moreover, Defendant walked out of Mr. Larry Woods's residence with a baggie with methamphetamine residue in his mouth. However, Mr. Larry Woods and Mr. Donald Woods both denied that Mr. Larry Woods sold drugs from his residence, Mr. Larry Woods asserted his Fifth Amendment right against self-incrimination in response to the State's questions, and the State presented no other evidence to establish any prior drug dealing. Mr. Larry Woods's indictments were admitted for identification purposes only and were not evidence. Moreover, while it is true that evidence of prior bad acts is not limited to criminal convictions, '[i]t is a well settled principle that "indictments are not evidence of the commission of a prior crime."' *State v. Raymond Griggs*, No. W2005-00198-CCA-R3-CD, 2006 WL 1005176, at *6 (Tenn. Crim. App. Apr. 17, 2006) (quoting *State v. Miller,* 674 S.W.2d 279, 284 (Tenn. 1984)), *perm. app. denied* (Tenn. Aug. 21, 2006); *see e.g., State v. Marvin D. Nance*, No. E2005-01623-CCA-R3-CD, 2007 WL 551317, at *11 (Tenn. Crim. App. Feb. 23, 2007) (stating that an arrest, without more, cannot be used to enhance a sentence). The connection is tenuous between the suspicious SUV witnessed by Officer Wilder and Defendant's possessing a methamphetamine baggie in his mouth with the State's assertion that Mr. Larry Woods was a drug dealer. Thus, the evidence was insufficient to satisfy Rule 404(b)(3).

"Even if the State had provided clear and convincing evidence that Mr. Larry Woods was a drug dealer in the past, we cannot see how that information would be relevant to any material issue at trial. Defendant did not dispute that he had methamphetamine in his mouth. Officer Wilder was not present to arrest Defendant on a drug charge but for aggravated assault. That Mr. Larry Woods allegedly sold drugs from his residence in the past does not make it more or less likely that Defendant committed the charged crimes. The evidence of prior bad acts did not 'make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence' because Defendant was not arrested or charged in connection with a drug crime. Tenn. R. Evid. 401. Thus, the evidence did not satisfy Rule 404(b)(2).

"Because the evidence was not relevant, its probative value was not outweighed by its prejudicial effect in impeaching an eyewitness called by the defense. Tenn. R. Evid. 403. The admission of the evidence of prior bad acts served only to 'prove the character' of Mr. Larry Woods 'in order to show action in conformity with the character trait[,]' namely, that Mr. Larry Woods cannot be trusted because he is a drug dealer. Tenn. R. Evid. 404(b). Thus, the evidence does not satisfy Rule 404(b)(4).

"State v. Gilliland and 'The Complete Story'

"Moreover, our supreme court has held that, in terms of Rule 404(b),

> when the [S]tate seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the [S]tate must establish, and the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void

> in the –[S]tate's presentation of its case; (2) the void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

"*State v. Bruce Turner*, No. W2010-02513-CCA-R3-CD, 2012 WL 12303681, at *15 (Tenn. Crim. App. May 25, 2012) (quoting *Gilliland*, 22 S.W.3d at 272). 'Crimes introduced to tell the 'complete story' will rarely be probative of a fact in issue in the trial of the crime charged and, therefore, rarely justify the prejudice created by their admission.' *State v. Darius Alexander Cox*, No. M2017-02178-CCA-R3-CD, 2019 WL 1057381, at *8 (Tenn. Crim. App. Mar. 6, 2019) (quoting Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, *Tennessee Law of Evidence*, § 4.04[13] (6th ed. 2011)). 'Crimes admitted to tell the 'complete story' should be only those 'so inextricably connected in time, place, or manner' that the jury would be baffled by the charged crime without hearing the evidence of the other crime.' *Id.*

"The trial court allowed the evidence of Mr. Larry Woods's prior bad acts for the 'complete story' but made no explicit findings regarding a conceptual void or jury confusion. While evidence of Defendant's use of methamphetamine was relevant to explain why Officer Wilder put his hands on Defendant, it was not relevant where that methamphetamine came from. No void or confusion would have resulted from completely omitting the evidence of Mr. Larry Woods's past arrests. *See Gilliland*, 22 S.W.3d at 272. Thus, we conclude that the trial court erred in allowing the State to question Mr. Larry Woods regarding his alleged prior bad acts under Rule 404(b).

"Bias

"The State argues on appeal that Mr. Larry Woods's prior bad acts were admissible under Rule 404(b) because it showed Mr. Larry Woods's 'specific bias against the State,' which influenced his testimony. Per the State's reasoning, any witness with a criminal record could have their criminal history admitted in a criminal trial, in contravention of the purpose and limits of Rule 404(b) and Tennessee Code Annotated section 24-7-125, because they would have a 'specific bias against the State' due to their prior arrests. *See e.g.*, *Vining v. Taylor*, No. CV 08-419 LH/LFG, 2010 WL 11590670, at *3 (D.N.M. Aug. 10, 2010) ('If the [c]ourt were to accept Defendant's argument that criminal history demonstrates a bias against law enforcement officers, then virtually every plaintiff's criminal history would be admissible to prove bias against law enforcement in nearly every claim against the police, in contravention of Rule 403 and 404(b)'s limitations.'). We reject this reasoning.

"Harmless Error

"The original purpose of Rule 404(b) was to protect a defendant against conviction based on his or her 'overall character' or 'believed propensity to commit crimes[.]' *State v. Jarman*, 604 S.W.3d 24, 49 (Tenn. 2020). In 2014, the General Assembly extended the protections of Rule 404(b) to witnesses. Tenn. Code Ann. § 24-7-125 (2014). Since a trial witness is not in jeopardy of conviction based on his or her 'overall character' or 'believed propensity to commit crimes[,]' the effect of the 2014 statute is to protect a trial witness against challenges to the witness's credibility based on character evidence.

"While the trial court's admission of Mr. Larry Woods's prior bad acts was error, we nevertheless conclude that the error was harmless. Mr. Larry Woods's testimony was improperly impeached by

the admission of prior bad acts; however, Mr. Donald Woods, J.J., and Defendant all testified to virtually the same sequence of events as Mr. Larry Woods. Mr. Donald Woods and J.J. both testified that they did not see Defendant with a gun in his hand and that Officer Wilder shot Defendant within seconds of removing his hand from Defendant's face or neck. Defendant said that he did not pull a gun on Officer Wilder. Each of the eyewitnesses gave far more information under oath at trial than they did in their statements to police, and the jury was free to conclude their testimonies were suspect. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997) (stating that the credibility of witnesses are resolved by the fact finder). The jury clearly rejected Defendant's and the eyewitnesses' accounts and accredited Officer Wilder's account that Defendant pointed a gun at Officer Wilder and pulled the trigger. Thus, the error was harmless."

III. Privileged Communications

A. Attorney-Client Privilege; Requiring List of Company's Customers Who Paid for but Did Not Receive Services (Including Pairing with Bankruptcy Attorneys) Did Not Violate Privilege

In re Law Solutions Chicago LLC, S.W.3d (Tenn. Ct. App., Frierson, 2021), perm. app. denied May 12, 2021.

"On October 9, 2019, Herbert H. Slatery, III, Tennessee Attorney General and Reporter ('the Attorney General'), filed a petition in the Davidson County Chancery Court ('trial court') requesting that the trial court order Upright to comply with a Request for Information ('RFI') issued pursuant to Tennessee Code Annotated § 47-18-106(a). As explained in the petition, the Attorney General had been investigating UpRight for alleged deceptive business practices under the Tennessee Consumer Protection Act ('TCPA') in connection with UpRight's 'advertising and sale of debt relief and legal services to consumers' and had also been investigating UpRight's purported 'unauthorized practice of law.'

"The Attorney General asserted that UpRight paired consumers in need of debt relief services with local bankruptcy attorneys. However, according to the Attorney General, UpRight did not always provide the services for which consumers had paid. The Attorney General sought, within the RFI, a list of Tennessee consumers, including names and addresses ('identifying information'), who had partially paid UpRight's fees but had received no services. The Attorney General also averred that UpRight refused to provide this information, which the Attorney General had deemed relevant to his investigation.

"UpRight filed a response opposing the Attorney General's petition, asserting that it had already produced over 14,000 pages of written documents in addition to searchable data files. UpRight asserted that the identifying information concerning clients who had not yet filed bankruptcy proceedings was protected by the attorney-client privilege and could not be disclosed by UpRight without the clients' consent. UpRight further asserted that it provided many other 'bankruptcy services' to clients aside from the filing of a bankruptcy petition. In support, UpRight filed an affidavit from its associate general counsel attesting to the types of services that UpRight provided to its clients prior to the filing of a bankruptcy petition.

"On December 4, 2019, the Attorney General filed a reply, claiming that the threshold requirements set forth in *U.S. v. Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950), had been met inasmuch as the RFI was within the Attorney General's authority to issue, was not too indefinite,

and was reasonably relevant to the investigation. The Attorney General posited that UpRight had failed to rebut the validity of the RFI.

"On February 14, 2020, the trial court entered a final order. The court determined that the Attorney General had the power to investigate a potential violation of the TCPA and that the person or entity being investigated could be required to 'make available for examination all documentary material and information relevant to the subject matter of the investigation.' *See* Tenn. Code Ann. § 47-18-106(a)(1) (Supp. 2019). As the court noted, although the statute further provided that the respondent could petition the Circuit or Chancery Courts of Davidson County for a protective order, UpRight had failed to seek such relief.

"Moreover, as the trial court recognized, Tennessee Code Annotated § 47-18-106(d) provides in pertinent part:

> Any court of competent jurisdiction in this state, upon a showing by the attorney general that there are reasonable grounds to believe that this part is being, has been, or is about to be violated; that the persons who are committing, have committed, or are about to commit such acts or practices or who possess the relevant documentary material have left the state or are about to leave the state; and that such an order is necessary for the enforcement of this part, may order such persons to comply with subsection (a) whether the attorney general has made a prior request for information or not.

"The court specifically found that UpRight's business practices alleged by the Attorney General's office, if proven, would likely violate the TCPA. The court further determined that the RFI did not appear to seek information that would violate the attorney-client privilege. The court therefore granted the petition and ordered UpRight to produce the information sought. UpRight timely appealed."

"UpRight asserts that the trial court abused its discretion by determining that the client information sought by the Attorney General was not protected by the attorney-client privilege and ordering its disclosure. By contrast, the Attorney General contends that the information sought—the identifying information concerning UpRight clients who paid fees but did not proceed to file a bankruptcy petition—is not protected by the privilege.

"In Tennessee, the attorney-client privilege is codified at Tennessee Code Annotated § 23-3-105 (2009), which provides:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

"Concerning the purpose of the attorney-client privilege, our Supreme Court has explained:

> Sound public policy seems to have required the establishment of the rule that facts communicated by a client to his counsel are under the seal of confidence, and cannot be disclosed in proof. It is a rule of protection to the client, more than a privilege to the attorney. The latter is not allowed, if he would, to break this [s]eal of secrecy and confidence. It is supposed to be necessary to the administration of justice, and the prosecution and defence of

> rights, that the communications between client and their attorneys should be free and unembarrassed by any apprehensions of disclosure, or betrayal. The object of the rule is, that the professional intercourse between attorney and client should be protected by profound secrecy.

"*McMannus v. State*, 39 Tenn. 213 (1858)."

"In this matter, although UpRight concedes that the protections of the attorney-client privilege generally do not extend to the client's identity, it argues that special circumstances exist herein warranting an exception to the general rule. *See Bobo*, 724 S.W.2d at 766. No allegation has been made, of course, that disclosure of the clients' identifying information herein would potentially expose the clients to criminal prosecution. *See id.*; *see also Ex Parte Enzor*, 270 Ala. 254, 117 So.2d 361 (1960); *People v. Sullivan*, 271 Cal. App. 2d 531, 77 Cal. Rptr. 25, *cert. den.* 396 U.S. 973, 90 S.Ct. 463, 24 L.Ed.2d 441 (1969). Instead, the Attorney General's investigation concerns only the business practices of UpRight. UpRight contends, however, that because it only provides bankruptcy services to its clients, disclosure of its clients' identifying information would be tantamount to disclosure of the clients' confidences given to UpRight in seeking representation. *See Bobo*, 724 S.W.2d at 766 ('[A]n exception to the general rule is recognized where unusual circumstances are present, such as ... in situations in which so much has been divulged regarding the legal services rendered or the advice sought, that to reveal the client's name would be to disclose the whole relationship and confidential communications.').

"We are not persuaded that an exception to the general rule permitting disclosure of a client's identifying information would apply in this case. Although UpRight has established, via an affidavit from its associate general counsel, that UpRight's practice exclusively deals with consumer bankruptcy matters, this does not demonstrate that the clients' motives for seeking advice from UpRight or their confidences provided to UpRight are revealed by simple disclosure of their identifying information. Without the provision of information concerning the manner in which UpRight markets its services, it cannot be determined that filing a bankruptcy petition is the only possible motivation for an individual to seek advice from UpRight. In fact, UpRight concedes in its brief that many of its clients never proceed to the point of filing a bankruptcy action and that UpRight provides other services prior to and outside of the act of filing a bankruptcy petition. UpRight has simply failed to demonstrate that 'so much has been divulged regarding the legal services rendered or the advice sought, that to reveal the client's name would be to disclose the whole relationship and confidential communications.' *See Bobo*, 724 S.W.2d at 766. We therefore conclude that the trial court did not abuse its discretion by determining that the information sought by the Attorney General was not protected by the attorney-client privilege.

"UpRight also posits that the trial court failed to consider UpRight's duty to protect privileged client information. Having determined that the information sought is not privileged, we conclude that this issue is moot. In any event, UpRight fulfilled its duty, pursuant to Rule of Professional Conduct 1.6, by making 'reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to, information relating to the representation of' its clients. *See* Tenn. R. Sup. Ct. 8, RPC 1.6(d). UpRight is authorized by RPC 1.6(c)(2) to disclose client information in order to comply with an 'order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law.' Having so asserted the privilege, UpRight has satisfied its duty."

B. Health Care Peer Review Privilege; "Original Source" Exception Permits Admission of Evidence that Doctor Surrendered Privileges at Hospital

Kanipe v. Patel, 623 S.W.3d 298 (Tenn. Ct. App., Swiney, 2020), perm. app. denied Mar. 17, 2021.

"This appeal arises from a health care liability lawsuit. In 2013, Sandra Kanipe ('Ms. Kanipe') died from an undiagnosed aortic dissection while in the care of Dr. Pragnesh Patel, M.D. ('Dr. Patel'). Travis Kanipe ('Mr. Kanipe'), Ms. Kanipe's son, sued Dr. Patel in the Circuit Court for Hamblen County ('the Trial Court'). After a trial, the jury found in favor of Dr. Patel. The Trial Court granted Mr. Kanipe's motion for a new trial on grounds that Dr. Patel had, through his testimony, shifted blame to a non-party despite having never pled comparative fault. After a second trial, the jury found in favor of Mr. Kanipe. Dr. Patel appeals, arguing among other things that he never shifted blame. From our review of the record, we conclude that Dr. Patel did, in fact, shift blame to a non-party when he testified in the first trial that the nurses never notified him of Ms. Kanipe's ongoing chest pain. In view of our Supreme Court's holding in *George v. Alexander*, 931 S.W.2d 517 (Tenn. 1996), the Trial Court did not abuse its discretion in ordering a retrial. We affirm the judgment of the Trial Court."

"Although not stated exactly as such, Dr. Patel raises the following issues on appeal: 1) whether the Trial Court erred in granting Mr. Kanipe's motion for a new trial in the first trial; 2) whether the Trial Court erred in admitting evidence of Dr. Patel's voluntary surrender of his privileges to practice medicine at Morristown-Hamblen Hospital in the second trial; and, 3) whether the Trial Court failed to independently exercise its role as thirteenth juror."

"We next address whether the Trial Court erred in admitting evidence of Dr. Patel's voluntary surrender of his privileges to practice medicine at Morristown-Hamblen Hospital in the second trial. Dr. Patel argues that admission of this evidence violated peer review privilege and lacked any probative value. In response, Mr. Kanipe argues, among other things, that the information falls under the 'original source exception.'

"Regarding evidentiary decisions, 'trial courts are accorded a wide degree of latitude in their determination of whether to admit or exclude evidence, even if such evidence would be relevant.' *Dickey v. McCord*, 63 S.W.3d 714, 723 (Tenn. Ct. App. 2001). This Court has discussed the original source exception as follows:

> To further protect those who participate in a QIC [quality improvement committee] or provide information or testimony to a QIC, the General Assembly mandated that all records of a QIC, including testimony or statements by persons relating to activities of the QIC, are not only confidential and privileged, they are protected from discovery or admission into evidence. Tenn. Code Ann. § 68-11-272(c)(1)....
> ***
> Nevertheless, the HCQIA provides an exception to the above, known as the 'original source' exception. *See* Tenn. Code Ann. § 68-11-272(c)(2). Pursuant to this exception, any information, documents or records that were not produced for use by a QIC, or which were not produced by persons acting on behalf of a QIC, and are available from original sources, are not immune from discovery or admission into evidence even if the information was presented during a QIC proceeding. Tenn. Code Ann. § 68-11-272(c)(2). Furthermore, persons who provided testimony or information to or as part of a QIC are not exempt from discovery and

are not prohibited from testifying as to their knowledge of facts or their opinions. *Id.*; *see Powell v. Community Health Systems, Inc.*, 312 S.W.3d 496, 510 (Tenn. 2010); *see also Stratienko v. Chattanooga-Hamilton County Hosp. Auth.*, 226 S.W.3d 280, 287 (Tenn. 2007) (Holding that, under the TPRL, information that had been furnished to a peer review committee by original sources 'outside the committee' could be obtained directly from the original sources, unless otherwise privileged).

We find it significant that the original source exception to the HCQIA privilege parallels the work product doctrine in many respects. *See* Tenn. R. Civ. P. 26.02(3); *see also* Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 8-1[i] at 8-25 (3d ed. 2009). Like the original source exception, the work product doctrine does not prevent the discovery of facts from the original source of the information. *Id.* § 8-1[i] at 8-26. Thus, while the work product doctrine prohibits a litigant from obtaining from the adverse party its work product, the litigant may obtain substantially the same information directly from the original sources. *See id.* § 8-1[i] at 8-28. Although the HCQIA privilege is problematic, it does not prohibit Dr. Pinkard from obtaining evidence that goes to the heart of the case from the original sources.

"Pinkard v. HCA Health Servs. of Tennessee, Inc., 545 S.W.3d 443, 452-53 (Tenn. Ct. App. 2017) (footnotes omitted).

"Dr. Patel points out correctly that the purpose of peer review privilege is to foster the improvement of healthcare services by protecting the records of QICs from discovery and thereby encouraging frankness in their deliberations. However, the fact of Dr. Patel's surrender of privileges in lieu of an investigation at Morristown-Hamblen Hospital is not, in our judgment, the sort of material the disclosure of which would tend to chill the work of QICs as envisioned by peer review privilege. Mr. Kanipe's attorney found this information on the Tennessee Department of Health website under Dr. Patel's publicly available Practitioner Profile. In addition, the Trial Court instructed the jury that it had to confine its consideration of this evidence to questions of Dr. Patel's competence as an expert witness and his credibility in resolving the factual dispute over the content of the 3:30 p.m. phone call with Nurse Crespo. Evidence of Dr. Patel's surrender of privileges thus was relevant for impeachment purposes. Dr. Patel's later surrender of his privileges at Morristown-Hamblen Hospital was not offered for the purpose of showing that Dr. Patel was negligent in his treatment of Ms. Kanipe. We do not presume without evidence that the jury ignored the Trial Court's limiting instruction. Given this narrowing of what the jury could use the information for, and in view of the original source exception, we find no abuse of discretion in the Trial Court's admission into evidence of Dr. Patel's voluntary surrender of privileges at Morristown-Hamblen Hospital."

C. Crisis Intervention and Response Services Privilege Expanded to Cover Communications with Support Peer

Chapter 245, Public Acts 2021, amending T.C.A. § 24-1-204(a)(1) and (2) eff. July 1, 2021.

"(1) 'Crisis intervention' means a session at which crisis response services are rendered by a critical incident stress management team member or leader prior to, during, or after a crisis or disaster;

"(2) 'Crisis response services' means consultation, risk assessment, prevention interventions, referral, and crisis intervention services provided by a critical incident stress management team to individuals affected by crisis or disaster."

IV. Witnesses

A. Rule 607; Impeachment of One's Own Witness

State v. Kea, No. E2019-00890-CCA-R3-CD (Tenn. Crim. App., Thomas, Mar. 2, 2021), perm. app. denied June 9, 2021.

"The Defendant, Eli Kea, was convicted by a jury of four counts of attempted aggravated robbery, four counts of aggravated assault, one count of reckless aggravated assault, and two counts of reckless endangerment of another by discharging a firearm into an occupied habitation. Thereafter, the trial court merged several of the convictions and imposed an effective ten-year sentence. On appeal, the Defendant contends that (1) the trial court erred in denying his motion to suppress, arguing that the officers lacked reasonable suspicion for an investigatory stop of his vehicle based solely on a general description of the vehicle; (2) the evidence was insufficient to establish his identity as the perpetrator of the episode involving four counts of attempted aggravated robbery and four counts of aggravated assault; and (3) the trial court erred by allowing the State to impeach a co-defendant with a prior statement because the jury was unlikely to consider the prior statement only for credibility purposes given the prejudicial nature of the statement. Following our review, we affirm the judgments of the trial court."

"This case involves three separate incidents that occurred on the east side of Knoxville between the hours of 1:00 a.m. and 3:00 a.m. on January 13, 2017. For these crimes, on July 19, 2017, the Knox County Grand Jury returned a sixteen-count indictment against the Defendant, Richard Wynn, and Destin McMillan based upon their respective involvement."

"Relative to co-defendant McMillan, Investigator Day testified that during her interview, she told him that the Defendant was wearing a red, puffy coat on January 13 when he exited the vehicle and went inside Austin Homes. According to Investigator Day, he was unaware that a red coat had been found inside the PT Cruiser at that time; thus, he had not mentioned anything about a red coat to co-defendant McMillan."

"During the portion of Investigator's Day testimony when he discussed co-defendant McMillan's interview, the trial court instructed the jury several times that co-defendant McMillan's statements on the recording were not to be considered as substantive evidence. Specifically, with regard to the red coat statement, the trial court instructed as follows:

> What she testified to yesterday was that he was wearing a blue jacket. That is the substantive proof. You may consider the fact that she has made this statement on another occasion only as to how it affects her credibility as a witness yesterday. Does everybody understand that distinction? What she testified to yesterday that he was wearing something blue is the proof in front of you."

"The Defendant submits that the trial court erred by permitting the State to impeach co-defendant McMillan with her prior inconsistent statement to Investigator Day that the Defendant was wearing a red coat when he went inside Austin Homes. According to the Defendant, the jury was unlikely to consider the statement only for impeachment purposes and likely viewed it as substantive evidence establishing the Defendant's identity as the perpetrator of the aggravated assaults and attempted aggravated robberies of Mr. Ware and Mr. Jefferson. The Defendant further contends that the trial court's curative instruction to the jury was insufficient to render the error harmless and

inadequate to avoid the prejudicial effect of the prior statement. The State responds that admission of the prior statement was proper as impeachment evidence and that the trial court's instruction significantly limited whatever danger of unfair prejudice accompanied the admission.

"During Investigator's Day testimony, the parties, outside the jury's presence, discussed the admission of co-defendant McMillan's statements that she made in her interview with Investigator Day, statements that were both consistent and inconsistent with her trial testimony. After the trial court found that certain consistent statements were only admissible as corroborative proof and not as substantive evidence, the following colloquy took place:

> [THE PROSECUTOR]: Then also the area about the red jacket. This would be an inconsistent statement because she never identified that red jacket and never said that he was wearing it, but in the statement to Investigator Day she mentioned the red jacket and described it—
>
> THE COURT: How could you put that in though? That's not con—that's not a consistency to what she testified. How would it corroborate anything?
>
> [THE PROSECUTOR]: We submit, your Honor, it would come in at this—that would be the opposite of it. It would be an inconsistent statement from what she said yesterday. She was asked about that. She was allowed—tried, you know, to explain it. She denied making the statement—
>
> THE COURT: If you—the voucher rule doesn't exist, so if you want to question him about the fact she said it previously, you may. But I've obviously got to give the jury a limiting instruction that that is not substantive proof. That what she testified no yesterday is the proof.

"That ended the discussion regarding the statement's admission.

'In *King v. State*, our supreme court adopted the rule that a party can impeach his or her own witness under the following circumstances:

> [A] party is compelled to call an indispensable witness, or a witness that is hostile taking the party by surprise ... but the impeachment of one's own witness is limited to those cases where his testimony is in direct contradiction to his prior statements, and he cannot be impeached where he is merely reluctant to give testimony or unless the testimony is actually prejudicial.

"215 S.W.2d 813, 815 (Tenn. 1948) (quoting *1 Wharton's Criminal Evidence* § 484a (10th ed.)). The ruling in, however, which embodied the voucher rule, is no longer controlling and has been replaced by Tennessee Rule of Evidence 607. *State v. Jones*, 15 S.W.3d 880, 892 (Tenn. Crim. App. 1999).

"Tennessee Rule of Evidence 607 allows a party to impeach its own witness. In addition, Tennessee Rule of Evidence 613 permits impeachment of a witness with a prior inconsistent statement. Under Tennessee Rule of Evidence 803(26), a prior inconsistent statement also may be used as substantive evidence if that statement is otherwise admissible under Rule 613(b) and:

> (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

"Though co-defendant McMillan's inconsistent statement regarding the red coat met the general parameters of both Rule 613(b) and Rule 803(26), there was no discussion regarding the requirements of Rule 803(26) or the requisite finding of trustworthiness required by that Rule. Consequently, co-defendant McMillan's statement about the red coat was not admitted as substantive evidence, and she was questioned about the prior statement for purposes of impeachment only. If a prior inconsistent statement is introduced only for impeachment purposes, 'it is well established that a witness may not be impeached primarily for the purpose of introducing the prior inconsistent statement.' Neil P. Cohen et al., *Tennessee Law of Evidence* § 6.13[2][d] (6th ed. 2011); see *State v. Rayfield*, 507 S.W.3d 682, 698 (Tenn. Crim. App. 2015). This court has recognized that '[i]mpeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony.' *State v. Jones*, 15 S.W.3d 880, 892 (Tenn. Crim. App. 1999) (citing *State v. Roy L. Payne*, No. 03C01-9202-CR-00045, 1993 WL 20116, at *2 (Tenn. Crim. App. Feb. 2, 1993)). In such situations, a jury may 'misuse the statement by considering it as substantive evidence.' Neil P. Cohen et al., *Tennessee Law of Evidence* § 6.13[2][d] (6th ed. 2011).

"There is no evidence in the record that the State was aware at trial that co-defendant McMillan would repudiate her prior statement to Investigator Day relative to the Defendant's wearing a red, puffy coat when he went inside Austin Homes on January 13, 2017. In fact, the State attempted to refresh co-defendant McMillan's recollection at trial with her prior 'testimony' about what the Defendant was wearing when he went inside Austin Homes, but after reviewing it, co-defendant McMillan said that she thought that the jacket 'was like a dark blue though.' She did not recall ever telling Investigator Day otherwise. Here, co-defendant McMillan's prior inconsistent statement spoke directly to the credibility of her recollection of Defendant's clothing on the night of the crimes, and her credibility on this issue was of significant value. 'Nothing in the record suggests that the impeachment "was calculated to and did serve only one purpose which was to put before the jury the out of court statements."' *State v. Deangelo Taylor*, No. W2016-00718-CCA-R3-CD, 2017 WL 2629478, at *6 (Tenn. Crim. App. June 16, 2017) (quoting *State v. Mays*, 495 S.W.2d 833, 837 (Tenn. Crim. App. 1972)) (reaching same conclusion under similar facts). Moreover, the trial court's instruction specifically instructed the jury that the red coat statement was only admissible as impeachment evidence, and it sought to limit any prejudicial impact. The trial court also gave multiple similar instructions regarding the use of co-defendant McMillan's statement. 'The jury is presumed to follow its instructions.' *State v. Young*, 196 S.W.3d 85, 111 (Tenn. 2006). For all of these reasons, the Defendant's argument must fail."

"Upon consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed."

B. Rule 616; Bias or Prejudice of Witness; Petitioner's Former Wife Testifying at Coram Nobis Proceeding

Stewart v. State, No. E2019-00859-CCA-R3-ECN (Tenn. Crim. App., Ogle, Dec. 9, 2020), perm. app. denied Apr. 7, 2021.

"The Petitioner, Michael E. Stewart, filed a petition for a writ of error coram nobis in the Polk County Criminal Court, claiming that newly discovered evidence revealed the investigating officer in his case participated in the bystander jury selection process used at his trial and that the statute of limitations should be tolled. After an evidentiary hearing, the coram nobis court denied the petition. On appeal, the Petitioner contends that our supreme court's rules prevented him from receiving a fair coram nobis hearing by depriving him of an investigator; that the coram nobis court erred by inquiring into the Petitioner's relationship with his 'main' witness at the hearing; and that the coram nobis court should have granted his petition. Based upon our review of the record and the parties' briefs, we find no reversible error and affirm the judgment of the coram nobis court."

"On November 16, 2005, a Polk County Criminal Court Jury convicted the Petitioner of first degree premeditated murder, first degree felony murder, kidnapping, and tampering with evidence. The convictions resulted from the Petitioner's beating Willard Trentham to death during a fight on July 20, 2002. See *State v. Michael E. Stewart*, No. E2007-00841-CCA-R3-CD, 2009 WL 1328871, at *1-7 (Tenn. Crim. App. at Knoxville, May 13, 2009). One of the State's witnesses at the Petitioner's trial was Detective Joe Price, a patrol officer who had responded to the scene and had investigated the case."

"On March 7, 2017, almost twelve years after he was convicted, the Petitioner filed a petition for a writ of error coram nobis, claiming that he was entitled to a new trial because the trial court 'ran out of potential jurors' while empaneling the jury for his trial and had the sheriff 'bring individuals off the street to act as jurors.' The Petitioner further claimed for the first time that one of the officers sent to obtain the additional jurors was Detective Price, who had investigated his case and had testified at trial.

"The Petitioner asserted in the petition for a writ of error coram nobis that on November 18, 2016, he was discussing his case with his then-wife, Ammie Barker Stewart, and that she 'told him the story of Detective Price's actions during the day of selecting the jury.' Specifically, Ms. Stewart told the Petitioner that Detective Price made statements to potential jurors about the Petitioner's guilt. The Petitioner contended that the sheriff's sending out State witnesses to 'round up' potential jurors violated his constitutional right to a fair trial and that Detective Price's statements tainted the jury pool. The Petitioner claimed, 'If these jurors had not been empaneled, the verdict could very well have been different.' He also claimed that he was without fault in failing to present the evidence within one year of his judgments of conviction becoming final because he did not know about Detective Price's statements inside the bank until he discussed his case with Ms. Stewart."

"Ammie Stewart testified for the Petitioner that at the time of his trial, she was working at Peoples Bank in Benton. One day, Detective Price came into the bank and asked if anyone wanted to be on the jury for a murder trial. Ms. Stewart and another teller told Detective Price that they did not know if they could leave the bank. Detective Price talked with Faye McClary, the bank vice president, and McClary gave Detective Price permission for the tellers to leave. Detective Price then spoke with the tellers. Ms. Stewart stated, 'He said it won't take very long if you want -- if y'all want to go. He said it's pretty cut and dry. He's guilty.' Ms. Stewart was certain Detective Price was the person who came into the bank and estimated that he was in the bank for ten or fifteen minutes. She said Detective Price must have been referring to the Petitioner's trial because 'that was the only trial in Polk County at that time.' Ms. Stewart said that at the time of the incident, she knew the Petitioner because they had been 'friends.'

"Ms. Stewart testified that in 2017, she and the Petitioner were talking about his trial. Ms. Stewart told the Petitioner about Detective Price coming into the bank and about what Detective Price had said. She had never mentioned the incident to the Petitioner previously. She explained, '[A]t that time I never knew how any of that stuff worked. So I didn't know if it, you know, played a big part in it. I didn't know if it had anything to do with it.' She acknowledged that after she and the Petitioner started talking, she knew 'he'd had appeals and post-trial procedure[s].'

"At the conclusion of Ms. Stewart's direct examination, the coram nobis court referred to counsel's earlier objection about Ms. Stewart's marriage to the Petitioner and stated that the court thought their relationship 'does go to her general character, potentially the intelligence and respectability of the witness, whether or not this witness has an interest in the outcome of the proceedings, their feelings. And it does go to apparent fairness or bias.' The coram nobis court then questioned Ms. Stewart about her relationship with the Petitioner. The coram nobis court asked if Ms. Stewart and the Petitioner were married, and she said she married him in November 2015. Their relationship began while the Petitioner was in prison and consisted of letters and prison visits. They divorced in March 2018, about one and one-half years prior to the hearing. Ms. Stewart said she thought she told the Petitioner about Detective Price in 2017. The coram nobis court asked if Ms. Stewart still had 'affection' for the Petitioner, and she responded, 'No. We're no longer together.' The court remarked that affection could continue after divorce and asked again if she had affection for the Petitioner. Ms. Stewart said, 'Yeah. I mean, I still care about him, yes.' She said, though, that she no longer communicated with him. The coram nobis court asked if Ms. Stewart remembered the other teller's name, and she answered, 'It was either Alex Brock or Tabitha Roller (phonetic).'

"On cross-examination, the State began asking Ms. Stewart about her dating and marrying the Petitioner while he was in prison. Ms. Stewart acknowledged that she had to undergo counseling from May to November prior to the marriage. At that point, coram nobis counsel objected, arguing that the State's questions were irrelevant. The coram nobis court overruled the objection, stating, 'I think it's very relevant. An individual who chooses to marry someone who is incarcerated for a considerable period of time is not what this court considers to be within the normal frame of human behavior and ... there is a concern about counseling, potential clearness of mind, one's judgment.' Ms. Stewart said that she thought she began visiting the Petitioner in prison in June 2014 and that she had to make a written request to marry him. In her letter requesting permission, she wrote that she and the Petitioner had known each other for approximately twenty-six years, that they had dated for several years when they were young, and that 'God brought us back together.' The letter stated, 'Throughout our separate journeys we have never stopped loving each other and want to spend the rest of our lives together.' Ms. Stewart reiterated that neither she nor anyone she worked with went to the Petitioner's trial."

"Next, the Petitioner claims that the coram nobis court's inquiry into his marriage to Ms. Stewart had 'no bearing on the facts of improper jury selection' and that the coram nobis court improperly found 'that the act of marriage while one party is in prison is itself a factor for determining credibility.' The State argues that it was within the coram nobis court's discretion to decide Ms. Stewart's credibility. We conclude that the Petitioner is not entitled to relief on this issue."

"Tennessee Rule of Evidence 616 provides that '[a] party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness.' Further, '[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.' Tenn. R. Evid. 611(b). This court has held that '[a]ny "feelings that a witness has with regard to a party or issue is an important factor for the trier of fact to

consider in assessing the weight to be given to the witness' testimony.'" *State v. Gilley*, 297 S.W.3d 739, 765 (Tenn. Crim. App. 2008) (quoting *State v. Williams*, 827 S.W.2d 804, 808 (Tenn. Crim. App. 1991)). Thus, the existence of a witness's prior relationship with a defendant is relevant to show bias or prejudice toward the defendant and does impact credibility. See *State v. Jeremy Sims*, No. W2013-01253-CCA-R3-CD, 2015 WL 5683755, at *11 (Tenn. Crim. App. at Jackson, Sept. 25, 2015).

"Turning to the instant case, the coram nobis court found that Ms. Stewart was biased in favor of the Petitioner because she continued to have 'strong feelings' for him after their divorce. We agree with the coram nobis court that Ms. Stewart's feelings for the Petitioner were relevant to show bias. However, the coram nobis court's harsh comments about Ms. Stewart, both at the coram nobis hearing and in its order denying relief, demonstrate that the court's primary reason for finding her not credible was her decision to marry the Petitioner. Pursuant to certain restrictions, though, prison inmates have a constitutional right to marry. See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). Therefore, in our view, the fact that a person has decided to enter into a legal marriage with a prisoner, even one serving a life sentence for first degree murder, is not, per se, a reason for finding that person not credible. In any event, as we will explain below, Detective Price's statements inside the bank were irrelevant to the Petitioner's coram nobis claim."

"Finally, the Petitioner contends that the trial court erred by denying his petition for a writ of error coram nobis and that he is entitled to coram nobis relief because Detective Price, 'an interested official' in his case, 'had a hand in rounding up bystander jurors against the statutes providing the jury selection process.' The Petitioner urges this court to address the constitutionality of his jury selection process 'head on' and to address whether his claims of a tainted jury pool warrant a new trial. The State argues that the Petitioner's petition for a writ of error coram nobis is barred by the one-year statute of limitations; that the Petitioner is not entitled to a tolling of the statute of limitations; and that even if the Petitioner's jury were improperly empaneled, his claim is not cognizable in the context of a petition for a writ of error coram nobis. We are compelled to agree with the State."

"Initially, we note that the coram nobis court did not address whether the statute of limitations should be tolled in this case. The Petitioner is not claiming actual innocence. In fact, he stated at the coram nobis hearing that he only wanted to challenge the process of obtaining the jurors for his trial. Moreover, the Petitioner was aware at the time of trial that police officers brought people into the courtroom from the street to serve as potential jurors. *Michael E. Stewart*, No. E2015-00418-CCA-R3-PC, 2016 WL 3621440, at *7. In April 2014, eight months prior to his post-conviction evidentiary hearing, he learned that one of those officers was Detective Price. Therefore, the Petitioner could have raised the issue on post-conviction, and the process used to obtain the jurors for the Petitioner's trial was not 'newly discovered' for the purposes of tolling the statute of limitations. See Tenn. Sup. Ct. R. 28, § 8(D)(4), (5) (providing that the post-conviction evidentiary hearing 'shall be limited to issues raised in the petition' but that 'the court may allow amendments and shall do so freely when the presentation of the merits of the cause will otherwise be subserved'). Accordingly, we conclude that the statute of limitations should not be tolled in this case.

"We note that at the time of the Petitioner's trial, our Code allowed a trial court to obtain additional jurors by using the 'bystander jury' selection process. See Tenn. Code Ann. § 22-2-308(a)(2) (2005) (providing that 'the judge may, if the judge thinks proper, direct the sheriff to summon a sufficient number [of potential jurors] to complete the jur[y].'"

"In *Coury v. Livesay*, 868 F.2d 842, 844 (6th Cir. 1989), the Sixth Circuit addressed the constitutionality of Tennessee's bystander jury statute and determined that, under the facts of that case, the process used to select prospective jurors was not unconstitutional because neither the investigating sheriff in the case nor his investigating officers participated in obtaining the bystander jurors. The court noted, though, that '[i]t is the participation of an interested official in the juror selection process that is fundamentally unfair' and concluded that an investigating officer should not be allowed to select prospective jurors. *Coury*, 868 F.2d at 844, 845 (quoting *Anderson v. Frey*, 715 F.2d 1304, 1309 (8th Cir. 1983)). However, analysis of the issue must be conducted on a case-by-case basis 'to determine the extent of any actual prejudice caused by the manner in which additional jurors were obtained.' Id. at 845; see *James B. Proctor v. State*, No. 01C01-9011-CC-00307, 1991 WL 136342, at *2 n.2 (Tenn. Crim. App. at Nashville, July 26, 1991) (citing Coury, 868 F.2d at 845).

"Given that Detective Price was an investigating officer in this case and a witness at trial, we agree with the Petitioner that Detective Price should not have participated in the bystander jury selection process and that his doing so may have violated the Petitioner's due process rights. Regardless, an error coram nobis proceeding is not the proper procedural mechanism to remedy violations of constitutional rights; such claims must be raised in post-conviction proceedings. *Nunley v. State*, 552 S.W.3d 800, 829 n.22 (Tenn. 2018). As stated above, the Petitioner could have raised Detective Price's participation in the jury selection process on post-conviction. Furthermore, evidence that Detective Price solicited bystander jurors 'does not qualify as substantive admissible evidence that "may have resulted in a different judgment, had it been presented at the trial."' Id. at 831 (quoting Tenn. Code Ann. § 40-26-105(b)). Accordingly, we must conclude that the coram nobis court properly denied the petition for a writ of error coram nobis."

"Based upon the record and the parties' briefs, we affirm the judgment of the coram nobis court."

V. Expert Testimony; Rules 702 and 703

A. Installer of Gravestones and Owner of Monument Company Qualified to Testify as Expert Regarding Faulty Installation of Headstone

Davis v. Keith Monuments, No. E2020-00792-COA-R3-CV (Tenn. Ct. App., Goldin, Apr. 29, 2021).

"The Plaintiff-Appellant in this matter, Sylvia Davis ('Ms. Davis'), filed a complaint in the Hamilton County Circuit Court as a result of injuries she allegedly sustained while visiting the grave of her deceased brother. According to the complaint, while Ms. Davis was setting flowers at the base of her brother's gravestone, 'the headstone fell over onto [her] hand, breaking several bones, necessitating surgery, and causing severe pain and suffering.' The complaint charged that the named Defendant, 'Keith Monuments,' was 'negligent in the construction, placement, and maintenance of the gravestone.' Further, the complaint asserted that the Defendant 'either created an unsafe condition on the property, or knew or should have known of the unsafe condition through the exercise of reasonable diligence.'

"Following the filing of the complaint, the Defendant moved for summary judgment and asserted that it was entitled to relief based upon the following grounds:

1. Plaintiff can provide no evidence that her injury was foreseeable and that some conduct by Keith Monuments could have prevented the injury.
2. Keith Monuments does not own the property at issue, nor did Keith Monuments manufacture the gravestone.
3. Plaintiff can provide no evidence that Keith Monuments negligently installed the gravestone, thus creating a dangerous condition.
4. Additionally, Plaintiff can provide no evidence that Keith Monuments had notice of the alleged dangerous condition.

"Ms. Davis opposed the summary judgment motion by contending there were genuine issues as to the negligence of the Defendant in its attachment of the headstone to the base of the monument. In relevant part, Ms. Davis argued that the Defendant had used the wrong compound to attach the headstone to the base. Specifically, she pointed to discovery materials indicating that putty had been used as the setting compound and submitted an affidavit from Manny Rico, an installer of gravesite monuments and owner of a monument business for thirty-four years. According to Mr. Rico, putty is not a proper compound to use and, if used, 'it will not hold the monument to the base for a very long time and it is foreseeable that the monument will fall.'

"The Defendant subsequently moved to strike Mr. Rico's affidavit on April 21, 2020. During the ensuing summary judgment hearing that occurred on Monday, April 27, 2020 and for which a notice of hearing was sent on Wednesday, April 22, 2020, the Defendant reiterated its objections to the affidavit, while also voicing an objection to a supplemental affidavit of Mr. Rico filed three calendar days before the hearing, on April 24, 2020. The supplemental affidavit from Mr. Rico was ostensibly offered to address any perceived deficiencies with his first one. Whereas the trial court did not formally enter an order directly dealing with the Defendant's motion to strike, this motion was implicitly denied inasmuch as the court's ensuing 'Memorandum Opinion' granting summary judgment to the Defendant specifically refers to the affidavit. By the same token, it appears that Mr. Rico's supplemental affidavit was also considered; indeed, when describing Mr. Rico's opinion in its summary judgment order, the trial court referred to statements made by Mr. Rico that were only specifically set forth in the supplemental affidavit."

"Whereas the Defendant argues in its appellate brief that Ms. Davis 'failed to provide any evidence linking the installation of the gravestone to [her] injuries,' this assertion is simply not supported by the record transmitted to us on appeal. Ms. Davis marshalled evidence that putty was used by the Defendant to attach the headstone to the monument's base, and she further adduced proof by an experienced monument installer that the use of that substance would result in the headstone eventually falling.

"As to the assertion that putty was used in the monument installation, the Defendant argues that there is no evidence of such a factual proposition. This contention is a spurious one. Evidence does exist to support Ms. Davis' assertion that putty was used by the Defendant. In his January 20, 2020 deposition, Charles McGhee, who was one of the installers of the monument at issue, testified that he did not know the type of setting compound he had used. He did state, however, that the compound he used in 2020 was the same compound he had used for ten years, agreeing that it had always been the same. According to Mr. McGhee, 'It's like a white bucket.' Thus, although Mr. McGhee's testimony clearly indicated that the Defendant had always used the same compound for attaching headstones during the decade in which the subject headstone was installed, he could not shed light onto the specific nature of the compound.

"Subsequent discovery helped Ms. Davis fill in the gap left by Mr. McGhee's memory. In serving a response to Ms. Davis' request for the production of '[a]ny and all invoices for any setting compounds purchased by Keith Monuments from the year 2010 until the present date,' the Defendant attached a single invoice that it had located, which reflected the purchase of 'One bucket of Putty' in 2019. Inasmuch as Mr. McGhee testified that the same substance had always been used when attaching headstones, there is clearly evidence here to support Ms. Davis' assertion at summary judgment that putty was used with respect to the installation of the headstone at issue.

"Although Mr. Rico's affidavit testimony served as evidence that the Defendant's use of putty resulted in the fall of the headstone, the Defendant appears to raise two primary objections to Mr. Rico. First, the Defendant appears to cast aspersions on Mr. Rico's competency to provide testimony as an expert in this case. We do not share the Defendant's concerns, and accordingly, we find no basis to fault the trial court in failing to strike any of Mr. Rico's affidavits from the record. Indeed, as to the Defendant's specific contention that Mr. Rico does not satisfy the standards under Rule 702 of the Tennessee Rules of Evidence, we note that Rule 702 provides that one may be an expert by 'knowledge, skill, experience, training, or education.' Tenn. R. Evid. 702. The record reflects that Mr. Rico has been in the monument business for fifty years. He has not only been an installer of monuments but has also owned his own monument business for thirty-four years. We have no quarrel with the trial court's consideration of his opinions on the proper manner of installing gravestone monuments.

"A second primary concern of the Defendant relates to the trial court's ability to consider the supplemental affidavit from Mr. Rico due to its belated filing with the court three calendar days before the summary judgment hearing. As previously noted, the submission of Mr. Rico's supplemental affidavit appears to have been aimed at curing any perceived deficiencies that arguably accompanied his first one. There is no dispute that Mr. Rico's supplemental affidavit was not strictly filed within the parameters of Rule 56.04, which instructs that the party opposing summary judgment 'may serve and file opposing affidavits not later than five days before the hearing.' Tenn. R. Civ. P. 56.04. Nevertheless, that does not mean the trial court was incapable of considering it in reference to the Defendant's pending motion. '[A] trial court, acting within its discretion, may waive the requirements of [Rule 56] in an appropriate situation.' *Owens v. Bristol Motor Speedway, Inc.*, 77 S.W.3d 771, 774 (Tenn. Ct. App. 2001).

"Here, as we explained in an earlier footnote in this Opinion, the terms of the trial court's order indicate that it considered the supplemental affidavit when ruling on the Defendant's summary judgment motion. We find no abuse of its discretion in its decision to do so, especially considering the fact that the prior affidavit (which essentially spoke on the same matters as the supplemental affidavit) was filed within the time restraints imposed by Rule 56."

B. Reliability and Admissibility

Spearman v. Shelby County Board of Education, No. W2019-02050-COA-R3-CV (Tenn. Ct. App., McGee, Jan. 15, 2021), perm. app. denied May 14, 2021.

"This suit involves an injury sustained by a minor at a track and field tryout at the middle school he attended. The minor's mother brought suit individually and on behalf of her minor child against the county school system and the school board for the minor's injuries and subsequent medical expenses. After a bench trial, the trial court found in favor of the plaintiff and awarded her $200,000

in compensatory damages. The defendants appealed. We affirm the trial court's decisions and remand."

"This suit involves a claim for personal injuries sustained by a minor, Kenji Lewis ('Kenji'), and brought by his mother, Crystal Spearman ('Plaintiff'), under the Tennessee Governmental Tort Liability Act ('the GTLA'). In August 2016, Plaintiff filed a claim for negligence under the GTLA against the Shelby County Board of Education and Shelby County Schools (collectively 'Defendants'). In her complaint, Plaintiff sought to recover for Kenji's injuries, his pain and suffering, his loss of enjoyment of life, his mental anguish, and for medical bills incurred as a result of the incident.

"The events that gave rise to the suit occurred on January 27, 2016, at Geeter Middle School in Memphis, Tennessee. At that time, Kenji was twelve years old and a sixth-grade student at Geeter Middle School. On the day of the incident, track and field tryouts were held in a field behind the school. Marcus Mosby, who at the time was a teacher assistant and track and field coach at the school, was in charge of the tryouts. Approximately 30 to 40 students attended the tryouts, including Kenji. One event that was being held as part of the tryouts was the shot put. The shot put event involves a person holding a heavy metal ball under his or her chin, spinning, and throwing the ball as far as he or she can. Kenji had played a variety of sports, including football, since he was five or six years old. However, prior to the tryouts he had not participated in shot put and was not familiar with the event. Although Mr. Mosby competed in track and field when he was in high school, he did not compete in the shot put event.

"During the tryouts, Mr. Mosby stood approximately 25 feet away from the students. While Mr. Mosby observed, the students took turns throwing a shot put in his direction. Two students stood near Mr. Mosby to help retrieve the thrown balls. The shot put being used during the tryouts was made of metal, approximately the size of an orange, and weighed between eight and ten pounds. Mr. Mosby testified that before a student would throw a shot put, he would make sure the other students were behind the person throwing. At some point during the tryouts, Mr. Mosby stopped the students to demonstrate how to properly throw the shot put. While Mr. Mosby was still standing across from the group of students, he verbally instructed and motioned with his hands for the students to move back. Mr. Mosby testified that prior to throwing the shot put, he also turned and took a few steps in the other direction. Mr. Mosby testified that the group of students was beginning to move back when he turned to demonstrate.

"With his back facing the group of students, Mr. Mosby turned and threw the shot put back toward the group of students, now standing approximately 30 to 40 feet away. Mr. Mosby stated that he intended to have the shot put fall short of the students. However, Kenji did not move farther away and stood approximately five feet closer to Mr. Mosby than the other students. Upon Mr. Mosby releasing the shot put, he immediately realized it was going to strike Kenji. He yelled for Kenji to move, but before Kenji could move, the shot put struck Kenji in the side of his head, causing him to fall to the ground. Kenji testified that he did not see his classmates move backward and did not hear Mr. Mosby instruct them to move back. Prior to being struck by the shot put, Kenji was facing sideways in relation to Mr. Mosby and did not see him throw it towards him."

"Kenji underwent a CT scan shortly after being admitted to the hospital. The initial CT scan revealed that Kenji suffered a depressed skull fracture to the left side of his skull, measuring 4.5 by 4.5 centimeters. The scan showed that Kenji's skull was depressed by 7.5 millimeters. While later scans showed signs of brain damage, the initial scan on January 27, 2016, did not show evidence

of brain damage or swelling to the brain. After receiving the results of the CT scan, Kenji was scheduled for surgery to repair his injury the next morning."

"Amidst the medical care and evaluations that Kenji received, on August 3, 2016, Plaintiff filed her complaint in this case. Plaintiff filed her claims against Defendants under the GTLA, claiming that Defendants are vicariously liable for the negligence of Mr. Mosby. Plaintiff sought actual and compensatory damages for the injuries and expenses sustained by her and Kenji. Defendants jointly answered on September 12, 2016. Several years of litigation and discovery followed before the case was set for trial."

"Along with the headaches and nightmares, Kenji testified regarding other ways the incident has affected him. He stated that it took several months before he was 'back' to his normal routine. While Dr. Klimo cleared him to play football in April 2016, Kenji testified the he began playing again in August 2016. He stated that he now plays football and basketball 'like everybody else,' with no restrictions. Despite his return to sports, though, Kenji still worries about the scar on his head from the surgery. He testified that the scar is still tender to the touch and that other students at his school have made comments about him 'hav[ing] a dent in [his] head.'"

"At the close of Plaintiff's proof, Defendants moved for an involuntary dismissal under Tennessee Rule of Civil Procedure 41.02(2). In doing so, Defendants claimed that Plaintiff failed to show Mr. Mosby acted negligently. Instead, they asserted that Mr. Mosby's actions were intentional, reckless, or grossly negligent. As a result, they claimed that they were immune from liability under the GTLA. The trial court disagreed and denied the motion. After the trial court denied the motion for involuntary dismissal, Defendants rested without putting on proof.

"On October 15, 2019, the trial court rendered an oral ruling in favor of Plaintiff. Two weeks later, it entered a final written order, incorporating the transcript of its oral ruling by reference. In particular, the court found (1) that Mr. Mosby was acting within the scope of his employment at Geeter Middle School at the time of the incident; (2) that Mr. Mosby acted negligently in injuring Kenji; (3) that Mr. Mosby's actions were the actual and proximate cause of Kenji's injuries and damages; and (4) that Defendants are vicariously liable for Mr. Mosby's negligent acts and are not immune under the GTLA. The court further found that no fault should be assessed to Kenji and that Defendants, through Mr. Mosby, were solely liable. The court awarded Plaintiff $200,000 in compensatory damages for Kenji's injuries and medical expenses."

"Defendants argue that the trial court erred in admitting into evidence portions of the transcript from Dr. Klimo's deposition. Thirteen days before trial, Plaintiff filed her designation of deposition testimony for use at trial. Included in her designation were portions of the transcript from Dr. Klimo's deposition. Over Defendants' objection, the trial court allowed the deposition testimony to be read into evidence. Defendants argue that Plaintiff did not prove that Dr. Klimo was 'unavailable' to testify as defined by Tennessee Rule of Evidence 804(a), so his deposition transcript could not be admitted under Tennessee Rule of Civil Procedure 32.01(3). We disagree.

"Tennessee Code Annotated section 24-9-101 states that deponents such as '[a] practicing physician, physician assistant, ... or attorney' are 'exempt from subpoena to trial but [are] subject to subpoena to deposition.' Tenn. Code Ann. § 24-9-101(a)(6). Rule 32.01(3) of the Tennessee Rules of Civil Procedure permits the use of a deposition transcript at trial if the witness is 'unavailable,' as defined by Tennessee Rule of Evidence 804(a). Tenn. R. Civ. P. 32.01(3). Rule 804(a) lists several situations in which a witness may be unavailable to testify. One situation

includes the witness being 'absent from the hearing and the proponent of a statement has been unable to procure the [witness's] attendance by process.' Tenn. R. Evid. 804(a)(5).

"Defendants' argument that the trial subpoena exemption under section 24-9-101 is not a ground for 'unavailability' under Rule 804(a) is simply an erroneous statement of law. Time and again, this Court has held that the term 'unavailable' under Rule of Evidence 804(a)(5) includes a deponent subject to the subpoena exemption under section 24-9-101. *See, e.g.*, *In re Madison M.*, No. M2013-02561-COA-R3-JV, 2014 WL 4792793, at *4 (Tenn. Ct. App. Sept. 25, 2014) (citing *Cullum v. Baptist Hosp. System, Inc.*, No. M2012-02640-COA-R3-CV, 2014 WL 576012, at *3 (Tenn. Ct. App. Feb. 12, 2014)); *Citadel Invs., Inc. v. White Fox Inc.*, No. M2003-00741-COA-R3-CV, 2005 WL 1183084, at *9 (Tenn. Ct. App. May 17, 2005).

"It is clear that Dr. Klimo is a 'practicing physician' and therefore exempt from subpoena to trial under section 24-9-101(a). He is a licensed neurosurgeon in seven different states, including Tennessee. He has been a full-time neurosurgeon since 2010, currently performing surgeries at LeBonheur Children's Hospital in Memphis. His primary focus is pediatric neurosurgery. To no avail, Defendants argue that Plaintiff failed to satisfy the requirements of section 24-9-101(a) because they did not attempt to serve Dr. Klimo with a subpoena to trial. They claim that a party must attempt to serve the witness with a subpoena before the deposition can be admitted, regardless of whether the witness would inevitably exercise the exemption. There is no such requirement in Tennessee.

"The facts related to this issue are analogous to those in *Citadel Invs. Inc. v. White Fox Inc.*, 2005 WL 1183084. In *Citadel Invs.*, a practicing attorney was deposed prior to trial. *Id.* at *8. The parties did not attempt to subpoena the attorney for trial, and the attorney did not appear to testify. *Id.* at *9. Regardless, the defendants in *Citadel Invs.* argued that the attorney's deposition should have been allowed to be admitted into evidence on the basis that he was 'unavailable' under Rule 804(a). *Id.* This Court agreed, stating that 'because he *could have* exercised his exemption as a practicing attorney under [section] 24-9-101,' he was exempt from appearing to testify at trial and his deposition *should have* been admitted. *Id.* (emphasis added).

"Dr. Klimo, just like the attorney in *Citadel Invs.*, was deposed but was not issued a subpoena to testify at trial. *See id.* at *8-9. As a practicing physician, Dr. Klimo was exempt from a trial subpoena regardless of whether he was actually served with a subpoena. *See* Tenn. Code Ann. § 24-9-101(a)(6); *Citadel Invs. Inc.*, at *11. Therefore, the trial court was correct in admitting Dr. Klimo's deposition transcript. He was 'unavailable' to testify under Tennessee Rule of Evidence 804(a)(5) due to his statutory exemption, and because of his unavailability, Plaintiff was permitted to use his deposition transcript under Tennessee Rule of Civil Procedure 32.01(3)."

"Prior to trial, Defendants filed a motion to exclude or limit Dr. Merrill Wise's testimony. The trial court denied this motion, finding that Dr. Wise's knowledge, experience, training, and education would assist the court and that the facts and data relied upon by Dr. Wise was trustworthy. On appeal, Defendants again argue that Dr. Wise is not an expert in pediatric neurology and that his testimony should not have been admitted.

"Tennessee Rules of Evidence 702 and 703 govern the admissibility of scientific proof. *See McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 264 (Tenn. 1997). Rule 702 states, '[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education may testify in the form of an opinion or otherwise.' Tenn. R. Evid. 702. The facts relied upon by an expert may be learned by the expert at or prior to the final hearing. Tenn. R. Evid. 703. 'The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.' *McDaniel*, 955 S.W.2d at 264 (quoting Tenn. R. Evid. 703). 'In general, questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court.' *McDaniel*, 955 S.W.2d at 263 (citing *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993)).

"In accordance with Rule 702 and 703, a trial court applies five non-exhaustive factors in determining whether an expert's testimony is reliable and admissible:

> (1) whether [the] evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether ... the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation.

"*Payne v. CSX Transp., Inc.*, 467 S.W.3d 413, 455 (Tenn. 2015) (alteration and omission in original) (quoting *McDaniel*, 955 S.W.2d at 265). Courts are not required to rigidly apply these factors. *See id.*; *Excel Polymers, LLC v. Broyles*, 302 S.W.3d 268, 272-73 (Tenn. 2009). Instead, the two most important considerations are whether the testimony is reliable and whether it will substantially assist the trier of fact. *Payne*, 467 S.W.3d at 455. Once testimony is admitted, it is then 'tested with the crucible of vigorous cross-examination and countervailing proof.' *McDaniel*, 955 S.W.2d at 265.

"After a thorough review of the record, we agree that Dr. Wise was qualified to testify as a medical expert under Rules 702 and 703. Dr. Wise is a licensed medical doctor in three different states, including Tennessee, and specializes in pediatrics. In the past, he worked first-hand as a child neurologist, treating patients with a wide range of neurological issues, including those that stem from head trauma. He has also held faculty positions at Baylor College of Medicine and the University of Alabama at Birmingham School of Medicine, focusing on neurology. While employed at Baylor College, he held a subspecialty in sleep neurophysiology and epilepsy. Currently he practices in Memphis as a specialist in sleep medicine. Although he is not certified in neurosurgery, he has maintained his board certification in child neurology. As a child neurologist, he testified that it is within his training and expertise to evaluate issues in this case, such as Kenji's susceptibility to future headaches as a result of the incident. Additionally, before forming his opinions in this case, Dr. Wise reviewed Kenji's medical records and performed an independent medical evaluation.

"Dr. Wise was also qualified to testify on Kenji's medical bills. To be qualified to give opinions on the necessity and reasonableness of medical bills, the testifying physician must exhibit: '(1) knowledge of the party's condition, (2) knowledge of the treatment the party received, (3) knowledge of the customary treatment options for the condition in the medical community where the treatment was rendered, and (4) knowledge of the customary charges for the treatment.' *Dedmon v. Steelman*, 535, S.W.3d 431, 438 (Tenn. 2017) (quoting *Long v. Mattingly*, 797 S.W.2d 889, 893 (Tenn. Ct. App. 1990))."

"Based on Dr. Wise's background, knowledge, and experience, the trial court found that the underlying facts and data relied upon by Dr. Wise were reliable and that his testimony would assist

the court in determining the factual issues of the case. Acting as the 'gatekeeper' of evidence, the trial court did not abuse its discretion in deciding whether to allow Dr. Wise to testify with no limitations. *Payne*, 467 S.W.3d at 455 (quoting *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 275 (Tenn. 2005)); *Mabry*, 458 S.W.3d at 909."

"Defendants rely on Tennessee Rule of Evidence 901 for the assertion that Dr. Wise's testimony did not authenticate the medical bills incurred by Plaintiff. Rule 901 states that, in order to be admitted, evidence must be properly authenticated or identified. Tenn. R. Evid. 901(a). Rule 901 also states that a witness with knowledge of the evidence may satisfy the authentication requirement by testifying that the evidence 'is what it is claimed to be.' Tenn. R. Evid. 901(b). On appeal, Defendants appear to argue that only a plaintiff or treating physician can authenticate medical bills and that Dr. Wise did not have firsthand knowledge to testify on the bills. This assertion is a clear misstatement of settled law."

"The medical bills that Plaintiff incurred on behalf of Kenji were proven to be necessary and reasonable. As a result, we affirm the trial court's decision to admit the medical bills at trial."

VI. Hearsay

A. Rule 803(25); Hearsay Exception for Children's Statements

1. Proper to Admit Trustworthy Statements of Four-Year-Old Victim

In re Azhianne G., No. E2020-00530-COA-R3-JV (Tenn. Ct. App., Frierson, Mar. 18, 2021).

"The trial court found that the minor child, Azhianne G. ('the Child'), was dependent and neglected in his mother's care. The trial court also determined that the Child had been severely abused based upon his disclosures of sexual abuse perpetrated by his mother. The mother has appealed. Discerning no reversible error, we affirm."

"On May 9, 2017, the Tennessee Department of Children's Services ('DCS') filed a petition in the Anderson County Juvenile Court ('juvenile court'), concerning the Child. The Child's mother, Barresha T. ('Mother'), and the Child's father, Shaunlee G. ('Father'), were named as respondents. In its petition, DCS sought to transfer legal custody of the Child to his maternal aunt and uncle due to allegations that the Child was dependent and neglected in Mother's care. DCS alleged in the petition that the parents did not live together and that the Child resided primarily with Mother and periodically visited with Father.

"DCS asserted in its petition that it had received a referral on April 28, 2017, concerning allegations that the Child, who was four years of age at the time, was the victim of sexual abuse. DCS conducted a forensic interview with the Child on May 1, 2017, during which the Child made graphic disclosures of sexual abuse perpetrated by Mother. DCS also asserted that there had been allegations of substance abuse by Father. The juvenile court entered a protective custody order on May 15, 2017, placing the Child in the custody of his maternal aunt and uncle and enjoining the parents from contact with the Child."

"Mother contends that the trial court erred by admitting as evidence the video recording of the Child's forensic interview. Prior to trial, Mother had filed a motion seeking exclusion of this

evidence, arguing that the Child's statements made therein lacked trustworthiness. Mother asserted, *inter alia*, that the forensic examiner had been unable to ascertain whether the Child knew the difference between truth and fiction and that there was a lack of corroborating evidence. The trial court denied Mother's request, determining that (1) it was the trial court's duty to evaluate the trustworthiness of the disclosures considering the totality of the circumstances and (2) the Child's disclosures were trustworthy because he had made spontaneous and consistent disclosures of sexual abuse perpetrated by Mother to both the forensic examiner and his treating therapist. Upon our thorough review of the record, we agree with the trial court's decision to admit the video recording of the Child's forensic interview as evidence."

"Statements made by a witness outside of court are generally considered hearsay and are inadmissible pursuant to Tennessee Rules of Evidence 801 and 802. Tennessee Rule of Evidence 803(25), however, provides an exception to the general hearsay rule and allows statements of abuse made by a child under the age of thirteen to be admitted in severe child abuse cases under certain circumstances. Rule 803(25) expressly provides:

> The following are not excluded by the hearsay rule:
> * * *
> (25) Children's Statements. Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

"In the case at bar, the Child was under thirteen years of age and was alleged to be the victim of sexual abuse in a civil action concerning issues of dependency and neglect and severe child abuse. As such, the trial court could properly allow the Child's statements made in the forensic interview to be admitted as an exception to the hearsay rule so long as the 'circumstances indicate[d] trustworthiness.' *See* Tenn. R. Evid. 803(25).

"With regard to trustworthiness, the Advisory Commission Comments provide that 'Courts should carefully consider the motivation of particular minor declarants and also the motivation of some adults to influence children. Also worthy of consideration is the presence or absence of evidence corroborating the hearsay statement. As with all hearsay offered at trial, balancing under Rule 403 is appropriate.' Tenn. R. Evid. 803(25) Adv. Comm'n. Cmt. This Court has further recognized that '[o]ther factors for consideration in assessing trustworthiness may include the circumstances surrounding the statement, such as the child's demeanor and appearance; the time between the statement and the event described; and whether the environment where the statement was made was coercive or suggestive.' *See In re Madison M.*, 2014 WL 4792793, at *8 [(Tenn. Ct. App., Sept. 25, 2014)] (citing Cohen, *Tennessee Law of Evidence* § 8.30[4][a] (5th ed. 2005))."

"Similarly, in the case at bar, the Child made spontaneous disclosures during the forensic interview of sexual abuse by Mother. The Child described the sexual acts and the body parts involved both

by touching his own body and by reenacting the acts with dolls. The Child also utilized language that would not be within a typical four-year-old's vocabulary. The Child described when and where the abuse took place, and he never disclosed any perpetrator besides Mother. Although Ms. McKeehan was unable to thoroughly explain the 'rules' of the interview to the Child due to his limited attention span, the veracity of his statements and actions is apparent from the spontaneous nature of the disclosures. Ms. McKeehan stated that she had no concerns regarding the veracity of the Child's disclosures and that it was not unusual for younger children to be unable to sit through her entire recitation of the rules."

"Ms. Lyle-Joiner, who is an undisputed expert in the treatment of sexual abuse victims, opined that she believed the Child's disclosures to be true because his disclosures were consistent, made in graphic detail, and identified solely Mother as the perpetrator. She reported that the Child was able to describe precisely where and when the abuse occurred and could also relate how it made him feel. Ms. Lyle-Joiner opined that a child who had simply viewed a sexual act would not be able to describe the act as accurately such that the Child's knowledge would corroborate his disclosures of abuse. She further stated that despite working with a number of abused children, she had never heard a child of such a young age utilize the type of language the Child used in his descriptions. Also disturbing was Ms. Lyle-Joiner's account of the Child's stated desire to engage in sexual acts with her, as he similarly expressed during the forensic interview with Ms. McKeehan. Both witnesses related that the Child seemed disappointed by their refusal to engage in sexual activity, and Ms. Lyle-Joiner explained that the Child felt such behavior was normal and seemed to conflate sex with love or bonding.

"As the trial court found, 'the [Child's] disclosures were spontaneous, credible, and very detailed.' The court specifically determined both the forensic examiner and Ms. Lyle-Joiner to be credible witnesses, and the court further found that the disclosures made to each of them were consistent. Following our review of the evidence, we agree and conclude that considering the totality of the circumstances, the trial court did not abuse its discretion in determining the Child's statements made in the forensic interview to be trustworthy."

2. Vastly Inconsistent Statements by Child Lack Trustworthiness; But Admissible

In re Angelleigh R., No. M2020-00504-COA-R3-JV (Tenn. Ct. App., Stafford, May 19, 2021).

"This appeal stems from the circuit court's finding that a child was dependent and neglected. In particular, Mother appeals the trial court's finding that the child was a victim of severe abuse and educational neglect. We reverse the trial court as to both determinations."

"Respondent/Appellant Amanda D.B. is the parent of the child at issue, born in February 2012. In August 2018, Petitioner/Appellee the Tennessee Department of Children's Services ('DCS') became involved with the child due to concerns that the child had fleas in her hair. That case was eventually closed. In October 2018, however, another issue arose that led to the DCS involvement at issue here. Specifically, on October 17, 2018, an incident occurred at the child's school that led DCS to begin an investigation into whether the child had been sexually abused. According to the referral from the child's school, the previous day the child had her hands down the front of her pants at school. When asked why she was doing that, the child stated that she was 'hurting,' that it was 'red down there' and that Mother's boyfriend, James M. ('Boyfriend'), 'was messing with her down there.' When questioned, the child made a similar disclosure to a second teacher and a DCS investigator that Boyfriend had poured hand sanitizer 'down there.' The child also informed a

teacher and the DCS investigator that Boyfriend threatened to 'put hot sauce in my eyes, he don't like me anymore and he told me to go away.'"

"A videotaped forensic interview with the child occurred on or about October 22, 2018. The child is somewhat difficult to understand in the video. It is clear, however, that the child repeatedly informed the interviewer that Boyfriend had put hand sanitizer on her private area. The child's gestures made clear that she was not referring to her toe, as she pointed specifically to her groin area and indicated that Boyfriend pulled down her pants to do so. The child stated that she told Boyfriend no, but that he performed the act anyway, while wearing gloves. The child further stated that Boyfriend also poured hot sauce on that area. The child initially said that the hand sanitizer incident happened once, but then goes on to mention the hand sanitizer and hot sauce incidents as if they perhaps happened together, variously describing them as having happened on 'Friday, Saturday, and 100 days,' 'Friday, Saturday, and Sunday,' and '100 times.' Upon being asked multiple times by the forensic interviewer only about the hand sanitizer incident (not the hot sauce), the child explained that it occurred during the night while Mother was sleeping. The child later stated, however, that Mother woke up and she informed Mother of the incident. The child responded variously that Mother did not care and that Mother 'ground' Boyfriend and put hot sauce in his eyes. The child discussed the hot sauce allegations at times while literally standing on her head. The child also stated that the police said that someone touched her, but she stated that no one touched her."

"Thus, the trial court found that the child was the victim of severe abuse by Boyfriend."

"We next turn to consider whether clear and convincing proof exists to support a finding that the child was a victim of severe abuse under section 37-1-102(b)(27)(C). The evidence in this case to support the severe abuse finding consists largely of disclosures the child made to various individuals in the fall of 2018. There is no evidence that there was a witness to the abuse and no physical evidence was presented to substantiate the allegations. Of course, this Court has previously held that a child's disclosures of sexual abuse 'are not rendered untrustworthy simply because there was no eyewitness to the abuse, and no physical evidence to confirm that it occurred.' *In re Madison M.*, No. M2013-02561-COA-R3-JV, 2014 WL 4792793, at *14 (Tenn. Ct. App. Sept. 25, 2014); *see also In re Azhianne G.*, No. E2020-00530-COA-R3-JV, 2021 WL 1038208, at *9 (Tenn. Ct. App. Mar. 18, 2021) (citing *In re Madison*, 2014 WL 4792793, at *14). In such a situation, the issue of whether the child's statements are trustworthy is for the trial judge to decide. *Id.*

"Here, the trial court's finding of severe abuse largely rested on its assessment of witness credibility. A DCS investigator and two of the child's former teachers testified about the disclosures made to them, while Mother and Boyfriend testified that the alleged abuse did not occur. The trial court's determination of the credibility of each of these witnesses is entitled to great weight on appeal. *See In re Samaria S.*, 347 S.W.3d 188, 200 (Tenn. Ct. App. 2011) ('Findings of fact based on witness credibility are given great deference and will not be disturbed absent clear evidence to the contrary.'); *In re Melanie T.*, 352 S.W.3d 687, 702 (Tenn. Ct. App. 2011) ('When the trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference is accorded to the trial court's factual findings.'). Nothing in the record indicates that the trial court erred in assessing the credibility of the witnesses that were present before it. Indeed, there is no dispute that the child did indeed make these disclosures to the DCS investigator, the forensic interviewer, and two teachers. Moreover, there is no real dispute that the child was suffering from irritation in her private area on the date that she made the initial disclosure. The central question in this case, however, is whether the child's disclosures that

indicated that this discomfort was due to abusive conduct by Boyfriend are trustworthy. Moreover, because these disclosures make up essentially the sole proof to show that Boyfriend committed severe abuse, we must evaluate the disclosures to determine whether they provide clear and convincing evidence to support the severe abuse finding.

"Importantly, the trial court did not hear proof directly from the child, but only heard the child's disclosures through the statements of others and the video-recorded forensic interview. In this situation, the trial court cannot 'insulate [its] findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness.' *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512, 84 L. Ed. 2d 518 (1985). 'Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it.' *Id.* Indeed, 'appellate courts are not required to give [ ] deference to a trial court's findings of fact based on documentary evidence such as depositions, transcripts, or *video recordings.*' *Kelly v. Kelly*, 445 S.W.3d 685, 693 (Tenn. 2014) (emphasis added) (citing *Mitchell v. Fayetteville Pub. Utils.*, 368 S.W.3d 442, 448 (Tenn. 2012)). As our supreme court explained:

> When findings are based on documentary evidence, an appellate court's ability to assess credibility and to weigh the evidence is the same as the trial court's. Accordingly, when factual findings are based on documentary evidence, an appellate court may draw its own conclusions with regard to the weight and credibility to be afforded that documentary evidence.

"Id. (citations omitted).

"Respectfully, the trial court's finding that the child's statements were 'consistent' is undermined by our de novo review of the forensic interview video, which reveals multiple 'internal[ ] inconsisten[cies]' in the child's disclosures. *Anderson*, 470 U.S. at 575, 105 S.Ct. 1504. While it is true that the child made similar disclosures to her teachers and the DCS investigator, her disclosures during the forensic interview were numerous and varied. For example, although the child initially stated that Boyfriend had used hand sanitizer on her private area, she later amended this statement to state that he also used hot sauce on this area as well. Upon being asked what the hand sanitizer looked like, the child said it was blue. Later, when the forensic interviewer asked her if the hand sanitizer was blue, she said it was green. The child also mentioned that Boyfriend used or threatened to use hot sauce on her eyes to the DCS investigator and her former teacher. DCS argues that the child's repeated statements to various people regarding the hand sanitizer incident lend that allegation an indicium of reliability. We would expect, then, that DCS would assign similar credence to the child's spontaneous allegations concerning the use of hot sauce on her body, which allegations were likewise repeated to multiple individuals. *Cf. In re Melanie T.*, 352 S.W.3d at 702 (noting that consistent statements made over a period of time to different people 'may constitute clear and convincing evidence' of sexual abuse, especially when coupled with other evidence) (discussed in detail, *infra*). DCS, however, does not seem to take these allegations concerning the hot sauce seriously—while hand sanitizer is mentioned fourteen times in DCS's brief, hot sauce is mentioned only once and, even then, only in the context of the child's initial statement to the investigator that Boyfriend threatened to put hot sauce in her eyes. DCS's choice to omit these allegations from its brief suggests their position that the child's allegation that Boyfriend put hot sauce on her private area had so little credibility or veracity as to not bear mentioning.

"Moreover, this was not the only mention of hot sauce by the child. Instead, her other remarks about hot sauce illuminate additional inconstancies in her disclosures. For example, when asked whether Mother was aware of the alleged abuse and what her reaction was, the child gave three different answers: (1) that Mother slept through the abuse; (2) that Mother awoke and learned of the abuse, but did not care; and (3) that Mother awoke and learned of the abuse, and then 'ground' Boyfriend and put hot sauce in his eyes. Despite the child stating that Mother was aware of the abuse in some of her statements, DCS does not argue in this case that Mother committed severe abuse by knowingly failing to protect the child from Boyfriend's alleged abuse. Indeed, DCS goes so far as to argue that Mother cannot contest the severe abuse finding because it was not relevant to her. As such, DCS again appears to discount some of the child's statements, while relying heavily on others.

"The child's explanation of how often the alleged abuse occurred was also not consistent. First, the child indicated that the alleged abuse occurred only a single time at night. The child later stated that Boyfriend had poured both hand sanitizer and hot sauce in her private area 'Friday, Saturday, Sunday,' and also '100 days' and '100 times.'

"Moreover, the sexual abuse allegations were not the only allegations made by the child in the forensic interview. The child alleged that her former teachers were going to jail in part because they kicked her. And the child alleged that Boyfriend had not only killed eighteen cats and stomped on her stomach, but had killed and dismembered their neighbor before burying him in the yard. DCS again declines to discuss these allegations in its brief, suggesting its position that these allegations should not be given weight in determining whether Boyfriend committed severe abuse against the child. DCS's witnesses also did not fully reckon with these inconsistencies, stating that they could not remember the child's varied allegations or that the child could have been telling the truth in all instances depending on the circumstances.

"DCS does not cite a single case wherein we have affirmed a finding of severe abuse under similar circumstances. Our own review of the caselaw shows a multitude of cases that have affirmed severe abuse findings without witnesses or physical evidence, but these cases are not analogous to the case-at-bar. For example, in *In re Madison M.*, No. M2013-02561-COA-R3-JV, 2014 WL 4792793 (Tenn. Ct. App. Sept. 25, 2014), the child disclosed to her teacher that her stepfather had touched her private area. *Id.* at *10. The child's teacher testified that the child touched her private area daily at school and that she believed that the child knew the difference between truth and 'non-truth.' The child's school counselor confirmed that the child complained that her private area hurt on several occasions. The child later repeated these allegations during a forensic interview. The child was generally consistent that her stepfather was the perpetrator, but once named her three-year-old brother. A former preschool teacher testified that the child never had issues with lying. Finally, a licensed clinical psychologist testified that the child made the same allegations consistently against stepfather during their sessions, that the child could demonstrate the abuse, and that her behavior when discussing the abuse was avoidant, which was 'congruent with the allegations of sexual abuse.' *Id.* The psychologist also opined that the child's statements were credible, despite sometimes not answering objective questions truthfully, due to the consistency of the allegations over three sessions, –as made verbally, acted out, and in drawings.

"On appeal, the stepfather argued that the child could not distinguish between the truth and a lie. *Id.* at *13. He therefore asserted that the trial court should not have admitted her statements under Rule 803(25) of the Tennessee Rules of Evidence. Although we conceded that the child had difficulty distinguishing between truths and lies and had once alleged that her three-year old brother

was the perpetrator of the abuse, we concluded that 'the overall circumstances present in this case indicate trustworthiness[.]' *Id.* In support, we noted that although there were 'slight variances' in the child's disclosures, the child was generally consistent in her allegations against stepfather and was 'unmistakably clear in communicating the details of the abuse to several people.' *Id.* We also noted that no evidence was presented of a motive for the child to be untruthful. Moreover, the child's teacher, guidance counselor, and psychologist testified that they believed the allegations. Based on the child's statements and the other testimony presented, we affirmed the trial court's finding that there was clear and convincing evidence of severe abuse. *Id.* at *14.

"We came to the same conclusion in *In re Azhianne G.*, No. E2020-00530-COA-R3-JV, 2021 WL 1038208, at *1 (Tenn. Ct. App. Mar. 18, 2021). In that case, a four-year-old child made spontaneous disclosures of sexual abuse to both a forensic interviewer and a treating therapist. *Id.* at *2. Indeed, the evidence showed that during both the forensic interview and later therapy sessions, the child was able to specifically and graphically describe the sexual abuse in detail, both by reenacting the abuse and using anatomical language that was beyond a typical four-year-old's vocabulary. *Id.* at *5. At all times, the child named the mother as the sole perpetrator. *Id.* at *5–6. As such, both the forensic interviewer and the therapist testified that the child's allegations were credible. The evidence further showed that the child had severe behavioral issues, including aggression, sexualized behavior, and violence to others and animals. *Id.* at *2. Indeed, the child stated a desire to engage in sexual acts with both his therapist and the forensic interviewer and was disappointed by their refusal. *Id.* at *6. Under these circumstances, we held that the child's statements were trustworthy under Rule 803(25). *Id.* at *6. We further held that 'the [c]hild's age at the time and the consistency and spontaneity of his disclosures of abuse, coupled with his obvious knowledge of terms and feelings associated with sexual acts and body parts and his unwavering identification of [m]other as the perpetrator' provided clear and convincing proof to establish severe abuse. *Id.* at *8."

"In this case, the child did make spontaneous disclosures that Boyfriend used foreign substances on her private area to multiple individuals. These disclosures unequivocally named Boyfriend as the perpetrator. These facts certainly lend credence to the allegations of severe abuse. *See In re Azhianne G.*, 2021 WL 1038208, at *8 (noting as support for the severe abuse finding that the child was 'unwavering' in his identification of mother as the perpetrator of the abuse). . . . Still, the child also said that Boyfriend did not hurt her and that no one touched her. Furthermore, none of the above cases involve the type and frequency of inconsistencies as to other details of the alleged abuse that are present here. Here, the child was not consistent in detailing the instrumentality of the abuse—be it hand sanitizer or hot sauce; the frequency of the abuse—from one instance to '100 days'; or whether her mother had knowledge of the abuse—which ranged from not knowing to not caring to punishing Boyfriend."

"Moreover, there was no expert medical or psychological proof of any kind submitted to substantiate the child's allegations in this case. *But see In re Madison M.*, 2014 WL 4792793, at *14 (noting that physical proof is not always necessary). Importantly, unlike some of the above cases, there was no expert testimony in this case that the child was able to distinguish between truth and untruth. *See, e.g.*, *In re Azhianne G.*, 2021 WL 1038208, at *1. While the child's former teachers and the DCS investigator testified that they believed the child about the hand sanitizer allegation, they often deflected when questioned about the child's other allegations. The forensic interviewer did not testify or offer any expert opinion about the truth of the child's allegations or her veracity. As such, it is rank speculation to suggest that due to the length of the interview or other circumstances, the child's initial statements are to be given weight, while the other allegations that

she makes throughout the entirety of the interview are to be discarded. And the child did not make any disclosures of abuse to Dr. Saunders that he could evaluate for their veracity. The omission of proof as to the child's ability to distinguish between truth and untruth is especially relevant in this case because the evidence was undisputed that the child had been diagnosed with developmental delays that affect her behavior; even the DCS investigator conceded that it would not be unusual for a child in that situation to make up stories and that the child at issue indeed had a 'propensity' to do so, as she often had difficulty distinguishing between the truth and facts created by her imagination. In light of the omission of this evidence coupled with the other incredible allegations in the forensic interview, we must conclude that substantial doubts about the child's ability to understand the difference between truth and untruth exist in this case.

"This case is distinguishable from the above cases in other ways. First, there was not expert testimony that the child was behaving in a way or suffering from issues that were typical of children who were the victims of sexual abuse. *See In re Madison M.*, 2014 WL 4792793, at *10 (relying in part on testimony that the child's behavior was consistent with having experienced sexual abuse); *In re Melanie T.*, 352 S.W.3d at 702 (relying in part on testimony by an expert that the children suffered from disorders that were typical of victims of child sexual abuse and also exhibited sexual behaviors). Ms. Urvan in fact testified to the opposite—that she had not observed any sexually reactive behaviors of any kind in her time with the child. Nor did the evidence show that the child has sexual knowledge inappropriate for her age. *See id.* Indeed, unlike the child in *In re Azhianne,* who used graphic language far beyond what was age-appropriate, the child here did not utilize such language; when asked to name her private area on a drawing, the child consistently stated that this area was the 'intestines.' *In re Azhianne*, 2021 WL 1038208, at *6."

"Despite our reluctance to overturn the decision of the trial court given the serious nature of the allegations at issue, we must conclude that clear and convincing evidence was not presented to support the allegation of severe abuse. Here, the claim of severe abuse rests nearly exclusively on disclosures made by the child to third parties. The trial court found the testimony of various witnesses to whom these disclosures had been made credible. Nothing in the record suggests that the trial court was in error in accepting this testimony. The issue in this case is not whether the child made these disclosures, but whether the disclosures produce a firm conviction of the truth of the allegations. *See In re S.J.*, 387 S.W.3d at 586 (citing *In re A.T.P.*, 2008 WL 115538, at *4). And here the disclosures themselves are suspect, riddled as they are with inconsistencies, exaggerations, and obvious fabrications that DCS chooses to ignore rather than address. Thus, this is not the case where a child's consistent allegations are rebutted by only a single instance of a false allegation. *See In re: M.D.*, 2016 WL 5723954, at *4."

B. Rule 804(b)(2); Dying Declaration

State v. Taylor, No. W2020-00437-CCA-R3-CD (Tenn. Crim. App., Dyer, Apr. 20, 2021).

"A Madison County jury convicted the defendant, Braxton Levar Taylor, of second-degree murder and unlawful possession of a firearm for which he received an effective sentence of twenty-five years' incarceration. On appeal, the defendant argues the trial court erred in denying two, pre-trial motions to suppress the victim's dying declaration, wherein the victim named the defendant as his shooter, and a photographic lineup which contained his picture and resulted in two witness identifications. The defendant also argues the trial court erred by failing to provide a jury instruction concerning the victim's dying declaration and in sentencing. Following our review of the briefs, the record, and the applicable law, we affirm the judgments of the trial court."

"On January 28, 2018, the defendant fired numerous shots at the victim, Daithan Cobb, in Madison County, Tennessee. Several law enforcement officers and paramedics responded to the scene of the shooting, including Sergeant Donald Laux of the Jackson Police Department. While the victim was being treated by paramedics, Sergeant Laux asked the victim who shot him, and the victim named the defendant. As the investigation progressed, Sergeant Laux developed the defendant as a suspect, created a photographic lineup containing the defendant's picture, and presented the lineup to two witnesses, Meribeth Holt and Josh Steiner. Both Ms. Holt and Mr. Steiner separately identified the defendant in the lineup. On February 11, 2018, the victim died from the injuries he suffered as a result of the shooting, and a Madison County Grand Jury subsequently indicted the defendant for first-degree murder (count 1) and unlawful possession of a firearm (count 2). Prior to trial and pertinent to this appeal, the defendant filed motions to exclude the 'alleged "dying declaration" of [the] victim' and to suppress the photographic lineup used in the investigation. The trial court addressed the defendant's motions in separate hearings."

"The defendant filed a motion in limine 'to exclude from evidence any testimony or reference to the victim's alleged "dying declaration" identifying the [d]efendant as his killer.' The defendant argued 'there is no indication that [the victim] was under the belief that his death was imminent on January 28, 2018, when he told law enforcement that the [d]efendant was his assailant.' As a result, the defendant asserted the statement did 'not meet the strict requirements of Rule 804(b)(2) of the Tennessee Rules of Evidence,' the dying declaration exception to the rule against hearsay. The State disagreed, and presented evidence regarding the admissibility of the victim's statement at the hearing.

"Jackson Police Department Captain Jeff Shepard responded to the shooting on January 28, 2018. When he arrived, Captain Shepard found the victim lying in an alleyway behind the La Paree Apartments in Jackson, Tennessee. Patrol officers were attempting to render aid to the victim who had been shot several times in the torso. Captain Shepard noticed blood and stated the victim was sweating and having trouble breathing. The victim was quickly placed in an ambulance where he continued to receive medical attention.

"Sergeant Laux soon arrived on the scene, and Captain Shepard asked Sergeant Laux if anyone had questioned the victim as to who shot him. Because Sergeant Laux did not know if anyone had questioned the victim, the two approached the ambulance in order to do so. Captain Shepard saw that the victim was sweating, violently shaking, and breathing through an oxygen mask, and heard Sergeant Laux ask the victim who shot him. According to Captain Shepard, the victim 'looked very scared. His eyes got real (sic) wide. It was difficult for [the victim] to speak, but he got out, Braxton Taylor.' Paramedics then left the scene with the victim as he was in critical condition.

"Captain Shepard testified that during his twenty-seven years in law enforcement, he has frequently encountered victims of gunshot wounds, is familiar with the severity of such wounds, and has seen someone die in his presence. When asked if he believed the victim was in fear that his death was imminent when answering Sergeant Laux's question, Captain Shepard responded, '[a]bsolutely.' Captain Shepard also noted the victim's voice was 'broken, raspy, like it was difficult to speak,' but the victim did not lose consciousness while on the scene."

"Dr. Michael Allen Revelle treated the victim in the emergency room of Jackson-Madison County General Hospital immediately after the shooting. Upon arrival, the victim was alert, having trouble breathing, and complaining of chest pain and pain around his gunshot wounds. Dr. Revelle noted the victim suffered five gunshot wounds to the left leg and torso, including the chest, abdomen, and

flank area. Dr. Revelle classified the victim's injuries as life-threatening and his condition as critical as there was a high likelihood the victim could die from the injuries. Furthermore, Dr. Revelle agreed the victim was on the verge of death when he arrived at the hospital but medical interventions and the proximity of the crime scene to the hospital prevented the victim from dying sooner."

"Upon its review, the trial court denied the defendant's motion in limine, both orally and in writing, finding the victim's statement qualified as a dying declaration under the exception to the rule against hearsay. Tenn. R. Evid. 804(b)(2). The State proceeded to trial with this evidence."

"The defendant asserts the trial court erred in denying his motion to suppress the victim's statement wherein he named the defendant as his shooter, arguing the statement did not meet the requirements of the dying declaration exception to the rule against hearsay. Generally, hearsay 'is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Tenn. R. Evid. 801(c). Though hearsay is not admissible evidence, certain exceptions to the rule against hearsay exist. One such exception allows for the admission of a statement made under the belief of impending death, otherwise known as a dying declaration. Tenn. R. Evid. 804(b)(2). This exception provides: 'In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.' *Id.* 'The rationale for this hearsay exception is that one facing imminent death will be truthful for fear of "eternal consequences."' *State v. Hampton*, 24 S.W.3d 823, 828 (Tenn. Crim. App. 2000) (quoting Neil P. Cohen, et al., *Tennessee Law of Evidence,* § 804(b)(2.1) at 599 (3d ed.1995)).

"This Court has stated that in order for a statement to be admissible as a dying declaration, five elements must be met:

(1) The declarant must be dead at the time of the trial;
(2) the statement is admissible only in the prosecution of a criminal homicide;
(3) the declarant must be the victim of the homicide;
(4) the statement must concern the cause or the circumstances of the death; and
(5) the declarant must have made the statement under the belief that death was imminent.

"Id. at 828-29 (citation omitted). Thus, the dying declaration exception requires that 'the declarant must have a "fixed and solemn belief that death is inevitable and near at hand."' *Id.* at 829 (quoting 41 CJS *Homicide* § 274 (1991)). The final element 'provides the indicia of reliability and truth that justifies admission of the statement.' *State v. David Smith*, No. W2009-02002-CCA-R3-CD, 2010 WL 2482326, at *6 (Tenn. Crim. App. June 17, 2010) (citation omitted). However, 'it is not necessary that the declarant state unequivocally a belief that death is imminent.' *Id.* (citing *State v. Maruja Paquita Coleman*, No. 01C01-9401-CR-00029, 1997 WL 438169, at *5 (Tenn. Crim. App. July 31, 1997) (footnotes omitted), *perm. app. denied* (Tenn. Apr. 13, 1998)). 'Awareness of impending death has been inferred from the language and condition of the declarant, the facts and circumstances surrounding the statement, and medical testimony concerning the seriousness of the victim's condition.' *Id.*

"Here, the defendant does not challenge the first four elements as a bar to the admissibility of the victim's statement, and the record makes clear these elements were met. Rather, the defendant argues the victim did not believe his death was imminent when he named the defendant as his

shooter, and thus, the statement cannot satisfy the last element required for admissibility as a dying declaration. *Id.* at 828-29. We, however, disagree as the record is replete with evidence supporting the trial court's determination that the victim believed his death was imminent when he made the statement.

"In examining the admissibility of the victim's statement as a dying declaration, the trial court stated:

> The [c]ourt found that based on the circumstances, the victim's identification of [the defendant] as the shooter qualifies as a [d]ying [d]eclaration. The victim did ultimately die from his injuries, is clearly unavailable for trial, this is a criminal homicide prosecution, the declarant is the victim, the statement concerned the manner and circumstances surrounding his death, and based on all the evidence at the hearing, it was made while the victim was under the belief his death was imminent.

"We agree with the trial court's assessment. The record includes testimony from Officer White, Sergeant Laux, Captain Shepard, Dr. Revelle, and Dr. Van Pelt regarding the victim's condition after the defendant shot him four times. Upon his arrival to the scene, Officer White stated the victim was fading in and out of consciousness, was in shock, and was bleeding heavily from multiple gunshot wounds. Officer White believed the defendant was suffering from serious injuries, and the victim was moved to an ambulance for additional medical attention.

"While in the ambulance, Captain Shepard observed the victim, stating the victim was in a grave condition, looked scared, was sweating and shaking, and was struggling to breath. Sergeant Laux stated that as the victim received medical attention in the ambulance, the victim appeared to be in distress, looked concerned, scared, and worried, and was using an oxygen mask. At this point, Sergeant Laux asked the victim who shot him, and the victim named the defendant. No additional questions were permitted as paramedics quickly left the scene in order to transport the victim to the nearest hospital.

"When the victim arrived at the hospital, Dr. Revelle stated he was in critical condition with life-threatening injuries as a result of four gunshot wounds. Dr. Revelle provided life support treatment, which included intubation, before transferring the victim to a Level 1 trauma center where he subsequently died. Dr. Van Pelt testified the victim died from the gunshot wounds despite significant medical intervention. Accordingly, we conclude that the trial court did not err in admitting the victim's statement into evidence under the dying declaration exception to the rule against hearsay.

"In support of his argument, the defendant asserts that the victim did not lose consciousness while on the scene, Captain Shepard and Sergeant Laux gave varying accounts as to whether the victim was shaking or sweating, Sergeant Laux did not observe any blood when talking to the victim nor could he 'determine the source of [the victim's] injuries,' and the victim's 'medical condition at the hospital supports a finding that [the victim's] death was not imminent.' We again disagree as the evidence showed that at the time of the statement, the victim had been shot four times, was in shock, having trouble breathing, was bleeding, and was fading in and out of consciousness. The victim received medical attention on the scene and required additional medical treatment in the emergency room of Jackson-Madison County General Hospital and from a Level I trauma center prior to his death. Though he died in the weeks following the shooting, Dr. Revelle indicated that the proximity of the crime scene to the hospital and the treatment provided by both the paramedics

and emergency room personnel prevented the victim from dying sooner. From these facts and circumstances, it can be inferred that the victim believed his death was imminent when he made the statement to Sergeant Laux. As such, the trial court did not err in admitting the statement as a dying declaration, and the defendant is not entitled to relief."

C. Rule 804(b)(3); Statement Against Interest; Statement Tended to Subject Declarant to Criminal Liability

State v. Owens, No. M2020-00132-CCA-R3-CD (Tenn. Crim. App., Glenn, June 16, 2021).

"The Defendant, Demetrie Darnell Owens, was convicted by a Marshall County Circuit Court jury of two counts of simple possession of cocaine, Class A misdemeanors; possession of cocaine within 1000 feet of a school or park with intent to sell, a Class B felony; attempted possession of cocaine with intent to deliver, a Class C felony; two counts of simple possession of Xanax, Class A misdemeanors; two counts of simple possession of methamphetamine, Class A misdemeanors; simple possession of marijuana, a Class A misdemeanor; and simple possession of Suboxone, a Class A misdemeanor. He was sentenced to an effective term of twenty years in the Department of Correction. On appeal, the Defendant argues that: (1) the trial court erred in allowing a State's witness to testify concerning statements and text messages made by an unavailable witness; (2) the State committed prosecutorial misconduct during closing argument; (3) the trial court's instruction that two individuals were accomplices as a matter of law amounted to a comment on the proof; and (4) the evidence is insufficient to sustain his convictions. After review, we affirm the judgments of the trial court."

"There was a prior agreement between the parties that the State would not introduce the contents of the Defendant's cellphone in its case in chief. The State entered the agreement because a copy of the search warrant for the Defendant's phone could not be located but was, however, located prior to trial. The State asserted that now that Ms. Randall had made herself unavailable to testify, the contents of the Defendant's phone could be used to authenticate the text messages found on Ms. Randall's phone.

"The State asserted that Ms. Randall's statements and text messages were admissions against interest of an unavailable witness. The Defendant argued that the admission of the evidence violated his right to confrontation.

"The court revisited the issue later during trial. The court first excluded anything Ms. Randall heard Mr. Coggin say. All the parties then agreed that Ms. Randall's statement that she wanted to smoke marijuana would be an illegal activity 'because obviously one would have to possess the pot to smoke it.' The court allowed proof that Ms. Randall 'stated that she wanted to smoke some pot and that she wanted to get some pot.' However, the court did not allow any proof that inculpated the Defendant 'without the Defendant having any ability to co[n]front the Declar[a]nt about a statement that inculpates him.' Nevertheless, the Defendant objected to the 'autopsy on the witness' statement line by line as to what [he] might be able to co[n]front the witness on or what [he] might not be able to co[n]front the witness on[.]'

"As to the text messages, the court was satisfied with the authenticity of the messages in that they came from the phone the Defendant dropped during the foot chase and that phone had the same text messages as Ms. Randall's phone. However, the court noted that it should 'narrowly construe[ ]' admissibility of the messages and excluded two of the exhibits, 22(a) and 22(b). The court allowed

one exhibit, 22(c), that detailed Ms. Randall's requests for marijuana but redacted the Defendant's responses. The court informed the Defendant that he could request a limiting instruction in front of the jury. The court reiterated that 'I can't be allowing [Ms. Randall] to make inculpatory statements about [the Defendant], and there's no availability to cross-examine her by the Defendant.' The court allowed testimony that the phone number that exchanged text messages with Ms. Randall was the phone number of the cellphone dropped by the Defendant during the foot chase."

"Back in the presence of the jury, Agent Daugherty testified that he interviewed Kashus Randall at the scene on the night in question, and she was subpoenaed to testify at trial but failed to appear. Ms. Randall told Agent Daugherty that she was at that location because she wanted to smoke marijuana.

"Ms. Randall allowed Agent Daugherty to look at her cellphone. She showed him a phone number and nickname for the individual with that phone number, as well as the text messages between her and that individual. Ms. Randall identified the nickname of 'petty ass' in her phone as being the Defendant. Agent Daugherty took photos of the screen of Ms. Randall's phone.

"The messages sent by Ms. Randall were time-stamped from 6:43 p.m. to 6:55 p.m. on January 5, 2016. The first message sent by Ms. Randall stated, 'W.Y.A.' The next message she sent said, 'Gan, I wanted to match petty ass[,]' which Agent Daugherty did not understand what that meant. The next message stated, 'you got some weed,' and then the final message was 'I need a dime.' The phone number that the messages were sent to was the same as the number for the phone that fell out of the Defendant's pocket during the foot chase."

"Hearsay is 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' Tenn. R. Evid. 801(c). As a general rule, hearsay is not admissible at trial unless it falls under one of the exceptions to the rule against hearsay. Tenn. R. Evid. 802. Tennessee Rule of Evidence 804 governs the hearsay exception regarding unavailable witnesses. Relevant here, the rule provides that a statement which, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless believing it to be true, is admissible if the declarant is unavailable as a witness. Tenn. R. Evid. 804(b)(3). A declarant is unavailable when, *inter alia*, the declarant is 'absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process[.]' Tenn. R. Evid. 804(a)(5).

"Here, Ms. Randall's statements and text messages clearly subjected her to criminal liability and, therefore, the trial court did not abuse its discretion in allowing their admission as statements against interest.

"As to the confrontation issue, the Sixth Amendment of the United States Constitution guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]' U.S. Const. amend. VI. The Tennessee Constitution provides the corresponding right 'to meet witnesses face to face.' Tenn. Const. art. I, § 9. In order to protect a defendant's right to confrontation, before the prior testimony of a witness will be admitted, the State must show that (1) the witness is unavailable and (2) the defendant had a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 68. Hearsay is testimonial where it takes the form of '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact'

and includes statements 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' Id. at 51-52.

"We first observe that Ms. Randall's text messages, part of an exchange with an acquaintance prior to being interviewed by the police, did not qualify as testimonial. Therefore, there is no confrontation clause issue in their regard. See *State v. Alex Goodwin and Joey Lee aka Joey Currie*, No. W2015-00813-CCA-R3-CD(C), 2017 WL 2472371, at *15 (Tenn. Crim. App. June 7, 2017), perm. app. denied (Tenn. Oct. 6, 2017) (holding that '[n]othing about the text messages indicate they were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."').

"Turning to Ms. Randall's verbal statements to Agent Daugherty, we note that Agent Daugherty was only allowed to testify concerning statements Ms. Randall made against her interest and not include any reference to the Defendant. The court specifically ruled that it would not allow any proof that inculpated the Defendant 'without the Defendant having any ability to co[n]front the Declar[a]nt about a statement that inculpates him.' We conclude that the Defendant's right to confrontation was not violated."

"The Defendant argues that the cellphone alleged to be his was not properly authenticated or proven to be owned by him. In ruling on this issue at the motion for new trial, the trial court found that the cellphone was sufficiently authenticated because the Defendant was in actual possession of the cellphone and messages on the cellphone matched those on Ms. Randall's phone.

"Tennessee Rule of Evidence 901 provides that '[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.' Tenn. R. Evid. 901(a). Evidence may be authenticated through '[t]estimony that a matter is what it is claimed to be' or '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.' Tenn. R. Evid. 901(b)(1), (4).

"Agent Daugherty testified that he saw the cellphone fall out of the Defendant's pocket during the foot chase and that the cellphone was dry whereas everything in the area was frosty or wet. Later extraction of data from the phone showed text conversations between that phone and the phone of Ms. Randall, thereby indicating use of the phone by the Defendant. The proof sufficiently established that the cellphone was in the possession of the Defendant. Moreover, the cellphone was not the linchpin of the State's case against the Defendant, and if there was any error in its admission, such did not affect the outcome of the trial."

VII. Rule 901; Authentication; Adequate Foundation Laid Regarding Workings of Credit Card Scanner

State v. Perry, No. E2019-02210-CCA-R3-CD (Tenn. Crim. App., Thomas, Apr. 29, 2021).

"The Defendant, Aaron Evan Perry, was convicted by a jury of three counts of fraudulent use of a credit card of an amount of $1,000 or less, a Class A misdemeanor. See Tenn. Code Ann. §§ 39-14-105(a)(1), -118(b). The trial court imposed an effective sentence of eleven months and twenty-nine days, suspended to time served. On appeal, the Defendant contends that (1) the trial court erred by denying his motion to suppress evidence, arguing that a Belk department store loss prevention manager acted as an agent of the State when he seized the Defendant's identification

card and credit card, that the police conducted a pretextual traffic stop of the Defendant to investigate the Belk incident, and that the warrantless search of his vehicle was not justified as a search incident to arrest or inventory search; (2) the evidence is insufficient to support his convictions; (3) the trial court erred by admitting information generated by a hand-held credit card scanner without an adequate foundation; and (4) the trial court erred when it instructed the jury on the elements of illegal possession of a credit card instead of fraudulent use of a credit card. After a thorough review of the record, we conclude that the evidence was insufficient to support the Defendant's convictions and that reversible error occurred when the trial court mistakenly instructed the jury on the elements of illegal possession of a credit card. As a result, we remand the case for the entry of amended judgments reflecting the new conviction offenses of attempted theft, a Class B misdemeanor. In addition, in the interest of judicial economy, we modify the sentence in each count to reflect concurrent sentences of six months and apply to the Defendant's two years of jail credit to satisfy his sentences."

"Rule 901(a) of the Tennessee Rules of Evidence states as follows: 'The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.' Evidence may be authenticated, in relevant part, through 'evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.' Tenn. R. Evid. 901(b)(9). The Advisory Commission Comments to Rule 901 elaborate that subsection (b)(9) 'treats authentication of computer documents. All that the lawyer need do is introduce evidence satisfying the court that the computer system produces accurate information.' Authentication issues are left to the discretion of the trial court. *State v. Cannon*, 254 S.W.3d 287, 295 (Tenn. 2008) (citing *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Beech*, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987)).

"We do not agree with the Defendant that the State failed to provide evidence of the credit card scanner's accuracy. According to the testimony at trial, when Detective Huff swiped the magnetic strip of a credit or debit card through the scanner, the scanner read the data encoded on the magnetic strip and displayed the sixteen-digit card number reflected therein. Detective Huff affirmed that the scanner in evidence was the one he used to verify the data produced by the credit cards confiscated from the Defendant. Detective Huff demonstrated the machine's functionality for the trial court and the jury by scanning one of the Defendant's legitimate credit cards, which reflected that the embossed and encoded numbers matched, and one of the forged credit cards, which showed that the embossed number did not match the number produced by the scanner. Given the demonstrative exhibit, Detective Huff's confirmation that this was the machine he used, and his assertion that to his knowledge, the machine did not need calibration, the State provided the trial court sufficient information for it to be satisfied that the device produced accurate results. The trial court did not abuse its discretion by admitting the scanner and the card numbers it produced.

"Additionally, Tennessee Rule of Evidence 702 provides that '[i]f scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.' Tennessee Rule of Evidence 703 provides that

> the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or make known to the expert at or before the hearing. If of a type

reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

"Relative to the Defendant's contention that it was necessary to have an expert witness explain the inner workings of the card scanner to prove its accuracy, we note that the Defendant cites to cases involving breathalyzers and the horizontal gaze nystagmus (HGN) test. Relative to the former, in *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992), our supreme court developed procedures to admit breathalyzer test results in light of their widespread use by patrol officers and the standardized nature of the devices; we do not think that the reasoning underlying *Sensing* applies to evidence obtained from credit card scanners, and we will not extend *Sensing's* procedural requirements to this case.

"Relative to the latter, we find it informative to examine *State v. Murphy*, 953 S.W.2d 200, 202-03 (Tenn. 1997), in which our supreme court compared the HGN test with other field sobriety tests and held that in order to admit results of an HGN test, it was necessary for an expert witness to testify. In *Murphy*, our supreme court explained that when assessing testimony about certain field sobriety tests like walking on a line, standing on one foot, or counting backwards, a juror could readily ascertain why the results were relevant to assessing a defendant's condition because he or she could 'rely upon his or her personal experience or otherwise obtained knowledge of the effects of alcohol upon one's motor and mental skills to evaluate and weigh the officer's testimony.' Id. at 203. In contrast, to present an officer's observations about a defendant's performance during an HGN test, 'the witness must necessarily explain the underlying scientific basis of the test in order for the testimony to be meaningful to a jury.... In effect, the juror must rely upon the specialized knowledge of the testifying witness and likely has no independent knowledge with which to evaluate the witness's testimony.' Id. Our supreme court also noted that the HGN test involved measurement of the angle at which nystagmus occurred and that the accuracy of an officer's testimony in this regard 'may be questionable in light of the officer's non-scientific measurement of a scientifically measurable phenomenon.' Id.

"In this case, the credit card scanner used by the police was described as a machine that read the number electronically encoded on a credit card and displayed the number on a screen. Credit and debit cards are sufficiently ubiquitous in our society that jurors can use their experience and knowledge to analogize the card scanner to other devices with which they are familiar—for example, a credit card terminal at a grocery store, bank, gas station, convenience store, or retail establishment—and are likely to be familiar with the concept of such a machine's reading the number of the card.

"The trial court did not abuse its discretion by determining that Detective Huff was competent to offer testimony about the card scanner's functionality and that the demonstrative exhibit was satisfactory proof of the machine's accuracy. Likewise, the court did not abuse its discretion by determining that expert testimony was unneeded to substantially assist the jury in understanding what results the scanner produced or how the scanner's readings were relevant to the case. The Defendant is not entitled to relief on this basis."

VIII. Rule 1006; Summaries; Underlying Original Should Be Made Available

Jernigan v. State, No. M2019-00182-CCA-R3-PC (Tenn. Crim. App., McMullen, Aug. 14, 2020).

"The Petitioner, LaVar R. Jernigan, appeals the order of the Rutherford County Circuit Court denying post-conviction relief from his convictions for six counts of especially aggravated sexual exploitation of a minor, for which he received an effective sentence of thirty years' imprisonment. See *State v. LaVar Jernigan*, No. M2016-00507-CCA-R3-CD, 2017 WL 1019513 (Tenn. Crim. App. Mar. 15, 2017). The Petitioner argues the State failed to disclose the existence of a 'notebook' compilation containing over 6000 text messages between the victim and the Petitioner, in violation of Rule 16 of the Tennessee Rules of Criminal Procedure and in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). He additionally argues that trial counsel was ineffective in failing to (1) advise the Petitioner of the existence of the notebook thereby resulting in the Petitioner's rejection of a four-year offer by the State to settle the case; (2) object to the admission of the 'notebook' at trial; and (3) prepare and preserve the record in his direct appeal. Upon our review, we vacate the Petitioner's convictions, reverse the judgment of the post-conviction court, and remand this matter for a new trial.

"At some point in October 2012, the Petitioner, an assistant to the band director at a high school in Lawrence County, Tennessee, and the sixteen-year-old victim, a student and band member at the same high school, began exchanging emails. The victim testified at trial that the emails initially were about stressful events in her life, including the deaths of her grandfather and a close friend. Within a few weeks, the Petitioner and the victim began talking on the phone and exchanging text messages. Their relationship eventually became 'physical' after a football game when the Petitioner placed his hand on her leg, and in another incident, when he kissed her and touched her buttocks in a closet after a band competition. *State v. LaVar Jernigan*, 2017 WL 1019513, at *3-4.

"A Lawrence County Sheriff's detective learned a concerned parent at the victim's school thought the Petitioner and the victim were having an inappropriate relationship. On April 10, 2013, the detective spoke to the victim and her mother and took the victim's cell phone with her mother's consent. The victim admitted she had sent the Petitioner sexually explicit videos of herself and that he had sent her videos of himself masturbating. Based upon his investigation, the Lawrence County detective obtained an arrest warrant in Lawrence County for the Petitioner for sexual exploitation of a minor by electronic means and solicitation of a minor. *LaVar Jernigan*, 2017 WL 1019513, at *9. Detectives from Lawrence County and Rutherford County later interviewed the Petitioner, which was recorded and played for the jury. The Petitioner initially denied having an inappropriate relationship with the victim; however, when pressed, he admitted their relationship had 'escalated.' Id. at *8. The Petitioner said the text messages concerned the victim wanting to have sexual intercourse, but he told the victim they had to wait until she was age eighteen. They discussed various sexual acts and had phone sex. The victim asked for a video recording of him 'ejaculating,' the Petitioner sent her a recording of the same, and the Petitioner said it was 'stupid.' He denied the victim sent him any recordings. Id. at *8. On September 9, 2013, the Petitioner pleaded guilty [in Lawrence County] to one count of sexual exploitation of a minor by electronic means, see Tenn. Code Ann. § 39-13-529(b)(2), and received a two-year sentence to be served on probation."

"Nearly six months later, on February 4, 2014, the Rutherford County Grand Jury returned a forty-five-count indictment charging the Petitioner with multiple counts of especially aggravated sexual exploitation of a minor, aggravated sexual exploitation of a minor, and sexual exploitation of a minor, all stemming from the Lawrence County investigation. *Lavar Jernigan*, 2017 WL 1019513, at *1. Although Lawrence County authorities had possession of the Petitioner's and the victim's cell phones at the time of the Petitioner's guilty plea, photographs believed to have been deleted on the Petitioner's cell phone were later recovered by an analyst with the Murfreesboro Police Department. The Rutherford County charges were based upon the victim's sending the

Petitioner nude photographs of herself at the Petitioner's request. The prosecutor stated that both counties had jurisdiction and that the Rutherford County prosecution was based upon conduct that occurred in Rutherford County."

"Detective West testified relative to a 'voluminous' notebook, which was received as an exhibit, containing text messages found on the [Petitioner's] and the victim's cell phones. Detective West read to the jury numerous messages exchanged between the [Petitioner] and the victim. Detective West said that on October 21, 2012, the [Petitioner's] cell phone received a message, that the message was read, and that the [Petitioner's] response to the victim included a frowning face and stated, '[N]aked, please, LOL.' Detective West stated that the victim responded that she was working and that she could not send a photograph. Detective West stated that the Petitioner responded with a frowning face and that the victim apologized and stated, 'Sorry, you have to earn a naked picture.... You don't get one yet.' Detective West said the [Petitioner's] response was a frowning face."

"Finally, the Petitioner said he would not have proceeded to trial had he known about the information contained in the notebook. He rejected the State's last four-year offer to settle the case because he believed, after talking with counsel, that the Lawrence County and Rutherford County cases were 'the same thing.' He sought review of the double jeopardy issue on appeal; however, he believed counsel was ineffective in the direct appeal of his case. His main concern was the fact that counsel had failed to include several items in the technical record. The Petitioner also believed that counsel was ineffective in failing to object to the admission of the notebook at trial. The Petitioner recalled a law school class was in court the day the notebook was admitted, and a teacher 'took the Tennessee Rules of Evidence [book] and threw ... [it] over the rail to the table' at them. The Petitioner testified, 'if another law school person know[s] that you should object to this, maybe you should.'"

IX. Material Evidence Supports Jury Verdict

Justice v. Hyatt, No. M2019-02105-COA-R3-CV (Tenn. Ct. App., McBrayer, June 30, 2021).

"James Justice and Paul Bradley spent the day of the accident looking at real estate investment opportunities around Giles County. The two men had been friends for over 20 years. As they were passing through Pulaski, Tennessee, they came to a four-way stop. Mr. Justice was driving his pickup truck that day with Mr. Bradley in the passenger seat. According to the two men, Mr. Justice stopped at the intersection and looked both ways. Seeing no other vehicles, he then proceeded forward. When he was about halfway through the intersection, he spotted an approaching car to his right. Mr. Justice claimed that the car, a white SUV, 'slowed down and then ... sped up and crashed into us.'

"According to Mr. Justice, '[w]e spun around on impact.' Meanwhile, the SUV continued traveling forward for another 40 or 50 feet before also stopping. He also presented diagrams depicting the point of impact and the final resting position of both vehicles.

"His passenger, Mr. Bradley, echoed Mr. Justice's description of the accident. Mr. Bradley confirmed that the truck was already in the intersection when a large SUV appeared to his right. And the SUV 'just rolled through' the stop sign and 'seemed to accelerate.' As he recalled, 'I was

looking right at the grille.' Mr. Bradley claimed that the front of Ms. Hyatt's vehicle collided with the passenger side of Mr. Justice's truck.

"Immediately after the accident, Mr. Justice checked on the other driver. He claimed that the driver, Elizabeth Hyatt, freely admitted liability for the accident. She told him, 'it was my fault, I'm sorry, I was looking at that house that's painted two colors. I didn't see you. It was my fault.' And she repeated this statement several times. Again, Mr. Bradley corroborated his story.

"Later, Mr. Justice filed this personal injury action against Ms. Hyatt. He maintained that Ms. Hyatt's negligence—specifically, her failure to stop and look before entering the intersection—caused the accident. In his view, there was nothing he could have done to avoid the collision.

"Ms. Hyatt's recollection diverged from Mr. Justice's narrative on several key points. A long-time resident in the area, Ms. Hyatt was intimately familiar with this intersection. And she distinctly remembered coming to a full stop at the four-way stop. She looked both ways and 'did not see any traffic anywhere.' She remembered noticing a nearby house when she stopped, but denied being distracted when driving. Still, she never saw Mr. Justice's vehicle before impact.

"As Ms. Hyatt described it, 'the whole thing happened very quickly.' She heard a noise and her car died. When Mr. Justice came to check on her, she was trapped in the car. The door was jammed. And she assured the jury that her apology was never intended as an admission of fault. She said she was sorry 'because that's just the type of person I am.'

"Both sides submitted pictures of the damage to their vehicles. Each driver claimed the location of the damage supported his or her description of the accident. According to Ms. Hyatt, her car's damage was on the left front side while Mr. Justice's truck sustained damage primarily to the front. Mr. Justice disagreed with her assessment, pointing out the damage to his truck's right-front-quarter panel.

"After hearing the testimony and viewing the exhibits, the jury found that Ms. Hyatt was not at fault. So the trial court issued a defense judgment. Mr. Justice moved for a new trial, arguing, in part, that the jury's verdict was against the weight of the evidence. The trial court independently reviewed the evidence and, as thirteenth juror, approved the verdict."

"The sole issue on appeal is whether there is material evidence to support the jury verdict. *See* Tenn. R. App. P. 13(d). In a material evidence review, we do not reweigh the evidence or re-evaluate witness credibility. *Grissom v. Metro. Gov't of Nashville, Davidson Cty.*, 817 S.W.2d 679, 684 (Tenn. Ct. App. 1991). That is the jury's province. *Ferguson v. Middle Tenn. State Univ.*, 451 S.W.3d 375, 383-84 (Tenn. 2014). Our task is to ascertain whether the record contains any material evidence to support the jury's finding. *Kelley v. Johns*, 96 S.W.3d 189, 194 (Tenn. Ct. App. 2002).

"Whether evidence is material has nothing to do with its weight. *Id.* 'Material evidence' is evidence 'which must necessarily enter into the consideration of the controversy and by itself, or in connection with the other evidence, be determinative of the case.' *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 422 (Tenn. 2013) (quoting *Knoxville Traction Co. v. Brown*, 89 S.W. 319, 321 (Tenn. 1905)). We take the strongest legitimate view of the evidence supporting the verdict, including all reasonable inferences, assume the truth of the supporting evidence, and

discard all countervailing evidence. *Crabtree Masonry Co. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978). If there is any material evidence to support the verdict, we must affirm. *Id.*"

"We conclude that this record contains material evidence in support of the jury verdict. Ms. Hyatt denied being distracted. And she provided a reasonable explanation for her apology. Based on Ms. Hyatt's testimony, the jury could reasonably find that she stopped, looked both ways, and only entered the intersection after verifying that the coast was clear. The jury could also have determined that the location of the damage to both vehicles tended to support Ms. Hyatt's account of the accident.

"For the most part, Mr. Justice's arguments are based on countervailing evidence that the jury was free to disregard. *See id.* He also argues that the only reasonable inference from the location of the damage to the vehicles and the resting positions of the cars is that Ms. Hyatt was at fault. But Ms. Hyatt offered a different viewpoint. And we will not second-guess the jury's evaluation of conflicting evidence. *Id.*

"Lastly, Mr. Justice contends that Ms. Hyatt admitted liability when she testified that she never saw his truck before the accident. In his view, this can only mean that she was not keeping a proper lookout. *See Harris v. Miller*, 144 S.W.2d 7, 9 (Tenn. Ct. App. 1940) ('It is the duty of the driver of an automobile to keep a diligent lookout ahead and to see all that comes within the radius of his line of vision, both in front and to the side.'). We disagree. Mr. Justice's theory requires the jury to assume his truck was already in the intersection when Ms. Hyatt arrived. To the contrary, a reasonable juror could conclude that Ms. Hyatt arrived first, and that Mr. Justice's truck was not in her line of vision when she entered the intersection."

"Because there is material evidence to support the jury verdict, we affirm."

X. Evidence of Littering

Annual Don Paine Redneck Litterbug Beer Award.

2001: Bud Light
2002: Natural Ice
2003: Natural Ice
2004: Budweiser
2005: Miller Lite
2006: Bud Light and Miller Lite (tie)
2007: Steele Reserve
2008: Busch
2009: Sparks
2010: Natural Ice
2011: Big Flats
2012: Natural Light
2013: Bud Lite Lime Straw-Ber-Rita
2014: Coors Light 24 Ounce
2015: Busch
2016: Bud Lite
2017: Busch Nascar Special Edition
2018: Recidivist Busch
2019: Bud Ice Premium
2020: Natural Light
2021:

TORTS

I. Health Care Liability Action

A. Defendant's Failure to Comply with Obligation to Advise of Other Potential Defendants Is Not "Extraordinary Cause" Excusing Plaintiff's Failure to Timely Provide Pre-Suit Notice

Bidwell ex rel. Bidwell v. Strait, 618 S.W.3d 309 (Tenn., Clark, 2021).

"James Bidwell filed this health care liability action individually and on behalf of his deceased wife, Clarissa Bidwell, and her estate against Drs. Timothy Strait and Jeffrey Colburn ('the physician Defendants') and the entities he believed to be their employers—The Neurosurgical Group of Chattanooga, P.C., EmCare Inc., and Envision Healthcare Corporation. Mr. Bidwell timely provided pre-suit notice to the named defendants and timely filed his lawsuit. Mr. Bidwell did not provide Chattanooga-Hamilton County Hospital Authority ('Erlanger') with pre-suit notice, nor did he name Erlanger as a defendant. Furthermore, Dr. Strait and Dr. Colburn did not provide Mr. Bidwell written notice of Erlanger as their correct employer within thirty days of receiving pre-suit notice. See Tenn. Code Ann. § 29-26-121(a)(5). Dr. Strait answered Mr. Bidwell's complaint, denying the allegations made against him and asserting that he was employed by Erlanger at all relevant times. Dr. Colburn similarly answered, denying the allegations made against him and that either EmCare Inc. or Envision Healthcare Corporation was his employer. Drs. Strait and Colburn then moved for summary judgment arguing that, pursuant to the Governmental Tort Liability Act, no judgment could be rendered against them because Mr. Bidwell had failed to name as a defendant their actual employer, Erlanger. See Tenn. Code Ann. § 29-20-310(b). Within ninety days of Dr. Strait's and Dr. Colburn's answers, Mr. Bidwell filed two motions for leave to amend his complaint to add Erlanger as a defendant. Mr. Bidwell relied on Tennessee Code Annotated section 20-1-119, which provides a plaintiff with a ninety-day 'grace period' within which to amend a complaint when comparative fault 'is or becomes an issue,' and section 29-26-121(a)(5), which he argued required the physician Defendants to notify him of Erlanger within thirty days of receiving pre-suit notice. The trial court granted Dr. Strait's and Dr. Colburn's motions for summary judgment, finding that Mr. Bidwell's motions to amend were futile because he had not provided Erlanger with pre-suit notice. Mr. Bidwell appealed, and the Court of Appeals vacated the trial court's orders granting summary judgment and remanded the case for further proceedings. Dr. Strait and Dr. Colburn subsequently filed an application for permission to appeal with this Court. We hold that, although the physician Defendants failed to comply with section Tennessee Code Annotated 29-26-121(a)(5), the statute provides no remedy for noncompliance, and their noncompliance does not constitute extraordinary cause sufficient to excuse Mr. Bidwell's failure to provide Erlanger with pre-suit notice. However, we additionally hold that Dr. Strait's and Dr. Colburn's answers sufficiently asserted Erlanger's comparative fault. Therefore, Mr. Bidwell was entitled to amend his complaint to name Erlanger as a defendant pursuant to section 20-1-119, so long as he amended his complaint and caused process to issue to Erlanger within ninety days of Dr. Strait's answer—the first answer alleging Erlanger's fault. Because section 20-1-119 applied, Mr. Bidwell was not obligated to provide Erlanger with pre-suit notice under Tennessee Code Annotated section 29-26-121(c). We conclude that, because the record on appeal reflects that Mr. Bidwell failed to file an amended complaint and cause process to issue, he is not entitled to amend his complaint to add Erlanger as a defendant. Accordingly, we affirm in part and reverse in part the judgment of the Court of Appeals on the grounds stated herein and reinstate the trial court's orders

granting the physician Defendants' motions for summary judgment and denying the Plaintiff's motions to amend."

"We begin our review of the trial court's conclusion by turning to the language of Tennessee Code Annotated section 29-26-121(a)(5). Enacted by the General Assembly in 2015, section 29-26-121(a)(5) provides:

> In the event a person, entity, or health care provider receives notice of a potential claim for health care liability pursuant to this subsection (a), the person, entity, or health care provider shall, within thirty (30) days of receiving the notice, based upon any reasonable knowledge and information available, provide written notice to the potential claimant of any other person, entity, or health care provider who may be a properly named defendant.

"When the statutory language is clear and unambiguous, 'we accord the language its plain meaning and ordinary usage in the context within which it appears, without a forced interpretation.' *Runions* [*v. Jackson-Madison County General Hospital District*], 549 S.W.3d [77 (Tenn. 2018)] at 86. The physician Defendants argue that the lack of a stated remedy or penalty for noncompliance renders the statute ambiguous. We disagree. A statute requiring action is not ambiguous simply because it lacks a consequence or remedy for any noncompliance. See e.g., *Stevens ex rel. Stevens v. Hickman Comm. Health Care Servs., Inc.*, 418 S.W.3d 547 (Tenn. 2013). Here, the language of section 29-26-121(a)(5) is clear. It instructs that a person 'shall, within thirty (30) days of receiving the notice, based upon any reasonable knowledge and information available, provide written notice to the potential claimant of *any other* person, entity, or healthcare provider who may be a properly named defendant.' Tenn. Code Ann. § 29-26-121(a)(5) (emphasis added)."

"In the case on appeal, it is undisputed that the physician Defendants failed to provide the Plaintiff with written notice of Erlanger, their employer. Although other circumstances may arise that require us to examine whether defendants had 'any reasonable knowledge and information available' that triggered their notice obligation under section 29-26-121(a)(5), that question is not presented by this appeal. Here, it is not disputed that the physician Defendants had 'reasonable knowledge and information available' that Erlanger was their employer and, therefore, that Erlanger was another entity or health care provider who may be not just a 'properly named defendant,' but a necessary party under the GTLA. Therefore, we conclude that the physician Defendants failed to comply with Tennessee Code Annotated section 29-26-121(a)(5)."

"Although section 29-26-121(a)(5) does not include a remedy for a defendant's failure to satisfy its notification requirement, the Plaintiff argued in the courts below, and argues before this Court, that the physician Defendants' failure to comply with Tennessee Code Annotated section 29-26-121(a)(5) constitutes extraordinary cause that excuses the Plaintiff from providing pre-suit notice to Erlanger. See Tenn. Code Ann. § 29-26-121(b) ('The court has discretion to excuse compliance with this section only for extraordinary cause.'). Therefore, he asserts that his motions to amend were not futile and his amended complaint naming Erlanger as a Defendant should relate back to the date of the original complaint.

"Tennessee Code Annotated section 29-26-121 does not define 'extraordinary cause.'"

"The Plaintiff asserts that the physician Defendants' failure to comply with Tennessee Code Annotated section 29-26-121(a)(5) alone constitutes extraordinary cause. However, he does not support this statement with any further discussion or argument. Although the trial court did not

directly address this argument when ruling on whether extraordinary cause existed, it did note that, while the misinformation the Plaintiff found during his pre-suit investigation may have caused confusion and 'created difficulty for the Plaintiff,' the facts did not give rise to extraordinary cause. We agree.

"Even if we accept the Plaintiff's assertion that its failure either to provide Erlanger with pre-suit notice or name it as a defendant resulted from the physician Defendants' failure to comply with their statutory notification requirement, we cannot agree that this is enough, standing alone, to constitute extraordinary cause in this case. While this leads to harsh results for the Plaintiff, had the General Assembly intended for noncompliance with section 29-26-121(a)(5) to excuse a plaintiff from providing pre-suit notice, it could have said so. See *Stevens ex rel. Stevens*, 418 S.W.3d at 560 (citing *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991) ('[I]t is a rule of statutory construction which is well recognized by our courts, that the mention of one subject in a statute means the exclusion of other subjects that are not mentioned.')); see e.g., Tenn. Code Ann. § 29-26-121(c) (noting that the pre-suit notice requirements do not apply to any person or entity that is made a party to an action as a result of a defendant's alleging comparative fault). Although a trial court may conclude in another case that a defendant's failure to comply with section 29-26-121(a)(5) constitutes extraordinary cause, we agree with the trial court's determination that extraordinary cause did not exist in the case on appeal.

"Therefore, although we conclude that the physician Defendants failed to comply with Tennessee Code Annotated section 29-26-121(a)(5), because the Plaintiff has not established extraordinary cause sufficient to excuse compliance with the pre-suit notice requirements, and in the absence of a remedy or penalty for noncompliance with section 29-26-121(a)(5), the trial court did not abuse its discretion when it denied the Plaintiff's motions to amend based on futility.

"For these reasons, we must turn to the Plaintiff's second argument—that he is entitled to amend his complaint, and was excused from providing Erlanger with pre-suit notice, pursuant to Tennessee Code Annotated section 20-1-119 and section 29-26-121(c)."

"This Court adopted the doctrine of comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52, 56 (Tenn. 1992), for a more just apportionment of fault between plaintiffs and defendants. *Austin* [*v. State*], 222 S.W.3d [354 (Tenn. 2007)] at 357."

"Shortly after our decision in *McIntyre*, the General Assembly enacted Tennessee Code Annotated section 20-1-119, which addresses the predicament that McIntyre hypothesized."

"Section 20-1-119 provides a ninety-day 'grace period' for a plaintiff to amend a complaint to add as a defendant any unnamed person alleged by a defendant to have caused or contributed to the plaintiff's injury, even if the statute of limitations applicable to the plaintiff's cause of action has expired. Tenn. Code Ann. § 20-1-119; see also *Owens v. Truckstops of Am.*, 915 S.W.2d 420, 427 (Tenn. 1996); *Mills* [*v. Fulmarque, Inc.*], 360 S.W.3d [362 (Tenn. 2012)] at 370."

"[I]n *Browder v. Morris*, 975 S.W.2d 308, 309 (Tenn. 1998), this Court granted review to determine whether Tennessee Code Annotated section 20-1-119 applies when a defendant raises the comparative fault of vicariously liable nonparties. Noting that section 20-1-119 'was enacted in response to this Court's adoption of comparative fault, and that the concepts of fairness and efficiency form the basis of such a system,' and that '[i]t is neither fair nor efficient in a comparative fault scheme to permit a defendant to identify a financially or legally responsible

nonparty after the statute of limitations has run against that nonparty, yet deny the plaintiff an opportunity to join them as a defendant,' we answered that question affirmatively. Id. at 312. Therefore, when, in an answer or amended answer, a named defendant raises the issue of the comparative fault of a nonparty who may be either directly or vicariously liable, a plaintiff is entitled to amend the complaint according to the ninety-day grace period of section 20-1-119.

"Based on the foregoing authorities, the physician Defendants' arguments that their answers did not trigger Tennessee Code Annotated section 20-1-119 are without merit. In his complaint, the Plaintiff asserted claims of both direct and vicarious liability against The Neurosurgical Group, EmCare, and Envision—the entities which he believed employed the physician Defendants. In his answer filed on August 28, 2017, Dr. Strait clearly stated that 'at all material times, [he] was employed by [Erlanger] and provided healthcare services to [the Decedent] in the course and scope of his employment with [Erlanger].' Furthermore, he stated that The Neurosurgical Group 'sold its assets to [Erlanger] and ceased conducting business' in April 2015. Dr. Strait also denied he 'was negligent in the care and treatment he provided to [the Decedent] or that he was a direct or proximate cause of any alleged injuries and death suffered by [the Decedent].' Lastly, Dr. Strait provided:

> This defendant reserves the right, should discovery or evidence, including that presented at trial, indicate it appropriate, *to plead the comparative negligence of the decedent or any other person or entity, as a proximate or contributing cause of all or a portion of the alleged injuries and damages*, and to take into account such evidence in apportioning or comparing negligence or fault, causation or damages, whether in apportionment or mitigation. At this time, this defendant has no knowledge of any persons except parties identified and as set forth in the plaintiff's Complaint to which this doctrine would apply.

"(Emphasis added). All of these statements make it clear that Dr. Strait sufficiently asserted comparative fault, triggering Tennessee Code Annotated section 20-1-119's savings provision."

"As such, the Plaintiff had ninety days from the filing of 'the first answer ... alleging [Erlanger's] fault' to either '*amend* [his] complaint to add [Erlanger] as a defendant pursuant to [Tennessee Rule of Civil Procedure] 15 *and cause process to be issued* for [Erlanger]' or institute a separate legal action against Erlanger by filing a summons and complaint. See Tenn. Code Ann. § 20-1-119(a)(1)-(2). Here, the Plaintiff filed motions to amend his complaint with the trial court rather than simply filing an amended complaint or initiating a separate legal action against Erlanger. This raises the question of whether the Plaintiff timely and properly complied with the statutory requirements set forth in section 20-1-119, as well as Tennessee Rule of Civil Procedure 15.01."

"As stated previously, the Rule now provides:

> A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served .... Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires. *For amendments adding defendants pursuant to [Tennessee Code Annotated section] 20-1-119, however, written consent of the adverse party or leave of court is not required.*

"Tenn. R. Civ. P. 15.01 (2008) (emphasis added)."

"In the case on appeal, Dr. Strait filed his answer prior to Dr. Colburn on August 28, 2017. The Plaintiff filed two *motions* for leave to amend—the first on November 3, 2017 and the second on November 20, 2017. Both motions were filed within the ninety-day period provided by section 20-1-119. However, while the record on appeal reflects that the Plaintiff *attached* his second amended complaint to his second motion for leave to amend, he failed to *actually amend* his complaint within ninety days of Dr. Strait's answer. Had the Plaintiff simply filed an amended complaint naming Erlanger as a defendant pursuant to section 20-1-119, as Rule of Civil Procedure 15.01 permits, and caused process to issue to Erlanger within ninety days of Dr. Strait's answer, he would have properly and timely satisfied the statutory requirements of section 20-1-119. However, he did not do so, and his motions to amend 'simply fail[ ] to fulfill the unambiguous requirements of the statute.' *Ward v. AMI SUB (SFH), Inc.*, 149 S.W.3d 35, 39 (Tenn. Ct. App. 2004)."

B. Common Law of Vicarious Liability Pretermitted by HCLA

Gardner v. Saint Thomas Midtown Hospital, No. M2019-02237-COA-R3-CV (Tenn. Ct. App., Bennett, Apr. 1, 2021), appl. perm. app. filed May 28, 2021.

"A patient filed a health care liability claim against a hospital, asserting the hospital was vicariously liable for injuries she suffered as a result of the anesthesia providers' conduct. The hospital moved for summary judgment, arguing that the anesthesia providers were not employed by the hospital and the hospital was, therefore, not liable for the anesthetists' actions as a matter of law because the statute of limitations had run on the plaintiff's direct claims against the anesthesia providers by the time the plaintiff filed her complaint against the hospital. The trial court granted the hospital's motion and dismissed the plaintiff's complaint, relying on the common law set forth in *Abshure v. Methodist Healthcare-Memphis Hospitals*, 325 S.W.3d 98 (Tenn. 2010). Acknowledging the conflict between provisions of the Tennessee Health Care Liability Act and the common law, we hold that the statute prevails. Accordingly, we reverse the trial court's judgment and remand the case for further proceedings."

"Beverly Gardner underwent a surgical procedure on May 8, 2016, at St. Thomas Midtown Hospital ('STM'). In the complaint she filed against the hospital, Ms. Gardner alleges that '[a]s a complication of anesthesia [she] suffered a traumatic intubation with right posterior lower pharyngeal laceration as a complication of oropharyngeal intubation with recurrent hemoptysis.' She asserts that STM, 'acting through its employees and/or agents,' was 'careless and negligent' in her care and treatment and that STM 'is liable for any negligent acts and/or omissions of any actual or apparent agents and/or employees of [STM].' Ms. Gardner provided pre-suit notice to STM more than sixty days before filing her complaint in accordance with the requirements of Tenn. Code Ann. § 29-26-121, and she attached a certificate of good faith to her complaint as required by Tenn. Code Ann. § 29-26-122.

"The hospital denied liability and raised the following affirmative defenses, among others:

> 2. To the extent that it is shown through discovery that the plaintiff or any non-party negligently caused or contributed to cause the alleged injuries and damages, STM intends to rely upon the doctrine of comparative negligence/comparative fault for their apportionment of damages, if any are awarded in this case.
>
> 3. STM admits that certain medical care was provided to plaintiff, Beverly Gardner, at its facility, but otherwise denies plaintiff's allegations and demands strict proof thereof. [STM]

> denies plaintiff's allegations of carelessness, negligence, breach of the standard of care, misrepresentation, and that any alleged injuries were caused by any act or omission by this defendant or any of its agents or employees. STM specifically denies that the physicians whose care is alleged in the Complaint were agents or employee[s] of this defendant. STM denies that the plaintiff is entitled to recover any damages from it.

"Six months after filing its answer, STM moved for a qualified protective order permitting it to engage in ex parte interviews with Ms. Gardner's treating physicians, including Dr. Allison Tucker. STM identified Dr. Tucker as 'anesthesiologist - treated patient during admission in question.' Following discovery, STM moved for summary judgment. In the memorandum of law supporting its motion for summary judgment, STM wrote: 'Plaintiff brings health care liability claims against [STM] premised solely on vicarious liability, but the underlying claims against the alleged agents (anesthesia providers employed by Anesthesia Medical Group) were barred by the statute of limitations at the time suit was filed against [STM].' STM's memorandum was the first time, according to the contents of the appellate record, that STM identified Anesthesia Medical Group ('AMG') as the employer of Ms. Gardner's anesthesia provider(s).

"The trial court granted STM's motion for summary judgment and dismissed Ms. Gardner's complaint. The court found that the statute of limitations for Ms. Gardner's direct claims against AMG began to run on May 8, 2016, the date when Ms. Gardner suffered the injury forming the basis of her claim. Relying on the case *Abshure v. Methodist Healthcare-Memphis Hospitals*, 325 S.W.3d 98 (Tenn. 2010), the court concluded that STM could not be held vicariously liable for any negligence by the anesthesia providers because, by the time Ms. Gardner filed her complaint against STM, her claims against AMG were 'procedurally barred by operation of law.'"

"This health care liability case is governed by the Tennessee Health Care Liability Act ('HCLA'), Tenn. Code Ann. §§ 29-26-102–122."

"A key statutory provision in this case is Tenn. Code Ann. § 29-26-121(a)(1), which states:

> "Any person, or that person's authorized agent, asserting a potential claim for health care liability shall give written notice of the potential claim *to each health care provider that will be a named defendant* at least sixty (60) days before the filing of a complaint based upon health care liability in any court of this state.

"(Emphasis added). This provision is mandatory and requires strict compliance. *Runions* [*v. Jackson-Madison Cnty. Gen. Hosp. Dist.*], 549 S.W.3d [77] at 86 [(Tenn. 2018)]. Pre-suit notice enables 'a potential defendant of a health care liability claim ... [to] investigate the merits of the claim and pursue settlement negotiations before the start of the litigation.' *Id.* (citing *Foster v. Chiles*, 467 S.W.3d 911, 915 (Tenn. 2015)). Pre-suit notice promotes the 'early resolution of claims, which also serves the interest of judicial economy.' *Id."*

"The next question concerns how these provisions interact with the statute of limitations for HCLA claims. Tennessee Code Annotated section 29-26-121(c) states, in pertinent part:

> When notice is given to a provider as provided in this section, the applicable statutes of limitations and repose shall be extended for a period of one hundred twenty (120) days from the date of expiration of the statute of limitations and statute of repose applicable to that provider.... In no event shall this section operate to shorten or otherwise extend the statutes of

> limitations or repose applicable to any action asserting a claim for health care liability, nor shall more than one (1) extension be applicable to any provider.

"As the statute provides, when pre-suit notice is given to a health care provider under the HCLA, the statute of limitations is extended for 120 days. In the present case, Ms. Gardner provided pre-suit notice to STM and to its registered agent on April 25, 2017, thereby extending by 120 days the statute of limitations applicable to her claim against STM. Pursuant to Tenn. Code Ann. §§ 29-26-116 and 28-3-104, the statute of limitations began to run on the date the cause of action accrued, which the trial court determined to be the date of Ms. Gardner's surgery, May 8, 2016. The record shows that STM and its registered agent received pre-suit notice on May 8 and 9, 2017. Ms. Gardner filed her complaint on September 5, 2017, which was timely pursuant to the 120-day extension of the statute of limitations provided by Tenn. Code Ann. § 29-26-121(c).

"Recognizing that Ms. Gardner's claim against it was timely under the HCLA, STM contends that the trial court properly granted its motion for summary judgment and dismissed Ms. Gardner's complaint because AMG, not STM, engaged in the conduct Ms. Gardner asserts was negligent. STM points out that Ms. Gardner failed to provide AMG with the requisite 60-day pre-suit notice and contends that her malpractice claim against AMG was barred by the statute of limitations. STM relies on *Abshure* to argue that the trial court properly granted its motion for summary judgment."

"The Court in *Abshure* stated that, despite the rule allowing a plaintiff to sue either the agent, the principal, or both, 'the courts have recognized that there are certain circumstances in which it would be improper to permit a plaintiff to proceed solely against a principal based on its vicarious liability for the conduct of an agent.' *Abshure*, 325 S.W.3d at 106. The circumstances warranting an exception to the general rule include the following:

> (1) when the agent has been exonerated by a finding of non-liability; (2) when the plaintiff has settled its claim against the agent; (3) when the agent is immune from suit, either by statute or by the common law; and (4) when the plaintiff's claim against the agent is procedurally barred by operation of law before the plaintiff asserts a vicarious liability claim against the principal.

"*Id.* We focus our attention on the Court's analysis regarding the fourth exception, which was the basis for the trial court's decision to dismiss Ms. Gardner's complaint: barring vicarious liability claims against a principal 'when the right of action against the agent is extinguished by operation of law.' *Id.* at 109 (quoting *Johnson* [*v. LeBonheur Children's Med. Ctr.*], 74 S.W.3d [338] at 345 [(Tenn. 2002)]). Noting that 'rights of action may be extinguished by operation of law in many different ways,' the Court discussed two cases dealing with 'procedural bars associated with the statute of repose and the res judicata doctrine.' *Id.*"

"As mentioned above, the Court's analysis in *Abshure* was based upon the law in effect before the pre-suit notice provisions and the HCLA were in effect. If we apply the fourth exception to vicarious liability identified in *Abshure* to Ms. Gardner's vicarious liability claims against STM in the present case, the result would likely be to bar her claims because, when she filed her complaint against STM (September 5, 2017), the one-year statute of limitations had run on any direct claims against AMG (on May 9, 2017). Under the plain language of the HCLA, however, as discussed above, the plaintiffs' claims against STM were timely. It is evident that the common law principles described in *Abshure* conflict with the plain language of the HCLA."

"For all of these reasons, we conclude that, in health care liability cases in which a plaintiff chooses to sue only the principal, the provisions of the HCLA regarding pre-suit notice prevail over the common law exception in *Abshure* with respect to the tolling of the statute of limitations. This result is consistent with the purposes and the language of the HCLA. Therefore, the trial court erred in granting STM's motion for summary judgment and dismissing Ms. Gardner's complaint.

"When STM received Ms. Gardner's pre-suit notice, it was required by the HCLA to provide written notice to Ms. Gardner of 'any other person, entity, or health care provider who may be a properly named defendant.' Tenn. Code Ann. § 29-26-121(a)(5). This provision states:

> In the event a person, entity, or health care provider receives notice of a potential claim for health care liability pursuant to this subsection (a), the person, entity, or health care provider shall, within thirty (30) days of receiving the notice, based upon any reasonable knowledge and information available, provide written notice to the potential claimant of any other person, entity, or health care provider who may be a properly named defendant.

"STM admits that it failed to comply with this section of the HCLA. STM argues that this provision did not apply to it because, 'when [STM] received pre-suit notice, its position was and still is that its employees and the alleged agents would not be 'properly-named Defendants' because they were not negligent and did not cause any injury to the Plaintiff.' According to STM, it 'should not be obligated to notify the Plaintiff that a health care provider is a proper Defendant when [STM] does not believe the provider acted negligently or caused an injury to the Plaintiff "based upon any reasonable knowledge and information available."'

"Our Supreme Court recently addressed this provision of the HCLA in *Bidwell ex rel. Bidwell v. Strait*. The plaintiff in *Bidwell* was the surviving husband of a patient who died following health care she received by Drs. Colburn and Strait. *Bidwell*, 2021 WL 260975, at *1. The plaintiff complied with the HCLA's requirement that he provide pre-suit notice to Drs. Colburn and Strait sixty days before filing a complaint naming them as defendants. *Id.*; *see* Tenn. Code Ann. § 29-26-121(a)(1). The plaintiff also provided pre-suit notice to three entities whom the plaintiff believed employed these two physicians. *Bidwell*, 2021 WL 260975, at *1. Despite the plaintiff's efforts to determine the doctors' employer(s), the plaintiff did not learn that Erlanger, a governmental agency, employed Drs. Colburn and Strait, and, therefore, did not provide pre-suit notice to Erlanger. *Id.* at *1-2. At least sixty days after providing the physicians with pre-suit notice, the plaintiff filed a complaint against Dr. Colburn, Dr. Strait, and the other defendants the plaintiff believed were liable for his wife's injuries and death. *Id.* at *2. None of the defendants the plaintiff served with pre-suit notice provided the plaintiff with notice of any other person, entity, or health care provider that may have been a properly named defendant within thirty days of receiving pre-suit notice, as required by Tenn. Code Ann. § 29-26-121(a)(5). *Id.* Dr. Strait identified Erlanger as his employer in his answer, but Dr. Colburn did not identify Erlanger as his employer in the answer he filed. *Id.* at *2-3.

"Dr. Strait subsequently moved for summary judgment, arguing that he was immune from suit because his employer, Erlanger, was a governmental entity, governed by the Tennessee Government Tort Liability Act ('GTLA'), and it was a necessary party to the lawsuit. *Id.* at *3. The plaintiff moved for leave to amend his complaint to add Erlanger as a defendant, pointing out that Dr. Strait had failed to comply with Tenn. Code Ann. § 29-26-121(a)(5), as he was required to do. *Id.* Dr. Colburn, who was also employed by Erlanger, then filed a motion for summary judgment on the same grounds as Dr. Strait. *Id.* at *4. The trial court denied the plaintiff's motion to amend

and granted the defendants' motions for summary judgment. *Id.* at *4. The trial court's judgment was reversed on appeal, and the Supreme Court granted the defendants' application for permission to appeal. *Id.*

"Rejecting the defendant physicians' contention that Tenn. Code Ann. § 29-26-121(a)(5) was ambiguous, the Court found that the language of the statute 'is clear' and requires those receiving pre-suit notice 'to provide the claimant with what amounts to a complete and total identification of all those "who may be a properly named defendant" based upon "the reasonable knowledge and information available" to the party that received pre-suit notice.' *Id.* at *7 (quoting *Bidwell ex rel. Bidwell v. Strait*, No. E2018-02211-COA-R3-CV, 2019 WL 4464815, at *5 (Tenn. Ct. App. Sept. 18, 2019)). The Court acknowledged that § 29-26-121(a)(5) does not provide a remedy for a defendant's failure to comply with its requirements, but it did not hold that the lack of a remedy excuses a defendant's noncompliance. *Id.* Contrary to STM's argument, a named defendant receiving pre-suit notice is not relieved of complying with this provision of the HCLA based on its belief that a non-named third party is not liable for conduct that may be proved negligent. Such an interpretation would effectively nullify the provision."

[Footnote:] "The outcome in *Bidwell* was different than the outcome here, in part, because the *Bidwell* physicians' employer was a governmental entity and was a necessary party to the HCLA complaint pursuant to the GTLA. See *Bidwell*, 2021 WL 260975, at *3."

"The trial court's judgment granting STM's motion for summary judgment is reversed, and this case is remanded for further proceedings consistent with this opinion."

II. Motor Vehicle Crashes; Statute of Limitations

A. Defendant's Traffic Citation Extends Statute of Limitations to Two Years

Younger v. Okbahhanes, S.W.3d (Tenn. Ct. App., Swiney, 2021), perm. app. denied June 11, 2021.

"Plaintiff and Defendant were involved in a traffic collision in September 2017. Plaintiff subsequently filed this action in April 2019, more than one year after the cause of action accrued. Defendant filed a motion seeking summary judgment pursuant to Tennessee Rule of Civil Procedure 56, arguing that Plaintiff's action had violated the relevant statute of limitations for personal injury actions. The Trial Court denied Defendant's motion for summary judgment, concluding that Plaintiff's action was timely, in part, because Defendant had been charged with a criminal offense and a criminal prosecution had been initiated against him related to his conduct that gave rise to the present cause of action. Relying on these conclusions, the Trial Court determined that the statute of limitations was extended from one to two years, pursuant to Tennessee Code Annotated § 28-3-104(a)(2). Defendant argues on appeal that the Trial Court erred in ruling that Tennessee Code Annotated § 28-3-104(a)(2) is applicable to this action.

"Tennessee Code Annotated § 28-3-104(a)(1) (2017) provides that personal injury actions shall be subject to a one-year statute of limitations except as provided in subsection (2), which states as follows:

A cause of action listed in subdivision (a)(1) shall be commenced within two (2) years after the cause of action accrued, if:

(A) Criminal charges are brought against any person alleged to have caused or contributed to the injury;

(B) The conduct, transaction, or occurrence that gives rise to the cause of action for civil damages is the subject of a criminal prosecution commenced within one (1) year by:

(i) A law enforcement officer;

(ii) A district attorney general; or

(iii) A grand jury; and

(C) The cause of action is brought by the person injured by the criminal conduct against the party prosecuted for such conduct.

"Whether Tennessee Code Annotated § 28-3-104(a)(2) is applicable to traffic citations is a matter of first impression in Tennessee. We hold that the language of Tennessee Code Annotated § 28-3-104(a)(2) is clear and unambiguous. In relevant part, the statute requires that '[c]riminal charges' be brought against the defendant and that a 'criminal prosecution' be commenced by a law enforcement officer, a district attorney general, or a grand jury within one year of the defendant's conduct. *See* Tenn. Code Ann. § 28-3-104(a)(2) (2017). As the statute is clear and unambiguous, we apply its plain meaning. *See Coleman v. Olson*, 551 S.W.3d [686] at 693 [(Tenn. 2018)].

"In this case, Defendant was issued a traffic citation for failure to exercise due care, in violation of Tennessee Code Annotated § 55-8-136. The issue on appeal is whether a traffic citation for failure to exercise due care is considered a criminal charge as provided in Tennessee Code Annotated § 28-3-104(a)(2)(A) and a criminal prosecution as provided in subsection (B). Pursuant to Tennessee statutory law, a violation of Tennessee Code Annotated § 55-8-136, (i.e. the failure to exercise due care), is a Class C misdemeanor. Tennessee Code Annotated § 40-35-111(e)(3) provides that a Class C misdemeanor may be punishable by up to thirty days incarceration and a fine of up to $50.

"On appeal, Defendant argues that '[t]he application of common sense dictates that the issuance of a traffic ticket to and payment of a fine by [Defendant] did not constitute the bringing of '[c]riminal charges' and a 'criminal prosecution' within the meaning of *Tenn. Code Ann.* § 28-3-104(a)(2)' and that the aforementioned terms are 'almost exclusively used to describe formal prosecutions commenced with charging instruments, such as complaints, indictments, and warrants.' Although Defendant acknowledges in his reply brief that 'a violation of *Tenn. Code Ann.* § 55-8-136 may constitute a criminal offense,' he argues on appeal that a traffic citation is not a legally adequate charging instrument and that being issued a traffic citation and paying a fine is not a criminal charge or a criminal prosecution.

"Although a traffic offense, Tennessee law is clear that a violation of Tennessee Code Annotated § 55-8-136 for failure to exercise due care is a Class C misdemeanor and, therefore, a criminal offense. However, traffic offenses are treated differently than more serious criminal offenses. *See* Tenn. Code Ann. § 55-10-207 (2020). Tennessee Code Annotated § 55-10-207(b)(1) requires an arresting officer for minor traffic violations to issue the individual a traffic citation in lieu of arrest, unless otherwise provided by subsection (h). Subsection (h) excludes certain traffic violations from the applicability of Tennessee Code Annotated § 55-10-207, including the offense of driving under the influence of intoxicating liquor or narcotic drugs. Furthermore, subsection (b)(2) allows a police officer to issue traffic citations to drivers at the scene of a traffic accident 'when, based on personal investigation, the officer has reasonable and probable grounds to believe' that the individual has

committed such traffic offense. According to Tennessee Code Annotated § 55-10-207(d), when a traffic citation has been prepared, accepted, and the original citation delivered to the court, that original citation 'shall constitute a complaint to which the person cited must answer and *the officer issuing the citation shall not be required to file any other affidavit of complaint with the court* (emphasis added).'

"Returning to the present case, Defendant's traffic citation for failure to exercise due care in violation of Tennessee Code Annotated § 55-8-136, a Class C misdemeanor, was prepared and accepted, and the original copy of the citation was delivered to the court. At that point, Defendant was required to answer the citation, and the law enforcement officer was not required to file any other affidavit of complaint with the court. *See* Tenn. Code Ann. § 55-10-207(d) (2020)."

"The language of the statute is clear and unambiguous, and, therefore, we must enforce the statute as written. We must give effect to each word that the General Assembly included when enacting a statute. In this case, the General Assembly specifically included that a criminal prosecution may be commenced by a law enforcement officer. Following the preparation, acceptance, and delivery of the original citation to the court, the individual charged with the traffic violation was required to answer the citation, and there was nothing further the police officer was required to file in order to commence the prosecution for such criminal offense. If our General Assembly intended to exclude traffic citations from the application of Tennessee Code Annotated § 28-3-104(a)(2) for policy reasons, it easily could have done so. It did not do so. It is not the role of this Court to rewrite the statute.

"We hold that the traffic citation issued to Defendant for failure to exercise due care, which had been prepared, accepted, and the original citation filed with the court, is a criminal charge and a criminal prosecution by a law enforcement officer, such that Tennessee Code Annotated § 28-3-104(a)(2) is applicable to extend the statute of limitations in this action to two years. We, therefore, affirm the Trial Court's judgment denying Defendant's summary judgment motion. Our holding that the issuance of a traffic citation for failure to exercise due care satisfies the statutory requirement of a criminal charge and commencement of a criminal prosecution by a law enforcement officer is limited to our interpretation of Tennessee Code Annotated § 28-3-104(a)(2) and has no effect on any criminal statute or procedure."

B. Wrongful Death; GTLA Case; Discovery Rule Inapplicable Here

Durham v. Estate of Losleben, 624 S.W.3d 492 (Tenn. Ct. App., Stafford, 2020), perm. app. denied Apr. 8, 2021.

"A Hardin County firefighter and Appellant's husband died after their vehicles collided. Appellant alleged that the firefighter had negligently caused the accident, and thus filed tort claims against Hardin County under a theory of vicarious liability and Tennessee's Governmental Tort Liability Act. She filed her claims more than one year after the accident, so the trial court dismissed them as barred by the applicable one-year statute of limitations. She appeals, and we affirm."

"Christopher Durham and Gus Losleben each died after colliding while driving separate vehicles in Hardin County on December 9, 2014. Mr. Losleben was a volunteer employee of the Hardin County Fire Department ('HCFD') and was driving a HCFD fire truck at the time of the collision. Susan Durham ('Appellant'), Mr. Durham's widow and Administratix of his estate, filed a wrongful death complaint against Mr. Losleben's estate, HCFD, Hardin County ('Appellee'), and John Does

1-10 on December 30, 2015, in the Circuit Court of Hardin County ('the circuit court'). According to Appellant's complaint, she did not know that Mr. Losleben was at fault on the date of the accident.

"Appellant's complaint alleged negligence and negligence per se of Mr. Losleben (such that Hardin County would be liable under the Tennessee Governmental Tort Liability Act ('GTLA')) and 42 U.S.C. § 1983 claims against Mr. Losleben, HCFD, and Hardin County. Appellant's claims were removed to the United States District Court for the Western District of Tennessee, Eastern Division ('the federal court'). The federal court dismissed the § 1983 claims with prejudice and remanded Appellant's state law claims to the circuit court.

"Mr. Losleben's estate, HCFD, and Hardin County thereafter filed a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss on March 15, 2019, in the circuit court. They argued that Appellant's claims were barred by the statute of limitations in the GTLA, that HCFD was not a separate, suable entity, and that Mr. Losleben's estate was immune from liability. Appellant filed a response in opposition to the motion to dismiss on June 10, 2019. Therein, she argued that she only discovered Mr. Losleben's fault after making efforts to obtain more information regarding how the accident occurred, including obtaining the Tennessee Highway Patrol ('THP') Report, which she received one month after the accident, and obtaining the Electronic Control Module ('ECM') data from the fire truck, which she received six months after the accident. Appellant also argued that the statute of limitations was tolled under Tennessee Code Annotated section 28-1-110, as discussed in detail, *infra.* The circuit court heard the motion to dismiss on June 19, 2019, and granted the motion with prejudice in a final order entered July 15, 2019. In this order, the circuit court found that Appellant's claims against the Hardin County entities were time-barred, Mr. Losleben's estate was immune under the GTLA, and Appellant's claims against John Does were moot and barred by the statute of limitations. Appellant timely appealed."

"There is no dispute that the claims at issue in this appeal are governed by the GTLA. The GTLA provides that causes of action against the government 'must be commenced within twelve (12) months after the cause of action arises.' Tenn. Code Ann. § 29-20-305(b). Here, it is undisputed that Appellant filed her claim more than one year (one year and twenty-one days) after the accident that killed her husband. Appellee has therefore raised the statute of limitations as an affirmative defense, arguing that Appellant's claim is time-barred."

"Appellant first argues that under the discovery rule, her claim is timely. The discovery rule applies to 'all tort actions predicated on negligence, strict liability, or misrepresentation.' *Doe v. Coffee Cty. Bd. of Educ.*, 852 S.W.2d 899, 904 (Tenn. Ct. App. 1992). We have previously described it as follows:

> It is well-established that the discovery rule, where applicable, 'is an equitable exception that tolls the running of the statute of limitations until the plaintiff knows, or in the exercise of reasonable care and diligence, should know that an injury has been sustained.' It is based on 'reason, logic and fundamental fairness.' The purpose of the discovery rule is to prevent the inequitable result of 'strict application' of the statute of limitations, which would require plaintiffs 'to vindicate a non-existent wrong, at a time when the injury is unknown and unknowable.'

"Smith v. Hauck, 469 S.W.3d 564, 569–70 (Tenn. Ct. App. 2015) (citations omitted). Appellee does not dispute that claims raised under the GTLA and claims of vicarious liability are both subject to the discovery rule."

"Appellant makes a valiant effort to persuade this Court that disputes of material fact remain as to when she should have discovered that her husband suffered an injury (i.e., his death) as a result of Mr. Losleben's wrongful conduct. Specifically, Appellant asserts that until she obtained additional information in the form of the THP Report and the ECM data, there was a lack of evidence about the manner in which Mr. Losleben's breach of duty contributed to her husband's death, and therefore 'no cause of action was known or available to [Appellant] at that time.'"

"In contrast, Appellee asserts that Appellant was not required to have certainty as to all the facts surrounding the injury before the statute of limitations began to run. Rather, Appellee asserts that the discovery rule tolls the statute of limitations 'only during the period when the plaintiff has no knowledge at all that a wrong has occurred.' *Doe v. Coffee Cty.*, 852 S.W.2d at 904. . . . In other words, a plaintiff is not required to know the type of legal claim he or she has as long as the plaintiff is 'aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.' *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994). More recently, the Tennessee Supreme Court reaffirmed this principle, explaining

> Under the current discovery rule, a cause of action accrues and the statute of limitations begins to run not only when the plaintiff has actual knowledge of a claim, but also when the plaintiff has actual knowledge of 'facts sufficient to put a reasonable person on notice that he [or she] has suffered an injury as a result of wrongful conduct.' *Carvell v. Bottoms*, 900 S.W.2d 23, 29 (Tenn. 1995) (quoting *Roe v. Jefferson*, 875 S.W.2d 653, 657 (Tenn. 1994)). This latter circumstance is variously referred to as 'constructive notice' or 'inquiry notice.' Quoting the Iowa Supreme Court, we have explained that inquiry notice 'charges a plaintiff with knowledge of those facts that a reasonable investigation would have disclosed.... [O]nce a plaintiff gains information sufficient to alert a reasonable person of the need to investigate 'the injury,' the limitation period begins to run.' *Sherrill v. Souder*, 325 S.W.3d [584] at 593 n.7 [(Tenn. 2010)] (quoting *Rathje v. Mercy Hosp.*, 745 N.W.2d 443, 461 (Iowa 2008))[.]

"*Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 459 (Tenn. 2012)."

"In sum, the undisputed facts indicate that Appellant had all of the information necessary on December 9, 2014, to alert her 'of the need to investigate any potential wrongful conduct by [Mr. Losleblen].' *Woodruff* [*v. Walker*], 542 S.W.3d [486] at 496 [(Tenn. Ct. App. 2017)]. We therefore affirm the trial court's finding that the discovery rule was not applicable to render Appellant's claim timely. Thus, Appellee is entitled to judgment as a matter of law. *See generally id.* (noting that summary judgment is only appropriate when the moving party is entitled to judgment as a matter of law); *see also Roe v. Jefferson*, 875 S.W.2d at 658 (concluding that 'no reasonable trier of fact could find that [the plaintiff] was unaware that she had suffered an injury for purposes of the discovery rule,' and thus defendant was entitled to summary judgment). Appellant's claim therefore accrued on the date of the accident, December 9, 2014. Thus, when she filed her claim on December 30, 2015, it was time-barred by the one-year statute of limitations in the GTLA."

"Appellant next raises an alternative argument: if the discovery rule does not save her claim, Tennessee Code Annotated section 28-1-110 does. Section 28-1-110 states:

> The time between the death of a person and the grant of letters testamentary or of administration on such person's estate, not exceeding six (6) months, and the six (6) months within which a personal representative is exempt from suit, is not to be taken as a part of the time limited for commencing actions which lie against the personal representative.

"Appellant asserts that this section operates in conjunction with section 20-5-103(a) to preserve claims against deceased tortfeasors by tolling statutes of limitations until a representative of the decedent's estate is appointed, a period not to exceed six months after the decedent's death. Section 20-5-103(a) states:

> In all cases where a person commits a tortious or wrongful act causing injury or death to another, or property damage, and the person committing the wrongful act dies before suit is instituted to recover damages, the death of that person shall not abate any cause of action that the plaintiff would have otherwise had, but the cause of action shall survive and may be prosecuted against the personal representative of the tortfeasor or wrongdoer.

"Thus, Appellant argues that under section 28-1-110, her cause of action against Mr. Losleben's estate did not accrue until a representative of his estate was appointed or June 9, 2015, six months after he died. Therefore, she argues, because Hardin County is vicariously liable for Mr. Losleben's negligence under the GTLA, the cause of action against Hardin County likewise did not accrue until June 9, 2015, or the one-year statute of limitations in the GTLA was tolled until June 9, 2015, making her claim filed on December 30, 2015 timely."

"Respectfully, we are not persuaded by Appellant's argument. The plain language of section 28-1-110 states that it applies to actions against personal representatives. The only remaining action in this case is not against a personal representative. Nothing in section 28-1-110 indicates that the statute is intended to apply beyond its express terms or that it is applicable anytime a defendant is to be held vicariously liable for the injuries caused by a decedent. In other words, we cannot interpret section 28-1-110 to mean anything other than what it plainly says. . . . We therefore decline Appellant's invitation to apply section 28-1-110 beyond its express boundaries. Instead, we conclude the applicable statute of limitations to the claims against Hardin County is one year, as provided in the GTLA. *See* Tenn. Code Ann. § 29-20-305(b)."

III. Statute of Repose; GTLA; Trolley or Light Rail System Deficiency

Chapter 506, Public Acts 2021, adding T.C.A. § 29-20-203(c) eff. July 1, 2021.

"(c) Notwithstanding any law to the contrary, all actions, arbitrations, or other binding dispute resolution proceedings to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of a trolley or light rail system, for injury to property, real or personal, arising out of any such deficiency, or for injury to the person or for wrongful death arising out of any such deficiency, must be brought against any governmental entity that owns, operates, or controls the trolley or light rail system within four (4) years after substantial completion of an improvement."

IV. Wrongful Death Act Modified; No Cause of Action for Wrongful Birth or Wrongful Life

Chapter 379, Public Acts 2021, adding T.C.A. § 29-34-212 and amending T.C.A. § 20-5-106 eff. May 11, 2021.

29-34-212.

"(a) There is no cause of action for wrongful birth on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.

"(b) There is no cause of action for wrongful life on behalf of any person based on a claim that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

"(c) For the purposes of this section, a person is deemed to be conceived at the moment of fertilization, as that term is defined in § 39–15–213."

20-5-106.

"(d) As used in this section, the word 'person' includes an unborn child at any stage of gestation in utero."

V. Negligence; Child's Fall from Balcony Not Foreseeable

Kim v. State, 622 S.W.3d 753 (Tenn. Ct. App., Stafford, 2020), perm. app. denied Mar. 23, 2021.

"This matter is before the court for a second time. Plaintiffs filed a negligence suit in the Tennessee Claims Commission against the State of Tennessee after their six-year-old son fell from the fifth-floor balcony of the state-owned and -operated Paris Landing State Park Inn. Plaintiffs alleged that the State was negligent in two respects: 1) in allowing their son to gain access to an unoccupied guest room and the attached balcony, and 2) in maintaining balcony railings that were shorter in height than was required by applicable building codes. Following a bench trial, the Tennessee Claims Commissioner concluded that the Plaintiffs failed to establish that the State's negligence was the proximate cause of their son's injuries. Plaintiffs appealed to this Court, and we held that the Commissioner's conclusions of law were deficient and vacated and remanded the case for further consideration. On remand, the Commissioner entered a supplemental order that included additional conclusions of law as to both claims for negligence, and, again, determined that the Plaintiffs failed to meet their burden of proving that the Inn's acts were the proximate cause of their son's fall and dismissed the claim in its entirety. Plaintiffs again appeal. We affirm the Commissioner's holding that Plaintiffs failed to establish that the negligence of the Inn was the proximate cause of their son's injuries."

"The following elements are essential to a negligence claim: '(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause.' *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995) (citing *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993); *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn. 1991)). A plaintiff must prove both causation in fact and proximate cause by a preponderance of the evidence. *Kilpatrick*, 868 S.W.2d at 598.

"The Commissioner held, and the parties do not dispute, that the State owed a duty of reasonable care to the Kims to ensure that the doors to unoccupied rooms were secured and that the balcony railing was built in compliance with the applicable building codes; that the State breached each of those duties; that the Kims suffered injuries and damages; and that 'but for [the State] leaving the doors to the guest room and balcony ajar Daniel Kim would not have gained access to the room or balcony.' Therefore, the only remaining element in dispute is that of proximate cause."

"The Tennessee Supreme Court last discussed proximate cause at length in *McClenahan v. Cooley*, 806 S.W.2d 767 (Tenn. 1991). According to the court, a three-pronged test should be used to determine proximate cause:

> (1) the tortfeasor's conduct must have been a 'substantial factor' in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

"*Id*. at 775 (citations omitted). The Commissioner did not make any explicit findings as to the first two elements but determined that the Inn's failure to secure the guest room and balcony doors was not the proximate cause of Daniel's injury because it was not reasonably foreseeable by the State. The Commissioner correctly ruled that in the absence of this element, there can be no proximate cause."

"In adopting the three-part test above nearly thirty years ago, the Tennessee Supreme Court offered the following observations:

> The foreseeability requirement is not so strict as to require the tortfeasor to foresee the exact manner in which the injury takes place, provided it is determined that the tortfeasor could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury or loss occurred. 'The fact that an accident may be freakish does not per se make it unpredictable or unforeseen.' It is sufficient that harm in the abstract could reasonably be foreseen. Finally, proximate causation is a jury question unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome.

"*McClenahan*, 806 S.W.2d at 775 (citations omitted)."

"Keeping this framework in mind, we address the Kims' contention that the evidence preponderates against the Commissioner's finding because the testimony established that there was a significant gravity of harm that resulted from the State's failure to secure the vacant room, that the risk of children falling from balconies is well-known, that the foreseeability requirement for proximate cause does not require the State to foresee the exact injury, and that public policy imposes a heightened duty on innkeepers who invite children to their establishments. The Kims also assert that the Commissioner interpreted the law of foreseeability, as it relates to proximate cause, too narrowly."

"The Kims also assert that the risk of children falling from balconies was well-known, and, therefore, should have been foreseen by the State; they cite to numerous cases from other jurisdictions to demonstrate that there is a generally recognized danger in children having

unsupervised access to balconies and as evidence that Daniel's harm was foreseeable. We respectfully disagree with this reasoning. In order to prevail on this issue, the Kims had to demonstrate that the harm was 'not just a remote possibility, and that some action within the defendant's power more probably than not would have prevented the injury.' *King* [*v. Anderson County*], 419 S.W.3d [232] at 248 [(Tenn. 2013)]. Moreover, we must always keep in mind that proximate cause involves the link between the negligence committed by the defendant and the harm that resulted. Proximate cause will be found if 'some such harm of a like general character was reasonably foreseeable as a likely result of defendant's [specific act of negligence].' *Spivey v. St. Thomas Hosp.*, 31 Tenn. App. 12, 28–29, 211 S.W.2d 450, 457 (Tenn. Ct. App. 1947)."

"The Kims assert, however, that they were not required to prove that Daniel's specific injury was foreseeable, and that they just had to establish that some harm to children, in the abstract, was foreseeable as a result of the Inn leaving vacant rooms unsecured. *See* discussion of *McClenahan*, *supra.* The State contends that the Kims' focus is too broad and asserts that the Commissioner correctly found that proximate cause was not established in this case. We agree that the Kims have failed to rebut the presumption of correctness that attached to the Commissioner's finding that proximate cause was not established. *Watson* [*v. Watson*], 196 S.W.3d [695] at 701 [(Tenn. Ct. App. 2005)].

"Importantly, the Tennessee Supreme Court has held that 'the particular harm need not have been foreseeable [only] if another "harm of a like general character was reasonably foreseeable."' *Moon v. St. Thomas Hosp.*, 983 S.W.2d 225, 229 (Tenn. 1998) (quoting *Spivey*, 211 S.W.2d at 457) (holding that because evidence was presented that injury due to impairment of a tube was foreseen, whether injury due to severing the tube was foreseeable was a question for the jury). And as previously discussed, the Tennessee Supreme Court has required more than a remote possibility for a negligent act to be deemed the proximate cause of any injury. *King*, 419 S.W.3d at 248."

"Thus, the Inn was not required to be hyper-vigilant of all types of harm that could manifest through the misconduct of its guests, but only those that were of like character to other harms that should have been reasonably foreseen. And the Kims had the responsibility to present sufficient evidence to support this element and to demonstrate that the evidence preponderates against the Commissioner's finding that the proof was insufficient. *Kilpatrick*, 868 S.W.2d at 598; *Watson*, 196 S.W.3d at 701. We cannot conclude that the Kims met this burden.

"In this case, the Commissioner explicitly found, and the Kims do not dispute, that Daniel 'would not have fallen from the balcony had he not deliberately climbed on top of the balcony railing.' Although we do not consider the exact series of events that led to Daniel's injuries, the fact that his injury resulted from both his caregivers' failure to supervise him and his own decision to climb atop the railing cannot be extricated from the analysis. And the fact that Daniel's injuries resulted from his own action in deliberately evading the safety features put in place to protect those on the Inn's balcony certainly factors into an analysis of whether a fall from that balcony by an unsupervised child was foreseeable."

"For the foregoing reasons, we affirm the Commissioner's determination that Daniel's fall was not foreseeable, and, therefore, the Kims failed to establish that the Inn's breach of duty was the proximate cause of his injuries. The judgment of the Tennessee Claims Commission is therefore affirmed and remanded for all further proceedings as may be necessary and consistent with this Opinion. Costs of this appeal are taxed to Appellants Heun Kim and Joung Kim, for which execution may issues if necessary."

VI. Defamation; Trespass to Chattels, Conversion, Negligence and Trespass

Kauffman v. Forsythe, No. E2019-02196-COA-R3-CV (Tenn. Ct. App., McBrayer, May 25, 2021).

"One Fourth of July evening, Tana Bishop's dogs entered Jack and Karen Kauffman's property and cornered one of their cats. Fearing for the safety of the cat, Mr. Kauffman fired two warning shots to scare the dogs away. When one of the dogs did not retreat, Mr. Kauffman fired again, injuring the dog's leg.

"Two days later, Ms. Bishop complained about the incident on social media. In her post, she called Mr. Kauffman evil and accused him of overreacting. After reading Ms. Bishop's post, Jason Williams posted his own negative opinion about Mr. Kauffman.

"In January 2018, Mr. Kauffman picked up a qualifying petition to run for a seat on the Rhea County Commission. Ms. Bishop and Mr. Williams continued to post negative comments about Mr. Kauffman throughout his election campaign. Mr. Williams posted, '[w]atch out for Jack (me off) Kauffman. He's running for district 4 county commission but get[s] arrested often[.]' In one post, Ms. Bishop questioned Mr. Kauffman's fitness for public office. Calling him 'mentally unstable,' she stated he had problems ranging '[f]rom child abuse investigations to burning down houses to animal cruelty issues.'

"Timothy Forsythe, the grandfather of Ms. Bishop's children, also voiced his negative opinion of Mr. Kauffman on social media. He posted two pictures of a Kauffman campaign sign, one standing upright and the other crumpled on the ground, with the following message: 'Kauffman, if I ever see your **** in my yard again I'll hunt you down like the dog you are[.] I'm not a thirteen year old kid and I'll take you out.' Mr. Forsythe later added a comment to his post, explaining that Mr. Kauffman 'was told to leave my property and not come back, when we got home this is what we found. Very bad move.'"

"After Mr. Kauffman lost the election, he and his wife sued Ms. Bishop, Mr. Forsythe, and Mr. Williams (collectively, the Defendants) for defamation, false light invasion of privacy, and negligent and intentional infliction of emotional distress. The Kauffmans sought compensatory and punitive damages.

"Defendants pled several affirmative defenses in their answer. They also filed a countercomplaint. The countercomplaint alleged that Mr. Kauffman intentionally and/or recklessly shot Ms. Bishop's dog even though the dog was not a threat to Mr. Kauffman, his family, or his property. It also alleged that Mr. Kauffman or his agent placed a campaign sign in Mr. Forsythe's yard without permission. Ms. Bishop sought damages for conversion, trespass to chattels, and/or negligence. Mr. Forsythe asserted a trespass claim."

"In Tennessee, a plaintiff in a defamation case must prove '1) a party published a statement; 2) with knowledge that the statement is false and defaming to the other; or 3) with reckless disregard for the truth of the statement or with negligence in failing to ascertain the truth of the statement.' *Sullivan v. Baptist Mem'l Hosp.*, 995 S.W.2d 569, 571 (Tenn. 1999). A public figure cannot rely on the negligence standard. Instead, a public figure must prove that the defendant published the allegedly defamatory statement with 'actual malice.' *Hibdon v. Grabowski*, 195 S.W.3d 48, 58

(Tenn. Ct. App. 2005). The actual malice standard also applies to false light claims brought by a public figure. *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 647 (Tenn. 2001)."

"As a candidate for public office, Mr. Kauffman's qualifications, background, and character were subjects of public concern. . . . So both criteria for application of the actual malice standard are satisfied here. *See Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 296 (Tenn. Ct. App. 2007)), *abrogation on other grounds recognized by Burke v. Sparta Newspapers, Inc.*, 592 S.W.3d 116 (Tenn. 2019)."

"The trial court dismissed the defamation and false light invasion of privacy claims solely because the Kauffmans failed to allege that allegedly defamatory statements were published with actual malice. But the complaint alleged that the defendants were 'negligent and/or reckless in ascertaining the truth' of their statements about Mr. Kauffman. We agree that allegations of 'mere negligence' are not enough. *Masson* [*v. New Yorker Magazine, Inc.*], 501 U.S. [496] at 510 [(1991)]. But the Kauffmans also alleged reckless disregard. And reckless disregard, if proven, does constitute actual malice. *See New York Times* [*v. Sullivan*], 376 U.S. [254] at 279-80 [(1964)] (A public figure may recover damages in a defamation action if he can 'prove[ ] that the statement was made ... with reckless disregard of whether it was false or not.').

"'[A] complaint should not be dismissed, no matter how poorly drafted, if it states a cause of action.' *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992). Construing the complaint liberally, as we must, we conclude that Mr. Kauffman sufficiently alleged actual malice. So we reverse the dismissal of his claims for defamation and false light invasion of privacy."

"Ms. Bishop asserts that the factual allegations in the countercomplaint entitle her to damages for trespass to chattels, conversion, and/or negligence. Taking those allegations as true, Mr. Kauffman intentionally or recklessly shot and injured Ms. Bishop's dog, and the dog was not a threat to Mr. Kauffman, his family, or his property. Also, Ms. Bishop incurred 'several thousand dollars' in veterinarian bills to treat her dog's injuries.

"Trespass to chattels and conversion are intentional torts involving interference with an owner's property rights. Restatement (Second) of Torts §§ 217, 222A (Am. Law Inst. 1965). A pet dog is personal property. *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 700 (1897) ('By the common law, as well as by the law of most, if not all, the states, dogs are so far recognized as property that an action will lie for their conversion or injury.'). . . ."

"A plaintiff may recover for trespass to chattels upon showing that another party 'intentionally use[d] or intermeddle[d] with [the plaintiff's] personal property ... without authorization.' *Garner v. Coffee Cty. Bank*, No. M2014-01956-COA-R3-CV, 2015 WL 6445601, at *6 (Tenn. Ct. App. Oct. 23, 2015) (citing Restatement (Second) of Torts § 217(b)). As her claim does not involve dispossession, Ms. Bishop must also show that her dog's 'condition, quality, or value' was impaired. . . . The factual allegations in the countercomplaint support a claim for trespass to chattels. '"Intermeddling" means intentionally bringing about a physical contact with the chattel.' *Id.* § 217 cmt. e. '[D]irecting an object or missile' at a dog is intermeddling. *See id.* And the dog was injured.

"A successful conversion claim, on the other hand, requires proof that the defendant appropriated the plaintiff's tangible personal property for his or her own use and benefit by intentionally exercising dominion over the property in defiance of the plaintiff's rights. *Barger v. Webb*, 391

S.W.2d 664, 665 (Tenn. 1965); *White v. Empire Exp., Inc.*, 395 S.W.3d 696, 720 (Tenn. Ct. App. 2012). Mr. Kauffman argued that injuring a dog did not meet conversion's more technical requirements. *See Gen. Elec. Credit Corp. of Tenn. v. Kelly & Dearing Aviation*, 765 S.W.2d 750, 753 (Tenn. Ct. App. 1988) (recognizing that 'the tort of conversion has highly technical rules'). The trial court agreed with Mr. Kauffman. We do not."

"Ms. Bishop's dog survived the interaction with Mr. Kauffman. So for Ms. Bishop to state a claim for conversion, the damage to the dog 'must be so material as to change the identity of the [dog] or its essential character.' *Id.* cmt. d; *see Gen. Elec. Credit Corp. of Tenn.*, 765 S.W.2d at 753 (explaining that the degree of 'interference, as well as the impact on the property, determines whether there has been a conversion'). Anything less 'may be a trespass to the chattel ..., but it is not a conversion.' Restatement (Second) of Torts § 226 cmt. d."

"[W]e conclude that Ms. Bishop has stated a claim for conversion. The countercomplaint alleged that the cost to treat the dog's injuries was 'several thousand dollars.' It would be reasonable to infer that the dog's injuries were 'more than a scratch.' *See id.* § 222A cmt. d, illus. 18. At this stage in the litigation, we cannot say that Ms. Bishop will be unable to prove that the injuries to her dog were serious enough to constitute conversion. *See Doe* [*v. Sundquist*], 2 S.W.3d [919] at 922 [(Tenn. 1999)]."

"Turning to the negligence claim, Ms. Bishop must establish a duty of care, a breach of that duty, damages, and both factual and legal causation. *See Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013). All the elements of a negligence claim are satisfied here. A dog owner may recover damages for the intentional or reckless killing or injury of a dog. *Birdsong v. Wilkinson*, 13 Tenn. App. 276, 279 (1931). *But see* Tenn. Code Ann. § 44-17-403 (2007) (limiting damages for wrongful death of a pet). The fact that the dog was trespassing is not a bar to recovery. *White v. State*, 249 S.W.2d 877, 879 (Tenn. 1952). The owner or occupier of property has a duty to refrain from willfully, maliciously, or intentionally injuring a trespasser. *Yarbrough v. Potter*, 207 S.W.2d 588, 589 (Tenn. 1948)."

"Mr. Forsythe sought damages for trespass. Trespass protects a landowner's right to exclusive possession. *Morrison v. Smith*, 757 S.W.2d 678, 681 (Tenn. Ct. App. 1988). Any unauthorized entry upon the property of another is a trespass. *Id.* The injured party is entitled 'to at least nominal damages.' *Price v. Osborne*, 147 S.W.2d 412, 413 (Tenn. Ct. App. 1940). The countercomplaint alleged that Mr. Kauffman or his agent intentionally placed a campaign sign in Mr. Forsythe's yard without permission. These facts state a claim for trespass under Tennessee law."

"We reverse the dismissal of Mr. Kauffman's claims for defamation and false light invasion of privacy because the complaint contains sufficient allegations of actual malice. We also reverse the dismissal of Ms. Bishop's counterclaims for trespass to chattels, conversion, and negligence; Ms. Bishop's request for punitive damages; and Mr. Forsythe's counterclaim for trespass. And we vacate the restraining order. We affirm the dismissal of the remaining claims and Mr. Forsythe's request for punitive damages. We remand this case to the trial court for such further proceedings, consistent with this opinion, that may be necessary."

VII. Product Liability Action; Asbestos

A. Failure to Warn of Later-Affixed Asbestos Containing Products Not Actionable

Coffman v. Armstrong International, Inc., 615 S.W.3d 888 (Tenn., Page, 2021).

"This products liability case was originally filed by Donald Coffman, who was diagnosed with mesothelioma, and his wife, Carolyn Coffman ('Appellees'). Mr. Coffman worked at the Tennessee Eastman chemical plant ('Tennessee Eastman') between the years of 1968 and 1997. During his career as an equipment mechanic at Tennessee Eastman, Mr. Coffman repaired and replaced equipment that included pumps, valves, steam traps, gaskets and piping while working around packing and insulation. According to Appellees, many of these products contained asbestos. Mr. Coffman spent most of his time working in and around 'Building 55,' in which acid from other divisions was distilled, reclaimed, and refined. The piping system at Tennessee Eastman carried highly corrosive steam and acids that required the equipment to be repaired daily and sometimes replaced entirely."

"Appellees alleged causes of action against the Equipment Defendants under the Tennessee Products Liability Act of 1978, Tennessee Code Annotated Sections 29-28-101 through -108. They claimed that the Equipment Defendants were liable for Mr. Coffman's illness because he was exposed to asbestos while working with or near the Equipment Defendants' products, such as industrial valves, pumps, and steam traps, that were supplied to Tennessee Eastman several years earlier. They further asserted that the Equipment Defendants were subject to liability because their products were unreasonably dangerous and because the Equipment Defendants failed to adequately warn users of potential asbestos exposure resulting from the post-sale integration of asbestos-containing materials manufactured and sold by others. The products alleged to have contained asbestos included: insulation applied to the exterior of the equipment post-sale; asbestos-containing flange gaskets applied to the exterior of the equipment post-sale; asbestos-containing replacement gaskets integrated into the equipment post-sale; and asbestos-containing replacement packing integrated into the equipment post sale. These later-affixed asbestos-containing products were manufactured and sold by other entities with no involvement from the Equipment Defendants. According to Appellees, the Equipment Defendants were liable under a duty-to-warn theory because it was foreseeable, and even intended, that their equipment be repaired and maintained with asbestos-containing materials.

"Each Equipment Defendant moved for summary judgment and asserted that they were entitled to summary judgment on claims related to asbestos exposure arising from products that they did not themselves make, sell, or distribute. As is pertinent to this appeal, the trial court determined that the Equipment Defendants affirmatively negated any duty to warn of asbestos with respect to Appellees' claims arising from the post-sale integration of asbestos-containing insulation, flange gaskets, replacement internal gaskets, and replacement packing that were manufactured and sold by others. Further, the trial court found the duty to warn to be an essential element of Appellee's negligence and strict liability claims under the Tennessee Products Liability Act (the 'TPLA'). Therefore, following multiple hearings, the trial court granted summary judgment in favor of the Equipment Defendants with respect to failure-to-warn claims for products made and sold by others. The trial court certified these orders as final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

"Appellees filed separate notices of appeal against twelve defendants regarding the trial court's dismissal of their claims. The Court of Appeals consolidated the cases on appeal pursuant to Rule 16(b) of the Tennessee Rules of Appellate Procedure. Several issues were presented to the Court of Appeals – only one of which is at issue before this Court. In short, the Court of Appeals disagreed with the trial court's holding that the Equipment Defendants had affirmatively negated

their duty to warn, which was an essential element of Appellees' negligence and strict liability claims, and ultimately vacated the final judgments entered by the trial court. As it relates to the appeal before us, the Court of Appeals held that the Equipment Defendants owed a common law 'duty to warn about the post-sale integration of asbestos-containing' products 'manufactured and sold by others,' and were therefore subject to liability under the TPLA."

"We granted this appeal to address whether 'the Equipment Defendants had a duty to warn of the dangers associated with the post-sale integration of asbestos-containing materials manufactured and sold by others.' Whether there is a duty to warn of the dangers associated with the post-sale integration of asbestos-containing parts that are manufactured and sold by others is an issue of first impression in Tennessee. The products at issue did not contain asbestos when they left the Equipment Defendants' control, but rather an end user integrated or used asbestos-containing materials with the Equipment Defendants' products after their final sale.

"The answer to whether the Equipment Defendants had a duty to warn as alleged is found in the plain language of the Tennessee Products Liability Act. In 1978, the Tennessee Legislature enacted the TPLA, which provides an extensive statutory framework for all claims arising from injuries alleged to have been caused by products. *See* Tenn. Code Ann. § 29-28-102(6) (2012). Through its enactment, the TPLA superseded common law claims for personal injuries stemming from alleged defects in products or failures to warn of the dangers associated with a product. Moreover, the TPLA speaks to the issue of a duty to warn and specifically provides that a failure to discharge a duty to warn, whether negligent or innocent, falls within the scope of the TPLA:

> 'Product liability action' for purposes of this chapter includes all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. 'Product liability action' includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation, concealment, or nondisclosure, whether negligent or innocent; or under any other substantive legal theory in tort or contract whatsoever[.]

"Tenn. Code Ann. § 29-28-102(6). Therefore, in cases in which a failure to warn is at issue, the language of the TPLA determines whether manufacturers can be liable for failing to warn of dangers associated with products they did not themselves make or sell.

"Appellees alleged injuries to Mr. Coffman as a result of work-related exposure to asbestos. However, none of the Equipment Defendants' products at issue contained asbestos when they were under the Equipment Defendants' control. The Equipment Defendants assert that they cannot be held liable for end-products containing asbestos that they themselves did not manufacture or sell. We agree that the best reading of the TPLA does not create a duty or liability for defendants for the post-sale incorporation of products containing asbestos because these products were incorporated into that equipment after it left their control. This Court has stated that '[t]he key operative provision of the Act is [Tennessee Code Annotated Section] 29-28-105(a).' *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 689 (Tenn. 1995). The TPLA specifically provides that a defendant shall not be liable under the TPLA unless the product is defective or unreasonably dangerous at the time it left the defendant's control, stating that '[a] manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined

to be in a defective condition or unreasonably dangerous *at the time it left the control of the manufacturer or seller*.' Tenn. Code Ann. § 29-28-105(a) (2012) (emphasis added). 'In order to prevail in a products liability action, a plaintiff must prove that the product in question was either defective or unreasonably dangerous, as those concepts are defined in the Act, *at the time it left the control of the manufacturer or seller*.' *Whaley v. Rheem Mfg. Co.*, 900 S.W.2d 296, 299 (Tenn. Ct. App. 1995) (emphasis added)."

"Appellees assert that the Equipment Defendants ignore certain language within the TPLA, including that a product is in a 'defective condition' under the TPLA when it is in a condition that 'renders it unsafe for normal or anticipatable handling and consumption.' Tenn. Code Ann. § 29-28-102(2). Appellees argue that the Equipment Defendants' products were in a defective condition at the time they left the Equipment Defendants' control because they were designed to use asbestos-containing materials and provided no warnings as to the dangers of asbestos. According to Appellees, the Court of Appeals' opinion is actually consistent with the TPLA because the definition of 'defective condition' includes 'anticipatable handling.' Both 'defective condition' and 'unreasonably dangerous' are defined terms within the TPLA. The TPLA defines 'defective condition' as 'a condition of a product that renders it unsafe for normal or anticipatable handling and consumption.' Tenn. Code Ann. § 29-28-102(2). 'Unreasonably dangerous' applies to a product that is:

> dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller, assuming that the manufacturer or seller knew of its dangerous condition.Tenn. Code Ann. § 29-28-102(8). Contrary to Appellees assertion, these provisions still link a defendant's liability to the defendant's own product, not the product of another manufacturer. The very definition of 'defective condition' states that the product's condition 'renders *it* unsafe for normal or anticipatable handling and consumption.' Tenn. Code Ann. § 29-28-102(2) (emphasis added). The '*it*' refers to the manufacturer's own product. In this case, the '*it*' is the Equipment Defendants' original product, not the Equipment Defendants' product plus some later-included asbestos-containing material.

"Appellees further point to the language of the TPLA that states '[i]f a product is not unreasonably dangerous at the time it leaves the control of the manufacturer or seller but was made unreasonably dangerous by subsequent *unforeseeable* alteration, change, improper maintenance or abnormal use, the manufacturer or seller is not liable.' Tenn. Code Ann. § 29-28-108 (emphasis added). Based on this provision, Appellees assert that the language of the TPLA anticipates that manufacturers are liable for the *foreseeable* alterations, changes, improper maintenance, or abnormal use of their products. As it relates to the case at hand, Appellees assert that the Equipment Defendants were not only able to foresee the dangers, but they actually intended and specified that asbestos material be used with their products."

"When viewing the TPLA as a whole, we find it dispositive that the end-products at issue on this appeal *were neither made nor sold by the Equipment Defendants*. Again, this appeal deals strictly with the Equipment Defendants in situations where there was post-sale integration of asbestos-containing parts manufactured and sold by others."

"Appellees also assert that the Court of Appeals decision is consistent with the U.S. Supreme Court's decision in *Air & Liquid Systems Corp. v. DeVries,* 139 S. Ct. 986 (2019). That case was discussed in some detail by the Court of Appeals. *Coffman,* 2019 WL 3287067, at *13-15. The *DeVries* case, however, is in no way determinative of the outcome in this case because we are bound by the specific language of the TPLA. The U.S. Supreme Court had no legislative enactment to apply regarding its duty analysis, and the majority of the Court, therefore, crafted its own test. By contrast, the TPLA supplies the test we must apply. Furthermore, the U.S. Supreme Court explicitly relied on the fact that the case arose from facts within the maritime context, noting '[m]aritime law's longstanding solicitude for sailors,' *DeVries,* 139 S. Ct. at 995, which of course does not apply to the facts of this case.

"We reiterate that the language of the TPLA dictates our decision here, and we do not opine on what we perceive to be the optimal outcome of this case in terms of public policy. That determination is for the legislature."

"In sum, we hold that, under the language of the TPLA, the Equipment Defendants cannot be held liable for injuries resulting from products they did not make, distribute, or sell. The judgment of the Court of Appeals is reversed in part. We remand to the trial court for proceedings consistent with this opinion. The costs of this appeal are taxed to the Appellees, for which execution may issue if necessary."

B. Asbestos Claims; Duty to Disclose Certain Relevant Information Within Thirty Days of Filing Suit

Chapter 265, Public Acts 2021, amending T.C.A. § 29-34-703(c), adding §§ -703(d)-(f) and renumbering accordingly eff. July 1, 2021.

"(c) A plaintiff in an asbestos action, including an action alleging a nonmalignant condition or a malignant condition, filed on or after July 1, 2021, shall file, within thirty (30) days of filing any complaint, an information form attested by plaintiff stating the evidence that provides the basis for each claim against each defendant. The information form must include all of the following to the best of the plaintiffs ability:

(1) The name, address, date of birth, marital status, occupation, smoking history, current and past worksites, and current and past employers of the exposed person, and any person through which the exposed person alleges exposure;
(2) The plaintiffs relationship to the exposed person or the person through which the exposure is alleged;
(3) Each asbestos-containing product to which the person was exposed and each physical location at which the person was exposed to asbestos, or the other person was exposed if exposure was through another person;
(4) The specific location and manner of each exposure, including the specific location and manner of exposure for any person through which the exposed person alleges exposure, the beginning and ending dates of each exposure, the frequency of the exposure, and the identity of the manufacturer or seller of the specific asbestos product for each exposure;
(5) The specific asbestos-related disease claimed to exist; and
(6) Supporting documentation relating to subdivisions (c)(1)–(5) that is sufficient to establish the basis for each claim against each defendant.

"(d) A plaintiff has a continuing duty to supplement the information that is required to be disclosed in this section.

"(e) The court, on motion by a defendant, shall dismiss a plaintiffs asbestos claim without prejudice as to any defendant whose product or premises is not identified in the required disclosures set forth in subsection (c).

"(f) The court, on motion by a defendant, shall dismiss a plaintiffs asbestos claim without prejudice as to all defendants if the plaintiff fails to comply with the requirements of subsection (c)."

VIII. Tennessee Public Participation Act Suit in Response to Defamation and False Light Action After Yelp! Review

Nandigam Neurology, PLC v. Beavers, No. M2020-00553-COA-R3-CV (Tenn. Ct. App., Davis, June 18, 2021).

"This case centers on the recently enacted TPPA, found at Tennessee Code Annotated section 20-17-101 et. seq. Kelly Beavers ('Defendant' or 'Appellee') and her father visited the office of Dr. Kaveer Nandigam ('Dr. Nandigam'), a neurologist, in early November 2019. Although the details of the visit are disputed, Dr. Nandigam and Defendant agree that there was a disagreement over whether Defendant could make a video recording of the appointment with her phone. According to Defendant, she often does this at her father's doctor's appointments because he has neurological and memory issues. According to Dr. Nandigam, however, videotaping a doctor's appointment violates his office policy. In any event, after the appointment, Defendant posted an online Yelp! review regarding Dr. Nandigam and his practice, Nandigam Neurology, PLC (together with Dr. Nandigam, 'Plaintiffs' or 'Appellants'). Defendant's review stated in its entirety:

> This 'Dr's' behavior today was totally unprofessional and unethical to put it mildly. I will be reporting him to the State of TN Medical Review Board and be filing a formal complaint. How this guy is in business is beyond me. Since when did they start allowing Doctors, to throw a complete temper tantrum in front of Patients and slam things when they get upset? He does not belong in the medical field at all.

"On November 27, 2019, Nandigam Neurology initiated the first action against Defendant in the circuit court. Dr. Nandigam was not listed as a plaintiff in that action. Nandigam Neurology claimed causes of action for defamation, libel, false light, and conspiracy and alleged, *inter alia*, that Defendant's Yelp! review contained 'false, disparaging, and misleading statements.' Defendant responded by filing a motion to dismiss pursuant to the TPPA, specifically sub-section 20-17-104(a). Defendant averred that Nandigam Neurology's lawsuit was a strategic lawsuit against public participation, meaning the suit was intended to deter Defendant's lawful exercise of her right to free speech and that the lawsuit should be dismissed. Before the circuit court could rule on Defendant's petition, however, Nandigam Neurology filed a notice of voluntary dismissal.

"Soon thereafter, on January 21, 2020, Plaintiffs filed a new action in the general sessions court, this time listing both Nandigam Neurology and Dr. Nandigam as plaintiffs. The summons alleged '[d]efamation as to Nandigam Neurology, PLC and [Dr. Nandigam]; and [f]alse light invasion of privacy as to [Dr. Nandigam].' Again, Defendant responded by filing a petition to dismiss Plaintiffs' case in its entirety. First, Defendant argued that Plaintiffs failed to state any claim for

which relief could be granted, pointing out that Plaintiffs failed to plead the substance of any statement over which they complained. Defendant also averred that her statement was not defamatory because it expressed only opinions and rhetorical hyperbole. Defendant again relied on the TPPA in asserting that her review was a statement made in connection with a matter of public concern and that Plaintiffs' lawsuit 'qualifies as one filed in response to [Defendant's] exercise of the right to free speech[.]' Defendant requested that the suit be dismissed, that she be awarded costs and attorney's fees, and that the general sessions court sanction Plaintiffs pursuant to Tennessee Code Annotated section 20-17-107. Attached to Defendant's petition to dismiss was an affidavit executed by Defendant which provided that her Yelp! review was based on her personal observations and that she had no reason to believe any of the statements in the review were false.

"Plaintiffs answered Defendant's petition for dismissal on January 31, 2020, asserting that section 20-17-101 et. seq. could not apply to their claims because 'it is a rule of [c]ivil [p]rocedure, and the rules of [c]ivil [p]rocedure do not apply in general sessions court.' Plaintiffs further argued that they '[met] the pleading requirements for general sessions court' and that they were entitled to a hearing at which they would provide evidence of their damages. Plaintiffs also asserted that because 'there is no discovery in general sessions court, ... no affidavit by Plaintiffs or Defendant is necessary or appropriate.' As such, Plaintiffs' response to Defendant's TPPA petition for dismissal did not address the substance of Defendant's argument nor did Plaintiffs offer any countervailing proof in response to Defendant's affidavit.

"The general sessions court held a hearing on Defendant's TPPA petition on February 6, 2020. While Defendant reiterated the argument that her Yelp! review was not defamatory as a matter of law, Plaintiffs maintained that 'there's no discovery in General Sessions Court[,]' and that the court should 'go ahead and just have the trial.' Rather than respond to the merits of Defendant's petition at the February 6, 2020 hearing, Plaintiffs' counsel relied solely on the theory that the TPPA is a rule of civil procedure that does not apply in general sessions court. On the other hand, Defendant maintained that the TPPA is a duly enacted Tennessee statute that, by its terms, applies to all legal actions, and that the general sessions court should rule on the petition and dismiss Plaintiffs' case. The general sessions court took the petition under advisement and informed the parties that a ruling would be announced on February 13, 2020, one week later.

"On February 12, 2020, six days after the hearing on Defendant's TPPA petition, Plaintiffs filed a pleading titled 'Plaintiff's Supplemental Answer to Defendant's § 20-17-104(a) Motion to Dismiss[.]' In this pleading, Plaintiffs addressed the substance of Defendant's TPPA petition for the first time, arguing that Plaintiffs could prove a prima facie case for defamation and false light. Specifically, Plaintiffs asserted that the use of ironic quotes in Defendant's Yelp! review was defamatory because the quotes suggest Dr. Nandigam is not a real doctor. Plaintiffs further asserted that the allegations that Dr. Nandigam 'threw a temper tantrum' and 'slammed things' were defamatory because these allegations amount to facts as opposed to opinion or hyperbole. In support of their contention that they could plead their prima facie case, Plaintiffs attached to their supplemental answer an affidavit of Dr. Nandigam, which provided his version of the circumstances surrounding Defendant's visit to Nandigam Neurology in November 2019.

"The parties appeared in the general sessions court the following day, February 13, 2020, to hear the ruling on Defendant's TPPA petition. At this hearing, Defendant argued that Plaintiffs' supplemental answer was untimely pursuant to section 20-17-104(c), which provides that a response to a TPPA petition to dismiss 'may be served and filed by the opposing party no less than five (5) days before the hearing or, in the court's discretion, at any earlier time that the court deems

proper.' As Plaintiffs' supplemental response and affidavit were not filed until nearly a week after the hearing on Defendant's petition and on the eve of the general sessions court's scheduled ruling, Defendant urged that Plaintiffs' response should not be considered. Defendant therefore averred that Plaintiffs had offered no countervailing proof in response to Defendant's TPPA petition and that Plaintiffs' case must be dismissed. The general sessions court acknowledged that it had only received Plaintiffs' response the prior afternoon and ruled that: (1) Plaintiffs failed to state a claim for defamation because they did not plead the substance of the statement at issue; (2) the TPPA applies in general sessions court because it is a Tennessee statute; and (3) Defendant's petition for dismissal was granted due to the 'lack of facts' offered by Plaintiffs. While the notation on the general sessions warrant indicates that the case was dismissed pursuant to the TPPA, the order did not resolve Defendant's requested costs, attorney's fees, or sanctions pursuant to section 20-17-107. Defendant informed the court, however, that she would be filing an itemized petition for her attorney's fees.

"Plaintiffs appealed to circuit court on February 18, 2020. Defendant responded by filing a motion to dismiss for failure to state a claim and another TPPA petition to dismiss. As a threshold issue, however, Defendant also asserted that Plaintiffs had appealed to the wrong court because the general sessions order dismissing Plaintiffs' case was appealable only to the Court of Appeals."

"On March 30, 2020, the circuit court entered an order transferring Plaintiffs' notice of appeal to this Court, finding that pursuant to section 20-17-106, the circuit court lacked subject matter jurisdiction over the case. The transfer order was received by this Court on April 2, 2020. On April 14, 2020, Defendant filed a notice of cross-appeal."

"The instant case centers on the TPPA, which is more commonly known as an 'anti-SLAPP' statute. *See* Todd Hambidge, et al., *Speak Up. Tennessee's New Anti-SLAPP Statute Provides Extra Protections to Constitutional Rights*, 55 TENN. B.J. 14 (Sept. 2019) ('Tennessee recently adopted a Strategic Lawsuit Against Public Participation ("Anti-SLAPP") statute.'). To better understand the issues before us, a general overview of anti-SLAPP legislation is beneficial. The term 'SLAPP' stands for 'strategic lawsuits against public participation,' meaning lawsuits which might be viewed as 'discouraging the exercise of constitutional rights, often intended to silence speech in opposition to monied interests rather than to vindicate a plaintiff's right.' *Id.* at 14, 15; *see also Sandholm v. Kuecker*, 962 N.E.2d 418, 427 (Ill. 2012) ('SLAPPs ... are lawsuits aimed at preventing citizens from exercising their political rights or punishing those who have done so.' (quoting *Wright Dev. Group, LLC v. Walsh*, 939 N.E.2d 389, 395 (2010)))."

"In that vein, the stated purpose of the TPPA, which was enacted by the General Assembly on July 1, 2019, is found at Tennessee Code Annotated section 20-17-102:

> The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, to speak freely, to associate freely, and to participate in government to the fullest extent permitted by law and, at the same time, protect the rights of persons to file meritorious lawsuits for demonstrable injury. This chapter is consistent with and necessary to implement the rights protected by Constitution of Tennessee, Article I, §§ 19 and 23, as well as by the First Amendment to the United States Constitution, and shall be construed broadly to effectuate its purposes and intent."

"The instant case raises several questions implicating subject matter jurisdiction. First, we must consider whether the finality of the general sessions order affects the present appeal. Second, we

must determine whether Tennessee Code Annotated section 20-17-106 confers upon this Court exclusive jurisdiction over appeals brought pursuant to the TPPA. Finally, Defendant asserts that Plaintiffs did not file a timely notice of appeal to this Court. We address each of these issues in turn."

"Here, the general sessions order itself plainly satisfies the statutory definition of an 'immediately appealable' order because it is an 'order dismissing ... a legal action pursuant to a petition filed under [the TPPA].' Tenn. Code Ann. § 20-17-106. Under these circumstances, the fact that the general sessions court did not address Defendant's request for attorney's fees, costs, or sanctions is inapposite in light of the clear import of the statute. In enacting section 20-17-106, the General Assembly created a statutory exception to the final judgment rule and we are not inclined to second-guess that decision."

"Accordingly, we conclude that this Court does not lack subject matter jurisdiction over this appeal due to Defendant's outstanding request for attorney's fees."

"Next, the parties dispute whether the circuit court properly found that it lacked subject matter jurisdiction over Plaintiffs' appeal from general sessions court. While Plaintiffs maintain that they are entitled to a de novo hearing in circuit court and should not be forced to litigate in this Court, Defendant argues that under section 20-17-106, the Court of Appeals is the only court that has subject matter jurisdiction over the present case."

"While the legislative history of the TPPA does not state directly that appeals under section 20-17-106 mandatorily lie in the Court of Appeals, 'the overall tenor of the discussion strongly supports such an interpretation.' *Robinson* [*v. Fulliton*], 140 S.W.3d [312] at 324 [(Tenn. Ct. App. 2003)]. Keeping in mind that 'the cardinal rule of statutory construction is to effectuate legislative intent[,]' we simply cannot conclude that section 20-17-106 affords Plaintiffs the opportunity for an appeal to circuit court."

"The circuit court did not err in concluding that it lacked subject matter jurisdiction over this appeal and in transferring the case to this Court. Because we conclude that the circuit court correctly transferred the case to this Court, Plaintiffs' second issue on appeal is pretermitted."

"Finally, Defendant asserts that Plaintiffs cannot challenge the circuit court's transfer order because Plaintiffs never filed a separate notice of appeal regarding the transfer order itself. Because we have already concluded, however, that the circuit court properly transferred Plaintiffs' notice of appeal to this Court, this issue is without merit."

"Next, in her posture as appellee, Defendant argues that the general sessions court correctly dismissed Plaintiffs' case in its entirety pursuant to Defendant's TPPA petition. The Plaintiffs failed to respond to the substance of Defendant's arguments under the TPPA in both the general sessions court and in their briefs to this Court. We therefore agree with the Defendant that the decision of the general sessions court should be affirmed."

"In this case, the communication at issue was an exercise of Defendant's right of free speech as that right is defined for purposes of the TPPA. *Id.* § 20-17-103. Defendant filed a timely TPPA petition challenging the substance of Plaintiffs' claims and alleging that as a matter of law, Defendant's Yelp! review was not defamatory. Defendant also raised several defenses to Plaintiffs' action. Plaintiffs failed to respond to the merits of the petition in accordance with the statute. *See id.*

§ 20-17-105(b). Rather, Plaintiffs' counsel argued at the hearing on the petition that the TPPA is a rule of civil procedure as opposed to a statute and that it was inapplicable in general sessions court. Plaintiffs made no substantive arguments, nor did they offer any sworn affidavits containing admissible evidence in support of their claims, notwithstanding the fact that the burden of proof had shifted to Plaintiffs by virtue of section 20-17-105(a) and (b). It was not until nearly a week later that Plaintiffs filed their 'supplementary answer' to the TPPA petition and offered an affidavit by Dr. Nandigam. At the hearing in which the general sessions court ruled on Defendant's petition, the court noted that it had only received Plaintiffs' supplemental answer the afternoon before, and dismissed Plaintiffs' legal action based on the 'lack of facts' offered by Plaintiffs.

"The record reflects that the general sessions court was well-founded in its conclusion that Plaintiffs failed to meet their burden of proof under section 20-17-105(b), insofar as Plaintiffs essentially failed to respond to Defendant's TPPA petition at all. Indeed, under section 20-17-105(b), dismissal of Plaintiffs' legal action was mandatory unless Plaintiffs 'establishe[d] a prima facie case for each essential element of the[ir] claim[s].' Moreover, Plaintiffs have not argued on appeal that the general sessions court erred in disregarding their late-filed response, nor have Plaintiffs made any argument to this Court that they can establish a prima facie case for each essential element of their claims. Rather, Plaintiffs have not addressed the substance of the underlying defamation and false light claims in their appellate briefs at all, but have pursued only the theory that this case should be remanded to the circuit court."

IX. Drug Dealer Liability Act

Effler v. Purdue Pharma L.P., 614 S.W.3d 681 (Tenn., Lee, 2020).

"Declaring that the sale and distribution of illegal drugs affects every community in the country, the Tennessee Legislature enacted the Tennessee Drug Dealer Liability Act, Tennessee Code Annotated sections 29-38-101 to -116. This Act provides a cause of action against a knowing participant in the illegal drug market for injuries caused by illegal drug use. In response to the opioid epidemic in East Tennessee, seven District Attorneys General and two Baby Doe plaintiffs sued several drug companies under the Act. The District Attorneys and the Baby Doe plaintiffs alleged that the drug companies knowingly participated in the illegal drug market by intentionally flooding East Tennessee communities with prescription opioid medications, leading to widespread addiction and diversion of the opioids into the black market. The District Attorneys claimed that the opioid epidemic had damaged the communities in their districts, and the Baby Doe plaintiffs alleged that they were harmed by exposure to opioids in utero. The drug companies moved to dismiss the lawsuit on the pleadings. Their two-fold challenge asserted that the Act did not authorize the District Attorneys to sue for damages and that the Act did not apply to the drug companies' conduct. The trial court ruled that the Act did not apply and dismissed the case. The Court of Appeals reversed. The issues we decide are whether the District Attorneys had statutory standing to sue under the Act and whether the Act applies to the drug companies based on factual allegations in the complaint that the drug companies knowingly participated in the illegal drug market. We hold that the District Attorneys lack standing because the Act does not name them as parties who can sue under the Act. This leaves the Baby Doe plaintiffs, who alleged facts showing that the drug companies knowingly participated in the illegal drug market by facilitating the marketing or distribution of opioids. Taking these factual allegations as true, as required at this stage of the case, we hold that the Baby Doe plaintiffs have stated a claim against the drug companies under the Act."

X. Statutory Cap on Non-Economic Damages Applies in the Aggregate

Yebuah v. Center for Urological Treatment, PLC, 624 S.W.3d 481 (Tenn., Page, 2021).

"This appeal concerns a jury award of noneconomic damages after part of a Gelport device was left inside a surgery patient. The underlying facts of the case are largely undisputed. In March 2005, Dr. Frank Lohrasbi performed surgery on Cynthia Yebuah to remove her left kidney after a CT scan revealed the kidney contained a potentially malignant mass. It was a laparoscopic procedure, which was performed with the assistance of a Gelport device. Mrs. Yebuah recovered from surgery routinely."

"In 2012, Mrs. Yebuah notified her doctor that she was experiencing abdominal pain and was referred to Dr. Leonardo Espinel for possible gallbladder disease. In July 2013, Dr. Espinel performed a laparoscopic procedure to remove Mrs. Yebuah's gallbladder. During this surgery, Dr. Espinel discovered a foreign cylindrical object inside her abdominal cavity.

"Dr. Espinel did not attempt to remove the object at that time but informed Mrs. Yebuah that her small bowel was looped around a fourteen-centimeter ring. It was later determined that during the March 2005 laparoscopic surgery to remove her kidney, a portion of a Gelport device was unintentionally left inside Mrs. Yebuah's abdomen. Thus, the foreign object remained inside Mrs. Yebuah's body for eight years before it was discovered during an unrelated surgery to remove her gallbladder.

"On November 4, 2013, Mrs. Yebuah underwent surgery to remove the fourteen-centimeter ring from her abdominal cavity. She returned to work shortly thereafter.

"In November 2014, the Yebuahs filed a complaint in the Circuit Court for Davidson County, Tennessee, seeking damages against Dr. Lohrasbi, Dr. Priest, and their employers, chiefly the Center for Urological Treatment, PLC (the 'Center') and Radiology Alliance, P.C. The Yebuahs alleged that Dr. Lohrasbi negligently left a portion of the Gelport device in Mrs. Yebuah's abdominal cavity, negligently failed to inform Mrs. Yebuah of the ring's presence, and negligently failed to remove the ring once it was discovered. The Yebuahs further alleged that Dr. Priest negligently failed to identify the foreign object after Mrs. Yebuah's initial CT scan. Mrs. Yebuah did not claim any permanent injury related to the Gelport device but instead sought recovery for noneconomic damages. Her husband, Eric Yebuah, likewise sought recovery for noneconomic damages in the form of loss of consortium. The individual doctors were later voluntarily dismissed, and the Yebuahs only pursued vicarious liability claims against the employers.

"The case against the Center and Radiology Alliance went to trial in February of 2018. Because the remaining defendants admitted fault, the case was presented to the jury solely on the issues of causation and damages. The trial court entered a directed verdict in favor of Radiology Alliance at the conclusion of the proof. Thus, only the case against the Center went to the jury, which returned a verdict against the Center and awarded Mrs. Yebuah $2,000,000 for pain and suffering plus $2,000,000 for loss of enjoyment of life. In addition, the jury awarded Mr. Yebuah $500,000 for loss of consortium.

"After trial, the Center and the Yebuahs submitted competing proposed judgments to the trial court. The Yebuahs' proposed order included a judgment for the total jury award of $4,500,000. In

contrast, the Center submitted a competing order that applied the statutory noneconomic damages cap, which is codified at Tennessee Code Annotated section 29-39-102. More specifically, the Center's proposed judgment reduced the total damage award for both Mr. and Mrs. Yebuah to $750,000.

"The trial court ultimately adopted the Center's proposed judgment. The Yebuahs filed a motion to alter or amend the judgment, arguing that the statutory cap was unconstitutional and, alternatively, that the trial court had incorrectly applied the statutory cap. According to the Yebuahs, the trial court should have interpreted the statute to apply the damages cap separately to each plaintiff's award. Meanwhile, the Center filed a motion for a new trial or a remittitur.

"The trial court denied the Center's motion but granted, in part, the Yebuahs' motion to amend the judgment. It determined that the Yebuahs waived their constitutional challenge to Tennessee Code Annotated section 29-39-102 by failing to raise the issue before or during trial. However, the trial court agreed with the Yebuahs' interpretation of the statutory language in section 29-39-102 and determined that the statutory $750,000 cap on noneconomic damages should apply separately to each plaintiff's damages award. Therefore, the trial court entered an order amending its original judgment to a judgment of $750,000 in favor of Mrs. Yebuah and a judgment of $500,000 in favor of Mr. Yebuah—for a total of $1,250,000."

"The issue on appeal to this Court is whether Tennessee Code Annotated section 29-39-102 provides that a spouse's loss of consortium claim is subject to the same cap on noneconomic damages as the injured spouse, or whether a separate cap applies to each spouse. The statute states, in pertinent part:

> (a) In a civil action, each injured plaintiff may be awarded:
>
> (1) Compensation for economic damages suffered by each injured plaintiff; and
>
> (2) Compensation for any noneconomic damages suffered by each injured plaintiff not to exceed seven hundred fifty thousand dollars ($750,000) for all injuries and occurrences that were or could have been asserted, regardless of whether the act is based on a single act or omission or on a series of acts or omissions that allegedly caused the injuries or death.
>
> ....
>
> (e) All noneconomic damages awarded to each injured plaintiff, including damages for pain and suffering, as well as any claims of a spouse or children for loss of consortium or any derivative claim for noneconomic damages, shall not exceed in the aggregate a total of seven hundred fifty thousand dollars ($750,000), unless subsection (c) applies, in which case the aggregate amount shall not exceed one million dollars ($1,000,000).

"Tenn. Code Ann. § 29-39-102 (2012). The Yebuahs assert that the Court of Appeals properly concluded that '[t]he repeated phrase "each injured plaintiff" tells us that the legislature chose to impose a "per plaintiff" limit on noneconomic damages.' *See Yebuah*, 2020 WL 2781586, at *6. In contrast, the Center argues that the language of subsection 29-39-102(e) provides a single $750,000 cap on both Mrs. and Mr. Yebuah's claims for noneconomic damages."

"The parties to this appeal assert that the phrase 'each injured plaintiff' is important to understanding the legislature's intent in this matter. The Yebuahs' interpretation does not distinguish between 'plaintiffs' and 'injured plaintiffs.' It does not consider the difference between a plaintiff with a personal injury and a plaintiff with a derivative claim, such as one for loss of

consortium. We agree with the Center that the phrase 'each injured plaintiff' is not synonymous with 'each plaintiff.' Otherwise, the word 'injured' would be unnecessary, and 'a legislature is presumed to have used no superfluous words.' *In re Hogue*, 286 S.W.3d 890, 896 (Tenn. 2009) (quoting *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878))."

"Further evidence of the legislature's intent is found in the words 'in the aggregate.' The crucial language here is that '[a]ll noneconomic damages awarded to each injured plaintiff ... as well as any claims of a spouse ... for loss of consortium or any derivative claim for noneconomic damages, shall not exceed *in the aggregate* a total of [$750,000].' *Id.* § 29-39-102(e) (emphasis added). 'Aggregate' is defined as 'formed by the collection of units or particles into a body, mass, or amount: collective: such as ... taking all units as a whole.' *Aggregate*, Merriam-Webster, https://www.merriamwebster.com/dictionary/aggregate (last visited May 20, 2021). The collection of units to be taken as a whole in this case are the total damages awarded for noneconomic losses. The noneconomic damages to Mrs. Yebuah as the injured plaintiff, as well as the noneconomic damages awarded to Mr. Yebuah for his derivative loss of consortium claim, may not, 'in the aggregate,' exceed a single cap of $750,000."

"As a final note, we acknowledge that the Tennessee Attorney General filed an intervening brief on appeal before this Court as he did before the Court of Appeals. During the trial court proceedings, the Yebuahs served the Attorney General with a copy of a proposed amended complaint in which the Yebuahs notified the Attorney General of their intention to allege that the statutory cap on noneconomic damages was unconstitutional. However, the Yebuahs ultimately did not include the constitutional issues in their amended complaint.

"As stated above, the trial court determined that the Yebuahs had waived their constitutional challenge to the statute at issue. The Court of Appeals, however, disagreed and elected to review the constitutional issues raised before it, including due process, the right to trial by jury, separation of powers, the equal protection clause, and the takings doctrine. *See Yebuah*, 2020 WL 2781586, at *4. After considering the issues, the Court of Appeals determined that the statute was constitutional. *Id.* at *5-6. The Court of Appeals properly noted that it was bound by this Court's recent decision in *McClay v. Airport Management Services, LLC*, which resolved most of the constitutional issues presented. *See* 596 S.W.3d [686] at 696 [(Tenn. 2020)] (holding 'that the statutory cap on noneconomic damages in Tennessee Code Annotated section 29-39-102 does not violate the right to trial by jury, the doctrine of separation of powers, or the equal protection provisions of the Tennessee Constitution.').

"In their brief before this Court, the Yebuahs very briefly touch on 'a due process issue' and a 'potential[ ] ... violation of the Takings Doctrine.' However, these issues were not mentioned in their response to the Center's application for permission to appeal. *See State v. Bishop*, 431 S.W.3d 22, 43 (Tenn. 2014) (stating that to preserve an issue for review by this Court, 'the issue must be ... properly raised in the Tenn. R. App. P. 11 application for permission to appeal or in the answer to the Tenn. R. App. P. 11 application.'). Regardless, in their brief they merely mention potential 'constitutional problems' without properly explaining or giving adequate legal support for such claims. *See Sneed v. Bd. of Pro. Resp.*, 301 S.W.3d 603, 615 (Tenn. 2010) ('It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.'). Thus, we deem these issues to be waived."

"For the reasons set forth herein, we hold that Tennessee Code Annotated section 29-39-102 creates a single cap on noneconomic damages that includes those awarded to the primary injured spouse as well as those awarded to the other spouse for a derivative loss of consortium claim. We therefore reverse the holding of the Court of Appeals and the trial court and reduce the total judgment for noneconomic damages in this case to $750,000."

XI. Alien Tort Statute; General Corporate Activity in U.S. Insufficient for Application Due to Conduct by Foreign Actors Outside of United States

Nestlé USA, Inc. v. Doe, 141 S.Ct. 1931 (U.S., Thomas, 2021).

"Respondents are six individuals from Mali who allege that they were trafficked into Ivory Coast as child slaves to produce cocoa. U. S.-based companies Nestlé USA, Inc., and Cargill, Inc., do not own or operate cocoa farms in Ivory Coast, but they do buy cocoa from farms located there and provide those farms with technical and financial resources. Respondents sued Nestlé, Cargill, and others under the Alien Tort Statute (ATS)—which provides federal courts jurisdiction to hear claims brought 'by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,' 28 U.S.C. § 1350—contending that this arrangement aids and abets child slavery. Because respondents' injuries occurred overseas and the only domestic conduct alleged by respondents was general corporate activity, the District Court dismissed the suit as an impermissible extraterritorial application of the ATS under *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U.S. 108. The Ninth Circuit held, as relevant, that respondents had pleaded a domestic application of the ATS, as required by *Kiobel*, because the corporations' major operational decisions originated in the United States.

"Held: The judgment is reversed, and the case is remanded.

I. Medical Evidence

A. At Expedited Hearing, Form C-32 Was Sufficient Evidence Despite Deficiencies

Mosley v. HG Staffing, LLC, Docket No. 2019-04-0064 (Tenn. W.C. Appeals Board, Conner, June 25, 2021).

"The employee reported suffering an injury to her right wrist and hand when she twisted her hand in an effort to catch a falling automotive part. She further alleged that repetitive job duties contributed to or aggravated her right wrist condition. The employer denied the claim, asserting the employee's medical condition did not arise primarily out of the employment. Following an earlier expedited hearing, the trial court determined the employee was entitled to temporary partial disability benefits but did not show a likelihood of prevailing on the issue of ongoing medical benefits. That order was not appealed. Thereafter, the employee filed a request for a second expedited hearing and submitted a Standard Form Medical Report (Form C-32) from a physician. The employer objected to the trial court's consideration of the Form C-32, arguing it was deficient in several respects. Following the second expedited hearing, the trial court concluded the employee had come forward with sufficient evidence to indicate a likelihood of prevailing on her claim for additional medical benefits, and the employer has appealed. We affirm the trial court's order and remand the case."

"Amanda Mosley ('Employee') was employed by HG Staffing, LLC ('Employer'), a temporary staffing agency, at an automotive parts facility. Employee reported suffering an injury to her right wrist and hand on or about January 10, 2019, when she twisted her hand in an effort to catch a drive shaft that was falling into a metal basket. In her petition for benefits, Employee also alleged that repetitive twisting of her hand and repetitive pushing of buttons contributed to or aggravated her wrist condition. Employee asserted she was reluctant to report the incident and seek workers' compensation benefits because she feared she would lose her job. Soon after reporting her claim, the automotive parts company advised her she was terminated due to 'performance' issues, and Employer did not assign her any other temporary positions.

"Prior to the first expedited hearing, Employee was evaluated and/or treated by several medical providers, including Dr. Grayson Smith, Dr. James Rubright, Dr. Roy Terry, and Dr. Son Le. Dr. Smith and Dr. Rubright were authorized by Employer; Dr. Terry and Dr. Le were not. In addition, Employer obtained a medical evaluation by Dr. David West. After reviewing all of the proof submitted at the first expedited hearing, the trial court determined Employee was likely to prevail in establishing entitlement to some temporary partial disability benefits, but she had not overcome the presumption of correctness accorded the causation opinion of Dr. Rubright, an authorized, panel-selected physician. It therefore denied her request for additional medical benefits. That order was not appealed.

"Thereafter, Employee filed a second request for an expedited hearing and a Standard Form Medical Report (Form C-32) bearing Dr. Terry's signature. The record indicates this Form C-32 was filed February 12, 2021, more than twenty days prior to the date of its intended use in accordance with Tennessee Code Annotated section 50-6-235(c)(2). Employer did not file an objection to Employee's intent to use Dr. Terry's Form C-32 within ten days of the receipt of the

Form C-32, as is allowed under Tennessee Code Annotated section 50-6-235(c)(2), but it did object to the sufficiency of the Form C-32 in various respects.

"Following an in-person evidentiary hearing, during which Employee was the only witness to testify live, the trial court determined Employee had come forward with sufficient evidence to show she was likely to prevail at trial in establishing an entitlement to additional medical benefits. In making this determination, the court noted Employer's objections to the Form C-32 signed by Dr. Terry but concluded Dr. Terry's causation opinion as stated in that report supported her claim for additional medical benefits. Moreover, the trial court concluded Dr. Terry's causation opinion as expressed in the Form C-32 overcame the presumption of correctness accorded Dr. Rubright's opinion. Employer has appealed the trial court's order for additional medical benefits."

"There are several statutory and regulatory provisions governing the authentication and admissibility of medical reports in the Court of Workers' Compensation Claims. Tennessee Code Annotated section 50-6-235 provides for the use of written medical reports in certain circumstances. In accordance with that provision, a party may 'introduce direct testimony' from a physician through the use of a 'form established by the administrator.' Tenn. Code Ann. § 50-6-235(c)(1). To be admissible as the physician's direct testimony, the form must 'bear[] an original signature' of the physician or be 'accompanied by an originally signed affidavit from the physician or the submitting attorney verifying the contents of the report.' *Id.* The form must be accompanied by a 'statement of qualifications of the person making the report.' *Id.* The party who intends to present the report as evidence 'at any stage of a workers' compensation claim' must provide 'notice of intent to use the sworn statement ... not less than twenty (20) days before the date of intended use.' Tenn. Code Ann. § 50-6-235(c)(2). The opposing party can object to the use of the form 'within ten (10) days of the receipt of the notice.' *Id.* In such circumstances, the opposing party 'shall depose the physician within a reasonable time or the objection shall be deemed to be waived.' *Id.*"

"In the present case, we must interpret and apply the provisions of Tennessee Code Annotated section 50-6-235(c) in conjunction with applicable rules, which have the force and effect of law. *See, e.g., Word v. Metro Air Servs.*, 377 S.W.3d 671, 676 (Tenn. 2012). The question is whether a Form C-32 that is deficient in certain respects under Tennessee Code Annotated section 50-6-235 can still be considered a signed medical record that is 'self-authenticating and admissible' under the rules governing the Court of Workers' Compensation Claims. *See* Tenn. Comp. R. & Regs. 0800-2-21-.16(2)(b). A corollary question is whether, even if the Form C-32 is statutorily deficient, a causation statement contained within that form qualifies as a 'written statement[] addressing medical causation signed by a physician,' which is admissible at an expedited hearing. *See* Tenn. Comp. R. & Regs. 0800-02-21-.15(2).

"We conclude the applicable rules are not in conflict with Tennessee Code Annotated section 50-6-235(c). In circumstances where a party intends to present a physician's direct testimony via a Form C-32, the requirements of section 50-6-235(c) must be met, including the signature requirement and the accompanying statement of qualifications. The opposing party can choose to acquiesce in the use of the Form C-32 in lieu of a deposition, or it can timely object and depose the physician. In the present case, although Employer did not file a timely objection to the intended use of the Form C-32 as allowed by Tennessee Code Annotated section 50-6-235(c)(1), it did object to admissibility of the report due to certain purported deficiencies, including the lack of an original signature, the lack of an accompanying statement of the physician's qualifications, and the physician's failure to complete certain parts of the form.

"With respect to the lack of an original signature, although the Form C-32 in its current form would not be admissible at a compensation hearing as the physician's direct testimony, that does not preclude the trial court from considering it a signed medical record in accordance with rule 0800-02-21-.16(2)(b), which establishes its authenticity and admissibility. Importantly, Employer did not object to the information or opinions contained in the Form C-32 based on any particular rule of evidence but objected to the lack of an original signature and a statement of qualifications as required by the statute. Moreover, section 50-6-235 does not preclude a trial court from considering a causation statement contained in a signed Form C-32 at an expedited hearing pursuant to rule 0800-02-21-.15(2).

"Finally, section 50-6-235(c) does not require the physician to respond to every question included on the Form C-32. Hence, Employer's argument that 'the Trial Court explained away the blanks on the C-32' is not persuasive. A trial court can review signed medical records and signed causation statements in accordance with applicable rules. It can then weigh the proof in the same manner it weighs all other proof and consider the persuasiveness of that evidence when weighed against countervailing evidence. That is what the trial court did in this case. Thus, we conclude the trial court did not err in considering Dr. Terry's medical causation statement as reflected in the signed Form C-32 at the expedited hearing."

B. At Summary Judgment Phase, Form C-32 Not Timely Filed, Was Excluded

Sadeekah v. Abdelaziz, Docket No. 2020-06-0218 (Tenn. W.C. Appeals Board, Conner, June 22, 2021).

"The employee reported injuring his right shoulder, wrist, and elbow when a large piece of furniture fell from a ramp and struck him. The employer denied the employee's claim for workers' compensation benefits, asserting: (1) the employee was not working on the date of the alleged incident; (2) it did not employ a sufficient number of people to trigger the requirements of the Workers' Compensation Law; and (3) the employee's alleged medical conditions did not arise primarily out of a work-related accident. Following an expedited hearing, the trial court denied the employee's request for temporary disability and medical benefits. Thereafter, the employer filed a motion for summary judgment in which it argued, among other things, that the employee's evidence of medical causation was insufficient as a matter of law. In an order granting the employee's request for an extension of time, the court set a deadline for the employee to respond to the employer's motion and scheduled a motion hearing. Within the response deadline set by the trial court, but less than twenty days before the hearing, the employee filed a response to the motion for summary judgment and a Standard Form Medical Report (Form C-32). The employer timely objected to the notice of the employee's intent to use a Form C-32. In its order granting the employer's motion for summary judgment, the trial court excluded the Form C-32 from evidence, and the employee has appealed. Having carefully reviewed this case, we affirm the trial court's order and certify it as final."

"The use of a Standard Form Medical Report, also known as a Form C-32, is governed by Tennessee Code Annotated section 50-6-235. The statute gives any party the ability to present a physician's direct testimony through a medical report using a form adopted by the Administrator of the Bureau of Workers' Compensation. Tenn. Code Ann. § 50-6-235(c)(1) (2020). This form can be used in lieu of a deposition 'if notice of intent to use the sworn statement is provided to the opposing party or counsel not less than twenty (20) days before the intended use.' Tenn. Code Ann. § 50-6-235(c)(2). Moreover, the opposing party can file an objection to the use of the Form C-32

within ten days of the receipt of the notice, and, if such an objection is filed, the burden is on the objecting party to schedule the physician's deposition within a reasonable time. *Id.*

"In the present case, Employee's decision to present a Form C-32 from Dr. Dinkins was not impacted by the trial court's order granting Employee additional time to respond to Employer's motion for summary judgment. The Form C-32 was signed by Dr. Dinkins on December 31, 2020, approximately 60 days prior to the summary judgment hearing on March 1, 2021. Employee has offered no explanation as to why he failed to inform Employer of his intent to offer Dr. Dinkins's Form C-32 as evidence at least twenty days before the summary judgment hearing as required by Tennessee Code Annotated section 50-6-235(c)(2). Furthermore, when Employer received the Form C-32 seven days before the summary judgment hearing, it filed an objection to the use of the form the following day.

"A trial court's decision to admit or exclude evidence is discretionary and will be reviewed under an abuse-of-discretion standard. *See, e.g., Prewitt v. Brown*, No. M2017-01420-COA-R3-CV, 2018 Tenn. App. LEXIS 235, at *18 (Tenn. Ct. App. Apr. 30, 2018) (a 'discretionary decision to admit or exclude evidence ... will be overturned on appeal only when there is an abuse of discretion'). In the present case, we do not have a transcript of the hearing, so we do not know the nature or the extent of the discussion during the hearing regarding any request for a continuance. In his notice of appeal, Employee asserts he 'objected [to] the hearing at the beginning' because Employer 'didn't respond to Employee's First Request for Production of Documents.' There is no indication in the record that Employee requested a continuance of the summary judgment hearing due to the belated filing of the Form C-32. Under the circumstances presented, we cannot conclude the trial court abused its discretion in excluding Dr. Dinkins's Form C-32."

II. Injury

A. Psychiatric

Vaughn v. City of Murfreesboro, S.W.3d (Tenn. Special W.C. Appeals Panel, Davies, 2020).

"Employee injured his left shoulder during a training session. He was diagnosed with a torn shoulder ligament which required a surgical repair of the left shoulder. Nine months later, Employee's treating physician performed a posterior capsular release of the left shoulder. When his symptoms failed to improve, Employer authorized follow up care with a different orthopedic surgeon, who performed another surgery to release the bicep tendon that had been previously repaired. Employer was provided with a letter from Employee's treating physician that Employee's restrictions had been lifted. Employee was required to take a return to duty test, which he ultimately failed. Subsequently, Employee developed intermittent violent movements of his head and was diagnosed with conversion disorder. At the request of Employee's counsel, Employee underwent an independent medical examination by a psychiatrist, who concluded that the conversion disorder arose out of Employee's work injury. However, because the psychiatrist noted issues regarding symptom magnification, he reduced Employee's psychiatric impairment rating to ten percent. Following a trial, the court awarded benefits for injuries to Employee's left shoulder and for the psychiatric injury; however, it found that Employee was not permanently and totally disabled. The trial court also declined to apply a multiplier to the impairment rating for the psychiatric injury and award temporary total disability related to that injury. The Employee appealed. The appeal has been

referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law pursuant to Tennessee Supreme Court Rule 51. We affirm the trial court's judgment."

"Using the Sixth Edition of the AMA Guides, Dr. Kyser assigned a fifteen percent psychiatric impairment rating. However, because Dr. Kyser felt there were issues regarding symptom magnification, he recommended a thirty percent reduction, which yielded a ten percent psychiatric impairment rating. Dr. Kyser discussed the issue of malingering in his deposition:

> I think one has to, when looking at a case such as this and looking over the totality of the medical record and the numerous people that have seen him and some concerns that have been expressed about that, one can't exclude the possibility that there could be an element of malingering. I can't say with a reasonable degree of medical certainty that he is a malingerer. I think that he clearly does have bizarre symptoms, unusual symptoms, symptoms that at times are not consistent, that are likely exaggerated to some degree. And subsequently, that's what led to my reduction in his impairment rating.

"Dr. Kyser observed that when Employee came in for his examination, he was in a wheelchair and kept 'knocking stuff off' Dr. Kyser's desk, and that his wife had to hold him back to keep him from coming out of his wheelchair. Dr. Kyser was then asked to compare those symptoms with the Employee being able to drive an automobile. Dr. Kyser noted this inconsistency stating: 'You know, how can someone be sitting in this chair and they can't control their arms, ... they are flinging themselves on the floor or have to be restrained, ... but they can hop in a car and drive to Murfreesboro? That doesn't make sense to me.'

"Employee appeared in court in a wheelchair with one of his hands raised in the air. He testified that his hand was stuck in that position and that it happened all the time. He testified he had been using a wheelchair since 2012 and that he also uses a scooter because the majority of the time he cannot walk. Employee indicated he does drive a car but knows when he should not be driving. Employee stated that prior to 2009, he never had any kind of seizure activity. Employee testified he takes Diazepam, which is valium, Primidone for seizures, Citalopram for depression, Mefocarbamol for spasms, and Gabapentin for nerve damage. He testified he has not earned any income since his injury and has no job prospects.

"On cross examination, Employee testified that from approximately 2012 to 2014, he travelled to Florida, California, Chicago, Atlanta, and St. Louis and that he drove during those trips. He indicated that his doctors do not recommend him driving, but they have never told him he could not drive."

"An employee is permanently and totally disabled when a work-related injury 'totally incapacitates the employee from working at an occupation that brings the employee an income.' Tenn. Code Ann. § 50-6-207(4)(B) (for injuries occurring prior to July 1, 2014). 'The extent of the vocational disability is a question of fact for the trial court to determine from all the evidence, including lay and expert testimony, the rating of anatomical disability by the experts and the testimony of the injured employee, which is relevant in determining the extent of vocational disability in Workers' Compensation cases.' *Pittman v. Lasco Ind., Inc*. 908 S.W.2d 932, 936 (Tenn. 1995) (Citing *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W. 2d 452 (Tenn. 1988)). Employee relies on his testimony and that of his wife and brother to show that he is permanently and totally disabled as a result of his conversion disorder. Employee presented no proof of his vocational disability other

than his own statements and those of his family that he cannot work. However, there were a number of questions raised with the psychiatrist, Dr. Kyser, and on cross-examination of Employee, that Employee was malingering. In fact, Dr. Kyser, the Employee's own expert, reduced his psychiatric impairment rating because of symptom magnification. The trial court also concluded that it was 'unexplainable' for Employee to drive a car 'as much and often as he does,' and that it 'just does not add up.' Thus, it appears to us that although the trial court found Employee credible in some respects, it specifically did not find Employee to be credible on this issue that he was permanently and totally disabled. Accordingly, we find this issue to be without merit."

"The trial court accepted Dr. Kyser's ten percent psychiatric impairment rating but elected not to apply any multiplier and awarded ten percent disability for the conversion disorder. Employee argues the trial court should have applied the same multiplier to the psychiatric injury that it applied to the shoulder injury. Tenn. Code Ann. § 50-6-241 (applicable to injuries occurring prior to July 1, 2014) requires the trial court to 'consider all pertinent factors' in determining permanent partial disability benefits. The trial court was clearly troubled by the conflicting testimony regarding the extent of Employee's conversion disorder, particularly in light of Employee's extensive driving activity. In contrast, there was no dispute that Employee's shoulder injury prevented him from working as a firefighter. The trial court weighed the evidence regarding the conversion disorder and properly exercised its discretion in declining to apply a multiplier to the psychiatric injury."

B. Emergency Rescue Worker; Impairment Caused by Pandemic Disease Presumed to be Disability Suffered in Line of Duty

Chapter 142, Public Acts 2021, amending T.C.A. § 7-51-209 eff. Apr. 13, 2021.

7-51-209(a)(4).

"'Infectious disease' means:
(A) The human immunodeficiency virus;
(B) Hepatitis C virus; and
(C) A virus or other communicable disease for which:
(i) A pandemic has been declared by the World Health Organization or the federal centers for disease control and prevention; and
(ii) The governor has declared a state of emergency pursuant to § 58–2–107."

7-51-209(b)(2).

"For reasons stated in subdivision (b)(1), an emergency rescue worker who suffers a condition or impairment of health that is caused by an infectious disease, and that results in total or partial disability or death is presumed to have a disability suffered in the line of duty, unless the contrary is shown by a preponderance of the evidence. However, in order to be entitled to the presumption, the emergency rescue worker must verify by written declaration that, to the best of the emergency rescue worker's knowledge and belief: In case of a medical condition caused by or derived from an infectious disease, the emergency rescue worker has not:
(A) Been exposed outside the scope of the worker's employment, through transfer of bodily fluids, to a person known to have a sickness or medical condition derived from an infectious disease;
(B) Had a transfusion of blood or blood components, other than a transfusion arising out of an accident or injury happening in connection with the worker's present employment, or

received any blood products for the treatment of a coagulation disorder since last undergoing medical tests for infectious disease, which tests failed to indicate the presence of an infectious disease;

(C) Engaged in unsafe sexual practices or other high-risk behavior, as identified by the centers for disease control and prevention or the surgeon general of the United States, or had sexual relations with a person known to the worker to have engaged in such unsafe sexual practices or other high-risk behavior; or

(D) Used intravenous drugs not prescribed by a physician."

III. Construction Services Providers

A. Exception to Contractor Liability

Chapter 90, Public Acts 2021, amending T.C.A. § 50-6-914(b)(1) eff. Apr. 7, 2021.

"(A) Notwithstanding subsection (a) and subject to subdivision (b)(2), a general contractor, intermediate contractor, or subcontractor is not liable for workers' compensation to a construction services provider listed on the registry established pursuant to this part.

"(B) Notwithstanding subsection (a) and subject to subdivision (b)(2), a general contractor, intermediate contractor, or subcontractor is not liable for workers' compensation to a construction services provider for injuries occurring during the time period of December 9, 2019, through September 9, 2021, if the following conditions are met:

(i) During the time period of December 9, 2017, through December 9, 2021, the construction services provider provided the general contractor, intermediate contractor, or subcontractor a notice of registration from the secretary of state showing exemption from § 50–6–902(a);

(ii) The general contractor, intermediate contractor, or subcontractor did not obtain workers' compensation insurance to cover the construction service provider providing the notice of registration; and

(iii) The construction services provider's exemption registry registration was revoked on December 9, 2019, pursuant to § 50–6–908(b)(1)(C), and the construction services provider failed to inform the general contractor, the intermediate contractor, or the subcontractor of the revocation."

B. Penalties for Non-Compliance

Chapter 189, Public Acts 2021, amending various parts of Title 50, Chapter 6 eff. July 1, 2021, ending July 1, 2024.

This act revises and rearranges certain provisions governing construction services providers, the penalties for noncompliance of insurance requirements, and the exemption from having workers' compensation insurance; revisions to be effective from July 1, 2021, until July 1, 2024.

IV. Statutory Technical Correction

Chapter 286, Public Acts 2021, amending various sections of T.C.A. Title 50, Part 6 eff. Apr. 30, 2021.

Chapter 286 is an administration bill that makes several technical changes and clarifications. These include:

- Specifying that the Tennessee Rules of Evidence and Tennessee Rules of Civil Procedure apply to hearings before a workers' compensation judge for resolution of a dispute about medical care and treatment, medical services or benefits, or both;
- Clarifying criteria for an employee to be eligible to request vocational recovery assistance;
- Extending eligibility for vocational recovery assistance through June 2025; and
- Specifying that workers' compensation judges are authorized to conduct judicial settlement conferences.

V. Attorney Fees

Chapter 152, Public Acts 2021, amending T.C.A. § 50-6-226(d) eff. July 1, 2021.

"(1) In addition to attorneys' fees provided for in this section, the court of workers' compensation claims may award reasonable attorneys' fees and reasonable costs, including, but not limited to, reasonable and necessary court reporter expenses and expert witness fees for depositions and trials, incurred when the employer:

(A) Fails to furnish appropriate medical, surgical, and dental treatment or care, medicine, medical and surgical supplies, crutches, artificial members, and other apparatus to an employee provided for in a settlement, expedited hearing order, compensation hearing order, or judgment under this chapter; or

(B) Wrongfully denies a claim or wrongfully fails to timely initiate any of the benefits to which the employee or dependent is entitled under this chapter, including medical benefits under § 50-6-204, temporary or permanent disability benefits under § 50-6-207, or death benefits under § 50-6-210 if the workers' compensation judge makes a finding that the benefits were owed at an expedited hearing or compensation hearing. For purposes of this subdivision (d)(1)(B), 'wrongfully' means erroneous, incorrect, or otherwise inconsistent with the law or facts.

"(2) Subdivision (d)(1)(B) shall apply to injuries that occur:

(A) Between July 1, 2016, and June 30, 2020; and

(B) Between July 1, 2021, and June 30, 2023."

INSURANCE

I. Property and Casualty

A. No Private Right of Action for Contractor to Sue Insurance Company

Affordable Construction Services, Inc. v. Auto-Owners Insurance Company, 621 S.W.3d 693 (Tenn., Lee, 2021).

"Tennessee Code Annotated section 56-7-111 provides that when an insured property owner's home or other structure sustains more than $1,000 in damages, the property or casualty insurance company shall name the general contractor of an uncompleted construction contract as a payee when issuing payment to the owner for the loss. Here, an insurance company issued a check to the insured owner but did not name the general contractor as a payee. The general contractor sued the insurance company, alleging noncompliance with section 56-7-111. We accepted three certified questions of law from the United States District Court for the Western District of Tennessee, one of which requires us to determine whether a general contractor has a private right of action against an insurance company for violating section 56-7-111. We hold that section 56-7-111 does not expressly grant a private right of action to the general contractor, and the general contractor failed to prove that the legislature intended to imply a private right of action. Thus, the general contractor has no right to sue the insurance company for noncompliance with section 56-7-111."

"Grand Valley Lakes Property Owners Association, Inc. owned property on Grand Valley Drive in Saulsbury, Tennessee. Owners Insurance Company issued a property and casualty insurance policy on the property. A severe weather event damaged the property, and the Association hired Affordable Construction Services, Inc. to make repairs. Three lawsuits were filed involving payment of insurance proceeds."

"The primary issue we must resolve is whether section 56-7-111 provides for a private right of action. A private right of action allows a person to sue to remedy a wrong or prevent a wrong caused by another party's violation or threatened violation of a statute. *See Hardy v. Tournament Players Club, Inc.*, 513 S.W.3d 427, 433 (Tenn. 2017). It is the exclusive province of the legislature—not the courts—to create a statutory private right of action. *Brown v. Tenn. Title Loans, Inc.*, 328 S.W.3d 850, 855 (Tenn. 2010) (citing *Premium Fin. Corp. of Am. v. Crump Ins. Servs. of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn. 1998); *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 689 (Tenn. Ct. App. 1999)). To bring a cause of action to enforce a statutory duty, the plaintiff must show that the legislature intended for a private right of action to exist. *Hardy*, 513 S.W.3d at 434. Whether the legislature provided for a private right of action in section 56-7-111 is a question of law requiring statutory construction. *Brown*, 328 S.W.3d at 855 (citing *Premium Finance*, 978 S.W.2d at 93); *Embraer Aircraft* [*Maint. Servs., Inc. v. Aerocentury Corp.*], 538 S.W.3d [404] at 409 [(Tenn. 2017)] (quoting *Seals* [*v. H & F, Inc.*], 301 S.W.3d [237] at 242 [(Tenn. 2010)]). When construing a statute, '[o]ur chief concern is to carry out the legislature's intent without unduly broadening or restricting the statute.' *Embraer Aircraft*, 538 S.W.3d at 410 (quoting *Seals*, 301 S.W.3d at 242).

"A court can find that the legislature created a private right of action in one of two ways: based on the express terms of a statute or by implication through the statute's structure and legislative history. *Brown*, 328 S.W.3d at 855; *Premium Finance*, 978 S.W.2d at 93. We begin with the

language of section 56-7-111 to determine whether it grants Affordable Construction an express private right of action against the Insurance Company:

> When insured property losses in excess of one thousand dollars ($1,000) accrue to the owners of dwellings or other structures insured under policies of property or casualty insurance ..., the insurance company shall name the general contractor ... of any uncompleted construction or building contract as a payee on the draft to the owner covering payment for the loss. The insurance company shall name the general contractor as payee on the draft pursuant to this section regardless of whether the work that was performed or is yet to be performed is less than twenty-five thousand dollars ($25,000). Tenn. Code Ann. § 56-7-111 (2016).

"Section 56-7-111 does not expressly create a private right of action. Thus, we must determine whether the legislature intended to imply a private right of action. *See Brown*, 328 S.W.3d at 855 (citing *Premium Finance*, 978 S.W.2d at 93; *Reed*, 4 S.W.3d at 689). We do this by examining the statute's structure and legislative history, assisted by the framework this Court set forth in *Brown*. *See id.*"

"Here, against the backdrop of *Brown* and *Hardy*, we review section 56-7-111, considering its statutory structure, legislative history, and the *Brown* factors in determining whether the legislature intended to imply a private right of action. *Brown*, 328 S.W.3d at 855. Like the statute at issue in *Hardy*, section 56-7-111 is not part of 'a comprehensive Act or regulatory scheme,' 513 S.W.3d at 437, but is part of Title 56 of the Tennessee Code, which broadly regulates the insurance industry. Thus, we look at section 56-7-111 'in evaluating statutory language, structure and legislative history.' *Id.* at 437–38.

"First, Affordable Construction had to show that it was an intended beneficiary of section 56-7-111. Affordable Construction satisfied this factor. A general contractor, not an insurance company or an insured owner, stood to benefit from a requirement that an insurance company name the general contractor, along with the owner, on an insurance proceeds check. The practical effect of this requirement is that a general contractor would have to endorse the insurance proceeds check before the owner could cash or deposit the check. Presumably, a general contractor would not endorse a check without receiving payment for work performed. Representative Jack Bowman, who introduced the House Bill that would later be enacted as section 56-7-111, stated that the purpose of requiring the inclusion of the general contractor as a payee on the insurance proceeds check was to make sure there would be 'no hold up [in] payment' to the general contractor for repairs. *Hearing on H.B. 1989*, 88th Gen. Assemb., Reg. Sess. 2 (Tenn. Mar. 29, 1974) (statement of Rep. Bowman) (available through the Tennessee State Library and Archives audio recordings).

"Second, Affordable Construction had to show an indication of express or implied legislative intent to create a private right of action. *See Brown*, 328 S.W.3d at 858. Affordable Construction failed to do so. While the legislature aimed to avoid a 'hold up' of payment to a general contractor, there is nothing, express or implied, in the statutory scheme or legislative history indicating that the legislature envisioned contractors filing suit under the statute. Arguably, adding a civil remedy could have put more 'teeth' in section 56-7-111 and better protected general contractors—but that is not our call. It is the role of the legislature, not the courts, to create a statutory private right of action.

"Finally, Affordable Construction had to show that an implied private right of action would be consistent with the statute's purposes. *Brown*, 328 S.W.3d at 859. Affordable Construction failed

to carry its burden on this factor. The legislature intended for section 56-7-111 to avoid a delay in payments to contractors but did not include a specific penalty for noncompliance. When the legislature provides no specific penalty, under Tennessee Code Annotated section 56-1-801, a violation of chapters 2–4, 7, 11, and 32 of Title 56 is a Class C misdemeanor. Section 56-7-111 falls under chapter 7, so a party who violates this section may be guilty of a misdemeanor. Thus, section 56-7-111 is a 'regulatory statute enforced through governmental remedies' like the statutes in *Brown*, *Hardy*, *Petty*, and *Reed*. *See Brown*, 328 S.W.3d at 861; *Hardy*, 513 S.W.3d at 440–41. As we concluded in *Brown*, 'the implication of a private right of action would be inconsistent with the [statute's] purposes as set forth by the legislature.' 328 S.W.3d at 861.

"In sum, Affordable Construction failed to carry its burden of proof that the legislature intended to create an implied private right of action on behalf of a general contractor under section 56-7-111."

B. Assignment of Benefits Is Governed by Terms of Policy

Chapter 67, Public Acts 2021, adding T.C.A. § 56-7-102(g) eff. Mar. 29, 2021.

"(g) Except as provided in § 56–7–120, the rights, duties, or benefits provided by a policy of insurance issued under this title may be assigned only as expressly provided by the terms of the policy of insurance or as otherwise expressly allowed by the insurer."

II. Health

A. Behavioral Telehealth Services; Audio Conversation Permissible if Other Alternatives Are Unavailable

Chapter 191, Public Acts 2021, adding T.C.A. § 56-7-2003(a)(6)(C) eff. Apr. 22, 2021.

This law authorizes the use of HIPAA-compliant audio only conversation when providing behavioral health provider-based telemedicine if HIPAA-compliant real-time interactive audio video telecommunications, or electronic technology, or store and forward telemedicine services are unavailable.

B. Transplantation; Anti-Discrimination Provision

Chapter 441, Public Acts 2021, adding T.C.A. §§ 68-31-101 et seq. and § 56-7-2607 eff. July 1, 2021.

56-7-2607.

"(b) A health insurance entity that offers plans in this state that provide coverage for transplantation to individuals or groups on an expense-incurred basis shall not deny coverage for transplantation solely on the basis of the covered person's disability [as defined in 42 U.S.C. § 12012]."

Similarly, health care providers cannot discriminate against a person with a disability by refusing to provide transplantation services. An aggrieved person may bring a civil action for injunctive or other equitable relief to enforce compliance, but not for compensatory or punitive damages.

III. Legal; Plan Involving Intermediary Organizations

Chapter 428, Public Acts 2021, adding T.C.A. § 56-43-103(4)(C)(v) eff. May 13, 2021.

[The following is not considered to be "legal insurance" under the insurance laws of this state:]

"(v) A plan entered into by a person and an intermediary organization as defined by, and that is registered in compliance with, the rules of the Tennessee Supreme Court whereby:

(1) The person pays a fee and is eligible to receive legal services specified in the plan;
(2) The intermediary organization contracts with a licensed attorney or a law firm that includes one (1) or more attorneys licensed to practice law in this state, where the attorney or law firm agrees to provide, or facilitate arrangements with other licensed attorneys to provide, the legal services specified in the plan; and
(3) The intermediary organization does not assume any risk or obligation to pay or reimburse for the cost of the legal services specified in the plan, and the payment of a fixed administrative fee from the intermediary organization to the attorney or law firm is not considered payment or reimbursement for the legal services specified in the plan. . . ."

IV. General Provisions

A. Statutory Rebuttable Presumption of Acceptance of Policy Terms by Payment of Premium Applies to Action Against Agent or Broker for Negligent Failure to Procure

Parveen v. ACG South Insurance Agency, LLC, 613 S.W.3d 113 (Tenn., Kirby, 2020).

"This case arises from the purchase of a personal umbrella insurance policy. Dr. Talat Parveen and Mr. Khurshid Shaukat (collectively, 'Insureds'), a married couple, moved to Johnson City, Tennessee, from Georgia in 2013.

"While residing in Georgia, the couple was insured by State Farm Fire and Casualty Company and specifically possessed a personal umbrella liability policy that provided $2,000,000 in excess uninsured motorist coverage. The quotes received by the Insureds and subsequent policy documents and declarations pages for the State Farm umbrella policy showed excess uninsured motorist coverage as a separate line item with a separate premium amount for such coverage. The Insureds received these declarations pages annually from 2009 to 2012. The umbrella policy alone would only pay third parties for claims against the Insureds—losses for which one of the Insureds was held liable. However, as the name indicates, the excess uninsured motorist coverage would compensate the Insureds for claims against uninsured or underinsured motorists that exceeded the amount of uninsured motorist coverage under their automobile policies.

"After relocating to Johnson City in March 2013, Mr. Shaukat scheduled a meeting with Jeffrey Norris, who was an insurance agent for ACG South Insurance Agency, LLC ('ACG'). Mr. Shaukat intended to obtain replacement auto, umbrella, and renters insurance policies—a task that Dr. Parveen agreed he undertook on her behalf as well. Notably, Mr. Shaukat maintains that during this roughly thirty-minute meeting, he provided Mr. Norris with a copy of his State Farm umbrella policy and explained that the Insureds wanted the exact same coverage in Tennessee. Mr. Norris, however, has consistently denied this claim.

"As is pertinent to this appeal, Mr. Norris provided Mr. Shaukat with a quote for a personal umbrella policy through Safeco Insurance Company of America ('Safeco'). A copy of the quote provided to Mr. Shaukat reveals no separate line item for excess uninsured motorist coverage, nor did the policy's premium reflect the inclusion of such coverage. Indeed, the parties agree that the quoted policy did not include excess uninsured motorist coverage as the Insureds allegedly requested. Even so, Mr. Shaukat accepted coverage and purchased the Safeco umbrella policy, among other insurance policies, that day. The Insureds received a copy of the policy and a declarations page and paid the premiums, which did not include a charge for excess uninsured motorist coverage.

"The Insureds renewed the Safeco umbrella policy and paid the premiums in 2014 and again in 2015. Each subsequent notice of renewal included a copy of the policy and a declarations page, which did not list excess uninsured motorist coverage as a separate line item. Moreover, the policy itself specifically contained the following exclusion:

> This policy does not apply to any:
> ....
> 7. amounts payable under any:
> ....
> b. Uninsured Motorists or Underinsured Motorists coverage or any similar coverage, unless this policy is endorsed to provide such coverage as shown in the Declarations.

"On November 10, 2015, while the Safeco policy was in force, Dr. Parveen was involved in an automobile accident. Dr. Parveen sustained personal injuries, and her vehicle was totaled as a result of the crash. The Insureds then discovered that the driver of the wrecker vehicle who caused the accident was underinsured. In a later meeting with Mr. Norris, they further discovered that the Safeco umbrella policy in effect did not include excess uninsured motorist coverage. At that time, Mr. Shaukat requested that such coverage be added to their umbrella policy and paid the premium, though he was informed that the coverage was not retroactive."

[Suit against the driver and wrecker service company was settled.]

"In December 2016, the Insureds filed the present action in the Washington County Circuit Court against ACG and Mr. Norris (collectively, 'Appellants'). The complaint alleged that Mr. Norris negligently failed to procure the requested excess uninsured motorist coverage as a part of the Safeco umbrella insurance policy. The Insureds sought damages from the Appellants 'in an amount no less than One Million Dollars ($1,000,000).'"

"The trial court granted Appellants' motion for summary judgment, finding that it was undisputed that the Insureds had paid the premiums for the policies in effect in 2013, 2014, and 2015. The court concluded that Tennessee Code Annotated section 56-7-135(b) thereby created a rebuttable presumption that the Insureds had accepted the provided coverage, which did not include excess uninsured motorist coverage. It further determined that the Insureds had not presented evidence to rebut the presumption and that, therefore, summary judgment was appropriate.

"The Court of Appeals, however, reversed the trial court's grant of summary judgment. *Parveen v. ACG S. Ins. Agency*, No. E2018-01759-COA-R3-CV, 2019 WL 5700048, at *6 (Tenn. Ct. App. Nov. 5, 2019), *perm. app. granted,* (Tenn. Mar. 26, 2020). It determined that the statutory

presumption does not apply to actions against an insurance agent and, consequently, remanded the case to the trial court. *Id.*"

"We begin with the language of the statute at issue. Tennessee Code Annotated section 56-7-135 provides as follows:

> (a) The signature of an applicant for or party to an insurance contract on an application, amendment, or other document stating the type, amount, or terms and conditions of coverage, shall create a rebuttable presumption that the statements provided by the person bind all insureds under the contract and that the person signing such document has read, understands, and accepts the contents of such document.
> (b) The payment of premium for an insurance contract, or amendment thereto, by an insured shall create a rebuttable presumption that the coverage provided has been accepted by all insureds under the contract.

"The section provides for two rebuttable presumptions, but the specific question before us concerns subsection (b).

"The present case involves a claim by the Insureds against their insurance agent. As this Court has explained before, '[a] cause of action for failure to procure insurance is separate and distinct from any cause of action against an insurer or a proposed insurer; in a failure to procure claim, "the agent, rather than [the] insurance company, is independently liable."' *Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011) (alteration in original) (quoting 43 Am. Jur. 2d *Insurance* § 163 (2003)). With this in mind, we restate the issue, which is one of first impression for this Court: Whether section 56-7-135(b)'s rebuttable presumption of acceptance of the policy terms by payment of premiums applies equally to an insured's action against an agent for negligent failure to procure requested coverage as it does to an action against a carrier for coverage under the policy.

"The Insureds argue that the rebuttable presumption does not apply to cases against the insurance agent. Appellants, however, argue that the rebuttable presumption does apply. Appellants further direct this Court's attention to the trial court's conclusion that if the statutory presumption applies, Appellants would necessarily be entitled to summary judgment because the Insureds presented no evidence to rebut the presumption. The Insureds admitted as much at oral argument before this Court, so we agree that our resolution of the question outlined above is outcome-determinative."

"In reversing the trial court's grant of summary judgment, the Court of Appeals specifically focused on the statute's use of the phrase 'under the contract.' It explained as follows:

> Upon a review of the statute at issue, we determine that Tennessee Code Annotated [section] 56-7-135(b) is unambiguous. The plain and unambiguous language contained in Tennessee Code Annotated [section] 56-7-135(b) creates a rebuttable presumption that a party has accepted the coverage provided in the policy upon payment of an insurance premium by the insured parties 'under the contract.' In analyzing the statutory subsection at issue, our General Assembly included the phrase 'under the contract' and that phrase must be given full effect. In looking at the statute as a whole, subsection (a) also includes language related to the insurance contract.
>
> Construing the statute at issue and giving effect to each word of the statute, we determine that by including language regarding the insurance contract, our General Assembly intended to

> restrict the application of the statute to actions between the parties to the insurance contract. As such, we conclude that the rebuttable presumption in Tennessee Code Annotated [section] 56-7-135(b) applies only to actions between the parties to an insurance contract, which includes the insurance carrier and the insured parties. The insurance agent obtaining the insurance policy for the insured is not a party to the insurance contract. Therefore, the rebuttable presumption created by Tennessee Code Annotated [section] 56-7-135 does not apply to actions brought against an insurance agent who failed to procure the insurance coverage as directed by the insured. Because Tennessee Code Annotated [section] 56-7-135 is not applicable to actions directly against insurance agents, we determine that the Trial Court erred by applying the rebuttable presumption in this action and reverse the Trial Court's summary judgment.

"*Parveen*, 2019 WL 5700048, at *6.

"Appellants take issue with the decision of the Court of Appeals for several reasons, but most significantly, the Appellants argue that the Court of Appeals erred by isolating the phrase 'under the contract' when interpreting subsection (b), resulting in a forced interpretation. According to Appellants, this particular language from subsection (b) merely defines the class of persons to whom the presumption applies, not any particular claim or legal theory to which the presumption applies."

"[T]he single statutory sentence at issue here states: 'The payment of premium for an insurance contract, or amendment thereto, by an insured shall create a rebuttable presumption that the coverage provided has been accepted by all insureds under the contract.' Tenn. Code Ann. § 56-7-135(b). The phrase 'under the contract' immediately follows and simply modifies the word 'insureds.' In our view, it clearly refers only to those against whom the rebuttable presumption applies—'all insureds'—and not to the persons or entities by whom the presumption may be asserted. Stated another way, the inclusion of the phrase 'under the contract' in subsection (b) serves to clarify that the presumption only applies *against* those insured under the contract, not third parties. So, as applied here, when Mr. Shaukat paid the annual premium, the rebuttable presumption was triggered 'that the coverage provided ha[d] been accepted by all insureds[, Mr. Shaukat and Dr. Parveen,] under the contract[, the Safeco umbrella policy].' *See Harris v. Nationwide Mut. Fire Ins. Co.*, 92 F. Supp. 3d 736, 746-47 (M.D. Tenn. 2015), *aff'd,* 832 F.3d 593 (6th Cir. 2016) (applying Tennessee Code Annotated section 56-7-135(b)'s rebuttable presumption to a claim against both an insurer and an insurance broker and concluding that insureds failed to rebut the statutory presumption)."

"Further, we disagree with the Insureds' characterization of our reading of the statute as a significant change to the common law or even as 'rejecting' the common law. Section 56-7-135(b) does not repeal a common law cause of action against insurance agents, but it merely acts as a burden-shifting statute. We reiterate that the plain language of subsection (b) creates a rebuttable presumption that the insureds have accepted the terms of the insurance contract. It does not leave insureds without redress against a negligent agent who fails to procure the coverage requested. The language of the statute still permits such an insured to present evidence to rebut the presumption that, by paying their premiums, they accepted the insurance contract as written. The Insureds in the case before us have not done so."

"For the foregoing reasons, we conclude that the rebuttable presumption articulated in Tennessee Code Annotated section 56-7-135(b) does apply to actions against an insurance agent by insureds

under the contract of insurance for negligent failure to procure an insurance policy as directed. Therefore, because the Insureds failed to rebut the statutory presumption, the trial court properly granted the Appellants' motion for summary judgment. Accordingly, the judgment of the Court of Appeals is reversed, and the judgment of the trial court is reinstated."

B. Insurance Modernization Act and Other Changes

Chapter 537, Public Acts 2021, amending various sections of Title 55 relative to insurance eff. May 25, 2021.

This law, known as the "Insurance Modernization Act," makes a number of changes to Tennessee law. These include changes to the provisions of Chapter 56, Title 13 regarding captive insurance companies. Captives may now provide parametric insurance. In addition, the minimum capital and surplus requirements for captive insurance companies have been significantly reduced, thus encouraging the growth of the captive insurance industry in Tennessee.

Among other changes contained in the act is the deletion of the Tennessee Health Care Liability Reporting Act, formerly found in Title 56, Chapter 54. Also, T.C.A. section 56-2-208 had been modified to expand the list of conditions that, if met, allow credit for reinsurance.

C. Insurance Data Security Act

Chapter 345, Public Acts 2021, adding T.C.A. §§ 56-2-1001–1011 eff. July 1, 2021.

According to the Department of Commerce and Insurance:

"The law modernizes, defines and toughens existing security measures that Tennessee insurance carriers must take to protect consumer information. Under the new law, insurance carriers must:

- Identify internal or external threats that could result in unauthorized access, transmission, disclosure, misuse or destruction of consumers' private information,
- Develop, implement and maintain an information security program based on its individual risk assessment with a designated employee in charge of the information security program, and
- Investigate any cybersecurity breach and notify the Insurance Commissioner of a cybersecurity event if the licensee is a domiciled insurer or if more than 250 Tennesseans are impacted."

CONTRACTS

I. Existence of an Enforceable Contract

A. Complaint Dismissed Because Plaintiff Not a Party

Nashville Tennessee Ventures, Inc. v. McGill, No. M2020-01111-COA-R3-CV (Tenn. Ct. App., Armstrong, May 24, 2021).

"Appellant, a Tennessee corporation in the timeshare exit business, brought suit against Appellee, a former employee, for breach of contract, breach of the duty of loyalty, and civil conspiracy. Appellant alleged that during Appellee's employment, she conspired with a competing company to steal business from Appellant. Appellee filed a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss, and the trial court dismissed the complaint in full with prejudice because the alleged employment contract, attached as an exhibit to the plaintiff's complaint, did not name the plaintiff as a party to the contract. We affirm the trial court's dismissal of the breach of contract claim but reverse the dismissal of the breach of the duty of loyalty claim and the civil conspiracy claim."

"Appellant Nashville Tennessee Ventures, Inc. d/b/a Help 4 Timeshare Owners ('Ventures') is a Tennessee corporation that provides services in the timeshare exit business. Ventures' business model includes two services: (1) a sales room in which team members sell Ventures' services to prospective clients; and (2) a fulfillment department in which 'Case Managers' work directly with clients who are seeking relief from unwanted timeshares. Case Managers in the fulfillment department are supervised by the Executive Branch Director, a position that the complaint alleges was held by Appellee Norma Elizabeth McGill under contract.

"On March 11, 2020, Ventures filed suit against Ms. McGill in the Davidson County Circuit Court ('trial court'), alleging breach of contract, breach of the duty of loyalty, and civil conspiracy. The crux of Ventures' lawsuit concerned Ms. McGill's alleged dealings with a Texas company, Lonestar Transfer, LLC ('Lonestar'). Lonestar, a competitor of Ventures, also provides services in the timeshare exit business. However, unlike Ventures, Lonestar did not have a fulfillment department and engaged Ventures to perform fulfillment services for its clients. Ventures alleged that Ms. McGill conspired with Lonestar's owners, Karen and Richard Holloway, to 'decimate' Ventures' fulfillment department. According to the complaint, Ms. McGill identified employees of Ventures' fulfillment department, notified these individuals that they were being 'laid off' by Ventures, and then recommended that Lonestar hire them. Although Ms. McGill's last day of employment with Ventures was December 13, 2018, the complaint alleged that she began working for Lonestar on December 3, 2018, in contravention of her contractual obligations."

"To establish a claim for breach of contract, a plaintiff must plead facts that, if true, would support each of these elements: '(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract.' *ARC Lifemed, Inc. v. AMC-Tenn., Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (quoting *Custom Built Homes v. G.S. Hinsen Co., Inc.*, No. 01A01-9511-CV-00513, 1998 WL 960287, at *3 (Tenn. Ct. App. Feb. 2, 1998)).

"Concerning the first *prima facie* element, i.e., the existence of an enforceable contract, in its complaint, Ventures avers that, 'The Agreement constitutes a binding and enforceable contract between [Ventures] and [Appellee] McGill.' The problem, as noted above, is that there is no agreement between Ventures and Ms. McGill because the Agreement was entered by 'Helping Timeshare Owners, LLC,' not Ventures. Furthermore, there is nothing in the record to indicate any relationship between 'Helping Timeshare Owners, LLC' and Ventures. Moreover, the Agreement does not contain the signature of any agent of Ventures. Nonetheless, in its brief, Ventures argues that the trial court erred in dismissing its breach of contract claim because

> [a]s [Ventures] argued on page three of its Response to [Ms. McGill's] Motion to Dismiss, even despite the Contract listing 'Helping Timeshare Owners, LLC' as a party to the Contract rather than [Ventures], '[t]here are several different legal arguments available to [Ventures] to demonstrate that [Ms. McGill] remained bound by the Agreement throughout her employment with [Ventures].' In support of this argument, [Ventures] cited to this Court's opinion in *Dominion Enterprises v. Dataium, LLC*, No. M2012-02385-COA-R3[-]CV, 2013 WL 6858266 (Tenn. Ct. App. Dec. 27, 2013) (no appeal taken) as an example of a case in which a court permitted enforcement of an agreement by an entity that was not actually named in the agreement.

"In addition to its misplaced reliance on *Dominion*, Ventures makes only one additional argument in its brief concerning the enforceability of the Agreement—reformation of the contract. Ventures notes that the Agreement contains a choice of law provision stating that Florida law governs any disputes, and 'both Tennessee and Florida law permit reformation of a contract where, due to a mutual mistake, the contract does not accurately express the true intention or agreement of the parties.'

"A mutual mistake is 'a mistake of all the parties [of a contract] laboring under the same misconception.' *Trent v. Mountain Commerce Bank*, 606 S.W.3d 258, 263 (Tenn. 2020) (citation and quotation marks omitted). A court may reform a contract when, due to a mutual mistake, the instrument does not accurately express the parties' agreement. *Id*. However, Ventures cites no authority in support of its proposition that the misidentification of a party constitutes a 'mutual mistake' for which reformation of a contract is an appropriate remedy. It is simply implausible that Ventures was laboring under a misconception as to its own identity. Furthermore, when Ms. McGill filed her motion to dismiss the complaint, Ventures was on notice of the discrepancy between the name of the party to the Agreement and the party to the lawsuit, yet Ventures failed to move to amend its complaint to either explain the discrepancy, or to establish a relationship between 'Helping Timeshare Owners, LLC' and Ventures. In short, neither the Agreement nor Ventures' complaint demonstrates the existence of an enforceable contract between Ventures and Ms. McGill. Because the purported contract itself negates an essential element of Ventures' claim, i.e., the existence of an enforceable contract between the parties, the trial court did not err in dismissing Ventures' breach of contract claim. *See Humphries v. W. End Terrace, Inc.*, No. 01-A-019102CH00047, 1991 WL 244468, at *2 (Tenn. Ct. App. Nov. 22, 1991) (finding that the trial court properly dismissed a fraud claim when exhibits to the plaintiff's complaint negated actionable fraud as a matter of law)."

B. Email Negotiations Not a Contract; No "Meeting of the Minds"

American Board of Craniofacial Pain v. American Board of Orofacial Pain, No. M2018-01696-COA-R3-CV (Tenn. Ct. App., McBrayer, Dec. 7, 2020), perm. app. denied Apr. 7, 2021.

"The American Board of Craniofacial Pain ('ABCP') and the American Board of Orofacial Pain ('ABOP') are professional dental associations. ABCP, an Illinois nonprofit corporation, is 'organized exclusively to conduct certification examinations [for licensed dentists] in the field of Craniofacial Pain.' Certification in the field of Craniofacial Pain earns one the designation 'Diplomate of the ABCP.'

"ABOP, a California nonprofit mutual benefit corporation, 'act[s] as an association of licensed professionals in order to conduct certification examinations in the field of Orofacial Pain.' Certification in the field of Orofacial Pain earns one the designation 'Diplomate of the ABOP.'

"Although they disagree over who initiated the discussions, both ABCP and ABOP agree that, in the spring of 2014, they started talking about a possible merger of the two entities. The goal was to unify orofacial pain and craniofacial pain dentistry into a single field. With unification, ABCP and ABOP hoped to improve the chances of recognition of the orofacial/craniofacial pain field by the American Board of Dental Specialties or ABDS.

"In May 2014, ABCP and ABOP formed a 'joint merger committee' composed of three members designated by each entity. Dr. Clifton Simmons, then-president of ABCP, and Dr. Dale Ehrlich, the incoming president of ABOP, both served on the committee for their respective entities."

"On July 14, 2014, prior to the joint committee's next meeting, Dr. Ehrlich sent the following email to Dr. Simmons with the subject line 'Merger Proposal':

> Clifton,
>
> During our first teleconference we discussed the fact that the committee's work must receive input from, and be approved by, the ABOP Board of Directors. In recent discussions with the Board of Directors there was concern about some of the issues we had discussed. Therefore, the Board has written a proposal for the merger of the ABCP and ABOP. We respectfully submit the attachment which is a merger proposal for your discussion and consideration prior to our Thursday night teleconference. This proposal is our agenda for the next teleconference.
>
> Respectfully,
> Dale

"The attachment referenced in Dr. Ehrlich's email was a two page document, which addressed the combination of the fields, the merger of the entities, and the treatment of diplomates of each entity. The following day, Dr. Simmons responded that he would 'take this Proposal to the [ABCP]' and that he did not believe the joint committee needed to proceed with its next conference call.

"On July 23, 2014, Dr. Simmons sent an email to the members of the joint merger committee informing them that the board of the ABCP had 'voted to accept the ABOP/ABCP Board merger proposal that was sent to us on July 14, 2014.' He went on: 'I suppose that a Memorandum of Understanding or other document needs to be constructed to consummate this merger of the ABOP and ABCP into one board.' The email concludes by inquiring about the 'next move ... in this process.' Dr. Ehrlich responded to Dr. Simmons and the other committee members, 'We will start working on an MOU based on the merger proposal.' Dr. Ehrlich also suggested a 'possible date for a conference call concerning the MOU.'

"The next month, Dr. Ehrlich sent Dr. Simmons an email, which was copied on the members of the joint merger committee, addressing what Dr. Ehrlich characterized as requirements for proceeding with a merger. The email was styled as a memo from Dr. Ehrlich to Dr. Simmons and read, in part, as follows:

> We have identified specific areas that are apparent roadblocks to the formulation of the MOU, a step mandatory to a merger. As it stands now, attorney preparation time, attorney review by both sides and other prudent and necessary details may make it impossible to meet the August 29 deadline. However, in our attempt to accommodate that date, we have summarized some of the data that is immediately required to allow our attorneys to begin this process.

"The email went on to list the information and actions that Dr. Ehrlich claimed were required. This included information on the development and administration of ABCP's certification examination.

"Approximately nine days later, Dr. Simmons responded with 'as much of the information ... as we have available for you at this time.' His letter forwarding the available information also referenced the anticipated MOU:

> We hope this information submitted here is sufficient to assemble the MOU by your attorney so that we can move on with the next steps in this important process. We understand that after your attorney has reviewed the items supplied, additional information may be required by both ABCP and ABOP. We will do our best to provide this to you in a timely manner, as I am sure you will also do. Once all of the data is sufficiently collected, please have the final MOU documents prepared by your attorney and send it to us so we can have our attorney review it and clarify any prudent and necessary details.

"But Dr. Simmons's hope was not to be realized. Several days after receiving the information, Dr. Ehrlich emailed Dr. Simmons that, 'due to the non[-]psychometrically supported nature of the ABCP exam process,' ABOP could not 'accept ABCP Diplomates directly as ABOP Diplomates.' ABOP also found continuing with the merger 'unacceptable' because it would undermine ABOP's efforts to seek certification with the American Board of Dental Specialties."

"ABCP sued, alleging that its acceptance of the terms of the July 14, 2014 email from ABOP's president, Dr. Ehrlich, formed a merger contract. ABCP explained that ABOP breached the contract because it had 'secretly and improperly applied for membership and recognition' by the American Board of Dental Specialties. Once it was accepted for membership, ABOP determined that it no longer needed to merge. ABCP asked for specific performance of the merger in accordance with the terms of the July 14, 2014 email. ABCP also alleged that it had suffered damages as a result of ABOP's failure to close on the merger."

"Viewing the evidence in the light most favorable to ABCP and drawing all reasonable inferences in ABCP's favor, we conclude that ABCP knew that the agreement to merge was incomplete until it was reduced to another written form. We reach that conclusion based primarily on two factors. One is 'the extent to which express agreement ha[d] been reached on all the terms to be included [in the merger agreement].' Restatement (Second) of Contracts § 27 cmt. c. The 'expression of the parties' intent to be bound[ ] and the definitiveness with which they state their terms' are related concepts. *Huber v. Calloway*, No. M2005-00897-COA-R3-CV, 2007 WL 2089753, at *3 (Tenn. Ct. App. July 12, 2007). Although for purposes of summary judgment we might accept ABCP's contention that the parties had agreed on a merger with ABOP to be the surviving entity, the parties

did not agree 'that ABOP would absorb all of ABCP's assets and assume all of its liabilities.'. . . Here, the ABOP proposal referenced specifically one asset, '[t]reasuries from both [b]oards,' and provided that the asset would 'be unified' upon completion of the merger. It is undisputed that there were other assets, namely intellectual property, and those assets were not specifically addressed in the proposal."

"The second factor favoring an incomplete agreement is the parties' conduct following the purported merger agreement. *See* Restatement (Second) of Contracts § 27 cmt. c. ('[W]hether either party takes any action in preparation for performance during the negotiations' is 'helpful in determining whether a contract has been concluded.'). After ABCP claims the binding merger agreement was formed, Dr. Simmons received a request for information and for steps that Dr. Ehrlich claimed were required to overcome 'roadblocks' to the merger. In that same communication, Dr. Ehrlich described the creation of a memorandum of understanding as 'a step mandatory to a merger.' Dr. Simmons did not object or insist that a merger agreement had already been reached. Instead, Dr. Simmons produced the requested information. ABCP describes Dr. Simmons's actions as merely 'a show of good faith.' But his email responding to the information request indicates otherwise. Dr. Simmons wrote of having ABCP's attorney review 'the final MOU documents ... and clarify any prudent and necessary details.'

"The undisputed evidence shows that ABCP knew that there would be no binding agreement until the whole had been reduced to a memorandum of understanding. Because a memorandum of understanding was never produced, the parties' objective manifestations show there was no mutual assent to an enforceable contract."

"The trial court also concluded that specific performance was not a remedy available to ABCP. We agree. In Tennessee, 'specific performance of a contract is not available to a party as a matter of right, but rests in the sound discretion of the [trial court] under the facts appearing in the particular case.' *North v. Robinette*, 527 S.W.2d 95, 98 (Tenn. 1975). To order specific performance, '[t]he contract must be clear, definite, complete and free from any suspicion of fraud or unfairness.' *Johnson v. Browder*, 207 S.W.2d 1, 3 (Tenn. 1947). As explained above, we do not find the purported contract between ABCP and ABOP to be complete."

"Because the undisputed facts show the lack of mutual assent, there was no enforceable contract between ABCP and ABOP. So we affirm the grant of summary judgment to ABOP."

II. Material Breach by Seller Who Failed to Provide Marketable Title to Real Estate

Bowers v. Estate of Mounger, No. E2020-01011-COA-R3-CV (Tenn. Ct. App., Swiney, May 27, 2021).

"This appeal concerns a real estate transaction that fell through. The Estate of Katherine N. Mounger ('the Estate'), as well as executors Katherine M. Lasater and E. Jay Mounger ('Defendants,' collectively), seek reversal of the judgment of the Circuit Court for Roane County ('the Trial Court') whereby they were ordered to return $150,000 in earnest money to Nelson E. Bowers, II ('Plaintiff'), successor in interest to would-be purchaser of the property at issue, McKenzie Loudon Properties, LLC ('MLP'). Defendants appeal to this Court, arguing, among other things, that MLP first materially breached the contract for sale ('the Agreement') by failing to perform a title examination and failing to notify it of a defect in title stemming from oral claims

of ownership made by Charles Mounger. However, we find, as did the Trial Court, that the Estate had actual notice of the defect in title. Further, it was the Estate, rather than MLP, that materially breached the Agreement by failing to provide marketable title. Aside from an award to Plaintiff of attorney's fees incurred on an earlier appeal in this matter which Plaintiff did not request from this Court in that earlier appeal, which we reverse, we affirm the judgment of the Trial Court and remand for an award to Plaintiff of reasonable attorney's fees incurred on this appeal as requested."

"We first address whether the Trial Court erred in ruling in favor of Plaintiff when it found that both parties breached the Agreement. Defendants present three sub-arguments on this issue: (1) the Trial Court failed to determine which party committed the first material breach; (2) contrary to the Agreement, MLP failed to obtained a title examination within 30 days of the execution of the Agreement, which constituted the first, uncured material breach; and, (3) the Trial Court erred in concluding that the notice provided by MLP was in 'substantial compliance' with its obligations under the Agreement. These issues present questions of contract interpretation and what constitutes a material breach of contract."

"With respect to Defendants' first sub-argument, Defendants are correct in that the Trial Court did not explicitly state that the Estate committed the first material breach of the Agreement. However, we agree with Plaintiff that 'it is clear by implication and context of its Order that [the Trial Court] found the Estate committed the first and only material breach.' The Trial Court found that both MLP and the Estate breached the Agreement. It then found MLP's instances of breach non-material. The Trial Court thus contrasted MLP's non-material breaches of the Agreement with what it found, necessarily by implication, to be the Estate's material breach of the Agreement in its failure to produce marketable title to the property at issue. While the Trial Court did not state outright that the Estate committed a material breach, it is clear from the context of the Trial Court's ruling that it found just that.

"With regard to Defendants' subargument (2), Defendants correctly note that there is no indication in the record that MLP ever performed a title examination. In response, Plaintiff argues in his brief that an application of the five Restatement factors, quoted above, supports his contention that MLP's failures to abide by the Agreement were non-material and, in contrast, the Estate's failure to provide marketable title constituted a material breach. As Plaintiff asserts, 'the title examination was for the benefit of MLP.' Indeed, it was. The point of the Agreement was not to perform a title examination; it was to sell the land at issue for a sum of money. Implicit in that bargain was that the land to be sold belonged to the seller—the Estate—without any other claimants to it in the wings. MLP's apparent decision to forego a title examination was to its own potential detriment, not the Estate's. In fact, even if MLP had timely performed a title examination, it would not have yielded a defect as Charles Mounger had not yet recorded his purported deed. The defect in this case stemmed, initially, from Charles Mounger's oral claims of ownership to some portion of the property. Charles Mounger's actions cast a cloud on the title, albeit one that would not have been discovered in a title examination at first.

"While MLP's apparent failure to conduct a title examination was to its own potential detriment, the Estate's failure to produce marketable title was very much detrimental to MLP's expected benefit under the Agreement. MLP reasonably expected free and clear title to the property from the Estate. Defendants point to *Seaton v. Wise Properties–TN, LLC*, No. E2011-01728-COA-R3-CV, 2012 WL 2362144, at *7 (Tenn. Ct. App. June 22, 2012), *Rule 11 perm. app. denied Oct. 16, 2012*, for the proposition that, in a 'time is of the essence' real estate contract such as the Agreement,

failure of a party to perform a title examination within the time set out in the contract constitutes failure to perform a condition precedent and amounts to material breach."

"We find *Seaton* inapposite. In *Seaton*, it was the seller who had the responsibility of performing a title examination. Here, the buyer, MLP, had that responsibility. MLP's apparent choice to forego a title examination, when such an examination was for its own benefit, is not comparable to the scenario in *Seaton*. Meanwhile, the Estate's failure to provide marketable title was very much to MLP's detriment, and went to the heart of the transaction. We find, as did the Trial Court, that the Estate committed a material breach of the Agreement in its failure to provide marketable title, whereas MLP's breaches were non-material in nature.

"Finally, Defendants argue they lacked notice of cloud of title until it was too late to act. Defendants contend they first became aware of Charles Mounger's claims at the October 31, 2007 meeting with MLP. Defendants state: 'The clear intent of Paragraph 4 [of the Agreement] was to determine as early as possible if a defect in the title existed and to notify seller of such. It is undisputed that MLP knew in early August that Charles Mounger's claims created a cloud on the title. Instead of disclosing that, MLP chose to remain silent.' Defendants' characterization of the timeline as to their awareness of Charles Mounger's claims does not accord with the Trial Court's factual findings. The Trial Court found as evidence of the Estate's early notice of defect in title both the August 3, 2007 letter from Mr. Carpenter to Mr. Anderson and an August 9, 2007 email forwarded by Harlon Rice to co-executor Katherine Lasater.

"Defendants contend that the August 3, 2007 letter is silent about any claims of ownership by Charles Mounger and cannot be used to establish notice. However, we believe that is an overly restrictive reading of the letter. The letter references Charles Mounger having ran a geotechnical person off the property and included a commitment to take legal action, such as obtaining a restraining order, to prevent future occurrences. The letter reflects that Charles Mounger believed, incorrectly as it turned out, he had some right to the property. That whatever this right or interest was supposed to be was not spelled out in the letter does not mean the Estate was ignorant of a problem. We agree with the Trial Court that the August 3, 2007 letter was sufficient to put the Estate on notice of Charles Mounger's claims on the property. . . . The evidence does not preponderate against the Trial Court's findings as to the Estate's notice of Charles Mounger's claims. At oral argument in this matter, Defendants' counsel acknowledged forthrightly that if we affirm the Trial Court's finding that the Estate knew of Charles Mounger's claims in August 2007, Defendants lose. We do so affirm that finding by the Trial Court, and Defendants lose on this issue.

"In sum, the Estate committed the first and only material breach of the Agreement in this case. The Estate was on notice of Charles Mounger's claims no later than August 3, 2007. The Estate then acted to remove the cloud on title, but it was too late. Like the Trial Court, we find no bad faith on the Estate's part, but the fact remains it failed to provide marketable title in time to fulfill the terms of the Agreement. We affirm the Trial Court in its conclusion that the earnest money is to be returned to Plaintiff."

III. Lease Did Not Require Lessee to Replace House Destroyed in Gatlinburg Wildfire

Hall v. Park Grill, LLC, No. E2020-00993-COA-R3-CV (Tenn. Ct. App., Frierson, May 26, 2021).

"On April 7, 2009, Alie Newman Maples, now deceased ('Decedent'), entered into a commercial lease ('the Lease') as the lessor with the defendant in this action, Park Grill, LLC ('Park Grill'), as the lessee. Geoffrey A. Wolpert, Park Grill's sole proprietor, entered into the Lease on behalf of Park Grill. The leased premises ('the Premises') consisted of improved real property located on Savage Gardens Drive in the City of Gatlinburg. The Lease provided for a ten-year term, expressly set to expire on June 30, 2019, and Park Grill agreed to pay $3,500.00 in annual rent plus property taxes on the Premises. Park Grill utilized the structure located on the Premises, described by both parties as a house ('the House'), as a storage facility for the benefit of two restaurants in Gatlinburg: The Park Grill, owned and operated by Park Grill, and The Peddler, owned and operated by Steaks Sophisticated, LLC, for which Mr. Wolpert is also the sole owner."

"On November 28, 2016, the House was completely destroyed by the Gatlinburg wildfires. Mr. Wolpert, acting through Steaks Sophisticated, Inc., had secured a fire insurance policy covering the Premises with Berkley Southeast Insurance Group ('Berkley'). According to Mr. Wolpert's affidavit and documents submitted in discovery, upon deeming the House a total loss, Berkley had paid proceeds in the amount of $112,360.00 for the House and $20,000.00 for its contents, which were the values claimed by Mr. Wolpert. Decedent passed away in July 2017 at the age of ninety-six. The plaintiff, Faye Maples Hall, was named as the personal representative of Decedent's estate. It is undisputed that after the fire, neither party to the Lease terminated the Lease prior to the end of the term and that Park Grill continued to pay its annual rent to Ms. Hall after Decedent's death. It is also undisputed that after the fire and during the term of the Lease, Park Grill cleaned the debris from the Premises and utilized temporary storage containers on the Premises."

"Ms. Hall asserts that the trial court improperly applied the maxim of *expressio unius est exclusio alterius* 'to allow an ambiguous mention [of fire loss] in a later section of a document [to] defeat a clear expression of the parties' intent in entering the lease.' We disagree. As this Court has explained within the context of contract interpretation:

> It is also a well known rule of construction that where general and specific clauses conflict, the specific clause governs the meaning of the contract. 11 Williston on Contracts § 32:10 (4th ed.); *City of Knoxville v. Brown,* 195 Tenn. 501, 260 S.W.2d 264, 268 (Tenn. 1953) (order on petitions to rehear) ('The doctrine of Ejusdem Generis based on the maxim expressio unius est exclusio alterius is: that, where general words are used, followed by a designation of particular things or subject to be included or excluded as the case may be, the inclusion or exclusion will be presumed to be restricted to the particular thing or subject') (quoting Ballentine's Law Dictionary, 2nd ed.); *Magevney v. Karsch,* 167 Tenn. 32, 65 S.W.2d 562, 571 (Tenn. 1933) ('There is no rule better established with reference to the construction of written instruments than that the exception of particular things from general words shows that the things excepted would have been within the general language, had the exceptions not been made.').

"*Richmond v. Frazier*, No. E2008-01132-COA-R3-CV, 2009 WL 2382303, at *7 (Tenn. Ct. App. Aug. 4, 2009). *See S.M.R. Enters., Inc. v. S. Haircutters, Inc.*, 662 S.W.2d 944, 949 (Tenn. Ct. App. 1983) (explaining in the context of interpreting a contract that *expressio unius est exclusio alterius* means that 'the expression of one implies the exclusion of the others' or '[s]tated differently, where a contract by its express terms includes one or more things of a class it simultaneously implies the exclusion of the balance of that class.').

"Ms. Hall's argument is premised on her assertion that the Lease's provision entitled, 'Fire Loss,' is ambiguous. The provision, which is paragraph eight of the Lease, states in full:

> In the event these premises are damaged by fire or other insurable loss, and the premises can be reasonably repaired within ten (10) working days, Lessee shall undertake to make these repairs using the proceeds of the insurance policy. Rental shall not abate. In the event these premises are damaged by fire or other loss and cannot be reasonably repaired within ten (10) working days, either party may elect to declare the lease terminated.

"We do not find this provision to be ambiguous. It provides for two possible outcomes in the event that the Premises are damaged by fire or other insurable loss. The first outcome is that the lessee, Park Grill, 'shall undertake to make these repairs using the proceeds of the insurance policy.' We note that the coordinating conjunction, 'and,' joins two conditions for this first outcome: (1) that the Premises 'are damaged by fire or other insurable loss' and (2) that the Premises 'can be reasonably repaired within ten (10) working days.' *See Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 21 (Tenn. Ct. App. 2002) (citing with approval the definition of 'and' in Black's Law Dictionary 86 (6th ed. 1990) as a 'conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first'). The second outcome provided in paragraph eight of the Lease is that 'either party may elect to declare the lease terminated.' This outcome is also preceded by two clear conditions joined together: (1) that the Premises 'are damaged by fire or other loss' and that (2) the Premises 'cannot be reasonably repaired within ten (10) working days.'

"As the trial court found, it is undisputed that the Premises could not be reasonably repaired within ten working days. Therefore, the first outcome, that of Park Grill's utilizing fire insurance proceeds to make the repairs, was not applicable. Ms. Hall takes some issue with the fact that Park Grill did not avail itself of the second outcome provided in paragraph eight by electing to terminate the Lease immediately upon learning that Berkley had deemed the House a total loss due to the fire. However, the second outcome is a permissive one in that either party may elect to terminate the Lease in the event that the damages cannot be repaired within ten working days. The provision does not require either party to terminate the Lease. *See Eberbach v. Eberbach*, 535 S.W.3d 467, 474 n.3 (Tenn. 2017) (recognizing that a contractual provision 'contain[ing] only permissive language, such as 'may award,' ' is discretionary in nature); *Huey v. King*, 415 S.W.2d 136, 139 (Tenn. 1967) ('It is well settled that the term 'may' does not confer on a person a mandatory duty; the term is permissive and operates to confer a discretion.'). Additionally, the fire loss provision requires that '[r]ental shall not abate,' indicating that Park Grill must continue to make rental payments in either situation until the Lease is terminated. It is undisputed that Park Grill continued to make the $3,500.00 annual rental payments due under the Lease through the end of the term.

"Contrary to Ms. Hall's argument, we do not find that the trial court utilized solely the maxim of *expressio unius est exclusio alterius* in interpreting the plain language of the Lease, ignored precedent, or applied the maxim improperly."

"The trial court analyzed the Lease as a whole and found that although paragraph five required Park Grill to maintain a fire and casualty insurance policy on the Premises, that paragraph included no requirement concerning the amount of such a policy or how the proceeds were to be used. Paragraph five does require a specific amount of coverage, $100,000.00, for liability insurance but states no such express amount for fire and casualty. Instead, paragraph eight, 'Fire Loss,' requires that Park Grill must use insurance proceeds to repair the Premises in the event that those repairs

could be reasonably made 'within ten (10) working days.' As the trial court noted, this specific fire loss provision is the only provision in the Lease directing the parties' actions in the event of fire loss and the only provision directing Park Grill's actions in utilizing the fire insurance proceeds. The trial court examined the provision concerning fire loss in paragraph eight to find that, taken together with the rest of the Lease, the express fire loss terms implied the exclusion of any other requirement for the use of the fire insurance policy. *See S.M.R. Enters.,* 662 S.W.2d at 949. We discern no error in the trial court's application of the maxim to the plain language of the Lease."

"Ms. Hall also asserts that the trial court erred by declining to find that the provisions in the Lease for Park Grill to keep the Premises in good repair; 'turn[ ] over' the Premises 'in a clean and good condition, reasonable wear and tear excepted'; and 'maintain a fire and casualty insurance policy' combined to render Park Grill responsible for full restoration of the Premises after a fire loss. Park Grill argues that the trial court properly found that, pursuant to Tennessee Code Annotated § 66-7-102(b), Park Grill's promise to return the Premises to the lessor in good condition did not bind Park Grill to restore the destroyed House. Park Grill also argues that the trial court properly found that under the plain meaning of the insurance and fire loss provisions in the Lease, Park Grill was required to maintain fire insurance on the Premises only to the extent that it was required to make fire damage repairs that could reasonably be completed within ten working days. Upon careful review, we agree with Park Grill and the trial court.

"Tennessee Code Annotated § 66-7-102 (2015) provides:

> (a) Where any building which is leased or occupied is destroyed or so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without fault or neglect by the lessee, surrender possession of the premises, without liability to the lessor or owner for rent for the time subsequent to the surrender.
>
> (b) A covenant or promise by the lessee to leave or restore the premises in good repair shall not have the effect to bind the lessee to erect or pay for such buildings as may be so destroyed, unless in respect of the matter of loss or destruction there was neglect or fault on the lessee's part, or unless the lessee has expressly stipulated in writing to be so bound.

"See EVCO Corp. v. Ross, 528 S.W.2d 20, 23 (Tenn. 1975) (recognizing that in enacting an earlier version of this statute, the General Assembly had overruled a prior holding in *Zuccarello v. Clifton*, 12 Tenn. App. 286, 292 (Tenn. Ct. App. 1930), that a tenant was bound by a covenant to repair in the lease despite the destruction of the building by fire); *see also Johnson Real Estate Ltd. P'ship v. Vacation Dev. Corp.*, No. E2017-01774-COA-R3-CV, 2018 WL 2948421, at *2 (Tenn. Ct. App. June 12, 2018), *perm. app. denied* (Tenn. Oct. 10, 2018) (recognizing same).

"Entitled, 'Maintenance,' Paragraph seven of the Lease provides:

> Lessee has examined these premises thoroughly and accept[s] the premises 'as is'. Lessee shall maintain the roof and outside of the building. Lessee shall maintain the interior of the building (including the doors and windows, the plumbing and light fixtures, and the heating and air conditioning systems). Lessee shall keep the interior of the leased premises in a clean and well-maintained and well-repaired condition at its own expense (including the doors and windows, the plumbing and light fixtures, and the heating and air conditioning systems) and shall save the Lessor harmless from all claims, injuries, damages, or expenses incident to the

> same. Any light fixtures and light bulbs, floor and wall coverings and fixtures attached in the windows and on the walls that have been provided by Lessee shall become a part of the realty and may not be removed without Lessor's written consent. Lessee shall not make any major changes to these premises without first obtaining the Lessor's written consent. *At the termination of this lease, these premises shall be turned over to Lessor in a clean and good condition, reasonable wear and tear excepted.*

"(Emphasis added.) The trial court found that the Lease contained a 'covenant or promise by the lessee to leave or restore the premises in good repair,' as described in Tennessee Code Annotated § 66-7-102(b). We note that in the 'Maintenance' provision, this is the final sentence of the paragraph, as underlined above. Ms. Hall posits that in the provision as a whole, Park Grill promised to perform all major repairs on the Premises during the term of its leasehold and that such a covenant means that any repairs needed, including the restoration of the destroyed House, would be included in Park Grill's responsibilities under the Lease. However, analyzing the plain language of the provision, we determine that although Park Grill did promise at its own expense to 'maintain the roof and outside' of the House and to keep the interior 'in a clean and well-maintained and well-repaired condition,' the parties did not contemplate in this provision complete restoration of the House following its total destruction. We determine that the closing sentence of the 'Maintenance' provision is Park Grill's covenant 'to leave or restore the premises in good repair' and is therefore governed by Tennessee Code Annotated § 66-7-102(b).

"Absent negligence or fault on the part of Park Grill in causing the fire or an express stipulation in writing that Park Grill would be bound to restore the House in the event of its destruction, Park Grill's promise to turn over the Premises to the lessor, now Ms. Hall, in 'a clean and good condition' did not bind Park Grill to rebuild or restore the House. *See* Tenn. Code Ann. § 66-7-102(b). As the trial court noted, it is undisputed that Park Grill bore no fault, whether direct or through negligence, in the destruction of the House by the Gatlinburg wildfires. Under the statute, the question then becomes whether Park Grill expressly stipulated to a duty to restore the House upon the House's total destruction by fire. Ms. Hall argues that the maintenance provision in the Lease, coupled with the agreement to obtain fire and casualty insurance, constitutes this express stipulation. We disagree.

"Paragraph five of the Lease, entitled, 'Insurance,' provides:

> *Lessee shall have and maintain a fire and casualty insurance policy on these leased premises*. Lessee shall obtain and keep in force a comprehensive general public liability policy in a sum of at least $100,000.00 for these premises.

"(Emphasis added.) The underlined sentence pertains to fire and casualty insurance. Unlike the corresponding provision for liability insurance, the original parties to the Lease, Decedent and Park Grill, did not specify an amount for the fire and casualty insurance coverage and did not specify in this paragraph the extent of the damage to be covered by the policy. Moreover, as we have determined in the preceding section of this opinion, the parties to the Lease did expressly agree in the subsequent 'Fire Loss' provision that Park Grill would use proceeds from the fire insurance to make repairs to the Premises after a fire loss in the event that 'the premises can be reasonably repaired within ten (10) working days.' Ms. Hall does not dispute that the fire damage to the House could not reasonably be repaired within ten working days."

"Given the plain and unambiguous language of the Lease and the clear application of Tennessee Code Annotated § 66-7-102(b), we determine that the trial court did not err in its interpretation of the Lease as binding Park Grill to utilize fire insurance proceeds to make repairs to the House only if those repairs could reasonably be made within ten working days. Determining also that no genuine issues of material fact existed that would have precluded summary judgment, we conclude that the trial court properly granted summary judgment in favor of Park Grill and denied summary judgment to Ms. Hall, dismissing her complaint."

IV. Omission of Essential Term Renders Contract Unenforceable

Payne v. Bradley, No. M2019-01453-COA-R3-CV (Tenn. Ct. App., Stafford, Feb. 26, 2021).

"The underlying lawsuit has its genesis in another lawsuit. Specifically, Defendant/Appellee Maxine Bradley was deeded a home in Hermitage, Tennessee by her sister Nancy O. Cockerill, known as the Tulip Grove Property. Ms. Cockerill thereafter died. Ms. Cockerill's son contested the validity of the deed in a quiet title action filed against Ms. Bradley in Davidson County Chancery Court ('the chancery court action'). Around November 2012, Ms. Bradley contacted her other sister, Plaintiff/Appellant Carolyn Payne, for help with the expenses related to the chancery court action. Eventually, on March 3, 2013, Ms. Bradley and Ms. Payne entered into a written agreement drafted by the attorney representing Ms. Bradley in the chancery court action. The agreement provided as follows:

> This agreement is made between [Ms.] Bradley and [Ms.] Payne regarding a certain lawsuit pending concerning real property located at 632 Tulip Grove Road, Hermitage, Tennessee.
>
> The parties have agreed to share equally the costs of pursuing the lawsuit [ ] in Chancery Court of Davidson County, Tennessee under docket number 12-1391-I. The parties further agree that they will share in any and all expenses of the real property including property taxes and upkeep and all expenses associated therewith. The parties agree that at the conclusion of the lawsuit the property will be deeded in the name of [Ms.] Bradley and [Ms.] Payne. If [Ms.] Payne fails to pay her share of expenses and costs and upkeep of the property and or taxes, then [Ms.] Bradley will not be required to deed one-half of the property to [Ms.] Payne.

"Pursuant to the parties' agreement, Ms. Payne made some undisputed payments toward expenses, including (1) a $400.00 payment prior to the execution of the March contract in December 2012 related to attorney's expenses; (2) a $250.00 payment in March 2013 directly to Ms. Bradley's attorney; (3) another payment in March 2013 for $850.00 to Ms. Bradley; (4) a $225.00 payment in April 2013 for a document examiner; and (5) another April 2013 check in the amount of $250.00 to Ms. Bradley's initial attorney.

"No further payments were made between May 2013 and February 5, 2015, when the chancellor entered a written order in Ms. Bradley's favor in the chancery court action. Ms. Payne thereafter attempted to make additional payments to Ms. Bradley, but Ms. Bradley refused to accept the payments and further refused to deed one-half of the Tulip Grove Property to Ms. Payne under the contract.

"On November 19, 2015, Ms. Payne filed a pro se civil warrant in Davidson County General Sessions Court ('general sessions court'). The civil warrant sought damages for breach of contract

and in quantum meruit. On November 30, 2015, Ms. Payne, now represented by counsel, filed a motion to transfer the matter to circuit court because her claim for an interest in real property exceeded the jurisdictional limit of general sessions court. The general sessions court entered an order on December 17, 2015, transferring the matter to the Davidson County Circuit Court ('the trial court')."

"The trial court entered a written order on July 18, 2020. Therein, the trial court found that it was undisputed that Ms. Payne paid her share of the expenses from December 8, 2012, to April 13, 2013, but that no payments were received after that date until the conclusion of the chancery court action. After reciting the applicable law on this subject, however, the trial court ruled that the contract omitted an essential term and was therefore unenforceable:

> In this case, the Agreement entered into between the parties clearly identifies the parties and subject matter of the agreement. It also specifies the exact size of the property interest to be conveyed by [Ms. Bradley] to [Ms. Payne] upon [Ms. Payne's] performance. However, the Agreement fails to establish any type of payment schedule. The parties disagree as to when payments were to be made pursuant to the Agreement. [Ms. Payne] testified that she had until the conclusion of the Chancery Suit to make payment. [Ms. Bradley] testified that the Agreement required [Ms. Payne] to pay expenses as those expenses arose. As such, this Court is unable to determine whether Plaintiff was expected to contribute payments during the lawsuit, or whether the Agreement permits her to remit payment to [Ms. Bradley] at the conclusion of the Chancery Suit. This discrepancy prevents this Court from determining whether or not [Ms. Payne] breached the agreement. Thus, this Court finds that a payment schedule is an essential element of the parties' agreement. Without this essential element, this Court finds that the Agreement is too indefinite and therefore unenforceable.

"The trial court found, however, that Ms. Bradley was unjustly enriched by Ms. Payne's monetary contributions, and ordered Ms. Bradley to pay Ms. Payne $1,975.00, representing all payments made by Ms. Payne and accepted by Ms. Bradley. Ms. Payne thereafter appealed to this Court."

"The same is unfortunately true in this case. As previously discussed, the trial court ruled that Ms. Payne was not entitled to specific performance on the contract because the contract contained missing terms and it was therefore unenforceable. Ms. Payne correctly notes in her brief that in order to support a claim for specific performance on a contract involving realty, the contract 'must be clear, complete and definite in all its essential terms.' *Parsons v. Hall*, 184 Tenn. 363, 367, 199 S.W.2d 99, 100 (Tenn. 1947). Other than this assertion of law, however, Ms. Payne's appellate brief contains little argument to address the trial court's actual ruling. Rather, the only sentence in Appellant's brief responsive to the trial court's ruling is as follows: 'The contract here is clear, complete and definite in all its essential terms and it show [sic] beyond doubt that the minds of the parties actually met.' Other than the previous citation to *Parsons*, no law is cited for this specific proposition, nor is it supported by any reference to the appellate record. Moreover, the trial court did not rule only that specific performance on the contract was inappropriate, but that the contract was unenforceable due to indefiniteness regarding an essential term, citing *Doe* [*v. HCA Health Servs. of Tennessee, Inc.*], 46 S.W.3d [191]at 196 [(Tenn. 2001)] ('Indefiniteness regarding an essential element of a contract may prevent the creation of an enforceable contract.') (quotation marks and citation omitted). Likewise, Ms. Payne's brief contains no argument, skeletal or otherwise, is as to why the trial court erred in ruling that the contract was unenforceable due to a missing essential term regarding the timing of payments under the agreement.

"Thus, Ms. Payne contains, as best, only a skeletal argument actually addressing the very foundation of the trial court's ruling against her. In other words, Ms. Payne has not properly appealed the dispositive issue in this appeal. Respectfully, citing some caselaw tangentially related to this issue without any effort to actually 'analyze or explain' why the trial court's ruling was in error falls far short of the requirements of Rule 27. *Tennessee Firearms Ass'n* [*v. Metro. Gov't of Nashville & Davidson Cty.*], 2017 WL 2590209 [(Tenn. Ct. App. June 15, 2 017)] at *4. And while Ms. Payne's brief does contain a section concerning performance, her brief contains no argument or legal authority asserting that partial performance on the contract should be considered in determining whether a contract is too indefinite to be performed. *Cf. Gurley v. King*, 183 S.W.3d 30, 41–42 (Tenn. Ct. App. 2005) (citing authorities outside Tennessee) ('Partial performance by one side of the bargain may, by the specifics of that performance, cure an indefinite term of the agreement.'). Instead, the bulk of Ms. Payne's legal analysis focuses on whether a breach of contract occurred—a question that is wholly irrelevant if the trial court correctly determined that no enforceable contract existed. In the absence of any proper argument to show that the trial court erred in its decision, we must affirm the trial court's decision that the contract omitted an essential term and could not be enforced. *See State v. Weaver*, No. M2001-00873-CCA-R3-CD, 2003 WL 1877107, at *16 (Tenn. Crim. App. Apr. 15, 2003) ('[T]he burden of identifying issues for review on appeal and setting forth argument in support of those issues falls upon the appellant[.]')."

V. Specific Performance of Option Contract

A. Denied When Purchase Price Is Not Definitely Stated

LVH, LLC v. Freeman Investment, LLC, No. M2020-00698-COA-R3-CV (Tenn. Ct. App., Bennett, May 14, 2021), appl. perm. app. filed July 13, 2021.

"This case concerns a twelve-acre parcel of property ('the Property') near the Wedgewood-Houston neighborhood in Nashville. Freeman Investment, LLC ('FI') owns the Property, and Lucy Freeman serves as the managing member of FI. LVH, LLC ('LVH') is a company that purchases real estate for development projects. LVH identified the Property as a possible site for a multi-family real estate development. Kent Campbell, vice president and corporate representative for LVH, negotiated with Hiram Lewis, FI's real estate broker, about LVH's possible purchase of the property.

"In February 2018, LVH and FI entered into an option agreement ('the Agreement') granting LVH an exclusive option to purchase the property. In June 2018, the parties amended the Agreement to extend the option period to March 15, 2019. When LVH and FI entered into the Agreement, FI was owned by the three Freeman siblings—Lucy Freeman, Susan Freeman, and Paul Freeman—in equal shares. In August 2018, Paul transferred his shares to Lucy, who now owns two-thirds of the shares in FI."

"As part of its due diligence process, LVH obtained a survey and title searches on the Property. A second title search revealed that there was a 70-foot strip within the Property that was owned by the three Freeman siblings rather than by FI. In a February 19, 2019 email to Mr. Campbell, LVH's attorney advised that, 'Since all 3 siblings are part of the entity [FI], I don't see a big problem, but if you like we could revise the PSA [purchase and sale agreement] so it is between LVH and both the Freeman entity and all 3 siblings.' Lucy Freeman testified that she learned of the siblings' ownership of part of the Property sometime after August 8, 2018.

"On February 26, 2019, LVH notified FI by letter that LVH was exercising its option to purchase the property. In a draft contract of sale, LVH set forth a price of $2,500,000 for the Property. According to Mr. Campbell, LVH had determined that, under all applicable zoning and grading requirements, a maximum of 155 parking spaces could be constructed on the Property. Based upon the ratio of one parking space per bedroom and the mix of one-bedroom and two-bedroom units described in the Agreement, LVH calculated that 119 units could be developed on the Property. LVH applied the minimum contract price, based upon the construction of 125 units at a price of $20,000 per unit. In response to LVH's letter of intent to exercise the option, FI informed LVH that it was willing to sell the property at a price of $9,975,000.

"LVH filed suit against FI in April 2019 for specific performance and unjust enrichment. In its amended answer, FI took the position that the Agreement was not an enforceable contract and that, if the Agreement was enforceable, LVH breached the contract by refusing to pay the agreed purchase price."

"The case proceeded to trial in November 2019 on the reserved issues. The court heard testimony from Mr. Campbell and Lucy Freeman. For the first time, FI asserted that specific performance was impossible because it did not own all of the property at issue. Based upon the uniqueness of the property, the trial court determined that compensatory damages were inadequate and that LVH was entitled to specific performance. The court further concluded that FI failed to prove impossibility of performance and that any discrepancy in the ownership or identification of the property was 'subject to relatively easy corrective measures through execution of a quitclaim deed by the Freeman siblings to [FI].' The trial court ruled that LVH was entitled to delay damages for lost rental income from the tenant on the property (in the amount of $105,241.28)."

"Summary judgment regarding enforceability of option agreement. We must first determine whether the trial court erred in granting summary judgment to LVH and denying summary judgment to FI on the issue of the enforceability of the Agreement. LVH argues that the trial court properly concluded that the minimum price in the Agreement was 'ascertainable' and that the Agreement is enforceable. FI counters that the price remained open to negotiation once the option was exercised and that the Agreement is merely an agreement to agree, which is unenforceable under Tennessee law."

"An option agreement is 'a unilateral contract whereby the optioner for a valuable consideration grants the optionee a right to make a contract of purchase but does not bind the optionee to do so.' *Keck v. Meek*, No. E2017-01465-COA-R3-CV, 2018 WL 3199220, at *10 (Tenn. Ct. App. June 28, 2018) (quoting *Kwasniewski v. Lefevers*, No. M2012-01802-COA-R3-CV, 2013 WL 3964788, at *4 (Tenn. Ct. App. July 30, 2013)). For an option contract (or any contract) to be enforceable, 'the parties must agree on the material terms.' *Abbott v. Abbott*, No. E2015-01233-COA-R3-CV, 2016 WL 3976760, at *4 (Tenn. Ct. App. July 20, 2016). The contract terms must be 'sufficiently definite to enable a court to give it an exact meaning.' *United Am. Bank of Memphis v. Walker*, 1986 WL 11250, at *1 (Tenn. Ct. App. Oct. 10, 1986). Price is generally considered an essential term in a sales contract. *Abbott*, 2016 WL 3976760, at *4.

"Both parties cite *Four Eights, LLC v. Salem*, 194 S.W.3d at 484 [(Tenn. Ct. App. 2005)], a case involving the enforceability of a tenant's option to purchase. The lease in *Four Eights* provided that the tenant would have the option to purchase the property at 'its then fair market value' and that 'Fair Market Value must be determined by the Lessor and Lessee, negotiating in good faith, within thirty (30) days of Lessee [sic] notice to Lessor of the election to purchase the Premises.' *Four*

Eights, 194 S.W.3d at 486. This court affirmed the trial court's determination that 'there was no enforceable option to purchase.' *Id.* at 486, 488. In reaching this conclusion, we stated:

> As the Trial Court found, if the parties had simply utilized the term 'fair market value[,'] then the Court could have ascertained the same based on its common usage. By adding the provision that 'Fair Market Value *must be determined* by the Lessor and Lessee, negotiating in good faith' (emphasis supplied), the parties basically made an 'agreement to agree' to something in the future, and such agreements have generally been held unenforceable, both in this jurisdiction and others."

"In the present case, the key provisions of the Agreement regarding the option price state:

> 2. Option Price. *To be mutually agreed upon* by Buyer and Seller within thirty (30) days following the expiration of the Option Period, at a price of $20,000 per residential unit (upon project completion) that can be reasonably developed on the property, *subject to the following parameters*:
>
> (a) Option Price to be based on a minimum of 125 units.
> (b) Site and building development subject to Metro Bulk Regulations of current IWD zoning, as modified under Adaptive Residential Development standards.
> (c) Building height limited to 30 feet at street setback, and not more than 4 stories where permitted by Slope of Height Control Plan (1.5 to 1).
> (d) All parking requirements to be met by surface parking; structured parking will not be considered. Parking ratio of 1 space per bedroom.
> (e) Unit mix to be approximately 70% 1 Bedroom and 30% 2 Bedroom, with average unit size of 860 square feet.
> (f) All required storm water detention and treatment to be accomplished on site without use of underground storage.
> (g) Site development subject to all governing authorities as pertains to floodplain development.
> (h) Within fourteen (14) calendar days from expiration of the term of this Option or upon Buyer notifying Seller of its intention to exercise its option.
>
> 3. Option Earnest Money. Upon execution of this agreement, Buyer shall deposit with the Chas. Hawkins Co., Inc. twenty thousand and no/100 dollars ($20,000.00) as Earnest Money. Said Earnest *Money shall be either refunded to Buyer in the event buyer terminates this agreement or Buyer and Seller cannot agree to an Option Price* or partnership terms. The refunding of the Earnest Money, in the event that the Buyer terminates this Agreement, or the Buyer and Seller cannot come to an agreement on an Option Price or partnership terms, shall be contingent upon Buyer delivering to Seller any and all due diligence items, reports, etc. gathered during the Option Term. In the event Buyer does not deliver said items to Seller within five (5) business days of terminating this agreement or not coming to terms on an Option Price or partnership terms, Seller shall retain the Earnest Money as compensation.

"(Emphasis added).

"In arguing that the option price is reasonably ascertainable, LVH asserts that the price parameters set forth in paragraph 2 constitute a specific formula for computing the purchase price and do not leave the price open to future negotiation. We respectfully disagree. We must consider the

Agreement provisions 'in the context of the entire contract.' *Huber* [*v. Calloway*], 2007 WL 2089753, at *4 [(Tenn. Ct. App. July 12, 2007)] (citing *D & E Constr. Co. v. Robert J. Denley Co.*, 38 S.W.3d 513, 518 (Tenn. 2001), and *Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 597 (Tenn. Ct. App. 1999)). Although paragraph 2 does establish parameters for the purchase price, it also states that the option price is to be mutually agreed upon by the parties within 30 days of the end of the option period. Even if we could construe paragraph 2 as sufficiently definite on the price term, paragraph 3 provides that the earnest money is to be returned to the buyer in the event the buyer and the seller cannot agree on a price. The plain and unambiguous language of the Agreement contemplates that the option price is to be agreed upon by the parties and that the parties may not agree upon it. Thus, the price is not reasonably ascertainable by a court from the provisions of the agreement. *See Huber*, 2007 WL 2089753, at *5. Rather, the Agreement provides that the price will be determined 'by future negotiations.' *Four Eights*, 194 S.W.3d at 487 (quoting *United Am. Bank of Memphis,* 1986 WL 11250, at *2).

"We, therefore, conclude that the Agreement is no more than an agreement to agree and is unenforceable. The trial court erred in granting summary judgment in favor of LVH and in denying FI's motion for summary judgment on this issue.

"In granting LVH's motion for summary judgment on enforceability, the trial court concluded that this determination pretermitted LVH's alternative unjust enrichment claim. The court proceeded to find, however, that 'there are genuine issues of material facts as to whether a benefit was conferred on [FI] and whether [FI] accepted that benefit.' Furthermore, the court stated, there was 'insufficient proof in the record as to [the] amount of damages relating to the unjust enrichment claim or the value of the benefit allegedly conferred on [FI].' Therefore, the trial court denied LVH's motion for summary judgment on its alternative claim for unjust enrichment. The subsequent trial was limited to the issues concerning specific performance and damages from FI's breach of the Agreement. Because we have determined that the Agreement is not an enforceable contract, the unjust enrichment claim must be addressed on remand."

B. Granted in "Business Deal Gone Badly"

St. George Holdings LLC v. Hutcherson, S.W.3d (Tenn. Ct. App., Swiney, 2020), perm. app. denied May 12, 2021.

"Marta Alder ('Alder'), a former real estate agent from Florida and primary manager for SGH, had a dream of restoring the Hotel, a derelict structure across the street from the historic Chattanooga Choo-Choo train station. A 2004 fire had left the Hotel severely damaged. In 2012, most of the Hotel was demolished because of its unsafe condition. The original facade survived, albeit in very bad condition. In May 2013, SGH bought the Hotel from its then-owner, Craig Driver ('Driver'), for $245,000, and then bought an adjacent parcel for $10,000. These funds came from Alder and her family. Alder thereafter hired engineers, architects, and a hotel management consultant. Alder's efforts were expensive, and money was an issue if the Hotel were ever to be restored.

"SGH needed investors. The former owner, Driver, referred Alder to Hutcherson, a local accountant. Alder presented her plans for the Hotel to Hutcherson. At this early stage, Hutcherson was enthusiastic. However, Hutcherson conveyed that he was not interested in being an investor, as such, but rather in making a bridge loan for the initial startup costs. Negotiations ensued, and a deal was struck. On June 8, 2017, SGH and Hutcherson executed four documents: a loan agreement, a promissory note, a deed of trust, and an option agreement. As a result, Hutcherson

loaned SGH $700,000 to be repaid over 18 months, for which he would receive accrued interest on the loan and a loan fee at the end of the 18-month term. Under the option agreement, Hutcherson had the option to purchase the property if one of four scenarios occurred: (1) SGH defaulted; (2) SGH failed to close on a loan for the development of the project substantially compliant with the design plans Alder had shown Hutcherson by the end of the 18-month term; (3) an offer from a third party to buy the property; or (4) SGH were to propose a transfer of the property."

"SGH's contention that the option agreement lacked the necessary meeting of the minds or consideration is unsupported by the record. The parties' transaction consisted of four documents all executed on the same day toward the same end, pursuant to which Hutcherson was required to lend SGH $700,000 and SGH was required to grant Hutcherson an option agreement and repay him with interest after 18 months. There is no suggestion let alone any genuine dispute that SGH, a sophisticated party that was represented by counsel, was misled or ignorant of the terms of any provision in their various signed documents. Together, these facts reflect mutual assent, consideration, and a meeting of the minds. In other words, this was an agreement entered into voluntarily that obligated both sides. We do not find the option agreement unconscionable, either, as its terms do not shock the judgment of a person of common sense or contain terms so oppressive that no reasonable person would make them on one hand and no honest and fair person would accept them on the other. Rather, the development option at issue reflects the product of negotiations by sophisticated, represented parties. There is nothing inherently shocking or oppressive about tying an option to purchase to the other party obtaining a development loan. With respect to anticipatory breach, the record contains no evidence that Hutcherson ever signaled an unqualified refusal to perform. Hutcherson's May 2018 letter to Alder correctly pointed out that a provision in the deed of trust forbade demolition of the property without his consent. The letter was not an unqualified manifestation of an intent to breach the parties' contract; it was an admonition to adhere to it. SGH's invocation of the doctrine of equitable estoppel is similarly misplaced, as SGH fails to identify a misrepresentation made by Hutcherson upon which it relied. Lastly, SGH's assertion of impossibility or frustration of purpose is undermined by the fact that failure to obtain a development loan was envisioned as a possible outcome by the very terms of the option agreement itself; it was an entirely foreseen contingency that came to pass. We find no genuine issue as to any material fact that would necessitate a trial on these claims. We affirm the Trial Court in its granting summary judgment to Hutcherson with respect to SGH's claims.

"We next address whether the Trial Court erred in determining that SGH waived its right to a jury trial concerning the option agreement because of a jury waiver contained in the deed of trust."

"SGH contends that the option agreement represented a separate, independent transaction from the other documents, and that the jury waiver in the deed of trust had no effect on the option agreement. According to SGH, the deed of trust related only to the separate loan of money secured by interests in property. However, the language in the jury waiver is quite broad and covers 'any matter whatsoever arising out of or in any way connected with this transaction, or under any amendment, instrument, document or agreement delivered (or which may be delivered in the future) in connection herewith, or arising from any lendering relationship between the parties hereto.' While 'transaction' is not defined, Hutcherson and SGH executed four documents between them on the same date, June 8, 2017. Each document in this quartet constitutes part of the same overall transaction: Hutcherson's loan to SGH of $700,000. The option agreement component of this transaction was like the other three documents—a product of negotiations between sophisticated parties represented by counsel. The jury waiver language contained in the deed of trust is extremely broad and includes any documents 'in connection herewith.' That includes the option agreement,

which clearly is connected as a document 'arising from any lendering relationship between' Hutcherson and SGH. That the option agreement contains an arbitration provision does not negate this sweeping, unequivocal language of the jury waiver, which was initialed separately. SGH's waiver of a right to jury was made knowingly, voluntarily, and intelligently. We affirm the Trial Court in its determination that SGH waived its right to a jury trial.

"The third and final issue we address is whether the Trial Court erred in granting Hutcherson, without the benefit of a jury, specific performance for breach of the option agreement rather than awarding him damages."

"SGH contends that the Trial Court's grant of specific performance to Hutcherson was unjust and unduly harsh because of the significant time and funds it put into its effort to restore the Hotel. SGH states that Hutcherson stands to reap a windfall from specific performance, giving him the benefit of SGH and Alder's acquisition of development plans and designs, environmental surveys, rezoning, investments, and other fruits of their efforts. SGH argues further that the Hotel is not 'unique' to Hutcherson, as he has mentioned possibly converting it into an office building. SGH states that in contrast, the Hotel was Alder's dream project. SGH also states that the option agreement itself did not contemplate specific performance.

"The Trial Court, in its discretion, determined that granting specific performance to Hutcherson was an appropriate remedy given that failure to do so would 'deprive him of the benefit of his bargain.' The Trial Court reasoned further that 'St. George was not able to obtain a development loan but now seeks to avoid the very consequences and pitfalls it agreed to on the front end.' The Trial Court correctly applied Tennessee law reflecting that specific performance is favored in cases involving real property. The Trial Court further correctly stated that the contract 'was negotiated between sophisticated parties,' parties that were 'represented by attorneys as well as other advisers in negotiating the deal.' In its findings regarding specific performance, the Trial Court did not apply an incorrect legal standard; did not reach an illogical conclusion; and did not base its decision on a clearly erroneous assessment of the evidence. Notwithstanding SGH's arguments, we do not find that the Trial Court employed reasoning that caused an injustice to SGH either. SGH, represented by counsel, was a sophisticated party to a business transaction and knew the risks it was undertaking. One such risk was that it might fail to obtain a development loan, which would result in Hutcherson having the option to purchase the Hotel. That risk, which was envisioned by and built into the contract itself, became reality. With all due respect to the significant efforts of SGH, and Alder, in particular, specific performance is not unduly harsh; this was simply a business deal gone badly for SGH, and now Hutcherson is entitled to the benefit of his bargain—namely, ownership of the Hotel, SGH having failed to obtain a development loan by December 8, 2018. Money damages would be an inferior substitute for what Hutcherson actually bargained for. We find no abuse of discretion in the Trial Court's decision to grant specific performance to Hutcherson. We affirm the judgment of the Trial Court in its entirety."

VI. Unjust Enrichment and Conversion; Retention by Patient and Parents of Insurance Company Payments Intended for Drug Testing Provider

Young v. H & H Testing, LLC, No. M2020-00145-COA-R3-CV (Tenn. Ct. App., Clement, May 14, 2021).

"This appeal arises from a financial dispute between a drug testing laboratory, H & H Testing, Inc. ('H & H Testing' or 'H & H'), and Wesley Young, for whom H & H performed 64 qualitative drug screens while Mr. Young was a client of Transcend Recovery Community ('Transcend'), which operates recovery communities nationwide. Upon commencing treatment for drug addiction at Transcend, Mr. Young agreed to adhere to treatment guidelines that included abstaining from drugs and alcohol and submitting to a rigorous drug screening protocol. Pursuant to this protocol, Transcend forwarded 64 of Mr. Young's random urine samples to H & H Testing for comprehensive laboratory testing. After H & H performed each drug screen, it submitted a claim to Mr. Young's health insurance provider, BlueCross BlueShield of Tennessee ('BlueCross' or 'BCBST'). BlueCross approved each and every claim submitted by H & H Testing and remitted payment for the services rendered by H & H in the aggregate of $85,837.11. Because H & H Testing was an out-of-network provider, BlueCross remitted payment for the services rendered by H & H to its insured, Mr. Young, expecting he would forward the proceeds to H & H. Instead of remitting the funds to H & H Testing, Mr. Young entrusted the money to his parents, but they did not forward the proceeds to H & H. When H & H Testing demanded payment, Mr. Young and his parents commenced this action to declare the rights of the parties to the funds. They contended that H & H Testing was not entitled to the insurance proceeds because Mr. Young did not have a contract with H & H Testing, its services were not medically necessary, and the charges were exorbitant. H & H Testing filed an answer and counterclaims for breach of contract, conversion, and unjust enrichment. Following a hearing on cross-motions for summary judgment, the trial court granted summary judgment in favor of H & H Testing without identifying the claims upon which the judgment was granted and imposed a constructive trust over the insurance proceeds. This appeal followed. We affirm the trial court's decision to grant summary judgment in favor of H & H Testing based on its claims of conversion and unjust enrichment. But we vacate the trial court's decision to impose a constructive trust over the proceeds because the parties failed to raise the issue in any of the pleadings."

"Petitioners conceded in their cross-motion for summary judgment and on appeal that BlueCross paid the claims submitted by H & H Testing directly to Mr. Young, and Mr. Young gave the money to his parents instead of forwarding the payment to H & H Testing. Mr. Young stated in his affidavit:

> *H & H submitted claims to my insurance carrier*. The claims were for 'Hospital Outpatient Services', [sic] not laboratory testing. A copy of a typical Explanation of Benefit (EOB) from my insurance carrier is attached as Exhibit C. *These EOBs were received with the payments from the insurance carrier*. I believed that the payments from the insurance carrier were to reimburse me for the cost of my treatment. Because my parents paid for my treatment, *I forwarded the payments to my parents, Petitioners Mark and Karen Young*.

"(Emphasis added). Likewise, Petitioners summarized the foregoing affidavit in their brief on appeal stating, 'BCBST paid the full amount of the claims submitted by H & H directly to Wesley Young,' and 'the funds were in turn given by him to his parents to help reimburse them for the cost of his treatment.' Thus, the undisputed facts established that the insurance proceeds were intended for H & H Testing, and Mr. Young exercised dominion and control over the proceeds in defiance of H & H Testing's right to them. *See Hanna* [*v. Sheflin*], 275 S.W.3d [423] at 427 [(Tenn. Ct. App. 2008)].

"The foregoing notwithstanding, Petitioners argue H & H Testing did not have a right to the insurance proceeds because Mr. Young did not have a contract with H & H Testing to perform the

services, the services were not medically necessary, and the charges were excessive. In essence, Petitioners take issue with BlueCross's decision to pay H & H Testing for its services. But it is not this court's task to delve into BlueCross's criteria for approving and paying claims. That is immaterial here. What is material to the conversion claim is the undisputed fact that the payment BlueCross sent to Mr. Young for $85,837.11 was intended for H & H Testing. Thus, the funds belonged to H & H Testing. As previously stated, Petitioners conceded in their brief on appeal and in Mr. Young's affidavit that the insurance proceeds were intended to satisfy H & H Testing's claims. That fact is undisputed.

"Moreover, Mr. Young admitted in his supplemental affidavit that Petitioners did not have a right to retain those funds: 'If the Court finds that H & H does not have a right to the insurance proceeds, then I am aware that my insurance carrier has a claim for a refund.' That said, BlueCross never asked for a refund, nor did it ask Petitioners to take up its cause. Simply put, it is undisputed that the funds belonged to BlueCross, only BlueCross had the right to decide who was entitled to the funds, and BlueCross decided who was entitled to the funds—H & H Testing. Thus, given that Petitioners concede that the money does not belong to them and given that the money was intended for H & H Testing, H & H Testing sufficiently demonstrated 'an immediate superior right of possession.' Speiser, *supra*, at § 24:1.

"Therefore, we have determined the undisputed facts establish that H & H Testing was entitled to judgment as a matter of law based on its claim of conversion."

"In the alternative to its claim based on an express or implied-in-fact contract, H & H seeks to recover the funds at issue based on a contract implied in law, also referred to as quantum meruit or unjust enrichment."

"As the affidavits of Mr. Kalish and Mr. Gottesman clearly reveal, the undisputed facts are that H & H Testing provided qualitative drug screens as a vital feature of Mr. Young's drug treatment and as a mandatory condition for his treatment to continue. More specifically, H & H Testing performed the complex qualitative drug screens needed to accurately determine if Mr. Young was using drugs during his treatment at Transcend, and it is undisputed that H & H Testing, in fact, performed drug screens on Mr. Young's urine samples. Further, whether 'the instant tests' performed by Transcend or the confirmatory screens performed by Avee and Millennium were necessary is both irrelevant and immaterial to H & H's claim for payment for its services. What is relevant, material, and undisputed is that Wesley Young would not have been permitted to remain in treatment at Transcend but for the testing performed by H & H, as mandated by Transcend and agreed to by Wesley Young. Moreover, and significantly, it is undisputed that Mr. Young received the benefit of H & H's drug screens, H & H reasonably expected to be compensated for its services, and there is no evidence whatsoever that Petitioners made any out-of-pocket payments for any qualitative drug screening performed by H & H Testing.

"The material and undisputed facts also establish the final element of a contract implied in law claim—that is, whether it would be unjust for Mr. Young to receive the benefit of the qualitative drug screening services without H & H Testing being paid for its services. Simply stated, it would be unjust for the Youngs to retain these funds. *See Bennett v. Visa U.S.A., Inc.*, 198 S.W.3d 747, 755 (Tenn. Ct. App. 2006) (setting forth the required elements of an unjust-enrichment claim as (1) a benefit conferred upon a party by the other; (2) appreciation by the recipient of such benefit and (3) acceptance of such benefit under such circumstances that it would be inequitable for the receiving party to retain the benefit without payment of the value thereof); *see also Freeman Indus.,*

LLC v. Eastman Chem. Co., 172 S.W.3d 512, 525 (Tenn. 2005) ('[A] plaintiff need not establish that the defendant received a direct benefit from the plaintiff. Rather, a plaintiff may recover for unjust enrichment against a defendant who receives *any* benefit from the plaintiff if the defendant's retention of the benefit would be unjust.').

"Based on these undisputed facts, Petitioners' denial of the existence of an express contract with H & H, and there being insufficient proof to establish that an express contract exists between H & H Testing and Wesley Young or the Petitioners, H & H Testing is entitled to summary judgment based on quantum meruit. *See Paschall's, Inc.* [*v. Dozier*], 407 S.W.2d [150] at 154 [(Tenn. 1966)]."

BUSINESS ORGANIZATIONS

I. Corporations; For Profit Corporations Meeting by Remote Communication

Chapter 85, Public Acts 2021, amending T.C.A. § 48-17-109 eff. Apr. 7, 2021.

"(a) Unless the charter or bylaws provide otherwise, and subject to guidelines and procedures as the corporation may adopt, a corporation may permit any or all shareholders and proxyholders to participate in a regular or special meeting by, and the corporation may conduct the meeting through the use of, any means of remote communication if:

(1) The corporation implements reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a shareholder or proxyholder;
(2) The corporation implements reasonable measures to provide shareholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with the proceedings; and
(3) The corporation maintains a record of any vote or other action taken by a shareholder or proxyholder that is taken by means of remote communication.

"(b) A shareholder or proxyholder who participates in a meeting by the means described in this section, whether the meeting is to be held at a designated place or solely by means of remote communication, is deemed to be present in person at the meeting."

II. Partnerships

A. Value of Dissociated Partner's Interest Should Not Include Discount for Lack of Control

Boesch v. Holeman, 621 S.W.3d 60 (Tenn. Ct. App., Swiney, 2020), perm. app. denied Jan. 14, 2021.

"In 2014, Boesch, Fraser and Holeman formed a partnership to sell flavored-moonshine and whiskey. Toward that end, the men came up with a business plan for what became known as Tennessee Legend. No written agreement was executed. Holeman was the so-called 'money man' of the operation. He was to contribute $300,000. Fraser and Boesch were to contribute 'sweat equity.' Holeman created Crystal Falls Spirits, LLC, d/b/a 'Tennessee Legend' to serve as a conduit through which the partnership acted; Boesch never was a member of the LLC.

"Boesch was the only one of the three men with any experience in this line of business. Boesch provided the formulas necessary to mix the product. He asserts that these formulas were his alone and were never meant to belong to the partnership. Boesch also has a background in air conditioning. Using this experience, he worked on a building owned by Holeman but used by the partnership.

"Unfortunately, tension emerged fairly quickly. Boesch and Fraser did not get along. On December 15, 2015, only a few months after the business opened, Boesch was disassociated from

the partnership. Boesch and Defendants present contrasting accounts of why this happened. In Boesch's account, he essentially was expelled. According to Defendants, Boesch left of his own volition after issuing an ultimatum that Fraser had to go or he would go. In either event, on December 15, 2015, Boesch was out at Tennessee Legend. Defendants carried on with the business using the formulas Boesch had provided. In time, the business grew.

"In May 2016, Boesch sued Defendants in the Trial Court seeking permanent injunctive relief and damages. Boesch alleged that 'Defendants continue to use Boesch's Trade Secrets in the business venture.' Among the claims asserted by Boesch were fraud and violation of the Uniform Trade Secrets Act. Alternatively, Boesch alleged that Defendants breached their fiduciary duties by terminating him and stealing his trade secrets. Additionally, Boesch alleged that Defendants benefited from Boesch's labor and skills but failed to pay him just compensation."

"The fourth and final issue we address is whether the Trial Court erred in its determination of the business's value for purposes of determining Boesch's buyout price. Boesch contends that Harwell's report and testimony, upon which the Trial Court based its determination of value, was flawed in the following ways: (1) Harwell's report relied wrongly on profit and loss statements that recorded loan repayments instead of owner draws; (2) Harwell's report relied wrongly upon profit and loss statements that reported exorbitant salaries and rent payments as expenses rather than owner draws; and (3) Harwell's report did not contend with the applicable law, Tenn. Code Ann. § 61-1-701, in that she applied a lack of control discount. Boesch argues also that he is entitled to an award of interest.

"Boesch's first and second sub-arguments implicate the live testimony and credibility of the witnesses, and we extend deference to the Trial Court's findings in that area. The evidence does not rise to the clear and convincing standard such that would cause us to overturn the Trial Court's implicit credibility determinations. However, Boesch's third point regarding whether the valuations properly contended with the applicable law is on firmer ground.

"From our review of the transcripts, there was some uncertainty at trial as to which law to apply in determining Boesch's one-third interest–that concerning LLCs, or that concerning partnerships. In the end, the valuation proceeded without a definitive answer. Indeed, the ambiguity reflects and is consistent with the ambiguity with which the parties conducted their business. The LLC, created by Holeman, acted as a sort of conduit through which the partnership operated. However, Boesch never was a member of the LLC. On appeal, there is no dispute as to the nature of the arrangement. Both sides describe the three men's business arrangement as a partnership. The Revised Uniform Partnership Act defines a 'partnership' generally as 'an association of two (2) or more persons to carry on as co-owners of a business or other undertaking for profit....' Tenn. Code Ann. § 61-1-101(7) (2018). This definition fits the facts of the business arrangement in this case. Thus, the law on partnerships is implicated.

"Regarding a scenario such as here where a partner is disassociated but the partnership is not dissolved and wound up, Tenn. Code Ann. § 61-1-701 provides, in part:

> (a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under § 61-1-801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).

> (b) The buyout price of a dissociated partner's interest is the amount that would have been distributable to the dissociating partner under § 61-1-807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date. Interest must be paid from the date of dissociation to the date of payment.

"Tenn. Code Ann. § 61-1-701 (a)-(b) (2018).

"The Uniform Law Comment to Tenn. Code Ann. § 61-1-701 explains:

> Under subsection (b), the buyout price is the amount that would have been distributable to the dissociating partner under Section 807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of liquidation value or going concern value without the departing partner. Liquidation value is not intended to mean distress sale value. Under general principles of valuation, the hypothetical selling price in either case should be the price that a willing and informed buyer would pay a willing and informed seller, with neither being under any compulsion to deal. The notion of a minority discount in determining the buyout price is negated by valuing the business as a going concern. Other discounts, such as for a lack of marketability or the loss of a key partner, may be appropriate, however.

"The parties agree liquidation value is of no use here. The relevant portion of the statute therefore is 'the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date.' Tenn. Code Ann. § 61-1-701(b) (2018). With this in mind, we look to the expert report relied upon by the Trial Court in determining Boesch's buyout price. Harwell's report certainly is thorough and detailed. However, Harwell's report applied a discount for lack of control in tandem with a discount for lack of marketability. Although in her testimony Harwell minimized the importance of the distinction between these discounts, the distinction matters with respect to the applicable statute, Tenn. Code Ann. § 61-1-701. While a discount for lack of marketability as to the entire partnership business and not as to the minority partnership interest may be appropriate, a discount for lack of control by the minority partnership interest is inappropriate because the statute calls for determining value based on a sale of the *entire* partnership business as a going concern. We note that under the Trial Court's ruling as affirmed by this Court, the formulas are an asset of the partnership and must be considered as such in the value determination of the entire partnership business. Only then can Boesch's one-third interest properly be determined. Harwell's report, extensive and informative though it is, does not contend with Tenn. Code Ann. § 61-1-701. As the Trial Court's valuation decision was based upon Harwell's report applying a lack of control and lack of marketability discount to Boesch's minority partnership interest, we reverse the Trial Court's valuation of Boesch's interest in the partnership's business for purposes of Boesch's buyout price and remand for a new valuation determination consistent with Tenn. Code Ann. § 61-1-701. The proper date of valuation is December 15, 2015, the date of Boesch's disassociation. Pursuant to Tenn. Code Ann. § 61-1-701(b), Boesch is entitled to an award of interest from December 15, 2015 through the date of payment.

"In sum, we reverse the Trial Court's valuation of Boesch's partnership interest. We remand for a new valuation that comports with Tenn. Code Ann. § 61-1-701. On all other issues, we affirm the judgment of the Trial Court."

B. Value of Deceased Partner's Interest Governed by Revised Uniform Partnership Act

Butler v. KBK Outdoor Advertising, No. M2019-00321-COA-R3-CV (Tenn. Ct. App., McBrayer, Dec. 22, 2020), perm. app. denied Apr. 7, 2021.

"James F. Butler, George R. Kettle, and Sue Kettle formed KBK Outdoor Advertising, a general partnership, to construct and rent billboards. Their partnership agreement provided for a term of 50 years. But it also addressed the prospect that a partner might die and cause a dissolution of the partnership. Under Article 5.3 of the agreement, '[i]f dissolution occur[ed] because of ... death ... of a Partner, the remaining Partners ... ha[d] the right to continue the Partnership business under the same name, by themselves or with any other person or persons they may select.' The article went on that, '[i]f the remaining Partners desire to continue the business, but not together, the Partnership shall be liquidated in accordance with 5.1.'

"Article 5.1 addressed winding up business following dissolution. It required assets of the partnership to 'be sold and turned into cash as soon as possible and all debts [to be] collected.' After satisfying all partnership debts and liquidation expenses, any surplus would be divided 'among the Partners or their representatives according to each Partner's then Percentage Share of Income.' A separate provision, Article 5.2, entitled 'Accounting on Dissolution,' specified that '[a]ssets and liabilities shall be taken at book value, but no value shall be assigned to good will or firm name.'

"Mr. Butler, who held a fifty percent interest in the partnership, died in early 2016. The two surviving partners, the Kettles, chose to continue the partnership business. With the aid of an accountant, they determined that the partnership's assets had a book value of $696,686.00. So the Kettles offered to pay Helen Butler, Mr. Butler's widow and the executrix of his estate, one-half of the book value—or $348,344—for Mr. Butler's interest.

"Ms. Butler sued the partnership and the Kettles. She argued that the dissolution provisions of the partnership agreement were inapplicable because her husband's death did not trigger a dissolution of the partnership. She asked the court to value her husband's interest under the default provisions of the Revised Uniform Partnership Act. Under RUPA, a partner is dissociated from a partnership upon his death. *Id.* § 61-1-601(7)(A) (2018). Where the dissociation does not result 'in a dissolution and winding up of the partnership business,' the buyout price for the dissociated partner's interest is determined as 'if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern.' *Id.* §§ 61-1-701(a), (b) (2018).

"The Kettles moved for summary judgment. They asserted that, under the terms of the partnership agreement, the partnership did dissolve with the death of Mr. Butler. But despite the dissolution, they had the right 'to continue t[he] [p]artnership business under the same name by themselves.' So they argued that the Article 5 dissolution provisions of the partnership agreement governed the value of Mr. Butler's interest.

"The court agreed with the Kettles. Although acknowledging that the dissolution provision of the partnership agreement contemplated the sale of all partnership assets, the court determined that liquidation was only required for 'a total dissolution.' Otherwise, 'the right to continue under [Article] 5.3 would be counter to selling all the assets of the Partnership since once that is done you no longer have the means to conduct a partnership.' So '[t]he only logical conclusion is that

[Article] 5.2 applies and book value is what the parties intended if a Partner passes away.' Based on that conclusion, the court granted the Kettles summary judgment."

"Mr. Butler and the Kettles signed their partnership agreement prior to Tennessee's adoption of RUPA. Under the former Uniform Partnership Act, a partner's departure from the partnership caused a dissolution. Unif. P'ship Act § 801 cmt. 1. 'Dissolution' meant 'the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on ... of the business.' Tenn. Code Ann. § 61-1-128 (repealed 2001). A deceased partner ceased to be associated with the business, so 'the death of any partner' caused dissolution of the partnership. *Id.* § 61-1-130(4) (repealed 2001). Understood in that context, Article 5.3 of KBK Outdoor Advertising's partnership agreement, entitled 'Right to Continue,' applied when any partner died. It gave the surviving partners the option 'to continue the Partnership business' upon dissolution as defined under the former Uniform Partnership Act.

"In 2001, Tennessee adopted RUPA. Revised Uniform Partnership Act, ch. 353, 2001 Tenn. Pub. Acts 775. RUPA introduced the concept of '"dissociation" ... to denote the change in the relationship caused by a partner's ceasing to be associated in the carrying on of the business.' Unif. P'ship Act § 601 cmt. 1. The term 'dissolution' was retained, but given a new meaning. *Id.* Dissolution referred to the 'commencement of the winding up process.' *Id.* § 801 cmt. 2. The partnership would 'complet[e] work in process' and then 'sell[ ] its assets, pay[ ] its debts, and distribut[e] the net balance, if any, to the partners in cash according to their interests.' *Id.* After that, 'the partnership entity terminates.' *Id.*

"RUPA became applicable to all partnerships, even those like KBK Outdoor Advertising formed under the former Uniform Partnership Act, on January 1, 2002. Tenn. Code Ann. § 61-1-1206(b) (2018). Retroactive application of RUPA 'change[d] the calculus of the deal for the partners' of partnerships formed under the former Uniform Partnership Act. Allan Donn et al., *supra*, at Section 1206 author's cmt. 2. So RUPA provided a transition period 'afford[ing] existing partnerships and partners an opportunity to consider the changes effected by RUPA and to amend their partnership agreements, if appropriate.' Unif. P'ship Act § 1206 cmt.

"KBK Outdoor Advertising failed to consider the changes effected by RUPA on its partnership agreement. Article 5.3, which granted the surviving partners the right to continue the partnership business upon death of a partner, no longer had any effect after January 1, 2002. Under RUPA, the death of a partner does not necessarily result in a dissolution. In a partnership for a definite term, the death of a partner only results in a dissolution if '[w]ithin ninety (90) days after a partner's dissociation by death ... at least half of the remaining partners express[ed] the will to wind up the partnership business.' Tenn. Code Ann. § 61-1-801(2)(A) (2018). Article 5.3 was drafted with the opposite eventuality in mind, that the remaining partners wanted to continue the partnership business. Such a provision is unnecessary under RUPA because the partnership, not just the partnership business, continues after the death of a partner.

"Because the Kettles did not express the will to wind up KBK Outdoor Advertising within 90 days of Mr. Butler's death, Article 5.2 of the partnership, which addressed accounting on dissolution, did not apply. The partnership was not dissolved. *See id.*"

"Having determined that neither Article 5.2 nor 5.3 applied, we conclude that the partnership agreement for KBK Outdoor Advertising is silent on the buyout price for the interest of a dissociated partner. So RUPA governs. *Id.* § 61-1-103(a). And the buyout price is determined based

on the amount that would have been distributed to Mr. Butler if a winding up of the partnership business had occurred on the date of his death and 'the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without [Mr. Butler].' *See id.* § 61-1-701(b)."

III. Limited Liability Companies; Valuation of Member's Interest; Evidence of Tax-Affecting is Relevant

Raley v. Brinkman, 621 S.W.3d 208 (Tenn. Ct. App., McBrayer, 2020), perm. app. denied Jan. 13, 2021.

"This appeal arises from a business dispute between the two members of a Tennessee limited liability company, 4 Points Hospitality, LLC ('4 Points'), each owning a 50% interest. The plaintiff-member, Terrell K. Raley ('Raley'), commenced this action asserting, individually and on behalf of the LLC, *inter alia*, that the defendant-member, Cees Brinkman ('Brinkman'), breached the operating agreement by failing to make a $175,000 capital contribution. Brinkman asserted counterclaims, individually and on behalf of the LLC, for breach of contract and breach of fiduciary duty, alleging that Raley misappropriated funds for his personal benefit and that he withheld a large portion of Brinkman's distributions and salary. Brinkman also claimed that Raley was liable for conversion and punitive damages. Brinkman sought to terminate Raley's membership interest because he willfully and persistently breached his fiduciary duty, and because it was no longer reasonably practicable for the two men to continue operating the business. Brinkman also claimed he was entitled to recover his attorneys' fees in accordance with Tenn. Code Ann. §§ 48-249-804 and -805, and the operating agreement. Upon Raley's pretrial motion, the trial court summarily dismissed Brinkman's claim for attorneys' fees under the operating agreement, holding that the attorneys' fees provision only pertained to disputes submitted to arbitration. Following a lengthy bench trial, the court ruled that (1) Brinkman breached the operating agreement by failing to make a $175,000 capital contribution, (2) Raley was liable for breach of fiduciary duty, breach of contract, and conversion for underpaying Brinkman's distributions and salary and for using 4 Points' funds to satisfy unrelated, personal expenses, (3) Raley was not liable for punitive damages because his conduct was not egregious, and (4) Brinkman was not entitled to attorneys' fees under §§ 48-249-804 and -805. The court also terminated Raley's membership interest in 4 Points in accordance with Tenn. Code Ann. § 48-249-503(a)(6)(B) and (C), finding that Raley's wrongful conduct adversely and materially affected the business, and it was no longer reasonably practicable for the members to continue operating the business together. Brinkman filed a motion to alter or amend the court's order, and the court denied his motion in all respects but one, ruling, in accordance with Tenn. Code Ann. § 48-249-805, that Brinkman was entitled to equitable relief in the form of attorneys' fees. Therefore, the court revised its order to allow half of the $240,275.59 Raley owed 4 Points as reimbursement for personal expenses to be paid to Brinkman, individually. Brinkman then filed notice that 4 Points intended to purchase Raley's membership interest in accordance with Tenn. Code Ann. §§ 48-249-505 and -506, which necessitated an evidentiary hearing to determine the 'fair value' of Raley's interest. In preparation for the hearing, Brinkman's expert prepared a valuation report applying shareholder-level discounts for lack of control and lack of marketability and adjusting 4 Points' income for the corporate income tax. Raley responded by filing a motion in limine to determine the meaning and components of 'fair value' under Tenn. Code Ann. § 48-249-506(3), arguing that any testimony or other evidence relating to discounts for lack of control and marketability and the corporate income tax should be excluded at the evidentiary hearing. In response, Brinkman submitted the affidavit of his valuation expert,

explaining the expert's valuation methodology and the reasons for applying a corporate income tax rate. The court ruled that because the company, rather than a third party, was purchasing the membership interest, the fact that the interest was non-controlling was irrelevant to its fair value. The court also excluded evidence and testimony on discounts for lack of marketability. As for the applicability of the corporate income tax, the court ruled that 'no entity level tax should be applied in the valuation analysis for a non-controlling interest in an electing S corporation, absent a compelling demonstration that independent third parties dealing at arms-length would do so as part of a purchase price negotiation.' Following the evidentiary hearing, the court determined that the fair value of 4 Points was $4,774,278.18, and that Raley's 50% interest was $2,387,139.09. Brinkman timely filed this appeal contending the trial court erred in determining that (1) Brinkman breached the operating agreement by failing to make a capital contribution, (2) Raley was not liable for punitive damages, and (3) Brinkman was not entitled to attorneys' fees pursuant to the operating agreement and/or §§ 48-249-804 and -805. As for the trial court's valuation of Raley's membership interest, Brinkman contends the trial court erred in (1) disallowing discounts for lack of control and lack of marketability and (2) determining that tax-affecting did not constitute relevant evidence of the fair value of Raley's membership interest in 4 Points. We affirm the trial court's judgment in every respect but one. We have determined that the trial court erred by failing to consider evidence relative to tax-affecting when determining the fair value of Raley's membership interest because Tenn. Code Ann. § 48-249-506 provides that relevant evidence of fair value includes the 'recommendations of any of the appraisers of the parties to the proceeding.' Brinkman's valuation expert stated in his affidavit that the application of a 38% tax rate 'comports with generally accepted valuation standards and methods' and reasoned that there is a risk of inaccurate valuation when the components of the capitalization rate are based on after-tax values, and no tax-affecting is applied to the income of the company. Therefore, we vacate the judgment valuing Raley's interest and remand for the trial court to consider evidence relative to tax-affecting in determining the fair value of Raley's membership interest and to enter judgment accordingly."

IV. Corporate Transparency Act

Public Law 116-283, Section 2(F) eff. Jan. 1, 2022.

The 2021 National Defense Authorization Act contains the Anti-Money Laundering Act of 2020. Contained therein is the Corporate Transparency Act, which requires new and existing companies and applicants to report information about their ownership. Regulations are being drafted that should give clarity to who must report, and this are to be completed before the act's effective date of January 1, 2022. Lawyers who form business corporations for clients should monitor the process of the law and its regulations in order to advise their clients on what, if any, reporting requirements apply. Additionally, there is concern that the Act's requirement that an "applicant" for a business entity might include the business lawyer who prepares and files formation papers with the state.

GOVERNMENT

I. Elections; Absentee Ballots

A. Watermark

Chapter 374, Public Acts 2021, amending T.C.A. §§ 2-5-207(b) and (e), 2-6-202(g) and -304(c) eff. Jan. 1, 2022.

2-5-207(b).

"(2) Except for ballots authorized by state or federal law to be delivered electronically to qualified voters who are entitled to vote by absentee ballot, all absentee ballots must include a watermark approved by the coordinator of elections. The watermark must be easily discernible for verification purposes by the absentee counting board."

2-5-207.

"(e) The county election commission of each county shall prepare a sample ballot of all candidates and submit this sample ballot to the coordinator of elections for approval. The absentee sample ballot must contain a watermark approved by the coordinator of elections. The sample ballots provided to the public pursuant to § 2–5–211 shall not contain the approved watermark. A ballot shall not be printed or funds expended therefor by any county until such approval has been granted."

2-6-304.

"(c) The counting board official shall then open the sealed absentee ballot envelopes, remove the absentee ballots, verify that the absentee ballots contain the approved watermark required under § 2–5–207(b), and count and record the absentee ballot votes and the early voting ballot votes. Any absentee ballot without the approved watermark must be rejected, unless the ballot was authorized by state or federal law to be delivered electronically. The absentee ballot must be marked 'Rejected' across its face with the reason for rejection written on it, signed by each official who rejected it, and placed in a container of rejected absentee ballots. In no event may the votes for any candidate be totaled until after all polls in the county are closed."

B. Independent Living Facility

Chapter 233, Public Acts 2021, amending T.C.A. § 2-6-601 eff. Apr. 22, 2021.

"(c) As used in this part, 'nursing home' means a licensed nursing home, assisted care living facility, or home for the aged, other than a penal institution, and includes any independent living facility on the same property as a licensed nursing home, assisted care living facility, or home for the aged."

C. Political Signs

Chapter 93, Public Acts 2021, amending T.C.A. § 2-7-143 eff. July 1, 2021.

The Tennessee Freedom of Speech Act permitting property owners to place political or campaign posters or signs on their own property for a certain period of time now applies to elections, not just general elections.

II. Public Records

A. Confidential Records Exceptions; Photo of Deceased Minor Motor Vehicle Victim

Chapter 304, Public Acts 2021, adding T.C.A. § 10-7-504(aa) eff. July 1, 2021.

"(aa)(1) Photographic evidence of a fatal motor vehicle accident that depicts a deceased minor victim at the scene of the accident shall be treated as confidential and shall not be open for inspection by members of the public.

"(2) The custodial parent or legal guardian of the deceased minor victim whose photograph is made confidential pursuant to subdivision (aa)(1) may waive confidentiality and allow the minor victim's photograph to be used and obtained in the same manner as other public records.

"(3) This subsection (aa) does not:

(A) Restrict the application of Rule 16 of the Tennessee Rules of Criminal Procedure in any court or the disclosure of information required of counsel by the state or federal constitution;

(B) Limit or deny access to otherwise public information because a file, document, or data file contains a photograph made confidential by subdivision (aa)(1); provided, that the photograph must be removed before any access is granted to a member of the public; or

(C) Limit access to records by law enforcement agencies, courts, or other governmental agencies engaged in investigating or prosecuting a criminal offense.

"(4) As used in this subsection (aa), 'photographic evidence' and 'photograph' mean any photograph or photographic reproduction, still or moving, or any videotape."

B. Record of Minor Student Activity on School Property

Chapter 391, Public Acts 2021, adding T.C.A. § 10-7-504(a)(4)(H) eff May 11, 2021.

"(H)(i) A record of a minor student attending an institution of secondary or elementary education that is created by a school resource or other law enforcement officer, or that is maintained by a law enforcement agency as the result of an incident involving the minor that occurred on school property and did not result in a charge of delinquency is confidential and not open to public inspection unless:

(a) The person requesting the information obtains consent from the minor's parent or guardian;

(b) The request is made subject to a court order; or

(c) A law enforcement officer of another jurisdiction requests the record when necessary for the discharge of the law enforcement officer's official duties.

(ii) Subdivision (a)(4)(H)(i) is terminated July 1, 2026."

C. Automatic License Plate Readers

Chapter 201, Public Acts 2021, adding T.C.A. § 10-7-504(a)(32) eff. Apr. 22, 2021.

"(32)

(A) Captured plate data from automatic license plate reader systems must be treated as confidential and shall not be open for inspection by members of the public. As used in this subdivision (a)(32):

(i) 'Automatic license plate reader system' means one (1) or more mobile or fixed automated high-speed cameras used in combination with computer algorithms to convert images of license plates into computer-readable data; and

(ii) 'Captured plate data' means global positioning system coordinates, date and time information, photographs, license plate numbers, and any other data captured by or derived from any automatic license plate reader system.

(B) This subdivision (a)(32) is repealed effective July 1, 2026."

D. Property Alert Service or Program

Chapter 333, Public Acts 2021, adding T.C.A. § 10-7-504(bb) eff. May 4, 2021.

"(bb) The name, mailing address, physical address, phone number, email address, social security number, or any other personally identifying information provided by an individual, whether or not the individual is a citizen of this state, as part of the individual's use of, or participation in, a government-sponsored or -supported property alert service or program, is not a public record and is not open for public inspection. As used in this subsection (bb), 'property alert service or program' refers to an online service that electronically alerts participants when a document is filed and indexed in the register of deed's office that references the participant's name or address."

E. Petition for Injunction to Stop Intent to Disrupt Government Operations

Chapter 242, Public Acts 2021, adding T.C.A. § 10-7-503(a)(7)(C) eff. Apr. 28, 2021.

This act creates a mechanism through which a records custodian may petition a court to enjoin a person who makes a request to view or copy a public record with intent to disrupt government operations.

III. Courts

A. Jury Service

Chapter 544, Public Acts 2021, adding T.C.A. § 22-1-103(e) eff. July 1, 2021.

"A person who is seventy-five (75) years of age or older is excused from jury service upon a showing that the person is seventy-five (75) years of age or older and that the person is incapable of performing jury service because of a mental or physical condition. The jury coordinator of the county shall excuse the person from jury service upon receiving a written declaration stating the person's name and date of birth, and declaring the mental or physical condition that causes the person to be incapable of performing jury service. The declaration may be completed by the person

or the person's personal representative. The jury coordinator of each county shall make available declaration forms for the purpose of this subsection (e). This subsection (e) does not prevent a person seventy-five (75) years of age or older from participating in jury service."

B. General Sessions or Juvenile Judge Serving by Interchange; Travel Reimbursement

Chapter 266, Public Acts 2021, adding T.C.A. § 16-15-209(i) eff. July 1, 2021.

"(i) A general sessions or juvenile judge selected to serve by interchange pursuant to subdivision (a)(1) in a court outside the judge's county of residence shall receive reimbursement for travel expenses from the county to which the judge travels to serve. Reimbursement shall be assessed in accordance with the standard mileage rate, maximum parking fee, maximum lodging credit, maximum meals, and incidentals credit set forth in the last published comprehensive travel regulations promulgated by the department of finance and administration and approved by the attorney general and reporter. Travel expenses relative to mileage, parking, meals, and incidentals shall not exceed one hundred dollars ($100) per day. A general sessions or juvenile judge entitled to reimbursement pursuant to this subsection must submit all travel expense claims to the appropriate county official responsible for processing travel reimbursement."

IV. Legislature; Convening Extraordinary Session; Electronic Signatures

Chapter 514, Public Acts 2021, adding T.C.A. § 3-1-117 eff. May 25, 2021.

"Whenever a written request to convene for an extraordinary session is initiated by members of the senate and the house of representatives in accordance with the Constitution of Tennessee, Article II, § 8, signatures by the members may be provided electronically. The use of an electronic signature has the same validity and effect as the use of a signature affixed by hand."

V. Administrative Procedures Act

A. UAPA; Award of Reasonable Expenses, Including Attorney Fees

Chapter 403, Public Acts 2021, amending T.C.A. § 4-5-325 and adding T.C.A. § 63-1-144(c) eff. May 12, 2021.

4-5-325.

"(a) (1) When a state agency issues a notice to a person, local governmental entity, board, or commission for the violation of a rule or statute and the notice results in a contested case hearing, at the conclusion of the contested case hearing, the hearing officer or administrative law judge may order the state agency to pay to the respondent the reasonable expenses incurred because of the notice, including a reasonable attorney's fee, if the hearing officer or administrative law judge determines that:

(A) (i) The claims contained in the notice are not warranted by existing law nor by a nonfrivolous argument for the extension or modification of existing law; and

(ii) The claims contained in the notice do not have evidentiary support; or

(B) The state agency issued the notice to harass, cause unnecessary delay, or cause needless expense to the party issued the notice.

(2) Subdivision (a)(1) is not satisfied simply by a state agency failing to prevail against the respondent.

(3) If the hearing officer or administrative law judge orders the state agency to pay the respondent the reasonable expenses incurred, then the hearing officer or administrative law judge shall set forth in a written order the findings of facts and conclusions of law upon which the determinations are based.

"(b) If a final decision in a contested case hearing results in a respondent seeking judicial review under § 4–5–322, then the judge conducting the review may, at the conclusion of the hearing, make the same findings and enter the same order as authorized by the hearing officer or administrative law judge pursuant to subsection (a)."

63-1-144.

"(c) (1) In addition to the authority contained in this section, when a party seeks judicial review of a state agency decision under § 4–5–322 or the chancery court decision under § 4–5–323, then the court, or the board, committee, or council if the matter is remanded to the agency, upon finding that a sanction of the license or certificate holder is appropriate, may require the license or certificate holder to pay the actual and reasonable costs incurred by the division or agency for the judicial review, including costs for the time, travel, and lodging of the office of the attorney general, court reporter and transcript costs, and court costs. The order must reflect the maximum amount owed by the license or certificate holder for the judicial review.

(2) A chancery court shall not award costs pursuant to this subsection (c) unless the court determines that:

(A) (i) The claims asserted in the petition for judicial review are not warranted by existing law nor by a nonfrivolous argument for the extension or modification of existing law; and

(ii) The claims asserted in the petition for judicial review do not have evidentiary support; or

(B) The license or certificate holder petitioned for judicial review to harass, cause unnecessary delay, or cause needless expense to the state or state agency."

B. Telecommunications; Affirmance of FCC Predictive Judgment Not Arbitrary or Capricious

Federal Communications Commission v. Prometheus Radio Project, 141 S.Ct. 1150 (U.S., Kavanaugh, 2021).

"Under its broad authority to regulate broadcast media in the public interest, the Federal Communications Commission (FCC) has long maintained several ownership rules that limit the number of radio stations, television stations, and newspapers that a single entity may own in a given market. Section 202(h) of the Telecommunications Act of 1996 directs the FCC to review its media ownership rules every four years and to repeal or modify any rules that no longer serve the public interest.

"In 2017, the FCC concluded that three of its ownership rules were no longer necessary to promote competition, localism, or viewpoint diversity. The Commission further concluded that the record evidence did not suggest that repealing or modifying those three rules was likely to harm minority

and female ownership. Based on that analysis, the agency decided to repeal two of those three ownership rules and modify the third. Prometheus Radio Project and several other public interest and consumer advocacy groups (collectively, Prometheus) petitioned for review, arguing that the FCC's decision to repeal or modify the three rules was arbitrary and capricious under the Administrative Procedure Act (APA). The Third Circuit vacated the FCC's reconsideration order, holding that the record did not support the agency's conclusion that the rule changes would have minimal effect on minority and female ownership.

"Held: The FCC's decision to repeal or modify the three ownership rules was not arbitrary and capricious for purposes of the APA. In analyzing whether to repeal or modify its existing ownership rules, the FCC considered the record evidence and reasonably concluded that the three ownership rules at issue were no longer necessary to serve the agency's public interest goals of competition, localism, and viewpoint diversity, and that the rule changes were not likely to harm minority and female ownership.

"In challenging the FCC's order, Prometheus argues that the Commission's assessment of the likely impact of the rule changes on minority and female ownership rested on flawed data. But the FCC acknowledged the gaps in the data sets it relied on, and noted that, despite its repeated requests for additional data, it had received no countervailing evidence suggesting that changing the three ownership rules was likely to harm minority and female ownership. Prometheus also asserts that the FCC ignored two studies submitted by a commenter that purported to show that past relaxations of the ownership rules had led to decreases in minority and female ownership levels. But the record demonstrates that the FCC considered those studies and simply interpreted them differently.

"In assessing the effects of the rule changes on minority and female ownership, the FCC did not have perfect empirical or statistical data. But that is not unusual in day-to-day agency decision making within the Executive Branch. The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies. And nothing in the Telecommunications Act requires the FCC to conduct such studies before exercising its discretion under Section 202(h). In light of the sparse record on minority and female ownership and the FCC's findings with respect to competition, localism, and viewpoint diversity, the Court cannot say that the agency's decision to repeal or modify the ownership rules fell outside the zone of reasonableness for purposes of the APA."

VI. Tennessee Nonprofit Gaming Law; Bingo

Chapter 473, Public Acts 2021, amending T.C.A. § 3-17-102(9)(A) eff. July 1, 2021.

Bingo has been added to the types of permissible games of chance permitted under Nonprofit Gaming Law.

VII. Special Days of Observance

A. Juneteenth

Chapter 89, Public Acts 2021, adding T.C.A. § 15-22-137 eff. Apr. 7, 2021.

"June 19 of each year is to be observed as 'Juneteenth' to honor and recognize the celebration of the action of Major General Gordon Granger in Galveston, Texas, who on June 19, 1865, two and one-half years after the Emancipation Proclamation took effect, announced to the people of Texas, the last territory to receive news of the proclamation due to its geographic and strategic isolation, that 'all slaves are free.' This day is not a legal holiday as defined in § 15–1–101."

B. African American Music Appreciation Month

Chapter 95, Public Acts 2021, adding T.C.A. § 15-2-138 eff. Apr. 7, 2021.

"The month of June is observed annually as 'African-American Music Appreciation Month' in this state."

C. Women's Veterans Day

Chapter 35, Public Acts 2021, adding T.C.A. § 15-2-135 eff. Mar. 23, 2021.

"June 12 of each year is to be observed as 'Women's Veterans Day,' to honor the efforts of our distinguished female veterans and pay tribute to their character and courage in answering the call of action with pride and conviction."

VIII. Designation; First Peoples

Chapter 58, Public Acts 2021, adding T.C.A. § 4-1-421 eff. Mar. 29, 2021.

"The following cultural groups are recognized as Tennessee's first peoples:

(1) The Algonquian peoples, including the Shawnee and Lenape;
(2) The Chickamaugan peoples;
(3) The Iroquoian peoples, including the Cherokee;
(4) The Muskogean peoples, including the Alabama, Coosa, Chickasaw, Natchez, Koasati, Tuskegee, and Taliwa;
(5) The Siouan peoples, including the Quapaw and Mosopelea; and
(6) The Yuchean peoples, including the Chisca, Yuchi, Taougalé, Tongeria, and Tamahita."

IX. Monuments; Davy Crockett

Chapter 175, Public Acts 2021, adding T.C.A. § 4-8-403(c) eff. Apr. 20, 2021.

"Once the design of the monument or statue honoring David Crockett is approved by the state capitol commission and the monument or statue is completed, the monument or statue must be placed on a pedestal above the entrance to the Motlow Tunnel on Dr. Martin Luther King, Jr. Boulevard. If relocation of an existing structure is required, private funds must be used for the relocation, and state funds must not be expended for the relocation of an existing structure."

X. State Poem

Chapter 118, Public Acts 2021, adding T.C.A. § 4-1-303(c) eff. Apr. 13, 2021.

"(c) The poem entitled, 'My Beloved Tennessee' by Marlene Tidwell, is designated and adopted as an official state poem for this state. The poem reads as follows:

My thoughts wander on your path again
Captivated by the beauty of rolling hills
That rise above a road that bends,
As dusk spreads mist across the fields.
I heard the piping of the morning lay
And gazed on scenes from yesteryears,
When open come the gates of May,
And in purple ruffles the Iris appears.
Cherished memories thou doth hold,
Sweet home in Tennessee, to you I hope
To come before the winds grow cold.

Nestled in vales, quaint barns of old
Stood in wait for the gathering harvest
Scattered across autumn fields of gold,
And chapels adorned with steeples fair
Rang bells against the morning cold
Calling the pleasant and faithful there
To come and nourish thirsting souls.
Your faith has kept your pillars strong,
My heritage from days of old,
How blessed am I to call you home.

Your vaulted domes, in blue mist crowned,
Listen to babbling brooks shower chambers
Beneath, rich treasures there are found.
From afar they come to see your sights,
And hear your song, from Memphis to
Bristol, your cities shine bright.
For in distant lands your light has shown,
Oh Valiant Volunteer, you gave hope
To those you had never known.
Come to me in my dreams tonight
Oh beloved home in Tennessee,
When I wake with morning's light,
May I again be near to thee."

XI. State Songs; "Amazing Grace"

Chapter 296, Public Acts 2021, adding T.C.A. § 4-1-302(8) eff. Apr. 30, 2021.

The official songs of this state now include: "Amazing Grace," by John Newton, as adopted by this act.

XII. Public Restrooms; Signage

Chapter 453, Public Acts 2021, adding T.C.A. § 68-120-120 eff. July 1, 2021.

"(a) A public or private entity or business that operates a building or facility open to the general public and that, as a matter of formal or informal policy, allows a member of either biological sex to use any public restroom within the building or facility shall post notice of the policy at the entrance of each public restroom in the building or facility.

"(b) Signage of the notice must be posted in a manner that is easily visible to a person entering the public restroom and must meet the following requirements:

(1) Be at least eight inches (8) wide and six inches (6) tall;
(2) The top one-third (1/3) of the sign must have a background color of red and state 'NOTICE' in yellow text, centered in that portion of the sign;
(3) The bottom two-thirds (2/3) of the sign must contain in boldface, block letters the following statement centered on that portion of the sign:
THIS FACILITY MAINTAINS A POLICY OF ALLOWING THE USE OF RESTROOMS BY EITHER BIOLOGICAL SEX, REGARDLESS OF THE DESIGNATION ON THE RESTROOM
(4) Except as provided in subdivision (b)(2), have a background color of white with type in black; and
(5) Be located on a door to which the sign must be affixed or have its leading edge located not more than one foot (1) from the outside edge of the frame of a door to which the sign must be affixed.

"(c) If an entity or business is notified that it is not in compliance with this section, the entity or business has thirty (30) days in which to comply before any action is taken against the entity or business.

"(d) As used in this section:

(1) 'Policy' means the internal policy of a public or private entity or such policy as the result of a rule, ordinance, or resolution adopted by an agency or political subdivision of this state; and
(2) 'Public restroom':
(A) Includes a locker room, shower facility, dressing area, or other facility or area that is:
(i) Open to the general public;
(ii) Designated for a specific biological sex; and
(iii) A facility or area where a person would have a reasonable expectation of privacy; and
(B) Excludes a unisex, single-occupant restroom or family restroom intended for use by either biological sex."

CIVIL PROCEDURE

I. Jurisdiction

A. Personal

1. Sufficient Minimum Contacts in Contracts Case

Crouch Railway Consulting, LLC v. LS Energy Fabrication, LLC, 610 S.W.3d 460 (Tenn., Bivins, 2020).

"The issue in this appeal is whether a Tennessee court may exercise specific personal jurisdiction over a Texas corporate defendant involved in a contractual dispute with a Tennessee company it chose to perform specialized professional services. A Texas oil-drilling company elected to contract with a Tennessee civil engineering company for custom design and consulting services related to the potential construction of a railcar repair facility in Texas. The Tennessee company performed the services primarily out of its principal place of business in Tennessee. When the Texas company failed to pay in full, the Tennessee company filed a civil action in Tennessee for breach of contract and unjust enrichment. The Texas company moved to dismiss the complaint for lack of personal jurisdiction. See Tenn. R. Civ. P. 12.02(2). The Williamson County Chancery Court granted the motion, finding (1) that the Texas company lacked the 'minimum contacts' necessary for the exercise of specific personal jurisdiction, and (2) that requiring the Texas company to litigate in Tennessee would be unreasonable and unfair. The Court of Appeals reversed, relying primarily on *Nicholstone Book Bindery, Inc. v. Chelsea House Publishers*, 621 S.W.2d 560 (Tenn. 1981), cert. denied, 455 U.S. 994, 102 S.Ct. 1623, 71 L.Ed.2d 856 (1982). Although we find *Nicholstone* to be consistent with our opinion today, we base our review on contemporary jurisprudence in this area of the law. We hold that, consistent with the Due Process Clause of the Fourteenth Amendment, the Tennessee company established a prima facie case for the valid exercise of personal jurisdiction over the Texas company. Additionally, the exercise of jurisdiction would not be unfair or unreasonable. Therefore, we affirm the decision of the Court of Appeals and remand this case to the trial court for further proceedings."

"In determining whether Crouch has made out a prima facie case showing Lonestar's sufficient minimum contacts with Tennessee related to this action, we examine whether Lonestar's contacts were purposeful and substantial enough to merit the exercise of personal jurisdiction. See *Burger King* [*Corporation v. Rudzewicz*], 471 U.S. [462] at 475, 105 S.Ct. 2174 [(1985)] ('Jurisdiction is proper ... where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the forum state.' (quoting *McGee* [*v. Int'l Life Ins. Co.*], 355 U.S. [220] at 223, 78 S.Ct. 199 [1957])). . . ."

"We acknowledge that Lonestar representatives never physically visited Tennessee in relation to the contract with Crouch. But, of course, the notion that a defendant, in an appropriate case, may be subject to personal jurisdiction without physically having entered the forum is by now 'an unexceptional proposition.' [*J. McIntyre Mach., Ltd. v.*] *Nicastro*, 564 U.S. [873] at 882, 131 S.Ct. 2780 [(2011)]; see also *Burger King*, 471 U.S. at 476, 105 S.Ct. 2174. . . ."

"The record reveals that Lonestar elected to enter into a contract with Crouch, knowing that Crouch was a Tennessee company. Lonestar sought custom professional services from Crouch,

understanding that Crouch's office was located in Tennessee and, thus, the services would primarily occur in Tennessee. Lonestar emailed the executed contract to Crouch in Tennessee. Lonestar also—in conformance with the expectations set forth in the contract—continued to communicate with Crouch in Tennessee by telephone and email during the course of the contractual relationship, including at least some substantive communications to aid accomplishing performance of the contract. Lastly, Lonestar sent partial payment in the form of a check by mail to Tennessee, where Crouch deposited it into a bank.

"Lonestar points out that it was Crouch that approached Lonestar about a business relationship and physically visited Lonestar at its office in Texas. Although caselaw indicates that this is a factor to consider, we find that this factor is not determinative. Indeed, we find more significant—from the perspective of evaluating whether Lonestar's contacts with Tennessee were purposeful—that Lonestar eventually chose to contract with Crouch, a company with considerable experience and expertise in railway engineering."

"Additionally, the fact that Lonestar's contacts—at the time of contracting and throughout the parties' course of dealing—occurred through emails, telephone calls, and mailings does not detract from their purposeful direction to Tennessee. The transmission of information into a forum by way of email, telephone, or mail is unquestionably a contact for purposes of personal jurisdiction analysis."

"After evaluating Lonestar's contacts with Tennessee related to the contract that forms the basis for Crouch's suit, we conclude that the circumstances do exhibit intentional or purposeful acts on the part of Lonestar. The purposeful availment requirement, in part, is designed to ensure that a defendant is called to answer in a forum based on its own deliberate acts, not the unilateral activity of another party or third party, nor solely as a result of random, fortuitous, or attenuated contacts. *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174. In this case, Lonestar itself chose the path that led to its Tennessee contacts, and we find nothing random, fortuitous, or attenuated about the contacts.

"Having concluded that Lonestar's contacts with Tennessee were deliberate, we now consider the more difficult question of whether those contacts were substantial enough to allow for the exercise of personal jurisdiction. Lonestar's contacts are substantial enough if they reflect that Lonestar's conduct and connection to Tennessee are such that it should reasonably anticipate being haled into a Tennessee court. See *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174.

"This case arises from a single contract. We note that a single contract can entail sufficiently meaningful contacts to allow for the exercise of personal jurisdiction. . . . However, we further recognize that we must carefully examine the breadth and depth of the contractual relationship. The fact that this case arose from a single contract serves to illustrate that Lonestar's contacts with Tennessee were somewhat limited.

"The record reflects that Crouch emailed a proposal to Lonestar on January 15, 2016. One week later, Lonestar had signed the proposal and emailed the contract back to Tennessee. Lonestar did not reach out to Tennessee to negotiate the terms of the contract with Crouch. Crouch produced its preliminary report on March 8, 2016, just over six weeks after execution of the contract. Although Crouch and Lonestar communicated 'multiple times' over that six-week time period, we are mindful that the time period is a limited one. The parties continued substantive communication into mid-April, but by May 9, 2016, the communication had transitioned to intermittent emails by which Crouch simply was attempting to ascertain whether Lonestar had made any decisions based on the

prior substantive discussions between the parties. By June 7, 2016, the communication had devolved into Crouch inquiring whether Lonestar would be choosing to move forward with construction of the railcar repair facility. During the course of the contractual relationship, Lonestar mailed payment for one invoice totaling $16,635.00 to Tennessee.

"These circumstances are significant in that an on-going business relationship typically provides more opportunity for substantial forum contact by the defendant than an isolated or one-shot business transaction."

"We note that there is a longstanding distinction between a nonresident purchaser who takes an active role in its contractual relationship in the forum state and a passive purchaser who does no more than place an order and await product delivery. See, e.g., *First Nat'l Bank of Louisville v. J.W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982) (per curiam). . . ."

"In summary, based upon our evaluation of the quality of Lonestar's contacts with Tennessee, we conclude that, considering all of the facts and surrounding circumstances, Lonestar's contacts were substantial enough to allow for the exercise of personal jurisdiction. Lonestar voluntarily elected to contract with a Tennessee company with expertise in railway engineering. The contract called for custom planning and design services that entailed work of some complexity. Lonestar knew that it was affiliating itself with a company that had its office in Tennessee and that contractual work would occur primarily in Tennessee. Lonestar is a corporate entity that was contracting with another corporate entity for commercial services, and it was obviously free to decline to pursue this business opportunity in Tennessee.

"Performance under the contract was expected to be relatively short-term, projected to take only approximately five to six weeks. The parties' course of dealing ultimately lasted approximately three months. The contract expressly contemplated continuing obligations on the part of Lonestar with respect to work under the contract. See *Burger King*, 471 U.S. at 473, 476, 105 S.Ct. 2174. By the terms of the contract and the parties' course of dealing, Lonestar was obligated to communicate with Crouch and supply information to help accomplish performance in Tennessee. In other words, Lonestar had a role to play as the contractual services unfolded in Tennessee. Lonestar did so, not by physically visiting Tennessee, but through communications—albeit limited ones—sent to Crouch in Tennessee. Lonestar's communications helped accomplish the work that was reflected in Crouch's preliminary report, identified as a deliverable under the contract. The communications also included exchanging information related to Lonestar's subsequent reaching out to Crouch about potential modifications to what was reflected in the preliminary report.

"In choosing to contract with Crouch and to accomplish performance under the contract, Lonestar reached into Tennessee and established forum connections. We recognize that Lonestar's contacts with Tennessee—courtesy of its purposeful choice to contract with a Tennessee company, knowing that performance under the contract would entail activities in Tennessee and joining in accomplishing that performance—do not exhibit as 'substantial and continuing' a relationship as the one envisioned by the parties in *Burger King*. Nevertheless, we conclude that the quality of Lonestar's contacts is substantial enough that Lonestar should reasonably have anticipated being haled into Tennessee to answer for an alleged breach of its contract. Lonestar's contacts in this case may indeed be characterized as 'minimum,' but minimum is all they need be to pass constitutional muster."

"Having determined that Crouch set forth a prima facie showing of sufficient minimum contacts between Lonestar and Tennessee, we turn to the second step in the jurisdictional analysis. We now must determine whether, in spite of the existence of minimum contacts, exercising jurisdiction over Lonestar in this particular case would be unreasonable or unfair. See *First Cmty. Bank*[*, N.A. v. First Tenn. Bank, N.A.*], 489 S.W.3d [369] at 388-89 [(Tenn. 2015)]. In determining whether exercising jurisdiction over Lonestar would be unreasonable or unfair, we consider: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. [*State v. NV*] *Sumatra* [*Tobacco Trading Co.*], 403 S.W.3d [726] at 752 [(Tenn. 2013)]. . . ."

"Lonestar bears the burden as to the second step of the jurisdictional inquiry. In its arguments, Lonestar has not focused its efforts on carrying its burden as to the second step. From its memorandum supporting its motion to dismiss in the trial court through to its brief in this Court, Lonestar has argued simply that this case does not make it past the first step. Nevertheless, because the trial court found that exercising personal jurisdiction over Lonestar would be unreasonable and unfair, we briefly will address the relevant considerations.

"The trial court intimated that 'a majority of the witnesses and evidence of the work performed are in Texas, and it would be a burden and expensive to force Lonestar to litigate this dispute in Tennessee.' We do not believe the record demonstrates that a majority of the witnesses and evidence of the work performed are in Texas. The record is largely silent in this regard. As for the burden and expense for Lonestar to litigate this dispute in Tennessee, the same advancements in transportation and communications that have transformed modern business transactions—and personal jurisdiction analysis—tend to lessen any unfair burden associated with a defendant having to litigate a dispute in another state. See *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174. We can glean no special or unusual burden from the limited record before us. We also do not believe that the mere fact that Lonestar would have to travel from Texas to Tennessee amounts to a constitutionally significant burden. See *Aristech Chem. Int'l Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628 (6th Cir. 1998) (stating that the travel distance between Kentucky and Ontario, Canada did not make the exercise of jurisdiction unreasonable); *PTG Logistics*[*, LLC v. Bickel's Snack Foods, Inc.*], 196 F. Supp. 2d [593] at 601 [(S.D. Ohio 2002)] (stating that the distance between Pennsylvania and Ohio was not so great as to make travel prohibitive for the defendant).

"As for the second and third considerations, we do not doubt that Crouch has a substantial interest in obtaining relief in Tennessee, and Tennessee has a corresponding manifest interest in providing residents with a convenient forum for redressing injuries inflicted by out-of-state actors. See *Burger King*, 471 U.S. at 473, 105 S.Ct. 2174; *Nicholstone*, 621 S.W.2d at 564 ('Tennessee clearly has an interest in protecting its residents against a breach of contract by nonresidents....'). The trial court's findings are in accord on this point.

"As for the fourth and fifth considerations—the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies—we find nothing in the limited record before us that weighs heavily in one direction or the other.

"From the limited record before us, Crouch's interest in having a convenient forum to redress the alleged breach of contract and Tennessee's interest in providing one are certainly no less substantial than the burden on Lonestar associated with litigating this action in Tennessee. We therefore

conclude that Lonestar has not carried the burden of establishing that the exercise of personal jurisdiction in this particular case would be unreasonable or unfair."

2. Specific

Ford Motor Company v. Montana Eighth Judicial District Court, 141 S.Ct. 1017 (U.S., Kagan, 2021).

"Ford Motor Company is a global auto company, incorporated in Delaware and headquartered in Michigan. Ford markets, sells, and services its products across the United States and overseas. The company also encourages a resale market for its vehicles. In each of these two cases, a state court exercised jurisdiction over Ford in a products-liability suit stemming from a car accident that injured a resident in the State. The first suit alleged that a 1996 Ford Explorer had malfunctioned, killing Markkaya Gullett near her home in Montana. In the second suit, Adam Bandemer claimed that he was injured in a collision on a Minnesota road involving a defective 1994 Crown Victoria. Ford moved to dismiss both suits for lack of personal jurisdiction. It argued that each state court had jurisdiction only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed, according to Ford, only if the company had designed, manufactured, or sold in the State the particular vehicle involved in the accident. In neither suit could the plaintiff make that showing. The vehicles were designed and manufactured elsewhere, and the company had originally sold the cars at issue outside the forum States. Only later resales and relocations by consumers had brought the vehicles to Montana and Minnesota. Both States' supreme courts rejected Ford's argument. Each held that the company's activities in the State had the needed connection to the plaintiff's allegations that a defective Ford caused in-state injury.

"Held: The connection between the plaintiffs' claims and Ford's activities in the forum States is close enough to support specific jurisdiction."

"The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant. The canonical decision in this area remains *International Shoe Co.* v. *Washington,* 326 U.S. 310. There, the Court held that a tribunal's authority depends on the defendant's having such 'contacts' with the forum State that 'the maintenance of the suit' is 'reasonable' and 'does not offend traditional notions of fair play and substantial justice.' *Id.,* at 316–317. In applying that formulation, the Court has long focused on the nature and extent of 'the defendant's relationship to the forum State.' *Bristol-Myers Squibb Co.* v. *Superior Court of Cal., San Francisco Cty.*, 582 U.S. __, __. That focus has led to the recognition of two types of personal jurisdiction: general and specific jurisdiction. A state court may exercise general jurisdiction only when a defendant is 'essentially at home' in the State. *Goodyear Dunlop Tires Operations, S. A* v. *Brown*, 564 U.S. 915, 919. Specific jurisdiction covers defendants less intimately connected with a State, but only as to a narrower class of claims. To be subject to that kind of jurisdiction, the defendant must take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.' *Hanson* v. *Denckla,* 357 U.S. 235, 253. And the plaintiff's claims 'must arise out of or relate to the defendant's contacts' with the forum. *Bristol-Myers*, 582 U.S., at ___."

"Ford admits that it has 'purposefully avail[ed] itself of the privilege of conducting activities' in both States. *Hanson,* 357 U.S., at 253. The company's claim is instead that those activities are insufficiently connected to the suits. In Ford's view, due process requires a causal link locating jurisdiction only in the State where Ford sold the car in question, or the States where Ford designed

and manufactured the vehicle. And because none of these things occurred in Montana or Minnesota, those States' courts have no power over these cases.

"Ford's causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities. *Bristol-Myers*, 582 U.S., at ___. The most common formulation of that rule demands that the suit 'arise out of or relate to the defendant's contacts with the forum.' *Id.*, at ___. The second half of that formulation, following the word 'or,' extends beyond causality. So the inquiry is not over if a causal test would put jurisdiction elsewhere. Another State's courts may yet have jurisdiction, because of a non-causal 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence involving the defendant that takes place within the State's borders.' *Id.,* at ___ - ___.

"And this Court has stated that specific jurisdiction attaches in cases identical to this one—when a company cultivates a market for a product in the forum State and the product malfunctions there. See *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286. Here, Ford advertises and markets its vehicles in Montana and Minnesota, including the two models that allegedly malfunctioned in those States. Apart from sales, the company works hard to foster ongoing connections to its cars' owners. All this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in the States' courts. Put slightly differently, because Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States, there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction. *Helicopteros Nacionales de Colombia, S. A.* v. *Hall,* 466 U.S. 408, 414. Allowing jurisdiction in these circumstances both treats Ford fairly and serves principles of 'interstate federalism.' *World-Wide Volkswagen*, 444 U.S. 293."

"*Bristol-Myers* and *Walden* v. *Fiore,* 571 U.S. 277, reinforce all that the Court has said about why Montana's and Minnesota's courts may decide these cases. In *Bristol-Myers*, the Court found jurisdiction improper because the forum State, and the defendant's activities there, lacked any connection to the plaintiffs' claims. 582 U.S., at ___. That is not true of these cases, where the plaintiffs are residents of the forum States, used the allegedly defective products in the forum States, and suffered injuries when those products malfunctioned there. And *Walden* does not show, as Ford claims, that a plaintiff's residence and place of injury can never support jurisdiction. The defendant in *Walden* had never formed any contact with the forum State. Ford, by contrast, has a host of forum connections. The place of a plaintiff's injury and residence may be relevant in assessing the link between those connections and the plaintiff's suit."

B. Subject Matter; Federal Tort Claims Act; "Judgment Bar"

Brownback v. King, 141 S.Ct. 740 (U.S., Thomas, 2021).

"The Federal Tort Claims Act (FTCA) allows a plaintiff to bring certain state-law tort claims against the United States for torts committed by federal employees acting within the scope of their employment, provided that the plaintiff alleges six statutory elements of an actionable claim. See 28 U.S.C. § 1346(b). Another provision, known as the judgment bar, provides that '[t]he judgment in an action under section 1346(b)' shall bar 'any action by the claimant' involving the same subject matter against the federal employee whose act gave rise to the claim. § 2676. Respondent James King sued the United States under the FTCA after a violent encounter with Todd Allen and Douglas Brownback, members of a federal task force. He also sued the officers individually under

the implied cause of action recognized by *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U.S. 388. The District Court dismissed his FTCA claims, holding that the Government was immune because the officers were entitled to qualified immunity under Michigan law, or in the alternative, that King failed to state a valid claim under Federal Rule of Civil Procedure 12(b)(6). The court also dismissed King's *Bivens* claims, ruling that the officers were entitled to federal qualified immunity. King appealed only the dismissal of his *Bivens* claims. The Sixth Circuit found that the District Court's dismissal of King's FTCA claims did not trigger the judgment bar to block his *Bivens* claims.

"Held: The District Court's order was a judgment on the merits of the FTCA claims that can trigger the judgment bar."

"Similar to common-law claim preclusion, the judgment bar requires a final judgment 'on the merits,' *Semtek Int'l Inc.* v. *Lockheed Martin Corp.,* 531 U.S. 497, 502. Here, the District Court's summary judgment ruling dismissing King's FTCA claims hinged on a quintessential merits decision: whether the undisputed facts established all the elements of King's FTCA claims. See *Arbaugh* v. *Y & H Corp.,* 546 U.S. 500, 510–511. The court's alternative Rule 12(b)(6) holding also passed on the substance of King's FTCA claims, as a 12(b)(6) ruling concerns the merits. *Id.,* at 506–507."

"In passing on King's FTCA claims, the District Court also determined that it lacked subject-matter jurisdiction over those claims. In most cases, a plaintiff's failure to state a claim under Rule 12(b)(6) does not deprive a federal court of subject-matter jurisdiction. See *Steel Co.* v. *Citizens for Better Environment,* 523 U.S. 83, 89. Here, however, in the unique context of the FTCA, all elements of a meritorious claim are also jurisdictional. Thus, even though a plaintiff need not prove a § 1346(b)(1) jurisdictional element for a court to maintain subject-matter jurisdiction over his claim, see *FDIC* v. *Meyer*, 510 U.S. 471, 477, because King's FTCA claims failed to survive a Rule 12(b)(6) motion to dismiss, the court also was deprived of subject-matter jurisdiction. Generally, a court may not issue a ruling on the merits when it lacks subject-matter jurisdiction, see *Steel Co.,* 523 U.S., at 101–102, but where, as here, pleading a claim and pleading jurisdiction entirely overlap, a ruling that the court lacks subject-matter jurisdiction may simultaneously be a judgment on the merits that can trigger the judgment bar."

C. Immunity; Federal Sovereign Immunities Act

Federal Republic of Germany v. Philipp, 141 S.Ct. 703 (U.S., Roberts, 2021).

"Respondents are the heirs of German Jewish art dealers who formed a consortium during the waning years of the Weimar Republic to purchase a collection of medieval relics known as the Welfenschatz. The heirs allege that when the Nazi government rose to power, it unlawfully coerced the consortium into selling the collection to Prussia for a third of its value. The relics are currently maintained by the Stiftung Preussischer Kulturbesitz (SPK), an instrumentality of the Federal Republic of Germany, and displayed at a Berlin museum. After unsuccessfully seeking compensation in Germany, the heirs brought several common law property claims in United States District Court against Germany and SPK (collectively Germany). Germany moved to dismiss, arguing that it was immune from suit under the Foreign Sovereign Immunities Act. As relevant, Germany asserted that the heirs' claims did not fall within the FSIA's exception to sovereign immunity for 'property taken in violation of international law,' 28 U.S.C. § 1605(a)(3), because a sovereign's taking of its own nationals' property is not unlawful under the international law of

expropriation. The heirs countered that the exception did apply because Germany's purchase of the Welfenschatz was an act of genocide, and the relics were therefore taken in violation of international human rights law. The District Court denied Germany's motion to dismiss, and the D.C. Circuit affirmed.

"Held: The phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule."

"The heirs contend that their claims fall within the FSIA's exception for cases involving 'property taken in violation of international law,' § 1605(a)(3)—a provision known as the expropriation exception—because the forced sale of the Welfenschatz constituted an act of genocide, and genocide is a violation of international human rights law. Germany argues that the relevant international law is not the law of genocide but the international law of expropriation, under which a foreign sovereign's taking of its own nationals' property remains a domestic affair."

"The 'domestic takings rule' invoked by Germany derives from the premise that international law customarily concerns relations among states, not between states and individuals. Historically, a sovereign's taking of a foreign national's property implicated international law because it constituted an injury to the state of the alien's nationality. A domestic taking, by contrast, did not interfere with relations among states. This domestic takings rule endured even as a growing body of human rights law made states' treatment of individual human beings a matter of international concern. And those who criticized the treatment of property rights under international law did so on the ground that *all* sovereign takings, not just domestic takings, were outside the scope of that law. This dispute over the existence of international law constraints on sovereign takings eventually reached the Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 436. Hesitant to delve into this controversy, the Court instead invoked the act of state doctrine. In response, Congress passed the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, which prohibits United States courts from applying the act of state doctrine where a 'right[ ] to property is asserted' based upon a 'taking . . . by an act of that state in violation of . . . international law.' 22 U.S.C. § 2370(e)(2). Courts and commentators understood the Amendment to permit adjudication of claims *Sabbatino* had avoided deciding, *i.e.,* claims against other countries for expropriation of American-owned property. But nothing in the Amendment purported to alter any rule of international law, including the domestic takings rule. Congress used nearly identical language when it crafted the FSIA's expropriation exception twelve years later. Based on this historical and legal background, courts reached a 'consensus' that the expropriation exception's 'reference to "violation of international law" does not cover expropriations of property belonging to a country's own nationals.' *Republic of Austria* v. *Altmann,* 541 U.S. 677, 713 (Breyer, J., concurring)."

"The heirs concede that the international law of expropriation retained the domestic takings rule at the time of the FSIA's enactment, but they read 'rights in property taken in violation of international law' to incorporate any international norm, including international human rights law, rather than merely the international law of expropriation. The text of the FSIA's expropriation exception, however, supports Germany's reading. The exception places repeated emphasis on property and property-related rights, while injuries and acts associated with violations of human rights law, such as genocide, are notably lacking—a remarkable omission if the provision was intended to provide relief for atrocities such as the Holocaust. A statutory phrase concerning property rights most sensibly references the international law governing property rights, rather than the law of genocide. The heirs' position would arguably force courts themselves to violate

international law not only by ignoring the domestic takings rule, but also by derogating international law's preservation of sovereign immunity for violations of human rights law. Germany's interpretation of the exception is also more consistent with the FSIA's express goal of codifying the restrictive theory of sovereign immunity, 28 U.S.C. § 1602, under which immunity extends to a sovereign's public, but not private, acts. It would destroy the Act's distinction between private and public acts were the Court to subject all manner of sovereign public acts to judicial scrutiny under the FSIA by transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations."

"Other FSIA provisions confirm Germany's position. The heirs' approach would circumvent the reticulated boundaries Congress placed in the FSIA with regard to bringing claims asserting human rights violations. One FSIA exception, for example, provides jurisdiction over claims 'in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property,' but only where the relevant conduct 'occurr[ed] in the United States.' § 1605(a)(5). And the FSIA's terrorism exception eliminates sovereign immunity for state sponsors of terrorism, but only for certain human rights claims, brought by certain victims, against certain defendants. §§ 1605A(a), (h). Such restrictions would be of little consequence if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception."

"The heirs' counterarguments cannot overcome the text, context, and history of the expropriation exception. They claim that the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act—which amends the FSIA to explain that participation in specified 'art exhibition activities' does not qualify as 'commercial activity' under the expropriation exception, § 1605(h)—demonstrates that Congress anticipated that Nazi-era claims could be adjudicated under the exception. Congress's effort to preserve sovereign immunity in a narrow, particularized context, however, does not support the broad elimination of sovereign immunity across all areas of law. Other statutes aimed at promoting restitution to Holocaust victims, on which the heirs rely, generally encourage redressing those injuries outside of public court systems and do not speak to sovereign immunity. See, *e.g.,* Holocaust Expropriated Art Recovery Act of 2016, 130 Stat. 1524."

"This Court does not address Germany's argument that the District Court was obligated to abstain from deciding the case on international comity grounds or the heirs' alternative argument that the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction."

II. Standing

A. Request for Nominal Damages Satisfies Redressability Element

Uzuegbunam v. Preczewski, 141 S.Ct. 792 (U.S., Thomas, 2021).

"Petitioners are former students of Georgia Gwinnett College who wished to exercise their religion by sharing their faith on campus while enrolled there. In 2016, Chike Uzuegbunam talked with interested students and handed out religious literature on campus grounds. Uzuegbunam stopped after a campus police officer informed him that campus policy prohibited distributing written religious materials outside areas designated for that purpose. A college official later explained to Uzuegbunam that he could speak about his religion or distribute materials only in two designated speech areas on campus, and even then only after securing a permit. But when Uzuegbunam

obtained the required permit and tried to speak in a free speech zone, a campus police officer again asked him to stop, this time saying that people had complained about his speech. Campus policy at that time prohibited using the free speech zone to say anything that 'disturbs the peace and/or comfort of person(s).' The officer told Uzuegbunam that his speech violated campus policy because it had led to complaints, and the officer threatened Uzuegbunam with disciplinary action if he continued. Uzuegbunam again complied with the order to stop speaking. Another student who shares Uzuegbunam's faith, Joseph Bradford, decided not to speak about religion because of these events. Both Uzuegbunam and Bradford sued certain college officials charged with enforcement of the college's speech policies, arguing that these policies violated the First Amendment. As relevant here, the students sought injunctive relief and nominal damages. The college officials ultimately chose to discontinue the challenged policies rather than to defend them, and they sought dismissal on the ground that the policy change left the students without standing to sue. The parties agreed that the policy change rendered the students' request for injunctive relief moot, but disputed whether the students had standing to maintain the suit based on their remaining claim for nominal damages. The Eleventh Circuit held that while a request for nominal damages can sometimes save a case from mootness, such as where a person pleads but fails to prove an amount of compensatory damages, the students' plea for nominal damages alone could not by itself establish standing.

"Held: A request for nominal damages satisfies the redressability element necessary for Article III standing where a plaintiff's claim is based on a completed violation of a legal right."

"To establish Article III standing, the Constitution requires a plaintiff to identify an injury in fact that is fairly traceable to the challenged conduct and to seek a remedy likely to redress that injury. *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338. The dispute here concerns whether the remedy Uzuegbunam sought—nominal damages—can redress the completed constitutional violation that he alleges occurred when campus officials enforced the speech policies against him. The Court looks to the forms of relief awarded at common law to determine whether nominal damages can redress a past injury. The prevailing rule at common law was that a party whose rights are invaded can always recover nominal damages without furnishing evidence of actual damage. By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small economic rights over important, but not easily quantifiable, nonpecuniary rights."

"The common law did not require a plea for compensatory damages as a prerequisite to an award of nominal damages. Nominal damages are not purely symbolic. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages. A single dollar often will not provide full redress, but the partial remedy satisfies the redressability requirement. *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 13. Respondents' argument that a plea for compensatory damages is necessary to confer jurisdiction also does not square with established principles of standing. And unlike an award of attorney's fees and costs which may be the byproduct of a successful suit, an award of nominal damages constitutes relief on the merits."

"A request for redress in the form of nominal damages does not guarantee entry to court. In addition to redressability, the plaintiff must establish the other elements of standing and satisfy all other relevant requirements, such as pleading a cognizable cause of action. Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms. The Court does not decide whether Bradford can pursue

nominal damages and leaves for the District Court to determine whether Bradford has established a past, completed injury."

B. Potential Judicial Candidate

Carney v. Adams, 141 S.Ct. 493 (U.S., Breyer, 2020).

"Delaware's Constitution contains a political balance requirement for appointments to the State's major courts. No more than a bare majority of judges on any of its five major courts 'shall be of the same political party.' Art. IV, § 3. In addition, on three of those courts, those members not in the bare majority 'shall be of the other major political party.' *Ibid.* Respondent James R. Adams, a Delaware lawyer and political independent, sued in Federal District Court, claiming that Delaware's 'bare majority' and 'major party' requirements violate his First Amendment right to freedom of association by making him ineligible to become a judge unless he joins a major political party. The District Court held that Adams had standing to challenge both requirements and that Delaware's balancing scheme was unconstitutional. The Third Circuit affirmed in part and reversed in part. It held that Adams did have standing to challenge the major party requirement, because it categorically excludes independents from becoming judges on three courts, but that he lacked standing to challenge the bare majority requirement, which does not preclude independents from eligibility for any vacancy.

"Held: Because Adams has not shown that he was 'able and ready' to apply for a judicial vacancy in the imminent future, he has failed to show a 'personal,' 'concrete,' and 'imminent' injury necessary for Article III standing."

"Two aspects of standing doctrine are relevant here. First, standing requires an 'injury in fact' hat must be 'concrete and particularized,' as well as 'actual or imminent.' *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351. Second, a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury in fact' and does not show standing. *Hollingsworth* v. *Perry*, 570 U.S. 693, 706, 133 S.Ct. 2652, 186 L.Ed.2d 768."

"Adams has not shown the necessary 'injury in fact.' To establish that he will suffer a concrete, particularized, and imminent injury beyond a generalized grievance, Adams must at least show that he is likely to apply to become a judge in the reasonably foreseeable future, if he were not barred because of political affiliation. He can show this only if he is 'able and ready' to apply. See *Gratz* v. *Bollinger*, 539 U.S. 244, 262, 123 S.Ct. 2411, 156 L.Ed.2d 257. Adams' only supporting evidence is two statements he made that he wanted to be, and would apply to be, a judge on any of Delaware's five courts. Those statements must be considered in the context of the record."

"The record evidence fails to show that, at the time he commenced the lawsuit, Adams was 'able and ready' to apply for a judgeship in the reasonably foreseeable future. First, Adams' statements stand alone, without any other supporting evidence, like efforts to determine possible judicial openings or other such preparations. Second, the context suggests an abstract, generalized grievance, not an actual desire to become a judge. For example, Adams did not apply for numerous existing judicial vacancies while he was a registered Democrat and eligible for those vacancies. He then read a law review article arguing that Delaware's judicial eligibility requirements unconstitutionally excluded independents, changed his political affiliation to independent, and filed this lawsuit shortly thereafter. Third, a holding that Adams' few words of general intent were

sufficient to show an 'injury in fact' would significantly weaken the longstanding legal doctrine preventing this Court from providing advisory opinions. Finally, precedent supports the conclusion that an injury in fact requires an intent that is concrete. See, *e.g.*, *Lujan*, *supra*. And arguably similar cases in which standing was found all contained more evidence that the plaintiff was 'able and ready' than Adams has provided. See, *e.g.*, *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158."

III. Court Filings; Signature

A. Email Address to be Included

Tennessee Rule of Civil Procedure 11.01, amended eff. July 1, 2021.

"(a) Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state, to the extent available, the signer's address, telephone number, e-mail address, and Tennessee Board of Professional Responsibility number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party."

"Advisory Commission Comment [2021]
Rule 11.01(a) is amended to require that every pleading, written motion, and other paper shall include the signer's email address. Providing an e-mail address is useful but does not of itself signify consent to filing or service by e-mail."

B. Signed by Another Attorney with Permission

Smith v. Gonzalez, No. W2019-02028-COA-R3-CV (Tenn. Ct. App., Goldin, Apr. 1, 2021).

"In the case before us, the dispositive issue concerns whether Plaintiff's complaint was compliant with the requirements of Rule 11.01(a). As will be discussed in more detail, *infra*, we conclude that the attorney of record's signature on Plaintiff's complaint was in compliance with Rule 11.01(a).

> Rule 11.01(a) of the Tennessee Rules of Civil Procedure provides, in pertinent part, [e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, and Tennessee Board of Professional Responsibility number, if any.... An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

"Tenn. R. Civ. P. 11.01(a). An advisory commission comment to Rule 11 expressly states that Rule 11 'makes it an absolute requirement that the attorney, if any, sign, and makes the signature, in effect, the attorney's statement that the pleading is filed in good faith.' *See* Tenn. R. Civ. P. 11.01(a) advisory commission's comment."

"In this case, Plaintiff's counsel, Mr. Rickman, directed another attorney at his firm, Mr. Sievers, to sign Mr. Rickman's name to the original complaint on his behalf and with his permission. At no point in the proceedings below, nor on appeal, have there been any allegations or proof that Mr. Rickman did not give Mr. Sievers his permission to sign the complaint, was not familiar with the contents of the complaint, or otherwise did not comply with his obligations pursuant to Rule 11. Therefore, we conclude that the signature of 'Chadwick Rickman (by permission)' was sufficient to warrant the complaint valid under Rule 11.01(a). However, while we find Plaintiff's counsel's signature by permission to be a valid signature under Rule 11.01(a), we note that the better practice would be for attorneys to identify themselves when signing with permission for another attorney under Rule 11.01(a) in order to avoid any confusion as was created here."

IV. Amendment of Complaint After Dismissal

Justice v. Nordquist, No. E2020-01152-COA-R3-CV (Tenn. Ct. App., Swiney, June 29, 2021).

"Defendant, a psychologist, was retained by counsel for the Child's mother in connection with paternity litigation involving Plaintiff. Defendant went on to testify as an expert witness in a manner adverse to Plaintiff's case. In 2014, Plaintiff filed a lawsuit alleging health care liability against Defendant; this lawsuit later was voluntarily dismissed. In May 2019, Plaintiff refiled his lawsuit against Defendant in the Trial Court."

"In June 2019, Defendant filed his Motion to Dismiss and to Strike the Complaint pursuant to Tenn. R. Civ. P. 12.02(6) and 12.06. Defendant made a number of arguments in support of his motion, including: (1) Defendant was immune for statements he made in judicial proceedings; (2) Plaintiff lacked standing to bring this suit on behalf of the Child because his paternity was not established when the suit was first filed; (3) Plaintiff's individual claims were barred by the statute of limitations and any health care liability claims made on the Child's behalf were barred by the applicable statute of repose; (4) Defendant owed no duty to Plaintiff; and, (5) Plaintiff was estopped from raising issues of Defendant's credibility or trustworthiness as those issues had already been determined by the juvenile court judge in the separate proceedings. Additional procedural history unfolded, not all of which is relevant to the dispositive issue on appeal. Upon Defendant's request, the Trial Court disqualified Plaintiff's counsel on grounds that counsel's involvement in the paternity action meant she was too 'intermingled' to serve in this case.

'On February 28, 2020, the Trial Court entered an order granting Defendant's motion to dismiss. Defendant filed his motion for costs and fees pursuant to Tenn. Code Ann. § 20-12-119. On March 30, 2020, Plaintiff filed two separate motions to alter or amend the Trial Court's February 28, 2020 order of dismissal. On May 7, 2020, the Trial Court entered an order denying Plaintiff's motions to alter or amend. On June 8, 2020, Plaintiff filed his First Amended Complaint. On June 15, 2020, the Trial Court entered an order awarding Defendant attorney's fees and expenses pursuant to Tenn. Code Ann. § 20-12-119(c)(1). Plaintiff thereafter filed a motion to alter or amend the Trial Court's June 15, 2020 order on attorney's fees and expenses. On July 28, 2020, the Trial Court entered an order denying Plaintiff's motion to alter or amend its June 15, 2020 order on attorney's fees and expenses. On August 14, 2020, Plaintiff filed a motion for default judgment pursuant to Tenn. R. Civ. P. 55 on grounds that Defendant had failed to answer Plaintiff's amended complaint. On August 24, 2020, Defendant filed his Response to Notice of Default and Motion to Dismiss Amended Complaint. In his response, Defendant stated:

> Comes the Defendant Dr. Vey Nordquist, by and through counsel, and objects to and requests that Plaintiff's Motion for Default be denied and his First Amended Complaint be stricken from the record and that the Defendant be awarded his attorney fees and costs in responding to the Motion. This case was dismissed by Order of the Honorable Kristi Davis entered on February 28, 2020. Plaintiff's two Motions to Alter or Amend the February 28, 2020 Order were denied by Judge Davis by Order entered May 7, 2020 and no appeal was filed. There is no legal basis for the filing of an Amended Complaint after the entry of an Order of Dismissal and no response was required. The filing of the Amended Complaint and Motion for Default are frivolous and unequivocal continuation of Justice's bad faith attempts to abuse and harass the Defendant and the judicial process and should not be tolerated. In addition to attorney's fees and costs, sanctions should be imposed, or an injunction entered to prevent Justice from continuing this abusive and vexatious litigation.

"On August 27, 2020, Plaintiff filed his Notice of Appeal with this Court '[o]ut of an abundance of caution' as he put it in his appellate brief."

"Plaintiff and Defendant raise multiple issues on appeal. However, we discern that a single issue—one raised by Plaintiff—is dispositive: whether this appeal must be dismissed for lack of a final judgment."

"Plaintiff contends that, as Defendant never filed a responsive pleading to his original complaint, he had an absolute right to file an amended complaint notwithstanding that the Trial Court already entered an order of dismissal as to his original complaint. In support of his contention, Plaintiff cites *Justice v. Nelson*, No. E2018-02020-COA-R3-CV, 2019 WL 6716300 (Tenn. Ct. App. Dec. 10, 2019), *no appl. perm. appeal filed*, incidentally another case involving Plaintiff. In *Justice*, the trial court granted defendants' motion to dismiss plaintiff's complaint. *Id.* at *1. Thirty days later, plaintiff filed an amended complaint. *Id.* Acknowledging the legitimacy of this procedural move, we noted:

> On September 4, 2018, the trial court entered an order clarifying that 'Mr. Justice filed a First Amended Complaint not a motion to be allowed to file an amended complaint.' (Emphasis in original.) The court was reminding defendants that '[a] party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served[.]' *See* Tenn. R. Civ. P. 15.01; *see also Adams v. Carter Cty. Memorial Hosp.*, 548 S.W.2d 307, 308-09 (Tenn. 1977) (holding that the plaintiff could file an amended complaint as a matter of course after the trial court granted the defendants' motion to dismiss and before that order of dismissal became a final judgment). Despite finding that '[t]here was never a motion to dismiss the amended complaint[,]' the trial court ruled that '[t]he response to the amended complaint reads like a motion to dismiss and the Court will consider it a motion to dismiss.' The court also requested additional briefing on the issue.

"*Justice*, 2019 WL 6716300, at *1. The trial court dismissed the lawsuit. *Id.* at *2. On appeal, we held that defendants' response to plaintiff's amended complaint was not a motion to dismiss in form or in substance, and that the trial court erred in effectively dismissing the amended complaint *sua sponte* without adequate justification. *Id.* at *3, 5. For purposes of the instant case, however, the main point from *Justice* is that this Court has recognized a scenario in which a party may file an amended complaint to continue her case even though the trial court already has dismissed her original complaint if no responsive pleading to the original complaint was filed and the order of dismissal has not become final. The first consideration in this scenario is whether a responsive

pleading has been filed. Here, Defendant filed only a motion to dismiss; he never filed an answer. Regarding the effect this has on a plaintiff's ability to amend her complaint, this Court has stated: '[A] plaintiff must seek permission from the court to file an amended complaint only when a responsive pleading has been filed. It is well-settled in Tennessee that a motion to dismiss is not a responsive pleading.' *Mosley v. State*, 475 S.W.3d 767, 774 (Tenn. Ct. App. 2015) (citations omitted). Defendant's Motion to Dismiss and to Strike the Complaint does not constitute a responsive pleading. The next consideration is whether Plaintiff's amended complaint was timely filed before the order of dismissal became final."

"On May 7, 2020, the Trial Court denied Plaintiff's motions to alter or amend. Plaintiff filed his amended complaint on June 8, 2020, within the time for appeal (the thirty-day mark landed on a Saturday; the amended complaint was filed that Monday). For this thirty-day period, the Trial Court's order remained non-final and 'within the bosom of the court,' thus subject to change or appeal. As was the scenario in *Justice*, Plaintiff's timely filing of an amended complaint when no responsive pleading was filed had the effect of keeping the case alive in the Trial Court. However, in the present case, the Trial Court never ruled on Plaintiff's amended complaint. Therefore, we lack a final judgment and, consequently, subject matter jurisdiction to hear this appeal.

"In his reply brief, Plaintiff states that his filing an amended complaint after the order of dismissal was entered effectively erased the Trial Court's order of dismissal. We disagree. The order of dismissal remains as valid as before as to the original complaint. Nevertheless, Plaintiff's amended complaint remains outstanding and must be addressed.

"We prefer to address appeals on their merits. Nevertheless, a final judgment generally is a prerequisite for an appeal as of right. Because the order appealed from is not a final judgment, this Court does not have subject matter jurisdiction, and the appeal is dismissed."

V. Requirements for Placing Documents in Record Under Seal

In re Estate of Thompson, No. E2019-01364-COA-R3-CV (Tenn. Ct. App., Davis, Apr. 6, 2021).
In re Estate of Thompson, No. E2019-01365-COA-R3-CV (Tenn. Ct. App., Davis, Apr. 6, 2021).

"This consolidated appeal arises from a dispute among various children and grandchildren of B. Ray Thompson, Jr. ('B. Ray Jr.') and Juanne Jennings Thompson ('Juanne' or together, 'Decedents'), over the estates of both B. Ray Jr. and Juanne. When three of the Decedents' children obtained a court order sealing the records for both estates, a different faction of the family filed petitions to intervene in the estate actions and to unseal the records. The Chancery Court for Knox County (the 'trial court') denied the petitions for intervention and left several documents under seal. This appeal followed. We hold that the trial court abused its discretion. The judgment of the trial court is reversed, and the case remanded for further proceedings."

"The discretionary decision at the center of this case is the trial court's finding that several documents in the court's record should remain under seal because the documents contain financial information and references to minor children. Appellant's argument regarding how the trial court abused its discretion is two-fold. First, Appellant asserts that the trial court applied an incorrect legal standard in determining whether the court records should remain sealed. Specifically, Appellant asserts that the trial court analyzed whether 'good cause' exists to seal the records, when the correct standard is whether the seal serves a 'compelling interest' and is narrowly tailored to that

interest. Insofar as the trial court applied a less stringent legal standard than required, Appellant avers that the trial court abused its discretion. *See Doe ex rel. Doe*, 154 S.W.3d at 42 ('A trial court abuses its discretion when it applies an incorrect legal standard[.]'). Appellees, on the other hand, argue that 'good cause' is the correct standard pursuant to our Supreme Court's holding in *Ballard v. Herzke*, 924 S.W.2d 652 (Tenn. 1996). Appellees alternatively contend that even if a 'compelling interest' is the correct legal standard for sealing a court record, the trial court's error in discussing 'good cause' in its order is harmless because the trial court ultimately concluded, at the end of the order, that several 'compelling interests' are furthered by the seal. The second prong of Appellant's argument is that even if the trial court applied the correct legal standard, it nonetheless erred in concluding that general financial privacy and the involvement of minor children constitute sufficient reasons to seal court records from public view."

"To summarize, Tennessee courts have developed different avenues of analysis for sealing documents from public view depending upon the particular documents and information at issue. Because it is undisputed that in the present case discovery was not conducted by the parties and all of the sealed documents were entered into the presumptively open, public court record, we conclude that the reasons for sealing the records in this case must be compelling. The presumption of openness regarding these records is 'strong[,]' *Brentwood Acad.*, 578 S.W.3d at 53, and 'may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.' *Kocher I*, 546 S.W.3d at 86.

"Bearing this standard in mind, we turn next to whether the trial court in fact applied the correct standard. The interpretation of a trial court's order is a question of law we review de novo. *Byrnes v. Byrnes*, 390 S.W.3d 269, 277 (Tenn. Ct. App. 2012); *see also Kocher II*, 2018 WL 6423030, at *9 ('When interpreting a trial court's order, "we ascertain the intent of the court, and, if possible, make the order in harmony with the entire record in the case and to be such as ought to have been rendered."' (quoting *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 73 (Tenn. Ct. App. 2016))). 'The determinative factor is the intention of the court as collected from all parts of the judgment.' *Stephens*, 529 S.W.3d at 73.

"According to Appellant, the trial court applied an incorrect legal standard by discussing *Ballard* and whether 'good cause' supports the current seal on the court's records. Appellees counter that because the trial court also reached the conclusion that various compelling interests support the seal, any discussion of the *Ballard* factors by the trial court is harmless error. Here, we find ourselves in agreement with Appellees. The trial court found the purported reasons for the sealing order compelling; in pertinent part, the trial court explained:

> The Court further concludes that there are compelling reasons exist [sic] to keep certain documents under seal. Those documents include the Affidavit of Will, the Petition to Set Aside, the [Consent Agreement and Final Judgment], and [the Removal Documents]. The Court concludes that the privacy interests at stake in this estate are paramount and compelling in this case. Although [Decedents'] Will[s] [were] submitted to probate, the disposition of the vast majority of [Decedents'] assets were disposed of through the [Trusts] that [were] created during [their] lifetime[s]. Had [Decedents] wished to make the disposition of [their] assets public, [they] would have done so through probate. Instead, [Decedents] chose to shield the disposition of [their] substantial assets from public view via the [ ] Trust[s]. The records at issue in this estate detail large sums of money, as well as the recipients of those sums. These privacy interests at stake, including the general privacy of the parties, the protection of the minor children at issue, and the interests of the estate[s] being closed without further

> interference by those holding no interest in [Decedents' estates] or the [ ] Trust[s], offer a compelling reason that outweigh[s] the needs of the public in general. Accordingly, the compelling reason favors sealing of the record in this case. Furthermore, the Court has not found any authority mandating the openness of the record.

"Based on the foregoing, we conclude that the trial court applied the correct legal standard. Although *Ballard* and its factor test are not dispositive in the present case, the trial court's discussion of the 'good cause' factors does not amount to reversible error. Indeed, while not controlling, some of the principles underlying these factors are relevant. *See Kocher I*, 546 S.W.3d at 85 n.9 ('[S]ome principles enunciated in *Ballard* [are] generally applicable to protective orders like the one entered in this case[.]'). Taking the trial court's order as a whole and giving effect to every word, as we are required to, we conclude that the order sufficiently reflects that the trial court ultimately considered the correct legal standard. Consequently, the trial court did not abuse its discretion in this regard.

"Our inquiry does not end here, however, as Appellant asserts that even if the trial court did not abuse its discretion by applying an incorrect legal standard, it nonetheless abused its discretion in ordering that several documents in its record remain sealed."

"The trial court found that the compelling interests justifying the seal in this case are financial privacy and the allegations that the minor grandchildren would be endangered by the sealed information becoming public. Appellant avers that these interests are not compelling and that the trial court's sealing order is not narrowly tailored."

"Having reviewed the record, including the documents placed under seal by the trial court, and the pertinent legal authorities, we conclude that the trial court abused its discretion in leaving the documents at issue under seal. In the present case, the trial court found and the Appellees insist that the sealed documents expose B. Ray Jr.'s and Juanne's minor grandchildren to potential danger and that the parties' interest in financial privacy outweighs the presumption of openness attached to the court's record. Nonetheless, the trial court failed to articulate any specific concerns regarding the minors, instead finding that 'protection of the minor children at issue' amounts to a compelling interest. *Kocher II*, however, suggests that unsubstantiated claims regarding the safety of a minor do not amount to a compelling interest sufficient to justify the sealing of a court's record. Indeed, a specific harm to which the grandchildren might be subjected should the documents be disclosed is unclear, and Appellees have never offered more than speculation as to how disclosure might affect the minor grandchildren. Nor do Appellees cite any case law supporting their contention that the involvement of minor children is a compelling interest sufficient to seal a court's record.

"Appellees also cite no authority for their contention that general financial privacy interests and Decedents' substantial wealth are sufficient compelling interests to seal the court records, nor do we read the salient Tennessee cases as supportive of this position. While Appellees assert that '[n]o Tennessee authority has specifically stated that financial privacy cannot be a compelling reason to seal judicial records[,]' we are unpersuaded by this argument. Indeed, we read the cases discussed herein to mean that the 'compelling interest' standard demands more than broad, vague allusions to general privacy interests or potential harm. *See, e.g.*, *Bottorff*, 2020 WL 2764414, at *9–10 (trial court's finding that sealing order would prevent 'harm and embarrassment' was insufficient to seal trial transcripts and exhibits); *Brentwood Acad.*, 578 S.W.3d at 54–55 (discussing that medical information, the information at issue in that case, is 'universally recognized as confidential'); *Paxton*, 509 S.W.3d at 258 ('A need is "compelling" if it is so great that irreparable harm or

injustice would result if it is not met; a reason may be "compelling" if time is of the essence; ... and the public interest in maintaining confidentiality of information may be "compelling" if the interest advanced by the promise of confidentiality would be eviscerated by compelled disclosure.') (some quotations omitted) (footnotes omitted). Further, unlike the sealed documents in *Brentwood Academy*, which were unrelated to the merits of the case and involved redactions of the sensitive information, the sealed records at issue here are scores of documents central to the case. *See id.*, 578 S.W.3d at 55 ('[I]f the information is both confidential and was not relied on by the court to make a judicial decision, then the public's right to such information is greatly diminished.').

"Finally, we cannot agree that Decedents' decision to dispose of their estates through trusts amounts to a compelling reason to seal the court's records, as this finding implies that parties may choose to have the records of their estate actions entirely sealed. It is well-settled, however, that a trial court should not seal its record simply because a party requests it be so. *See Kocher I*, 546 S.W.3d at 86 (quoting *Warwick*, 2013 WL 1788532, at *1 n.1) ('This Court has "caution[ed] trial courts not to seal records simply because a party requests this be done."').''

"The Appellees did not establish in the trial court a compelling interest justifying the seal on the Consent Agreement and the Final Judgment, the Petition to Set Aside, the Removal Documents, and the Affidavit of Will. Moreover, minimal if any efforts were taken to ensure the seal on these documents was narrowly tailored as required. The trial court's decision was therefore plainly against logic, reasoning, and the effect of the facts before the court. This is especially true in light of the fact that when reviewing a trial court's decision to seal its record, the 'decision is not accorded the deference that [the abuse of discretion] standard normally brings.' *Brentwood Acad.*, 578 S.W.3d at 53 (citing *Shane Group*, 825 F.3d at 306). In light of the significant and well-established interests underpinning the presumptive openness of court records, the trial court's decision caused prejudice not only to the complaining party but also the public at large. Accordingly, the trial court's decision to place the above-listed documents under seal is reversed, and the case remanded for further proceedings consistent with this opinion."

VI. Res Judicata; Dismissal; With or Without Prejudice?

A. For Failure to Prosecute

Regions Bank v. Prager, S.W.3d (Tenn., Bivins, 2021).

"In May 2014, Regions Bank ('the Plaintiff') filed a breach-of-contract lawsuit ('the first lawsuit') against Nathan I. Prager ('the Defendant') based on a promissory note executed by the parties in December 2011. On August 11, 2016, the trial court sua sponte entered an order dismissing the first lawsuit ('the initial order of dismissal') based on the Plaintiff's failure to prosecute. See Tenn. R. Civ. P. 41.02. Although the record on appeal does not contain the initial order of dismissal, the parties agree that the order did not state whether the dismissal was with or without prejudice. This fact is significant in that Rule 41.02(3) of the Tennessee Rules of Civil Procedure provides that, other than in the case of certain inapplicable exceptions, '[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41 ... operates as an adjudication upon the merits.'

"However, neither party apparently received notice that the case had been placed on the dismissal docket, and neither party was served with the initial order of dismissal. In fact, the parties continued to engage in discovery and settlement negotiations after entry of the initial order of dismissal.

"The Plaintiff first learned of the existence of the initial order of dismissal over ten months later on June 29, 2017, when it attempted to file a motion in the first lawsuit. Having learned of the order, the Plaintiff filed a motion to set aside the dismissal, presumably pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Because the motion to set aside is not in the record, it is unclear what grounds the Plaintiff relied on in seeking relief. The parties agree that the trial court denied the motion to set aside on July 25, 2017. However, there is no order to that effect in the record.

"The Plaintiff then filed a 'Motion to Reconsider' in the wake of the July 25, 2017 denial of its motion to set aside. The 'Motion to Reconsider,' like the motion to set aside, also is not in the record. What is in the record is an 'Order Denying Motion to Reconsider' and a transcript of the trial court's related verbal ruling, which was specifically incorporated by reference into the order. The trial court conducted a hearing on the 'Motion to Reconsider' on July 28, 2017, three days after it had denied the motion to set aside. The trial court's verbal ruling . . . [included] as follows:

> . . . . Now, I could grant your motion and set it on another dismissal docket, which we have active right now, and guess what, the case will be dismissed for lack of prosecution. If I set that order aside and put it on another dismissal docket, with notice given to you here and now verbally and in person, the case will be dismissed for lack of prosecution.
>
> Now with that said, *a dismissal for lack of prosecution under those circumstances is simply a dismissal pursuant to Rule 41. And unless it is designated, quote, with prejudice, underline the word, 'With' here, it is neither with nor without prejudice and that doesn't bar you from refiling the suit.*
>
> *We went through that when you were here over a month ago. And that's where we still stand. You're welcome to refile the suit.* If you had been engaged in settlement negotiations and the rest of that sort of thing, my common sense approach would be to sit down at a comfortable place at a table with our clients together and come to some resolution and get it out of the way, instead of going through all of the gymnastics, if you will, *of getting this case back into court*, so to speak.
>
> Your motion is denied.

"(Emphasis added). After the July 28, 2017 hearing, the trial court entered the corresponding 'Order Denying Motion to Reconsider' on August 4, 2017. In the order, the trial court confirmed its dismissal of the first lawsuit for failure to prosecute pursuant to Rule 41. The order did not specify whether the dismissal was with or without prejudice. However, mirroring the trial court's verbal ruling, the order expressly stated: 'Unless [the dismissal pursuant to Rule 41] is designated "with prejudice," [sic] it is neither with or without prejudice and that doesn't bar a refiling of the suit.' Unfortunately, the trial court's language clearly represents an erroneous interpretation of Rule 41.02(3).

"In light of the August 4, 2017 order, the Plaintiff refiled its lawsuit on August 8, 2017 ('the present lawsuit'). More than ten months later, in June 2018, the Defendant filed a motion to dismiss in

which he asserted that the matter previously had been adjudicated on the merits pursuant to Rule 41.02(3), and thus the Plaintiff's claim was barred under the doctrine of res judicata. The Plaintiff filed a response to the motion to dismiss in which the Plaintiff detailed the history of the first lawsuit. The Plaintiff argued that the most recent order dismissing the first lawsuit—the August 4, 2017 order—governed the issue of whether the dismissal was an adjudication on the merits. According to the Plaintiff, the August 4, 2017 order made clear that the trial court had not intended to dismiss the first lawsuit with prejudice, and thus the Plaintiff was free to refile its lawsuit.

"The trial court granted the Defendant's motion to dismiss the present lawsuit, finding simply that the motion was well-taken. Thereafter, the Plaintiff filed a 'Motion to Reconsider.' At the hearing on this motion, the trial court commented:

> Well, let me say this, I've read everything that you all have given me now for this additional go around in this case. And I -- a good bit of emphasis has been placed upon what I would characterize as a side bar comment by the Court, you're welcome to refile the lawsuit. And I've been known to make side bar comments that were off target in other matters and I apologize if that that [sic] misled counsel for the [P]laintiff in this particular case.
>
> But to characterize that side bar comment as a, quote, ruling, you know, would be inappropriate, I think. And again, having reviewed the entire matter now, yet again, and the Court is of the opinion that this motion is simply not well taken and cannot be granted and it will not be granted. I'll be careful about making side bar comments henceforth.

"On the Plaintiff's appeal, a divided panel of the Court of Appeals affirmed the trial court's judgment dismissing the present lawsuit based on the doctrine of res judicata. *Regions Bank v. Prager*, No. W2019-00782-COA-R3-CV, 2020 WL 2319168 (Tenn. Ct. App. May 11, 2020), perm. app. granted, (Tenn. Sept. 18, 2020). The majority noted that the initial order of dismissal did not specify whether the dismissal was with or without prejudice. Id. at *3. Looking to Rule 41.02(3), the majority recognized that '[i]n the absence of language that indicates otherwise, this dismissal was therefore "on the merits."' Id. (citing Tenn. R. Civ. P. 41.02(3))."

"We begin our analysis of whether the doctrine of res judicata bars the present lawsuit by recognizing that '[t]he prime function and purpose of the judicial system is to settle, determine and end differences between contending parties.' *Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn. 1991). The doctrine of res judicata, or claim preclusion, long has served that purpose. Res judicata 'bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the former suit.' *Elvis Presley Enters., Inc. v. City of Memphis*, 620 S.W.3d 318, 323–24 (Tenn. 2021) (quoting *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012)). The fundamental principle underlying the doctrine 'is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.' Restatement (Second) of Judgments, ch. 1, at 6 (Am. L. Inst. 1982)."

"The party asserting the defense of res judicata bears the burden of demonstrating:

> (1) that the underlying judgment was rendered by a court of competent jurisdiction;
> (2) that the same parties or their privies were involved in both suits;
> (3) that the same claim or cause of action was asserted in both suits; and
> (4) that the underlying judgment was final and on the merits.

Elvis Presley Enters., 620 S.W.3d at 324 (citing *Jackson*, 387 S.W.3d at 491); *Napolitano*, 535 S.W.3d at 496. We have observed that '[a] party asserting a res judicata defense may generally prove its defense with a copy of the judgment in the former proceeding.' *Jackson*, 387 S.W.3d at 492 n.10.

"Res judicata is an affirmative defense, see Tenn. R. Civ. P. 8.03, and as such ordinarily must be included in the defendant's answer, *Jackson*, 387 S.W.3d at 491. In certain circumstances, however, the defense may be raised in a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure. Id. at 491–92 ('For a Tenn. R. Civ. P. 12.02(6) motion to be used as a vehicle to assert an affirmative defense, the applicability of the defense must "clearly and unequivocally appear[ ] on the face of the complaint."' (alteration in original))."

"In this case, there is no dispute that the first three elements of the defense of res judicata are satisfied. The controversy centers upon the fourth element, whether the Defendant established that the trial court dismissed the first lawsuit 'on the merits.' The Defendant argues that the initial order of dismissal controls, that it was final, and that it operated as an adjudication on the merits pursuant to Rule 41.02(3). The Plaintiff argues that the August 4, 2017 order on its 'Motion to Reconsider' controls and that it, consistent with Rule 41.02(3), specified that the dismissal of the first lawsuit was not an adjudication on the merits."

"The initial order of dismissal was entered on August 11, 2016. After learning of the existence of the order on June 29, 2017, the Plaintiff promptly sought to set aside the order. Because the record does not contain the Plaintiff's motions in this regard, the precise grounds are unknown. However, the known circumstances point to excusable neglect under Rule 60.02 of the Tennessee Rules of Civil Procedure as the avenue for relief. . . . [Citations omitted] However, certain grounds for relief—including mistake, inadvertence, surprise or excusable neglect—must be sought 'not more than one year after the judgment, order or proceeding was entered or taken.' Tenn. R. Civ. P. 60.02. The circumstances of this case reflect that the Plaintiff sought relief from the initial order of dismissal within a year. Thus, after learning of the existence of the initial order of dismissal, the Plaintiff both promptly and timely sought relief from the order.

"The record contains the August 4, 2017 order in which the trial court addressed the Plaintiff's request for relief. In that order, the trial court confirmed its dismissal of the first lawsuit under Rule 41 for failure to prosecute. However, the order expressly stated, 'Unless it is designated "with prejudice," [sic] it is neither with or without prejudice and that doesn't bar a refiling of the suit.' The order also expressly incorporated the transcript of the trial court's verbal ruling, which is almost verbatim the language used in the written order.

"Rule 41.02(3) provides that, other than in certain identified circumstances, an involuntary dismissal operates as an adjudication on the merits '[u]nless the court in its order for dismissal otherwise specifies.' Obviously, the trial court's verbal ruling and the corresponding language of the August 4, 2017 order exhibit an incorrect reading of Rule 41.02(3). However, Rule 41.02(3) does not require that the trial court use special language. Rather, Rule 41.02(3) simply requires that the trial court 'manifest an intention on the record that the judgment shall not bar another action on the same claim.' Restatement (Second) of Judgments § 20 cmt. i. The trial court's August 4, 2017 order did just that in spite of its incorrect statement of the law.

"In finding that res judicata barred the present lawsuit, the trial court characterized its verbal ruling that the Plaintiff was free to refile its lawsuit as a 'side bar comment.' Like the Court of Appeals—both the majority and the dissent—we cannot agree with any suggestion that the language lacked significance. The August 4, 2017 order clearly states that the dismissal of the first lawsuit 'doesn't bar a refiling of the suit.' Furthermore, the language goes to the very heart of Rule 41.02(3) in that it manifests an intention that the involuntary dismissal of the first lawsuit not operate as an adjudication on the merits. These circumstances demonstrate that our courts must take care to articulate the governing law accurately.

"Having determined that the August 4, 2017 order reflects that the dismissal of the first lawsuit did not operate as an adjudication on the merits, we further conclude that the August 4, 2017 order is the 'operative order' for purposes of our res judicata analysis, even considering the initial order of dismissal as a final judgment. We previously have held that 'when consecutive "final" judgments are entered, a subsequent entry of judgment operates as the final judgment only if the subsequent judgment affects the parties' substantive rights or obligations settled by the first judgment.' *Ball v. McDowell*, 288 S.W.3d 833, 838 (Tenn. 2009). In this case, the August 4, 2017 order affected the parties' substantive rights or obligations in that it provided that the dismissal did not operate as an adjudication on the merits. As such, the Plaintiff's substantive rights in light of the August 4, 2017 order included the ability to refile its lawsuit rather than appeal the dismissal."

"For the foregoing reasons, we reverse the decision of the Court of Appeals and vacate the judgment dismissing the present lawsuit. We conclude that the involuntary dismissal of the first lawsuit for failure to prosecute did not operate as an adjudication on the merits because the record reflects that the trial court, in its August 4, 2017 order, specified that it did not. Accordingly, we hold that the present lawsuit is not barred by the doctrine of res judicata. We reinstate the present lawsuit and remand the case to the trial court for further proceedings."

B. For Failure to Exhaust Administrative Remedies

Elvis Presley Enterprises, Inc. v. City of Memphis, 620 S.W.3d 318 (Tenn., Page, 2021).

"This case involves a dispute over a proposal to build a 6,200-seat theater/arena in Memphis, Tennessee. The appellants are Elvis Presley Enterprises, Inc., EPPF, LLC, and Guesthouse at Graceland, LLC (collectively, 'EPE'). The appellees are the City of Memphis, Shelby County, Tennessee, and Memphis Basketball, LLC (collectively, 'Appellees').

"Though not a party to this action, another relevant entity—an industrial development corporation—is Economic Development Growth Engine for Memphis and Shelby County ('EDGE'). EDGE is a Tennessee nonprofit corporation that, among other things, considers applications for its Tax Increment Financing ('TIF') program to promote industrial development. If EDGE's Industrial Development Board votes to do so, EDGE recommends applications for TIF to the Shelby County Commission and Memphis City Council for final approval. Rather than providing direct funding, the TIF program allows developers to share in increased property tax revenues to be received from the surrounding area of the developer's project.

"In 2001, prior to the events leading to the present dispute, Memphis Basketball entered into an agreement with the City and the County regarding the construction and use of the FedEx Forum and the relocation of the Grizzlies to Memphis ('Arena Agreement' or 'Agreement'). Under the Agreement, Memphis Basketball must pay rent to the City and County and is responsible for

covering costs, expenses, and operating losses incurred in the operation of the FedEx Forum. Pertinent to this case, the Arena Agreement restricts the City from providing tax incentives or other benefits for facilities that would compete with the FedEx Forum."

"In 2014, EPE undertook a project to redevelop Graceland, which consists of retail property owned and operated by EPE and is considered a tourist destination in the Memphis area. Specifically, EPE's plan to revitalize Graceland consisted of the construction of a 450-room hotel equipped with convention and concert facilities, construction of a theater, and upgrades to museum facilities and an archive studio ('Graceland Project'). To make the Graceland Project economically feasible, EPE applied for TIF through EDGE, requesting a property tax benefit whereby EPE would receive from the City and County fifty percent of the excess property taxes from the 'plan area' (as defined by EPE's proposed economic plan) over the 'base tax' (also as defined in EPE's proposed plan). EPE secured a recommendation from EDGE for its Graceland Project TIF, and thereafter, it received approval by both the City and the County.

"In 2017, EPE presented to EDGE a supplemental plan to its original 2014 Graceland Economic Plan ('Supplemental Plan'). Therein, EPE requested approval of certain amendments to its project, including the construction of a 6,200-seat arena, among other things. To finance these amendments, which EPE refers to as the 'next phase of The Graceland Project,' the Supplemental Plan also included a request to have the existing TIF increased from fifty percent to sixty-five percent of excess property taxes over the base tax.

"According to EPE, both the City and the County initially expressed support of the Supplemental Plan. However, EPE claims that Memphis Basketball contacted the City while the request for the Supplemental Plan was still pending and asserted that granting TIF for the proposed arena would violate the Non-Participation Provision of the Arena Agreement. EPE was unable to reach an agreement with the City and Memphis Basketball as to the issue of the alleged conflict between the requested TIF and the Agreement. Consequently, consideration of EPE's Supplemental Plan, which was scheduled for EDGE's September 2017 board meeting, was removed from the agenda. According to EPE, EDGE refused to move forward with the TIF approval process due to Memphis Basketball's objection.

"In November 2017, EPE filed a complaint against Appellees in the Chancery Court for Shelby County for declaratory judgment, intentional interference with business relations, and other injunctive and equitable relief ('EPE I'). Each of the three Appellees filed a separate motion to dismiss, and by written order entered February 16, 2018, the trial court granted the motions. . . ."

"On April 5, 2018, following a written request by EPE, the EDGE board voted to conditionally recommend approval of the Supplemental Plan to the City and County, including the accompanying TIF increase. . . . The following month, on May 8, 2018, the City Council declined to vote on the Supplemental Plan. On June 4, 2018, however, the County Commission voted to conditionally approve EDGE's recommendation, adopting the same contingency included in EDGE's resolution."

"On June 29, 2018, EPE filed a second complaint in the Shelby County Chancery Court from which this appeal arises ('EPE II'). In contrast to EPE I, the complaint in EPE II sought only a declaratory judgment that approving the Supplemental Plan's TIF does not violate the Arena Agreement in order to satisfy the contingencies to EDGE's and the County Commission's conditional approvals. Again, the Appellees filed three separate motions to dismiss the complaint.

In a January 15, 2019 order, the trial court granted the motions to dismiss, concluding that EPE lacked standing to bring the second complaint. EPE timely appealed the trial court's order.

"In a divided opinion, the Court of Appeals affirmed the trial court's decision to dismiss the complaint in EPE II. *Elvis Presley Enterp., Inc. v. City of Memphis*, No. W2019-00299-COA-R3-CV, 2019 WL 7205894, at *7 (Tenn. Ct. App. Dec. 26, 2019), *perm. app. granted* (Tenn. July 21, 2020). The majority opinion concluded that the second complaint was barred by res judicata, and therefore declined to address the issue of standing. *Id.* Judge J. Steven Stafford filed a separate dissenting opinion in which he concluded that res judicata should not bar EPE's second complaint. *Id.* at *8 (Stafford, J., dissenting). Judge Stafford expressed that he would have proceeded to consider whether the trial court correctly dismissed EPE's complaint for lack of standing. *Id.* at *11.

"We granted the ensuing application for permission to appeal to consider whether the Court of Appeals, relying on res judicata, properly affirmed the trial court's dismissal of EPE's complaint."

"Our courts have recognized that '[a]s a general matter, a lawsuit filed before the exhaustion of available administrative remedies is subject to dismissal,' but such dismissal 'is, of course, not a decision on the merits for the purposes of res judicata.' *Pendleton v. Mills*, 73 S.W.3d 115, 129 (Tenn. Ct. App. 2001). This position is 'consistent with the federal rule that the dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits' for purposes of res judicata. *Heath v. Cleary*, 708 F.2d 1376, 1380 n.4 (9th Cir. 1983) (citing authority); *see also* 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Jurisdiction* § 4436 (Edward H. Cooper 3d ed. Oct. 2020 Update) ('[C]laim preclusion is not proper, following dismissal on grounds of primary jurisdiction or failure to exhaust administrative remedies, or following a decision that simply remands a case for further administrative proceedings.').

"The trial court here, in part, couched its dismissal of EPE I based on a lack of standing. However, the trial court made clear that ultimately it was dismissing EPE I based on a failure to exhaust administrative remedies, specifically stating that 'since EPE has not exhausted its administrative remedies, EPE lacks standing.' The trial court further stated that before it 'should consider the issue, EPE must have EDGE formally rule that they have rejected the Supplemental Plan and that the City Council and County Commission formally deny EPE's appeal of EDGE'S decision.' The trial court also emphasized that it was not ruling on the merits of the underlying case, stating '[t]o be clear, this Court makes no ruling as to the correct interpretation of the Non-Participation Provision of the Arena Use Agreement.'

"Appellees have argued that the dismissal of EPE I was an adjudication on the merits under Tennessee Rule of Civil Procedure 41.02(3), which states:

> [u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

"As just discussed, however, our courts have recognized that a dismissal for failure to exhaust administrative remedies is not an adjudication on the merits for purposes of res judicata, and the trial court's order made clear that it was dismissing the case for failure to exhaust administrative remedies and was not ruling on the merits of the underlying case. Thus, the trial court's order

sufficiently stated that its order of dismissal was not an adjudication on the merits for purposes of Rule 41.02(3)."

"Having determined that EPE II is not barred by res judicata, the parties invite us to address whether the trial court erred in dismissing EPE II for lack of standing, an issue that was pretermitted by the holding of the Court of Appeals. We decline to do so and remand to the Court of Appeals for consideration of the standing issue. *See, e.g.*, *Moss v. Shelby Cnty. Civ. Serv. Merit Bd.*, 597 S.W.3d 823, 834 (Tenn. 2020) (remanding to the Court of Appeals for consideration of the issues pretermitted by its decision); *StarLink Logistics Inc. v. ACC, LLC*, 494 S.W.3d 659, 672 (Tenn. 2016) (same)."

VII. Summary Judgment; Trial Court Must State Grounds for Granting

Regions Commercial Equipment Finance LLC v. Richards Aviation Inc., No. W2020-00408-COA-R3-CV (Tenn. Ct. App., Stafford, May 6, 2021).

"In this second appeal, Appellant appeals the trial court's grant of summary judgment on the basis that the ruling is not the product of the trial court's independent judgment. Appellee argues that the trial court's ruling can be affirmed on a different basis, as the trial court erred in denying its motion to alter or amend the judgment to include this additional basis for the judgment in its favor. We agree that the trial court's order does not comply with *Smith v. UHS of Lakeside*, 439 S.W.3d 303 (Tenn. 2014), and so we once again vacate the grant of summary judgment. We decline, however, to reverse the trial court's denial of Appellee's motion to alter or amend."

"On February 6, 2020, the trial court's law clerk emailed the parties that the court had reviewed the record and the proposed orders and had chosen to enter Regions' order in its entirety. Specifically, the email stated that

> [The trial court] has reviewed the record, the Court of Appeals opinion and the proposed orders presented to the Court.... [Regions'] Proposed Findings of Fact and Conclusions of Law in Support of Order Granting Summary Judgment articulately state his reasons for granting Summary Judgment. An Amended Order including these findings and conclusions would entirely resolve the appellate court's concerns by bringing the trial court ruling into compliance with Tenn. R. Civ. P. 56.04 by specifically addressing [Richards'] affirmative defenses.

"No further discovery was allowed. Regions was directed to resubmit its proposed order as an amended order. Regions thereafter submitted a proposed order that incorporated the law clerk's above statements, as well as the proposed findings and conclusions that had previously been submitted by Regions. Although Richards did not consent to the form or substance of the order, the trial court signed the amended order on February 17, 2020. The order entered by the trial court was in all respects identical to the order proposed by Regions. Richards again appealed."

"The dispositive issue in this case is whether the trial court's order is a product of its independent judgment. Summary judgment is governed by Rule 56 of the Tennessee Rules of Civil Procedure. Importantly, Rule 56.04 states: 'The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling.' In *Smith v. UHS of Lakeside*, 439 S.W.3d 303 (Tenn. 2014), the Tennessee Supreme Court held that Rule 56.04 requires that an order granting or denying summary judgment include a rationale for

the ruling that is both adequately explained and is the product of the trial court's independent judgment. *Id.* at 314. In *Smith v. UHS of Lakeside*, the trial court orally granted summary judgment without providing any basis for its decision, directing counsel for one party to draft the trial court's order and provide the 'rationale for the [c]ourt's ruling.' *Id.* at 317. The Tennessee Supreme Court held that the trial court had abrogated its 'high judicial function' to provide the basis for its ruling and that the basis provided by the party-prepared order would not be imputed to the trial court. *Id.* at 317–18. Thus, 'the trial court, upon granting or denying a motion for summary judgment, [must] state the grounds for its decision before it invites or requests the prevailing party to draft a proposed order.' *Id.* at 316. In reaching this result, the Tennessee Supreme Court noted that intermediate appellate courts need not adhere to our prior practice of 'conduct[ing] archeological digs' of the record and remanding 'the case only when their practiced eyes cannot discern the grounds for the trial court's decision.' *Id.* at 314 (footnotes omitted). Rather, the court noted that in addition to issues of judicial economy, questions of whether we should soldier on in spite of the trial court's failure to comply with Rule 56.04 should also take into account 'the fundamental importance of assuring that a trial court's decision either to grant or deny a summary judgment is adequately explained and is the product of the trial court's independent judgment.' *Id.*

"Richards argues that the trial court's order was not the product of its independent judgment, but rather was a verbatim copy of the order proposed by Regions. We must agree. Here, the trial court made no additions, omissions, or alterations to the order proposed by Regions. Instead, the only basis given by the trial court for its decision prior to the order's entry came not from the trial court, but its law clerk, who wrote the parties' that Regions' order 'articulately state[d] [the trial judge's] reasons for granting Summary Judgment.' Respectfully, however, the trial court never gave any reasons to the parties for its decision to grant summary judgment from which Regions was to glean the trial court's reasoning. In the absence of that reasoning from the trial court, the order simply does not withstand scrutiny under either Rule 56.04 or *Smith v. UHS of Lakeside*. Instead, as the Tennessee Supreme Court clearly held, Rule 56.04 'requires the trial court, upon granting or denying a motion for summary judgment, to state the grounds for its decision before it invites or requests the prevailing party to draft a proposed order.' *Id.* at 316. The trial court here did not follow this mandate, but rather allowed counsel to provide the reasoning for its decision, much like in *Smith v. UHS of Lakeside*.

"Regions argues, however, that the record does not actually cast doubt that the trial court conducted its own independent review of the record in reaching its decision. *See id.* at 316 ('Accordingly, reviewing courts have declined to accept findings, conclusions, or orders when the record provides no insight into the trial court's decision-making process, or when the record "casts doubt" on whether the trial court "conducted its own independent review, or that the opinion is the product of its own judgment[.]"') (citation omitted). In support, Regions asks us to consider, inter alia, the trial court's later ruling on its motion to alter or amend. We respectfully disagree. First, regardless of the Tennessee Supreme Court's observations of the tactics taken by reviewing courts prior to its decision, the holding in *Smith v. UHS of Lakeside* clearly requires the trial court to state the basis for its ruling 'before' an order is prepared by counsel. *Id.* Indeed, our prior opinion clearly explained this requirement, noting that '[t]he trial court is *required* to state the grounds for its decision before requesting that a party prepare a proposed order.' *Regions I*, 2019 WL 1949633, at *7 (emphasis added) (citing *Smith*, 439 S.W.3d at 316). Although the law clerk's email and the amended order granting summary judgment both reflect that the trial court reviewed the opinion in *Regions I*, this mandate was apparently overlooked. Moreover, the cited statements by the trial court, either before or after the entry of the amended order, do no more to illuminate the trial court's reasoning than the law clerk's earlier email. And the Tennessee Supreme Court has stressed that it

is of 'fundamental importance' to ensure that trial courts' orders are the product of their independent judgment, so as to 'assure the parties that the trial court independently considered their arguments.' *Smith*, 439 S.W.3d at 316. Unfortunately, the trial court's reluctance to state even a single legal or factual basis for its decision was an abdication of that fundamental responsibility. As such, these conclusory and non-specific statements of agreement with Regions' position do not excuse the clear failure to comply with *Smith v. UHS of Lakeside* that is present in this case. Consequently, the trial court's order must once again be vacated for the entry of a proper order granting or denying summary judgment that (1) explains the reasoning for the decision; and (2) is a product of the trial court's independent judgment."

VIII. Judgments

A. Interest

Tennessee Judgment Interest Rates (as published on the website of the Administrative Office of the Courts).

The interest rate on state court judgments, pursuant to the requirements of T.C.A. §§ 47-14-105 and -121, has remained at 5.25% in 2021:

7/1/2021 Rate - 5.25%
1/1/2021 Rate - 5.25%
7/1/2020 Rate - 5.25%
1/1/2020 Rate - 6.75%
7/1/2019 Rate - 7.50%
1/1/2019 Rate - 7.45%
7/1/2018 Rate - 7.00%
1/1/2018 Rate - 6.50%
7/1/2017 Rate - 6.25%
1/1/2017 Rate - 5.75%
7/1/2016 Rate - 5.50%
1/1/2016 Rate - 5.50%
7/1/2015 Rate - 5.25%

B. Execution; Homestead Exemption

Chapter 301, Public Acts 2021, amending T.C.A. § 26-2-301 eff. Jan. 1, 2022.

The basic homestead exemption upon real property for an individual has been increased from $5,000 to $35,000. The exemption on jointly owned property has been increased from $7,500 to $52,500.

IX. Rule 60 Motion Unsuccessful Regarding Settlement Announced in Court but Later Repudiated

MC Builders, LLC v. Reveiz, No. E2019-01813-COA-R3-CV (Tenn. Ct. App., McClarty, Nov. 5, 2020).

"On September 1, 2015, MC Builders, LLC ('Plaintiff') filed this action against Fuad Reveiz, Ernest Hofferbert, and Reveiz and Associates, LLC (collectively 'Defendants'), alleging breach of contract and fraudulent misrepresentation. The underlying facts of the claims are not at issue on appeal. On July 6, 2016, Plaintiff filed a motion for summary judgment. The court denied the motion following a hearing, and the case was set for a trial date of July 11, 2019. Meanwhile, Defendants cycled through two law firms. Upon the second law firm's motion and a finding that 'continued representation by counsel has been rendered unreasonably difficult,' the trial court allowed counsel to withdraw, ordered a continuance so that Defendants could retain new counsel or proceed pro se, and reset the trial date to July 25, 2019, 'regardless of whether Defendants obtain new counsel.' Counsel from a third law firm entered an appearance for Defendants on July 12, 2019.

"The record shows that on the morning of trial, July 25, 2019, the court invited counsel for both parties to chambers to meet Defendants' new counsel for the first time and to discuss the anticipated length of the proceedings, breaks, lunch time, and the like. At this time, counsel requested to speak to each other outside of chambers. After over an hour's discussion, counsel told the bailiff that they had settled this case. As set forth in the statement of the evidence, the parties entered the courtroom, the bailiff formally opened court, and the trial court received the parties' announcement of their settlement before hearing any proof. Then, all parties were sworn in. No motions were raised before the parties announced their settlement. Each Defendant testified that it was voluntarily entering into the settlement agreement, on the advice of counsel, and each asked the trial court to accept the settlement agreement. Upon the trial court's inquiry, Defendants' counsel affirmed that his clients voluntarily consented to the settlement agreement and that the trial court should accept it. The trial court accepted the settlement agreement and recorded the terms of the settlement in its notes.

"On August 20, 2019, Defendants' counsel filed a motion pursuant to Tennessee Rule of Civil Procedure 60.02 to withdraw consent from the settlement agreement and to set a trial. On August 30, 2019, the trial court adopted the settlement agreement as the order of the court. The trial court further ordered that a monetary judgment in the parties' agreed amount plus ten percent per annum prejudgment interest, running from the date the complaint was filed, be entered against Defendants and in favor of Plaintiff, as the parties agreed in the settlement. Defendants did not sign the order. Pursuant to Eleventh Judicial District Local Rule of Practice 5.02 and 5.03, the trial court waived the requirement that Defendants' counsel sign the order because it 'reflected precisely the agreement the Parties testified to in Court.'

"On September 3, 2019, the trial court heard arguments on Defendants' Rule 60.02 motion. The record contains the transcript of this hearing. Following the hearing, the trial court found that all parties were represented by counsel when, by their sworn testimony, they agreed to the terms of the settlement. Accordingly, the trial court denied Defendants' Rule 60.02 motion by order entered September 26, 2019. Defendants appealed from this order on October 9, 2019."

"Tennessee Rule of Civil Procedure 60.02 provides:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

> equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment...."

"On appeal, Defendants do not state under which subsection of Rule 60.02 they sought relief. Nor is this apparent from their Rule 60.02 motion filed on August 20, 2019 in the trial court. Defendants contend that the settlement agreement was not final until the trial court's entry of the order confirming the agreement, at which time the court had notice that they no longer consented to its entry. They concede that the agreement was announced under oath in open court prior to their withdrawal of consent. Defendants claim, however, that because there is no transcript or recording of the proceeding, the trial court improperly adopted the parties' settlement after they objected to it in their Rule 60.02 motion. For this reason, Defendants contend that the trial court's August 30, 2019 order 'is invalid and subject to reversal.' Although we observe that the notice of appeal was filed on October 9, 2019, and acknowledge Plaintiff's arguments on this point, we will address Defendants' argument as to whether the trial court improperly adopted the parties' settlement agreement."

"In the instant case, the terms of the parties' settlement clearly received the 'sanction of the court' at the time of their consent. *Harbour*, 732 S.W.2d at 599. No one disputes that the announcement of the parties' settlement was made through the sworn testimony of each of them, or that the 'terms of the agreement in this case were read in open court to the Chancellor who personally asked each of the parties if they consented to the settlement.' *REM Enterprises, Ltd. v. Frye*, 937 S.W.2d 920, 922 (Tenn. Ct. App. 1996), *reh'g granted on other grounds*, 958 S.W.2d 747 (Tenn. Ct. App. 1996). Defendants correctly cite the rule that:

> the terms of [a] settlement should be stated to the court and taken down by the reporter or otherwise reduced to writing so as to prevent a dispute as to what are the terms of the settlement, and that an oral stipulation for compromise and settlement made in open court in the presence of the parties and preserved in the record of the court is as binding as a written agreement.

"*Envtl. Abatement*, 27 S.W.3d at 539–40. Yet they argue that the above rule and the relevant caselaw stand for the proposition that, absent a transcript or audio recording of the proceedings, a settlement announced in open court is per se invalid. We disagree, especially considering the facts of this case. Defendants acknowledge that the trial court reduced the specific terms of the parties' settlement agreement to writing through the court's notes taken during the proceeding and handwritten by the court into its order adopting the settlement. Importantly, Defendants do not dispute that the trial court's August 30, 2019 order accurately reflects the terms of the settlement agreement they testified to and announced in open court. All of this was recounted without dispute in the transcript of the hearing on Defendants' Rule 60.02 motion. With the above considerations in mind, we find no error in the trial court's decision to enter the August 30, 2019 order.

"'Rule 60.02 cannot be utilized to save a party from choices he has deliberately made, or to protect a party who has failed to protect his own interests.' *Cathey v. City of Dickson*, No. M2001-02425-COA-R3-CV, 2002 WL 970429, at *7 (Tenn. Ct. App. May 10, 2002) (citing *Banks v. Dement Const. Co.*, 817 S.W.2d 16, 19 (Tenn. 1991)). Here, we discern no abuse of discretion in the denial of Defendants' Rule 60.02 motion. Accordingly, we affirm."

X. Allocation of Costs; Federal Court

City of San Antonio, Texas v. Hotels.com, L.P., 141 S.Ct. 1628 (U.S., Alito, 2021).

"The City of San Antonio—acting on behalf of a class of 173 Texas municipalities—was awarded a multi-million dollar judgment in Federal District Court against a number of popular online travel companies (OTCs) over the calculation of hotel occupancy taxes. To prevent execution on that judgment pending appeal, the OTCs obtained supersedeas bonds securing the judgment. See Fed. Rule Civ. Proc. 62. On appeal, the Court of Appeals determined that the OTCs had not underpaid on their taxes. In accordance with Federal Rule of Appellate Procedure 39(d), the OTCs filed with the circuit clerk a bill of costs seeking appellate docketing fees and printing costs, which were taxed without objection. The OTCs then filed a bill of costs in the District Court seeking more than $2.3 million in costs—primarily for premiums paid on the supersedeas bonds that are listed in Rule 39(e) as 'taxable in the district court for the benefit of the party entitled to costs.' San Antonio objected and urged the District Court to exercise its discretion to decline to tax all or most of those costs. The District Court held that it had no discretion to deny or reduce those costs under Circuit precedent. The Court of Appeals affirmed, reasoning that the District Court lacked discretion to deny or reduce appellate cost awards.

"Held: Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule."

"Rule 39 creates a cohesive scheme for taxing appellate costs that gives discretion over the allocation of appellate costs to the courts of appeals. Rule 39(a) sets out default rules for cost allocation based on the outcome of an appeal and provides that these default rules apply unless the court 'orders otherwise.' Nothing in the broad language of Rule 39(a) suggests that a court of appeals may not divide up costs in such an order. Quite the opposite, Rule 39(a)(4) suggests that a court of appeals may apportion costs based on each party's relative success when the results of the appeal are something other than complete affirmance or reversal. Rule 39(e) points in the same direction; it addresses appellate costs taxable in the district court for the benefit of 'the party entitled to costs' under the rule (not to a party entitled to seek costs). The court of appeals' determination that a party is 'entitled' to a certain percentage of costs would mean little if the district court could take a second look at the equities. San Antonio contends that the plain text of subsection (e) providing for costs 'taxable in the district court' vests district courts with discretion over cost allocations, but that interpretation reads too much into the term 'taxable' and ignores the history of the Rule. The real work done by the phrase 'taxable in the district court' is in specifying the court in which these costs are to be taxed."

"The Court is not persuaded that applying the plain text of Rule 39 will create the problems that San Antonio envisions. First, awarding costs incurred prior to appeal is different from taxing appellate costs. Limiting a district court's discretion to allocate appellate costs will not cause confusion with the equitable discretion district courts exercise with respect to certain costs incurred in the district court that are customarily taxed under Federal Rule of Civil Procedure 54(d). Second, there is no evidence to suggest that appellate courts have struggled to allocate appellate costs due to factual disputes better handled by the district court. And nothing in the Court's decision should be read to cast doubt on the approach taken by some courts of appeals to delegate this responsibility to the district court. See, *e.g., Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616, 626. Third, it makes sense for the district court to tax the costs in Rule 39(e) because those costs relate to events in that court. This process requires more than a 'ministerial order,' as San Antonio would have it,

because the district court will ensure that the amount of appellate costs requested is 'correct,' 28 U.S.C. § 1924, and that the cost submissions otherwise comply with the relevant rules and statutes. Finally, that the current rules and relevant statutes could specify more clearly the procedure that a party should follow to obtain review of their objections to Rule 39(e) costs in the court of appeals does not mean that a district court can reallocate those costs. A simple motion 'for an order' under Rule 27 should suffice to seek an order under Rule 39(a), and the Court does not foreclose parties from raising their arguments through other procedural vehicles."

XI. Statute Allowing Appellate Review of Remand Order Permits Review of Entire Order

BP P.L.C. v. Mayor and City Council of Baltimore, 141 S.Ct. 1532 (U.S., Gorsuch, 2021).

"Baltimore's Mayor and City Council (collectively City) sued various energy companies in Maryland state court alleging that the companies concealed the environmental impacts of the fossil fuels they promoted. The defendant companies removed the case to federal court invoking a number of grounds for federal jurisdiction, including the federal officer removal statute, 28 U.S.C. § 1442. The City argued that none of the defendants' various grounds for removal justified retaining federal jurisdiction, and the district court agreed, issuing an order remanding the case back to state court. Although an order remanding a case to state court is ordinarily unreviewable on appeal, Congress has determined that appellate review is available for those orders 'remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of [Title 28].' § 1447(d). The Fourth Circuit read this provision to authorize appellate review only for the part of a remand order deciding the § 1442 or § 1443 removal ground. It therefore held that it lacked jurisdiction to review the district court's rejection of the defendants' other removal grounds.

"Held: The Fourth Circuit erred in holding that it lacked jurisdiction to consider all of the defendants' grounds for removal under § 1447(d)."

"The ordinary meaning of § 1447(d)'s text permits appellate review of the district court's entire remand order when a defendant relies on § 1442 or § 1443 as a ground for removal. The relevant portion of § 1447(d) provides that 'an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal.' The 'order remanding a case' here rejected *all* of the defendants' grounds for removal because (subject to exceptions not applicable here) the district court was not at liberty to remove the City's case from its docket until it determined that it lacked any authority to entertain the suit. See, *e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 356, 108 S.Ct. 614; see also *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72, 134 S.Ct. 584 ('[C]ourts are obliged to decide cases within the scope of federal jurisdiction' assigned to them). And this case was removed 'pursuant to' § 1442 because the defendants relied on § 1442 as a ground for removal when satisfying the requirements of § 1446. It makes no difference that the defendants removed the case 'pursuant to' *multiple* federal statutes. The general removal statute contemplates this possibility when it speaks of actions 'removed *solely* under' the diversity jurisdiction statute. § 1446(b)(2)(A) (emphasis added). And § 1447(d) contains no comparable language limiting appellate review to cases removed *solely* under § 1442 or § 1443. The parties' dueling observations that Congress knows how to authorize appellate courts to review every issue in a remand order, see, *e.g.,* 18 U.S.C. § 3595(c)(1), and that Congress also knows how to limit appellate review to particular 'questions' rather than the whole 'order,' see, *e.g.,* 28 U.S.C. § 1295(a)(7), confirms the wisdom of focusing on the language Congress *did* employ. The City's novel contention that the defendants

never really removed the case pursuant to § 1442 because no federal court here held that the statute indeed authorized removal is mistaken and has never been adopted by any court."

"The Court's most analogous precedent, *Yamaha Motor Corp., U. S. A. v. Calhoun*, 516 U.S. 199, 116 S.Ct. 619, resolves any remaining doubt about the best reading of § 1447(d). That case involved a dispute about the meaning of § 1292(b)—a statute allowing a district court to certify 'an order' to the court of appeals if it 'involves a controlling question of law.' The Court held that the statute's grant of appellate review for the 'order,' meant the entire order was reviewable, not just the part of the order containing the 'controlling question of law.' *Id.,* at 205, 116 S.Ct. 619. The City suggests that the statute's use of the word 'involves' shows that the reviewable issues on appeal can be broader than the certified question. But nothing in *Yamaha* turned on the presence of the word 'involves.' Instead, as here, the Court focused on the statute's use of the word 'order.' The Court's decisions in *Murdock v. Memphis*, 20 Wall. 590, and *United States v. Keitel*, 211 U.S. 370, 29 S.Ct. 123, do not support the City because both decisions were driven by concerns unique to their statutory contexts; their reasoning is not easily generalizable to other jurisdictional statutes; and neither comes nearly as close to the mark as *Yamaha*. The Court's decisions in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 129 S.Ct. 1862, and *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584—which *permitted* rather than foreclosed appellate review of certain remand orders—similarly do not help the City's cause because they say nothing about the part of § 1447(d) at issue today. Finally, the City argues that, when Congress amended § 1447(d) to add the exception for federal officer removal under § 1442 to the existing exception for civil rights cases under § 1443, Congress ratified lower court decisions that had read the prior version of § 1447(d) as permitting review only of the part of the remand order addressing § 1443's civil rights removal ground. It is most unlikely that a smattering of lower court opinions could ever represent a 'broad and unquestioned' judicial consensus that Congress must have been aware of and is presumed to have endorsed. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 349, 125 S.Ct. 694. And it certainly cannot do so where, as here, 'the text and structure of the statute are to the contrary.' *Id.,* at 352, 125 S.Ct. 694."

"The City's policy arguments do not alter the result because 'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive, *Kloeckner v. Solis*, 568 U.S. 41, 56, n. 4, 133 S.Ct. 596. While the City argues that allowing exceptions to the bar on appellate review of remand orders will impair judicial efficiency, that is the balance that Congress struck for cases removed pursuant to § 1442 or § 1443. And allowing full appellate review may actually help expedite some cases. The City's contention that the Court's reading of § 1447(d) will invite defendants to frivolously add § 1442 or § 1443 to their other grounds for removal has already been addressed by other statutes and rules, such as § 1447(c), which permits a district court to order a party to pay the costs and expenses of removal, and Federal Rule of Civil Procedure 11(b)–(c), which authorizes courts to sanction frivolous arguments. The Court declines to consider the merits of the defendants' removal grounds and remands for the Fourth Circuit to consider those matters in the first instance."

XII. 2021 Changes to Tennessee Rules of Appellate Procedure

A. Interlocutory Appeal; Specific Issues Certified

Tennessee Rule of Appellate Procedure 9(b) amended eff. July 1, 2021.

"(b) Procedure in the Trial Court. The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the specific issue or issues the court is certifying for appeal and the reasons for its opinion. The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal. The appellate court may in its discretion allow an appeal from the order."

"Advisory Commission Comment [2021]
Rule 9(b) is amended to add a requirement that a trial court's order certifying as appealable an interlocutory order of the court shall state the specific issue or issues for consideration by the appellate court. The word "thereupon" is deleted from the last sentence of the Rule as surplusage."

B. Filing of Papers; Commercial Delivery Service

Tennessee Rule of Appellate Procedure 20(a) amended eff. July 1, 2021.

"(a) Filing. Papers required or permitted to be filed in the appellate court shall be filed with the clerk. Filing shall not be timely unless the papers are received by the clerk within the time fixed for filing or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing. Filing will also be timely if placed for delivery with computer tracking, either through a commercial delivery service or the United States Postal Service, within the time fixed for filing.

"Official drop boxes for filing of papers shall be located at the Supreme Court Buildings in Knoxville, Nashville, and Jackson and shall be maintained by agents of the Clerk of the Appellate Courts. These boxes shall be opened at the beginning of each business day. Papers found therein will be deemed filed on the last business day preceding opening of the box."

"Advisory Commission Comment [2021]
Subdivision (a) is amended to clarify that, as with commercial delivery services, filing is timely if placed for delivery with computer tracking with the United States Postal Service within the time fixed for filing."

XIII. 2021 Proposed Amendments to Federal Rules of Appellate and Civil Procedure

The Proposed rules, which are anticipated to go into effect December 1, 2021, include changes to Rule 3, Notice of Appeal, and Rule 6, Appeal in a Bankruptcy case. They can be found at: https://www.uscourts.gov/sites/default/files/congressional_package_-_april_2021_0.pdf

ALTERNATIVE DISPUTE RESOLUTION

I. Mediation

A. Enforcement of Mediated Agreement

Moorehead v. Tennessee Farmers Mutual Insurance Company, No. M2020-01319-COA-R3-CV (Tenn. Ct. App., Armstrong, July 13, 2021).

"On May 29, 2017, Appellants Debra and Jerry Moorehead were injured in a car accident. The at-fault driver was 16 years old at the time of the accident. On October 13, 2017, the Mooreheads filed suit against the driver and his parents, Danny and Jennifer Crabtree. Both the Crabtrees and the Mooreheads were insured by Farmers. The parties attended mediation on May 29, 2020. At mediation, the Mooreheads and the Crabtrees were represented by their own counsel. In addition, the Crabtrees' underlying insurance carrier, Farmers, was represented by Todd Bobo, and the Mooreheads' uninsured motorist carrier, Tennessee Farmers ('Farmers UM'), was represented by Walter Nichols. The parties arrived at a 'Mediation Agreement' (the 'Agreement'), which provided:

> WHEREAS, the parties are engaged in litigation in the above-styled matter, which litigation involves a claim for damages as a result of an automobile accident that occurred in Moore County, Tennessee, on May 29, 2011.
>
> WHEREAS, as a result of Mediation conducted on this date, the parties have now resolved all matters of dispute between themselves and desire to execute this Mediation Agreement for the purpose of confirming this settlement.
>
> NOW, THEREFORE, FOR AND IN CONSIDERATION of the premises above stated, the parties do hereby agree as follows:
>
> 1. The Crabtree[s'] insurance company, Tennessee Farmers, will pay Debra Moorehead $50,000.00 for full and complete settlement of the case.
> 2. The Moorehead[s'] UM carrier, Tennessee Farmers, will pay Debra Moorehead $50,000.00 for full and complete settlement of the case.
> 3. The Crabtree[s'] insurance company, Tennessee Farmers, will pay Jerry Moorehead $50,000.00 for full and complete settlement of the case.
> 4. The Moorehead[s'] UM carrier, Tennessee Farmers, will pay Jerry Moorehead $50,000.00 for full and complete settlement of the case.
> 5. The Crabtrees, individually, will pay Debra Moorehead $100,000.00 for full and complete settlement of the case. The Crabtrees will have 60 days from the date of this agreement to pay the amount in full.
> 6. Upon payment of said amounts, the plaintiffs will, execute a release supplied by the defendants and/or their insurance carrier. Each party shall bear its own attorney[']s fees and expenses. . . ."

"On September 2, 2020, the Mooreheads filed a motion to enforce the Agreement. In their motion, the Mooreheads alleged that Farmers paid only $50,000 in total UM coverage, which was half of the $100,000 contemplated in the Agreement. The Mooreheads averred that when they informed Mr. Nichols of Farmers' alleged failure to make full payment, he stated that pursuant to the Limit

of Liability clause of the UM coverage, Farmers was entitled to a $50,000 credit for payments it made to the Mooreheads in 2018 under the medical payment coverage provision of their insurance policy. The UM Limit of Liability clause provides:

> Our limit of liability for this Uninsured Motorist Coverage shall be reduced by the sum of the limits paid or payable under all liability and/or primary uninsured motorist insurance policies, bonds and securities applicable to the bodily injury or death of the covered person.
>
> Our limit of liability under this coverage to or for a covered person shall be reduced by the amount paid or payable under the Liability and Medical Payments Coverages of this policy or any other automobile insurance policy[.]

"In response, Farmers UM asserted that it had paid the entire $100,000 contemplated in the Agreement. Specifically, Farmers UM argued that, in May 2020, it paid $25,000 to each of the Mooreheads under the Agreement, and it had previously paid them $25,000 each in April 2018 under the medical payment provision of the insurance policy. Thus, Farmers UM maintained that it had satisfied its obligation, under the Agreement, to pay the Mooreheads $100,000.

"On September 9, 2020, the trial court conducted a hearing on the Mooreheads' motion to enforce. During the hearing, Mrs. Moorehead testified that she and Mr. Moorehead received $100,000 from the Crabtrees personally and $100,000 from the Crabtrees' insurance coverage, but only $50,000, collectively, from Farmers UM. She also testified that she and Mr. Moorehead received $50,000 (or $25,000 each) from Farmers approximately two years prior, but that those previous payments were never referenced during mediation.

"On September 14, 2020, the trial court entered an order denying the Mooreheads' motion, stating:

> The Court finds that the Mediation Agreement is a binding contract, and that Tennessee Farmers UM has, in fact, paid a total of $50,000.00 to each named plaintiff, for a total collective sum of $100,000.00, the limits of the UM policy in question. The Court does not find from the terms of the Mediation Agreement that Tennessee Farmers UM intended to 'go beyond' the limits of the policy.... The Court finds that Tennessee Farmers UM has, in fact, complied with the terms of the Mediation Agreement, and[,] therefore, the requested relief in said Motion is hereby DENIED.

"The Mooreheads appeal."

"[W]e return to the disputed language of the Agreement at issue in this appeal, to-wit:

> 2. The Moorehead's UM carrier, Tennessee Farmers, will pay Debra Moorehead $50,000.00 for full and complete settlement of the case.
> . . . .
> 4. The Moorehead's UM carrier, Tennessee Farmers, will pay Jerry Moorehead $50,000.00 for full and complete settlement of the case.

"At the outset, we reiterate the Tennessee Supreme Court's guidance that, in interpreting contracts, courts must enforce the parties' performances according to the parties' mutual understanding of their respective obligations '*at the time [the contract] was* made.' 566 S.W.3d at 688. It is undisputed that, at the time of the mediation, Farmers UM was aware of its previous payments to

the Mooreheads under the medical payment provision of their insurance policy. Yet, Mrs. Moorehead testified that there was no mention of these previous payments during the mediation. At oral argument before this Court, Farmers UM's attorney, Mr. Nichols, corroborated Mrs. Mooreheads' statements when he candidly stated that, 'It [i.e., the previous payment] wasn't discussed, at all, by anyone.' In the absence of any reference, in the Agreement, to the previous payments or to the insurance policy, this Court cannot infer that the parties intended to incorporate, into their Agreement, either the policy itself or the fact of the previous payments. Nonetheless, Farmers cites our opinion in *Merrimack Mutual Fire Insurance Co. v. Batts*, 59 S.W.3d 142, 148 (Tenn. Ct. App. 2001) ('The insuring agreement defines the outer limits of an insurance company's contractual liability'), for the proposition that the Agreement is limited or defined by the provisions of the Mooreheads' UM policy. Farmers specifically asserts that '[if] the portion of the policy ... regarding the earlier payment was to be waived, it would have been necessary to include such an agreement in the [Mediation Agreement].' On the contrary, this Court has held that '[a]fter preliminary negotiations and oral conversations are concluded and a contract is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire agreement to writing[.]' *Faithful v. Gardner*, 799 S.W.2d 232, 235 (Tenn. Ct. App. 1990). Therefore, there is a presumption that the Agreement signed by the parties is the entire agreement. Still, Farmers argues that the Mooreheads' motion to enforce the Agreement was nothing more than an attempt to secure a waiver of a provision of their insurance policy. We disagree. The Agreement itself is a contract independent of the insurance policy. Farmers UM was fully aware of the previous payments and the terms of the insurance policy at the time it entered into the Agreement, yet there is no reference, in the Agreement, to either the policy or the payments. In short, this is not a question of waiver of a contractual provision, but rather an issue of two successive contracts, i.e., the insurance policy and the Agreement. Therefore, we look to '[t]he ordinary rule in contractual matters [, which] is that the last agreement as to the same subject matter which is signed by all parties super[s]edes all former agreements....' *Bringhurst v. Tual*, 598 S.W.2d 620, 622 (Tenn. Ct. App. 1980); *Davidson v. Davidson*, 916 S.W.2d 918, 922 (Tenn. Ct. App. 1995); *Magnolia Grp. v. Metro. Dev. & Hous. Agency of Nashville, Davidson Cty.*, 783 S.W.2d 563, 566 (Tenn. Ct. App. 1989). The Mediation Agreement is the last agreement on the same subject matter as the Mooreheads' UM insurance policy and is signed by all parties; therefore, it supersedes the insurance policy.

"Turning to the plain language of the Agreement as set out in context above, the parties use the future verb tense, i.e., Farmers 'will pay Debra Moorehead $50,000.00,' and Farmers 'will pay Jerry Moorehead $50,000.00....' The verb, 'will pay,' is not ambiguous nor open to more than one interpretation. *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006) (noting that words in a contract are ambiguous when they are 'susceptible to more than one reasonable interpretation.'); *Dick Broad. Co.*, 395 S.W.3d at 659. As this Court noted in *McCollum v. Huffstutter*, in interpreting contracts, we are not only 'bound by the plain language of th[e] document[, but also by] the general rules of grammatical construction.' No. M2002-00051-COA-R3-CV, 2002 WL 31247077, *4 (Tenn. Ct. App. Oct. 8, 2002), *perm. app. denied* (Tenn. Feb. 18, 2003). Having employed the simple future tense, the parties' Agreement contemplates a payment that had not yet been made at the time of the Agreement. Furthermore, there is no limiting language concerning any offset for past payments. As such, we interpret the Agreement to obligate Farmers UM to pay each of the Mooreheads $50,000 in 'new money.'"

"For the foregoing reasons, we reverse the judgment of the trial court. The case is remanded for entry of judgment in favor of the Mooreheads for the full amount (i.e., $50,000 each) contemplated in the Agreement, and for such further proceedings as may be necessary and are consistent with this

opinion. Costs of this appeal are assessed to the Appellee, Tennessee Farmers Mutual Insurance Company, for all of which execution may issue if necessary."

B. Restrictions Against Mediator Filing Mediated Settlement Agreement with Court

Tennessee Alternative Dispute Resolution Commission Advisory Opinion 2020-0001.

"Background Information:

"A set of questions has developed as a result of referrals from a Court to a Community Mediation Center ('Center'). The Court selected a number of *pro se* cases and referred them to the Center to conduct mediations between willing parties.

"The Center sought clarification from the Court regarding how the Center should handle 'remote filings' of reports and subsequent contacts, if any, by the litigants under certain circumstances (e.g. due to a payment plan being breached).

"In response to the Center's inquiries, one Judge responded in part, 'Please send a copy of the signed settlement agreement for our file. Upon receipt of this signed agreement, the Court will either dismiss the case or continue the case, whichever is appropriate.'

"A question was raised as to whether it was appropriate for Rule 31 Mediators to file the mediated settlement agreement with a Court, along with the *Rule 31, Section 5* mediation report. The Center's mediators have not filed mediated settlement agreements pending clarification from the ADRC.

"Question 1:

"Is the filing, by a Rule 31 Mediator, of a mediated settlement agreement with a Court a violation of Rule 31?

"Response:

"Yes. The filing, by a Rule 31 Mediator, of a mediated settlement agreement with a Court is a violation of *Rule 31, Section 5. Reports in Rule 31 Mediations Conducted in Eligible Civil Actions.* The Committee believes that Question 1 is expressly addressed in *Rule 31, Section 5*. According to *Rule 31, Section 5*, a Rule 31 Mediator shall submit a final report to the Court at the conclusion of a Rule 31 Mediation in an Eligible Civil Action and, '*The final report shall state **only**:(i) which parties appeared and participated in the Rule 31 Mediation; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 Mediator requests that the costs of the Rule 31 Mediator's services be charged as court costs.*' (emphasis added).

"The Committee reads the word 'only' as a limitation; it restricts the information to be shared with a Court solely to the three listed items. Because a mediated settlement agreement is not one of the three listed items, the filing, by a Rule 31 Mediator, of a mediated settlement agreement with a Court is a violation of Rule 31.

"This Opinion is consistent with *In Re James R. Finney*, a Grievance Decision of the ADRC filed January 3, 2006. There the Mediator sent a letter to a Judge after mediation. The letter included the

following language: 'I experienced some problems in this mediation which I feel the court should be aware of.... It is my opinion that [party A] cooperated and acted in good faith. Their settlement offer in light of the evidence presented to me was reasonable. Lastly, I found that [party B] did not mediate in good faith.'

"The ADRC suspended the Mediator, finding that 'Providing this letter to the judge with the language as described constitutes a violation of Tenn. Sup. Ct. Rule 31(5)(a). This section of the Rule specifically provides that a final report of a mediator to the court shall include only the following information: '*(i) which parties appeared and participated in the Rule 31 Mediation; (ii) whether the case was completely or partially settled; and (iii) whether the Rule 31 Mediator requests that the costs of the Rule 31 Mediator's services be charged as court costs.*' The Rule does not permit the mediator to provide any further information to the court.'

"Question 2:

"Assuming the answer to Question 1 is 'yes,' if a Court ordered the mediated settlement agreement to be filed by the Rule 31 Mediator, would doing so be a permitted exception? (*See §10(c)(4)*).

"Response:

"No. The Committee does not find any exception to *Rule 31, Section 5* for Orders of a Court in *Rule 31, Section 10(c)(4)* or otherwise.

"*Rule 31, Section 10(c)(4). Obligations of Rule 31 Mediators* provides, as it relates to Question 2, that the Rule 31 Mediator shall, '*Preserve and maintain the confidentiality of all information obtained during the Rule 31 Mediation and shall not divulge information obtained by the Rule 31 Mediator during the course of the Rule 31 Mediation ... except as otherwise may be required by law.*'

"*Rule 31, Section 7. Confidential and Inadmissible Evidence*, provides, as it relates to Question 2, '*Evidence of conduct, information disclosed, or any statement made in the course of a Rule 31 Mediation is confidential to the extent ... provided by other law or rule of this State.... No Rule 31 Mediator may be compelled to testify by deposition or otherwise,*' regarding such conduct, information, or statements.

"Unlike *Rule 31, Section 5*, neither of the Sections quoted immediately above expressly addresses the information to be provided by a Rule 31 Mediator to a Court. The Committee believes that the specific provision in *Rule 31, Section 5*, strictly limiting what a Rule 31 Mediator may disclose to a Court controls over the more general language in other Sections.

"The Committee is not aware of any applicable Tennessee law or rule that requires mediated settlement agreements to be filed with a Court upon a Judge's Order in the circumstances presented in the request under consideration. The mediated settlement agreements in the instant request are not marital dissolution agreements or parenting plans.

"While a Judge's Order can represent the law of the case and is entitled to the utmost deference and respect, the Committee is of the opinion that the Rule 31 Mediator should not be placed in the position of deciding to comply with a Judge's Order to provide information to a Court beyond the express limitations placed by *Rule 31 Section 5*. Any other interpretation would render *Rule 31,*

Section 5 superfluous. Further, an Order for a Rule 31 Mediator to file a mediated settlement agreement with a Court would have the same effect as compelling testimony, contrary to *Rule 31, Section 7*. Prior to accepting a Rule 31 appointment from a Court, it is the responsibility of the Rule 31 Mediator to be satisfied that the Rule 31 Mediator will not be required to violate Rule 31."

"Question 3:

"Assuming the answer to Question 1 is 'yes,' would the filing, by a Rule 31 Mediator, of the mediated settlement agreement be a violation if the parties voluntarily consent (via the Agreement to Mediate or the Mediated Agreement) to the filing (*See §10(c)(4)*)?

"Response:

"Yes. The filing, by a Rule 31 Mediator, of a mediated settlement agreement would still be a violation even if the parties, 'voluntarily consent [via the Agreement to Mediate or the Mediated Agreement] to the filing.'

"*Rule 31, Section 10(c)(4)*, as it relates to Question 3, requires the Rule 31 Mediator to, '*Preserve and maintain the confidentiality of all information obtained during the Rule 31 Mediation and … not divulge information obtained by the Rule 31 Mediator during the course of the Rule 31 Mediation without the consent of the parties....*'

"*Rule 31, Section 7*. Confidential and Inadmissible Evidence, as it relates to Question 3, provides that '*Evidence of conduct, information disclosed, or any statement made in the course of a Rule 31 Mediation is confidential to the extent agreed by the parties …. No Rule 31 Mediator may be compelled to testify by deposition or otherwise regarding such conduct, information, or statements.*'

"It should be noted that Tennessee Code Annotated Section 36-4-130 provides a similar exception for domestic mediation: '*(1) When all parties to the mediation agree, in writing, to waive the confidentiality of the written information.*'

"Again, the Committee believes that the specific provision in *Rule 31, Section 5*, strictly limiting what a Rule 31 Mediator may disclose to the Court controls over the more general language in other Sections. That specific provision in *Rule 31, Section 5* does not contain a 'consent of the parties' exception. The Committee does not believe that the parties can, by consent, agree that the Rule 31 Mediator may violate *Rule 31, Section 5*.

"Further, the Committee is particularly concerned with the situation surrounding a Rule 31 Mediator obtaining informed consent on this issue from *pro se* parties, without simultaneously violating the requirement of *Rule 31, Section 10(b)(3)* to '*refrain from giving legal advice*.' Here, the court aptly uses the expertise and skills of mediators to resolve cases in a less adversarial manner. However, it should be recognized that *pro se* parties are particularly susceptible to misunderstanding the short-term—and long-term—legal implication of consenting to filing of a mediated settlement agreement. If the Rule 31 Mediator simply includes the consent to file the mediated settlement agreement in either that document or the agreement to mediate, without providing prohibited legal advice, the consent becomes boilerplate, analogous to an adhesion contract.

"This Opinion has no effect on the provision in *Rule 31, Section 7*, that '*A written mediated agreement signed by the parties is admissible to enforce the understanding of the parties.*' The Rule 31 Mediator is not expected to have a role in that process. For example, *Rule 31, Section 10(d)* states, '*The Rule 31 Mediator shall not be called as a witness in any proceeding to enforce any terms of the resulting mediation agreement.*'"

II. Arbitration

A. Tennessee Act Differs from Federal Act

New Phase Investments LLC v. Elite RE Investments LLC, No. W2019-00980-COA-R10-CV (Tenn. Ct. App., McBrayer, Nov. 5, 2020).

"In 2012, brothers Earl and Zack Fuelling purchased The Villas, a distressed property in Memphis, Tennessee. The brothers transferred ownership of The Villas to South Beale Company, LLC ('South Beale'), a limited liability company created to own and operate the property. New Phase Investments, LLC ('NPI') and Elite RE Investments, LLC ('Elite') each owned a fifty percent interest in South Beale. Earl Fuelling was the sole member of NPI; Zack Fuelling was the sole member of Elite.

"Two years later, the brothers purchased the Wilson Townhomes, another distressed Memphis property. They created a second limited liability company, Wilson Townhomes, LLC ('Wilson') to own and operate this property. As with South Beale, NPI and Elite owned Wilson.

"The operating agreements for Wilson and South Beale were nearly identical. Both operating agreements vested control of the companies in the two member managers, who were required to make decisions by unanimous vote. Both members initially agreed to hire Nathaniel Robataille as asset director and Shawn Woods as accountant for Wilson and South Beale.

"The members also agreed to settle all disputes through binding arbitration. The operating agreements provided as follows:

> 10.4. Arbitration of Disputes. Any dispute between Members(s) and/or Manager(s) and/or Managing Member(s) and/or Member Representative(s) and/or the Company shall be resolved only by arbitration. The governing authority shall be the Tennessee Arbitration Act(s).

"After the first asset director proved ineffective, South Beale and Wilson entered a management agreement with Elite. Per the agreement, Elite performed management services, including the duties of asset director, for the two companies for a monthly fee. The members agreed that Shawn Woods would assist Elite and be compensated at a set rate. The management agreement also contained an arbitration clause, which provided:

> 7) BREACH OR VIOLATION OF THIS AGREEMENT: If there is any violation and/or breach of this Agreement by any party in this agreement ... then any one party may at their discretion terminate this Agreement with notice in writing to the other Members, Managers, and Companies stating the exact details of the violation and/or breach. The entity being accused on the breach or violation will have 30 days to respond and prove their case that they

were not in violation. If the parties cannot agree then the plaintiff must set up binding arbitration within 14 days."

"On March 6, 2019, NPI, individually and on behalf of South Beale and Wilson, sued Elite, Zack Fuelling, and others for breach of the management agreement and the two operating agreements, breach of fiduciary duty, fraud, conversion, and unjust enrichment. Among other things, the complaint alleged that Zack Fuelling and Elite had mismanaged the companies, commingled funds, and dissipated company profits. The complaint sought injunctive relief, compensatory and punitive damages, and judicial dissolution of South Beale and Wilson. *See* Tenn. Code Ann. § 48-249-617 (2019).

"NPI also filed a contemporaneous motion for a temporary restraining order and a temporary injunction. *See* Tenn. R. Civ. P. 65.01. According to NPI, Zack Fuelling and Elite were jeopardizing the continued viability of South Beale and Wilson by failing to properly manage the properties and by diverting property income into Memphis Management, LLC, another entity controlled by Zack Fuelling. NPI asked the court to (1) transfer control of South Beale and Wilson to NPI, (2) grant NPI the authority to appoint a new management company, (3) remove Zack Fuelling from the companies' bank accounts, (4) require an accounting, and (5) prohibit dissipation of company profits. The court issued a temporary restraining order that same day. The restraining order prohibited further violations of the management and operating agreements and ordered Elite to cede control of South Beale and Wilson to NPI. The order also prohibited Zack Fuelling from withdrawing any company funds or writing checks on company accounts.

"On March 15, Zack Fuelling and Elite filed a motion to compel arbitration and to stay the judicial proceedings pending the outcome of arbitration. NPI responded that the arbitration provisions were unenforceable because Elite had materially breached the underlying agreements. The court did not immediately address the arbitration issue. Instead, the court granted NPI a temporary injunction. The injunction essentially mirrored the temporary restraining order, with the following additional provisions:

> Zach [sic] Fuelling, Elite, and/or Memphis Management, LLC shall produce all documents evidencing accounts payable, accounts receivable, operating expenses or any funds expended for the South Beale or Wilson Townhomes from January 1, 2017 to March 19, 2019 to Plaintiffs on or before April 22, 2019.
>
> Zach [sic] Fuelling, Elite, and/or Memphis Management, LLC shall provide all electronic records and access to view all Memphis Management, LLC's bank accounts to Plaintiff on or before March 20, 2019.

"NPI also asked the court to order mediation. *See* Tenn. R. Sup. Ct. 31 § 3(b). The court granted NPI's request and ordered the parties to mediate 'all issues currently pending before the court' within fourteen days. The court expressly reserved ruling on the arbitration issue until after mediation.

"Zack Fuelling and Elite refused to participate in mediation. And on April 24, they again sought a ruling on the arbitration issue. NPI responded with a motion for civil contempt for violation of the court's mediation order."

"Zack Fuelling and Elite applied for an extraordinary appeal. *See* Tenn. R. App. P. 10. In granting their request, we limited our review to the following issue:

> Whether the trial court failed to comply with Tennessee Code Annotated section 29-5-303 when it did not stay the proceeding pending adjudication of the motion for arbitration and did not 'proceed summarily' to address the question of arbitration.

"*See Culbertson v. Culbertson*, 455 S.W.3d 107, 127 (Tenn. Ct. App. 2014) (explaining that the issues on an extraordinary appeal 'are limited to those specified in this court's order granting the extraordinary appeal').

"The outcome of this appeal turns on Tennessee Code Annotated § 29-5-303, which is part of the Tennessee Uniform Arbitration Act. The Tennessee Uniform Arbitration Act 'governs the extent of judicial involvement in the arbitration process.' *Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. Wade*, 404 S.W.3d 464, 466 (Tenn. 2013). Courts have the power to enforce arbitration agreements. Tenn. Code Ann. § 29-5-302(b) (2012). When one party to a lawsuit claims the dispute is subject to arbitration and the other party refuses to arbitrate,

> the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

"Id. § 29-5-303(a) (2012). At the same time, the trial court must stay '[a]ny action or proceeding involving an issue subject to arbitration.' *Id.* § 29-5-303(d).

"Here, Zack Fuelling and Elite asked the court to compel arbitration based on the arbitration provisions in the parties' agreements. NPI took the position that the arbitration provisions were unenforceable. At this juncture, the Tennessee Uniform Arbitration Act required the court to do two things—stay any proceedings involving an arbitrable issue and decide whether a valid agreement to arbitrate existed. The trial court did neither. As explained by our supreme court,

> The purpose of arbitration is to promote the settlement of disputes without judicial involvement. The TUAA effectuates this purpose by limiting the authority of a trial court to conduct proceedings on the merits prior to determining whether arbitration should be enforced. The language of the TUAA clearly and unambiguously instructs courts to determine whether arbitration is required before delving into the merits of the case.

"*Glassman, Edwards, Wyatt, Tuttle & Cox, P.C.*, 404 S.W.3d at 467 (citations and footnotes omitted). The trial court had no authority to order mediation on the merits of an arbitrable issue. *See id.* at 468. And the court compounded this error by finding Zack Fuelling and Elite in contempt of an unlawful order. *See Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346, 355 (Tenn. 2008) ('A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties.').

"Despite the Tennessee statutory mandate, NPI asks this Court to leave the temporary injunction issued by the trial court in place, citing federal case law interpreting the Federal Arbitration Act. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1380 (6th Cir. 1995). We decline to do so because the Federal Arbitration Act does not govern in this circumstance.

"While the Federal Arbitration Act and the Tennessee Uniform Arbitration Act have similar goals, they are not identical. *See Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 883 (Tenn. 2007) ('The question of whether the contract is governed by the state or federal arbitration act is not an academic one.'). . . ."

"By contrast, the Tennessee Uniform Arbitration Act requires the trial court to stay '[a]ny action or proceeding involving an issue subject to arbitration.' *See* Tenn. Code Ann. § 29-5-303(d). . . . Under Tennessee law, the court may address non-arbitrable issues but only if the non-arbitrable issues are severable from the issues subject to arbitration. *See* Tenn. Code Ann. § 29-5-303(d).

"We conclude that the trial court erred in deferring decision on the motion to compel arbitration and in failing to stay any proceeding involving an arbitrable issue. So we vacate the order granting a temporary injunction, the mediation order, and the civil contempt ruling. On remand, the trial court should determine whether a valid agreement to arbitrate exists. *See Taylor* [*v. Butler*], 142 S.W.3d [277] at 283-84 [Tenn. 2004] (explaining that the trial court is permitted to determine whether an arbitration agreement is valid 'before submitting the remainder of the dispute to arbitration'). If so, the court must enforce it. The court must also stay any proceedings that involve an issue subject to arbitration. If the arbitrable issues are severable from other issues in dispute, the court may limit the scope of the stay to the arbitrable issues. *See* Tenn. Code Ann. § 29-5-303(d). We decline to grant the additional relief requested by the appellants as beyond the scope of this extraordinary appeal."

"We vacate the court's order granting a temporary injunction, the order compelling mediation, and the order on NPI's motion for contempt. On remand, the court shall determine whether any of the agreements at issue require arbitration and take such further actions as necessary and consistent with this opinion."

B. Federal Subject Matter Jurisdiction; Challenge of $0 Arbitration Award

Hale v. Morgan Stanley Smith Barney LLC, 982 F.3d 996 (6th Cir., Donald, 2020).

"Dissatisfied with several disciplinary actions taken against him at work, Plaintiff Richard 'Rip' Hale sought recourse against his employer, Defendant Morgan Stanley Smith Barney LLC, d/b/a Morgan Stanley Wealth Management ('Morgan Stanley'), through arbitration. When this arbitration was unsuccessful, Hale filed suit in district court, seeking to vacate the arbitration award pursuant to the Federal Arbitration Act ('FAA'), 9 U.S.C. §§ 1 *et seq*. The district court never reached the merits of Hale's claims however, finding that it lacked subject-matter jurisdiction. Because we find that diversity jurisdiction has been satisfied, we REVERSE and REMAND."

"Hale has been employed by Morgan Stanley as a financial advisor since 1984. Though Hale prospered financially at Morgan Stanley, he was disciplined on several occasions between 2013 and 2016. Believing that he was wrongly reprimanded by his employer, Hale initiated an arbitration action, and requested damages for his claims of negligence, defamation, breach of fiduciary duty, and intentional infliction of emotional distress. Following an arbitration hearing that lasted four days, and during which eleven witnesses testified, the arbitrator issued an award denying all of Hale's claims and awarded him $0 in damages.

"Following the arbitration decision, Hale filed suit in district court, requesting that the arbitration award be vacated pursuant to §§ 10(a)(3) and 10(a)(4) of the FAA. Morgan Stanley subsequently

filed a motion to dismiss the case on jurisdictional grounds. The district court ruled in favor of Morgan Stanley, holding that the court lacked diversity and federal question jurisdiction over the suit. Hale timely appealed to this Court."

"With regard to diversity jurisdiction, it is firmly established that parties attempting to demonstrate that such jurisdiction exists must show that: (1) the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs; and (2) there is complete diversity of citizenship between the disputing parties. 28 U.S.C. § 1332(a). The parties in the instant case concede that they are diverse in citizenship, but disagree as to whether the amount in controversy requirement has been satisfied. Morgan Stanley asserts that since the arbitrator did not award Hale any damages, the amount in controversy is $0. Conversely, Hale argues that the amount in controversy is met because he requested a damages award of $14.75 million in his complaint (filed as a motion to vacate). In finding that it lacked diversity jurisdiction, the district court cited to *Ford v. Hamilton Inv., Inc.*, 29 F.3d 255 (6th Cir. 1994) in support of its decision. Because the district court's reliance on *Ford* was misplaced, we agree with Hale.

"In *Ford*, the plaintiff sought to vacate the arbitrator's award of approximately $30,000 under the FAA. *Id.* at 257. The Court held that based on the general federal rule that it is appropriate to 'decide what the amount in controversy is from the complaint itself,' *Horton v. Liberty Mut. Ins. Co.,* 367 U.S. 348, 353, 81 S.Ct. 1570, 6 L.Ed.2d 890 (1961), even though the plaintiff counter-claimed more than $50,000 against the defendant in the arbitration proceeding, because the award that the plaintiff asked to be vacated was only that of the $30,000 arbitration award, it clearly fell below the amount in controversy threshold under 28 U.S.C. § 1332(a). *Ford*, 29 F.3d at 260. The conclusion reached by the Court in *Ford* was not that the amount of the *arbitrator's award* should be considered when calculating the amount in controversy in this context, but that in making such determinations, it is necessary to look to the *amount alleged* to be in controversy *in the complaint*. *See Theis Research, Inc. v. Brown & Bain*, 400 F.3d 659, 665 (9th Cir. 2005) (noting that 'the Sixth Circuit was quite clear that had the losing party [in *Ford*] sought to challenge the arbitrator's denial of that party's counterclaims, the amount in controversy *would* have been met') (citing *Ford*, 29 F.3d at 260). Accordingly, in actions where a party seeks to vacate a $0 arbitration award pursuant to § 10 of the FAA, courts should look to the complaint for purposes of assessing whether § 1332(a)'s jurisdictional amount in controversy requirement has been met.

"This rule was similarly applied by the Court in *Mitchell v. Ainbinder*, 214 F. App'x 565 (6th Cir. 2007). In *Mitchell*, the Court reaffirmed that district courts 'should consider the amount alleged in a complaint' when determining the amount in controversy. *Id.* at 566 (quoting *Mass. Cas. Ins. Co. v. Harmon,* 88 F.3d 415, 416 (6th Cir. 1996)). And in cases where the petitioner seeks to vacate a $0 arbitration award and reopen his arbitration, the Court held that the amount in controversy includes the amount sought in the underlying arbitration. *Id.* at 566–67. While the district court distinguished *Ford* and *Mitchell* by indicating that the former involved a request to vacate an arbitration award and the latter included a demand to reopen an arbitration, there is no meaningful difference between the two forms of relief—and Morgan Stanley has not provided sufficient support for a finding to the contrary. *Ford* and *Mitchell* therefore both stand for the same proposition: when a petitioner disputes an issued arbitration award—either through vacation or seeking to reopen arbitration—courts need only to review the relief requested in the complaint to determine the amount in controversy.

"When that rule is applied here, it becomes evident that the district court had diversity jurisdiction over this case. In his complaint, Hale sought to vacate the $0 award, arguing that the arbitrator

should have awarded him almost $15 million in damages—certainly more than the amount necessary to satisfy § 1332(a). Therefore, the minimum amount in controversy was met, and the district court had the subject-matter jurisdiction necessary to adjudicate Hale's claims."

ESTATES, CONSERVATORSHIPS AND TRUSTS

I. Estates

A. Markings on Will Did Not Prove Decedent's Intent to Revoke

In re Estate of Lewis, No. W2019-01839-COA-R3-CV (Tenn. Ct. App., Swiney, Oct. 28, 2020).

"In this case, Decedent executed his last will and testament in January 2018 in the presence of two witnesses as required by Tennessee Code Annotated § 32-1-104 (Supp. 2020). Pursuant to Tennessee Code Annotated § 32-2-110 (2015), those two witnesses executed an affidavit certifying that Decedent signed the will in their sight and presence, that they signed the will as witnesses at the request of Decedent and in the presence of Decedent and each other, and that Decedent appeared to be of sound mind when executing the will. Tennessee Code Annotated § 32-2-110 provides an avenue for a party to prove the requirements in section 32-1-104 without the need for live testimony from the witnesses to the will. *See In re Estate of Harris*, No. W2016-01768-COA-R3-CV, 2018 WL 6444136, at *3 (Tenn. Ct. App. Dec. 10, 2018). Tennessee Code Annotated § 32-2-110 provides that an affidavit containing the sworn statements of the witnesses to the will stating the facts for which they would testify in court in order to prove the will 'shall be accepted by the court of probate when the will is not contested as if it had been taken before the court.' No one challenged the will's compliance with Tennessee Code Annotated § 32-1-104 during the probate proceedings.

"The issue on appeal concerns the markings on the last will and testament after its execution. Lines had been drawn over one provision in the will appointing Gail Forte as an executor of the will but Freda Lewis's name in that same provision remained untouched. A line also had been drawn through a sentence directing the funds for Decedent's head stone to be paid from Petitioners' share of the estate. As a result of these markings, the Trial Court denied Petitioners' request to admit Decedent's will to probate, finding the entire will to be unacceptable for probate and determining that Decedent died intestate.

"The Trial Court stated in its order that its ruling was based on 'the Petition for Probate, the Affidavits of Gail Forte and Freda Lewis, the statements of counsel for Petitioners, and upon the entire record of this cause.' This is consistent with Petitioners' appellate brief which states that no evidence was presented at the time of the hearing. The record before us reflects no evidence of any contest to the will or its validity. The only sworn statements before the Trial Court concerning the markings were by Petitioners in their joint affidavit. In such affidavit, Petitioners denied that they had any knowledge of the identity of the individual who made the markings on the will. There was no other evidence presented as to these markings. Following this hearing, the Trial Court's order stated only that 'the markings on [Decedent's] Will negated it from being accepted to Probate' and that Decedent had died intestate, without providing further explanation.

"We note that markings on a will do not necessarily mean that the entire will has been revoked by the testator. Tennessee Code Annotated § 32-1-201 (2015) provides as follows concerning the revocation of a will:

> A will or any part thereof is revoked by:

(1) A subsequent will, other than a nuncupative will, that revokes the prior will or part expressly or by inconsistency;
(2) Document of revocation, executed with all the formalities of an attested will or a holographic will, but not a nuncupative will, that revokes the prior will or part expressly;
(3) Being burned, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking it, by the testator or by another person in the testator's presence and by the testator's direction; or
(4) Both the subsequent marriage and the birth of a child of the testator, but divorce or annulment of the subsequent marriage does not revive a prior will.

"This Court has held that a testator can revoke by physical act specific provisions of a will, while leaving the remaining provisions intact. *See In re Estate of Warren*, 3 S.W.3d 493, 495 (Tenn. Ct. App. 1999); *In re Estate of Dye*, 565 S.W.2d 219, 221 (Tenn. Ct. App. 1977). 'For a revocation to be valid, concurrence of an intention to revoke and some act by the testator manifesting that intention is required.' *In re Estate of Dye*, 565 S.W.2d at 221. In cases regarding revocation of a will, the key is the intent of the testator. *See id.*; *Cozart v. Jones*, 1986 WL 624, at *3 (Tenn. Ct. App. Jan. 3, 1986).

"On appeal, Petitioners argue that the trial court erred by finding that Decedent had died intestate due to the lack of evidence demonstrating an intent by Decedent to revoke his will and Tennessee's presumption against intestacy. As early as 1875, the Tennessee Supreme Court in *Hearn v. Alexander*, 3 Tenn. Cas. (Shannon) 224 (1875), applied a presumption against intestacy when construing the meaning of a will. Since then, Tennessee courts have recognized a presumption against intestacy, which provides that 'when a person makes a will there is a presumption that the person did not intend to die intestate as to any part of his or her property.' *In re Estate of McFarland*, 167 S.W.3d 299, 303 (Tenn. 2005); *see also* Tenn. Code Ann. § 32-3-101 (2015) (codifying the common law presumption against intestacy)."

"In *Cozart v. Jones*, this Court applied that presumption to a case concerning whether a testator had revoked his will by marking changes onto the face of the will. 1986 WL 624, at *4, 7 (Tenn. Ct. App. Jan. 3, 1986). In that case, the trial court ultimately concluded that the testator had not intended to revoke his existing will but that he had only intended to make changes to the will in the future, leaving his existing will in effect until he executed a new will. *Id.* at *1. In affirming the trial court's decision, the *Cozart* Court applied the presumption against intestacy, determining the existing will remained valid and had not been revoked. *Id.* at *7. We hold that the common law presumption against intestacy is relevant to the present case concerning whether Decedent intended to revoke his last will and testament by drawing lines through two provisions in the will if indeed it was Decedent who drew the lines.

"In the present case, Decedent had not destroyed the last will and testament or written anything on it to reflect that he intended to revoke his last will and testament, nor had he executed a subsequent document revoking the January 2018 will. The markings on the will, which consisted of lines drawn through only two provisions, do not demonstrate an intent by Decedent to revoke his will in its entirely. Although a testator's action of drawing through provisions of a will can support a revocation of those provisions, there is no evidence in this case that Decedent was the person who made the markings on the will or that he intended to revoke portions of the will. The only proof in the record is Petitioners' joint affidavit stating that they are unaware who made the markings on the will. This was not challenged during the probate proceedings. We note that no initials were located near the markings to demonstrate the identity of the person making the markings. Additionally, no

evidence was presented of any individual witnessing Decedent make any markings on the will, of any person identifying the markings on the will as those of Decedent, or concerning whether Decedent made comments prior to his death regarding revision of his will. Moreover, no one was present contesting the will in its entirety or any provisions within the will. The record lacks evidence demonstrating an intent by Decedent to revoke any portions of his will, only the presence of unexplained lines drawn through two provisions in the will that had not been attributed to Decedent.

"As such, there is insufficient evidence to support that Decedent made the markings on the will or that he intended to revoke those portions of the will, much less a revocation of the entire will. We, therefore, reverse the Trial Court's order denying the petition to probate Decedent's will. Upon remand, the Trial Court is instructed to enter an order admitting Decedent's last will and testament to probate."

B. Residuary Clause; "Issue" Includes Children of Deceased Child

In re Estate of Clifton, No. M2020-00432-COA-R3-CV (Tenn. Ct. App., Clement, Mar. 18, 2021), perm. app. denied July 12, 2021.

"When she died in 2017, Mrs. Clifton had two living children, Penelope Clifton and Gene Clifton, and one deceased child, Sherry Smith. Sherry had one living son, Randy Smith, and one deceased son, Danny Smith. Danny was survived by two children, Stevie Ray Smith and Kalie Brooke.

"In February 2018, Penelope Clifton filed a petition to admit Mrs. Clifton's will in the Rutherford County Probate Court. The petition listed three beneficiaries: Gene Clifton, Penelope Clifton, and Randy Smith. The court admitted the will and appointed Penelope Clifton as the personal representative of Mrs. Clifton's estate ('the Estate'). Over the next two years, the Estate requested and received approval to sell 18 acres of Mrs. Clifton's real property.

"In January 2020, two of Mrs. Clifton's great-grandchildren, Stevie Ray Smith and Kalie Brooke ('Petitioners'), filed a petition to enjoin the Estate from further action pending an interpretation of the will. Petitioners asserted that Sherry Smith's share of Mrs. Clifton's estate should have been divided between them and their uncle, Randy, because Petitioners were 'issue then living' of 'a deceased child.' The Estate opposed the petition, contending that the will defined 'issue' as only persons with 'a parent-child relationship' to any deceased child. Under this definition, Randy was the only 'issue then living' of Mrs. Clifton's deceased daughter, Sherry.

"After a hearing in February 2020, the court agreed with the Estate and held that Petitioners were not issue and, therefore, not beneficiaries of Mrs. Clifton's residual estate:

> While the Petitioners claim that they are the 'issue' of Sherry Smith, the definition of 'issue' ... is one where there is a 'parent-child relationship.' There is no 'parent-child' relationship between the Petitioners and the Testator. There is no 'parent-child' relationship between the Petitioners and Sherry P. Smith. The intent of the Testator is clear in that only: (1) living issue of the Testator, i.e. Penelope June Clifton and Gene Dale Clifton; or (2) issue of the deceased Sherry P. Smith, i.e. Danny Smith and/or Randy Smith, could possibly inherit through her. The Petitioners are neither of these.

"Accordingly, the court denied the petition. This appeal followed."

"Petitioners raised three issues in this appeal. We, however, have determined that the dispositive issue is whether the residuary clause in Mrs. Clifton's will limited or restricted the meaning of the term 'issue' to persons with a parent-child relationship to Mrs. Clifton or one of her children. The construction of a will is a question of law that we review de novo with no presumption of correctness. *See In re Estate of Vincent*, 98 S.W.3d 146, 148 (Tenn. 2003)."

"In her will, Mrs. Clifton identified Sherry Smith, Gene Clifton, and Penelope Clifton as her 'children':

> At the time of executing this Will, I am unmarried. The names of my children are listed below. Unless otherwise specifically indicated in this Will, any provision for my children includes the below-named children, as well as any child of mine hereafter born or adopted.
>
> Sherry Prosnick Smith
> Gene Dale Clifton, Jr.
> Penelope June Clifton

"Mrs. Clifton made one specific bequest to Penelope Clifton, which is not in dispute, and left the residue and remainder to her 'children' and their 'issue' as follows:

> I divide all of the residue and remainder of my gross estate, ... into as many equal shares as there are living children of mine and deceased children of mine with issue then living. Each living child shall be given one share. Any share of my estate allocated to a deceased child with issue then living shall be further divided into shares for said issue, per stirpes. The terms 'issue,' 'child,' 'children,' includes a person who has a parent-child relationship, as defined under applicable state law, with the person through whom this person claims benefits under my Will.

"As Petitioners correctly point out, Tennessee law defines a person's 'issue' as 'the person's lineal descendants, adopted as well as natural born, of all generations, with the relationship of a parent and child at each generation being determined by the definitions of child and parent contained in this title.' Tenn. Code Ann. § 31-1-101(6). Accordingly, we have recognized that '[t]he word 'issue' includes all persons who have descended from a common ancestor, and unless the context indicates otherwise means lineal descendants without regard to degree of proximity or remoteness.' *Decker v. Meriwether*, 708 S.W.2d 390, 393 (Tenn. Ct. App. 1985) (citing *Burdick v. Gilpin*, 325 S.W.2d 547, 554 (Tenn. 1959)).

"The Estate contends that the general definition of 'issue' does not apply because the will expressly states that '"issue" ... includes a person who has a parent-child relationship with [the deceased child of Testator].' We respectfully disagree that the use of the non-limiting term 'includes' limits or restricts Mrs. Clifton's beneficiaries to only those with a parent-child relationship to Mrs. Clifton's children. To the contrary, as we have previously held, when the word 'includes' or 'including' is used, 'it serves as a term of enlargement, not one of restriction.' *Lovlace v. Copley*, 418 S.W.3d 1, 18 (Tenn. 2013); *see Sears, Roebuck & Co. v. Roberts*, No. M2014-02567-COA-R3-CV, 2016 WL 2866141, at *6 (Tenn. Ct. App. May 11, 2016) (recognizing that 'use of the term "include" does "not ordinarily introduce an exhaustive list"' (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012))). Thus, by stating that '"issue" ... includes a person who has a parent-child relationship with [Testator's children],' the will does not exclude those who do not.

"Based on the foregoing, we respectfully reverse the trial court's determination that Petitioners are not beneficiaries of Mrs. Clifton's estate."

C. Residuary Beneficiary in Bankruptcy Lacks Standing to Bring Action Against Administrator

In re Estate of Ramey, No. E2020-00270-COA-R3-CV (Tenn. Ct. App., Swiney, Apr. 23, 2021).

"This appeal concerns a residual beneficiary's objection to an estate administrator receiving any fees based upon the latter's alleged breach of fiduciary duty. David Ramey ('Ramey') is a beneficiary under his late father's will. However, Ramey was in Chapter 7 Bankruptcy at the time of his father's death, and Ramey's inheritance became part of the bankruptcy estate. Dustin Crouse ('Crouse') was appointed administrator of the probate estate. Michael Fitzpatrick ('Fitzpatrick') is the Chapter 7 Trustee. Ramey filed an objection alleging Crouse breached his fiduciary duty by selling the estate's primary asset, a house, below market value in a private sale. The General Sessions Court for Loudon County, Probate Division ('the Trial Court') ruled against Ramey, although it found he had standing to bring his claims. Ramey appeals, objecting to fees paid to Crouse. We hold that Ramey lacks standing as any such claims of his to the probate estate belong to the Chapter 7 Trustee rather than him. We, therefore, affirm the Trial Court, although on different grounds. The judgment of the Trial Court is affirmed as modified."

"On December 7, 2018, Ramey filed for Chapter 7 Bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Tennessee. Shortly thereafter, Ramey's father Shelton D. Ramey ('Decedent') entered the hospital. Decedent died on December 27, 2018. Before his death, on December 20, 2018, Decedent executed his last will and testament. In his will, Decedent named Veda Odle ('Odle') personal representative of his estate. The will provided for Odle to receive certain property. The balance of the estate was awarded to Ramey.

"Owing to the bankruptcy proceedings, Ramey's inheritance interest became the property of the bankruptcy estate, which was administered by Fitzpatrick as Trustee. In January 2019, Odle filed a petition for letters testamentary with the Trial Court. In February 2019, Ramey filed a motion seeking to remove Odle as personal representative. Ramey alleged that Odle had taken advantage of his heavily sedated, dying father to procure the will. In March 2019, citing Odle and Ramey's conflict and their dueling allegations of inappropriate conduct with respect to the estate, Fitzpatrick filed a motion to appoint an independent, third-party administrator to administer the probate estate. Fitzpatrick requested Crouse for the role. The Trial Court granted Fitzpatrick's motion and appointed Crouse administrator. Odle was relieved of her role. The Trial Court ordered Ramey to return all assets of the probate estate in his possession. Odle filed for fees and expenses and to be awarded the items left to her in Decedent's will."

"In July 2019, Crouse entered into a purchase and sale agreement with one Shannon Littleton. Under the agreement, Littleton would purchase Decedent's house for $166,000. The house was the primary asset of the estate. Crouse submitted his petition to confirm the purchase and sale agreement with the Trial Court. No objections were raised. In August 2019, the Trial Court entered another order, this time: (1) approving fees and expenses of Odle and Waterhouse; (2) offsetting the $5,000.00 funeral expense claim of Odle for her option to buy the Kubota tractor from the estate under the will; (3) approving payment of outstanding federal income taxes; (4) concluding Ramey lacked standing to contest the will; (5) providing 10 days for Odle to remove items bequeathed to her from the real property; (6) authorizing Crouse to deliver remaining personal property to Ramey; (7) allowing for the sale, disposal, or donation of any remaining property; and (8) directing Crouse

to file a final accounting upon completion. The Trial Court also entered an agreed order confirming the purchase and sale agreement. In September 2019, the Trial Court entered another order, to wit: (1) granting Ramey more time to pick up remaining personal property; (2) reaffirming Crouse's authority to dispose, or donate, leftover items; (3) reaffirming that Crouse serves as an independent administrator; (4) affirming the parties' agreement that items at Powell Auction & Realty remain with it; and (5) affirming Odle received all the discovered property that was owed to her under Decedent's last will and testament.

"In October 2019, Crouse filed his final accounting and petition for attorney-administrator fees and expenses, to which Ramey filed an objection. Ramey, who stood to inherit if anything remained in the estate after the bankruptcy proceedings and creditors were satisfied, alleged Crouse wasted the estate by conducting a private sale and failing to market the property resulting in the house selling for $50,000 below its fair market value. In response, Crouse filed a motion to dismiss. In December 2019, a hearing was held, at which witnesses testified to the circumstances surrounding the sale of the house. Following that hearing, the Trial Court entered an order with the following provisions: (1) Ramey's Motion for Order Setting Aside Sale of Real Property on Grounds of Fraud in the Inducement was denied; (2) Ramey's Objection of David Ramey to Executor's Petition for Approval of Fees and Expenses was denied; (3) Crouse's Motion to Dismiss was granted on the merits; (4) Crouse's initial fees and expenses were approved; (5) 10 days were granted from December 5, 2019 to contest Crouse's supplemental fee petition; (6) 15 days were granted to object to counsel for Crouse's fee petition; (7) payment was directed toward a creditor's claim; and (8) Crouse was directed to file an amended Final Accounting.

"In January 2020, Crouse filed his Amended Final Accounting & Distribution Plan and Petition for Final Attorney-Administrator Fees. Ramey again filed an objection on the basis that Crouse violated his fiduciary duty to the estate and to him as a residual beneficiary. In February 2020, a final hearing was held. Afterward, the Trial Court confirmed and approved the pending fee applications. Ramey timely appealed to this Court."

"Ramey raises a number of issues on appeal. However, we discern a single dispositive issue, one raised by Crouse: whether Ramey has standing in this matter. Crouse raises a separate issue of whether he is entitled to his attorney's fees and expenses incurred on appeal.

"We first address whether Ramey has standing. In his brief, Crouse asserts that 'Bankruptcy Trustee [Fitzpatrick] is the sole party to these proceedings with a legal and equitable interest in the sale of the real property and in the proceeds of the real property.' Fitzpatrick makes a similar argument in his brief, stating: 'Due to the fact that Appellant Ramey's interest in the Shelton Ramey estate is a bankruptcy asset, and Appellee Fitzpatrick is serving as the Chapter 7 Trustee of the bankruptcy estate, David Ramey does not have standing to bring this appeal.' For his part, Ramey states in his reply brief that he has standing on the basis of 'a *residuary interest* in the probate estate, because [he] has an ownership interest in the property of the estate, after all creditors of the probate estate and his chapter 7 bankruptcy estate were paid.' (Emphasis in original)."

"Regarding the impact that the filing of a bankruptcy petition has upon a debtor's standing to assert causes of action previously held by the debtor, this Court has explained:

> Under the United States Bankruptcy Code, when a debtor files a bankruptcy petition, a bankruptcy estate is created which includes all of the debtor's legal or equitable interests in property as of the commencement of the case. 11 U.S.C. § 541(a)(1). These interests in

> property include causes of action. *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988). Upon the appointment of a trustee in bankruptcy, the trustee succeeds to all causes of action formerly held by the debtor, and the debtor lacks standing to pursue those causes of action. 11 U.S.C. § 323(a); *Bowie v. Rose Shanis Financial Services, LLC*, 160 Md. App. 227, 862 A.2d 1102 (2004); *Vucak v. City of Portland*, 194 Or. App. 564, 96 P.3d 362 (2004). Property that the debtor schedules in the petition that has not been administered when the court closes the case is abandoned to the debtor. 11 U.S.C. § 554(c). But estate property which is not administered as part of the bankruptcy case and which is not abandoned to the debtor under section 554 remains property of the estate.

"*Headrick v. Bradley County Mem'l Hosp.*, 208 S.W.3d 395, 399 (Tenn. Ct. App. 2006).

"Based upon our review of the pertinent law, we agree with Crouse and Fitzpatrick with regard to their standing argument. There is no serious dispute that Ramey's interest in Decedent's probate estate became an asset of Ramey's bankruptcy estate. *See* 11 U.S.C. § 323(a) and 11 U.S.C. § 541(a). Fitzpatrick has stepped into Ramey's shoes, so to speak. Should any claims be made against Crouse's performance as independent administrator, they belong to Fitzpatrick rather than Ramey. Nevertheless, Ramey insists that he is an aggrieved party because he has a residual interest in the probate estate. Ramey's interest is residual indeed, and that residual interest is now an asset of the bankruptcy estate. Ramey argues further as evidence of his standing that Fitzpatrick abandoned the estate's interest in certain personal property to him. Ramey cites 11 U.S.C. § 554 for the proposition that property abandoned by the Chapter 7 Trustee no longer is property of the estate. Ramey is correct—but only as to the abandoned property. That certain property was abandoned to Ramey does not alter the fact that the Chapter 7 Trustee has otherwise 'stepped into his shoes.' It is Fitzpatrick as the bankruptcy trustee who now holds Ramey's residual interest in the probate estate as a bankruptcy asset."

"The second and final issue we address is whether Crouse is entitled to his attorney's fees and expenses incurred on appeal. Crouse cites to Tenn. Code Ann. § 30-2-317, which provides as relevant: '(a) All claims or demands against the estate of any deceased person shall be divided into the following classifications, which shall have priority in the order shown: (1) First: Costs of administration....' Tenn. Code Ann. § 30-2-317 (2015). This Court has expounded upon administrator's fees as follows:

> [T]his case involves services rendered in the course of administering a decedent's estate, services provided for the benefit of the estate. More specifically, the services rendered by Mr. Gossum on appeal in this case were in furtherance of his duties as both the administrator and the attorney for the estate, and recovery was sought from the estate, not from a non-prevailing party. '[I]t is well established that a personal representative of an estate may be entitled to receive reasonable attorney fees from the estate, where ... the attorney's services have inured to the estate's benefit.' *Martin*, 109 S.W.3d at 313; *see also In re Wakefield*, M1998-009210-COA-R3-CV, 2001 WL 1566117, at *24 (Tenn. Ct. App. Dec. 10, 2001); T.C.A. § 30-2-317(a) (2007) (listing reasonable compensation to the personal representative's counsel among the types of administrative costs that are given first priority). We see no reason why Mr. Gossum's fee for representing the estate on appeal should be treated differently than his fee for representing the estate in the trial court. Thus, as in *Chaille*, we find that 'the proper time and place to request attorneys fees for' such services is in the trial court, along with the request for compensation for all the other services rendered to the estate. *See Chaille*, 689 S.W.2d at 179.

"*In re Estate of Dunlap*, No. W2010-01516-COA-R9-CV, 2011 WL 1642577, at *4 (Tenn. Ct. App. April 29, 2011), *no appl. perm. appeal filed.* The *Dunlap* panel found further that 'Mr. Gossum's request for the approval of his attorney fees incurred on appeal in the administration of an estate should be classified with the other requests for attorney fees incurred in the administration of the estate,' and that 'the estate's attorney need not request such fees in the appellate court, and indeed would not make such a request in the first instance to the appellate court.' *Id.* at *5. We hold that Crouse is entitled to an award, out of the estate, of his attorney's fees and expenses incurred in defending this appeal because these fees and expenses constitute a cost of administration. On remand in the Trial Court, Crouse may request his attorney's fees and expenses incurred on appeal."

D. Claims Against Estate

1. Limitations Period for Creditors' Claims Does Not Apply to Administrator's Request for Reimbursement of Funeral Expenses, Probate Filing Fee and Bond

In re Estate of Vaughn, 615 S.W.3d 133 (Tenn. Ct. App., Clement, 2020), no appl. perm. app.

"In her proposed final accounting, the administrator of an intestate estate sought court approval for, *inter alia,* the decedent's funeral expenses and routine administrative expenses, including her attorney's fees. She also sought to recover the costs she incurred to repair and sell the decedent's house pursuant to an agreed order. The administrator is the decedent's widow, and the remaining heirs, who are the decedent's children from a prior marriage, opposed her request for reimbursement. The court denied her claims for post-death expenses finding 'they were not timely filed because any request for reimbursement was required to be filed pursuant to Tenn. Code Ann. § 30-2-307.' The court also denied the administrator's request to recover her attorney's fees upon the finding that the legal services did not benefit the estate. We affirm the denial of the administrator's request to recover her attorney's fees. However, we have determined that the other 'claims' for reimbursement of post-death expenses are not subject to the limitation provisions in Tenn. Code Ann. § 30-2-307. This is because the statute pertains to debts and liabilities incurred by or on behalf of the decedent prior to his death. All of the expenses at issue were incurred after the decedent's death; therefore, we reverse the trial court's ruling that the administrator's post-death 'claims' were time-barred pursuant to Tenn. Code Ann. § 30-2-307. Because the court has supervisory authority to determine the reasonableness and necessity of expenses incurred for the benefit of and in the administration of the decedent's estate, we remand with instructions for the trial court to determine whether each post-death expense was reasonable and necessary in light of all the relevant circumstances and to enter judgment accordingly."

2. Bureau of TennCare

Chapter 102, Public Acts 2021, adding T.C.A. § 30-2-310(c) eff. Apr. 7, 2021.

"(c) Notwithstanding subsections (a) and (b), § 71–5–116, and §§ 30–2–306--30–2–309:
(1) If the bureau of TennCare receives a notice to creditors as defined in § 30–2–306(b) within twelve (12) months of the decedent's date of death, then the bureau's claims and demands against the decedent's estate are forever barred unless the bureau files a claim with the probate court clerk or brings or revives suit within the later of:
(A) Twelve (12) months from the decedent's date of death; or
(B) Four (4) months from the date when the bureau received the notice to creditors.

(2) If the bureau of TennCare does not receive a notice to creditors as defined in § 30–2–306(b) within twelve (12) months of the decedent's date of death, then the bureau's claims and demands against the decedent's estate are forever barred unless the bureau files a claim with the probate court clerk or files a petition to open or re-open a decedent's estate within forty-eight (48) months of the decedent's date of death.
(3) If a claim is not filed by the bureau of TennCare pursuant to subdivision (c)(1) or (c)(2), then the requirements of § 71–5–116(c)(2) do not apply."

II. Guardianship or Conservatorship

A. Challenges in Receiving Attorney Fees Award

In re Conservatorship of Tapp, No. W2020-00216-COA-R3-CV (Tenn. Ct. App., McGee, Jan. 22, 2021).

"On November 18, 2015, a petition to appoint co-conservators of the person and estate of Mary Ann Tapp ('the Ward') was filed in the Chancery Court for Fayette County. In the petition, John E. Simmons ('John') and Thomas M. Minor are listed as petitioners. John was a brother of the Ward, and Mr. Minor was the long-time personal attorney of the Ward. Also listed as petitioners were the Ward's seven remaining siblings. . . ."

"On November 19, 2015, the day after the petition to appoint co-conservators was filed, the trial court granted the petition. John and Mr. Minor were appointed as co-conservators of the Ward's person and estate. As co-conservators, the trial court vested them with all of the rights listed in Tennessee Code Annotated section 34-3-107(a)(2).

"Over two years after John and Mr. Minor were appointed as co-conservators, the Siblings filed a petition to remove John as a co-conservator. In their petition to remove him, they asserted that John failed to perform his duties and failed to act in the best interest of the Ward."

"On January 13, 2020, the trial court entered its final written order, dismissing the petition to remove John as a co-conservator. In the written order, the court found that the Siblings did not present sufficient evidence to justify removing John as a co-conservator. The court noted that Ms. Shelton, who testified that John appeared to be doing a good job as a co-conservator, was a credible witness. Despite its decision to dismiss the petition, the court concluded that it was in the best interest of the Ward to maintain a relationship with the Siblings. As a result, it ordered the parties to continue to follow a bi-weekly visitation schedule between the Siblings and the Ward. As the prevailing parties, the trial court awarded John and Mr. Minor $33,424.34 in attorney's fees under Tennessee Code Annotated sections 34-3-107(a)(2)(P) and -108(f)."

"The Siblings raise a single issue on appeal, which has been copied verbatim:

> Whether the Trial Court had authority to award attorney's fees to counsel for the Co-Conservators."

"As a means of attacking the trial court's decision to award attorney's fees, the Siblings argue that the trial court never had subject matter jurisdiction to hear the petition to appoint co-conservators. They argue that at the time the initial petition was filed, in November 2015, the Ward was a

resident of Haywood County, rather than Fayette County. Thus, the Siblings argue that the initial conservatorship petition should have been filed in Haywood County and that the orders entered by the trial court in this conservatorship proceeding are void for lack of subject matter jurisdiction."

"In conservatorship proceedings, venue is treated as jurisdictional. *In re Conservatorship of Ackerman*, 280 S.W.3d 206, 210 (Tenn. Ct. App. 2008) ('*In re Ackerman*'). Tennessee Code Annotated section 34-3-101(b) states, '[a]n action for the appointment of a conservator *shall* be brought in the county of residence of the alleged person with a disability.' (Emphasis added)."

"Other than assertions made by the Siblings, there is no evidence to show that the Ward ever intended to abandon her domicile in Fayette County. In its final order dismissing the Siblings' removal petition, the trial court did not make a finding on the Ward's domicile at the time the original petition was filed. However, the petition to appoint co-conservators clearly states that the Ward was a resident of Fayette County. More importantly, the order that appointed John and Mr. Minor as co-conservators also states that she was a resident of Fayette County. Whether the Ward also maintained a residence in Haywood County at the time the petition was filed is not outcome-determinative. A person may have more than one residence but may only have one domicile. *In re Ackerman*, 280 S.W.3d at 210."

"Based on 'the face' of the order that appointed John and Mr. Minor as co-conservators, there is no indication that the trial court lacked subject matter jurisdiction in the original conservatorship proceeding. The court's finding that the Ward was a resident of Fayette County is clear and unequivocal. As a facially valid order, the Siblings have not demonstrated that the underlying order is void for lack of subject matter jurisdiction.

"As a result, we find that the trial court had subject matter jurisdiction in this case."

"Tennessee courts follow the 'American Rule' in awarding attorney's fees. The American Rule states that 'a party in a civil action may recover attorney fees only if: (1) a contractual or statutory provision creates a right to recover attorney fees; or (2) some other recognized exception to the American rule applies, allowing for recovery of such fees in a particular case.' *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 308 (Tenn. 2009)."

"In this case, the trial court awarded John and Mr. Minor attorney's fees under Tennessee Code Annotated section 34-3-108(f). After denying the Siblings' petition to remove John as a co-conservator, the court concluded that it was in the best interest of the Ward to maintain a relationship with the Siblings. Accordingly, it ordered the parties to continue to follow a bi-weekly visitation schedule. The court also found that the instructions in section 34-3-108(f) were mandatory and awarded John and Mr. Minor $33,424.34 in attorney's fees as the 'prevailing parties' for successfully defending the petition.

"Tennessee Code Annotated section 34-3-108(f) states, '[a]ny person listed in § 34-3-103(1)-(4) may petition the court to require the conservator to grant any of the rights provided in § 34-3-107(a)(2)(P). The prevailing party in a petition *under this subsection (f)* shall be entitled to court costs and reasonable attorney fees.' Tenn. Code Ann. § 34-3-108(f) (emphasis added). The rights for which a party may petition the court pursuant to this statute include the right to communicate, visit, or interact with the ward. *See id.* § 34-3-107(a)(2)(P). Persons granted the authority to file such a petition include the 'closest relative or relatives' of the ward. *Id.* § 34-3-103(4)."

"Although the trial court correctly found that the petition was filed under section 34-3-108(a), it went on to award attorney's fees as if the petition had actually been one filed under section 34-3-108(f) seeking the right to 'communication, visitation, or interaction' with the Ward. Tenn. Code Ann § 34-3-107(a)(2)(P). In doing so, the trial court applied an incorrect legal standard. Based upon the foregoing discussion, we find that the Siblings' petition to remove John as a co-conservator was not a petition filed pursuant to section 34-3-108(f) to seek or enforce rights listed in section 34-3-107(a)(2)(P). Having found that the petition was not such, it is axiomatic that John and Mr. Minor were *not* the 'prevailing parties' under section 34-3-108(f). Therefore, we find that the trial court abused its discretion in awarding attorney's fees to John and Mr. Minor under section 34-3-108(f). *See Lee Med., Inc.* [*v. Beecher*], 312 S.W.3d [515] at 524 [(Tenn. 2010)]; *Taylor* [*v. Fezell*], 158 S.W.3d [352] at 359 [(Tenn. 2005)], (stating that an appellate court will not disrupt an award of attorney's fees unless the trial court abused its discretion in granting the award).

"John and Mr. Minor argue that regardless of the trial court's application of subsection (f), they may still be entitled to attorney's fees under Tennessee Code Annotated section 34-1-114(a). This appeal is the first time John and Mr. Minor presented this argument. They never asked the trial court to award them attorney's fees under this section. When the case was before the trial court, their claim for attorney's fees was only presented under section 34-3-108(f). Therefore, we find that John and Mr. Minor waived the argument that they may be entitled to attorney's fees under section 34-1-114(a). *See In re Taylor B.W.*, 397 S.W.3d 105, 114 (Tenn. 2013) (stating that '[i]t has long been the rule that [appellate] [c]ourt[s] will not address questions not raised in the trial court')."

B. County of Residence of Persons in State Custody

Chapter 133, Public Acts 2021, adding T.C.A. § 34-3-101(b)(2) eff. Apr. 13, 2021.

"(2) For purposes of subdivision (b)(1):
(A) The county of residence of a person incarcerated in a department of correction facility is the county in which the facility is located; and
(B) The county of residence of a person involuntarily hospitalized in an institution of the department of mental health and substance abuse services is the county in which the institution is located."

C. Search of Department Registry

Chapter 84, Public Acts 2021, amending T.C.A. § 34-3-104 eff. Jan. 1, 2022.

"The petition for appointment of a conservator, which shall be sworn, should contain the following. . . .

"(4) The name, age, mailing address, relationship of the proposed conservator, statement of any felony or misdemeanor conviction of the proposed conservator, and, if the proposed conservator is not the petitioner, a statement signed by the proposed conservator acknowledging awareness of the petition and a willingness to serve. The petition must also include current copies of the following reports on the proposed conservator:
(A) A search of the department of health's registry of persons who have abused, neglected, or misappropriated the property of vulnerable persons, established by title 68, chapter 11, part 10; and

(B) A search of the national sex offender registry maintained by the United States department of justice."

D. Notice of Proceeding; Confidentiality of Medical and Psychological Records

Chapter 305, Public Acts 2021, amending T.C.A. § 34-1-106(b) and adding § 34-3-105(f) eff. May 4, 2021.

34-1-106(b).

"The petitioner shall give notice to the closest relative of the respondent required to be named in the petition and to the person, if any, having care or custody of the respondent, institution, or residential provider with whom the respondent is living by certified mail or personal service in accordance with the Tennessee Rules of Civil Procedure. If, after reasonable effort, a postal address cannot be ascertained, a notification may be published in a newspaper of general circulation in the county where the petition is filed, or if there is no newspaper of general circulation published in the county, notice may be posted at the county courthouse, except where such petitions are filed by or on behalf of a regional mental health institute owned and operated by the department of mental health and substance abuse services or by or on behalf of the department of intellectual and developmental disabilities pertaining to an individual receiving home- and community-based waiver services or intermediate care facility/intellectual disability (ICF/ID) services."

34-3-105.

"(f) Reports and documents prepared under this section [from physical or psychological exam] are confidential and are not open for inspection by the public. However, this section does not:

(1) Limit the respondent or the respondent's agent or attorney from having access to any such reports or documents about the respondent; or
(2) Prohibit an investigative body from accessing any such reports or documents as authorized or required by law."

III. Trusts; Major Statutory Changes

Chapter 420, Public Acts 2021, amending numerous portions of Title 35 eff. July 1, 2021.

This public act makes a number of changes to Tennessee's Uniform Trust Code that are intended to advance the state's position as a leading trust jurisdiction. These include shortening the creditor statute of limitations, lengthening the duration/enforceability of certain trusts to 360 years and expanding the circumstances in which non-judicial settlement agreements can be used. Provisions regarding designation of Tennessee law to be applicable to administration of a trust have been clarified, as have those related to registration of trusts. Additional protection from creditors is provided by amendments in the law related to self-settled asset protection trusts (Tennessee Investment Services Trusts and Tennessee by the Entirety Trusts). The foregoing list of topics is only a portion of the matters addressed in this complex legislation.

TAXATION

I. Federal

A. 2021 Standard Mileage Rates

IR-2020-279, Dec. 22, 2020.

"Beginning on January 1, 2021, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 56 cents per mile driven for business use, down 1.5 cents from the rate for 2020,
- 16 cents per mile driven for medical, or moving purposes for qualified active duty members of the Armed Forces, down 1 cent from the rate for 2020, and
- 14 cents per mile driven in service of charitable organizations, the rate is set by statute and remains unchanged from 2020.

"The standard mileage rate for business use is based on an annual study of the fixed and variable costs of operating an automobile. The rate for medical and moving purposes is based on the variable costs.

"It is important to note that under the Tax Cuts and Jobs Act, taxpayers cannot claim a miscellaneous itemized deduction for unreimbursed employee travel expenses. Taxpayers also cannot claim a deduction for moving expenses, unless they are members of the Armed Forces on active duty moving under orders to a permanent change of station. For more details see Moving Expenses for Members of the Armed Forces.

"Taxpayers always have the option of calculating the actual costs of using their vehicle rather than using the standard mileage rates."

B. Eligible Payroll Protection Expenses Now Deductible

Revenue Ruling 2021-2, Jan. 6, 2021.

"This ruling obsoletes Notice 2020-32, 2020-21 I.R.B. 837 (May 18, 2020), and Rev. Rul. 2020-27, 2020-50 I.R.B. 1552 (Dec. 7, 2020), due to the enactment of § 276(a) of the COVID-related Tax Relief Act of 2020 (Act), enacted as Subtitle B of Title II of Division N of the Consolidated Appropriations Act, 2021, Public Law 116-260, 134 Stat.1182 (Dec. 27, 2020).

"Notice 2020-32 and Rev. Rul. 2020-27 provide that certain taxpayers (eligible recipients) may not deduct certain otherwise deductible expenses to the extent that the payment of such expenses results (or is expected to result) in the forgiveness of a loan (covered loan) guaranteed under the Paycheck Protection Program authorized under § 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) (SBA), as enacted by § 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281, 286-93 (Mar. 27, 2020). Section 1106(b) of the CARES Act provides for the forgiveness of covered loans and § 1106(i) of the CARES Act provides, for purposes of the Internal Revenue Code, that any amount that otherwise would be includible in an eligible recipient's gross income by reason of such forgiveness is excluded from gross income.

"Section 1106(i) of the CARES Act was redesignated, and transferred to § 7A(i) of the SBA, and amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, which was enacted as Title III of Division N of the Consolidated Appropriations Act, 2021. Section 276(a) of the Act amended § 7A(i) of the SBA to provide that no amount shall be included in the gross income of the eligible recipient by reason of forgiveness of indebtedness described in § 7A(b) of the SBA. See § 7A(i)(1) of the SBA. In addition, § 276(a) provides that no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by § 7A(i)(1) of the SBA. See § 7A(i)(2) of the SBA. The amendment made by § 276(a) of the Act applies to taxable years ending after March 27, 2020, the date of the enactment of the CARES Act. See § 276(a)(2) of the Act.

"As a result of the amendment made by § 276(a) of the Act regarding the Federal income tax consequences of covered loan forgiveness, the conclusion stated in Notice 2020-32, and the holding stated in Rev. Rul. 2020-27, are no longer accurate statements of the law. Accordingly, Notice 2020-32 and Rev. Rul. 2020-27 are declared obsolete as of the effective date of the amendment made by § 276(a) of the Act."

C. Material Advisor's Suit to Enjoin Notice Not Barred by Anti-Injunction Act

CIC Services, LLC v. Internal Revenue Service, 141 S.Ct. 1582 (U.S., Kagan, 2021).

"Internal Revenue Service (IRS) Notice 2016–66 requires taxpayers and 'material advisors' like petitioner CIC to report information about certain insurance agreements called micro-captive transactions. The consequences for noncompliance include both civil tax penalties and criminal prosecution. Prior to the Notice's first reporting deadline, CIC filed a complaint challenging the Notice as invalid under the Administrative Procedure Act and asking the District Court to grant injunctive relief setting the Notice aside. The District Court dismissed the action as barred by the Anti-Injunction Act, which generally requires those contesting a tax's validity to pay the tax prior to filing a legal challenge. A divided panel of the Sixth Circuit affirmed.

"Held: A suit to enjoin Notice 2016–66 does not trigger the Anti-Injunction Act even though a violation of the Notice may result in a tax penalty."

"The Anti-Injunction Act, 26 U.S.C. § 7421(a), provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.' Absent the tax penalty, this case would be easy: the Anti-Injunction Act would pose no barrier. A suit to enjoin a requirement to report information is not an action to restrain the 'assessment or collection' of a tax, even if the information will help the IRS collect future tax revenue. See *Direct Marketing Assn. v. Brohl*, 575 U.S. 1, 9–10, 135 S.Ct. 1124, 191 L.Ed.2d 97. The addition of a tax penalty complicates matters, but it does not ultimately change the answer. Under the Anti-Injunction Act, a 'suit['s] purpose' depends on the action's objective purpose, *i.e.*, the relief the suit requests. *Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 761, 94 S.Ct. 2053, 40 L.Ed.2d 518. And CIC's complaint seeks to set aside the Notice itself, not the tax penalty that may follow the Notice's breach. The Government insists that no real difference exists between a suit to invalidate the Notice and one to preclude the tax penalty. But three aspects of the regulatory scheme here refute the idea that this is a tax action in disguise. First, the Notice imposes affirmative reporting obligations, inflicting costs separate and apart from the statutory tax penalty. Second, it is hard to characterize CIC's suit as one to enjoin a tax when CIC stands nowhere near the cusp of tax liability; to owe any tax, CIC would have to first violate the Notice, the IRS would then have to find noncompliance,

and the IRS would then have to exercise its discretion to levy a tax penalty. Third, the presence of criminal penalties forces CIC to bring an action in just this form, with the requested relief framed in just this manner. The Government's proposed alternative procedure—having a party like CIC disobey the Notice and pay the resulting tax penalty before bringing a suit for a refund—would risk criminal punishment. All of these facts, taken together, show that CIC's suit targets the Notice, not the downstream tax penalty. Thus, the Anti-Injunction Act imposes no bar."

"Allowing CIC's suit to proceed will not open the floodgates to pre-enforcement tax litigation. When taxpayers challenge ordinary taxes, assessed on earning income, or selling stock, or entering into a business transaction, the underlying activity is legal, and the sole target for an injunction is the command to pay a tax. In that scenario, the Anti-Injunction Act will always bar pre-enforcement review. And the analysis is the same for a challenge to a so-called regulatory tax—that is, a tax designed mainly to influence private conduct, rather than to raise revenue. The Anti-Injunction Act draws no distinction between regulatory and revenue-raising tax laws, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 743, 94 S.Ct. 2038, 40 L.Ed.2d 496, and the Anti-Injunction Act kicks in even if a plaintiff's true objection is to a regulatory tax's regulatory effect. By contrast, CIC's suit targets neither a regulatory tax nor a revenue-raising one; CIC's action challenges a reporting mandate separate from any tax. Because the IRS chose to address its concern about micro-captive agreements by imposing a reporting requirement rather than a tax, suits to enjoin that requirement fall outside the Anti-Injunction Act's domain."

II. Tennessee

A. Alcohol Tax; Special Procedures for Consumer Tasting Samples

Chapter 437, Public Acts 2021, amending T.C.A. § 57-3-404(h)(2)(G) eff. May 13, 2021.

"(i) Notwithstanding subdivisions (h)(2)(A)–(F), a manufacturer conducting a consumer tasting at a retail licensee's premises may, in the manufacturer's discretion:

(*a*) Have a licensed wholesaler deliver the product to be tasted directly to the retailer using a zero dollar ($0.00) invoice; or

(*b*) Obtain the product to be tasted from a wholesaler in advance of the tasting and bring the product to the retail licensee's premises to be used exclusively for consumer tastings.

"(ii) If a manufacturer chooses the option in subdivision (h)(2)( )(i)(*b*), then the applicable wholesaler shall provide a zero dollar ($0.00) invoice for the product requested by the manufacturer. In addition, the manufacturer must notify the wholesaler in writing at least five (5) business days prior to pick up by the manufacturer of any scheduled consumer tasting that includes the date and location of the consumer tastings. If additional tastings occur, each manufacturer shall notify in writing their wholesalers of the date and location of the consumer tasting at least five (5) business days after such tastings.

"(iii) A manufacturer may acquire a reasonable amount of product for consumer tastings that will occur in the next thirty (30) days. If a manufacturer has leftover product after this thirty-day period, then the manufacturer may email the applicable wholesalers the approximate amount of leftover product, and the manufacturer may possess this overage for another thirty (30) days. This process may continue indefinitely until the extra product is used up or poured out by the manufacturer.

"(iv) A manufacturer shall not leave excess or leftover product, either sealed or unsealed, with a retail licensee. All product must be taken by the manufacturer to be used by them for future consumer tastings."

B. Tobacco Tax; Smokeless Nicotine Products Excluded

Chapter 69, Public Acts 2021, amending T.C.A. §§ 67-4-1001 and -1005 eff. Mar. 31, 2021.

67-4-1001.

"(2)(C) 'Cigarette' does not include smokeless nicotine products."

"(20) 'Smokeless nicotine product':
(A) Means nicotine that is in the form of a solid, gel, gum, or paste that is intended for human consumption or placement in the oral cavity or absorption into the human body by any means other than inhalation; and
(B) Does not include tobacco or tobacco products."

"(24) 'Tobacco products':
(A) Means cigars, cigarettes, manufactured tobacco, and snuff; and
(B) Does not include smokeless nicotine products or tobacco produced and processed by the grower for the grower's own use and not for sale."

67-4-1005.

"(a) The rate on all other tobacco products, including, but not limited to, cigars, cheroots, stogies, beedies, bidis, manufactured tobacco, and snuff of all descriptions made of tobacco or any substitute for tobacco, is six and six-tenths percent (6.6%) of the wholesale cost price.

"(b) This section does not apply to smokeless nicotine products."

C. Sales and Use Tax

1. Sales Tax Holiday; Gun Safes and Safety Devices

Chapter 592, Public Acts 2021, adding T.C.A. § 67-6-393(i) eff. May 27, 2021.

"(1) There is exempt from the tax imposed by this chapter the retail sale of gun safes and gun safety devices, if sold between 12:01 a.m. on July 1, 2021, and 11:59 p.m. on June 30, 2022.

"(2) For purposes of this subsection (i):
(A) 'Gun safe' means a locking container or other enclosure equipped with a padlock, key lock, combination lock, or other locking device that is designed and intended for the secure storage of one (1) or more firearms; and
(B) 'Gun safety device' means any integral device to be equipped or installed on a firearm that permits a user to program the firearm to operate only for specified persons designated by the user through computerized locking devices or other means integral to and permanently part of the firearm."

2. Aviation Fuel

Chapter 477, Public Acts 2021, amending T.C.A. § 67-6-217 eff. July 1, 2021.

The tax on aviation fuel has been reduced from 4.5 percent to 4.25 percent.

The maximum tax charged per tax year for an air carrier with a transportation hub in the state is $8,500,000 for July 1, 2021 through June 30, 2022 tax year and reduces to $5,000,000 for tax years thereafter.

The transportation equity fund may be reimbursed for any resulting decrease in aviation fuel tax revenue.

3. Micro Markets

Chapter 289, Public Acts 2021, adding T.C.A. § 67-6-102( ) and -504(n) eff. Oct. 1, 2021.

67-6-102.

"( ) 'Micro market' means an unattended food establishment that:
(A) Includes one (1) or more micro market displays;
(B) Has an automated payment kiosk or other device designated for self-checkout by the consumer by means of electronic payment;
(C) Has controlled entry not accessible by the general public; and
(D) Provides commercially prepackaged food or ready-to-eat food, including, without limitation:
(i) Items prepackaged in tamper-evident packaging;
(ii) Products containing nutrition information required by the federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.); or
(iii) Products containing a freshness or expiration date;

"( ) 'Micro market display' means a place where food being sold by a micro market is displayed, including a:
(A) Refrigerator or refrigerated cooler;
(B) Freezer;
(C) Vending machine;
(D) Open rack;
(E) Beverage dispenser; or
(F) Single-service coffee brewer; and

'( ) 'Unattended' means sales of goods are processed electronically without the physical presence of a person operating the market sales checkout.'

67-6-504.

"(n) Notwithstanding any law to the contrary, a dealer who owns and operates multiple micro markets in the state may file a single return for all sales or purchases made at micro markets within this state and report on a consolidated basis all sales and purchases made at micro markets within each local jurisdiction owned and operated by the dealer and taxable under this chapter."

4. Periodic Filing Requirements Modified

Chapter 275, Public Acts 2021, adding T.C.A. § 67-6-505(c) eff. July 1, 2021.

"(c)(1) Notwithstanding § 67–6–504(a), dealers whose sales and use tax liability for twelve (12) consecutive months has averaged one thousand dollars ($1,000) or less per month, adjusted every five (5) years to reflect inflation, as measured by the United States bureau of labor statistics consumer price index for all urban consumers, are authorized to file monthly or quarterly.

"(2) Any sales and use tax liability amount that is adjusted for inflation in accordance with subdivision (c)(1) must be rounded to the nearest ten dollars ($10.00), and the first adjustment for inflation must commence on January 1, 2026."

D. Franchise and Excise Tax

1. Extension Filing Deadline Expanded

Chapter 559, Public Acts 2021, amending T.C.A. § 67-4-2015(h)(1)(A) eff. for tax years beginning on or after Jan. 1, 2021.

The extension time period for filing a Tennessee franchise and excise tax return has been expanded from six to seven months.

2. COVID Relief Funds Exempt

Chapter 154, Public Acts 2021, adding T.C.A. §§ 67-4-2006(b)(2)(v) and (w) eff. Apr. 14, 2021.

67-4-2006(b)(2)(v).

"Any amount received between March 1, 2020, and December 31, 2021, through the following programs funded by the coronavirus relief fund under the Coronavirus Aid, Relief, and Economic Security (CARES) Act (15 U.S.C. §§ 9001 et seq.), including any extension or modification thereof, or funded by appropriations under other federal law under Title VI of the Social Security Act (42 U.S.C. §§ 301 et seq.), to mitigate the fiscal effects of COVID–19, to the extent such amount would otherwise be included in net earnings or loss as defined in subsection (a):

(i) The Tennessee business relief program or the supplemental employer recovery grant program administered by the department of revenue;
(ii) The coronavirus agricultural and forestry business fund administered by the department of agriculture;
(iii) The hospital staffing assistance program or the emergency medical services ambulance assistance program administered by the department of health; or
(iv) The Tennessee small and rural hospital readiness grants program administered by the departments of economic and community development and finance and administration."

67-4-2006(b)(2)(w).

"Any amount received between March 1, 2020, and December 31, 2021, out of the additional funds allocated to the payments to states for the child care and development block grant under the Coronavirus Aid, Relief, and Economic Security (CARES) Act (15 U.S.C. §§ 9001 et seq.),

including any extension or modification thereof and the Further Consolidated Appropriations Act, 2020, Pub. L. 116–94, or received between March 1, 2020, and December 31, 2021, out of additional funds allocated to the payments to states for the child care and development block grant under other federal law enacted to mitigate the fiscal effects of COVID–19, and administered by the department of human services, to the extent such amount would otherwise be included in net earnings or net loss as defined in subsection (a)."

E. Privilege Tax; Hotel Occupancy; Definition Expanded

Chapter 334, Public Acts 2021, amending T.C.A. § 67-4-1401(2) eff. July 1, 2021.

"(2) 'Hotel' means any structure or space, or any portion thereof, that is occupied or intended or designed for occupancy by transients for dwelling, lodging, or sleeping purposes, and includes privately, publicly, or government-owned hotels, inns, tourist camps, tourist courts, tourist cabins, motels, short-term rental units, primitive and recreational vehicle campsites and campgrounds, or any place in which rooms, lodgings, or accommodations are furnished to transients for consideration."

F. Reliance on Commissioner's Policies or Guidance

Chapter 214, Public Acts 2021, amending T.C.A. § 67-1-108 eff. July 1, 2021.

"(a) It is the commissioner's duty to implement and enforce the laws administered by the commissioner under this or any other title. The commissioner shall enforce these laws in a manner consistent with all applicable statutes, rules, and regulations. When the commissioner publishes guidance regarding the taxability of any privilege, affected taxpayers are entitled to rely on the guidance. If the commissioner changes the guidance, then a taxpayer who relied on the guidance before it was changed is not liable for any assessment of additional tax, interest, or penalty that accrued before the guidance was changed and was unpaid because of the taxpayer's reasonable reliance upon the guidance.

"(b) If a taxpayer is either audited by the department or requests specific advice from the department and receives erroneous audit findings or advice, then the taxpayer is not liable for any assessment of additional tax, interest, or penalty attributable to the erroneous finding or advice furnished by the department, to the extent the following conditions are all satisfied:

(1) The finding or advice was reasonably relied upon by the taxpayer. In determining whether the reliance was reasonable, the taxpayer is deemed to be aware of any changes in applicable law that occurred after the finding or advice was furnished by the department;
(2) The additional assessment did not result from the taxpayer's failure to provide adequate or accurate information; and
(3) The department provided the finding or advice to the taxpayer in writing or the department's records establish that the department provided erroneous verbal advice to the taxpayer. In furtherance of this condition, the department shall adopt formal audit procedures to allow taxpayers the right to memorialize audit findings in the final audit document prepared by the audit division upon completion of the audit.

"(c) If the commissioner changes the policy of the department as to the taxability of any privilege, then the policy change must be applied to the exercise of those privileges occurring after the date of the policy change only, unless otherwise provided by law.

"(d) The commissioner is encouraged to continue providing and publishing guidance and advice to taxpayers to assist with compliance with this state's tax statutes. Except as specifically provided in this section, the issuance of guidance, advice, or audit findings by the commissioner does not constitute new or revised enforcement of the law.

"(e) This section is intended only to prevent audit assessments against taxpayers that reasonably relied upon guidance, advice, or prior findings communicated to the taxpayer by the department. Such guidance, advice, or findings do not have the force and effect of law and do not independently establish a basis for a claim for refund under § 67–1–1802. Any claim for refund must be based on applicable statutes, rules, and regulations.

"(f) The department shall designate as public guidance applicable, published manuals, notices, and statements.

"(g) As used in this section:

(1) 'Audit finding' or 'finding':
   (A) Means the specific conclusions contained in the final document written by the audit division or hearing office and presented to the taxpayer upon completion of an audit or an informal conference conducted to review an audit;
   (B) Includes findings memorialized in the final document written by the audit division pursuant to the procedures established under subdivision (b)(3); and
   (C) Does not include the issuance of a license, certificate, or application approval;
(2) 'Published' means displayed on the department's website; and
(3) 'Published guidance' or 'guidance':
   (A) Means tax manuals, important notices, statements presented in a question-and-answer format, or other substantive statements regarding the taxability of a privilege that are published on the department's website; and
   (B) Does not include verbal comments from an auditor or letter rulings or revenue rulings, as described in § 67–1–109, that are redacted and placed on the department's website."

G. Six Year Period for Making Levy Tolled

Chapter 217, Public Acts 2021, adding T.C.A. § 67-1-1429(a)(5) eff. Apr. 22, 2021.

"(5) The period for collection provided in subdivision (a)(1)(A) ceases running upon the imposition of a bankruptcy stay as provided in 11 U.S.C. § 362 or upon the filing of a probate, receivership, or assignment for the benefit of creditors proceeding. Such period recommences running thirty (30) days after the stay is lifted or the proceeding prohibiting collection ends."

INTELLECTUAL PROPERTY

I. Trademark

A. Trademark Modernization Act Makes It Easier to Invalidate a Registration for an Abandoned Mark

The Trademark Modernization of 2020 ("TMA") became law on December 27, 2020, and should be fully implemented by December 27, 2021.

The TMA expands the Letters of Protest to allow interested parties to submit evidence of a conflicting prior registration and evidence that the applied-for mark is not actually in use for the goods or services identified in the application in addition to those matters currently allowed for: genericness, prior registrations, ongoing litigation, and examiner error in calculating Paris Convention priority. This is another step to rid the register of zombie registrations.

Under Section 16A of the TMA, anyone can petition the USPTO to expunge a registration where there are specific goods or services listed in the registration for which the trademark has never been used in U.S. commerce. The petition must set forth evidence of a "reasonable investigation" showing that the registered mark was never used for the goods and services identified in the petition. The expungement proceeding can only be filed three years after issuance of the registration.

Under Section 16B, a registered mark may be invalidated if it was not used in U.S. commerce for some or all the goods or services listed in the registration as of the "relevant date" in the application process with "relevant date" being any of the following:

1. the filing date for an application in which the mark was claimed to have already been used in U.S. commerce,
2. the filing date for an amendment claiming that the mark was currently in use in U.S. commerce, or
3. the deadline by which a statement of use was due to be filed for applications originally filed based on an "intention to use" the mark in U.S. commerce.

The Trademark office can initiate re-examination proceedings upon receipt of a petition that is accompanied by a reasonable investigation showing that the mark was not used in U.S. commerce as of the "relevant date." The request for the re-examination/invalidation must be filed within the first five (5) years after the trademark registration issued.

A trademark examining attorney is now allowed to set a time to respond to an office action from between two to six months as opposed to the prior set six-month period. The applicant may request to extend the shortened response deadline.

The TMA establishes a presumption of irreparable harm for trademark infringement thereby improving the likelihood of an injunction. Before the TMA, there was a circuit split on the standard for injunctive relief in trademark infringement cases following the U.S. Supreme Court's ruling in patent infringement cases in *eBay Inc. v. MercExchange.* 547 U.S. 388 (2006). This presumption has already been helpful to trademark owners in getting an injunction.

B. The Trademark Office is Closely Examining Use of All Listed Goods/Services for Statements of Use, Renewals, and 8 and 15 Declaration

Use must be shown upon filing statements of use, renewals and 8 and 15 applications. Previously, the declaration and a specimen in each class filed in connection with these documents was sufficient. The Trademark Office will now issue an Audit Request asking the filer to show specimens of use for all listed goods and services. Additionally, if goods/services are deleted after these documents are filed, the filer must pay an amendment fee per class. The best practice is to file specimens for each listed good/service.

Also, when a website is used as a specimen, the website screenshot must display the URL along with the date of capture to fight fake specimens that are mostly coming from China.

C. Term Styled "GENERIC.COM" is a Generic Name for a Class of Goods or Services Only if the Term Has That Meaning to Consumers

United States Patent & Trademark Office (USPTO) v. Booking.Com B.V., 140 S.Ct. 489 (U.S., Ginsburg, 2020).

A generic mark is the name of a class of goods/services and not registrable. The Trademark Office traditionally refuses to register a mark containing a generic term connected to ".com". Booking.com sought to register BOOKING.COM in connection with online hotel-reservation services. BOOKING.COM offered evidence demonstrating that consumers did not see "BOOKING.COM" as the name for a class of services. The Trademark Office refused registration as it always has. The Fourth Circuit reversed. The USPTO requested cert.

The USPTO asked the court to implement a "nearly *per se*" rule that a generic term remains generic even if coupled with a generic top-level domain (such as ".com"). The Supreme Court declined the Trademark Office's request and affirmed, stating that it could "not support the PTO's current view in trademark law or policy." The majority stated that whether the term taken as a whole is generic as opposed to a portion of the BOOKING.COM mark being generic must be decided separately. The court then stated that while "booking" may be generic, "Booking.com" is not a generic name to consumers. Therefore, it is not generic. The Court noted that the PTO had registered ART.COM and DATING.COM. This inconsistency argument is one that practitioners before the Trademark Office cannot use successfully.

D. Crowded Field Doctrine Allows Registration of BLUE INDUSTRY Despite Prior INDUSTRY Mark.

Pure & Simple Concepts v. 1 H W Management (Finchley Group), Fed. App'x , 2021 WL 2065914 (Fed. Cir. 2021).

Pure & Simple owns several INDUSTRY trademark registrations for use in connection with clothing that it licenses to the Manhattan Group who sells clothing displaying the mark.

In 2015, Finchley applied to register BLUE INDUSTRY for clothing in Class 25. Pure & Simple opposed registration of the trademark alleging a likelihood of confusion and dilution. The Trademark Trial & Appeal Board found no likelihood of confusion and no dilution. Pure & Simple appealed.

The Federal Circuit found no likelihood of confusion nor dilution in this case because of the numerous third party uses of INDUSTRY derivative marks that the dominant BLUE added to INDUSTRY by Finchley Group avoids a likelihood of confusion and dilution.

The Trademark Act (Lanham Act) prohibits registration of a mark that "so resembles" another registered/used mark "as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1052(d). The TTAB made findings of fact on the limited duPont factors as to likelihood of confusion. The Federal Circuit refused to allow the parties to argue on any of the other factors.

The Federal Circuit dismissed the dilution argument stating that mark must be famous at the time of the alleged act - "A mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner." Slip Op. at 11.

E. A Court Must Consider Facts Most Favorably for the Nonmovant in Evaluating the Eight Likelihood of Confusion Factors to Determine Reverse Confusion.

Ironhawk Technologies, Inc. v. Dropbox, Inc., 994 F.3d 1107 (9th Cir. 2021).

Ironhawk develops computer software that uses compression technology to allow for the efficient transfer of data, especially in "bandwidth-challenged environments" somewhat like the fictitious Pied Piper from Silicon Valley. It began marketing its software displaying "SmartSync" in 2004 and obtaining registration for the mark in 2007. While selling mostly to the military, it sold its software to at least one major pharmacy chain in 2013.

Dropbox provides cloud storage and transfer software online to millions of users. In 2017, Dropbox began using "Smart Sync" for services allowing a user to see and access files without using up any of the user's hard drive storage. Dropbox was aware of Ironhawk's SmartSync mark prior to adoption. Dropbox had attempted to acquire Ironhawk.

Ironhawk sued Dropbox for trademark infringement and unfair competition under the Lanham Act. Ironhawk alleged reverse confusion, which means that consumers would likely be confused into thinking that Ironhawk's products were from Dropbox. Reverse confusion can occur when the junior user's advertising and promotion so swamps the senior user's reputation in the market that customers are likely to be confused into thinking that the senior user's goods are those of the junior user.

Dropbox successfully moved for summary judgment of non-infringement based upon the factors set forth in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th Cir. 1979). The Sixth Circuit uses the same *Sleekcraft* factors that it calls the *Frisch* factors. The district court found that "the overwhelming balance of the *Sleekcraft* factors weighs against a likelihood of confusion" and found that no reasonable jury would find the requisite likelihood of confusion. Ironhawk appealed to the Ninth Circuit.

The Ninth Circuit confirmed that the theory of "reverse confusion" "occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one." While this may seem to be of benefit to the smaller senior user in that Ironhawk's mark could be enhanced with its association with the more well-known brand of Dropbox, the Ninth Circuit

acknowledged that "reverse confusion" may prevent the senior user "from expanding into related fields" and misconduct or problems with the junior user's product could negatively impact the goodwill of the senior user if it was unfairly associated with the junior mark. In essence, courts have recognized the reverse confusion theory "to prevent the calamitous situation [where] a larger, more powerful company thus usurp[s] the business identity of a smaller senior user." (*Citing, Commerce Nat'l Ins. Servs., Inc. v. Commerce Ins. Agency, Inc.,* 214 F.3d 432, 445 (3d Cir. 2000).)

The Ninth Circuit then laid out and analyzed each of the following *Sleekcraft* factors: "(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines" but followed that these factors are "neither exhaustive nor dispositive" and that courts should look to the "totality of facts in a given case."

In any infringement analysis, the market must be defined. Dropbox argued that Court should limit the market to the United States Navy and disregard the isolated private consumer. Ironhawk sought the broader market as it had explored marketing its products and had marketed its products to others. Ironhawk also argued that Dropbox's prior attempt at acquiring Ironhawk showed that Dropbox recognized the possibility of a larger market.

Considering the evidence in a light most favorable to the nonmovant Ironhawk, the Ninth Circuit found that the market could be found to be the broader market by a jury. Applying the *Sleekcraft* factors to this broader market, the Ninth Circuit held that the majority of these factors weighed in favor of Ironhawk, again applying the facts most favorable to the nonmovant.

In determining the strength of the mark for the *Sleekcraft* analysis, the Ninth Circuit found that while a jury could find the Ironhawk mark to be descriptive, it could also find the mark to be suggestive. The Ninth Circuit recognized that Ironhawk did not need to show that the parties are direct competitors to satisfy the relatedness of goods and services.

Regarding the similarity of the marks, the Court first looked at whether there is similarity "by appearance, sound and meaning" and should consider marks in their entirety "as they appear in the marketplace," weighing similarities more heavily than differences between the marks. While the consistent use of a house mark could generally reduce the likelihood of confusion, "in a reverse confusion case the junior user's use of a house mark can also aggravate confusion by reinforcing the association between the mark and the junior user." The Ninth Circuit found that this factor likewise favored Ironhawk.

In determining evidence of actual confusion, Ironhawk's evidence included that several consumers had expressed concern about why they needed Ironhawk's SmartSync if they already had Dropbox's Smart Sync. Despite issues relating to credibility, the Court found this factor favored Ironhawk.

The Court found that overlap of marketing channels favored Dropbox given the very little overlap in marketing channels. As to degree of consumer care, the Court disagreed with Dropbox's argument that U.S. Navy purchasers were sophisticated given that Ironhawk had offered evidence that it was attempting to market its product beyond the government. As to the intent to infringe, the Court found it significant that Dropbox knew of Ironhawk's SmartSync mark before adoption by

Dropbox. As to expansion of product lines, the Court favorably noted Ironhawk's attempts to expand its products beyond the United States Navy.

Having found that 7 of the 8 factors could weigh in favor of DropBox, the Ninth Circuit concluded that the trial court had erred in granting Dropbox summary judgment and remanded the court for trial.

F. A Term That Is Also a Registered Mark May Be Used as a Descriptive Term As Opposed to a Trademark

Tiffany and Company v. Costco Wholesale Corporation, 971 F.3d 74 (2nd Cir. 2020).

Before Tiffany developed its iconic Tiffany setting in 1886, all diamonds were set in a bezel, or a complete circle of metal so that only the top was visible. Charles Lewis Tiffany lifted a round brilliant cut diamond above the band on six prongs so that light penetrates the sides and enhances the stone's brilliance. By 2012, Forbes Magazine called the Tiffany setting "The World's Most Popular Engagement Ring." As it is the most sought-after style for engagement rings, other jewelers, including Costco Wholesale Corp. ("Costco") use the term "Tiffany setting" to indicate rings made in this way.

In 2013 Tiffany sued Costco alleging trademark infringement and counterfeiting under the Lanham Act and New York law alleging that consumers bought engagement rings under the belief that they were products from Tiffany. Costco argued that it was entitled under the Lanham Act to descriptive fair use of an otherwise protected mark.

The district court held that no reasonable jury could find for Costco and granted summary judgment for Tiffany for infringement and counterfeiting.

In a 2015, the district court awarded Tiffany trebled profits along with punitive damages and prejudgment interest totaling $21,010,438.35 after an advisory jury trial on the questions of damages.

Costco moved to challenge several things, including damages calculation. The court rejected Costco's challenges and added $6 million in attorney's fees. Costco appealed.

The Second Circuit vacated the judgment, finding that genuine issues of fact remained. Costco raised genuine issues of fact on three relevant factors on likelihood of confusion: actual confusion, bad faith, and sophistication of purchasers. It found that "[a] reasonable jury could conclude that Costco did not intend to mislead its customers and that signs bearing the word 'Tiffany' were the product of a good-faith attempt to communicate to its customers the setting style of certain rings that it sold." The Second Circuit cited a prior decision where it found "that purchasers of diamond engagement rings educate themselves so as to become discerning customers."

Also, evidence was presented that "'Tiffany' is a broadly recognized term denoting a particular style of pronged ring setting," leaving a triable question on its fair use defense, advising that "[t]here is nothing inherently absurd about a single word's being both a source identifier and a descriptive term within the same product class."

The Second Circuit reversed the counterfeiting finding, noting "that it is likely inappropriate to impose liability for trademark counterfeiting when a defendant is able to establish . . . that it used a term identical to the registered mark otherwise than as a mark."

G. The Standard of Review for the Equitable Basis of the Unclean Hands Doctrine Is Abuse of Discretion Though There May Be Issues of Fact

Metal Jeans, Inc. v. Metal Sport, Inc., 987 F.3d 1242 (9th Cir. 2021).

Gary Topolewski owns Metal Jeans and formerly owned Topolewski America, Inc. ("TA"). He began selling "METAL" branded clothing the early 1990s mostly through hard rock music magazines. He expanded his offerings to motorcyclists, skaters, lumberjacks and "headbangers." He registered the "METAL" mark in 1999 under TA in Class 25 listing various types of clothing. As part of the 8 and 15 declaration, Topolewski attested to the continuous use of the METAL mark on all the listed items since 1999. In a separate 2008 proceeding, the PTO concluded that this was a false statement, at least as to boots, and cancelled TA's registration of the METAL mark. Topolewski later registered through Metal Jeans the "METAL" mark in 2013.

Metal Sport, started by a retired Finish power lifter, registered a stylized "METAL" mark in August 2016 for power lifting apparel and gear that he marketed. The power lifter began using the stylized "METAL" mark sometime around 1997.

Metal Jeans sued Metal Sport for trademark infringement in 2015 claiming a likelihood of consumer confusion between the two marks. On cross motions for summary judgment the district court granted Metal Sport's motion based on the affirmative defense of unclean hands. Metal Jeans appealed to the Ninth Circuit.

The Ninth Circuit acknowledged that a grant of summary judgment by a district court in a trademark infringement claim is normally reviewed "de novo with all reasonable inferences drawn in favor of the non-moving party." On the other hand, equitable relief such as unclean hands is generally reviewed under an abuse of discretion standard. The Ninth Circuit had decided two prior cases involving summary judgment on the issue of unclean hands but had not identified the standard of review. Other Ninth Circuit recognized the general principle that other equitable doctrines such as acquiescence and/or laches should be analyzed under an abuse of discretion standard. It was "a modest and obvious step to extend these previous holdings to the present situation," i.e., to the application of the unclean hands doctrine. The Ninth Circuit concluded that "the appropriate standard of review of a district court's determination to grant summary judgment on the affirmative defense of unclean hands is abuse of discretion." However, other aspects relating to the granting of summary judgment would be reviewed under a de novo standard, such as "whether the district court inappropriately resolved any disputed material facts in reaching its decision."

In a separate unpublished opinion, the Ninth Circuit reversed the summary judgment based on unclean hands. The Ninth Circuit stated that "to constitute unclean hands, a defendant must show (1) that the plaintiff's conduct is inequitable and … (2) relates [directly] to the subject matter of its claims.' The Ninth Circuit reviewed the examples of misconduct used to demonstrate unclean hands: (1) Metal Jeans' various accounts of how it acquired the mark; (2) Metal Jeans' representation that it had owned the "METAL" mark at the time TA had in fact owned it; (3) Topolewski told the PTO that Metal Jeans was a "premium denim lifestyle clothing brand," which

may not have been accurate; (4) Metal Jeans apparently sourced some of its products from China despite having an "American made, American worn" slogan; (5) Topolewski testified inconsistently as to how he had assigned the goodwill and trademarks between TA and Metal Jeans; and (6) Topolewski's apparent false statement to the PTO that had led to the cancellation of the mark in 2008.

The Ninth Circuit found that the district court had improperly resolved several disputes of material fact as to the first five examples in the movant's favor while also finding that five of the six examples did not "necessarily relate directly to the trademark claim Metal Jeans asserts in this case;" did not appear to cause any harm; and did not evidence any malintent by Metal Jeans. The Ninth Circuit said that, because a jury could decide these five factors either way, the district court had erred in granting summary judgment based on unclean hands.

H. A Utility Patent Is Irrelevant on the Issue of Functionality When the Feature Was Not Part of the Utility Patent's Technological Advance

Ezaki Glico Kabushiki Kaisha v. Lotte International America Corp., 986 F.3d 250 (3d Cir. 2021).

Ezaki makes the Pocky which is a thin, long cookie partially covered by chocolate. Lotte released a competing product. Ezaki filed suit for trade dress infringement. The trial court granted summary judgment, stating the trade dress was functional and not subject to protection. Ezaki appealed.

The Third Circuit affirmed. The court rejected Ezaki's argument that functional should mean "essential," favoring instead to focus on the dictionary definition of "functional" to mean "in a word, useful." The court also noted that functionality is analyzed "not at the level of the entire product or type of feature, but at the level of the particular design chosen for feature(s)."

The court looked at common types of evidence for functionality which include (1) evidence that "directly show[s] that a feature or design makes a product work better," (2) evidence that "a product's marketer touts a feature's usefulness," (3) utility patents, and (4) evidence that "there are only a few ways to design a product," explaining that the list is not exhaustive.

The court stated that a utility patent is not automatically relevant. Recognizing that a utility patent is "strong evidence" of functionality, the court noted that the feature in question must nonetheless be part of the "central advance" of the utility patent. Unless part of that central advance of the utility patent, the utility patent is irrelevant to the functionality. Instead, the central advance of the utility patent related to how to make the snack as opposed to the shape of the snack, making the utility patent irrelevant to the functionality inquiry.

The court still found the trade dress functional noting that the Pocky design makes it work better because it enables a user to eat the snack without getting their fingers dirty. The court also noted that Ezaki had promoted the "utilitarian advantages" of Pocky, promoting it as "no mess" and "portable." Based on this evidence, the court affirmed the district court's determination that the trade dresses covering Pocky were functional, and therefore invalid.

I. Court Use of *Morton-Norwich* Factors to Determine Functionality

In re Reelex Packaging Solutions, 834 Fed. App'x 574 (Fed. Cir. 2020).

Reelex makes and sells machines that wind and package cables and wires into boxes. The packaging allows the cable or wire to be removed from the box with less kinking or tangling. Reelex packages the cable in figure-8 formation that are placed in "Reelex Boxes". Reelex filed applications to register the box designs in International Class 9. The USPTO refused both stating the designs were functional trade dress. The Lanham Act requires trade dress in product packaging to be non-functional and distinctive.

The Examining Attorney refused the registrations based on Reelex patents that identified functional features and company advertising that described its "tangle-free technology" in the boxes established functionality. The Examining Attorney also found that the trade dress lacked distinctiveness. The Trademark Trial and Appeal Board (TTAB) affirmed. Reelex appealed to the Federal Circuit.

The Federal Circuit Affirmed. The court used the *Morton-Norwich* factors to determine functionality: 1) existence of a utility patent disclosing the functional aspects of the design; 2) advertising materials touting the functional advantages of the product; 3) availability of functionally equivalent designs; and 4) assessing whether the designs result from a comparatively simple or inexpensive manufacturing method. *In re Morton-Norwich Products, Inc.*, 671 F.2d 1332 (C.C.P.A. 1982).

The existence of five utility patents weighed heavily against Reelex's box design, each of which disclosed the features Reelex claimed as trade dress as to the first factor. Reelex's website alleging that the winding and packaging system made it easier to dispense cable and wire without kinking or tangling, as well as claims that it was lower cost and allowed for easier transport and storage of the boxes, also favored functionality as to the second factor. The Federal Circuit dismissed Reelex's proof as to the existence of alternative designs stating that the employee and inventor declarations were self-serving. The Court did not analyze the last factor regarding simple or inexpensive manufacturing methods given there to be no evidence in the record. After finding three of the four factors favored a finding of functionality, the Court affirmed while passing on the distinctiveness issue.

J. You Must Prove Actual Damages if You Want Punitive Damages in an Infringement Action

Monster Energy Company v. Integrated Supply Network, LLC, 821 Fed. App'x 730 (9th Cir. 2020).

Monster Energy Company sells energy drinks and sometimes sponsors racing events. Integrated Supply sells automotive supplies, some of which display Monster Mobile and ISN Monster. Monster Energy sued Integrated Supply Network for trademark infringement. A jury found that ISN infringed some Monster marks and trade dress, though not willfully, and found no actual damages but awarded Monster Energy Company $5,000,000 in punitive damages. The trial court awarded Monster Energy Company $1 in nominal damages in addition to the $5 Million in punitive damages. Both sides appealed to the Ninth Circuit.

The Ninth Circuit affirmed the jury's verdict on zero damages concluding that the "verdict reflects the jury's determination that [Monster Energy Company] failed to carry its burden of proving the amount of damages if any." The court rejected an argument that the $5,000,000 in punitive damages showed that the jury must have made a mistake regarding its finding of $0 in actual damages, stating that "any tension between the jury's punitive and actual damages awards does not

lead to the conclusion that the actual damages verdict had no reasonable basis." The court ruled that the jury's findings of $0 in actual damages precluded an award of punitive damages. "Because 'actual damages are an absolute predicate for an award of exemplary or punitive damages' in California and the jury awarded $0 in actual damages, the punitive damages award should have been vacated."

The Court reversed the trial court's $1 award because "Moreover, although an award of nominal damages may be mandatory in a 42 U.S.C. § 1983 action in some circumstances [i.e., civil rights actions], the district court erred in overriding the jury's $0 damages verdict and awarding $1 in nominal damages in this case." The Ninth Circuit vacated the award of nominal and punitive damages.

The Ninth Circuit remanded the case to address other issues including unfair competition law claim and its Lanham Act disgorgement claim. The Court stated that there could be a later basis for an award of punitive damages.

K. Washington Redskins Change Their Team Name

On Monday, July 13, 2020, the Washington Redskins announced that it will abandon "Redskins." The team is currently known as "The Washington Football Team". The team denied the change was caused by social pressure despite powerful corporations, such as Nike and Amazon, refusing to sell Redskins merchandise.

In 1992, Suzan Shown Harjo, president of the Morning Star Institute, and six other prominent Native Americans petitioned the USPTO to cancel the Washington Redskins trademark registrations, stating them to be "disparaging, scandalous, contemptuous, or disreputable" and therefore not entitled registration. The TTAB cancelled the registrations "on the grounds that the subject marks may disparage Native Americans and may bring them into contempt or disrepute." The District Court for the District of Columbia reversed with no appeal taken. Later attempts to cancel the registrations were denied because of laches.

A second set of Native Americans, led by Amanda Blackhorse, filed a petition in the TTAB seeking to cancel the Team's marks on the same grounds. The TTAB cancelled six registrations, finding the marks to be disparaging to a "substantial composite of Native Americans" and supported their conclusion with evidence demonstrating the cessation of use of the term "redskins" to refer to Native Americans in the 1960s. The Eastern District of Virginia affirmed. The Team appealed to the Fourth Circuit. But after the Team filed its appeal with the Fourth Circuit, the Supreme Court agreed to hear *Matal v. Tam* in which the Supreme Court held that the disparagement clause of the Lanham Act violates the First Amendment's free speech clause. The Fourth Circuit vacated the lower court's order, remanding the *Blackhorse* matter for further proceedings, consistent with *Tam*. But the commercial pressure became too much.

L. License Providing Licensor with Sole and Absolute Discretion to Approve a Use with Explicit No Remedy For Denial Enforceable

Authentic Apparel v. U.S., 989 F.3d 1008 (Fed. Cir. 2021).

The U.S. Army non-exclusively licenses to Authentic certain U.S. Army trademarks for clothing. Authentic was going to feature Duane Johnson with Army-Style clothing. The license required the

Army's "advance written approval" subject to the Army's "sole and absolute discretion" prior to any sale/distribution. The Army refused The Rock expansion line of clothing as well as rejecting and delaying other proposals. Army did not approve various advertisements because it did not want to be recognized as the source of the licensed goods, to which Authentic argued that it licensed use of the Army mark "for trademark purposes." Authentic sued the Army for breach in the Court of Federal Claims. The Court of Federal Claims granted summary judgment for the Army. Authentic appealed to the Federal Circuit.

The Federal Circuit affirmed the CFC's summary judgment holding that the "sole and absolute discretion" provision controls, further pointing out that the license agreement indicated no remedy would be available for the Army's refusal to approve proposals. While agreeing that the Army had an obligation of good faith and fair dealing in its contracting, the broad right of approval given the Army came with much freedom.

M. Trademark Office's Refusal to Register Confers Standing to Challenge a Registration Despite Existence of Coexistence Agreement

Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC, 965 F.3d 1370 (Fed. Cir. 2020) (en banc).

NAKED TM registered the mark NAKED in connection with luxury condoms. Before NAKED TM's priority date, Australian Therapy sold NAKED condoms to U.S. internet customers. In the early 2000s, the companies reached an arrangement of coexistence without a written contract. Since 2003, Australian has sold NAKED condoms in the U.S. to less than 48 consumers per year.

Australian Therapy petitioned to cancel NAKED TM's registration. The TTAB dismissed for lack of standing under 15 U.S.C. § 1064, which requires the petitioner to be "any person who believes that he is or will be damaged … by the registration of a mark. …" The TTAB found a binding contract between the parties where Australian Therapy gave up its rights to use the mark in the U.S. Australian Therapy appealed.

The Federal Circuit reversed, finding that a cancellation petition may be filed by any party demonstrating "a real interest in the cancellation proceeding and a reasonable belief of damage regardless." There is no requirement of a proprietary interest in an asserted unregistered mark. The Court held that Australian applied to register its marks and that the USPTO refused registration based on a likelihood of confusion with Naked's registered mark.

N. Future Possibility of Amendment of a Registration Does Not Establish Basis for Cancellation of Registration

Royal Crown Company, Inc. v. Coca-Cola Company, 823 Fed. App'x 960 (Fed. Cir. 2020).

Coca-Cola registered several ZERO derivative marks including COKE ZERO. Royal Crown petitioned to cancel the registrations unless Coca-Cola disclaimed the term "zero." The TTAB had dismissed the oppositions, finding a lack of evidence that the term ZERO is generic for the term "zero-calorie" or "zero-sugar" even when used to label otherwise sugary soft drinks. RC appealed.

The Federal Circuit vacated and remanded, concluding that the Board had applied the incorrect legal standard for generic. On remand, Coca-Cola moved to amend its registrations to disclaim the

term ZERO. The TTAB granted the motion to amend and dismissed the oppositions. Royal Crown again appealed, being concerned that Coca-Cola may file new applications or expand the scope of its marks in future litigation asking for a finding that the ZERO portion is generic.

The Federal Circuit found that the appeal moot because Royal Crown has received everything that it requested after the disclaimers of ZERO were entered. The Federal Circuit found that potential harm of future action "too speculative to invoke the jurisdiction of this court."

II. Copyright

A. There Is No Right to Jury Trial for a Determination of Fair Use

Google LLC v. Oracle America, Inc., 141 S.Ct. 1183 (U.S., Breyer, 2021).

An API is an Application Program Interface (API), which allows an application to interface with or communicate with a program or other application. Google developed an API to interface with Oracle's Java programming language which allows other applications to interface with Java. Google copied various naming conventions of the functions such as "MAX" functions and their organization, which are thousands of function names organized into 37 Packages. Google wanted its developers to be able to communicate with Java code. Oracle wanted revenues for using the language. Google recreated the language but used certain common terms which allowed the app to communicate with Java.

Oracle sued Google for copyright infringement because of Google's use of the API. Google raised Fair Use. The jury in the district court found fair use. The Federal Circuit reversed, finding no fair use, finding the API to be copyrightable, and found infringement.

Justice Breyer in a 6-2 decision wrote that that Google's copying of the JAVA API naming convention was a fair use as a matter of law but declined to decide the question of whether the materials copied were copyrightable.

The Supreme Court agreed with *de novo* review of the legal conclusions by the Federal Circuit but reversed on the ultimate issue of fair use as a matter of law.

The four factors of fair use in copyright are:

- the purpose and character of the use
- the nature of the copyrighted work
- the amount and substantiality of the portion taken, and
- the effect of the use upon the potential market

These four factors are not the exclusive factors to review to determine fair use. The analysis of these factors is a mixed question of law and fact. The issues of the amount of the work used and the effect on the potential market are factual issues that must be proven by evidence as weighed by the factfinder (often a jury). Other issues and the issues of the importance of each factual finding are issues of law.

Although some fair use questions were sent to juries prior to the Constitution, current fair use originates in equity rather than common law. Thus, there is no right to a jury trial under the Seventh Amendment for fair use claims.

In its fair use analysis, the court placed importance that the value of Java's API is because "those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn the API's system" as opposed to there being any inherent creativity of the expression in the API. By doing this, the court was able to conclude that the "'nature of the copyrighted work' points in the direction of fair use."

The Supreme Court found Google "precisely" copied the JAVA API but found the use transformative by allowing it to be used in a mobile device rather than a laptop. The Court found the copying to be insubstantial as Google copied around 11,000 lines of code or less than 1% of Java as a whole. As to market impact, the Court found Oracle unlikely to be able to compete in the Android marketplace otherwise, thereby creating more market opportunity for others.

B. Statutory Damages Based Upon the Number of the Works Infringed as Opposed to the Number of Infringers

Desire, LLC v. Manna Textiles, Inc., 986 F.3d 1253 (9th Cir. 2021).

Fabric supplier Desire obtained a Copyright registration for a two-dimensional floral print textile design. Top Fashion, a clothing manufacturer, purchased some fabric from Desire to sell items of clothing to retailer Ashley Stewart, Inc. Top Fashion and Desire could not finalize a price so Top Fashion worked with fabric designer Manna who worked with a Chinese textile design firm to modify the design by 30-40% to create a design for which Manna subsequently obtained a copyright registration. Manna's fabric was purchased by and used in garments made by at least three retailers. Desire sued for copyright infringement against Manna, the manufacturing defendants and their retailer defendants and alleged that neither the manufacturing defendants acted in concert with one another nor that the three retail defendants acted in concert with one another.

The trial court granted summary judgment to Desire on the issues of ownership and validity. It also found that Manna and two of the manufacturing defendants had access to the asserted design. The trial court found Desire's copyright design was entitled to broad copyright protection. The court found that if the jury determines copyright infringement, it would award up to seven statutory damages awards under a theory of the joint and several liable of the various defendants.

After a trial, the jury found willful infringement by Manna and two of the manufacturer defendants and innocent infringement by a third manufacturer and one retailer. The trial court awarded Desire $480,000 in statutory damages assessed jointly and severally against Manna and the manufacturers. The defendants appealed to the Ninth Circuit.

The Ninth Circuit found that the district court had properly apportioned joint and several liability as to the manufacturers and Manna. The court then found that each retailer would have only been the cause of harm resulting from its own actions. However, this related to apportionment, and not amount.

The Ninth Circuit found that only a single work was alleged to have been infringed and that only one statutory damage could be awarded. The purpose of a statutory damages award is an alternative

to actual damages, and the election always belonged to the copyright owner. Congress did not intend to create a windfall statutory award where Manna's actual profit on the subject design was no more than $5,000. The statutory damage award in the Copyright Act had to fulfill the two remedial provisions of the Copyright Act, "to provide adequate compensation to the copyright holder and to deter infringement."

C. The DMCA's Copyright Management Information Alteration Liability Does Not Require Copyright Holder to Prove That the Other Party Knew Their Actions Would Lead to Future Infringement

Mango v. BuzzFeed, Inc., 970 F.3d 167 (2d Cir. 2020).

Freelance photographer Mango licensed a photograph to the New York Post who included the photo in a story placing Mango's name below the photo in what is known as a "gutter credit." BuzzFeed published a related story and included Mango's photo with neither Mango's permission and nor credit. Mango sued for copyright infringement and for removal or alteration of copyright management information under the DMCA. BuzzFeed stipulated to copyright infringement, leaving the DMCA claim to be decided.

The DMCA made unlawful the removal or alteration of Copyright Management Information which includes: 1) the title or other information identifying the work; 2) the name of the author of the work; and 3) the name of the copyright owner of the work. Section 1202(b) liability requires actual knowledge that CMI was removed or altered, and constructive knowledge that such removal or alteration may induce, enable, facilitate or conceal an act of infringement.

Buzzfeed argued that it did not know that its actions would cause copyright infringement. The district court found violation of the DMCA and awarded Mango statutory damages.

The Second Circuit affirmed, finding that the "infringement" is not limited by actor (i.e., to third parties) or by time (i.e., to future conduct). BuzzFeed's own infringement was "an infringement" and its awareness that it was distributing copyrighted material without proper attribution potentially concealed its own infringing conduct thereby satisfying the DMCA's second scienter requirement.

D. In a License Agreement, Breach of a Covenant is Not an Infringement While Breach of a Condition is Infringement

Bitmanagement Software GmbH v. U.S., 989 F.3d 938 (Fed. Cir. 2021).

Bitmanagement distributes graphics-rendering software made available by the U.S. Navy to computers connected to the Navy Marine Corps Intranet. The Navy purchased copies but not enough seat license fees for system-wide use. The Navy did not use the required licensing-tracking software ("Flexera") to monitor and limit the number of simultaneous users of its system. Bitmanagement registered its copyright and then sued for copyright infringement in the Court of Federal Claims (CFC) under 28 U.S.C. § 1498(b). The CFC found Bitmanagement "had established a prima facie case of copyright infringement" but that the Navy's actions were excused by an implied license to make/distribute copies. *Bitmanagement Software GmbH v. United States*, 144 Fed. Cl. 646 (2019). The Navy admitted that it did not track/limit usage but argued that the potential breach should be pursued via a breach-of-contract claim as opposed to a copyright claim. Bitmanagement appealed.

The Federal Circuit found that the Navy's failure to track/limit usage created an infringement claim, distinguishing between (1) breach of a condition that limits the scope and (2) breach of a covenant. Breach of a covenant is not an infringement while breach of a condition is. The court explained that terms of a license are presumed to be covenants, rather than conditions, unless a condition precedent was intended. Normally, a copyright owner who grants a license to his copyrighted material has waived his right to sue the licensee for copyright infringement and must instead pursue a claim for breach of contract. The court found that the use of Flexera to limit/monitor usage was a condition that induced Bitmanagement to enter the contract. The court went on to say that actions against the government only allow for compensatory damages, including the lowest statutory damages.

E. The DoD May Only Limit Statements Restricting Governmental Rights to Information Within a Document

The Boeing Company v. Secretary of the Air Force, 983 F.3d 1321 (Fed. Cir. 2020).

Boeing contracted with the Air Force to develop a multi-billion-dollar F-15 Eagle Passive/Active Warning Survivability System (EPAWSS). Under the contract, Boeing "retains ownership" of the technical data it generates and delivers. The U.S. Government receives "unlimited rights" to the data, including the right to "use, modify, reproduce, perform, display, release, or disclose [the] technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so."

Boeing began placing a copyright notice listing Boeing as the owner as well as a limitation that the information could only be used with the written permission of either Boeing or the US. After U.S. objected, Boeing listed the owner as Boeing and the U.S. and limiting further disclosure by "Non-U.S. Government recipients." Boeing petitioned to the Armed Services Board of Contract Appeals (ASBCA). After losing, Boeing appealed to the Federal Circuit.

The Federal Circuit reversed, finding that Boeing's restrictions restrict only non-US-Governmental parties. Although DoD regulations state that "All other markings are nonconforming markings," the court held that statement as only applying to markings that restrict U.S. governmental rights.

III. Patent

A. Judges at the Patent Trial and Appeal Board Are Reviewable by the Director of the PTO Making Them No Longer Principal Officers

United States v. Arthrex, Inc., 141 S.Ct. 1970 (U.S., Roberts, 2021).

In order to make an attempt to invalidate patents easier, Congress created the Patent Trial and Appeal Board to hear *inter partes* proceedings including *inter partes* reviews. These cases are heard by one of more than 200 patent judges appointed by the Secretary of the Department of Commerce.

Smith and Nephew petitioned to invalidate a patent owned by Arthrex in an *inter partes* review before the Patent Trial and Appeal Board ("PTAB"). The PTAB found Arthrex's patent invalid.

Arthrex appealed to the Federal Circuit stating that the PTAB was wrong and that all judges on the PTAB were improperly appointed because they are Principal Officers of the U.S. but were not

appointed by the President and confirmed by the Senate. The Federal Circuit found that, given the powers given them, they should be nominated by the President and confirmed by the Senate. The Federal Circuit attempted to resolve this issue by making it easier for the judges to be fired, making them inferior judges.

Losers in the PTAB have challenged decisions based upon Arthrex. The Federal Circuit ordered many cases before the PTAB to be reheard by properly appointed judges. The Patent Office has stayed rehearing of these cases until the Supreme Court ruled.

With much hand waiving, the Court fixed the issue by amending the statute to make all decisions of the PTAB reviewable by the Director of the Patent and Trademark Office. As the decisions are now reviewable, the PTAB judges are no longer Principal Officers. One interesting issue is that the PTO Director at the time of the decision is an acting director appointed by no one. As to pending matters before the PTAB and the Federal Circuit challenging the appointments, the Supreme Court did not order rehearing but requires the Director to review all decisions and approve or disapprove them.

B. A Patent Assignor May Not Challenge the Validity of an Assigned Patent

Minerva Surgical, Inc. v. Hologic, Inc., 141 S.Ct. 2298 (U.S., Kagan, 2021).

Patentee Estoppel precludes a patent assignee from challenging the validity of the assigned patent. This arises mainly where an inventor listed in a patent application assigns the patent application and resulting patent to their employer. That employee goes elsewhere. The inventor is charged with infringement of the patent. The inventor, having previously stated in the declaration in the patent application that they believe the invention to be patentable, now challenges the validity of the patent.

In a 5-4 decision, the Supreme Court has upheld prior precedent continuing the doctrine of assignor estoppel that when an assignor warrants that a patent is valid, their later denial of validity breaches norms of equitable dealing. The Court was concerned about profiting doubly when the patent is assigned and when the new company wants to exploit the same technology.

However, there is no warranty in cases where there are no explicit nor implicit representations. The warranty applies when a specific patent is assigned but does not apply to an assignment occurring before the invention even existed.

On remand, the Federal Circuit will consider how these caveats play into the specific case here where the claims were apparently changed substantially post-assignment.

C. Claims Are Invalid if They Invoke Generic Processes and Machinery Even if the Specifications Contain Patentable Subject Matter

Yu v. Apple Inc., 1 F.4th 1040 (Fed. Cir. 2021).

U.S. Patent No. 6,611,289 covers "Digital cameras using multiple sensors with multiple lenses." The asserted claims are directed generally to image sensors and lenses in a digital camera(s) that takes two pictures, using one picture to improve the other. Yu and Zhang sued Apple and Samsung for patent infringement. The district court dismissed the cases for failure to state a claim because

the claims are directed toward an abstract idea and thus invalid under 35 U.S.C. § 101. Yu and Zhang appealed.

The Federal Circuit affirmed, finding that the claims "merely invoke generic processes and machinery." (Quoting *Smart Sys.*) The patent's specification suggests an abstract idea when it states that "there is a great need for a generic solution that makes digital cameras capable of producing high resolution images without enormously incurring the cost of photo-sensitive chips with multimillion photocells." 289 Patent. The Court suggested that the specification includes patentable subject matter such as "a four-lens, four-image-sensor [including] a black-and-white sensor." The claims omitted this detail. This is a pre-*Alice* patent that did not appreciate the need to discuss the technological problem and a detailed discussion of at least technological solution.

D. Patent Infringement Suit Can Go Forward Without Patent Holder and After Involuntary Found to Have Sovereign Immunity

Gensetix, Inc. v. Board of Regents of the University of Texas System, 966 F.3d 1316 (Fed. Cir. 2020).

The other UT (University of Texas) owns 2 patents for using modified dendritic cells to create an anti-tumor immune response which it exclusively licensed to Gensetix. Gensetix sued Baylor for patent infringement. Under F.R.Civ.P. 19, an exclusive licensor of asserted patents is a necessary party, but UT refused to participate. The district court found UT was immune from being sued in Federal Court under the 11th Amendment of the U.S. Constitution.

In a weird split, Judges Newman and Taranto found UT to be immune while Judges Newman and O'Malley said the case should proceed without UT. The Federal Circuit cited *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd*., 527 U.S. 666 (1999) for the proposition that the Supreme Court found that sovereign immunity was not created by the 11th Amendment but rather is "reflected in" the amendment and that immunity "transcends the narrow text of the Amendment itself."

E. Prosecution Disclaimer Occurs When a Claim is Amended and an Argument as to the Amendment is Made by the Applicant

SpeedTrack, Inc. v. Amazon.com, Inc., 998 F.3d 1373 (Fed. Cir. 2021).

Prosecution disclaimer occurs when a patentee amends a claim and makes statement distinguishing the claimed invention from the prior art to overcome a rejection. The patentee cannot later argue that the claim covers what was distinguished in the prior art. SpeedTrack's patent covers a method of searching-by-category comprising three steps:

1. Creating a table of category descriptions without any "predefined hierarchical relationship."
2. Creating a directory of files that includes a set of category descriptions for each file.
3. Creating a search filter, that allows a user to pick a set of categories, but only allows selection when there is at least one file that matches the selection.

As stated in the patent, this system avoids the problem of typos in searches as well as the time-waste of searching for data that cannot be matched. Claim 1 included through exclusion by

prohibiting a preexisting hierarchical relationship between the various categories: "the category descriptions having no predefined hierarchical relationship." The accused systems had some relationship as to genus-species or field-value relationships within their categories. The district court found the genus-species relationships were prohibited under the no-preexisting hierarchy limitation because of prosecution disclaimer. SpeedTrack distinguished the invention from the prior art through argument and the addition of this limitation.

On appeal, SpeedTrack argued that the prior art's use of field-and-value was not a hierarchy and so not excluded by the claim limitation. The Federal Circuit found prosecution disclaimer because the patentee had added the limitation specifically to avoid the prior art reference and had particularly distinguished the prior art reference as requiring a "2-part hierarchical relationship between fields or attributes, and associated values for such fields or attributes."

F. Numerous Communications to a State Can Establish Personal Jurisdiction for the Communicator in that State

Trimble Inc. v. PerDiemCo LLC., 997 F.3d 1147 (Fed. Cir. 2021).

PerDiemCo is a non-practicing entity or patent troll that makes money through patent licenses and is a Texas LLC with office space in Marshall, Texas. Washington DC Attorney Robert Babayi is the sole employee of PerDiemCo and has apparently never visited the Texas office. PerDiemCo owns several U.S. patents covering the electronic logging of hours for commercial vehicles and geofencing. Trimble is a Delaware corporation with its Sunnyvale headquarters in the Northern District of California. Iowa corporation ISI is a subsidiary of Trimble headquartered in Iowa. In 2018 Babayi mailed a letter to ISI's corporate HQ in Iowa alleging patent infringement and forwarded the letter to Trimble's Chief IP in Colorado. The parties then began negotiating, with PerDiemCo communicating with Trimble through their patent counsel in Colorado at least twenty-two times, many of which included express threats to sue Trimble for patent infringement. In 2019, Trimble and ISI sued for declaratory judgment in the Northern District of California. The District Court dismissed the case, finding it to be unreasonable to assert personal jurisdiction.

The Federal Circuit reversed, finding (1) sufficient minimum contacts with the state of California related to the cause of action and (2) that exercise of jurisdiction by a California court would be reasonable. Trimble and ISI argued Babayi communications created purposeful availment. PerDiemCo argued that the communications went to Colorado, not California, which the Federal Circuit dismissed. In 1998, the Federal Circuit found in *Red Wing Shoe Co*. that a patentee's accusations of infringement do create personal jurisdiction in a particular state. In *Trimble*, the Federal Circuit limited *Red Wing Shoe* to situations having a small number of communications, as opposed to the "extensive" contacts by PerDiemCo that went beyond simply "informing" Trimble of its infringement and seeking a license agreement. The *Trimble* Court found that the PerDiemCo communications were "a negotiation" rather than merely providing information, adding that Trimble is headquartered in California, which is a consideration the Court in *Ford* found relevant in distinguishing its earlier decision in *Bristol-Myers*.

G. What the Heck is a "Vexatious Litigant"?

Mankaruse v. Raytheon Company TRS LLC US, Fed. App'x , 2021 WL 1828067 (Fed. Cir. 2021).

Mankaruse is a former Raytheon engineer and patentee who sued Raytheon for employment discrimination who was later laid off during a workforce reduction. Mankaruse sued Raytheon in California state court for various claims, including trade-secret misappropriation, breach of contract, and discrimination, among other claims. Mankaruse was named a "vexatious litigant" pursuant to California state law and required to post a $10,000 bond, which he lost after losing the case.

Mankaruse later filed a *pro se* lawsuit against Raytheon alleging patent infringement and trade-secret misappropriation. Upon Raytheon's request the U.S. District Court (C.D. Cal.) deemed Mankaruse a "vexatious litigant" under Federal Law requiring a bond of $25,000 and requiring him to seek pre-filing approval from the court of any future lawsuit. He did not pay the money and the case was dismissed. Mankaruse appealed.

The Federal Circuit affirmed, stating that while the Federal Rules of Civil Procedure do not speak to the "vexatious litigant" designation, courts have an inherent power to protect the judicial process that is also supported by the *All Writs Act* and have power to order litigants to pay a security-deposit associated with potential future costs or sanctions.

H. Lies Cost a Corporation a Multimillion Dollar Judgment Through a Rule 60 Motion

Cap Export, LLC v. Zinus, Inc., 996 F.3d 1332 (Fed. Cir. 2021).

Zinus owns a patent for an easily assembled bed frame. One key feature of the claimed invention is that the back-side of the headboard includes a zippered compartment that can hold the individual pieces. Zinus sued Cap Export for patent infringement. The district court granted *sua sponte* summary judgment of obviousness based upon a bed-in-a-box reference. The Federal Circuit vacated that finding because Zinus lacked notice and an opportunity to present evidence prior to the summary judgment determination.

On remand, the district court awarding summary judgment to the patent holder awarding $1.1 million in damages and issued a permanent injunction. Testifying as both a fact and expert witness, the president of Zinus gave false testimony regarding the prior art. After learning of the lies, the accused filed a R. 60(b) motion. The district court set aside the judgment, finding that the statement amounted to fraud on the court. Zinus appealed.

The Federal Circuit affirmed, stating that fraud on the court does not require demonstration that the outcome would change but-for the fraud. The Federal Circuit stressed the importance of fraud on the court particularly in the patent infringement context of engaging in equitable conduct.

I. Employment Agreement Assigning Inventions Does Not Include Inventions Not Completed During Employment

Bio-Rad Laboratories, Inc. v. International Trade Commission, 998 F.3d 1320 (Fed. Cir. 2021).

Saxonov and Hindson co-founded QuantLife that was later bought by Bio-Rad wherein both became Bio-Rad employees. Saxonov and Hindson signed agreements at both companies agreeing to transfer invention rights. Saxonov and Hindson left Bio-Rad to form 10X where they filed new patent applications resulting in patents. 10X sued Bio-Rad for patent infringement in the USITC. Bio-Rad argued that it owns the patents. In the agreements, Saxonov and Hindson assigned anything conceived, developed, or reduced-to-practice "during the period of my employment."

While Saxonov and Hindson conceived of some aspects of the inventions while still at Bio-Rad, they did not have complete conception until after leaving Bio-Rad. Bio-Rad argued that advances during employment were enough. The USITC found against Bio-Rad.

The Federal Circuit affirmed. The Federal Circuit found "the assignment provisions do not apply to a signatory's ideas developed during the employment (with Bio-Rad or QuantLife) solely because the ideas ended up contributing to a postemployment patentable invention in a way that supports co-inventorship of that eventual invention." The Federal Circuit said that "The most straightforward interpretation is that the assignment duty is limited to subject matter that itself could be protected as intellectual property before the termination of employment."

J. The Western District of Texas Has to Transfer Cases Where Appropriate

In re TracFone Wireless, Inc., 852 Fed. App'x 537 (Fed. Cir. 2021).

The Western District of Texas had long been the center of patent infringement cases, providing a lot of economic benefits to Marshall, Texas. The Western District of Texas has now become a hotbed for patent infringement cases.

Precis sued TracFone in the W.D. Texas for patent infringement. Precis is a Delaware company with "no disclosed place of business." The key inventor likely to testify lives in Minnesota. The prosecuting patent attorney likely to testify lives in Arizona. TracFone, a Delaware company has its principal place of business in Miami Florida. TracFone has Florida witnesses likely to testify. The Federal Circuit ordered District Court Judge Albright to grant TracFone's motion to transfer its case to the SDF on convenience grounds under 28 U.S.C. § 1404(a) and finding an abuse of discretion in denying the transfer. The discretion provided to the trial court judge by Section 1404(a) is not boundless.

K. A Portfolio License Does Not Create Standing for a Licensee to Sue to Challenge the Patent Rights to a Limited Number of Patents

Qualcomm Incorporated v. Apple Inc., 835 Fed. App'x 610 (Fed. Cir. 2021).

To settle a case, and as part of a time-limited covenant not to sue, Apple licensed a large portfolio of Qualcomm patents. Apple filed *inter partes* reviews for two Qualcomm patents in the family as part of the original action. Apple's IPR's were instituted but later the PTAB held that Apple had not proven that the claims were invalid. Apple appealed.

The Federal Circuit found that while a patent licensee may challenge the validity of all patents to a license, challenging a subset of the patents in a license does not create standing. The Supreme Court found in *MedImmune, Inc. v. Genentech, Inc.*, 529 U.S. 118 (2007) that a patent licensee can challenge a patent's validity without stopping payment of royalties. *Apple* argued that it has standing because Apple could be sued at the end of the limited covenant not to sue. The Federal Circuit found still that invalidating only two Qualcomm patents would not relieve Apple's obligations under the license whereas with *MedImmune* the invalidity finding would dramatically impact the royalty owed.

L. The Determination of Whether the Accused Product Is Prior Art Is a Required Part of Prefiling Investigation Prior to Patent Infringement Suit.

WPEM, LLC v. SOTI Inc., 837 Fed. App'x 773 (Fed. Cir. 2020).

WPEM sued SOTI for patent infringement. WPEM learned that the claims were very likely invalid in large part because the accused product was prior art and dismissed the case. The district court awarded attorney fees against WPEM for failing to conduct a pre-filing investigation into the validity and enforceability. WPEM appealed.

WPEM pointed out that patent law provides a presumption of validity and argued no need to investigate validity. Although agreeing to the presumption of validity, the Federal Circuit distinguished this situation where the accused device is the prior art. The bar created by the sale of the accused product means that the issue of validity and infringement were intertwined.

M. Use of "Module" Is a Means Under Means Plus Function

Rain Computing, Inc. v. Samsung Electronics America, Inc., 989 F.3d 1002 (Fed. Cir. 2021).

Rain's patent included language "*a user identification module* configured to control access of said one or more software application packages." If the court interprets "module" as being a means-plus-function under 35 U.S.C. § 112 ¶ 6, the claim would be limited to what is disclosed in the patent and its equivalents. If no structure for "module" is disclosed in the patent, the claim is indefinite. The district court construed a different claim limitation narrowly and found no infringement. Rain appealed.

The Federal Circuit found the term "module" in this patent is a means plus function lacking support in the specification, making the patent invalid under 35 U.S.C. § 112 ¶ 6 because there was no structure nor did it even mention the term "user identification module." All of this is despite the patent examiner finding that "module" did not bring means plus function into play during prosecution.

N. A Regulation Limiting One's Ability to Do Business Can Preclude Filing a Suit

Tormasi v. Western Digital Corporation, 825 Fed. App'x 783 (Fed. Cir. 2020).

Tormasi is serving a life sentence in New Jersey for murdering his mother. Tormasi is the inventor of and owns U.S. Patent No. 7,324,301. Tormasi sued Western Digital in the N.D. Cal for patent infringement. The district court dismissed the case because New Jersey's Prison Administrative Code prohibits prisoners from "operating a business … without the approval of the Administrator" N.J. ADMIN. CODE § 10A:4-4.1, meaning that Tormasi lacked the capacity to sue. Tormasi appealed.

The Federal Circuit affirmed, citing the Federal Rules of Civil Procedure for the proposition that "the law of the individual's domicile" determines a plaintiff's capacity to sue. Tormasi never obtained approval from the Administrator. Tormasi has filed a Petition for Cert.

O. Patent Application Should Set Forth the Technical Problem Recognized and the Technical Processes to Solve the Technical Problem

WhitServe LLC v. Dropbox, Inc., 854 Fed. App'x 367, 2021 WL 1608941 (Fed. Cir. 2021).

In a patent infringement suit brought by WhitServe, the district court found the patents ineligible as a matter of law, dismissing the case prejudice. WhitServe appealed.

The Federal Circuit Affirmed. The Federal Circuit found that the language in Claim 10 which required an internet-based data-backup system with the ability of "requesting, transmitting, receiving, copying, deleting, and storing data records" is a fundamental and longstanding business practice. WhitServe argued that its physical arrangement of the components offered a specific and technological improvement. The Court found that even if true, the patent discussed these issues at too high of a level and failed to set out at least one specific solution. The Federal Circuit said that the limitations in the claim may have been sufficient if only the technical improvement had been simply disclosed in the specification with sufficient detail. The Court rejected WhitServe's attempt to take advantage of the conflation of novelty and nonobviousness into subject matter eligibility by over secondary indicia of non-obviousness, saying that "*Objecti[ve] indicia of nonobviousness are relevant in a § 103 inquiry, but not in a § 101 inquiry."*

P. Whose Case Is It Anyway?

Ericsson v. Samsung Electronics Company, Ltd., Docket No. 21-1565 (Fed. Cir. 2021).

Swedish Ericson and Korean Samsung have cases pending in both the U.S. and China. The U.S. Case is *Ericsson Inc. v. Samsung Elecs. Co.*, No. 2:20-CV-00380-JRG (E.D. Tex. Jan. 11, 2021). The Chinese Case is *Samsung Electronics Co., Ltd. et al. v. Telefonaktiebolaget LM Ericsson*, (2020) E 01 Zhi Min Chu No. 743.

The Chinese court ordered Ericsson to stop litigating the case in the U.S. and anywhere else. The U.S. court barred Samsung from attempting to enforce the Chinese order against the U.S. actions. Litigation between the parties is ongoing in other countries.

Q. Settlement Agreements Are Discoverable

In re Modern Font Applications LLC, 846 Fed. App'x 918 (Fed. Cir. 2021).

MFA sued Alaska Air for patent infringement. Alaska Airlines sought copies of MFA's prior settlement agreements in discovery. MFA refused to comply with the request based upon privilege because the prior agreements had been shared between litigating parties in prior suits. MFA argued that parties became unified as to the agreement, resulting in "common interest privilege." The district court ordered production. MFA sought mandamus.

The Federal Circuit denied MFA's petition for mandamus, finding that prior settlement agreements tend to be relevant for damages calculations. The court said that it will only grant mandamus in cases involving a clear and indisputable right to relief where there are no other adequate means to attain the relief. The Court went on to say that even where that is met, the district court also has discretion to decide whether granting the writ is appropriate under the circumstances.

The Federal Circuit did not decide the issue of common interest privilege in the settlement context while noting that it had previously been denied in *In re MSTG, Inc.*, 675 F.3d 1337 (Fed. Cir. 2012), which held that pre-settlement communications were not privileged. The Federal Circuit also added that even if common interest privilege were adopted in this context, the parties would still

have to demonstrate that the withheld documents are communications by a client to an attorney made in order to obtain legal assistance from the attorney in his capacity as a legal advisor.

R. A Patentee's Failure to Appeal Finding on Noninfringement Can Unilaterally Moot an Accused Infringer's Appeal of Invalidity

ABS Global, Inc. v. Cytonome/ST, LLC., 984 F.3d 1017 (Fed. Cir. 2021).

Cytonome filed a patent infringement suit against ABS. ABS filed a petition for IPR of the patent which was instituted by the PTAB. The PTAB found some, but not all, of the claims invalid. The district court found that ABS did not infringe the claims or the patent. ABS appealed the Board's decision of invalidity to the Federal Circuit. Cytonome did not appeal the non-infringement finding.

The Federal Circuit found that Cytonome would not be reasonably expected to resume its enforcement efforts against ABS. The Federal Circuit shifted the burden to ABS, finding that it failed to offer adequate evidence to show that ABS was at risk for future infringement of the patent. Ultimately, the Federal Circuit deemed ABS's assertions "too speculative to support constitutional standing," and dismissed the appeal as moot.

S. In Order to Serve as Anticipatory Prior Art for a Design Patent, the Entire Design Must Be the Same

Mojave Desert Holdings, LLC v. Crocs, Inc., 987 F.3d 1070 (Fed. Cir. 2021).

In 2012 Mojave Desert (then Dawgs) filed an *inter partes* reexamination for a design patent for the Crocs shoe. The examiner in the reexam found Internet Archive (Wayback Engine) images on the Crocs website prior to the patent application filing and rejected the patent claims as anticipated.

The patent includes claim features on the bottom-side of the shoe whereas the website did not show the bottom of the shoe. Mojave's basic argument is that nothing on the bottom of the shoe was really claimed because the entire drawing relied upon dashed lines, which means that no claim is being made to that portion. The PTAB rejected that analysis and instead upheld the validity of the issued patent. Mojave Desert appealed.

The Federal Circuit affirmed, finding that because the bottom of the shoe was not shown in the images, there could be no anticipation because it did not disclose the entire design.

Another issue was whether Mojave could stand-in for the original IPR petitioner, Dawgs, who went bankrupt in 2018 and stopped participating in the IPR. Although Mojave bought various assets of Dawgs' rights, the PTAB refused to allow Mojave to participate in the reexam. The Federal Circuit found that Mojave was an appropriate substitute.

T. A Functional Limitation that Can Be Met by Too Many Possible Options May Be Invalid if It Requires Undue Experimentation

Amgen Inc. v. Sanofi Adventisub LLC, 987 F.3d 1080 (Fed. Cir. 2021).

In a first trial, the jury found for patentee Amgen and that Regeneron had not proven the patents invalid by a lack of enablement or written description. On the first appeal, the Federal Circuit

vacated and ordered a new trial based upon errors in evidentiary rulings and jury instructions. On remand, the second jury again sided with Amgen, but the judge awarded JMOL for lack of enablement. Amgen appealed.

The claims included functional limitations. Sanofi argued to that the claims encompass millions of potential antibody candidates and that the specifications lack sufficient guidance to allow a person of skill in the art to choose which one. Amgen argued that the number of distinct antibodies within the claims was around 400.

Citing *In re Wands*, 858 F.2d 731 (Fed. Cir. 1988), the Federal Circuit considered the following when asking whether the gaps in disclosure require undue experimentation:

1. Quantity of experimentation necessary: When more experimentation is needed, it is more likely undue experimentation;
2. Amount of direction or guidance presented in the specification: When less guidance is provided, it is more likely that practicing the invention requires undue experimentation;
3. Presence or absence of working examples: Their absence suggests undue experimentation;
4. Nature of the invention: This one is basically meaningless, but it generally is seen in comparison to the level of prior art;
5. State of the prior art: If the invention is a major step beyond the prior art, then it more likely requires undue experimentation;
6. Relative skill of those in the art: If PHOSITA is relatively low skill then it is more likely that undue experimentation is needed to practice the invention;
7. Predictability or unpredictability of the art: Unpredictable arts are more likely to require undue experimentation in order to practice the invention;
8. Breadth of the claims: Broad claims are more likely to require undue experimentation to practice the full scope of the claims.

The Federal Circuit held that that the amount of experimentation was too much.

U. Federal Circuit Law Controls Over PTO Rules

cxLoyalty, Inc. v. Maritz Holdings Inc., 986 F.3d 1367 (Fed. Cir. 2021).

Maritz owns a patent claiming a computer system for using "award points" to purchase goods at a regular store by using a "shadow credit card." Maritz sued cxLoyalty for patent infringement. cxLoyalty filed a petition for covered-business-method review (CBM), arguing that the claims lack patent eligibility. The PTAB found some claims invalid as ineligible patentable subject matter and other eligible. The parties appealed.

The Federal Circuit reversed, finding that none of the claims recite patent eligible subject matter under 35 U.S.C. 101 and *Alice*. The court noted that the eligibility guidance provided by the Patent Office is not the law and does not carry the force of law. The court reminded everyone that Federal Circuit caselaw controls PTAB judgments on eligibility as opposed to PTO guidance. The Court found that the claims failed *Alice* step 2 as not including a technical solution.

V. A Patent Challenger Must Provide Adequate Notice of Relied Upon Prior Art in an IPR

M & K Holdings, Inc. v. Samsung Electronics Co., Ltd., 985 F.3d 1376 (Fed. Cir. 2021).

Samsung Challenged M&K's patent in an IPR stating that the challenged Claim 3 was obvious. The PTAB found Claim 3 invalid instead for lack of novelty. M&K appealed.

The Federal Circuit reversed, finding that the PTAB "deviated impermissibly from the invalidity theory set forth in Samsung's petition." Samsung had argued that the anticipation is inherent in the obviousness theory. The Federal Circuit found lack of notice because Samsung's original petition stated that the primary reference did not disclose the "predetermined block." The Court also found that documents uploaded to a website and discussed at a meeting attended by more than 200 people was a public disclosure.

W. A Sale Directed to a U.S. Customer Is a Sale Creating an On Sale Bar Pre-AIA

Caterpillar Inc. v. International Trade Commission, 837 Fed. App'x 775 (Fed. Cir. 2020).

Cat filed a complaint with the International Trade Commission (ITC) against Wirtgen alleging the German manufacturer was importing infringing devices into the US. The ITC invalidated the claims because of Cat's pre-filing sales. Cat appealed.

The Federal Circuit affirmed. Cat's patent covers a milling machine. The invention was originally created by Bitelli in the late 1990's who Cat purchased in 2000. Bitelli sold embodiments of the invention before 2000. However, the priority patent application was April 2001, followed by the PCT in 2002.

This matter is prior to the America Invents Act so prior law controls, including that limiting the on-sale bar to sales within the United States. Wirtgen presented records showing the sale of two Bitelli machines to a U.S. customer in June of 1999 and July of 2000. The machines were delivered to the Bitelli factory gates in Italy, and the customer could have brought them to America. The Federal Circuit followed the ITC finding that the deliveries in Italy were still "directed to the United States" in a manner sufficient to satisfy the "in this country" prong of the on-sale bar "by at least July 2000." The Federal Circuit said that while a sale to a U.S. company is not enough, a sale directed to a U.S. company is. The Court factored in things such as the buyer was located in the US, U.S. tariffs were paid, the sale was in U.S. dollars, the VAT assessment was 0%, and there was no other evidence indicating that the purchase was for use anywhere but the US.

X. Venue in a Patent Infringement Case Must Be Filed Either Where the Defendant Resides or Where Actual Infringement (As Opposed to Future Infringement) Has Occurred and The Defendant Has a Regular and Established Place of Business

Valeant Pharmaceuticals North America LLC v. Mylan Pharmaceuticals Inc., 978 F.3d 1374 (Fed. Cir. 2020).

Milan filed a generic ANDA application with the U.S. government, which can be an infringing act, which is admittedly weird. Valeant sued Mylan, a West Virginia company, in New Jersey for patent infringement, stating that Mylan intended to sell the accused product in New Jersey in the future. There was no other connection to New Jersey. 28 U.S.C. § 1400(b) provides that "Any civil action for patent infringement may be brought [1] in the judicial district where the defendant resides, or [2] where the defendant has committed acts of infringement and has a regular and established place

of business." In *TC Heartland*, the Supreme Court said that "regular and established place of business" was something more than minimum contacts and instead requires some physical presence in the state. The district court dismissed for lack of venue. Valeant appealed.

The Federal Circuit affirmed, stating that the act of current infringement is the filing of the ANDA application, as provided by the Hatch-Waxman Act, which was not filed in New Jersey.

Y. A Known Product by Process Is Not Patentable Even if It Is Made by a New Process

Biogen MA, Inc. v. EMD Serono, Inc., 976 F.3d 1326 (Fed. Cir. 2020).

Biogen sued for patent infringement. The jury found that Biogen's asserted claims were anticipated. The District Court granted JMOL, stating that no reasonable jury could have found anticipation, found infringement, conditionally granted a new trial on anticipation under R.59, and a new trial on damages. 28 U.S.C. § 1292(c)(2) provides appellate jurisdiction once a patent case is "final except for an accounting." In *Robert Bosch, LLC v. Pylon Mfg. Corp*., 719 F.3d 1305 (Fed. Cir. 2013) (*en banc*), the court determined that "accounting" as used in that provision included a jury trial on damages. Biogen appealed.

The Federal Circuit found that the claims were anticipated. The claims at issue were product by process, meaning that the product was covered as long as it was made by the process. However, an old product is not patentable even if it is made by a new process. See *Gen. Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364 (1938). Here the Court said that it was the same product, generally, and the new process did not matter.

Z. A Party Can Raise Prior Art in a Subsequent Civil Action to Challenge a Patent That It Could Not Raise in an IPR

Network-1 Technologies, Inc. v. Hewlett-Packard Company, 981 F.3d 1015 (Fed. Cir. 2020).

Network-1 sued for patent infringement. HP had previously joined an IPR brought by Avaya. A party to an IPR is estopped from challenging a patent for any grounds that could have been raised in the IPR. A jury found that HP did not infringe the claims of the patent and that the patent claims were invalid. The district court granted directed verdict, estopping HP under 35 U.S.C. § 315(e)(2) from raising its obviousness challenge because it had earlier been unsuccessful in invalidating the patent in a joint IPR. HP appealed.

The Federal Circuit vacated, finding the district court too broadly applied estoppel because a party is only estopped from challenging claims in the final written decision based on grounds that it 'raised or reasonably could have raised' during the IPR. HP joined claims brought by Avaya because it was time-barred from bringing its own IPR. Other matters that could have been raised by HP but were not raised by Avaya can be used by HP to challenge the claims.

AA. Limitations from the Specification Cannot be Added to the Claims When the Claims Specifically Use Broader Definitions of the Terms

Baxalta Inc. v. Genentech, Inc., 972 F.3d 1341 (Fed. Cir. 2020).

This is one of the many cases where claims construction by the trial curt resulted in the parties stipulating non-infringement. This gets to a final judgment that can be appealed. The disputed terms are "antibody" and "antibody fragment".

The Federal Circuit rejected the claim construction and vacated the non-infringement judgment. The trial court interpreted the term narrowly based upon a portion of the specification that seemed to narrow the terms. The Federal Circuit found that was improperly reading a limitation from the specification into the claims, especially where other claims included broader definitions of the terms. Although the patentee amended its claims from "antibody derivative" to "antibody fragment," the court found no clear statement from the prosecution history regarding how that amendment modified the scope of the claims, thereby precluding prosecution disclaimer leading to disavowal of scope.

BB. A Joined Party Has the Right to Appeal All Aspects of a PTAB Decision Even for Grounds Raised by Others

Fitbit, Inc. v. Valencell, Inc., 964 F.3d 1112 (Fed. Cir. 2020).

Valencell filed infringement lawsuits against Apple and Fitbit. Apple and Fitbit petitioned for *inter partes* review against different claims for different prior art. Fitbit moved for joinder of Apple's IPR. The PTAB founds some claims invalid and others not invalid as part of Apple's IPR. Apple did not appeal, Fitbit did.

Valencell claimed that Fitbit did not have the right to appeal Apple's claims. The Federal Circuit found that a joined party's rights apply "to the entirety of the proceedings and includes the right of appeal." The court cited the language that states that "Any party to the *inter partes* review shall have the right to be a party to the appeal." 35 U.S.C. § 319. Further, another statute states that the joinder provision indicates that the new entity is "join[ed] as a party." 35 U.S.C. § 315(c). The Federal Circuit found that the PTAB should have corrected certain errors brought to light during the IPR, stopping just short of finding this necessary in all such cases.

CC. An ITC Exclusion Order Stays in Effect Until There is a Changed Condition, and Discovery of Prior Art is Not a Changed Condition

Mayborn Group, Ltd. (Shanghai Jahwa) v. International Trade Commission, 965 F.3d 1350 (Fed. Cir. 2020).

Mighty Mug petitioned the ITC to investigate competing imports covered by its patents. The ITC issued a General Exclusion Order (GEO) "barring importation of infringing goods by any party." ITC found a pattern of violations and difficulty in identifying the source(s) of the infringing product, issuing a general exclusion order against all parties as opposed to merely a more common limited exclusion order against the investigated parties. Mayborn makes a similar product but was never notified of the action while pending and was not investigated. Mayborn waited until after the exclusion order to petition to rescind order because the claims were invalid as anticipated by the prior art. A Section 337 order will "continue in effect until … the conditions which led to such exclusion from entry or order no longer exist." The ITC said that discovery of prior art did not amount to a changed condition even though Mayborn discovered the prior art after the exclusion order. Mayborn appealed.

The Federal Circuit affirmed that the ITC "had no obligation to consider the substance of Mayborn's petition." Therefore, until Mayborn invalidated the patent, the exclusion order stays in effect.

DD. A Motion for Judgment on the Pleadings Finding a Patent Asserted in Counterclaim of Patent Infringement is Appropriate

Procon Analytics, LLC. v. Spireon, Inc., 2021 WL 1269081 (E.D. Tenn. 2021).

Spireon sent cease and desist letters to Procon and several Procon dealers. Procon filed a declaratory judgment complaint seeking a finding of no infringement and invalidity. Spireon counterclaimed alleging infringement. Procon filed a motion for judgment on the pleadings stating that Spireon's patent is invalid for lack of patentable subject matter. Judge McCalla granted the motion. Spireon has appealed.

TRADE REGULATION

I. Health Care Matters

A. COVID Issues

1. Role of Health Department; Prohibition Against Governmental Requirement to Show Proof of Vaccination

Chapter 550, Public Acts 2021, amending T.C.A. §§ 68-2-601(f) and -603 and adding § 68-5-117 eff. May 26, 2021.

68-2-601(f).

[The powers and duties of county boards of health are to: . . .]

"(2) Advise the county mayor on the enforcement of such rules and regulations as may be prescribed by the commissioner essential to the control of preventable diseases and the promotion and maintenance of the general health of the county;

"(3) Advise the county mayor on the adoption of rules and regulations as may be necessary or appropriate to protect the general health and safety of the citizens of the county; and. . . ."

68-2-603.

"(b) It is the county health director's duty to enforce the regulations of the state department of health."

68-5-117.

"(a) A state or local governmental official, entity, department, or agency shall not:
(1) Require, or mandate that a private business require, proof of vaccination as a condition of entering upon the premises of the business or utilizing services provided by the business; or
(2) Require proof of vaccination as a condition of entering upon the premises of a state or local government entity, or utilizing services provided by a state or local government entity.

"(b) As used in this section:
(1) 'Private business' means a person, proprietor, partnership, corporation, or other non-governmental entity, whether for profit or not for profit, engaged in business, commerce, or an activity in this state; and
(2) 'Proof of vaccination' means physical documentation or digital storage of protected health information related to an individual's immunization or vaccination against COVID–19."

2. Prohibition Against Governmental Requirement to Receive Vaccination

Chapter 513, Public Acts 2021, adding various provisions to Title 68, Chapters 2 and 5 and T.C.A. § 49-6-5001 eff. May 25, 2021.

This act restricts the governor and various others from requiring individuals to receive a COVID vaccine.

3. State of Emergency; "Business Fairness Act"

Chapter 155, Public Acts 2021, adding T.C.A. §§ 58-2-301–302 eff. July 1, 2021.

"58-2-301. This act is known and may be cited as the 'Business Fairness Act.'

"58-2-302. During the existence of a state of emergency declared pursuant to this chapter, a business entity may continue or resume its business if the business entity complies with safety precautions and guidelines issued by the governor, state department or agency, or a county or municipal governing body or agency acting in accordance with this chapter, or any executive order, proclamation, or rule issued pursuant to this chapter, to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event, or the appearance of a novel or previously controlled or eradicated infectious agent or biological toxin."

B. Opioid Abatement

Chapter 491, Public Acts 2021, amending various portions of T.C.A. eff. May 24, 2021.

This act establishes the opioid abatement fund, enacts the "Opioid Abatement Council Act," enacts the "Tennessee Opioid Abatement Act," and authorizes the attorney general and reporter to settle claims against opioid manufacturers.

C. Tobacco and Vapor Products

Chapter 551, Public Acts 2021, amending various sections of Title 39, Chapter 17 eff. July 1, 2021.

The Non-Smoker Protection Act has been expanded to include use of vapor products in addition to smoking as acts that are prohibited in enclosed public places. Similarly, the statute that permits local governments to prohibit smoking within fifty feet of a hospital entrance applies to use of vapor products.

Chapter 574, Public Acts 2021, amending T.C.A. § 39-17-1551(e) eff. July 1, 2021.

"(e)(1) Notwithstanding subsection (a) or any other provision of this title, a municipality, a county, or a county having a metropolitan form of government is authorized by local ordinance or resolution, as applicable, to prohibit the use of tobacco products or vapor products, or both, on the grounds of a public park, public playground, public greenway, or any public property that is accessible to use by youth as long as the public park, public playground, public greenway, or public property is owned or controlled by the respective municipality or county."

D. Medical Cannabis

Chapter 577, Public Acts 2021, adding T.C.A. §§ 68-7-101–108 and -201 and amending § 39-17-402(16)(F) eff. May 27, 2021.

68-7-101.

"(a) There is created the medical cannabis commission. The commission shall serve as a resource for the study of federal and state laws regarding medical cannabis and the preparation of legislation to establish an effective, patient-focused medical cannabis program in this state upon the rescheduling or descheduling of marijuana from Schedule I of the federal Controlled Substances Act (21 U.S.C. § 801, et seq.).

"(b) This chapter does not authorize a medical cannabis program to operate in this state, and licenses for such a program shall not be issued, or authorized to be issued, until marijuana is removed from Schedule I of the federal Controlled Substances Act."

39-17-402.

"(F) The term 'marijuana' does not include oil containing the substance cannabidiol, with less than nine-tenths of one percent (0.9%) of tetrahydrocannabinol, if: . . .

(ii) *(a)* The bottle containing the oil is labeled by the manufacturer as containing cannabidiol in an amount less than nine-tenths of one percent (0.9%) of tetrahydrocannabinol on a printed label that includes the manufacturer's name and the expiration date, batch number or lot number, and tetrahydrocannabinol concentration strength of the oil; and

(b) The person in possession of the oil retains:

(1) Proof of the legal order or recommendation from the issuing state;

(2) Proof that the person or the person's immediate family member has been diagnosed with at least one (1) of the following diseases or conditions by a medical doctor or doctor of osteopathic medicine who is licensed to practice medicine in this state:

(A) Alzheimer's disease;

(B) Amyotrophic lateral sclerosis (ALS);

(C) Cancer, when such disease is diagnosed as end stage or the treatment produces related wasting illness, recalcitrant nausea and vomiting, or pain;

(D) Inflammatory bowel disease, including Crohn's disease and ulcerative colitis;

(E) Multiple sclerosis;

(F) Parkinson's disease;

(G) Human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS); or

(H) Sickle cell disease; and

(3) Proof that the person or the person's immediate family member has a valid letter of attestation, as defined in § 68–7–201. . . ."

E. Providers

1. Limitations on Ability to Prescribe Controlled Substances

Chapter 461, Public Acts 2021, adding T.C.A. § 63-1-170 and amending portions of Titles 4, 29, 63 and 68 eff. May 18, 2021.

As enacted, this chapter requires that a licensing authority, upon learning a healthcare prescriber was indicted for or convicted of certain criminal offenses, to restrict or revoke, respectively, the prescriber's ability to prescribe controlled substances. It further requires licensing authority to suspend the license of certain healthcare professionals upon finding the healthcare professional failed to comply with physician collaboration requirements. It also requires facility administrators to report certain information.

2. Certified Medical Assistants in Ambulatory Outpatient Hospitals

Chapter 396, Public Act 2021, adding T.C.A. § 68-11-244 eff. May 11, 2021.

This act establishes provisions governing the practice of certified medical assistants, who assist licensed physicians or licensed nurses in patient care activities in ambulatory outpatient hospital clinics.

3. Nursing; Temporary Nurse Aides' Road to Becoming Certified Nursing Assistants

Chapter 148, Public Acts 2021, adding T.C.A. § 68-11-209(e)(5) eff. Apr. 13, 2021.

"(5) Notwithstanding a law to the contrary, and pursuant to the authority granted in subsection (a), no later than July 1, 2021, the board shall promulgate emergency rules to permit individuals who qualified as temporary nurse aides in nursing homes on or after the beginning date of the national public health emergency as declared by the United States secretary of health and human services on January 31, 2020, to become certified as nursing assistants in this state and be placed on the nurse aide registry."

4. Aesthetician; Microneedling

Chapter 376, Public Acts 2021, adding T.C.A. § 62-4-109(c) eff. May 11, 2021.

"(c) Notwithstanding this chapter, a licensed aesthetician may perform cosmetic microneedling if performed under the supervision of a physician licensed pursuant to title 63, chapter 6 or 9."

5. Out-of-State Provider Volunteering Telehealth Services at Free Clinic

Chapter 357, Public Acts 2021, adding T.C.A. § 63-1-155(g)(3) eff. May 11, 2021.

"(3) An individual licensed in another state who would, if licensed in this state, qualify as a healthcare provider under subsection (a) may practice telehealth under this section while providing healthcare services on a volunteer basis through a free clinic pursuant to title 63, chapter 6, part 7."

6. Telehealth; Licensed Alcohol and Drug Abuse Counselors

Chapter 62, Public Acts 2021, amending T.C.A. § 63-1-155(g)(1) eff. Mar. 29, 2021.

"Except as provided in subdivision (g)(2), to practice under this section a healthcare provider must be licensed to practice in this state."

7. Telemedicine; "Store-and-Forward" Services

Chapter 153, Public Acts 2021, amending T.C.A. § 63-1-155(a)(2) eff. Apr. 13, 2021.

"(2) 'Store–and–forward telemedicine services' means the use of asynchronous computer-based communications, which may include the transfer of medical data in an image captured or created by a camera or similar device, between a healthcare provider and patient for the purpose of diagnosis, consultation, or treatment of the patient at a distant site where there may be no in-person exchange between the healthcare provider and the patient; and

"(3) 'Telehealth,' 'telemedicine,' and 'provider–based telemedicine' mean:
(A) The use of real time audio, video, or other electronic media and telecommunication technology that enables interaction between a healthcare provider and a patient for the purpose of diagnosis, consultation, or treatment of a patient at a distant site where there may be no in-person exchange between a healthcare provider and a patient; or
(B) Store–and–forward telemedicine services."

8. Psychologists; Psychology Interjurisdictional Compact

Chapter 352, Public Acts 2021, adding T.C.A. §§ 63-11-401–404 eff. May 11, 2021.

This lengthy law, which has been enacted in many states, regulates the practice of telepsychology by psychologists across state boundaries in the performance of their psychological practice under certain circumstances. It further permits and regulates temporary, in-person face-to-face services in a state in which the psychologist is not licensed to practice for thirty days per calendar year. A detailed regulatory structure applies.

9. Professional Art Therapist

Chapter 160, Public Acts 2021, adding T.C.A. § 63-11-401–402 eff. July 1, 2022.

This public act recognizes the genre of professional art therapy, provides for licensure, and creates an advisory committee under the board of examiners in psychology.

10. Occupational and Physical Therapy

Chapter 143, Public Acts 2021, amending T.C.A. § 63-13-103(10)(A)(i) and adding T.C.A. §§ 63-13-103(10)(B)(vi) and 63-3-103(10)(C)(vi) eff. July 1, 2021.

63-13-103(10)(A).

"Occupational therapy practice" includes:

"(i) Screening, evaluation, assessment, planning, implementation, or discharge planning in order to determine an occupational therapy treatment diagnosis, prognosis, plan of therapeutic intervention, or discharge plan, or to assess the ongoing effect of intervention."

63-13-103(10)(B).

"Occupational therapy services" include:

"(vi) Practice of dry needling of the upper limb, with proper training and certification."

Both occupational therapy and physical therapy practices may be provided through telehealth, telemedicine or provider-based telemedicine, as provided by T.C.A. § 63-1-155.

11. Home Health Services

Chapter 124, Public Acts 2021, amending T.C.A. §§ 68-11-201(20) and -260 eff. Apr. 13, 2021.

Advance practice registered nurses and physician assistants join physicians in being authorized to provide orders for patient care to a home health service, which orders may be transmitted electronically.

F. Pharmacies; Compounding

Chapter 149, Public Acts 2021, amending T.C.A. § 63-10-216 eff. Apr. 13, 2021.

This public chapter makes several regulatory and licensing amendments regarding compounding pharmacies.

G. Hormone Treatment for Prepubertal Minors Prohibited

Chapter 460, Public Acts 2021, adding T.C.A. § 63-1-169 eff. May 18, 2021.

This act specifies that standard medical practice does not involve prescribing hormone treatment for gender dysphoric or gender incongruent prepubertal minors; prohibits a healthcare prescriber from prescribing a course of treatment that involves hormone treatment for gender dysphoric or gender incongruent prepubertal minors, except that a healthcare prescriber may prescribe a course of treatment that involves hormone treatments for prepubertal minors for diagnoses of growth deficiencies or other diagnoses unrelated to gender dysphoria or gender incongruency.

II. Alcoholic Beverages

A. Residency Requirement for License Removed

Chapter 59, Public Acts 2021, amending T.C.A. § 57-3-204(b) eff. Mar. 29, 2021.

The residency requirements for a person applying for a retail liquor license have been removed.

B. Sale; Population Required for Referendum Lowered

Chapter 426, Public Acts 2021, amending T.C.A. §§ 57-3-101(a)(14) and -106(b) eff. May 12, 2021.

The population threshold making a municipality eligible to hold a referendum on the sale of alcoholic beverages has been lowered from 925 to 700.

C. Sales "To Go"

Chapter 451, Public Acts 2021, adding T.C.A. § 57-4-112 eff. May 14, 2021; terminates July 1, 2023.

"(a) Notwithstanding any law to the contrary, a restaurant, limited service restaurant, or wine-only restaurant licensed under this chapter may offer drive-through, pickup, and carryout orders of alcoholic beverages and beer at the licensee's place of business if the sale of alcoholic beverages and beer for consumption off the licensee's premises:

(1) Is accompanied by the sale of prepared food in the same order;
(2) Is packaged in a bottle or can with a secure cap or in a container that is secured by tape which secures the lid, covers any openings in the lid, and which would show that it has been opened; and
(3) Consists of, per purchase, not more than:
    (A) A single serving of alcoholic beverages, not to exceed sixteen fluid ounces (16 fl. oz.), or beer as authorized by the local beer board; or
    (B) A container of wine that may be lawfully sold within this state.

"(b) A licensee selling alcoholic beverages and beer under this section shall post a conspicuous sign containing the following language:

> A driver shall not consume alcoholic beverages or beer while operating a motor vehicle in this state.

"(c) This section does not authorize a licensee to sell bottles of distilled spirits.

"(d) An employee of a licensee shall not provide alcoholic beverages or beer to a person under twenty-one (21) years of age or who is visibly intoxicated. An employee of a licensee who is providing alcoholic beverages or beer shall inspect a valid, government-issued photo identification card that is acceptable to the licensee and that contains the photograph and birthdate of the purchaser confirming that the purchaser is at least twenty-one (21) years of age.

"(e) Sales of alcoholic beverages and beer made under this section must be in accordance with the hours for sale of alcoholic beverages under § 57–4–203(d) or beer under § 57–5–301(b), as applicable.

"(f) A licensee shall collect the liquor by the drink tax imposed on alcoholic beverages under § 57–4–301 (c)(1) for all sales of alcoholic beverages made under this section in accordance with § 57–4–301 (c)(2). A licensee shall not collect such tax on the sale of beer.

"(g) As used in this section, 'licensee' means a restaurant, limited service restaurant, or wine-only restaurant licensed under this chapter to sell alcoholic beverages and beer by the drink for consumption on the premises."

D. Delivery Service Fee

Chapter 185, Public Acts 2021, adding T.C.A. § 57-3-224(a)(3) eff. Apr. 20, 2021.

"(3) A delivery service licensee may charge a fee based on a percentage of the sales of the alcoholic beverages or beer being delivered. The delivery service licensee shall not charge a fee that exceeds ten percent (10%) of the price of each alcoholic beverage or beer sold. The delivery service licensee is not responsible for remitting applicable taxes on alcoholic beverages or beer delivered by the licensee. The charging of such a fee must not be construed as the delivery service reselling alcoholic beverages or having a direct or indirect interest in a retailer."

E. Institutions of Higher Education; Sports Authority Facility

Chapter 267, Public Acts 2021, amending T.C.A. § 57-4-102(34)(E) eff. Apr. 30, 2021.

The definition of "sports authority facility" that enables the sale of alcohol at a sport facility on the campus of a public institution of higher education now includes private schools.

F. Manufacturer's or Distiller's License; Disclosure of Owners and Percentage Owned

Chapter 329, Public Acts 2021, adding T.C.A. § 57-3-202(l) eff. May 4, 2021.

A person applying for or renewing a manufacturer's or distiller's license is required to provide the name and percentage of ownership interest of each individual or entity owner and some additional information with certain exceptions.

G. Department of Revenue; Information About Distillers and Suppliers

Chapter 324, Public Acts 2021, adding T.C.A. § 57-3-301(i) eff. May 4, 2021.

"(1) The department of revenue shall make available to the public the identity of the wholesalers and suppliers operating in this state, including their addresses, brands, and designated territories for which a contract has been registered with the department. Such information may be made available electronically.

"(2) If a manufacturer, supplier, importer, nonresident seller, or nonmanufacturer nonresident seller registers a contract with a wholesaler for a brand, the department of revenue shall provide notice by electronic means of such registration to the manufacturer, supplier, importer, nonresident seller, or nonmanufacturer nonresident seller, as applicable, and the contracted wholesaler."

H. Beer; Self-Distribution by Small Manufacturer

Chapter 432, Public Acts 2021, amending T.C.A. § 57-5-101 eff. Oct. 1, 2021.

A manufacturer brewing not more than 25,000 barrels of beer per year and operating as a retailer pursuant to T.C.A. § 57-5-101(c) may self-distribute its product under limited circumstances.

I. Wine; Direct Shipper

Chapter 425, Public Acts 2021, adding T.C.A. § 57-3-217(d)(2) and renumbering accordingly eff. May 12, 2021.

"(2) Notwithstanding subdivision (d)(1), a winery direct shipper that produces or manufactures less than two hundred seventy thousand (270,000) liters of wine per calendar year may ship up to fifty-four (54) liters of wine to an individual per calendar year."

III. Food, Drug, Cosmetic Act; Immunity to Donor of Female Hygiene Products

Chapter 207, Public Acts 2021, adding T.C.A. § 53-1-117 eff. July 1, 2021.

"(a) The good faith donor of an apparently usable feminine hygiene product to a bona fide charitable or nonprofit organization for free distribution to persons in need of the product is not subject to criminal penalty for violation of unfair trade practice laws or civil damages arising from the nature, age, packaging, or condition of an apparently usable feminine hygiene product.

"(b) A bona fide charitable or nonprofit organization that in good faith receives an apparently usable feminine hygiene product and distributes the product to persons in need is not subject to criminal penalty for violation of unfair trade practice laws or civil damages arising from the nature, age, packaging, or condition of an apparently usable feminine hygiene product.

"(c) Subsections (a) and (b) do not apply when a good faith donor or bona fide charitable or nonprofit organization's actions constitute gross negligence or intentional misconduct that results in injury or death to a person who uses the apparently usable feminine hygiene product."

IV. Barbers/Cosmetologists; Domestic Violence Training

Chapter 117, Public Acts 2021, adding various sections under Title 62, Chapters 3 and 4 eff. Jan. 1, 2022.

Applicants for a technician certificate of registration, master barber certificate of registration, barber instructor certificate of registration, cosmetologist license, manicuring license, cosmetology instructor license, aesthetician license, or natural hair styling license are required to obtain, at no cost to the applicant, up to one hour of online or in-person training on domestic violence. A person who holds a certificate of registration for any such profession as of December 31, 2021, and who is renewing the certificate of registration must successfully complete the training by December 31, 2025, at no cost to the person.

The training required by this bill must be provided by a nonprofit anti-domestic violence organization recognized by the Tennessee Coalition to End Domestic Violence and Sexual Assault on domestic violence that focuses on how to recognize the signs of domestic violence, how to respond to these signs, and how to refer a client to resources for victims of domestic violence."

A person who holds a certificate of registration and the employer of that person, who responds to signs of domestic violence with a client, refers a client to resources for victims of domestic violence, or fails to respond or refer will not be civilly or criminally liable for those actions or inactions. Also, a person who holds a certificate of registration and the employer of that person, who so responds, refers, or fails to respond or refer will not be subject to the jurisdiction of any board by those actions or inactions.

V. Contractors; Exclusion

Chapter 198, Public Acts 2021, adding T.C.A. § 62-6-102(4)(E) and renumbering accordingly eff. Apr. 22, 2021.

"(E) 'Contractor' does not include a person who erects or installs an on-premises device, as defined in § 54–21–102; digital display, as defined in § 54–21–102; or other improvement to a property or structure that is primarily intended to serve as advertising, and for which compensation is not being received and not intended to be received by the owner or occupant of the property or structure."

VI. Real Estate Professionals

Chapter 94, Public Acts 2021, adding T.C.A. § 62-13-315 and renumbering accordingly eff. Apr. 7, 2021.

"(a) A broker, affiliate broker, or other person licensed by the real estate commission may receive compensation directly to a business entity that:

(1) Is solely owned by that broker, affiliate broker, or other person; and
(2) Has been formed for the purpose of receiving compensation earned by that broker, affiliate broker, or other person for acts regulated by this chapter.

"(b) A business entity formed for the purpose stated in subdivision (a)(2) is not required to be licensed under this chapter so long as the sole owner of the business entity is licensed by the real estate commission."

VII. Commercial Driver License

Chapter 112, Public Acts 2021, adding T.C.A. § 55-50-405(i) eff. Apr. 13, 2021.

"(1) The commissioner shall suspend for life, a commercial motor vehicle operator who has been convicted of a human trafficking offense, as defined in § 39–13–314, or an equivalent offense in another jurisdiction.

"(2) A person who has been convicted of a human trafficking offense, as defined in § 39–13–314, or an equivalent offense in another jurisdiction, is disqualified from obtaining a commercial driver license."

CONSUMER LAW

I. Anti-Phishing Act; Now Applies to Text Messages Sent on Smart Devices

Chapter 370, Public Acts 2021, amending T.C.A. § 47-18-5202 eff. May 11, 2021.

The Anti-Phishing Act of 2006 has been modified. The definition of "wireless communication" specifically includes text messages sent and received on smart devices.

II. Telephone Consumer Protection Act

Facebook, Inc. v. Duguid, 141 S.Ct. 1163 (U.S., Sotomayor, 2021).

"The Telephone Consumer Protection Act of 1991 (TCPA) proscribes abusive telemarketing practices by, among other things, restricting certain communications made with an 'automatic telephone dialing system.' The TCPA defines such 'autodialers' as equipment with the capacity both 'to store or produce telephone numbers to be called, using a random or sequential number generator,' and to dial those numbers. 47 U.S.C. § 227(a)(1). Petitioner Facebook, Inc., maintains a social media platform that, as a security feature, allows users to elect to receive text messages when someone attempts to log in to the user's account from a new device or browser. Facebook sent such texts to Noah Duguid, alerting him to login activity on a Facebook account linked to his telephone number, but Duguid never created that account (or any account on Facebook). Duguid tried without success to stop the unwanted messages, and eventually brought a putative class action against Facebook. He alleged that Facebook violated the TCPA by maintaining a database that stored phone numbers and programming its equipment to send automated text messages. Facebook countered that the TCPA does not apply because the technology it used to text Duguid did not use a 'random or sequential number generator.' The Ninth Circuit disagreed, holding that § 227(a)(1) applies to a notification system like Facebook's that has the capacity to dial automatically stored numbers.

"Held: To qualify as an 'automatic telephone dialing system' under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator."

"This case turns on whether the clause 'using a random or sequential number generator' in § 227(a)(1)(A) modifies both of the two verbs that precede it ('store' and 'produce'), as Facebook contends, or only the closest one ('produce'), as maintained by Duguid. The most natural reading of the text and other aspects of § 227(a)(1)(A) confirm Facebook's view. First, in an ordinary case, the 'series-qualifier canon' instructs that a modifier at the end of a series of nouns or verbs applies to the entire series. Here, that canon indicates that the modifying phrase 'using a random or sequential number generator' qualifies both antecedent verbs, 'store' and 'produce.' Second, the modifying phrase immediately follows a concise, integrated clause ('store or produce telephone numbers to be called'), which uses the word 'or' to connect two verbs that share a common direct object ('telephone numbers to be called'). Given this structure, it would be odd to apply the modifier to just one part of the cohesive clause. Third, the comma in § 227(a)(1)(A) separating the modifying phrase from the antecedents suggests that the qualifier applies to all of the antecedents, instead of just the nearest one."

"Duguid's insistence that a limiting clause should ordinarily be read as modifying only the phrase that it immediately follows (the so-called 'rule of the last antecedent') does not help his cause for two reasons. First, the Court has declined to apply that rule in the specific context where, as here, the modifying clause appears after an integrated list. *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 344, n. 4, 125 S.Ct. 694, 160 L.Ed.2d 708. Second, the last antecedent before the clause at issue in § 227(a)(1)(A) is not 'produce,' as Duguid argues, but rather 'telephone numbers to be called.'"

"The statutory context confirms that the TCPA's autodialer definition excludes equipment that does not use a random or sequential number generator. Congress found autodialer technology harmful because autodialers can dial emergency lines randomly or tie up all of the sequentially numbered phone lines at a single entity. Facebook's interpretation of § 227(a)(1)(A) better matches the scope of the TCPA to these specific concerns. Duguid's interpretation, on the other hand, would encompass any equipment that stores and dials telephone numbers."

"Duguid's other counterarguments do not overcome the clear commands of the statute's text and broader context. First, he claims that his interpretation best accords with the 'sense' of the text. It would make little sense however, to classify as autodialers all equipment with the capacity to store and dial telephone numbers, including virtually all modern cell phones. Second, Duguid invokes the 'distributive canon,' which provides that a series of antecedents and consequents should be distributed to one another based on how they most naturally relate in context. But that canon is less suited here because there is only one consequent to match to two antecedents, and in any event, the modifying phrase naturally relates to both antecedents. Third, Duguid broadly construes the TCPA's privacy-protection goals. But despite Congress' general concern about intrusive telemarketing practices, Congress ultimately chose a precise autodialer definition. Finally, Duguid argues that a random or sequential number generator is a 'senescent technology,' *i.e.,* one likely to become outdated quickly. That may or may not be the case, but either way, this Court cannot rewrite the TCPA to update it for modern technology. Congress' chosen definition of an autodialer requires that the equipment in question must use a random or sequential number generator. That definition excludes equipment like Facebook's login notification system, which does not use such technology."

III. True Origin of Goods Act; Private Cause of Action

Chapter 87, Public Acts 2021, amending T.C.A. § 47-18-407 and adding T.C.A. § 47-18-408 eff. July 1, 2021.

47-18-407(b).

"For the purpose of application of the Tennessee Consumer Protection Act of 1977, a violation of this part constitutes an unfair or deceptive act or practice affecting trade or commerce and is subject to the penalties and remedies as provided in the Tennessee Consumer Protection Act of 1977, in addition to the penalties and remedies set forth in this part. However, no criminal penalty is incurred for violation of this part."

47-18-408.

"(a) An owner, assignee, authorized agent, or exclusive licensee of a commercial recording or audiovisual work electronically disseminated by a website or online service in violation of this part may bring a private cause of action to obtain a declaratory judgment that an act or practice violates this part and obtain an injunction against a person who knowingly has violated, is violating, or is otherwise likely to violate this part. As a condition precedent to filing a civil action under this section, the aggrieved party must provide written notice to an individual alleged to be in violation of this part. The written notice must explain that the individual may be in violation of this part and that failure to cure the violation within fourteen (14) days of receipt of the written notice may result in a civil action filed in a court of competent jurisdiction.

"(b) Upon motion of the party instituting the action, the court may make appropriate orders to compel compliance with this part.

"(c) The prevailing party in a cause of action under this section is entitled to recover necessary expenses and reasonable attorneys' fees."

IV. Federal Trade Commission Act; No Monetary Relief for Deceptive Payday Lending Practices

AMG Capital Management, LLC v. Federal Trade Commission, 141 S.Ct. 1341 (U.S., Breyer, 2021).

"The Federal Trade Commission filed a complaint against Scott Tucker and his companies alleging deceptive payday lending practices in violation of § 5(a) of the Federal Trade Commission Act. The District Court granted the Commission's request pursuant to § 13(b) of the Act for a permanent injunction to prevent Tucker from committing future violations of the Act, and relied on the same authority to direct Tucker to pay $1.27 billion in restitution and disgorgement. On appeal, the Ninth Circuit rejected Tucker's argument that § 13(b) does not authorize the award of equitable monetary relief.

"Held: Section 13(b) does not authorize the Commission to seek, or a court to award, equitable monetary relief such as restitution or disgorgement."

"Congress granted the Commission authority to enforce the Act's prohibitions on 'unfair or deceptive acts or practices,' 15 U.S.C. §§ 45(a)(1)–(2), by commencing administrative proceedings pursuant to § 5 of the Act. Section 5(*l*) of the Act authorizes the Commission, following completion of the administrative process and the issuance of a final cease and desist order, to seek civil penalties, and permits district courts to 'grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.' § 45(*l*). Section 19 of the Act further authorizes district courts (subject to various conditions and limitations) to grant 'such relief as the court finds necessary to redress injury to consumers,' § 57b(b), in cases where someone has engaged in unfair or deceptive conduct with respect to which the Commission has issued a final cease and desist order applicable to that person, see § 57b(a)(2). Here, the Commission responded to Tucker's payday lending practices by seeking equitable monetary relief directly in district court under § 13(b)'s authorization to seek a 'permanent injunction.' In doing so, the Commission acted in accordance with its increasing tendency to use § 13(b) to seek monetary awards without prior use of the Commission's traditional administrative proceedings. The desirability of the Commission's practice aside, the question is whether Congress, by enacting § 13(b) and using the words 'permanent injunction,' granted the

Commission authority to obtain monetary relief directly from courts and effectively bypass the requirements of the administrative process."

"Section 13(b) does not explicitly authorize the Commission to obtain court-ordered monetary relief, and such relief is foreclosed by the structure and history of the Act. Section 13(b) provides that the 'Commission may seek ... a permanent injunction.' § 53(b). By its terms, this provision concerns prospective injunctive relief, not retrospective monetary relief. Section 13(b) allows the Commission to go directly to district court when the Commission seeks injunctive relief pending administrative proceedings or when it seeks only a permanent injunction. Other statutory provisions, in particular the conditioned and limited monetary relief authorized in § 19, confirm this conclusion. It is highly unlikely that Congress, without mentioning the matter, would grant the Commission authority to circumvent its traditional § 5 administrative proceedings."

"The Commission's contrary arguments are unavailing. First, *Porter* v. *Warner Holding Co.*, 328 U.S. 395, and *Mitchell* v. *Robert DeMario Jewelry*, *Inc.*, 361 U.S. 288, did not adopt a universal rule that statutory authority to grant an injunction automatically encompasses the power to grant equitable monetary remedies. Instead, the text and structure of the particular statutory scheme at issue can limit a court's jurisdiction in equity. Second, in enacting § 19 two years after § 13(b), Congress did not simply create an alternative enforcement path with similar remedies. The Court does not believe Congress would have enacted § 19's provisions expressly authorizing monetary relief if § 13(b) already implicitly allowed the Commission to obtain that same monetary relief without satisfying § 19's conditions and limitations. Third, § 19's saving clauses —preserving 'any authority of the Commission under any other provision of law' and 'any other remedy or right of action provided by State or Federal law,' § 57b(e)—do not help answer whether § 13(b) gave the Commission the authority to obtain equitable monetary relief directly in court in the first place. Fourth, the Act's 1994 and 2006 amendments, which did not modify the specific language at issue here, do not demonstrate congressional acquiescence to lower court rulings that favor the Commission's interpretation of § 13(b). Fifth, policy arguments that § 5 and § 19 are inadequate to provide redress to consumers should be addressed to Congress."

V. Concrete Harm Required for Standing to Seek Damages

A. Fair Credit Reporting Act; Misleading Credit Reports

TransUnion LLC v. Ramirez, 141 S.Ct. 2190 (U.S., Kavanaugh, 2021).

"The Fair Credit Reporting Act regulates the consumer reporting agencies that compile and disseminate personal information about consumers. 15 U.S.C. § 1681 *et seq.* The Act also creates a cause of action for consumers to sue and recover damages for certain violations. § 1681n(a). TransUnion is a credit reporting agency that compiles personal and financial information about individual consumers to create consumer reports and then sells those reports for use by entities that request information about the creditworthiness of individual consumers. Beginning in 2002, TransUnion introduced an add-on product called OFAC Name Screen Alert. When a business opted into the Name Screen service, TransUnion would conduct its ordinary credit check of the consumer, and it would also use third-party software to compare the consumer's name against a list maintained by the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals. If the consumer's first and last name matched the first and last name of an individual on OFAC's list, then TransUnion would place an

alert on the credit report indicating that the consumer's name was a 'potential match' to a name on the OFAC list. At that time, TransUnion did not compare any data other than first and last names.

"A class of 8,185 individuals with OFAC alerts in their credit files sued TransUnion under the Fair Credit Reporting Act for failing to use reasonable procedures to ensure the accuracy of their credit files. The plaintiffs also complained about formatting defects in certain mailings sent to them by TransUnion. The parties stipulated prior to trial that only 1,853 class members (including the named plaintiff Sergio Ramirez) had their misleading credit reports containing OFAC alerts provided to third parties during the 7-month period specified in the class definition. The internal credit files of the other 6,332 class members were not provided to third parties during the relevant time period. The District Court ruled that all class members had Article III standing on each of the three statutory claims. The jury returned a verdict for the plaintiffs and awarded each class member statutory damages and punitive damages. A divided panel of the Ninth Circuit affirmed in relevant part.

"Held: Only plaintiffs concretely harmed by a defendant's statutory violation have Article III standing to seek damages against that private defendant in federal court."

"Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies' in which a plaintiff has a 'personal stake.' *Raines* v. *Byrd*, 521 U.S. 811, 819–820. To have Article III standing to sue in federal court, a plaintiff must show, among other things, that the plaintiff suffered concrete injury in fact. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–561. Central to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts. *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 340. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury. Physical or monetary harms readily qualify as concrete injuries under Article III, and various intangible harms—like reputational harms—can also be concrete. *Ibid*.

"'Article III standing requires a concrete injury even in the context of a statutory violation.' *Ibid*. The Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.' *Id.*, at 341. An injury in law is not an injury in fact."

"The Court applies the fundamental standing requirement of concrete harm to this case."

"In their reasonable-procedures claim, all 8,185 class members maintain that TransUnion did not do enough to ensure that misleading OFAC alerts labeling them as potential terrorists were not included in their credit files. See § 1681e(b). TransUnion provided third parties with credit reports containing OFAC alerts for 1,853 class members (including the named plaintiff Ramirez). Those 1,853 class members therefore suffered a harm with a 'close relationship' to the harm associated with the tort of defamation. *Spokeo*, 578 U.S., at 341. Under longstanding American law, a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party. *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 13. The Court has no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact.

"The credit files of the remaining 6,332 class members also contained misleading OFAC alerts, but the parties stipulated that TransUnion did not provide those plaintiffs' credit information to any

potential creditors during the designated class period. The mere existence of inaccurate information, absent dissemination, traditionally has not provided the basis for a lawsuit in American courts. The plaintiffs cannot demonstrate that the misleading information in the internal credit files itself constitutes a concrete harm.

"The plaintiffs advance a separate argument based on their exposure to the risk that the misleading information would be disseminated in the future to third parties. The Court has recognized that material risk of future harm can satisfy the concrete-harm requirement in the context of a claim for injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial. See *Spokeo*, 578 U.S., at 341–342 (citing *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398). But TransUnion advances a persuasive argument that the mere risk of future harm, without more, cannot qualify as a concrete harm in a suit for damages. The 6,332 plaintiffs did not demonstrate that the risk of future harm materialized. Nor did those plaintiffs present evidence that the class members were independently harmed by their exposure to the risk itself. The risk of future harm cannot supply the basis for their standing."

"In two other claims, all 8,185 class members complained about formatting defects in certain mailings sent to them by TransUnion. But the plaintiffs have not demonstrated that the format of TransUnion's mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. See *Spokeo*, 578 U.S., at 341.

"The plaintiffs argue that TransUnion's formatting violations created a risk of future harm, because consumers who received the information in the dual-mailing format were at risk of not learning about the OFAC alert in their credit files and thus not asking for corrections. The risk of future harm on its own is not enough to support Article III standing for their damages claim. In any event, the plaintiffs here made no effort to explain how the formatting error prevented them asking for corrections to prevent future harm.

"The United States as *amicus curiae* asserts that the plaintiffs suffered a concrete 'informational injury' from TransUnion's formatting violations. See *Federal Election Comm'n* v. *Akins*, 524 U.S. 11; *Public Citizen* v. *Department of Justice*, 491 U.S. 440. But the plaintiffs here did not allege that they failed to receive any required information. They argued only that they received the information in the wrong format. Moreover, an asserted informational injury that causes no adverse effects does not satisfy Article III."

B. Fair and Accurate Credit Transaction Act; Too Many Digits of Credit Card Number

Thomas v. TOMS King (Ohio), LLC, 997 F.3d 629 (6th Cir., Suhrheinrich, 2021).

"After receiving a credit card receipt printed with the first six and last four digits of her credit card, Plaintiff Denece Thomas (Plaintiff) sued Defendants TOMS King (Defendants) for violating the 'truncation requirement' of the Fair and Accurate Credit Transactions Act of 2003 (FACTA). That provision prohibits anyone who accepts credit or debit cards for payment from printing more than the last five digits of a customer's card number on the receipt, and offers actual and statutory damages. The question before us is whether Defendants' alleged violation of that statute resulted in harm sufficiently concrete for Article III standing purposes. The district court concluded that it did not and dismissed the case without prejudice for lack of subject matter jurisdiction. Plaintiff appeals that decision."

"First, a bit about the statute at issue. Congress enacted FACTA in 2003 as an amendment to the Fair Credit Reporting Act (FCRA). Pub. L. No. 108–159, 117 Stat. 1952 (2003). One aim of the legislation is 'to prevent identity theft.' *Id.* To this end, § 1681 instructs that 'no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.' 15 U.S.C. § 1681c(g)(1). Any person who willfully violates this provision is liable for actual damages or statutory damages ranging from $100 to $1,000. 15 U.S.C. § 1681n(a)(1)(A). Punitive damages as well as attorneys' fees are also available. *Id.* § 1681n(a)(2)–(3)."

"Plaintiff alleges that on June 26, 2017, at an undisclosed TOMS King location, for an undisclosed purchase, she received an electronically printed receipt containing the first six and last four digits of her card number. She asserts that all Class Members received noncompliant receipts from Defendants within two years of the suit's filing date. She therefore claims injury because (1) her situation 'is exactly the scenario Congress sought to avoid by passing FACTA,' and (2) Defendants exposed her and the entire Class 'to at least an increased and material risk of identity theft and credit and/or debit card fraud.' In other words, according to the complaint, Defendants' 'violation of FACTA's prohibition against printing excess digits of a card number presents a significant risk of the exact harm that Congress intended to prevent—the display of card information that could be exploited by an identity thief.' And this harm is not made harmless simply because the receipt was not seen by a potential identify thief: 'Plaintiff and class members must take additional steps to ensure the safety of his or her identity' like saving the receipt. Furthermore, there is also a risk of harm because merchants often retain receipts, allowing others access to card information. Plaintiff seeks statutory damages, punitive damages, costs, and attorney fees."

"We apply well-worn yet enduring standards. To satisfy Article III standing requirements, Plaintiff must show that (1) she suffered an injury in fact, (2) caused by Defendants, that (3) is redressable by a judicial decision. *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016). Only the first element is at issue in this case. An injury in fact is one that is 'real, not abstract, actual, not theoretical, concrete, not amorphous.' *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 462 (6th Cir. 2019) (citing *Spokeo*, 136 S. Ct. at 1548), *cert. denied*, 140 S. Ct. 1117 (2020). An injury in fact can be tangible or intangible. *Spokeo*, 136 S. Ct. at 1549."

"To recap: A violation of the statute does not automatically create a concrete injury of increased risk of real harm even if Congress designed it so. And the factual allegations in this complaint do not establish an increased risk of identity theft either because they do not show how, even if Plaintiff's receipt fell into the wrong hands, criminals would have a gateway to consumers' personal and financial data. Furthermore, as the district court noted, Plaintiff does not allege that the receipt was lost, stolen, or seen by a third set of eyes, inside or outside of Defendants' employ.

"Notwithstanding, Plaintiff does identify one potentially concrete harm: forcing her to safeguard her receipt, which can be a legitimate injury. *See Huff*, 923 F.3d at 463 (suggesting that wasted time is an actual injury); *Jeffries* [*v. Volume Servs. Am., Inc.*], 928 F.3d [1059] at 1064 n.2 [(D.C. Cir. 2019)]. But a 'hypothetical future harm' [that] is not 'certainly impending' is not a concrete injury, and so Plaintiff's efforts to protect her identity cannot be either. *See Muransky* [*v. Godiva Chocolatier, Inc.*], 979 F.3d [917] at 931 [(11th Cir. 2020)] (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 422 (2013)); *Buccholz* [*v. Meyer NJUS Tanick*], 946 F.3d [855] at 865 [(6th Cir. 2020)] (same). In other words, '[i]f [the] receipt would not offer any advantage to identity thieves,

we could hardly say that [Plaintiff] was injured because of the efforts [he] took to keep it out of their hands.' *Muransky*, 979 F.3d at 931."

VI. Farm Machinery; Refund or Replacement of Non-Conforming Equipment

Chapter 411, Public Acts 2021, adding T.C.A. §§ 47-18-3101–3104 eff. July 1, 2021.

47–18–3102.

"(a) At the consumer's discretion, a manufacturer shall replace farm machinery with comparable farm machinery or accept return of the farm machinery from a consumer and refund to the consumer the full purchase price and related repair costs specific to the machinery, less a reasonable allowance for use and a reasonable offset for physical damage to the farm machinery caused by the consumer, if:

(1) The consumer provides written notice by certified mail to the manufacturer, distributor, or authorized dealer that a piece of farm machinery does not conform to an applicable express warranty or manufacturer's warranty during the quality assurance period;
(2) The nonconformity substantially impairs the use of the farm machinery; and
(3) The manufacturer, its agent, the distributor, or the authorized dealer cannot conform the farm machinery to an applicable express warranty or manufacturer's warranty after a reasonable number of repair attempts.

"(b) The consumer shall furnish possession of the nonconforming farm machinery to the manufacturer, distributor, or authorized dealer at the time of a refund or replacement. If a refund is made, then the refund must be made to the consumer, and lien holder or holder of a security interest, if any, as their interest may appear. If a replacement is made, then a consumer, lien holder, or lessor shall furnish clear title to, and possession of, the farm machinery to the manufacturer, distributor, or authorized dealer."

47–18–3103.

"It is an affirmative defense to a claim under this part that:

(1) A defect or condition does not substantially impair the use, value, or safety of the farm machinery;
(2) A nonconformity is the result of an accident, abuse, neglect, or unauthorized modification of the farm machinery by a person other than the manufacturer, an agent of a manufacturer, the distributor, or an authorized dealer; or
(3) The consumer did not file a claim in good faith."

47–18–3104.

"(a) A consumer may bring a civil action to enforce this part in a court of competent jurisdiction. A consumer must bring a legal action under this section within two (2) years after the date the consumer first reports a nonconformity to a manufacturer, an agent of a manufacturer, or an authorized dealer.

"(b) This part does not limit the rights or remedies available to a consumer under any other applicable law.

"(c) If a consumer prevails in a legal proceeding under this part, then the consumer may recover, as part of the judgment, a sum equal to the aggregate amount of costs and expenses, including attorney's fees, based on:

(1) Actual time expended by an attorney; and

(2) Charges reasonably incurred by the consumer in connection with the commencement and prosecution of an action under this section as determined by a court.

"(d) Before filing a legal action to enforce this part in a court of competent jurisdiction, the consumer and the manufacturer, distributor, or authorized dealer may, upon mutual agreement and in good faith, attempt to resolve any issue or claim in dispute through the use of an impartial third-party mediator."

ANTITRUST

I. Sherman Act; Education-Related Benefits for Student Athletes

National Collegiate Athletic Association v. Alston, 141 S.Ct. 2141 (U.S., Gorsuch, 2021).

"Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on 'amateur' student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

"Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate § 1 of the Sherman Act, which prohibits 'contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.' 15 U.S.C. § 1. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court 'struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.' 958 F.3d 1239, 1263. Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes have not renewed their across-the-board challenge and the Court thus does not consider the rules that remain in place. The Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined. The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.

"Held: The district court's injunction is consistent with established antitrust principles."

PROPERTY

I. Title to Real Estate Held in Trust

Chapter 449, Public Acts 2021, adding T.C.A. §§ 35-15-113 and 10-7-201 eff. July 1, 2021.

"35-15-113. Real Property in Trust.

"(a) An estate in real property may be acquired in the name of the trust or in the name of the trustee on behalf of the named trust, and title to real property conveyed by the trust must be conveyed by the trustee, as trustee of the trust.

"(b) Subsection (a) applies to documents executed prior to, on, and after July 1, 2021.

"(c) This section does not abrogate or amend § 35–15–402(d)."

10-7-201.

"(b) A suit, decree, judgment, sale, mortgage, transfer, lien, deed, power of attorney, or other record referencing a trust must be indexed in the name of the trust, if the name is stated in the document, and in the name of each trustee listed in the document."

II. Restrictive Covenants Inapplicable to Land Sold Before Covenant Recorded

Phillips v. Hatfield, 624 S.W.3d 464 (Tenn., Bivins, 2021).

"Mark Hatfield ('the Defendant') owns land in Bristol, Tennessee along U.S. Highway 11E, a divided highway known at that location as Volunteer Parkway. The Defendant purchased the land through two transactions, one in late 2016 and the other in early 2017. The local property assessor has classified the land as commercial since the early-to-mid 1990s. The City of Bristol has zoned the property as 'General Business,' which permits retail business. Having purchased the property, the Defendant proposed to raze an existing structure, construct a new building and parking lot, and open a retail business known as Intimate Treasures. The business would offer for sale at least some percentage of 'adult novelty items.'

"Ritchie and Roma Phillips ('the Plaintiffs') own land in Bristol at 104 Sunnybrook Drive. The Plaintiffs reside in a home on this property. Sunnybrook Drive intersects Volunteer Parkway. The Defendant's property is situated at the intersection, abutting both Volunteer Parkway and Sunnybrook Drive. The Plaintiffs' property abuts Sunnybrook Drive and lies immediately up the street from the Defendant's property. The Plaintiffs' property shares a property line with a portion of the Defendant's property.

"The Plaintiffs' property and the Defendant's property are comprised of various platted lots, or portions thereof, in a subdivision known as Sunnybrook Addition. Sunnybrook Addition was platted in 1953 by the then-owners of the land comprising the subdivision, J.C. and Mary Virginia Chambers ('the Chambers'). Sunnybrook Drive is a path of ingress into the subdivision from Volunteer Parkway.

"Aggrieved by the Defendant's plan to open a retail business on his property, the Plaintiffs filed suit seeking an injunction and a declaratory judgment that certain restrictive covenants prohibit non-residential structures on the Defendant's land. According to the Plaintiffs, the Chambers recorded 'Protective Covenants' in 1955 ('the 1955 Restrictive Covenants') that purported to cover all lots in the subdivision and to 'run with the land,' in other words to bind remote grantees or successive purchasers. The 1955 Restrictive Covenants consisted of fourteen paragraphs that specified a variety of restrictions, from building setbacks, to minimum dwelling sizes, to prohibitions on the keeping of livestock and poultry. Chief among them for purposes of this appeal was a provision governing 'land use and building type.' The provision designated all lots as residential and prohibited the erection of any structure other than a single-family dwelling. In their Complaint, the Plaintiffs alleged that the Defendant's proposed construction would violate this covenant."

"The initial deeds for all of the parties' lots—from the Chambers as grantors to the various initial grantees in 1953—contained the Original Restrictive Covenants. However, by the terms of the deeds, the covenants were binding for a period of only twenty years. Thus, it is uncontested that the express residential-use restriction contained in the deeds for the Defendant's property terminated by its own terms long ago.

"Each of the Defendant's lots was conveyed multiple times between the initial sale in 1953 and when the Defendant purchased it. Lot one was sold by the Chambers in 1953 and remained in the hands of that purchaser until August 8, 1956, when the purchaser sold the lot back to the Chambers. Lot two was sold by the Chambers in 1953, and was sold three more times before it also was sold back to the Chambers on May 21, 1956. After the Chambers reacquired lots one and two in 1956, the lots were always conveyed together. The Chambers re-sold lots one and two in 1960, and the lots were conveyed four more times before the Defendant bought them in 2016."

"The crux of the controversy in this case involves the 1955 Restrictive Covenants. On May 3, 1955, the Chambers recorded the 1955 Restrictive Covenants, even though by then they had already sold the vast majority of lots in Sunnybrook Addition. Nevertheless, the 1955 Restrictive Covenants purported 'to cover the Sub-division Plot as to lots in the entire Sub-division, but no further or otherwise,' and they specifically stated they were to 'run with the land.' As previously mentioned, among the covenants was a restriction as to 'land use and building type':

> All lots in the tract shall be known and designated as residential lots. No structure shall be erected, altered or placed or permitted to remain on any lot other than one detached single family dwelling not to exceed two stories in height and a private garage for not more than two cars and usual domestic servants quarters.

"By their terms, the 1955 Restrictive Covenants were to be binding for a definite period of time but were to renew automatically for successive ten-year periods unless a majority of the then-owners of the lots agreed to change the covenants.

"None of the deeds that conveyed the Defendant's property after May 3, 1955, incorporated or referred to the 1955 Restrictive Covenants. Some of the deeds involving the Defendant's predecessors-in-title contained no restrictive language at all. In fact, the deed by which the Chambers re-sold lots one and two in 1960 after they had reacquired the lots in 1956 contained no restrictive language whatsoever. On the other hand, some of the deeds involving the Defendant's predecessors-in-title contained general language that the conveyance was subject to valid restrictive

covenants of record, if any. In fact, the 2016 and 2017 deeds conveying the properties to the Defendant stated: 'This conveyance is made subject to valid restrictive covenants and easements, if any, appearing of record.'

"At trial, the Defendant offered evidence that the 1955 Restrictive Covenants did not appear in the chain of title to his property. The Defendant's witness in this regard explained that the Chambers had sold the lots in question before recording the 1955 Restrictive Covenants. The witness testified that in the case of restrictions recorded after a conveyance, it was standard practice for the parties to a conveyance to join and expressly recognize that the property will be encumbered by the restrictions. That practice did not occur with respect to what became the Defendant's property."

"After hearing all of the evidence, the trial court concluded that the Defendant's property was restricted to residential use and entered a declaratory judgment in favor of the Plaintiffs. The basis for the trial court's ruling was a conclusion that the Defendant's property was subject to an implied negative reciprocal easement through the 1955 Restrictive Covenants."

"Upon the Defendant's appeal, the Court of Appeals reviewed 'whether the trial court properly found the existence of an implied negative reciprocal easement.' *Phillips v. Hatfield*, No. E2019-00628-COA-R3-CV, 2019 WL 6954182, at *4 (Tenn. Ct. App. Dec. 18, 2019), perm. app. granted, (Tenn. July 17, 2020). The Court of Appeals concluded that the evidence did not preponderate against the trial court's findings related to the elements of establishing an implied negative reciprocal easement:

> (1) that the parties derived their titles from a common grantor;
> (2) that the common grantor had a general plan for the property involved;
> (3) that the common grantor intended for the restrictive covenant to benefit the property involved; and
> (4) that the grantees had actual or constructive knowledge of the restriction when they purchased their parcels.

"Id. at *4 (citing *Ridley v. Haiman*, 164 Tenn. 239, 47 S.W.2d 750, 755 (1932)). The intermediate appellate court concluded that the evidence established 'that an implied reciprocal negative easement existed ..., such that [the Defendant's] lots were subject to the residential-use restriction contained in the [1955 Restrictive Covenants].' Id. at *6. Accordingly, the court affirmed the trial court's judgment. Id. at *8."

"The central issue in this case is whether the Defendant's property is restricted to residential use. It is clear that for a period of time from the 1950s to the 1970s, what is now the Defendant's property indeed was restricted to residential use by virtue of the Original Restrictive Covenants. However, by its own terms, this restriction terminated after twenty years—long before the Defendant acquired his property. The only other potential source of restriction is the 1955 Restrictive Covenants. Thus, the heart of this case is whether the 1955 Restrictive Covenants apply to the Defendant's property."

"The record reflects that when the Chambers executed and recorded the 1955 Restrictive Covenants—the only potential source of restriction for the Defendant's property in this case—they did not own any of the parties' lots. Under these circumstances, there is a fundamental flaw in the Plaintiffs' attempt to burden the Defendant's property through the recording of the 1955 Restrictive Covenants. As we mentioned above, for a restrictive covenant to qualify as a servitude and run with

the land, the covenant not only must have been intended to run with the land, it also must have been created effectively. Restatement (Third) of Prop.: Servitudes § 1.3 cmt. a. Of keen importance under the circumstances of this case, to create a servitude, 'the grantor must own the servient estate.' Id. § 2.1 cmt. b, note. Cf. id. § 2.13, note (observing in the context of servitudes implied by reference to a plat or map that '[u]nless the grantor has the power to create the servitude, there would be no point to implying the servitude')."

"In this case, it is true that the language of the 1955 Restrictive Covenants purported to cover all lots in Sunnybrook Addition. However, the Chambers did not own lots one through four when they recorded the 1955 Restrictive Covenants. Therefore, the inescapable conclusion is that the Chambers lacked the authority to impose a servitude on the land that became the Defendant's property simply through recording the 1955 Restrictive Covenants."

"Tennessee recognizes negative reciprocal easements. The concept is reflected in the following language from this Court:

> The general rule is that, where the owner of a tract of land subdivides it and sells the different lots to separate grantees, and puts in each deed restrictions upon the use of the lot conveyed, in accordance with a general building, improvement, or development plan, such restrictions may be enforced by any grantee against any other grantee.

"*Ridley v. Haiman*, 164 Tenn. 239, 47 S.W.2d 750, 753 (1932). The concept is concerned primarily with '[w]hether a person not a party to a deed containing a restrictive covenant is entitled to enforce that covenant.' Id."

"Tennessee law recognizes the implied negative reciprocal easement doctrine. For instance, in *Land Developers, Inc. v. Maxwell*, 537 S.W.2d 904 (Tenn. 1976), we reiterated the principles of negative reciprocal easements: that when a property owner subdivides land and sells lots with deed restrictions in accordance with a general plan, the restrictions may be enforced by any grantee against any other grantee. 537 S.W.2d at 912."

"The 1955 Restrictive Covenants purported to cover all lots in Sunnybrook Addition. However, the Chambers were the common grantor for the lots in Sunnybrook Addition in 1953, when they conveyed the first lots subject to the Original Restrictive Covenants. By the time of the recording of the 1955 Restrictive Covenants, the Chambers were no longer acting as the common grantor with respect to the parties' properties, for the Chambers did not then own those lots. Under these circumstances, we conclude that the 1955 Restrictive Covenants cannot burden the Defendant's property by virtue of an implied negative reciprocal easement. To hold otherwise would be to impose the 1955 Restrictive Covenants retroactively."

"In our view, when the Chambers reacquired lots one and two in 1956—after at least sixty-seven of the seventy-nine lots in the subdivision had been sold, some more than once—they stood in the same shoes as any other purchaser. They acquired lots one and two subject to the Original Restrictive Covenants, and they were free to use or sell the lots. We do not believe that the implied negative reciprocal easement doctrine can be stretched to impose a restriction upon property when the grantor parted ways with it before attempting to impose the restriction, simply because the grantor reacquired it a year after recording the purported restriction. Thus, we conclude that the Chambers' re-acquisition and later re-sale of lots one and two did not trigger the imposition of the 1955 Restrictive Covenants as a servitude upon the Defendant's property.

"Accordingly, in light of the discussion above, we are compelled to conclude that the 1955 Restrictive Covenants do not apply to the Defendant's property. The Defendant is entitled to a declaratory judgment to that effect."

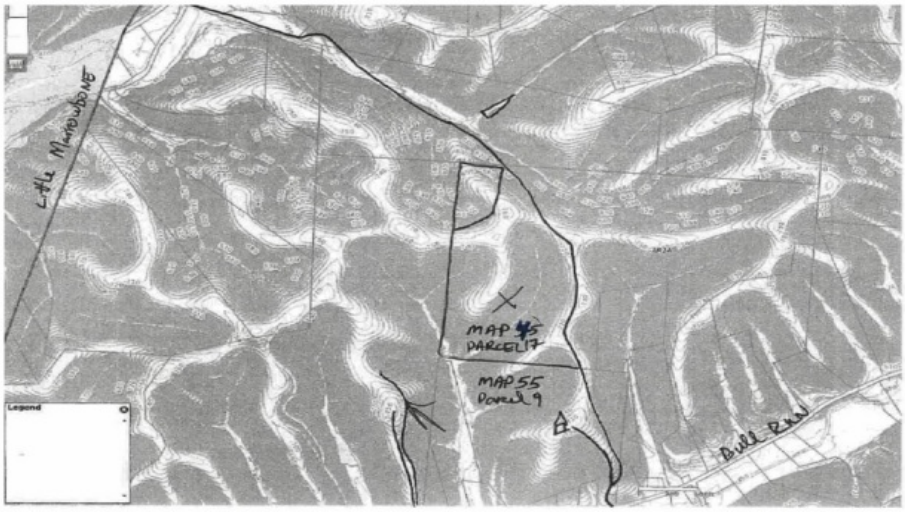
III. Easement; No Abandonment nor Acquiescence

Anthony Rentals v. Sagers, No. M2019-01237-COA-R3-CV (Tenn. Ct. App., Clement, Nov. 18, 2020), perm. app. denied Mar. 17, 2021.

"This appeal arises out of a dispute concerning an express, ingress and egress easement across the defendant's property. The principal issue is whether the plaintiff abandoned the easement by failing to maintain the easement in a condition permitting it to be used for access and/or by acquiescing in the acts of others that reduced the utility of the easement. Following a bench trial, the court determined the defendant failed to prove abandonment by clear and convincing evidence. Having determined that the evidence does not preponderate against the findings by the trial court, we affirm.

"Anthony Rentals, a general partnership comprised of two sisters, Sharon and Donna Anthony, ('Plaintiff') owns a parcel of over 50 acres of undeveloped, wooded land identified as 'Map 45, Parcel 17' (the 'Anthony property'). Mark B. Sagers ('Defendant') owns a parcel identified as 'Map 55, Parcel 9' (the 'Sagers property'), which consists of approximately 50 acres. The Sagers property directly fronts Bull Run Road and lies immediately south of the Anthony property, which is not adjacent to a public roadway. Both properties are located in the Scottsboro area of Davidson County, Tennessee, between Bull Run Road and Little Marrowbone Road.

"The easement at issue, which runs across the Sagers property from Bull Run Road to the Anthony property, was previously a public road known as Old Post Road or Old Mail Route Road ('Old Road'). From Bull Run Road, the driveway to the Sagers property is on the easement for 500 to 600 feet and then veers left of the easement toward Defendant's house. Where the driveway veers left, the easement continues north toward the Anthony property for another 200 to 300 feet. This stretch of easement leading north to the Anthony property is unpaved, varies in width from eight to 13 feet, and a portion of the easement is impassible by automobile. Below is a map showing the location of the properties and the easement:



"In 1961, the Davidson County Chancery Court granted Plaintiff's predecessors in interest an access easement in the Old Road from the entrance at Bull Run Road, and this court affirmed that decision in *Payton v. Richardson*, 356 S.W.2d 289 (Tenn. Ct. App. 1961). Plaintiff's warranty deed contained an express grant of the easement over the Sagers property:

> Together with an easement for right-of-way over Old Post Road or Old Mail Route Road running northwardly from Bull Run Road, as set out in the decree entered in Minute Book 187, page 162, Chancery Court at Nashville, in this cause of William M. Payton, Jr. and wife vs. E. Newsom Richardson and wife, Rule No. 83027, said Court. This conveyance is made subject to an easement for right-of-way of Old Post Road lying within the boundaries of the premises herein described.

"While Defendant's warranty deed did not specifically reference the easement, it stated that the property was 'subject to any and all existing easements and restrictions as shown of record.' Defendant testified at the trial that he was aware of the easement when he purchased the property in 2005, and the easement's status as an express easement is not in dispute."

"Defendant concedes that Plaintiff never made statements disavowing the easement, never placed a permanent obstruction across the easement, and never developed an alternative access to the Anthony property. Instead, Defendant relies on the second and third *Hall* factors to prove abandonment. He contends Plaintiff abandoned the easement by failing to maintain the easement in a passable condition. He also contends Plaintiff acquiesced to the reduction of the easement's utility by failing to remove the steel cable or gate across the easement.

"In response, Plaintiff contends its failure to maintain the easement was a consequence of infrequent use and not an expression of Plaintiff's intent to abandon it. Plaintiff also contends that, while the steel cable may have deterred trespassers, it did not limit Plaintiff's access in any significant way. As for the locked gate installed by Defendant, Plaintiff contends it promptly initiated this action to enforce its rights upon learning of the gate's existence. Therefore, there was no acquiescence."

"Although Plaintiff failed to maintain the easement, the evidence preponderates in favor of the trial court's finding that the easement was not in such poor condition that it indicated Plaintiff's intent to abandon it. Additionally, Ms. Anthony and Mr. Weesner's testimony supports a finding that Plaintiff's failure to maintain the easement was not for the purpose of abandoning the easement, but resulted from Plaintiff's infrequent need to visit the property."

"Defendant testified that, after Defendant and his former wife purchased the Sagers property in 2005, they built a home on it and cleared a portion of the easement to construct a driveway leading to the home. At that time, a metal cable blocked the easement at the Bull Run Road entrance. As part of his renovations, Defendant removed the metal cable and replaced it with a gate to block public access across the driveway."

"The evidence preponderates in favor of the trial court's finding that the steel cable did not limit Plaintiff's access to the Anthony property in any significant way and, thus, did not indicate abandonment. As for Defendant's claim that Plaintiff acquiesced to the gate blocking Plaintiff's access, it is undisputed that Plaintiff was not aware of the gate until 2016. Moreover, upon learning of the gate, Plaintiff promptly informed Defendant of its need and intent to use the easement for ingress and egress to its property. When Defendant refused to remove the lock from the gate or

otherwise permit Plaintiff's use of the easement, Plaintiff commenced this action. Therefore, the evidence preponderates in favor of the trial court's finding that Defendant failed to establish that Plaintiff acquiesced to Defendant's acts to reduce the easement's utility.

"For the foregoing reasons, we affirm the judgment of the trial court."

IV. Landlord-Tenant Issues

A. Termination of Lease by Domestic Abuse Victim

Chapter 293, Public Acts 2021, adding T.C.A. §§ 66-7-112 and 66-28-205 eff. July 1, 2021.

Chapter 293 authorizes a tenant to terminate a residential rental or lease agreement entered into or renewed on or after July 1, 2021, upon the tenant providing the landlord with written notice stating that the tenant or household member is a domestic abuse victim, sexual assault victim, or stalking victim, regardless of whether the victim is an adult or a child, and establishes requirements for the tenant and landlord in such situations.

B. Landlord Protection from Liability for Renting to Non-Violent Convicted Criminal

Chapter 298, Public Acts 2021, adding T.C.A. § 40-29-108 eff. July 1, 2021.

"(a) In any proceeding on a claim against a landlord for negligence in renting, leasing, or otherwise extending housing opportunities to a person who has been previously convicted of a criminal offense, a landlord is not liable based solely upon the fact that the person has been previously convicted of a criminal offense.

"(b) In a cause of action against a landlord for negligence in renting, leasing, or otherwise extending housing opportunities to a person who has been previously convicted of a criminal offense, evidence that the person has been previously convicted of a criminal offense is not admissible.

"(c) Subsections (a) and (b) do not apply when:

(1) The landlord had actual knowledge of the person's prior conviction for a violent offense, as defined in § 40–35–120(b) or a violent sexual offense, as defined in § 40–39–202; or

(2) The landlord, having actual knowledge of the person's commission of a violent offense, as defined in § 40–35–120(b), or a violent sexual offense, as defined in § 40–39–202, after beginning of the person's tenancy, was willful in allowing the person to continue to rent, lease, or otherwise use housing opportunities.

"(d) This section does not create a cause of action or expand an existing cause of action.

"(e) The provisions of § 1–3–119 relative to implied rights of action apply to this section.

"(f) As used in this section, 'landlord' means the owner, lessor, or sublessor of the dwelling unit or the building of which the unit is a part, the manager of the premises, and employees and agents of the owner, lessor, or sublessor."

C. Uniform Residential Landlord Tenant Act as Sole Governing Authority in Applicable Counties

Chapter 182, Public Acts 2021, adding T.C.A. §§ 66-28-102(a) and (e) eff. July 1, 2021.

"In the counties in which this chapter applies, this chapter occupies and preempts the entire field of legislation concerning the regulation of landlords and tenants. The governing body of a county subject to this chapter shall not enact or enforce regulations that conflict with, or are an addition to, this chapter."

The act also specifies that a county's population is determined by the 2010 federal census, not any subsequent federal census.

V. Forcible Entry and Detainer; Warrant Sufficiently Demonstrated Service; Rules of Civil Procedure Inapplicable in this Sessions Court Matter

Scarlett v. AA Properties, GP, 616 S.W.3d 815 (Tenn. Ct. App., Swiney, 2020), perm. app. denied Nov. 16, 2020.

"In 2017, title to 1024 Connecticut Avenue in Knoxville passed to Scarlett and his sister upon the death of his mother. In February 2019, the property was foreclosed upon and transferred to AA Properties, which filed a detainer warrant against Scarlett in the General Sessions Court. The warrant reflects 'Posted Dates' of March 1, 2019, March 4, 2019, and March 5, 2019, all handwritten in blank spaces above three separate lines. The 'Date Served' was March 5, 2019, or, the same date as the third 'Posted Date.' The matter was set for trial on March 12, 2019. Above the trial date the word 'POSTED' is stamped at an angle.

"On March 12, 2019, default judgment was entered against Scarlett. A writ of possession was issued and served upon Scarlett, and he was removed from the property in April 2019. That month, Scarlett filed his petition for writ of certiorari and supersedeas in the Circuit Court alleging, in part, that he 'was never legally served with process or proper notice of the date for hearing thereof, at the time judgment was entered against him, and the General Sessions Court, in this cause, had neither personal nor in rem jurisdiction in this cause,' and that 'as a result of the wrongful issuance of the Writ of Possession, the Movant has not only lost possession of the real property but also his personal possessions have been lost or converted, including household furnishings and a valuable collector's automobile, having a value of as much as $125,000.' AA Properties subsequently filed a motion to dismiss. In June 2019, the motion was heard [and granted]."

"Scarlett raises one issue on appeal subdivided into two parts, which we restate slightly as follows: 1) whether the General Sessions Court lacked jurisdiction to grant relief on an expedited basis in view of the service requirements of Tenn. Code Ann. § 29-18-115(e)(2); and 2) whether the General Sessions Court erred by entering default judgment earlier than six days after service of process, requiring Scarlett to appear and defend in violation of the requirements of Tenn. Code Ann. § 29-18-115(e)(2) as computed by Tenn. R. Civ. P. 6.01."

"We first address whether the General Sessions Court lacked jurisdiction to grant relief on an expedited basis in view of the service requirements of Tenn. Code Ann. § 29-18-115(e)(2). In his brief, Scarlett asserts that '[t]he warrant fails on its face to meet the requirements of *Tennessee Code*

Annotated § 29-18-115(a)(1)(C)(e)(2), stating neither personal service upon James Scarlett nor unsuccessful attempt at personal service.' In response, AA Properties disputes that special language on the warrant regarding personal service is required. To determine which interpretation is correct, we look to Tenn. Code Ann. § 29-18-115 as it read when this action was commenced:

> (a)(1) In commencing an action under this chapter, summons may be served upon any adult person found in possession of the premises, which includes any adult person occupying the premises; and service of process upon such party in possession shall be good and sufficient to enable the landlord to regain possession of such landlord's property. In the event the summons cannot be served upon any adult person found in possession of the premises, personal service of process on the defendant is dispensed with in the following cases....
> * * *
> (e)(1) In addition to the methods set out in this section, service of process for an action commenced under this chapter shall be good and sufficient to enable the landlord to regain possession of such landlord's property if a sheriff, sheriff's deputy, or constable personally serves a copy of the warrant or summons upon any one (1) named defendant who has a contractual or possessory property right in the subject premises.
>
> (2) If, after attempting personal service of process on three (3) different dates and documenting such attempts on the face of the warrant, the sheriff, sheriff's deputy, or constable, is unable to serve any such one (1) named defendant personally, service of process for determining the right of possession of the subject premises as to all who may have a contractual or possessory property right therein may be had by the sheriff, sheriff's deputy, or constable taking the following actions at least six (6) days prior to the date specified therein for the defendant or defendants to appear and make a defense:
>
> (A) Posting a copy of the warrant or summons on the door of the premises;
> (B) Sending by United States postal service first class mail a copy of the warrant or summons to the so named defendant or defendants at the address of the subject premises or the defendants' last known address, if any; and
> (C) Making an entry of this action on the face of the warrant or summons filed in the action.
>
> (3) Subdivision (e)(2) shall apply only to the service of process in an action brought to regain possession of real property, and shall not apply to the service of process in any action seeking monetary judgment.

"Tenn. Code Ann. § 29-18-115 (West April 12, 2018 to April 17, 2019).

"Here, the warrant reflects that it was 'posted' on March 1, 2019, March 4, 2019, and March 5, 2019, and then set for trial on March 12, 2019. Scarlett argues that merely posting notice on a door does not affect personal service. He also raises due process concerns, noting that constructive service and personal service are not the same. Scarlett is correct that Tenn. Code Ann. § 29-18-115(e)(2) requires three attempts at personal service on three different dates, as well as documentation of those attempts on the face of the warrant. If the warrant stated explicitly that personal service of process was attempted unsuccessfully, that undoubtedly would have been clearer. However, Tenn. Code Ann. § 29-18-115(e)(2) contains no requirement that any specific language be used in documenting the attempts. The presence of three blank lines next to 'Posted Dates,' with 'Date Served' as a separate line, tracks the process set forth in Tenn. Code Ann.

§ 29-18-115(e)(2). In our judgment, the Circuit Court did not err when it held that the filling in of those 'Posted Dates' blanks with three separate dates is adequate documentation reflecting that the process server attempted to serve Scarlett personally but was unsuccessful. We decline to add, from the bench, additional requirements to Tenn. Code Ann. § 29-18-115(e)(2). If the statute is to be modified, the General Assembly would be the body to do it. We hold, as did the Circuit Court, that the notations on the detainer warrant constituted sufficient documentation of unsuccessful attempts at personal service on Scarlett.

"We next address whether the General Sessions Court erred by entering default judgment earlier than six days after service of process, requiring Scarlett to appear and defend in violation of the requirements of Tenn. Code Ann. § 29-18-115(e)(2) as computed by Tenn. R. Civ. P. 6.01. Tenn. Code Ann. § 29-18-117 (2012) provides: 'The officer serving the warrant shall notify the defendant of the time and place of trial, the time not to be less than six (6) days from the date of service.' Here, the detainer warrant was posted on March 5, 2019, and the hearing was set for March 12, 2019. This meant seven actual days elapsed. However, Rule 6.01 of the Tennessee Rules of Civil Procedure provides for the computation of time as follows:

> In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday as defined in Tenn. Code Ann. § 15-1-101, or, when the act to be done is the filing of a paper in court, a day on which the office of the court clerk is closed or on which weather or other conditions have made the office of the court clerk inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

"If Tenn. R. Civ. P. 6.01 applied in the General Sessions Court as Scarlett argues, only five rather than seven days elapsed from the posting to the hearing.

"In response, AA Properties contends that the Rules of Civil Procedure did not apply in the General Sessions Court. AA Properties argues that Tenn. Code Ann. § 1-3-102 (2014) applied instead, which provides: 'The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is a Saturday, a Sunday, or a legal holiday, and then it shall also be excluded.' In *State v. Smith*, 278 S.W.3d 325, 330-31 (Tenn. Crim. App. 2008), the Tennessee Court of Criminal Appeals held that Tenn. Code Ann. § 1-3-102 applies in general sessions court, at least for criminal cases. If Tenn. Code Ann. § 1-3-102 applied in the General Sessions Court as AA Properties argues, then Scarlett received more than the six days he was entitled to before the hearing."

"We find no exception in this case to the general rule that the Tennessee Rules of Civil Procedure are inapplicable in general sessions courts. We affirm the Circuit Court in its determination that, in this instance, the Tennessee Rules of Civil Procedure—including Rule 6.01—did not apply in the General Sessions Court, and Scarlett's hearing date was timely set pursuant to Tenn. Code Ann. § 1-3-102.

"As a final matter, AA Properties argues that the foreclosure extinguished any right Scarlett had to the property at issue, possessory or otherwise. AA Properties contends that, as Scarlett is not

challenging the underlying foreclosure, he lacks a meritorious defense necessary under Tenn. Code Ann. § 29-18-129 to sustain his petition for writ of certiorari and supersedeas. Indeed, Scarlett does not challenge the foreclosure; he withdrew such a challenge during the hearing below on AA Properties' motion to dismiss. Scarlett challenges only when and how he was removed from the property. We do not regard this as a meritorious defense to the detainer warrant because Scarlett never claims to have a right of possession. Scarlett's lack of a meritorious defense constitutes an additional basis for affirmance of the Circuit Court's grant of AA Properties' motion to dismiss. For this and the other reasons discussed, we affirm the judgment of the Circuit Court."

VI. Homeowners' Association

A. Long-Term Rental Property

Chapter 151, Public Acts 2021, adding T.C.A. §§ 66-27-701–705 eff. May 1, 2021.

"66-27-702. Provision of voting record upon request.

"A homeowners' association shall, upon written request from a member, provide a record of the votes cast in a vote to amend a declaration that prohibits or effectively prohibits the use of residential property as long-term rental property. The record must include the following:

(1) The language of the ballot questions used;
(2) Proof of mailing;
(3) The number of members present at a meeting at which the vote is taken;
(4) The total number of members of the homeowners' association;
(5) The total number of votes that the governing body of the homeowners' association is entitled to cast;
(6) The number of members required for a quorum; and
(7) The final count of votes cast."

"66-27-703. Vested right to lease residential property.

"The owner of a property subject to a declaration that is amended to prohibit, or effectively prohibit, the use of single family residential real property as long-term rental property during the period of the owner's ownership of the property has a vested right to use the property as long-term rental property until the owner transfers the property."

"66-27-704. Notice of change of business entity information.

"(a) A business entity that owns residential property in this state that is subject to a declaration shall send to the homeowners' association for the property a written notice of the following:

(1) A change in contact information for the business entity; or
(2) A transfer of the ownership interest in the residential property.

"(b) The business entity must send the notice required by this section within thirty (30) business days of the occurrence of an event listed in subdivision (a)(1) or (a)(2). The business entity may send the notice by electronic means to the homeowners' association and to a property manager designated by the homeowners' association, as long as the homeowners' association has provided the business entity with contact information for the purpose of electronic communications."

"66-27-705. Application of part.

"This part applies to declaration amendments that are enacted on or after May 1, 2021."

B. Warning Signs Related to Water on Property

Chapter 80, Public Acts 2021, amending T.C.A. § 66-27-603 eff. Mar. 31, 2021.

"(a) A homeowners' association shall not prohibit, by covenant, condition, restriction, or rule, the use of any sign posted to warn the public of health, safety, or dangerous natural conditions associated with water on the property when:

(1) The property owner has consulted with local or state authorities regarding a condition on the property that may pose a threat to health and safety to a person on the property and a liability, or potential liability, to the property owner; and

(2) The property contains a pond, including a retention or detention pond, or a lake, stream, river, or other natural body of water.

"(b) A homeowners' association may adopt or enforce reasonable rules and regulations regarding the placement and manner for the display of the signs permitted by this section.

"(c) This section does not alter, reduce, or eliminate any civil or criminal liability of a property owner for injuries arising from any condition on the owner's property.

"(d) This section applies to dedicatory instruments entered into before, on, or after July 1, 2021."

VII. Registration of Documents; Electronic Document Certification

Chapter 181, Public Acts 2021, amending T.C.A. § 66-24-101(d)(3) eff. July 1, 2021.

"(3) An electronic document must be certified by either a licensed attorney or the custodian of the original version of the electronic document and the signature of that person must be acknowledged by a notary public. The certification must be transmitted with the electronic document and recorded by the county register as a part of the document being registered. The certification of an electronic document must be in the following form and the text of the certification must be in no less than ten (10) point font:

I, _____, do hereby make oath that I am a licensed attorney and/or the custodian of the original version of the electronic document tendered for registration herewith and that this electronic document is a true and exact copy of the original document executed and authenticated according to law on _____ (date of document).

_____
Affiant Signature

_____
Date

State of _____
County of _____

Sworn to and subscribed before me this ___ day of _____, 2___.

_____
Notary's Signature

MY COMMISSION EXPIRES: _____

Notary's Seal (if on paper)"

VIII. Termination of Condominium; Dispute of Appraisal

Ernest B. Williams IV, PLLC v. Association of Unit Owners of the Five Hundred and One Union Building, No. M2019-02114-COA-R3-CV (Tenn. Ct. App., Goldin, Apr. 7, 2021).

"This case concerns the termination of a condominium building. At the center of the dispute on appeal is a disagreement over whether the ordered distribution of the proceeds from the sale of the condominium real estate was proper. The Appellant, who was a unit owner in the condominium, takes specific issue with the trial court's use of a certain appraisal as the basis for a distribution of sale proceeds. The trial court ruled against the Appellant on this issue, holding that the subject appraisal became final because it had not been timely disapproved by unit owners representing at least 25% of the votes in the unit owners' association as provided in Tennessee Code Annotated section 66-27-318 of the Tennessee Condominium Act of 2008. In holding that the proposed allocation from the appraisal should be used, the trial court also ordered that the Appellant pay certain attorney's fees and discretionary costs. A request for prejudgment interest against the Appellant, however, was ultimately denied. On appeal, we affirm the trial court's judgment in all respects."

"In late 2015, many of the 501 Building's unit owners held informational discussions regarding a potential sale of the building. The following year, on January 27, 2016, the Original Board voted to investigate the sale of the building as a whole and to assemble the information needed to present to the unit owners for their consideration. The Original Board also authorized the Original Association to retain an appraiser to determine the value of the building."

"In May 2016, Mr. Sauermann sent an email to fellow unit owners advising that an appraisal of the 501 Building had been completed by Robert Pickens. The same month, at a meeting of the Original Board, Mr. Sauermann presented projections which forecasted the approximate net proceeds each unit owner would receive under the Pickens appraisal for various sale prices. At a subsequent June 6, 2016 meeting of the Original Board and some of the unit owners, the unit owners discussed the minimum amounts they would accept for their respective units in the event of a sale of the 501 Building.

"The following fall, on November 8, 2016, the unit owners met at a special meeting where they approved the adoption of the Tennessee Condominium Act of 2008 to govern the Original Association and the 501 Building. The unit owners of the Original Association also approved amended and restated bylaws and a name change to the 501 Association, and they further agreed to operate the 501 Association as a nonprofit corporation. The Board was also elected, and notice for a second special meeting to take place on November 29, 2016 was approved. An amended and restated declaration for the 501 Association, which was approved at the November 8 meeting, was recorded with the Davidson County Register of Deeds on November 9, 2016."

"At the scheduled second special meeting on November 29, 2016, over 80% of the members of the 501 Association agreed to sell the 501 Building and to terminate the 501 Building as a condominium and the 501 Association. It was further agreed that the 501 Association was authorized to enter into a listing agreement with Colliers International as the seller's broker, and Mr. Sauermann was given approval to perform services as an owners' representative and to be compensated with a referral fee, payable out of the brokerage fee.

"The 501 Association ultimately agreed to sell the 501 Building to 501 Union Level Office, LLC for $8,850,000. Moreover, in an effort to comply with the Tennessee Condominium Act of 2008, specifically Tennessee Code Annotated section 66-27-318, the 501 Association retained Mr. Pickens again to perform an updated appraisal. Under the foregoing statutory section, proceeds of a sale must be distributed in accordance with a valuation made 'immediately before the termination, as determined by one (1) or more independent appraisers selected by the association.' *See* Tenn. Code Ann. § 66-27-318(e), (h)(1). Mr. Pickens later prepared an appraisal, which was dated July 31, 2017.

"Upon receipt of the Pickens appraisal, which was sent out to all unit owners on August 12, 2017, disputes arose almost immediately concerning the valuations. In the meantime, on August 14, 2017, the sale of the 501 Building to 501 Union Level Office, LLC closed.

"As is relevant here, the Tennessee Condominium Act of 2008 provides that '[t]he decision of the independent appraisers ... becomes final unless disapproved within thirty (30) days after distribution by unit owners of units to which at least twenty-five percent (25%) of the votes in the association are allocated.' Tenn. Code Ann. § 66-27-318(h)(1). On August 29, 2017, a meeting of several unit owners was held by telephone. During the meeting, Westchester Partners, the Greater Nashville Regional Council, the Tennessee Organization of School Superintendents, Stanley Davis, and Top Floor Associates, LLP decided they would formally disapprove the Pickens appraisal. It is undisputed that these particular parties disapproved the appraisal within 30 days of its distribution."

"The report prepared by Colliers International (the 'Colliers Appraisal'), which was dated November 2, 2017, was sent to all unit owners via email on November 6, 2017. A hard copy was also mailed via U.S. Mail. In contrast to the last appraisal prepared by Mr. Pickens, the Colliers Appraisal was *not* disapproved by 25% of the unit owner votes. In fact, the following unit owners signed a ballot to approve the Colliers Appraisal: Top Floor Associates, LLP, Stanley Davis, the Greater Nashville Regional Council, Aubrey Givens, Richard Braun, David Downard, Angela Evans, Westchester Partners, and the Tennessee Organization of School Superintendents.

"On November 17, 2017, the 501 Association moved the trial court to approve the Colliers Appraisal. Thereafter, on November 29, 2017, Mr. Sauermann filed an answer to the interpleader petition and a cross-claim, asserting that the effort to approve the Colliers Appraisal was violative of the Tennessee Condominium Act because the majority of unit owners had 'gang[ed] up' on him 'by disapproving an appraisal favorable to him and then ordering another appraisal ... until one is ... obtained that values Mr. Sauermann's unit(s) low enough to please the majority.'"

"[W]e now turn our attention to the heart of the dispute among the parties, i.e., whether the Colliers Appraisal was properly utilized in determining how the condominium sale proceeds should be allocated among the unit owners. In our view, the necessary question that is squarely presented pertains to the trial court's conclusion that the Colliers Appraisal became final when it was not disapproved within thirty days after distribution by unit owners representing 25% of the votes in

the 501 Association. As previously outlined, the trial court held that if Mr. Sauermann wanted to challenge the Colliers Appraisal from becoming final, it was incumbent upon him to marshal at least 25% of the votes in the 501 Association to disapprove the appraisal, stating:

> There is nothing in the condominium statute which provides a unit owner or group of unit owners, who are unable to muster 25% of the votes to disapprove an appraisal, to challenge the unit owners, to which at least 75% of the votes in the Association are allocated, who do not vote to disapprove the appraisal. Any argument regarding the appraiser's methodology or defects, must take place within thirty days after the distribution of the appraisal to the unit owners, and then those unit owners who are dissatisfied must convince enough unit owners to which at least 25% of the votes in the Association are allocated to vote to disapprove the appraisal.

"We agree with the trial court that the subject appraisal became final when it was not disapproved 'by unit owners of units to which at least twenty-five percent (25%) of the votes in the association are allocated.' Tenn. Code Ann. § 66-27-318(h)(1). The Code expressly provides for a thirty-day window after distribution of the appraisal for such disapproval to occur, *id.*, signaling a clear legislative intent that the distribution of proceeds of sale not be prolonged if the overwhelming majority of owners has no opposition to the ordered appraisal. That is, at least 25% of association votes must timely disapprove the appraisal in order to prevent it from becoming final and serving as the basis for distribution. Sensibly, the legislature included this provision to ensure that the distribution of proceeds of sale is not held up by a small faction of votes."

"In summary, based on the fact that the Colliers Appraisal was not disapproved by the requisite 25% of the voting power, it became final under the statute. *See id.* (stating that the decision of the appraiser 'becomes final unless disapproved within thirty (30) days after distribution by unit owners of units to which at least twenty-five percent (25%) of the votes in the association are allocated'). We conclude, therefore, that the trial court committed no error in relying upon the Colliers Appraisal when ordering a distribution of sale proceeds."

ENVIRONMENTAL LAW

I. Equitable Apportionment of Water

A. Credit for Evaporated Water

Texas v. New Mexico, 141 S.Ct. 509 (U.S., Kavanaugh, 2020).

"The 1949 interstate Pecos River Compact provides for equitable apportionment of the use of the Pecos River's water by New Mexico and Texas. In a 1988 amended decree in this case, the Court appointed a River Master to annually calculate New Mexico's obligations to Texas under the Compact. See *Texas* v. *New Mexico,* 485 U.S. 388. The Court also adopted the River Master's Manual, which elaborates on how to make the necessary calculations to determine whether New Mexico is complying with its obligations under the Compact. As relevant, § C.5 of the Manual provides that when water is stored 'at the request of Texas' in a facility in New Mexico, then New Mexico's delivery obligation 'will be reduced by the amount of reservoir losses attributable to its storage.'

"In 2014, a tropical storm caused heavy rainfall in the Pecos River Basin. To prevent flooding, Texas's Pecos River Commissioner requested that some of the River's water be stored in New Mexico. New Mexico's Commissioner agreed. Several months later, the water was released. But critically for purposes of this dispute, a significant amount of water evaporated while the water was held in New Mexico.

"For years thereafter, the States sought to reach an agreement on how the evaporated water should be accounted for under the Compact. To permit those negotiations to continue, the River Master outlined a procedure in 2015 that called for the future resolution of the issue. Neither State objected. When negotiations eventually broke down, however, New Mexico filed a motion with the River Master that sought delivery credit for the evaporated water. As relevant here, the River Master ruled in New Mexico's favor, rejecting Texas's argument that the motion was untimely and concluding that the evaporated water was water stored 'at the request of Texas' under § C.5 of the River Master's Manual.

"Held:

"New Mexico's motion for credit for the evaporated water was not untimely. Both parties agreed to postpone the River Master's resolution of the evaporated-water issue. Neither party may now object to the negotiation procedure outlined by the River Master for resolving the dispute."

"New Mexico is entitled to delivery credit for the evaporated water. Section C.5 of the River Master's Manual resolves this case. Texas requested that New Mexico store water at a facility in New Mexico, and New Mexico did so, with the understanding that the water belonged to Texas. Texas's counterarguments—that the stored water was not actually part of the 'Texas allocation' referred to in § C.5, that New Mexico did not 'store' the water for § C.5 purposes, and that Texas should not be charged for any evaporation occurring from March 15 until the water was released in August 2015—are unpersuasive."

B. Failure to Prove Serious Injury

State of Florida v. State of Georgia, 141 S.Ct. 1175 (U.S., Barrett, 2021).

"This case involves a dispute between Florida and Georgia concerning the proper apportionment of interstate waters. Florida brought an original action against Georgia alleging that its upstream neighbor consumes more than its fair share of water from interstate rivers in the Apalachicola-Chattahoochee-Flint River Basin. Florida claims that Georgia's overconsumption of Basin waters caused low flows in the Apalachicola River which seriously harmed Florida's oyster fisheries and river ecosystem. The first Special Master appointed by the Court to assess Florida's claims recommended dismissal of Florida's complaint. The Court disagreed with the Special Master's analysis of the threshold question of redressability, and remanded for the Special Master to make definitive findings and recommendations on several issues, including: whether Florida had proved any serious injury caused by Georgia; the extent to which reducing Georgia's water consumption would increase Apalachicola River flows; and the extent to which any increased Apalachicola flows would redress Florida's injuries. *Florida* v. *Georgia*, 585 U.S. ——. Following supplemental briefing and oral argument, the Special Master then reviewing the case produced an 81-page report recommending that the Court deny Florida relief. Relevant here, the Special Master concluded that Florida failed to prove by clear and convincing evidence that Georgia's alleged overconsumption caused serious harm either to Florida's oyster fisheries or to its river wildlife and plant life. Florida filed exceptions.

"Held: Florida's exceptions to the Special Master's Report are overruled, and the case is dismissed."

"The Court has original jurisdiction to equitably apportion interstate waters between States. Given the competing sovereign interests in such cases, a complaining State bears a burden much greater than does a private party seeking an injunction. Florida concedes that it cannot obtain an equitable apportionment here unless it first proves by clear and convincing evidence a serious injury caused by Georgia. The Court conducts an independent review of the record in ruling on Florida's exceptions to the Special Master's Report. *Kansas v. Nebraska*, 574 U.S. 445, 453, 135 S.Ct. 1042, 191 L.Ed.2d 1."

"Florida has not proved by clear and convincing evidence that the collapse of its oyster fisheries was caused by Georgia's overconsumption. The oyster population in the Bay collapsed in 2012 in the midst of a severe drought. Florida attempts to show that Georgia's alleged unreasonable agricultural water consumption caused reduced river flows, which in turn increased the Bay's salinity, which in turn attracted saltwater oyster predators and disease, decimating the oyster population. Georgia offers contrary evidence that Florida's mismanagement of its fisheries, rather than reduced river flows, caused the decline. Florida's own documents and witnesses reveal that Florida allowed unprecedented levels of oyster harvesting in the years leading to the collapse. And the record points to other potentially relevant factors, including actions of the U.S. Army Corps of Engineers, multiyear droughts, and changing rainfall patterns. The precise causes of the Bay's oyster collapse remain a subject of scientific debate, but the record evidence establishes at most that increased salinity and predation contributed to the collapse of Florida's fisheries, not that Georgia's overconsumption caused the increased salinity and predation. Florida fails to establish that Georgia's overconsumption was a substantial factor contributing to its injury, much less the sole cause. As such the Court need not address the causation standard applicable in equitable-apportionment cases."

"Florida also has not proved by clear and convincing evidence that Georgia's overconsumption has harmed river wildlife and plant life by disconnecting tributaries, swamps, and sloughs from the Apalachicola River, thereby drying out important habitats for river species. The Special Master found 'a complete lack of evidence' that any river species has suffered or will suffer serious injury from Georgia's alleged overconsumption, Second Report of Special Master 22, and the Court agrees with that conclusion."

II. Endangered Species Act; FOIA; Deliberative Process Privilege

United States Fish and Wildlife Service v. Sierra Club, Inc., 141 S.Ct. 777 (U.S., Barrett, 2021).

"The Environmental Protection Agency (EPA) proposed a rule in 2011 regarding 'cooling water intake structures' used to cool industrial equipment. 76 Fed. Reg. 22174. Because aquatic wildlife can become trapped in these intake structures and die, the Endangered Species Act of 1973 required the EPA to consult with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (together, the Services) before proceeding. Following this required consultation, the Services prepare an official 'biological opinion' (known as a 'jeopardy' or 'no jeopardy' biological opinion) addressing whether the agency's proposal will jeopardize the existence of threatened or endangered species. 50 CFR § 402.14(h)(1)(iv). Issuance of a 'jeopardy' biological opinion here would require the EPA either to implement certain alternatives proposed by the Services, to terminate the action altogether, or to seek an exemption. 16 U.S.C. §§ 1536(b)(4), (g), 1538(a). After consulting with the Services, the EPA made changes to its proposed rule, and the Services received the revised version in November 2013. Staff members at NMFS and FWS soon completed draft biological opinions concluding that the November 2013 proposed rule was likely to jeopardize certain species. Staff members sent these drafts to the relevant decisionmakers within each agency, but decisionmakers at the Services neither approved the drafts nor sent them to the EPA. The Services instead shelved the draft opinions and agreed with the EPA to extend the period of consultation. After these continued discussions, the EPA sent the Services a revised proposed rule in March 2014 that differed significantly from the 2013 version. Satisfied that the revised rule was unlikely to harm any protected species, the Services issued a joint final 'no jeopardy' biological opinion. The EPA issued its final rule that same day.

"Respondent Sierra Club, an environmental organization, submitted requests under the Freedom of Information Act (FOIA) for records related to the Services' consultations with the EPA. As relevant here, the Services invoked the deliberative process privilege to prevent disclosure of the draft biological opinions analyzing the EPA's 2013 proposed rule. The Sierra Club sued to obtain these withheld documents, and the Ninth Circuit held that the draft biological opinions were not privileged because even though labeled as drafts, the draft opinions represented the Services' final opinion regarding the EPA's 2013 proposed rule.

"Held: The deliberative process privilege protects from disclosure under FOIA in-house draft biological opinions that are both predecisional and deliberative, even if the drafts reflect the agencies' last views about a proposal."

"FOIA mandates the disclosure of documents held by a federal agency unless the documents fall within certain exceptions. 5 U.S.C. § 552(b). One of those exceptions, the deliberative process privilege, shields from disclosure documents reflecting advisory opinions and deliberations comprising the process by which the Government formulates decisions and policies. *NLRB v.*

Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29. The privilege aims to improve agency decisionmaking by encouraging candor and blunting the chilling effect that accompanies the prospect of disclosure. The privilege distinguishes between predecisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not. See *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 186, 95 S.Ct. 1491, 44 L.Ed.2d 57. A document does not represent an agency's final decision solely because nothing follows it; sometimes a proposal dies on the vine or languishes. What matters is if the agency treats the document as its final view and concludes the deliberative process by which governmental decisions and policies are formulated, giving the document 'real operative effect.' See *Sears*, 421 U.S. at 150, 160, 95 S.Ct. 1504."

"The deliberative process privilege protects the draft biological opinions from disclosure because they reflect a preliminary view—not a final decision—about the EPA's proposed 2013 rule. The administrative context confirms that the draft opinions were subject to change and had no direct legal consequences. Because the decisionmakers neither approved the drafts nor sent them to the EPA, they are best described not as draft biological opinions but as drafts of draft biological opinions. While the drafts may have had the practical effect of provoking EPA to revise its rule, the privilege applies because the Services did not treat the drafts as final."

III. CERCLA

Territory of Guam v. United States, 141 S.Ct. 1608 (U.S., Thomas, 2021).

"Guam and the United States dispute liability for environmental hazards at the Ordot Dump, a site constructed on the island by the Navy in the 1940s and into which both parties allegedly have deposited waste over the decades. The Environmental Protection Agency (EPA) and Guam entered into a consent decree in 2004 that resolved litigation filed by the EPA alleging violations of the Clean Water Act. The decree in relevant part required Guam to pay a civil penalty and to take certain actions at the dump, and also stated that Guam's compliance would constitute full settlement and satisfaction of the civil claims of the United States as alleged in the EPA's complaint (*i.e.*, claims under the Clean Water Act). More than a decade later, Guam sued the United States under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), alleging that the United States' use of the dump exposed it to two possible actions under the Act. The first was a 'cost-recovery' action under § 107(a), which allows recovery of the costs of a 'removal or remedial action' from 'any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.' The second was a 'contribution' action under § 113(f), which provides that a party that 'has resolved its liability to the United States … for some or all of a response action or for some or all of the costs of such action in [a] settlement may seek contribution from any person who is not [already] party to a [qualifying] settlement.' § 113(f)(3)(B). The D. C. Circuit rejected Guam's CERCLA claims against the United States. The court determined that although Guam had once possessed a CERCLA contribution claim based on the 2004 consent decree that sufficiently 'resolved Guam's liability' for the dump, that claim was time barred. The court further held that a party eligible to pursue a contribution claim under § 113(f) cannot assert a cost-recovery claim under § 107(a), leaving Guam no CERCLA remedy. As relevant here, Guam now contends that the 2004 consent decree did not give rise to a viable CERCLA contribution claim, leaving Guam free to pursue a cost-recovery action. The case turns on whether CERCLA authorizes a contribution

claim only when a party resolves a CERCLA-specific liability or whether settlement of environmental liabilities under other laws will do.

"Held: A settlement of environmental liabilities must resolve a CERCLA-specific liability to give rise to a contribution action under § 113(f)(3)(B). The Court interprets § 113(f)(3)(B) in light of its text and place within CERCLA's comprehensive statutory scheme. Section 113(f)'s interlocking provisions governing the scope of a contribution claim, taken together and in sequence, anticipate a predicate CERCLA liability. See *New Prime Inc.* v. *Oliveira*, 586 U.S. __, __. Section 113(f)'s anchor provision—entitled 'contribution'—explains the scope of contribution actions with reference to CERCLA's other provisions, allowing contribution 'during or following any civil action under §[1]06 of this title or under §[1]07 of this title.' § 113(f)(1). The provision at issue here—recognizing a statutory right to contribution in the specific circumstance where a person 'has resolved its liability' via 'settlement,' § 113(f)(3)(B)—exists within 'the specific context' of § 113(f), which outlines the broader workings of CERCLA contribution. *Merit Management Group, LP* v. *FTI Consulting, Inc.*, 583 U.S. __, __. Section 113(f)(3)(B)'s opening clause further ties itself to the CERCLA regime by permitting contribution after a party 'has resolved its liability ... for some or all of a *response action* or for some or all of the costs of such action.' (Emphasis added.) The anchor provision also discusses allocation of 'response costs,' and the phrase 'response action' appears dozens of times throughout the Act. That remedial measures under different environmental statutes might functionally overlap with a CERCLA response action does not justify reinterpreting § 113(f)(3)(B)'s phrase 'resolved its liability ... for some or all of a response action' to instead mean 'settled an environmental liability that might have been actionable under CERCLA.' Interpreting § 113(f)(3)(B) to authorize a contribution right for a host of environmental liabilities arising under other laws would stretch the statute beyond Congress' actual language. And because the word 'resolve' conveys certainty and finality, it would be odd to interpret § 113(f)(3)(B) as referring to a party that has 'resolved its liability' if that party remains vulnerable to a CERCLA suit. The most natural reading of § 113(f)(3)(B) is that a party may seek contribution under CERCLA only after settling a CERCLA-specific liability, as opposed to resolving environmental liability under some other law. The Government's contrary arguments fail given § 113(f)(3)(B)'s place in CERCLA's comprehensive statutory scheme."

IV. Renewable Fuel Program; Extension of Exemption for Small Refineries

HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association, 141 S.Ct. 2172 (U.S., Gorsuch, 2021).

"When Congress created the renewable fuel program (RFP) requiring most domestic refineries to blend renewable fuels into the transportation fuels they produce, see 42 U.S.C. § 7545(*o*)(1)(J), (*o*)(1)(L), (*o*)(2)(A)(i), it added features designed to lessen the impact of the program's mandates on small refineries. At the outset, Congress created a blanket exemption from RFP obligations for all small refineries until 2011. § 7545(*o*)(9)(A)(i). Congress also directed the Environmental Protection Agency (EPA) to 'extend the exemption under clause (i)' for at least two years if the RFP obligations would impose 'a disproportionate economic hardship' on a given small refinery. § 7545(*o*)(9)(A)(ii). Finally, Congress offered the possibility of further relief in future years by providing that '[a] small refinery may at any time petition . . . for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.' § 7545(*o*)(9)(B)(i).

"Here, three small refineries initially received an exemption, saw it lapse for a period, and then again petitioned for an exemption under subparagraph (B)(i). EPA granted the exemptions, and a group of renewable fuel producers objected. The Tenth Circuit vacated EPA's decisions, concluding that the small refineries were ineligible for an 'extension' under subparagraph (B)(i) because they had allowed previous exemptions to lapse.

"Held: A small refinery that previously received a hardship exemption may obtain an 'extension' under § 7545(*o*)(9)(B)(i) even if it saw a lapse in exemption coverage in a previous year."

"The key term here—'extension'—is not defined in the statute. Sometimes it can refer to an increase in time. 5 Oxford English Dictionary 597. Other times it can refer to the act of offering or making something available, such as the granting of a benefit. *Id.,* at 595. Here, three textual clues show subparagraph (B)(i) uses 'extension' in its temporal sense. First, subparagraph (A)(i)'s initial exemption is described temporally (as lasting 'until calendar year 2011'). Second, subparagraph (A)(ii)'s exemption is also described temporally—authorizing EPA to 'extend the exemption under clause (i) . . . for a period of not less than 2 years.' Finally, subparagraphs (A)(ii) and (B)(i) share an identical title—'Extension of exemption'—underscoring the likelihood that the two neighboring provisions use the term 'extension' in one consistent sense."

"Subparagraph (B)(i)'s temporal use of 'extension,' however, does not require unbroken continuity. The Tenth Circuit erred by imposing such a requirement here and concluding that a small refinery is permanently ineligible for an extension once an exemption lapses."

"The plain meaning of 'extension' does not require unbroken continuity. Dictionary definitions contemplate the possibility of resumption after an interruption. Federal rules permit litigants to seek (and courts to grant) an 'extension' of time even after a lapse. See 28 U.S.C. § 2107(c); Fed. Rule Civ. Proc. 6(b)(1). And recent federal statutes provide an 'extension' of benefits that previously expired months or even years earlier. See Pub. L. 116–260, § 203, 134 Stat. 1182; Pub. L. 116–136, § 2114, 134 Stat. 281."

"A different statutory context might make for a different outcome, for example, where Congress uses modifying language requiring an extension to be 'consecutive' or 'successive.' See, *e.g.,* 8 U.S.C. § 1184(g)(8)(D). But the statutory context here confirms the best reading of subparagraph (B)(i) does not require unbroken continuity. The absence of any 'consecutive' or 'successive' language suggests exemptions need not follow one another without interruption. By authorizing small refineries to seek a hardship exemption 'at any time,' subparagraph (B)(i) points to an expansive meaning that invites small refineries to seek hardship exemptions in different years as market conditions change. And subparagraph (A), the immediately preceding paragraph, contemplates extension of exemption coverage even after interruption. See 42 U.S.C. § 7545(*o*)(1)(K), (*o*)(9)(A)(i), (*o*)(9)(A)(ii). Before the Tenth Circuit, EPA pressed a similar argument by pointing to a 2014 regulation, 40 CFR § 80.1441(e)(2)(iii), and asking for deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837. Because 'the government is not invoking *Chevron*' now, the Court declines to consider whether any deference is due."

"Respondents contend the statute establishes a general sunset scheme and that any exemptions were meant to end rapidly. They note that subparagraph (A) is titled 'temporary exemption,' that it was permitted to expire in 2013, and that subparagraph (B)(i) speaks of extending 'the exemption under subparagraph (A).' Context, however, suggests subparagraph (B) is not part of some sunset scheme.

Subparagraph (A)(ii)'s exemptions did not have to expire in 2013; they could have lasted indefinitely. Subparagraph (B)(i)'s 'at any time' language expressly contemplates exemptions beyond 2013. That looks nothing like readymade examples of sunset schemes, which Congress eschewed here. *E.g.,* § 247d–7f(b). Finally, even on respondents' reading, a small refinery with an unbroken record of failing to comply with the RFP may continue to seek and obtain extensions forever."

"In an appeal to public policy, respondents argue that subparagraph (B) was adopted to 'funnel small refineries toward compliance over time' and that enforcing a continuity requirement helps advance that goal. Consistent with that view, the Tenth Circuit concluded the number of small refinery exemptions 'should have tapered down' over time. Petitioners counter that the statute seeks to increase production of renewable fuel while offering an annual 'safety valve' for small refineries. Neither the statute's text, structure, nor history affords sufficient guidance to choose between these competing narratives and metaphors. Instead, the analysis can be guided only by the statute's text—and that nowhere commands a continuity requirement."

V. Tennessee Statutes

A. Coal; Primacy and Reclamation Act

Chapter 548, Public Acts 2021, adding T.C.A. §§ 59-8-101--132 and various other parts eff. 8 months after approval from the Secretary of the Interior.

The revised Primacy and Reclamation Act of Tennessee provides a regulatory framework for the regulation of surface coal mining and reclamation activities. The act does not become effective until the federal government approves Tennessee's application for primacy over the regulation of surface coal mining in the state. This 42-page public act makes various technical clarifications and additions to existing law and is intended to give the state control over regulation of the coal mining industry and to revive the industry in Tennessee.

B. Environmental Investigation Law Enforcement Officers

Chapter 135, Public Acts 2021, adding T.C.A. §§ 11-1-101(h) and 11-3-107(b)(2) eff. Apr. 13, 2021.

11-1-101(h).

"(1) In addition to the authority granted by chapters 3 and 6 of this title, the commissioner is authorized to commission as environmental investigation law enforcement officers those employees of the department who have successfully met standards of initial and recurrent training and qualification established by the commissioner pursuant to this subsection for the commissioning of employees as environmental investigation law enforcement officers. The standards must be substantially equivalent to those established by the Tennessee peace officer standards and training commission.

"(2) (A) For the sole purpose of carrying out the scope of assigned duties regarding environmentally-related criminal offenses within the jurisdiction of the department as specified or limited in the sole discretion of the commissioner, each employee commissioned pursuant

to subdivision (h)(1) shall have all the powers and protections of a law enforcement officer throughout this state, including, but not limited to, the authority to:

(i) Make arrests for public offenses, execute all warrants, and serve process in criminal and penal prosecutions for such offenses;

(ii) Carry weapons for the reasonable purposes of the employee's office while in the performance of the employee's assigned duties; and

(iii) Assist other local, state, and federal agencies in their law enforcement duties.

(B) When on duty, each employee commissioned pursuant to subdivision (h)(1) shall carry on the employee's person a badge and identification card that identify the commissioned employee as an officer of the department of environment and conservation. The commissioned employee shall exhibit the badge and identification card on demand and prior to making an arrest."

11-3-107(b).

"(2) The employees commissioned under subdivision (b)(1) may also provide both law enforcement and search and rescue assistance outside of the areas described in subdivision (b)(1) at the request of federal, state, or local officials if such assistance is necessary for the protection of life, health, or safety. For the purposes of rendering such assistance, the commissioned employees shall have all the powers and protections of a law enforcement officer throughout the state."

BANKRUPTCY

I. Notice by Publication Violates Due Process of Ascertainable Interested Party

In re HNRC Dissolution Co., 3 F.4th 912 (6th Cir., Larsen, 2021).

"In 1998, the Old Ben Coal Company (Old Ben) conveyed its rights to the methane gas in various coal reserves to the appellee in this case, Illinois Methane, LLC (Methane). As part of that $2.6 million transaction, Old Ben agreed to a 'Delay Rental Obligation' that required the owner of the coal estate to pay rent to Methane while it mined the coal in areas that Methane had not yet exploited. A deed memorializing this conveyance (and setting forth the Delay Rental Obligation) was then recorded with the county treasurer.

"A few years later, Old Ben filed for bankruptcy protection. As part of the proceedings, Old Ben purported to sell its coal interests 'free and clear of any and all Encumbrances' to the Lexington Coal Company, a buyer who stands in privity with the appellant, Alliance WOR Properties, LLC (Alliance). Old Ben did not, however, notify Methane prior to the bankruptcy sale. It merely circulated notice by publication in several newspapers.

"Alliance's predecessor-in-interest later sought a permit to mine coal; and Methane eventually sought to collect the amount due under the Delay Rental Obligation in Illinois state court. Alliance responded by filing in the bankruptcy court a motion to enjoin the state-court lawsuit, arguing that Old Ben's 'free and clear' sale had extinguished Methane's interest in the land. This was the first time Methane had learned of the bankruptcy proceedings.

"The bankruptcy court held that Old Ben's publication notice had been insufficient to satisfy due process as to Methane. Accordingly, the court ruled that the sale had not erased Methane's interest and that Alliance was not entitled to an injunction barring the State Court Action. The district court affirmed. For the reasons stated below, we AFFIRM as well."

"[W]e now turn to Methane's interest. Neither the bankruptcy court nor the district court defined the nature of the Delay Rental Obligation. But as the parties' briefing makes clear, 'the reasonableness of constructive notice' in this case is intertwined with 'the nature of the property interest at stake.' *Davis Oil Co. v. Mills*, 873 F.2d 774, 790 (5th Cir. 1989); *see also In re J.A. Jones, Inc.*, 492 F.3d 242, 250–51 (4th Cir. 2007). Alliance contends that Methane held a pre-petition 'contingent claim that was merely future, conjectural, and speculative,' while Methane says the Delay Rental Obligation is a 'vested, non-contingent real property right.' That distinction matters for the due-process inquiry. *See Mullane* [*v. Cent. Hanover Bank & Tr. Co.*], 339 U.S. [306] at 317–18, 70 S.Ct. 652 [(1950)]; *Tulsa* [*Pro. Collection Servs., Inc. v. Pope*], 485 U.S. [478] at 490, 108 S.Ct. 1340 [(1988)].

"Because the coal reserves are located in Illinois, that state's law governs the interest Methane received through the Old Ben Deed. *See, e.g.*, Restatement (Second) of Conflict of Laws §§ 223(1), 235 (Am. Law. Inst. 1971); *De Vaughn v. Hutchinson*, 165 U.S. 566, 570, 17 S.Ct. 461, 41 L.Ed. 827 (1897). Applying that law, we agree with Methane that the Delay Rental Obligation conferred a 'vested property interest'—specifically, a covenant running with the land—and not, as Alliance believes, some run-of-the-mill contingent claim."

"Having determined that the burden of the Delay Rental Obligation ran with the land, this case becomes straightforward. Methane was a known party with a known, present, and vested interest in real property; it was thus entitled to more than publication notice. *See, e.g.*, *Tulsa*, 485 U.S. at 489–90, 108 S.Ct. 1340; *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983); *Mullane*, 339 U.S. at 318, 70 S.Ct. 652; *see also City of New York v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 293, 296–97, 73 S.Ct. 299, 97 L.Ed. 333 (1953) (holding the same was required under the bankruptcy code)."

"In short, Alliance is wrong that the Delay Rental Obligation 'is the type of future, conjectural, and speculative claim for which publication notice satisfies due process.' Quite the opposite. The covenant was a present, vested, and readily ascertainable interest in real property that was held by a known party. As such, Old Ben's publication notice was constitutionally deficient. *See Mennonite*, 462 U.S. at 798–99, 103 S.Ct. 2706. And 'due process prevents [Methane] from being bound' by the bankruptcy court's previous orders. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 802, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996); *see also Griffin v. Griffin*, 327 U.S. 220, 228–32, 66 S.Ct. 556, 90 L.Ed. 635 (1946)."

"Notwithstanding Alliance's policy argument, then, we hold that the bankruptcy court did not err in refusing to enjoin the State Court Action. The constitutionally '[i]nadequate notice' here means that Methane's 'suit may proceed.' *Chemetron*, 72 F.3d at 345–46; *see Lampe* [*v. Kash*], 735 F.3d [942] at 945 [(6th Cir. 2013)]; *In re Motors Liquidation Co.*, 829 F.3d [135] at 159, 166 [(2d Cir. 2016)]; *In re Savage Indus.*, 43 F.3d [714] at 721 [(1st Cir. 1994)](observing that the 'concern for *finality* in bankruptcy sales "will not ... protect a party buying from the trustee in a sale free and clear of liens where no notice is given to the lienholder"' (citation omitted))."

II. City's Passive Retention of Impounded Vehicles of Debtors Does Not Violate Automatic Stay

City of Chicago v. Fulton, 141 S.Ct. 585 (U.S., Alito, 2021).

"The filing of a petition under the Bankruptcy Code automatically 'creates an estate' that, with some exceptions, comprises 'all legal or equitable interests of the debtor in property as of the commencement of the case.' 11 U.S.C. § 541(a). Section 541 is intended to include within the estate any property made available by other provisions of the Bankruptcy Code. Section 542 is one such provision, as it provides that an entity in possession of property of the bankruptcy estate 'shall deliver to the trustee, and account for' that property. The filing of a petition also automatically 'operates as a stay, applicable to all entities,' of efforts to collect prepetition debts outside the bankruptcy forum, § 362(a), including 'any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate,' § 362(a)(3). Here, each respondent filed a bankruptcy petition and requested that the city of Chicago (City) return his or her vehicle, which had been impounded for failure to pay fines for motor vehicle infractions. In each case, the City's refusal was held by a bankruptcy court to violate the automatic stay. The Seventh Circuit affirmed, concluding that by retaining possession of the vehicles the City had acted 'to exercise control over' respondents' property in violation of § 362(a)(3).

"Held: The mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code. Under that provision, the filing of a bankruptcy petition operates as a 'stay' of 'any act' to 'exercise control' over the property of the estate. Taken together, the most natural reading of these terms is that § 362(a)(3) prohibits affirmative acts that would

disturb the status quo of estate property as of the time when the bankruptcy petition was filed. Respondents' alternative reading would create at least two serious problems. First, reading § 362(a)(3) to cover mere retention of property would render § 542's central command—that an entity in possession of certain estate property 'shall deliver to the trustee ... such property'—largely superfluous, even though § 542 appears to be the provision governing the turnover of estate property. Second, respondents' reading would render the commands of § 362(a)(3) and § 542 contradictory. Section 542 carves out exceptions to the turnover command. Under respondents' reading, an entity would be required to turn over property under § 362(a)(3) even if that property were exempt from turnover under § 542. The history of the Bankruptcy Code confirms the better reading. The Code originally included both § 362(a)(3) and § 542(a), but the former provision lacked the phrase 'or to exercise control over property of the estate.' When that phrase was later added by amendment, Congress made no mention of transforming § 362(a)(3) into an affirmative turnover obligation. It is unlikely that Congress would have made such an important change simply by adding the phrase 'exercise control,' rather than by adding a cross-reference to § 542(a) or some other indication that it was so transforming § 362(a)(3)."

III. Qualified Educational Loans Nondischargeable; Sole Purpose Was to Pay Debtor's "Cost of Attendance"

In re Conti, 982 F.3d 445 (6th Cir., Cole, 2020), cert. denied June 28, 2021.

"After filing for Chapter 7 bankruptcy, Kathryn MacEwen Conti commenced an adversary proceeding against Arrowood Indemnity Co. seeking to determine that loans she incurred while enrolled at the University of Michigan were not 'qualified education loan[s]' under 11 U.S.C. § 523(a)(8)(B) and were thus dischargeable in bankruptcy. The bankruptcy court granted summary judgment to Arrowood, concluding that the plain language of the loan documents demonstrated they were qualified education loans. Because the bankruptcy court's conclusion was correct, we affirm its summary judgment in favor of Arrowood."

"Kathryn MacEwen Conti attended the University of Michigan ('Michigan') from 1999 to 2003, obtaining a bachelor's degree in musical arts. In order to finance three years of her education, Conti applied for five private loans from Citibank (the 'Citibank loans'), totaling $76,049.

"Conti's loan applications are all expressly '[f]or students attending 4-year colleges and universities.' (*E.g.*, Ex. 2, R. 7-2, PageID 2838.) They request information regarding the school's identity, the academic year for which the funds are intended, and the amount of the loan requested. And they specify that the student may 'borrow up to the full cost of education less any financial aid [they] are receiving.' (*E.g.*, *id.* § B.) The applications include a section where the school financial aid office can certify the student applicant's year, enrollment status, loan amount (not to exceed the cost of education when combined with other financial aid), and recommended disbursement dates. Each application incorporates by reference an attached promissory note as the 'entire agreement' between Citibank and the debtor. (*E.g.*, *id.* § F.) The promissory notes state that 'the proceeds of this loan are to be used for specific educational expenses.' (*E.g.*, *id.* at PageID 2834.)

"Citibank appears to have disbursed each loan to Michigan directly. The record discloses that none of the loan amounts exceeded the cost of attendance at Michigan for the relevant enrollment period minus the maximum sum of a federal Pell grant for the same period, which is the only other financial aid Conti remembers receiving."

"For several years from around 2011 to early 2016, Conti made payments on the Citibank loans, which were eventually assigned to Arrowood. In May 2017, Conti filed for voluntary Chapter 7 bankruptcy in the Eastern District of Michigan. *See In re Conti*, No. 2:17-bk-48277 (Bankr. E.D. Mich. filed May 31, 2017). She listed the five Citibank loans as dischargeable, claiming that they were not excepted under 11 U.S.C. § 523(a)(8). In October 2017, Conti filed this adversary proceeding seeking to determine the same. *See Conti v. Arrowood Indemnity Co. (In re Conti)*, Case No. 2:17-ap-04711 (Bankr. E.D. Mich. filed Oct. 10, 2017).

"The parties cross-moved for summary judgment. After a hearing, the bankruptcy court granted summary judgment to Arrowood and denied it to Conti. (*See* Summ. J. Hr'g, R. 7-1, PageID 2767, 2812.) On appeal, the district court affirmed. *Conti v. Arrowood Indemnity Co.*, 612 B.R. 877, 878 (E.D. Mich. 2020). Conti timely appealed to this court."

"This appeal concerns whether Conti's Citibank loans are 'qualified education loan[s]' under 11 U.S.C. § 523(a)(8)(B) that are non-dischargeable in Chapter 7 bankruptcy (save for 'undue hardship' for the debtor, which Conti does not claim). In any § 523(a) analysis, '[t]he creditor ... bears the burden of proving by a preponderance of the evidence that a debt is excepted from discharge.' *Meyers v. IRS (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (citing *Grogan v. Garner*, 498 U.S. 279, 290–91, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)).

"Subsection (8)(B) was enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. It expanded to private student loans § 523(a)(8)'s existing discharge exception for government- and non-profit-backed educational loans. *See* 4 Collier on Bankruptcy ¶ 523.14[2] (Lexis 2020). Subsection (8)(B) defines qualified education loans by cross-reference to the tax code, which in turn defines them, in relevant part, as: 'any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses.' 26 U.S.C. § 221(d)(1). That same section further defines qualified higher education expenses, in relevant part, as 'the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 1087*ll* ...) at an eligible educational institution, reduced by the sum of' applicable scholarships or financial aid. § 221(d)(2). Finally, 20 U.S.C. § 1087*ll* lists a series of expenses that comprise the 'cost of attendance,' including sums for tuition & fees, room & board, books, materials, supplies, transportation, and 'miscellaneous personal expenses' for enrolled students, in amounts determined by the university. In sum, the issue here is whether Conti's Citibank loans were 'incurred ... solely to pay' her 'cost of attendance' at Michigan (as determined by the university) minus any applicable scholarships or aid.

"Both parties argue that the court should look to the initial purpose of Conti's loans, rather than their actual uses, to determine whether they fall within the scope of (8)(B). We agree that this is the proper inquiry. First and foremost, the statutory definition of qualified education loan specifically focuses on whether the loan was 'incurred ... to pay' qualified higher education expenses, rather than on its ultimate uses. *See* 26 U.S.C. § 221(d)(1); *cf. Murphy v. Smith*, —— U.S. ——, 138 S.Ct. 784, 787, 200 L.Ed.2d 75 (2018) (observing that Congress uses infinitival phrases to express purpose). Second, concerns that have long motivated other circuits to adopt a purpose test for 'educational loans' under § 523(a)(8)(A) apply with equal strength for qualified education loans under subsection (8)(B). *See, e.g.*, *Busson-Sokolik v. Milwaukee Sch. of Eng'g (In re Sokolik)*, 635 F.3d 261, 266 (7th Cir. 2011) (adopting the purpose test for § 523(a)(8)(A) loans, following *Murphy v. Pennsylvania Higher Education Assistance Agency (In re Murphy)*, 282 F.3d 868 (5th Cir. 2002)). Most notably, allowing debtors to discharge their student loans simply because they misuse the funds for non-educational expenses would not further Congress' goal of preserving the

financial integrity of the student loan system. *See Murphy*, 282 F.3d at 873; *see also Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 742 (6th Cir. 1992)."

"The bankruptcy court correctly concluded that the sole purpose of the Citibank loans was to pay the cost of attendance at Michigan minus the maximum amount of other financial aid Conti received."

IV. Malpractice Claims Against Lawyers Who Prepared Faulty Bankruptcy Filings Arose Post-Petition; Are Not Part of Bankruptcy Estate

In re Blasingame, 986 F.3d 633 (6th Cir., Donald, 2021).

"In July 2008, the Blasingames met with Martin A. Grusin and Tommy L. Fullen (collectively the 'filing attorneys') to discuss the mounting pressure of their financial situation. Grusin was familiar with the Blasingames' finances prior to their bankruptcy conversations and suggested Fullen, a bankruptcy attorney, to assist in their bankruptcy filing. The Blasingames signed engagement agreements with both Grusin and Fullen. *Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 597 B.R. 614, 616-17 (6th Cir. B.A.P. 2019).

"The Blasingames filed their Chapter 7 bankruptcy petition on August 15, 2008, in the United States Bankruptcy Court for the Western District of Tennessee. Fullen signed the petition as the attorney of record. *In re Blasingame*, 559 B.R. 692, 695 (6th Cir. B.A.P. 2016). Edward L. Montedonico ('the Trustee') was appointed as Trustee in the case. *Id.* at 696. Fullen constructed the bankruptcy schedules, pulling most of the Blasingames' financial information from Grusin."

"On February 22, 2011, the bankruptcy court granted the Trustee's motion for summary judgment, denying the Blasingames' discharge. The bankruptcy court denied the Blasingames' discharge on the basis that '[t]he petition, schedules, and statement of financial affairs, as initially filed, did not disclose Debtors' interests in several trusts and corporations, certain household goods, multiple annuities, property held for others, several bank accounts and several liabilities, and an assignment to [ ] Grusin.' *In re Blasingame*, 559 B.R. at 695 (abbreviations removed). On July 19, 2011, the bankruptcy court disqualified the filing attorneys from further representation of the Blasingames. Although the Blasingames' new counsel was able to obtain relief from the summary judgment order, their discharge was once again denied on January 15, 2015, following a trial. On appeal, the BAP affirmed the denial. *In re Blasingame*, 559 B.R. at 701.

"As a result of the filing attorneys' mishandling of the Blasingames' bankruptcy filing and the Trustee's belief that the estate lacked the resources to pursue a malpractice claim against them itself, creditor CJV obtained derivative standing from the bankruptcy court to file a malpractice claim against the filing attorneys on behalf of the estate. *In re Blasingame*, 651 F. App'x at 387-88. CJV, in the bankruptcy court, and the Blasingames, in Tennessee state court, filed malpractice complaints against the filing attorneys, both alleging that the filing attorneys' negligence resulted in the denial of the Blasingames' discharge. During this time, the Blasingames also attempted to settle the malpractice claim with the filing attorneys for $1 million and later $1.25 million. *Id.* The bankruptcy court denied the Blasingames' motion to approve the settlement because of the overwhelming likelihood that the claim would be successful on the merits. *Id.* at 388. The Blasingames appealed the denial, but the BAP dismissed their appeal for lack of jurisdiction, holding that the bankruptcy court's order was not a final, appealable order. *Id.* The Blasingames

further appealed the dismissal, and a panel of this Court similarly dismissed the appeal for lack of jurisdiction. *Id.* at 389.

"On January 2, 2018, CJV filed a motion for summary judgment, asserting that the malpractice claims against the filing attorneys are property of the bankruptcy estate, not the Blasingames. The Blasingames responded to the motion, and the bankruptcy court treated the response as a cross-motion for summary judgment, seeking a declaration that the malpractice claims were property of the Blasingames. Applying Tennessee law to determine when the legal malpractice claims accrued, the bankruptcy court denied CJV's motion for summary judgment and granted the Blasingames' cross-motion for summary judgment. The bankruptcy court determined that the claims arose post-petition and were therefore the property of the Blasingames."

"Although this Court has frequently encountered the general question posed here—whether contested claims are property of the debtor or the bankruptcy estate—the context of a legal malpractice claim against the debtors' filing attorneys seems to be an issue of first impression for this Court. The bankruptcy court applied the 'accrual theory,' determining that, because the malpractice claims did not accrue until the Blasingames suffered an injury, they arose post-petition, and are therefore property of the Blasingames. As explained by the bankruptcy court:

> The [Blasingames] are correct. There can be no more personal damage in connection with a bankruptcy case than the loss of a debtor's discharge. [CJV] has alleged no other damage that accrued to the bankruptcy estate, and has alleged no damage that accrued to the [Blasingames] prior to the filing of their bankruptcy petition. Neither of the complaints describes a cause of action that could have been pursued by the [Blasingames] prior to the filing of their bankruptcy petition.

"*Church Joint Venture v. Blasingame (In re Blasingame)*, No. 08-28289-L, 2018 WL 10323377 at *6, 2018 Bankr. LEXIS 1781 at *17 (W.D. Tenn. May 9, 2018)."

"Section 541(a) of the Bankruptcy Code provides that, barring a few exceptions not relevant here, 'all legal or equitable interests of the debtor in property as of the commencement of the case' are property of the bankruptcy estate. 11 U.S.C. § 541 (a)(1). '[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541.' *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013) (alteration in original) (quoting *Azbill v. Kendrick (In re Azbill)*, No. 06-8074, 2008 WL 647407 at *7, 2008 Bankr. LEXIS 527 at *19-20 (6th Cir. B.A.P. Mar. 11, 2008)). While § 541 dictates what interests are property of the estate pursuant to federal bankruptcy law, the 'nature and extent of [the] property rights ... are determined by the "underlying [state] substantive law."' *Id.* (quoting *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15, 20, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000)). 'Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.' *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979).

"To make out a prima facie claim of legal malpractice under Tennessee law, a plaintiff must show the existence of five elements: (1) the attorney owed a duty to the plaintiff; (2) the attorney breached that duty; (3) the plaintiff suffered damages; (4) the breach was the but for cause of the plaintiff's damages; and (5) the breach was the proximate cause of the plaintiff's damages. *Gibson v. Trant*, 58 S.W.3d 103, 108 (Tenn. 2001).

"To analyze the nature and extent of the rights in the legal malpractice claims, we must determine which elements of the claims were satisfied as of the commencement of the bankruptcy filing. CJV contends, and the Blasingames do not dispute, that the filing attorneys owed the Blasingames duties with respect to the process of filing for bankruptcy and that the filing attorneys breached those duties when they failed to properly investigate and draft the Blasingames' schedules and statement of financial affairs prior to filing the Blasingames' bankruptcy petition.

"The parties do, of course, dispute whether the damages element was met pre-petition, or, alternatively, whether that is a requirement at all. The Blasingames assert that both the Trustee's malpractice complaint and their own malpractice complaint filed against the filing attorneys allege that the sole damages caused by the filing attorneys' breach was the denial of the Blasingames' discharge, which is undisputedly a post-petition event. . . . CJV, on the other hand, points to two possible events which damaged the Blasingames pre-petition: first, the advice to file for bankruptcy in the first place because bankruptcy may not have been the Blasingames' best option; and second, the negligent construction of their bankruptcy petition."

"A legal malpractice claim accrues as of the date on which the negligence became irremediable. *Ameraccount Club, Inc. v. Hill*, 617 S.W.2d 876, 879 (Tenn. 1981). . . . With respect to each asserted breach, the ultimate damage came once the filing attorneys filed the bankruptcy petition, and not prior to the commencement of the bankruptcy case because, until that time, the Blasingames need not have continued on the path towards filing for bankruptcy at all.

"In the alternative, however, CJV points to the real crux of the issue: whether, even assuming that all damages occurred post-petition, the filing attorneys' underlying pre-petition conduct causes the claim to be 'sufficiently rooted in the [debtor's] pre-bankruptcy past' as to make it property of the estate. Appellant's Br. at 26-31 (quoting *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966)). This language has a long and disputed history."

"Tennessee used to follow the traditional common law rule that a claim accrues upon the wrongful act, not when damages are incurred. *Albert v. Sherman*, 167 Tenn. 133, 67 S.W.2d 140, 141 (1934). But the Tennessee Supreme Court overruled the traditional common law rule, finding that a 'cause of action accrues ... when the patient discovers ... or should have discovered the resulting injury.' *Teeters v. Currey*, 518 S.W.2d 512, 517 (Tenn. 1974). . . ."

"True enough, it is not of great consequence when, under Tennessee law, the malpractice claims became actionable because federal law determines when a property interest becomes part of the bankruptcy estate. *In re Underhill*, 579 F. App'x 480, 484 (6th Cir. 2014) (Donald, J., dissenting); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1172 (6th Cir. 1990). Thus, while it remains difficult to determine whether, if ever, an unaccrued claim can be 'sufficiently rooted' in a debtor's past, it is clear that at the very least there must be some awareness of the claim in order for it to exist as a legal interest and be properly included in the debtor's bankruptcy petition. *See In re Underhill*, 579 F. App'x at 484 (Donald, J., dissenting) (contending that the debtors' tortious interference claim was part of the bankruptcy estate despite the fact that the claim had not accrued under state law because violative conduct occurred prior to the petition and the debtors *were aware of it* prior to the petition). Tennessee courts have likewise applied this same reasoning to their accrual rule, seeking to ameliorate the unjust results caused by treating a claim as accrued prior to a plaintiff's knowledge of the injury. *Smith*, 551 S.W.3d at 709-10.

"Applying that test here, the malpractice cause of action could not have become a legal interest under Tennessee law until after the judgment denying the Blasingames' discharge was entered because the Blasingames were unaware of the filing attorneys' conduct, which allegedly constituted malpractice. This result is in accord with our Court's previous guidance. Here, the malpractice claims could not be more entangled with the Blasingames' ability to make a fresh start because they directly resulted in the denial of their discharge. Thus, at the time of the Blasingames' filing, the malpractice claims were not a legal interest under Tennessee law such that they could be considered as property of the bankruptcy estate under federal law.

"In the alternative, CJV contends that, if this Court finds that even some of the malpractice claims arose pre-petition, 'the Bankruptcy Court should have considered splitting the claims into two separate and distinct causes of action – one in the pre-petition period and one in the post-petition period.'. . . Because, as determined above, any legal interest in the malpractice claims arose post-petition, there is no need to divide them. Furthermore, CJV fails to offer any case law which endorses their proposal in the context of determining whether a property interest arose pre- or post-petition."

V. Mandatory Dismissal of Previously Unconverted Chapter 13 Case on Motion of Debtor

In re Smith, 999 F.3d 452 (6th Cir., Kethledge, 2021).

"At issue in this case is a straightforward statutory rule: that, subject to one condition, if the debtor in a Chapter 13 bankruptcy moves to dismiss his case, 'the court shall dismiss' it. 11 U.S.C. § 1307(b). Here, on three separate occasions, Ronald Smith filed a Chapter 13 bankruptcy petition shortly before a scheduled foreclosure sale of his home—thereby preventing the sale—only to move for the dismissal of his bankruptcy case shortly afterward. The bankruptcy court granted those motions and dismissed Smith's cases, notwithstanding his bad faith, because 11 U.S.C. § 1307(b) plainly commanded the court to dismiss them. A few months later, however, the bankruptcy court invoked its putative equitable powers and reinstated Smith's most recent bankruptcy case. But a court may exercise those powers only in furtherance of the Bankruptcy Code's provisions, not in circumvention of them. The court's order here did the latter. We reverse.

"In 2004, Ronald Smith obtained a $528,500 loan to purchase a home on Gully Top Lane in Canfield, Ohio. Smith defaulted on the loan about a year later. The mortgage holder sued him, and a state court eventually scheduled a foreclosure sale for August 7, 2007. But Smith filed for bankruptcy under Chapter 13 four days before the sale, thereby triggering an 'automatic stay' against any collection activity against him. *See* 11 U.S.C. § 362(a). After the sale date passed Smith filed a motion to dismiss his Chapter 13 case, which the bankruptcy court granted.

"Smith employed the same tactic in 2017, when the state court again scheduled a foreclosure sale for his home. Again Smith filed a Chapter 13 petition shortly before the sale, and again he successfully moved to dismiss the case after the sale was cancelled.

"By early 2019, U.S. Bank had purchased the mortgage for Smith's home. The state court scheduled a sheriff's sale for the property on February 19, 2019. On the day of the sale, however, Smith filed a third Chapter 13 petition and obtained yet another automatic stay. Six days later, Smith again filed a motion to dismiss his case, which the court granted.

"At no point, apparently, did the bankruptcy court exercise its power to sanction Smith for filing all these bankruptcy petitions in patent bad faith. *See* Fed. R. Bankr. P. 9011(b)(1), (c). Nor did U.S. Bank promptly move for relief from the automatic stay, which U.S. Bank plainly could have obtained on the ground that 'the filing of the petition was part of a scheme to delay, hinder, or defraud creditors[.]' 11 U.S.C. § 362(d)(4)(B). Instead, in June 2019, the bankruptcy court granted U.S. Bank's motion under Civil Rule 60(b) (as incorporated by Bankruptcy Rule 9024) to vacate its order dismissing Smith's most recent bankruptcy case. The court also lifted the automatic stay in Smith's case for a period of two years. Smith appealed to the district court, where he sought a stay of the bankruptcy court's order reinstating his case. The district court denied that motion but certified for interlocutory appeal the question whether the reinstatement of Smith's case was contrary to law. Our court then granted Smith leave to bring this appeal."

"The interpretive question in this case is simple. Section 1307(b) provides in full:

> On request of the debtor at any time, if the case has not been converted [from a case under Chapter 7, 11, or 12], the court shall dismiss a case under this chapter [*i.e.*, Chapter 13]. Any waiver of the right to dismiss under this subsection is unenforceable.

"By its plain terms, this provision is mandatory: upon the debtor's request, subject to one exception not applicable here (namely that the case was not converted to Chapter 13 from another chapter), the court 'shall dismiss' a Chapter 13 case. *See Me. Cmty. Health Options v. United States*, —— U.S. ——, 140 S.Ct. 1308, 1320, 206 L.Ed.2d 764 (2020). The debtor's right to dismiss a Chapter 13 case comports with § 303(a), which makes clear that Chapter 13 is a 'wholly voluntary alternative to Chapter 7[.]' *Harris v. Viegelahn*, 575 U.S. 510, 514, 135 S.Ct. 1829, 191 L.Ed.2d 783 (2015). Meanwhile, § 1307(c) provides that, at the 'request of a party in interest or the United States trustee,' the court 'may dismiss' a Chapter 13 case 'for cause[.]' Congress thus specified the circumstances in which a bankruptcy court 'may dismiss' a Chapter 13 case, and those in which it 'shall' do so. The circumstances here were undisputedly those that mandated dismissal under § 1307(b)."

"U.S. Bank also argues that Civil Rule 60(b)(3) authorized the bankruptcy court to vacate its dismissal of Smith's bankruptcy case. Rule 60(b)(3) (as incorporated by Bankruptcy Rule 9024) allows a court to 'relieve a party' from a final order due to fraud, 'misrepresentation, or misconduct by an opposing party.' Fed. R. Civ. P. 60(b)(3). But 'any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code.' *United States v. Chavis (In re Chavis)*, 47 F.3d 818, 822 (6th Cir. 1995). Here, as shown above, the Bankruptcy Code directs bankruptcy courts to dismiss a Chapter 13 case on a debtor's request. *See* 11 U.S.C. § 1307(b). That command would be meaningless if a bankruptcy court could then vacate its dismissal under Rule 60(b). The district court therefore abused its discretion when it held that the bankruptcy court could reinstate Smith's Chapter 13 case under that Rule."

VI. Fourteen-Day Deadline for Filing Notice of Appeal Is Non-Jurisdictional but Mandatory

In re Tennial, 978 F.3d 1022 (6th Cir., Sutton, 2020).

"After Tennial's mortgage company foreclosed on her home, she filed a Chapter 13 bankruptcy petition. Her petition triggered an automatic stay of any further action against her home, allowing her to continue living there. 11 U.S.C. § 362. But the next year, REI Nation bought Tennial's home

from the mortgage company and moved the bankruptcy court to end the automatic stay. The bankruptcy court terminated the stay in an order entered on September 12, 2019. Tennial's attorney received electronic notice of the order the same day, and the court mailed a copy to Tennial by first class mail on September 14.

"Under Rule 8002(a)(1) of the Federal Rules of Bankruptcy Procedure, Tennial had 14 days—through September 26, 2019—to appeal the bankruptcy court's order to district court. Tennial didn't file her notice of appeal until October 9, 2019. At the bottom of her notice, she wrote, 'I am filing this notice of Appeal after the allowed time because I did not receive a copy of the order until September 26, 2019, via U.S. Postal Service.'"

"REI asked the district court to dismiss Tennial's appeal as untimely. The court granted REI's motion, concluding that it lacked jurisdiction to review the order because Tennial waited too long to file the appeal. The appeal deadline could not be extended, the court added, because Tennial failed to move for an extension under Bankruptcy Rule 8002(d). Tennial appealed to this court.

"A threshold question is whether the bankruptcy appeal deadline imposes a jurisdictional requirement. Rule 8002(a)(1) requires that 'a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.' Fed. R. Bankr. P. 8002(a)(1). The relevant federal statute, 28 U.S.C. § 158(c)(2), provides that bankruptcy appeals 'shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.'

"We have treated this deadline as jurisdictional before, first in *In re Dick*, 187 F.3d 635 (6th Cir. 1999), then in an unpublished decision in *Schwab Industries, Inc. v. Huntington National Bank*, 679 F. App'x 397 (6th Cir. 2017). But we have yet to look at the question in the light cast by the Supreme Court's recent guidance about jurisdictional requirements.

"As we see it, the 14-day deadline created by Bankruptcy Rule 8002(a)(1) does not create a jurisdictional limit on the federal courts.

"*First*, the Supreme Court has been rigorous and vigorous in distinguishing between requirements that go to the subject matter jurisdiction of the federal courts and requirements that are merely mandatory. To the end of simplifying and clarifying the issue, Justice Ginsburg wrote a trailblazing unanimous decision for the Court that created a clear-statement rule for the daunting array of settings in which the question arises. Congress must 'clearly state[ ]' that the requirement implicates the judiciary's subject matter jurisdiction—its 'statutory or constitutional *power* to adjudicate the case'—before the federal courts will treat the requirement as a non-waivable and non-forfeitable jurisdictional imperative. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The goal, the Court said, is to rein in the 'profligate' and imprecise use of 'jurisdiction.' *Arbaugh*, 546 U.S. at 510, 126 S.Ct. 1235. Consistent with that goal and consistent with the clear-statement rule, the Court has treated most of the procedural requirements that have come before it since then as *not* being jurisdictional in the constitutional sense of the term. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010); *United States v. Kwai Fun Wong*, 575 U.S. 402, 135 S.Ct. 1625, 191 L.Ed.2d 533 (2015); *Musacchio v. United States*, —— U.S. ——, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016).

"That does not seem like a hard principle to apply here. Congress did not state that this 14-day deadline establishes a jurisdictional prerequisite. In the relevant statute, Congress merely referred to any appeal deadlines created by the Bankruptcy Rules. 28 U.S.C. § 158(c)(2). Nothing about that reference indicates that Congress meant to attach subject matter jurisdiction consequences to deadlines established by the Bankruptcy Rules. Much less did it do so 'clearly' with that modest reference.

"*Second*, and more concretely, the Court has handled four cases involving rule-based deadlines in recent years, and each of them suggests that the Bankruptcy Rule's 14-day appeal deadline is not jurisdictional. Here are the rules at issue in each case:

* the 60-day deadline for a creditor to object to its debtor's discharge under Bankruptcy Rules 4004(a) and (b) and 9006(b)(3), *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004);

* the 7-day deadline to move for a new trial on grounds other than newly discovered evidence under Criminal Rules 33 and 45(b)(2), *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (per curiam);

* the 14-day time limit for extending the civil appeal deadline if the losing party does not receive notice of the decision under Appellate Rule 4(a)(6), *Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007); and

* the 30-day time limit for extending the civil appeal deadline if the losing party receives notice of the appealable judgment under Appellate Rule 4(a)(5)(C), *Hamer v. Neighborhood Hous. Servs. of Chi.*, —— U.S. ——, 138 S.Ct. 13, 199 L.Ed.2d 249 (2017).

"How did the Court resolve these cases? Based on this straightforward principle: Rule-based deadlines are jurisdictional when they implement an appeal deadline created by Congress. Otherwise, they are not. Thus: A bankruptcy appellate deadline is not jurisdictional when Congress did not create it. *Kontrick*, 540 U.S. at 448, 453–54, 124 S.Ct. 906. A criminal procedure deadline to move for a new trial is not jurisdictional when Congress did not create it. *Eberhart*, 546 U.S. at 13, 15–19, 126 S.Ct. 403. A civil appellate deadline is not jurisdictional when Congress did not 'set[ ] the time.' *Hamer*, 138 S.Ct. at 17. But a civil appellate deadline is jurisdictional when the rule creates a 'specific[ ]' appeal deadline that is 'set forth in a statute.' *Bowles*, 551 U.S. at 213, 210, 127 S.Ct. 2360. The answer to how to characterize each rule-based deadline comes down to this: 'If a time prescription governing the transfer of adjudicatory authority [to an] Article III court ... appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category.' *Hamer*, 138 S.Ct. at 20 (quotation omitted).

"Under this straightforward principle, Bankruptcy Rule 8002(a)(1)'s appeal deadline falls on the nonjurisdictional side of the line. It does not implement an appeal deadline set by Congress. At no place in 28 U.S.C. § 158(c)(2) does Congress create an appeal deadline for these appeals, whether 10 days, 14 days, or 30 days. It merely references the deadline created by the Advisory Committee on Bankruptcy Rules and the Standing Committee on Rules of Practice and Procedure under the Rules Enabling Act. 28 U.S.C. §§ 2071–77. If deadlines established by the rules process alone created jurisdictional limits, *Kontrick*, *Eberhart*, and *Hamer* would have come out differently. And

Bowles would not have wasted its breath in talking about how that rule-based deadline implemented a statutory requirement.

"No less significantly, if deadlines established by the rules process alone created jurisdictional limits, that would mean the rules committee could change the scope of federal court subject matter jurisdiction on its own. That's good work if you can get it, to be sure. But the Constitution gives that power to Congress alone. *See* U.S. Const. art. III, § 1; *see also Kontrick*, 540 U.S. at 452, 124 S.Ct. 906. Nor is this possibility a mere product of a fevered imagination. The rules committees, as it happens, have changed the bankruptcy appeal deadline since 28 U.S.C. § 158 was enacted—from 10 to 14 days. *See* Fed. R. Bankr. P. 8002 advisory committee's note to 2009 amendment. How, then, can we say that Congress 'specifi[ed]' a deadline that the rules committee has changed on its own with no input from the National Legislature? *Bowles*, 551 U.S. at 213, 127 S.Ct. 2360. We have no answer."

"All in all, Bankruptcy Rule 8002(a)(1)'s 14-day time limit for filing a notice of appeal does not create a jurisdictional imperative.

"Even so, the deadline remains mandatory. Bankruptcy appeals '*shall* be taken in ... the time provided by Rule 8002 of the Bankruptcy Rules,' 28 U.S.C. § 158(c)(2), and Bankruptcy Rule 8002(a)(1) provides that an appeal '*must* be filed ... within 14 days.' (Emphases added). Tennial missed the deadline, and REI invoked the deadline in its motion to dismiss. Nor does the explanation she placed on the notice of appeal excuse the dilatory filing. Her lawyer had timely notice of the district court's order. And while Tennial protests that her note should be treated as a motion for an extension of time under Bankruptcy Rule 8002(d), that same rule precludes extensions when a party appeals from an order 'grant[ing] relief from an automatic stay.' Fed. R. Bankr. P. 8002(d)(2)(A). That's just what we have: Tennial attempted to appeal the bankruptcy court's order granting REI relief from an automatic stay.

"Because the appeal deadline is mandatory, because Tennial missed it, and because REI raised the issue in its motion to dismiss, the appeal must be dismissed as dilatory.

"We affirm the dismissal on this ground."

VII. 2021 Proposed Amendments to Federal Rules of Appellate and Civil Procedure

The Proposed rules, which are anticipated to go into effect December 1, 2021, include changes to Rule 3, Notice of Appeal, and Rule 6, Appeal in a Bankruptcy case. They can be found at: https://www.uscourts.gov/sites/default/files/congressional_package_-_april_2021_0.pdf

I. Article II; Appointments Clause Claims Subject to Judicial Review; Issue-Exhaustion Requirement Inapplicable

Carr v. Saul, 141 S.Ct. 1352 (U.S., Sotomayor, 2021).

"Petitioners are six individuals whose applications for disability benefits were denied by the Social Security Administration (SSA). They each unsuccessfully challenged their respective adverse benefit determination in a hearing before an SSA administrative law judge (ALJ). The SSA Appeals Council denied discretionary review in each case. Thereafter, this Court decided *Lucia* v. *SEC*, 585 U.S. ___, which held that the appointment of Securities and Exchange Commission ALJs by lower level staff violated the Constitution's Appointments Clause. Because the SSA ALJs who denied petitioners' claims were also appointed by lower level staff, petitioners argued in federal court that they were entitled to a fresh administrative review by constitutionally appointed ALJs. In each case, the Court of Appeals held that petitioners could not obtain judicial review of their Appointments Clause claims because they failed to raise those challenges in their administrative proceedings.

"Held: The Courts of Appeals erred in imposing an issue-exhaustion requirement on petitioners' Appointments Clause claims."

"Administrative review schemes commonly require parties to give the agency an opportunity to address an issue before seeking judicial review of that question. Such administrative issue-exhaustion requirements are typically creatures of statute or regulation. But where, as here, no statute or regulation imposes an issue-exhaustion requirement, courts decide whether to require issue exhaustion based on 'an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.' *Sims* v. *Apfel,* 530 U.S. 103, 109. '[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.' *Ibid*. In *Sims*, which declined to apply an issue-exhaustion requirement to SSA Appeals Council proceedings, the Court explained that 'the rationale for requiring issue exhaustion is at its greatest' when 'the parties are expected to develop the issues in an adversarial administrative proceeding,' but is 'much weaker' when 'an administrative proceeding is not adversarial.' *Id.*, at 110. Although *Sims* dealt with administrative review before the SSA Appeals Council, much of the opinion's rationale applies equally to SSA ALJ proceedings."

"Even assuming that ALJ proceedings are comparatively more adversarial than Appeals Council proceedings, the question remains whether the ALJ proceedings here were adversarial enough to support the 'analogy to judicial proceedings' that undergirds judicially created issue-exhaustion requirements. *Sims*, 530 U.S., at 112 (plurality opinion)."

"In the specific context of petitioners' Appointments Clause challenges, two considerations tip the scales decidedly against imposing an issue-exhaustion requirement. First, agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise. See, *e.g., Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.,* 561 U.S. 477, 491. Second, this Court has consistently recognized a futility exception to exhaustion requirements. See, *e.g., Bethesda Hospital Assn.* v. *Bowen,* 485 U.S.

399, 405–406. Both considerations apply fully here: Petitioners assert purely constitutional claims about which SSA ALJs have no special expertise and for which they can provide no relief. *United States* v. *L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, distinguished."

"The Commissioner's contention that petitioners cannot obtain new hearings because they did not 'timely challenge' their adjudicators' appointments presumes what the Commissioner has failed to prove: that petitioners' challenges are, in fact, untimely. The Commissioner's reliance on *Ryder* v. *United States,* 515 U.S. 177, and *Lucia*, 585 U.S. ___, is misplaced, as neither decision had occasion to opine on what would constitute a 'timely' objection in an administrative review scheme like the SSA's."

II. Separation of Powers; Federal Agency's Structure Unconstitutional Due to Removal Restrictions

Collins v. Yellen, 141 S.Ct. 1761 (U.S., Alito, 2021).

"When the national housing bubble burst in 2008, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), two of the Nation's leading sources of mortgage financing, suffered significant losses that many feared would imperil the national economy. To address that concern, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act), which, among other things, created the Federal Housing Finance Agency (FHFA)—an independent agency tasked with regulating the companies and, if necessary, stepping in as their conservator or receiver. See 12 U.S.C. § 4501 *et seq.* At the head of the Agency, Congress installed a single Director, removable by the President only 'for cause.' §§ 4512(a), (b)(2).

"Soon after the FHFA's creation, the Director placed Fannie Mae and Freddie Mac into conservatorship and negotiated agreements for the companies with the Department of Treasury. Under those agreements, Treasury committed to providing each company with up to $100 billion in capital, and in exchange received, among other things, senior preferred shares and quarterly fixed-rate dividends. In the years that followed, the agencies agreed to a number of amendments, the third of which replaced the fixed-rate dividend formula with a variable one that required the companies to make quarterly payments consisting of their entire net worth minus a small specified capital reserve.

"A group of the companies' shareholders challenged the third amendment on both statutory grounds—that the FHFA exceeded its authority as a conservator under the Recovery Act by agreeing to the new variable dividend formula—and constitutional grounds—that the FHFA's structure violates the separation of powers because the Agency is led by a single Director, removable by the President only for cause. The District Court dismissed the statutory claim and granted summary judgment in the FHFA's favor on the constitutional claim. The Fifth Circuit reversed the District Court's dismissal of the statutory claim, held that the FHFA's structure violates the separation of powers, and concluded that the appropriate remedy for the constitutional violation was to sever the removal restriction from the rest of the Recovery Act, but not to vacate and set aside the third amendment.

"Held:

"The shareholders' statutory claim must be dismissed. The 'anti-injunction clause' of the Recovery Act provides that unless review is specifically authorized by one of its provisions or is requested by the Director, 'no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.' § 4617(f). Where, as here, the FHFA's challenged actions did not exceed its 'powers or functions' 'as a conservator,' relief is prohibited."

"The Recovery Act grants the FHFA expansive authority in its role as a conservator and permits the Agency to act in what it determines is 'in the best interests of the regulated entity *or the Agency*.' § 4617(b)(2)(J)(ii) (emphasis added). So when the FHFA acts as a conservator, it may aim to rehabilitate the regulated entity in a way that, while not in the best interests of the regulated entity, is beneficial to the Agency and, by extension, the public it serves. This feature of an FHFA conservatorship is fatal to the shareholders' statutory claim. The third amendment was adopted at a time when the companies had repeatedly been unable to make their fixed quarterly dividend payments without drawing on Treasury's capital commitment. If things had proceeded as they had in the past, there was a possibility that the companies would have consumed some or all of the remaining capital commitment in order to pay their dividend obligations. The third amendment's variable dividend formula eliminated that risk, and in turn ensured that all of Treasury's capital was available to backstop the companies' operations during difficult quarters. Although the third amendment required the companies to relinquish nearly all of their net worth, the FHFA could have reasonably concluded that this course of action was in the best interests of members of the public who rely on a stable secondary mortgage market."

"The shareholders argue that the third amendment did not actually serve the best interests of the FHFA or the public because it did not further the asserted objective of protecting Treasury's capital commitment. First, they claim that the FHFA agreed to the amendment at a time when the companies were on the precipice of a financial uptick which would have allowed them to pay their cash dividends and build up capital buffers to absorb future losses. Thus, the shareholders assert, sweeping all the companies' earnings to Treasury increased rather than decreased the risk that the companies would make further draws and eventually deplete Treasury's commitment. But the success of the strategy that the shareholders tout was dependent on speculative projections about future earnings, and recent experience had given the FHFA reasons for caution. The nature of the conservatorship authorized by the Recovery Act permitted the Agency to reject the shareholders' suggested strategy in favor of one that the Agency reasonably viewed as more certain to ensure market stability. Second, the shareholders claim that the FHFA could have protected Treasury's capital commitment by ordering the companies to pay the dividends in kind rather than in cash. This argument rests on a misunderstanding of the agreement between the companies and Treasury. Paying Treasury in kind would not have satisfied the cash dividend obligation; it would only have delayed that obligation, as well as the risk that the companies' cash dividend obligations would consume Treasury's capital commitment. Choosing to forgo this option in favor of one that eliminated the risk entirely was not in excess of the FHFA's authority as a conservator. Finally, the shareholders argue that because the third amendment left the companies unable to build capital reserves and exit conservatorship, it is best viewed as a step toward liquidation, which the FHFA lacked the authority to take without first placing the companies in receivership. This characterization is inaccurate. Nothing about the third amendment precluded the companies from operating at full steam in the marketplace, and all available evidence suggests that they did. The companies were not in the process of winding down their affairs."

"The Recovery Act's restriction on the President's power to remove the FHFA Director, 12 U.S.C. § 4512(b)(2), is unconstitutional."

"The threshold issues raised in the lower court or by the federal parties and appointed *amicus* do not bar a decision on the merits of the shareholders' constitutional claim."

"The shareholders have standing to bring their constitutional claim. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. First, the shareholders assert that the FHFA transferred the value of their property rights in Fannie Mae and Freddie Mac to Treasury, and that sort of pocketbook injury is a prototypical form of injury in fact. See *Czyzewski* v. *Jevic Holding Corp.*, 580 U. S. ——, ——, 137 S.Ct. 973, 981. Second, the shareholders' injury is traceable to the FHFA's adoption and implementation of the third amendment, which is responsible for the variable dividend formula. For purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556. Finally, a decision in the shareholders' favor could easily lead to the award of at least some of the relief that the shareholders seek."

"The shareholders' constitutional claim is not moot. After oral argument was held in this case, the FHFA and Treasury agreed to amend the stock purchasing agreements for a fourth time. That amendment eliminated the variable dividend formula that caused the shareholders' injury. As a result, the shareholders no longer have any ground for prospective relief, but they retain an interest in the retrospective relief they have requested. That interest saves their constitutional claim from mootness."

"The shareholders' constitutional claim is not barred by the Recovery Act's 'succession clause.' § 4617(b)(2)(A)(i). That clause effects only a limited transfer of stockholders' rights, namely, the rights they hold 'with respect to the regulated entity' and its assets. *Ibid.* Here, by contrast, the shareholders assert a right that they hold in common with all other citizens who have standing to challenge the removal restriction. The succession clause therefore does not transfer to the FHFA the constitutional right at issue."

"The shareholders' constitutional challenge can proceed even though the FHFA was led by an Acting Director, as opposed to a Senate-confirmed Director, at the time the third amendment was adopted. The harm allegedly caused by the third amendment did not come to an end during the tenure of the Acting Director who was in office when the amendment was adopted. Rather, that harm is alleged to have continued after the Acting Director was replaced by a succession of confirmed Directors, and it appears that any one of those officers could have renegotiated the companies' dividend formula with Treasury. Because confirmed Directors chose to continue implementing the third amendment while insulated from plenary Presidential control, the survival of the shareholders' constitutional claim does not depend on the answer to the question whether the Recovery Act restricted the removal of an Acting Director. The answer to that question could, however, have a bearing on the *scope* of relief that may be awarded to the shareholders. If the statute does not restrict the removal of an Acting Director, any harm resulting from actions taken under an Acting Director would not be attributable to a constitutional violation. Only harm caused by a confirmed Director's implementation of the third amendment could then provide a basis for relief. In the Recovery Act, Congress expressly restricted the President's power to remove a confirmed Director but said nothing of the kind with respect to an Acting Director. When a statute does not limit the President's power to remove an agency head, the Court generally presumes that the officer serves at the President's pleasure. See *Shurtleff v. United States*, 189 U.S. 311, 316, 23 S.Ct. 535, 47 L.Ed. 828. Seeing no grounds for departing from that presumption here, the Court

holds that the Recovery Act's removal restriction does not extend to an Acting Director and proceeds to the merits of the shareholders' constitutional argument."

"The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. In *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ——, 140 S.Ct. 2183, the Court held that Congress could not limit the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB) to instances of 'inefficiency, neglect, or malfeasance.' *Id.*, at ——, 140 S.Ct., at 2191. In so holding, the Court observed that the CFPB, an independent agency led by a single Director, 'lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.' *Id.,* at ——–——, 140 S.Ct., at 2192. A straightforward application of *Seila Law*'s reasoning dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power. The distinctions Court-appointed *amicus* draws between the FHFA and the CFPB are insufficient to justify a different result. First, *amicus* argues that Congress should have greater leeway to restrict the President's power to remove the FHFA Director because the FHFA's authority is more limited than that of the CFPB. But the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. Moreover, the test that *amicus* proposes would lead to severe practical problems. Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies. Second, *amicus* contends that Congress may restrict the removal of the FHFA Director because when the Agency steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power. But the Agency does not always act in such a capacity, and even when it does, the Agency must implement a federal statute and may exercise powers that differ critically from those of most conservators and receivers. Third, *amicus* asserts that the FHFA's structure does not violate the separation of powers because the entities it regulates are Government-sponsored enterprises that have federal charters, serve public objectives, and receive special privileges. This argument fails because the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives. Finally, *amicus* contends that there is no constitutional problem in this case because the Recovery Act offers only 'modest' tenure protection. But the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer. *Id.*, at ——, 140 S.Ct., at 2205."

"The shareholders seek an order setting aside the third amendment and requiring that all dividend payments made pursuant to that amendment be returned to Fannie Mae and Freddie Mac. In support of this request, they contend that the third amendment was adopted and implemented by officers who lacked constitutional authority and that their actions were therefore void *ab initio*. This argument is neither logical nor supported by precedent. All the officers who headed the FHFA during the time in question were properly *appointed*. There is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office or that actions taken by the FHFA in relation to the third amendment are void. That does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief. Although an unconstitutional provision is never really part of the body of governing law, it is still possible for an unconstitutional provision to inflict compensable harm. The possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out. The parties' arguments on this point should be resolved in the first instance by the lower courts."

III. Article III; Affordable Care Act Plaintiffs Fail to Show Standing Due to Lack of Personal Injury

California v. Texas, 141 S.Ct. 2104 (U.S., Breyer, 2021).

"The Patient Protection and Affordable Care Act as enacted in 2010 required most Americans to obtain minimum essential health insurance coverage and imposed a monetary penalty upon most individuals who failed to do so. Amendments to the Act in 2017 effectively nullified the penalty by setting its amount to $0. Subsequently, Texas (along with over a dozen States and two individuals) brought suit against federal officials, claiming that without the penalty the Act's minimum essential coverage provision, codified at 26 U.S.C. § 5000A(a), is unconstitutional. They sought a declaration that the provision is unconstitutional, a finding that the rest of the Act is not severable from § 5000A(a), and an injunction against enforcement of the rest of the Act. The District Court determined that the individual plaintiffs had standing. It also found § 5000A(a) both unconstitutional and not severable from the rest of the Act. The Fifth Circuit agreed as to the existence of standing and the unconstitutionality of § 5000A(a), but concluded that the District Court's severability analysis provided insufficient justification to strike down the entire Act. Petitioner California and other States intervened to defend the Act's constitutionality and to seek further review.

"Held: Plaintiffs do not have standing to challenge § 5000A(a)'s minimum essential coverage provision because they have not shown a past or future injury fairly traceable to defendants' conduct enforcing the specific statutory provision they attack as unconstitutional."

"The Constitution gives federal courts the power to adjudicate only genuine 'Cases' and 'Controversies.' Art. III, § 2. To have standing, a plaintiff must 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342. No plaintiff has shown such an injury 'fairly traceable' to the 'allegedly unlawful conduct' challenged here."

"The two individual plaintiffs claim a particularized individual harm in the form of past and future payments necessary to carry the minimum essential coverage that § 5000A(a) requires. Assuming this pocketbook injury satisfies the injury element of Article III standing, it is not 'fairly traceable' to any 'allegedly unlawful conduct' of which the plaintiffs complain, *Allen* v. *Wright*, 468 U.S. 737, 751. Without a penalty for noncompliance, § 5000A(a) is unenforceable. The individuals have not shown that any kind of Government action or conduct has caused or will cause the injury they attribute to § 5000A(a). The Court's cases have consistently spoken of the need to assert an injury that is the result of a statute's actual or threatened enforcement, whether today or in the future. See, *e.g.*, *Babbitt* v. *Farm Workers*, 442 U.S. 289, 298. Here, there is only the statute's textually unenforceable language.

"Unenforceable statutory language alone is not sufficient to establish standing, as the redressability requirement makes clear. Whether an injury is redressable depends on the relationship between 'the judicial relief requested' and the 'injury' suffered. *Allen*, 468 U.S. at 753, n. 19. The only relief sought regarding the minimum essential coverage provision is declaratory relief, namely, a judicial statement that the provision challenged is unconstitutional. But just like suits for every other type of remedy, declaratory-judgment actions must satisfy Article III's case-or-controversy requirement. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 126–127. Article III standing requires identification of a remedy that will redress the individual plaintiffs' injuries. *Id.*, at 127. No such remedy exists here. To find standing to attack an unenforceable statutory provision would allow

a federal court to issue what would amount to an advisory opinion without the possibility of an Article III remedy. Article III guards against federal courts assuming this kind of jurisdiction. See *Carney* v. *Adams*, 592 U.S. ___, ___. The Court also declines to consider Federal respondents' novel alternative theory of standing first raised in its merits brief on behalf the individuals, as well as the dissent's novel theory on behalf of the states, neither of which was directly argued by plaintiffs below nor presented at the certiorari stage."

"Texas and the other state plaintiffs have similarly failed to show that the pocketbook injuries they allege are traceable to the Government's allegedly *unlawful* conduct. *DaimlerChrysler Corp*. v. *Cuno*, 547 U.S. 332, 342. They allege two forms of injury: one indirect, one direct.

"The state plaintiffs allege indirect injury in the form of increased costs to run state-operated medical insurance programs. They say the minimum essential coverage provision has caused more state residents to enroll in the programs. The States, like the individual plaintiffs, have failed to show how that alleged harm is traceable to the Government's actual or possible action in enforcing § 5000A(a), so they lack Article III standing as a matter of law. But the States have also not shown that the challenged minimum essential coverage provision, without any prospect of penalty, will injure them by leading more individuals to enroll in these programs. Where a standing theory rests on speculation about the decision of an independent third party (here an individual's decision to enroll in a program like Medicaid), the plaintiff must show at the least 'that third parties will likely react in predictable ways.' *Department of Commerce* v. *New York*, 588 U.S. __, __. Neither logic nor evidence suggests that an unenforceable mandate will cause state residents to enroll in valuable benefits programs that they would otherwise forgo. It would require far stronger evidence than the States have offered here to support their counterintuitive theory of standing, which rests on a 'highly attenuated chain of possibilities.' *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 410–411."

"The state plaintiffs also claim a direct injury resulting from a variety of increased administrative and related expenses allegedly required by § 5000A(a)'s minimum essential coverage provision. But other provisions of the Act, not the minimum essential coverage provision, impose these requirements. These provisions are enforced without reference to § 5000A(a). See 26 U.S.C. §§ 6055, 6056. A conclusion that the minimum essential coverage requirement is unconstitutional would not show that enforcement of these other provisions violates the Constitution. The other asserted pocketbook injuries related to the Act are similarly the result of enforcement of provisions of the Act that operate independently of § 5000A(a). No one claims these other provisions violate the Constitution. The Government's conduct in question is therefore not 'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain—§ 5000A(a). *Allen*, 468 U.S., at 751."

IV. First Amendment

A. Freedom of Expression; Violated by School's Suspension of High School Cheerleader for Off-Campus Snapchat Profanity

Mahanoy Area School District v. B.L., 141 S.Ct. 2038 (U.S., Breyer, 2021).

"Mahanoy Area High School student B. L. failed to make the school's varsity cheerleading squad. While visiting a local convenience store over the weekend, B. L. posted two images on Snapchat, a social media application for smartphones that allows users to share temporary images with

selected friends. B. L.'s posts expressed frustration with the school and the school's cheerleading squad, and one contained vulgar language and gestures. When school officials learned of the posts, they suspended B. L. from the junior varsity cheerleading squad for the upcoming year. After unsuccessfully seeking to reverse that punishment, B. L. and her parents sought relief in federal court, arguing *inter alia* that punishing B. L. for her speech violated the First Amendment. The District Court granted an injunction ordering the school to reinstate B. L. to the cheerleading team. Relying on *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731, to grant B. L.'s subsequent motion for summary judgment, the District Court found that B. L.'s punishment violated the First Amendment because her Snapchat posts had not caused substantial disruption at the school. The Third Circuit affirmed the judgment, but the panel majority reasoned that *Tinker* did not apply because schools had no special license to regulate student speech occurring off campus.

"Held: While public schools may have a special interest in regulating some off-campus student speech, the special interests offered by the school are not sufficient to overcome B. L.'s interest in free expression in this case."

"In *Tinker*, we indicated that schools have a special interest in regulating on-campus student speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.' 393 U.S., at 513, 89 S.Ct. 733. The special characteristics that give schools additional license to regulate student speech do not always disappear when that speech takes place off campus. Circumstances that may implicate a school's regulatory interests include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices."

"But three features of off-campus speech often, even if not always, distinguish schools' efforts to regulate off-campus speech. *First*, a school will rarely stand *in loco parentis* when a student speaks off campus. *Second*, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. *Third*, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy. Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished."

"The school violated B. L.'s First Amendment rights when it suspended her from the junior varsity cheerleading squad."

"B. L.'s posts are entitled to First Amendment protection. The statements made in B. L.'s Snapchats reflect criticism of the rules of a community of which B. L. forms a part. And B. L.'s message did not involve features that would place it outside the First Amendment's ordinary protection."

"The circumstances of B. L.'s speech diminish the school's interest in regulation. B. L.'s posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B. L.

also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends."

"The school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community is weakened considerably by the fact that B. L. spoke outside the school on her own time. B. L. spoke under circumstances where the school did not stand *in loco parentis*. And the vulgarity in B. L.'s posts encompassed a message of criticism. In addition, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom."

"The school's interest in preventing disruption is not supported by the record, which shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class 'for just a couple of days' and that some members of the cheerleading team were 'upset' about the content of B. L.'s Snapchats. App. 82–83. This alone does not satisfy *Tinker's* demanding standards."

"Likewise, there is little to suggest a substantial interference in, or disruption of, the school's efforts to maintain cohesion on the school cheerleading squad."

B. Free Exercise Clause; Violated by City's Refusal to Make Referrals to Faith Based Agency that Would Not Place Foster Children with Same-Sex Couple

Fulton v. City of Philadelphia, Pennsylvania, 141 S.Ct. 1868 (U.S., Roberts, 2021).

"Philadelphia's foster care system relies on cooperation between the City and private foster care agencies. The City enters standard annual contracts with the agencies to place children with foster families. One of the responsibilities of the agencies is certifying prospective foster families under state statutory criteria. Petitioner Catholic Social Services has contracted with the City to provide foster care services for over 50 years, continuing the centuries-old mission of the Catholic Church to serve Philadelphia's needy children. CSS holds the religious belief that marriage is a sacred bond between a man and a woman. Because CSS believes that certification of prospective foster families is an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. But other private foster agencies in Philadelphia will certify same-sex couples, and no same-sex couple has sought certification from CSS. Against this backdrop, a 2018 newspaper story recounted the Archdiocese of Philadelphia's position that CSS could not consider prospective foster parents in same-sex marriages. Calls for investigation followed, and the City ultimately informed CSS that unless it agreed to certify same-sex couples the City would no longer refer children to the agency or enter a full foster care contract with it in the future. The City explained that the refusal of CSS to certify same-sex married couples violated both a non-discrimination provision in the agency's contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.

"CSS and three affiliated foster parents filed suit seeking to enjoin the City's referral freeze on the grounds that the City's actions violated the Free Exercise and Free Speech Clauses of the First Amendment. The District Court denied preliminary relief. It reasoned that the contractual non-discrimination requirement and the Fair Practices Ordinance were both neutral and generally applicable under *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872, and that CSS's free exercise claim was therefore unlikely to succeed. The Court of Appeals for the Third Circuit affirmed. Given the expiration of the parties' contract, the Third Circuit examined whether the City could condition contract renewal on the inclusion of new language forbidding

discrimination on the basis of sexual orientation. The court concluded that the City's proposed contractual terms stated a neutral and generally applicable policy under *Smith.* CSS and the foster parents challenge the Third Circuit's determination that the City's actions were permissible under *Smith* and also ask the Court to reconsider that decision.

"Held: The refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment."

"The City's actions burdened CSS's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs. *Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable. 494 U.S., at 878–882. This case falls outside *Smith* because the City has burdened CSS's religious exercise through policies that do not satisfy the threshold requirement of being neutral and generally applicable. *Church of Lukumi Babalu Aye, Inc*. v. *Hialeah*, 508 U.S. 520, 531–532. A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions. *Smith*, 494 U.S., at 884. Where such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason. Ibid."

"The non-discrimination requirement of the City's standard foster care contract is not generally applicable. Section 3.21 of the contract requires an agency to provide services defined in the contract to prospective foster parents without regard to their sexual orientation. But section 3.21 also permits exceptions to this requirement at the 'sole discretion' of the Commissioner. This inclusion of a mechanism for entirely discretionary exceptions renders the non-discrimination provision not generally applicable. *Smith*, 494 U.S., at 884. The City maintains that greater deference should apply to its treatment of private contractors, but the result here is the same under any level of deference. Similarly unavailing is the City's recent contention that section 3.21 does not even apply to CSS's refusal to certify same-sex couples. That contention ignores the broad sweep of section 3.21's text, as well as the fact that the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples 'explicit' in future contracts. Finally, because state law makes clear that the City's authority to grant exceptions from section 3.21 also governs section 15.1's general prohibition on sexual orientation discrimination, the contract as a whole contains no generally applicable non-discrimination requirement."

"Philadelphia's Fair Practices Ordinance, which as relevant forbids interfering with the public accommodations opportunities of an individual based on sexual orientation, does not apply to CSS's actions here. The Ordinance defines a public accommodation in relevant part to include a provider 'whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.' Phila. Code § 9–1102(1)(w). Certification is not 'made available to the public' in the usual sense of the words. Certification as a foster parent is not readily accessible to the public; the process involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The District Court's contrary conclusion did not take into account the uniquely selective nature of foster care certification."

"The contractual non-discrimination requirement burdens CSS's religious exercise and is not generally applicable, so it is subject to 'the most rigorous of scrutiny.' *Lukumi*, 508 U.S., at 546. A government policy can survive strict scrutiny only if it advances compelling interests and is narrowly tailored to achieve those interests. *Ibid*. The question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. Under the circumstances here, the City does not have a compelling interest in refusing to contract with CSS. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless the agency agrees to certify same-sex couples as foster parents cannot survive strict scrutiny and violates the Free Exercise Clause of the First Amendment. The Court does not consider whether the City's actions also violate the Free Speech Clause."

C. Freedom of Association; Violated by State's Charity Donor Disclosure Rules

Americans for Prosperity Foundation v. Bonta, 141 S.Ct. 2373 (U.S., Roberts, 2021).

"Charitable organizations soliciting funds in California must disclose the identities of their major donors to the state Attorney General's Office. Charities generally must register with the Attorney General and renew their registrations annually. The Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, a form on which tax-exempt organizations provide information about their mission, leadership, and finances. Schedule B to Form 990—the document that gives rise to the present dispute—requires organizations to disclose the names and addresses of their major donors. The State contends that having this information readily available furthers its interest in policing misconduct by charities.

"The petitioners are two tax-exempt charities that solicit contributions in California. Since 2001, each petitioner has renewed its registration and has filed a copy of its Form 990 with the Attorney General, as required by Cal. Code Regs., tit. 11, § 301. To preserve their donors' anonymity, however, the petitioners have declined to file unredacted Schedule Bs, and they had until recently faced no consequences for noncompliance. In 2010, the State increased its enforcement of charities' Schedule B disclosure obligations, and the Attorney General ultimately threatened the petitioners with suspension of their registrations and fines for noncompliance. The petitioners each responded by filing suit in District Court, alleging that the compelled disclosure requirement violated their First Amendment rights and the rights of their donors. Disclosure of their Schedule Bs, the petitioners alleged, would make their donors less likely to contribute and would subject them to the risk of reprisals. Both organizations challenged the constitutionality of the disclosure requirement on its face and as applied to them. In each case, the District Court granted preliminary injunctive relief prohibiting the Attorney General from collecting the petitioners' Schedule B information. The Ninth Circuit vacated and remanded, reasoning that Circuit precedent required rejection of the petitioners' facial challenge. Reviewing the petitioners' as-applied claims under an 'exacting scrutiny' standard, the panel narrowed the District Court's injunction, and it allowed the Attorney General to collect the petitioners' Schedule Bs so long as they were not publicly disclosed. On remand, the District Court held bench trials in both cases, after which it entered judgment for the petitioners and permanently enjoined the Attorney General from collecting their Schedule Bs. Applying exacting scrutiny, the District Court held that disclosure of Schedule Bs was not narrowly tailored to the State's interest in investigating charitable misconduct. The court found little evidence that the Attorney General's investigators relied on Schedule Bs to detect charitable fraud, and it

determined that the disclosure regime burdened the associational rights of donors. The District Court also found that California was unable to ensure the confidentiality of donors' information. The Ninth Circuit again vacated the District Court's injunctions, and this time reversed the judgments and remanded for entry of judgment in favor of the Attorney General. The Ninth Circuit held that the District Court had erred by imposing a narrow tailoring requirement. And it reasoned that the disclosure regime satisfied exacting scrutiny because the up-front collection of charities' Schedule Bs promoted investigative efficiency and effectiveness. The panel also found that the disclosure of Schedule Bs would not meaningfully burden donors' associational rights. The Ninth Circuit denied rehearing en banc, over a dissent.

"Held: The judgment is reversed, and the cases are remanded.

"The Chief Justice delivered the opinion of the Court with respect to all but Part II–B–1, concluding that California's disclosure requirement is facially invalid because it burdens donors' First Amendment rights and is not narrowly tailored to an important government interest."

"The Court reviews the petitioners' First Amendment challenge to California's compelled disclosure requirement with the understanding that 'compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.' *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462. *NAACP* v. *Alabama* did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. In *Buckley* v. *Valeo*, 424 U.S. 1, 64 (*per curiam*), the Court articulated an 'exacting scrutiny' standard, which requires 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,' *Doe* v. *Reed*, 561 U.S. 186, 196. The parties dispute whether exacting scrutiny applies in these cases, and if so, whether that test imposes a least restrictive means requirement similar to the one imposed by strict scrutiny.

"The Court concludes that exacting scrutiny requires that a government-mandated disclosure regime be narrowly tailored to the government's asserted interest, even if it is not the least restrictive means of achieving that end. The need for narrow tailoring was set forth early in the Court's compelled disclosure cases. In *Shelton* v. *Tucker*, 364 U.S. 479, the Court considered an Arkansas statute that required teachers to disclose every organization to which they belonged or contributed. The Court acknowledged the importance of 'the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools,' and it distinguished prior decisions that had found 'no substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure.' *Id*., at 485. But the Court invalidated the Arkansas statute because even a 'legitimate and substantial' governmental interest 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Id*., at 488. *Shelton* stands for the proposition that a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes."

"California's blanket demand that all charities disclose Schedule Bs to the Attorney General is facially unconstitutional."

"The Ninth Circuit did not impose a narrow tailoring requirement to the relationship between the Attorney General's demand for Schedule Bs and the identified governmental interest. That was error under the Court's precedents. And properly applied, the narrow tailoring requirement is not

satisfied by California's disclosure regime. In fact, a dramatic mismatch exists between the interest the Attorney General seeks to promote and the disclosure regime that he has implemented.

"The Court does not doubt the importance of California's interest in preventing charitable fraud and self-dealing. But the enormous amount of sensitive information collected through Schedule Bs does not form an integral part of California's fraud detection efforts. California does not rely on Schedule Bs to initiate investigations, and evidence at trial did not support the State's concern that alternative means of obtaining Schedule B information—such as a subpoena or audit letter—are inefficient and ineffective compared to up-front collection. In reality, California's interest is less in investigating fraud and more in ease of administration. But 'the prime objective of the First Amendment is not efficiency.' *McCullen* v. *Coakley*, 573 U.S. 464, 495. Mere administrative convenience does not remotely 'reflect the seriousness of the actual burden' that the demand for Schedule Bs imposes on donors' association rights. *Reed*, 561 U.S., at 196 (internal quotation marks omitted)."

"In the First Amendment context, the Court has recognized a 'type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.' *United States* v. *Stevens*, 559 U.S. 460, 473 (internal quotation marks omitted). The Attorney General's disclosure requirement is plainly overbroad under that standard. The regulation lacks any tailoring to the State's investigative goals, and the State's interest in administrative convenience is weak. As a result, every demand that might deter association 'creates an unnecessary risk of chilling' in violation of the First Amendment. *Secretary of State of Md*. v. *Joseph H. Munson Co.*, 467 U.S. 947, 968. It does not make a difference in these cases if there is no disclosure to the public, see *Shelton*, 364 U.S., at 486, if some donors do not mind having their identities revealed, or if the relevant donor information is already disclosed to the IRS as a condition of federal tax-exempt status. California's disclosure requirement imposes a widespread burden on donors' associational rights, and this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State's interest in administrative convenience is sufficiently important."

V. Takings Clause; Violated by California Regulation Guaranteeing Union Access to Agricultural Employer's Property

Cedar Point Nursery v. Hassid, 141 S.Ct. 2063 (U.S., Roberts, 2021).

"A California regulation grants labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization. Cal. Code Regs., tit. 8, § 20900(e)(1)(C). The regulation mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. Organizers from the United Farm Workers sought to take access to property owned by two California growers—Cedar Point Nursery and Fowler Packing Company. The growers filed suit in Federal District Court seeking to enjoin enforcement of the access regulation on the grounds that it appropriated without compensation an easement for union organizers to enter their property and therefore constituted an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments. The District Court denied the growers' motion for a preliminary injunction and dismissed the complaint, holding that the access regulation did not constitute a *per se* physical taking because it did not allow the public to access the growers' property in a permanent and continuous manner. A divided panel of the Court of Appeals for the Ninth Circuit affirmed, and rehearing en banc was denied over dissent.

"Held: California's access regulation constitutes a *per se* physical taking."

"The growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments."

"The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: '[N]or shall private property be taken for public use, without just compensation.' When the government physically acquires private property for a public use, the Takings Clause obligates the government to provide the owner with just compensation. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321, 122 S.Ct. 1465, 152 L.Ed.2d 517. The Court assesses such physical takings using a *per se* rule: The government must pay for what it takes. *Id.*, at 322, 122 S.Ct. 1465.

"A different standard applies when the government, rather than appropriating private property for itself or a third party, instead imposes regulations restricting an owner's ability to use his own property. *Id*., at 321–322, 122 S.Ct. 1465. To determine whether such a use restriction amounts to a taking, the Court has generally applied the flexible approach set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631, considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Id.*, at 124, 98 S.Ct. 2646. But when the government physically appropriates property, *Penn Central* has no place—regardless whether the government action takes the form of a regulation, statute, ordinance, or decree."

"California's access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude. The right to exclude is 'a fundamental element of the property right.' *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180, 100 S.Ct. 383, 62 L.Ed.2d 332. The Court's precedents have thus treated government-authorized physical invasions as takings requiring just compensation. As in previous cases, the government here has appropriated a right of access to private property. Because the regulation appropriates a right to physically invade the growers' property—to literally 'take access'—it constitutes a *per se* physical taking under the Court's precedents."

"The view that the access regulation cannot qualify as a *per se* taking because it does not allow for permanent and continuous access 24 hours a day, 365 days a year is insupportable. The Court has held that a physical appropriation is a taking whether it is permanent or temporary; the duration of the appropriation bears only on the amount of compensation due. See *United States v. Dow*, 357 U.S. 17, 26, 78 S.Ct. 1039, 2 L.Ed.2d 1109. To be sure, the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868, discussed the heightened concerns associated with '[t]he permanence and absolute exclusivity of a physical occupation' in contrast to 'temporary limitations on the right to exclude,' and stated that '[n]ot every physical *invasion* is a taking.' *Id.*, at 435, n. 12, 102 S.Ct. 3164. But the regulation here is not transformed from a physical taking into a use restriction just because the access granted is restricted to union organizers, for a narrow purpose, and for a limited time. And although the Board disputes whether the access regulation appropriates an easement as defined by California law, it cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state property law.

"*PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741, does not cut against the Court's conclusion that the access regulation constitutes a *per se* taking. In *PruneYard* the California Supreme Court recognized a right to engage in leafleting at the PruneYard, a privately owned shopping center, and the Court applied the *Penn Central* factors to hold that no compensable taking had occurred. 447 U.S. at 78, 83, 100 S.Ct. 2035. *PruneYard* does not establish that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. Restrictions on how a business generally open to the public such as the PruneYard may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public."

"The Court declines to adopt the theory that the access regulation merely regulates, and does not appropriate, the growers' right to exclude. The right to exclude is not an empty formality that can be modified at the government's pleasure."

"The Board's fear that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property is unfounded. First, the Court's holding does nothing to efface the distinction between trespass and takings. The Court's precedents make clear that isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights, including traditional common law privileges to access private property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028–1029, 112 S.Ct. 2886, 120 L.Ed.2d 798. Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. Under this framework, government health and safety inspection regimes will generally not constitute takings. In this case, however, none of these considerations undermine the Court's determination that the access regulation gives rise to a *per se* physical taking."

VI. Sixth Amendment; Right to Jury Trial; New Constitutional Rule Requiring Unanimous State Court Jury Verdict for Conviction Does Not Apply Retroactively on Federal Collateral Review

Edwards v. Vannoy, 141 S.Ct. 1547 (U.S., Kavanaugh, 2021).

"In 2007, a Louisiana jury found petitioner Thedrick Edwards guilty of armed robbery, rape, and kidnapping. At the time, Louisiana law permitted non-unanimous jury verdicts if at least 10 of the 12 jurors found the defendant guilty. In Edwards's case, 11 of 12 jurors returned a guilty verdict as to some crimes, and 10 of 12 jurors returned a guilty verdict as to others. After Edwards's conviction became final on direct review, Edwards filed a federal habeas corpus petition, arguing that the non-unanimous jury verdict violated his constitutional right to a unanimous jury. The District Court rejected Edwards's claim as foreclosed by *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184, and the Fifth Circuit denied a certificate of appealability. While Edwards's petition for a writ of certiorari was pending, the Court repudiated *Apodoca* and held that a state jury must be unanimous to convict a criminal defendant of a serious offense. *Ramos* v. *Louisiana*, 590 U.S. ——, 140 S.Ct. 1390, 206 L.Ed.2d 583. Edwards now argues that the *Ramos* jury-unanimity rule applies retroactively on federal collateral review.

"Held: The *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review."

"A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded. But the Court has stated that new rules of criminal procedure ordinarily do not apply retroactively on federal *collateral* review. The Court has stated that a new procedural rule will apply retroactively on federal collateral review only if the new rule constitutes a 'watershed' rule of criminal procedure. *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (plurality opinion). When the *Teague* Court first articulated that 'watershed' exception, however, the Court stated that it was 'unlikely' that such watershed 'components of basic due process have yet to emerge.' *Id.,* at 313, 109 S.Ct. 1060. And in the 32 years since *Teague*, the Court has *never* found that any new procedural rule actually satisfies the purported exception."

"To determine whether *Ramos* applies retroactively on federal collateral review, the Court must first ask whether *Ramos* announced a new rule of criminal procedure and, if so, whether that rule falls within an exception for watershed rules of criminal procedure that apply retroactively on federal collateral review. The Court concludes that *Ramos* announced a new rule and that the jury-unanimity rule announced by *Ramos* does not apply retroactively on federal collateral review."

"The *Ramos* jury-unanimity rule is new because it was not '*dictated* by precedent existing at the time the defendant's conviction became final,' *Teague*, 489 U.S. at 301, 109 S.Ct. 1060, or 'apparent to all reasonable jurists' at that time, *Lambrix v. Singletary*, 520 U.S. 518, 528, 117 S.Ct. 1517, 137 L.Ed.2d 771. On the contrary, before *Ramos*, many courts interpreted *Apodaca* to allow for non-unanimous jury verdicts in state criminal trials. And the *Ramos* Court expressly repudiated *Apodaca*."

"The new rule announced in *Ramos* does not qualify as a 'watershed' procedural rule that applies retroactively on federal collateral review. In an attempt to distinguish *Ramos* from the long line of cases where the Court has declined to retroactively apply new procedural rules, Edwards emphasizes three aspects of *Ramos*: (i) the significance of the jury-unanimity right; (ii) *Ramos*'s reliance on the original meaning of the Constitution; and (iii) the effect of *Ramos* in preventing racial discrimination in the jury process. But the Court has refused to retroactively apply other momentous cases with similar attributes. In *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093, 20 L.Ed.2d 1308, the Court declined to retroactively apply *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, even though *Duncan* established the jury right itself. In *Whorton v. Bockting*, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1, the Court declined to retroactively apply *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, even though *Crawford* relied on the original meaning of the Sixth Amendment to restrict the use of hearsay evidence against criminal defendants. And in *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (*per curiam*), the Court declined to retroactively apply *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69, even though *Batson* held that state prosecutors may not discriminate on the basis of race when exercising individual peremptory challenges. There is no good rationale for treating *Ramos* differently from *Duncan*, *Crawford*, and *Batson*."

"Given the Court's numerous precedents holding that landmark and historic decisions announcing new rules of criminal procedure do not apply retroactively on federal collateral review, the Court acknowledges that the watershed exception is moribund and that no new rules of criminal procedure can satisfy the purported exception for watershed rules. Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts. Moreover, no one can reasonably rely on an exception that is non-existent in practice, so no reliance interests can be affected by forthrightly acknowledging reality. The watershed exception must 'be

regarded as retaining no vitality.' *Herrera* v. *Wyoming*, 587 U.S. ——, ——, 139 S.Ct. 1686, 1697, 203 L.Ed.2d 846 (internal quotation marks omitted)."

VII. Eleventh Amendment; Sovereign Immunity Does Not Preclude Condemnation of State-Owned Land by Private Company for Interstate Pipeline

PennEast Pipeline Company, LLC v. New Jersey, 141 S.Ct. 2244 (U.S., Roberts, 2021).

"Congress passed the Natural Gas Act in 1938 to regulate the transportation and sale of natural gas in interstate commerce. To build an interstate pipeline, a natural gas company must obtain from the Federal Energy Regulatory Commission a certificate reflecting that such construction 'is or will be required by the present or future public convenience and necessity.' 15 U.S.C. § 717f(e). As originally enacted, the NGA did not provide a mechanism for certificate holders to secure property rights necessary to build pipelines, often leaving certificate holders with only an illusory right to build. Congress remedied this defect in 1947 by amending the NGA to authorize certificate holders to exercise the federal eminent domain power, thereby ensuring that certificates of public convenience and necessity could be given effect. See § 717f(h).

"FERC granted petitioner PennEast Pipeline Co. a certificate of public convenience and necessity authorizing construction of a 116-mile pipeline from Pennsylvania to New Jersey. Several parties, including respondent New Jersey, petitioned for review of FERC's order in the D. C. Circuit. The D. C. Circuit has held those proceedings in abeyance pending resolution of this case. PennEast filed various complaints in Federal District Court in New Jersey seeking to exercise the federal eminent domain power under § 717f(h) to obtain rights-of-way along the pipeline route approved by FERC. As relevant here, PennEast sought to condemn parcels of land in which either New Jersey or the New Jersey Conservation Foundation asserts a property interest. New Jersey moved to dismiss PennEast's complaints on sovereign immunity grounds. The District Court denied the motion, and it granted PennEast's requests for a condemnation order and preliminary injunctive relief. The Third Circuit vacated the District Court's order insofar as it awarded PennEast relief with respect to New Jersey's property interests. The Third Circuit concluded that because § 717f(h) did not clearly delegate to certificate holders the Federal Government's ability to sue nonconsenting States, PennEast was not authorized to condemn New Jersey's property.

"Held: Section 717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States."

"The United States raises a threshold challenge to the Third Circuit's jurisdiction below on the grounds that § 717r(b) grants the court of appeals reviewing FERC's certificate order (here, the D. C. Circuit) 'exclusive' jurisdiction to 'affirm, modify, or set aside such order.' The Court rejects this challenge. New Jersey does not seek to modify FERC's order; it asserts a defense against the condemnation proceedings initiated by PennEast. The Third Circuit's decision that § 717f(h) does not grant natural gas companies the right to bring condemnation suits against States did not 'modify' or 'set aside' FERC's order, which neither purports to grant PennEast the right to file a condemnation suit against States nor addresses whether § 717f(h) grants that right. Contrary to the argument of the United States, New Jersey's appeal is not a collateral attack on the FERC order."

"The Federal Government has exercised its eminent domain authority since the founding, connecting our country through turnpikes, bridges, and railroads—and more recently through

pipelines, telecommunications infrastructure, and electric transmission facilities. The Court has upheld these exercises of the federal eminent domain power—whether by the Government or a private corporation, whether through the upfront taking of property or a condemnation action, and whether against private property or state-owned land. Section 717f(h) falls within this established practice."

"Governments have long taken property for public use without the owner's consent. The United States is no different. While the Constitution and Bill of Rights did not use the term 'eminent domain,' the Takings Clause of the Fifth Amendment ('nor shall private property be taken for public use, without just compensation') presupposed the existence of such a power. Initially, the Federal Government exercised its eminent domain authority in areas subject to exclusive federal jurisdiction. The Court later confirmed that federal eminent domain extended to property within a State. *Kohl* v. *United States*, 91 U.S. 367. The Court's decision in *Kohl*—which upheld the power of the United States to condemn land in Ohio to construct a federal building—observed that eminent domain was a 'means well known when the Constitution was adopted' and that '[t]he powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States.' *Id*., at 371–372. *Kohl* involved the condemnation of private land, but the Court subsequently made clear that '[t]he fact that land is owned by a state is no barrier to its condemnation by the United States.' *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534."

"For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties. The Colonies, the States, and the Federal Government have commonly authorized the private condemnation of land for public works. And in the years following *Kohl*, the Court confirmed that private delegatees, like the United States, can exercise the federal eminent domain power within the States. In *Luxton* v. *North River Bridge Co*., 153 U.S. 525, for example, the Court rejected a landowner's claim that Congress could not delegate its authority to condemn property necessary to construct a bridge between New York and New Jersey. Congress had the sovereign power to construct bridges for interstate commerce, and the Court confirmed Congress could choose to do so through a corporation. *Id.*, at 530. These powers, the Court noted, could be exercised 'with or without a concurrent act of the State in which the lands lie.' *Ibid*. Early cases also reflected the understanding that state property was not immune from the exercise of delegated federal eminent domain power. See *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 F. 9 (Bradley, Cir. J.). The contrary position—that a federal delegatee could not condemn a State's land without the State's consent—would give rise to the 'dilemma of requiring the consent of the state' in virtually every infrastructure project authorized by the Federal Government. *Id.*, at 17. The Court in *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641, echoed *Stockton*'s explanation of the superior eminent domain power of the Federal Government when it rejected a challenge to a private railroad company's exercise of the federal eminent domain power against land owned by the Cherokees. In reaching that result, the Court acknowledged that 'the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States,' and the Court labeled as 'strange' the notion that the Federal Government 'could not exercise the same power in a Territory occupied by an Indian nation or tribe.' 135 U.S., at 656–657."

"Section 717f(h) delegates to certificate holders the power to condemn any necessary rights-of-way, including land in which a State holds an interest. This delegation of the federal eminent domain authority is consistent with the Nation's history and this Court's precedents. FERC's issuance to a company of a certificate of public convenience and necessity to build a pipeline carries with it the

power—if the company cannot acquire the necessary rights-of-way by contract at an agreed compensation—to 'acquire the same by the exercise of the right of eminent domain.' § 717f(h). This delegation is categorical; by its terms, § 717f(h) delegates to certificate holders the power to condemn any necessary rights-of-way, including land in which a State holds an interest."

"Respondents contend that sovereign immunity bars condemnation actions against a nonconsenting State. Alternatively, respondents contend that § 717f(h) does not speak with sufficient clarity to authorize such actions. The Court rejects each argument, for reasons stated below."

"'States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution.' *Alden* v. *Maine*, 527 U.S. 706, 713. A State may be sued only in limited circumstances, including where the State expressly consents or where Congress clearly abrogates the State's immunity under the Fourteenth Amendment. A State may also be sued if it has implicitly agreed to suit in the 'plan of the Convention,' which is shorthand for 'the structure of the original Constitution itself.' *Id.*, at 728. The Court has looked to the plan of the Convention to permit actions against nonconsenting States in the context of bankruptcy proceedings, suits by other States, and suits by the Federal Government."

"Respondents do not dispute that the NGA empowers certificate holders to condemn private property, but they contend that the same certificate holders have no power to condemn state-owned property under § 717f(h). It is argued that the NGA cannot authorize such condemnation actions under the Court's decision in *Seminole Tribe of Fla*. v. *Florida*, 517 U.S. 44, which generally prohibits Congress from using its Article I powers to abrogate state sovereign immunity. But congressional abrogation is not the only means of subjecting States to suit. The States implicitly consented to private condemnation suits when they ratified the Constitution, and respondents' arguments to the contrary cannot be squared with the Court's precedents.

"Respondents do not dispute that the Federal Government enjoys a power of eminent domain superior to that of the States, or that the Federal Government can delegate that power to private parties. Respondents instead point to the absence of founding-era evidence of private condemnation suits against nonconsenting States to maintain that States did not consent to such suits when they entered the federal system. Respondents would divorce the federal eminent domain power from the power to bring condemnation actions—and then argue that the latter cannot be delegated to private parties with respect to state-owned lands. But the eminent domain power is inextricably intertwined with condemnation authority. Separating the two would diminish the eminent domain power of the federal sovereign, which the State may not do. See *Kohl*, 91 U.S., at 374. Absent the power to condemn States' property interests, the only constitutionally permissible way of exercising the federal eminent domain power would be to take property up front and require States to sue for compensation later. State sovereign immunity would not be served by favoring private or Government-supported invasions of state-owned lands over judicial proceedings.

"The Court held in *United States* v. *Texas*, 143 U.S. 621, that it 'does no violence to the inherent nature of sovereignty' for a State to be sued by 'the government established for the common and equal benefit of the people of all the States.' *Id.*, at 646. In so holding, the Court did not insist upon examples from the founding era of federal suits against States. Similar structural considerations support the conclusion that States consented to the federal eminent domain power, whether that power is exercised by the Government or its delegatees. The absence of a perfect historical analogue to the proceedings PennEast initiated below does not suggest otherwise."

"Finally, respondents argue that even if States agreed in the plan of the Convention to condemnation suits by Federal Government delegatees, the NGA does not authorize such suits with the clarity required by the Court's precedents. There is no requirement, however, that the Federal Government speak with 'unmistakable clarity' when authorizing a private party to exercise its eminent domain power."

VIII. Voting Rights Act; Not Violated by Arizona Restrictive Statutes

Brnovich v. Democratic National Committee, 141 S.Ct. 2321 (U.S., Alito, 2021).

"Arizona law generally makes it very easy to vote. Voters may cast their ballots on election day in person at a traditional precinct or a 'voting center' in their county of residence. Ariz. Rev. Stat. § 16–411(B)(4). Arizonans also may cast an 'early ballot' by mail up to 27 days before an election, §§ 16–541, 16–542(C), and they also may vote in person at an early voting location in each county, §§ 16–542(A), (E). These cases involve challenges under § 2 of the Voting Rights Act of 1965 (VRA) to aspects of the State's regulations governing precinct-based election-day voting and early mail-in voting. First, Arizonans who vote in person on election day in a county that uses the precinct system must vote in the precinct to which they are assigned based on their address. See § 16–122; see also § 16–135. If a voter votes in the wrong precinct, the vote is not counted. Second, for Arizonans who vote early by mail, Arizona House Bill 2023 (HB 2023) makes it a crime for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed. §§ 16–1005(H)–(I).

"The Democratic National Committee and certain affiliates filed suit, alleging that both the State's refusal to count ballots cast in the wrong precinct and its ballot-collection restriction had an adverse and disparate effect on the State's American Indian, Hispanic, and African-American citizens in violation of § 2 of the VRA. Additionally, they alleged that the ballot-collection restriction was 'enacted with discriminatory intent' and thus violated both § 2 of the VRA and the Fifteenth Amendment. The District Court rejected all of the plaintiffs' claims. The court found that the out-of-precinct policy had no 'meaningfully disparate impact' on minority voters' opportunities to elect representatives of their choice. Turning to the ballot-collection restriction, the court found that it was unlikely to cause 'a meaningful inequality' in minority voters' electoral opportunities and that it had not been enacted with discriminatory intent. A divided panel of the Ninth Circuit affirmed, but the en banc court reversed. It first concluded that both the out-of-precinct policy and the ballot-collection restriction imposed a disparate burden on minority voters because they were more likely to be adversely affected by those rules. The en banc court also held that the District Court had committed clear error in finding that the ballot-collection law was not enacted with discriminatory intent.

"Held: Arizona's out-of-precinct policy and HB 2023 do not violate § 2 of the VRA, and HB 2023 was not enacted with a racially discriminatory purpose."

"Two threshold matters require the Court's attention. First, the Court rejects the contention that no petitioner has Article III standing to appeal the decision below as to the out-of-precinct policy. All that is needed to entertain an appeal of that issue is one party with standing. *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U.S. ___, ___, n. 6. Attorney General Brnovich, as an authorized representative of the State (which intervened below) in any action in

federal court, fits the bill. See *Virginia House of Delegates* v. *Bethune-Hill*, 587 U.S. ___, ___. Second, the Court declines in these cases to announce a test to govern all VRA § 2 challenges to rules that specify the time, place, or manner for casting ballots. It is sufficient for present purposes to identify certain guideposts that lead to the Court's decision in these cases."

"The Court's statutory interpretation starts with a careful consideration of the text."

"The Court first construed the current version of § 2 in *Thornburg* v. *Gingles*, 478 U.S. 30, which was a vote-dilution case where the Court took its cue from § 2's legislative history. The Court's many subsequent vote-dilution cases have followed the path *Gingles* charted. Because the Court here considers for the first time how § 2 applies to generally applicable time, place, or manner voting rules, it is appropriate to take a fresh look at the statutory text."

"In 1982, Congress amended the language in § 2 that had been interpreted to require proof of discriminatory intent by a plurality of the Court in *Mobile* v. *Bolden*, 446 U.S. 55. In place of that language, § 2(a) now uses the phrase 'in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color.' Section 2(b) in turn explains what must be shown to establish a § 2 violation. Section 2(b) states that § 2 is violated only where 'the political processes leading to nomination or election' are not '*equally open* to participation' by members of the relevant protected group '*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.' (Emphasis added.) In § 2(b), the phrase 'in that' is 'used to specify the respect in which a statement is true.' New Oxford American Dictionary 851. Thus, equal openness and equal opportunity are not separate requirements. Instead, it appears that the core of § 2(b) is the requirement that voting be 'equally open.' The statute's reference to equal 'opportunity' may stretch that concept to some degree to include consideration of a person's ability to use the means that are equally open. But equal openness remains the touchstone."

"Another important feature of § 2(b) is its 'totality of circumstances' requirement. Any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered."

"The Court mentions several important circumstances but does not attempt to compile an exhaustive list."

"The size of the burden imposed by a challenged voting rule is highly relevant. Voting necessarily requires some effort and compliance with some rules; thus, the concept of a voting system that is 'equally open' and that furnishes equal 'opportunity' to cast a ballot must tolerate the 'usual burdens of voting.' *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 198. Mere inconvenience is insufficient."

"The degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration. The burdens associated with the rules in effect at that time are useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally 'open' or furnishing an equal 'opportunity' to vote in the sense meant by § 2. Widespread current use is also relevant."

"The size of any disparities in a rule's impact on members of different racial or ethnic groups is an important factor to consider. Even neutral regulations may well result in disparities in rates of

voting and noncompliance with voting rules. The mere fact that there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. And small disparities should not be artificially magnified."

"Consistent with § 2(b)'s reference to a States' 'political processes,' courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision. Thus, where a State provides multiple ways to vote, any burden associated with one option cannot be evaluated without also taking into account the other available means."

"The strength of the state interests—such as the strong and entirely legitimate state interest in preventing election fraud—served by a challenged voting rule is an important factor. Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest. In determining whether a rule goes too far 'based on the totality of circumstances,' rules that are supported by strong state interests are less likely to violate § 2."

"Some factors identified in *Thornburg* v. *Gingles,* 478 U.S. 30, were designed for use in vote-dilution cases and are plainly inapplicable in a case that involves a challenge to a facially neutral time, place, or manner voting rule. While § 2(b)'s 'totality of circumstances' language permits consideration of certain other *Gingles* factors, their only relevance in cases involving neutral time, place, and manner rules is to show that minority group members suffered discrimination in the past and that effects of that discrimination persist. The disparate-impact model employed in Title VII and Fair Housing Act cases is not useful here."

"Section 2(b) directs courts to consider 'the totality of circumstances,' but the dissent would make § 2 turn almost entirely on one circumstance: disparate impact. The dissent also would adopt a least-restrictive means requirement that would force a State to prove that the interest served by its voting rule could not be accomplished in any other less burdensome way. Such a requirement has no footing in the text of § 2 or the Court's precedent construing it and would have the potential to invalidate just about any voting rule a State adopts. Section 2 of the VRA provides vital protection against discriminatory voting rules, and no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated. Even so, § 2 does not transfer the States' authority to set non-discriminatory voting rules to the federal courts."

"Neither Arizona's out-of-precinct policy nor its ballot-collection law violates § 2 of the VRA."

"Having to identify one's polling place and then travel there to vote does not exceed the 'usual burdens of voting.' *Crawford*, 553 U.S., at 198. In addition, the State made extensive efforts to reduce the impact of the out-of-precinct policy on the number of valid votes ultimately cast, *e.g.,* by sending a sample ballot to each household that includes a voter's proper polling location. The burdens of identifying and traveling to one's assigned precinct are also modest when considering Arizona's 'political processes' as a whole. The State offers other easy ways to vote, which likely explains why out-of-precinct votes on election day make up such a small and apparently diminishing portion of overall ballots cast.

"Next, the racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms. Of the Arizona counties that reported out-of-precinct ballots in the 2016 general election, a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters who voted on election day cast an out-of-precinct ballot. For non-minority voters,

the rate was around 0.5%. A procedure that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open.

"Appropriate weight must be given to the important state interests furthered by precinct-based voting. It helps to distribute voters more evenly among polling places; it can put polling places closer to voter residences; and it helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote. Precinct-based voting has a long pedigree in the United States, and the policy of not counting out-of-precinct ballots is widespread.

"The Court of Appeals discounted the State's interests because it found no evidence that a less restrictive alternative would threaten the integrity of precinct-based voting. But § 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives. Considering the modest burdens allegedly imposed by Arizona's out-of-precinct policy, the small size of its disparate impact, and the State's justifications, the rule does not violate § 2."

"Arizona's HB 2023 also passes muster under § 2. Arizonans can submit early ballots by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office. These options entail the 'usual burdens of voting,' and assistance from a statutorily authorized proxy is also available. The State also makes special provision for certain groups of voters who are unable to use the early voting system. See § 16–549(C). And here, the plaintiffs were unable to show the extent to which HB 2023 disproportionately burdens minority voters.

"Even if the plaintiffs were able to demonstrate a disparate burden caused by HB 2023, the State's 'compelling interest in preserving the integrity of its election procedures' would suffice to avoid § 2 liability. *Purcell* v. *Gonzalez*, 549 U.S. 1, 4. The Court of Appeals viewed the State's justifications for HB 2023 as tenuous largely because there was no evidence of early ballot fraud in Arizona. But prevention of fraud is not the only legitimate interest served by restrictions on ballot collection. Third-party ballot collection can lead to pressure and intimidation. Further, a State may take action to prevent election fraud without waiting for it to occur within its own borders."

"HB 2023 was not enacted with a discriminatory purpose, as the District Court found. Appellate review of that conclusion is for clear error. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287–288. The District Court's finding on the question of discriminatory intent had ample support in the record. The court considered the historical background and the highly politicized sequence of events leading to HB 2023's enactment; it looked for any departures from the normal legislative process; it considered relevant legislative history; and it weighed the law's impact on different racial groups. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–268. The court found HB 2023 to be the product of sincere legislative debate over the wisdom of early mail-in voting and the potential for fraud. And it took care to distinguish between racial motives and partisan motives. The District Court's interpretation of the evidence was plausible based on the record, so its permissible view is not clearly erroneous. See *Anderson* v. *Bessemer City*, 470 U.S. 564, 573–574. The Court of Appeals concluded that the District Court committed clear error by failing to apply a 'cat's paw' theory—which analyzes whether an actor was a 'dupe' who was 'used by another to accomplish his purposes.' That theory has its origin in employment discrimination cases and has no application to legislative bodies."

IX. Indian Tribes; CARES Act Relief

Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S.Ct. 2434 (U.S., Sotomayor, 2021).

"Title V of the Coronavirus Aid, Relief, and Economic Security (CARES) Act allocates $8 billion to 'Tribal governments' to compensate for unbudgeted expenditures made in response to COVID–19. 42 U.S.C. § 801(a)(2)(B). The question in these cases is whether Alaska Native Corporations (ANCs) are eligible to receive any of that $8 billion. Under the CARES Act, a 'Tribal government' is the 'recognized governing body of an Indian tribe' as defined in the Indian Self-Determination and Education Assistance Act (ISDA). §§ 801(g)(5), (1). ISDA, in turn, defines an 'Indian tribe' as 'any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act [(ANCSA),] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.' 25 U.S.C. § 5304(e).

"Consistent with the Department of the Interior's longstanding view that ANCs are Indian tribes under ISDA, the Department of the Treasury determined that ANCs are eligible for relief under Title V of the CARES Act, even though ANCs are not 'federally recognized tribes' (*i.e.,* tribes with which the United States has entered into a government-to-government relationship). A number of federally recognized tribes sued. The District Court entered summary judgment for the Treasury Department and the ANCs, but the Court of Appeals for the District of Columbia Circuit reversed.

"Held: ANCs are 'Indian tribe[s]' under ISDA and thus eligible for funding under Title V of the CARES Act."

"The ANCs argue that they fall under the plain meaning of ISDA's definition of 'Indian tribe.' Respondents ask the Court to adopt a term-of-art construction that equates being 'recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians' with being a 'federally recognized tribe.'"

"Under the plain meaning of ISDA, ANCs are Indian tribes. ANCs are 'established pursuant to' ANCSA and thereby 'recognized as eligible' for that Act's benefits. ANCSA, which made ANCs eligible to select tens of millions of acres of land and receive hundreds of millions of tax-exempt dollars, 43 U.S.C. §§ 1605, 1610, 1611, is a special program provided by the United States to 'Indians,' *i.e.,* Alaska Natives. Given that ANCSA is the only statute ISDA's 'Indian tribe' definition mentions by name, eligibility for ANCSA's benefits satisfies the definition's final 'recognized-as-eligible' clause."

"Respondents ask the Court to read ISDA's 'Indian tribe' definition as a term of art. But respondents fail to establish that the language of ISDA's recognized-as-eligible clause was an accepted way of saying 'a federally recognized tribe' in 1975, when ISDA was passed. Nor is the mere inclusion of the word 'recognized' enough to import a term-of-art meaning. Respondents also fail to show that the language of the recognized-as-eligible clause later became a term of art that should be backdated to ISDA's passage in 1975."

"Even if ANCs did not satisfy the recognized-as-eligible clause, they would still satisfy ISDA's definition of an 'Indian tribe.' If respondents were correct that only a federally recognized tribe can

satisfy that clause, then the best way to read the 'Indian tribe' definition would be for the recognized-as-eligible clause not to apply to ANCs at all. Otherwise, despite being prominently 'includ[ed]' in the 'Indian tribe' definition, 25 U.S.C. § 5304(e), all ANCs would be excluded by a federal-recognition requirement there is no reasonable prospect they could ever satisfy."

"Respondents' remaining arguments that ANCs are not Indian tribes under ISDA are unpersuasive. They first argue that the ANCs misrepresent how meaningful a role they play under ISDA because the actual number of ISDA contracts held by ANCs is negligible. This point is largely irrelevant. No one would argue that a federally recognized tribe was not an Indian tribe under ISDA just because it had never entered into an ISDA contract. Respondents further argue that treating ANCs as Indian tribes would complicate the administration of ISDA. But respondents point to no evidence of such administrative burdens in the 45 years the Executive Branch has treated ANCs as Indian tribes. Respondents also warn that blessing ANCs' status under ISDA will give ANCs ammunition to press for participation in other statutes that incorporate ISDA's 'Indian tribe' definition. This concern cuts both ways, as adopting respondents' position would presumably exclude ANCs from the many other statutes incorporating ISDA's definition, even those under which ANCs have long benefited."

"One respondent tribe further argues that the CARES Act excludes ANCs regardless of whether they are Indian tribes under ISDA, because ANCs do not have a 'recognized governing body.' In the ISDA context, the term 'recognized governing body' has long been understood to apply to an ANC's board of directors, and nothing in either the CARES Act or ISDA suggests that the term places additional limits on the kinds of Indian tribes eligible to benefit under the statutes."

X. Tennessee Constitution; Actions Against State or State Actor Challenging Statute's Constitutionality

A. Trial; Three-Judge Panel

Chapter 566, Public Acts 2021, adding T.C.A. § 20-18-101–106 eff. July 1, 2021.

20-18-101.

"(a) A civil action in which the complaint meets each of the following criteria must be heard and determined by a three-judge panel pursuant to this chapter:

(1) Challenges the constitutionality of:
(A) A state statute, including a statute that apportions or redistricts state legislative or congressional districts;
(B) An executive order; or
(C) An administrative rule or regulation;
(2) Includes a claim for declaratory judgment or injunctive relief; and
(3) Is brought against the state, a state department or agency, or a state official acting in their official capacity.

"(b)

(1) When an action described in subsection (a) is filed, the person or entity filing the action shall provide notice of the complaint to the presiding judge of the judicial district, who shall notify the supreme court. The supreme court shall select two (2) trial court judges

of courts of record to sit with the judge to whom the civil action was originally assigned as a three-judge panel to hear and decide the civil action.

(2) To ensure that members of the three-judge panel are drawn from different regions of the state, the supreme court shall select one (1) judge from each grand division of the state other than the grand division in which the civil action was originally filed.

(3) The supreme court shall designate one (1) member of the panel to serve as the chief judge.

(4) Should any member of the three-judge panel be disqualified or otherwise unable to serve on the panel, the supreme court shall appoint as a replacement another trial court judge from the same grand division as the judge being replaced, who shall serve by interchange, as provided in Rules 10B and 11 of the Tennessee Supreme Court Rules.

(5) In the event of a disagreement among the three (3) judges comprising the panel, the majority prevails.

(6) The rules promulgated by the supreme court shall govern the practice and procedure of the three-judge panel including what procedural matters may be decided solely by the chief judge.

"(c) The three-judge panel shall sit in the supreme court building in the grand division in which the civil action was filed, unless a location is otherwise designated by the supreme court."

Section 20-18-102 provides that venue lies in the county where a plaintiff resides. For out-of-state plaintiffs, venue is in Sumner County.

Under Section 20-18-104, the court of appeals has jurisdiction of appeals of rulings from the three-judge-panel.

Section 20-18-105 contains a special procedure to be implemented in cases involving apportionment or redistricting of state legislative or congressional districts.

Tennessee Supreme Court Rule 54 eff. July 1, 2021.

"Rule 54: Interim Rule for Special Three-Judge Panels

"Section 1. Applicability

"This rule applies to civil actions filed in a trial court in this state in which the state, a department or agency of the state, or a state official acting in his or her official capacity is a defendant in a complaint that:

"(a) challenges the constitutionality of a state statute, including a statute that apportions or redistricts state legislative or congressional districts; or an executive order; or an administrative rule or regulation; and

"(b) includes a claim for declaratory judgment or injunctive relief.

"Comment: This rule applies to amended complaints, counter-claims, and third-party complaints as well as complaints.

"Section 2. Procedure for Initiating the Empaneling of a Special Three-Judge Trial Court.

"(a) The person or entity filing the action described in Section 1 shall provide notice of the complaint to the presiding judge of the judicial district in which the action is filed. The notice must be filed contemporaneously with the filing of the complaint, amended complaint, counter-claim, or third-party complaint and must be served on all parties to the case.

"(b) The notice must:

(1) list all parties and, if available, counsel and complete contact information for counsel;

(2) state the cause number and style of the case, the trial court in which it is pending, and, if available, the name of the judge to whom it is assigned;

(3) summarize the dispute and all claims asserted against the state or a state official, department, or agency; and

(4) attach a copy of the complaint, amended complaint, counter-claim, or third-party complaint.

"(c) Service of the notice shall comply with the Tennessee Rules of Civil Procedure applicable to service of the pleading with which the notice is filed.

"(d) The clerk of the trial court in which the action is filed shall notify the presiding judge of any notice requesting a three-judge panel.

"(e) A defendant as defined in Section 1 may request the empaneling of a special three-judge panel by providing notice consistent with the provisions of this rule within sixty (60) days of the date of service of the complaint, amended complaint, counter-claim, or third-party complaint.

"(f) For matters pending before July 1, 2021, notice compliant with the provisions of subsection (b) must be filed by July 30, 2021.

"(g) The filing of a notice under this rule stays all proceedings in the trial court until the Supreme Court appoints a three-judge panel as provided in Section 3.

"Section 3. Action on Notice; Composition of the Special Three-Judge Panel Trial Court.

"(a) The presiding judge of the judicial district in which the notice was filed shall make an initial determination as to whether the action filed qualifies under the provisions of Section 1 requiring the empaneling of a special three-judge panel. Within ten (10) days of notification from the clerk of the trial court, the presiding judge shall notify the Supreme Court of the filing of the notice and the initial determination as to whether the action qualifies under the provisions of Section 1. The Supreme Court makes the final determination as to whether the action qualifies under the provisions of Section 1. If the Supreme Court determines that it does not, the Court shall remand the case to the original trial judge to whom the case was assigned. If the Supreme Court determines that it does, the Court shall then select two (2) trial judges of courts of record to sit with the judge to whom the case was originally assigned as a three-judge panel to hear and decide the case.

"(b) The special three-judge panel will be composed of:

(1) the trial judge of the judicial district to which the case was originally assigned; and

(2) one trial judge from each grand division of the state other than the grand division in which the action was originally filed.

"(c) The Supreme Court shall appoint one of the three judges to serve as the chief judge of the special three-judge panel.

"(d) Should any member of the three-judge panel be disqualified or otherwise unable to serve on the panel, the Supreme Court shall appoint as a replacement another trial court judge from the same grand division as the judge being replaced, who shall serve by interchange, as provided in Rules 10B and 11 of the Tennessee Supreme Court Rules.

"Section 4. Location of Special Three-Judge Panel; Governing Rules.

"(a) The courtroom of the trial judge to whom the case was originally assigned or another appropriate courtroom in the judicial district shall serve as the location for any in-person hearings before the special three-judge panel, unless otherwise directed by the Supreme Court.

"(b) The use of technology, including telephone, teleconferencing, email, video conferencing or other means that do not involve in-person contact shall be permitted.

"(c) Except as provided by this rule, the Tennessee Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure and all other statutes and rules applicable to civil litigation in a trial court in this state apply to proceedings before a special three-judge panel.

"Section 5. Actions by Judges Serving on a Special Three-Judge Panel.

"(a) In the event of any disagreement on any matter before the special three-judge panel, the decision of the majority of the panel will prevail.

"(b) A single judge of a special three-judge panel may not independently order a temporary restraining order, temporary injunction, or an order that finally disposes of a claim before the court.

"Section 6. Appeals.

"(a) Except as provided in subsection (b), the Court of Appeals shall have jurisdiction of appeals from the decisions of a special three-judge panel appointed pursuant to Tennessee Code Annotated § 20-18-101, et seq., and this rule. Notice of appeal shall be filed with the Court of Appeals in compliance with the Tennessee Rules of Appellate Procedure.

"(b) In cases involving a constitutional challenge to a redistricting or apportionment plan enacted by the general assembly, an appeal by any party is to the Supreme Court within thirty (30) days from the entry of the judgment of the special three-judge panel.

"(c) If the constitutional challenge raised in the complaint, amended complaint, counter-claim, or third-party complaint is denied or reversed on appeal, the chief judge of the three-judge panel shall promptly notify the Supreme Court of that fact. The Supreme Court may then dissolve the three-judge panel and re-assign the case to the trial judge to whom the case was originally assigned to preside over and decide any remaining causes of action."

B. State's Right of Appeal from Interlocutory Order Regarding Injunction

Chapter 564, Public Acts 2021, adding T.C.A. § 27-1-101 eff. July 1, 2021.

"In an action brought against this state, a department or agency of this state, or an official of this state in their official capacity that challenges the constitutionality of a state statute, the state may appeal as of right from an interlocutory order of a circuit or chancery court of this state that:

(1) Grants, continues, or modifies an injunction; or

(2) Denies a motion to dissolve or modify an injunction."

CIVIL RIGHTS

I. Immigration Law

A. Noncitizen Seeking Cancellation of Removal Has Burden of Showing No Conviction for a Disqualifying Offense

Pereida v. Wilkinson, 141 S.Ct. 754 (U.S., Gorsuch, 2021).

"Immigration officials initiated removal proceedings against Clemente Avelino Pereida for entering and remaining in the country unlawfully, a charge Mr. Pereida did not contest. Mr. Pereida sought instead to establish his eligibility for cancellation of removal, a discretionary form of relief under the Immigration and Nationality Act (INA). 8 U.S.C. §§ 1229a(c)(4), 1229b(b)(1). Eligibility requires certain nonpermanent residents to prove, among other things, that they have not been convicted of specified criminal offenses. § 1229b(b)(1)(C). While his proceedings were pending, Mr. Pereida was convicted of a crime under Nebraska state law. See Neb. Rev. Stat. § 28–608 (2008). Analyzing whether Mr. Pereida's conviction constituted a 'crime involving moral turpitude' that would bar his eligibility for cancellation of removal, §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), the immigration judge found that the Nebraska statute stated several separate crimes, some of which involved moral turpitude and one—carrying on a business without a required license—which did not. Because Nebraska had charged Mr. Pereida with using a fraudulent social security card to obtain employment, the immigration judge concluded that Mr. Pereida's conviction was likely not for the crime of operating an unlicensed business, and thus the conviction likely constituted a crime involving moral turpitude. The Board of Immigration Appeals and the Eighth Circuit concluded that the record did not establish which crime Mr. Pereida stood convicted of violating. But because Mr. Pereida bore the burden of proving his eligibility for cancellation of removal, the ambiguity in the record meant he had not carried that burden and he was thus ineligible for discretionary relief.

"Held: Under the INA, certain nonpermanent residents seeking to cancel a lawful removal order bear the burden of showing they have not been convicted of a disqualifying offense. An alien has not carried that burden when the record shows he has been convicted under a statute listing multiple offenses, some of which are disqualifying, and the record is ambiguous as to which crime formed the basis of his conviction."

"The INA squarely places the burden of proof on the alien to prove eligibility for relief from removal. § 1229a(c)(4)(A). Mr. Pereida accepts his burden to prove three of four statutory eligibility requirements but claims a different rule should apply to the final requirement at issue here—whether he was convicted of a disqualifying offense. Mr. Pereida identifies nothing in the statutory text that singles out that lone requirement for special treatment. The plain reading of the text is confirmed by the context of three nearby provisions. First, the INA specifies particular forms of evidence that 'shall constitute proof of a criminal conviction' in 'any proceeding under this chapter,' regardless of whether the proceedings involve efforts by the government to remove an alien or efforts by the alien to establish eligibility for relief. § 1229a(c)(3)(B). Next, Congress knows how to impose the burden on the government to show that an alien has committed a crime of moral turpitude, see §§ 1229a(c)(3), 1227(a)(2)(A)(i), and yet it chose to flip the burden when it comes to applications for relief from removal. Finally, the INA often requires an alien seeking admission to show 'clearly and beyond doubt' that he is 'entitled to be admitted and is not inadmissible,' § 1229a(c)(2), which in turn requires the alien to demonstrate that he has not

committed a crime involving moral turpitude, § 1182(a)(2)(A)(i)(I). Mr. Pereida offers no account why a rational Congress would have placed this burden on an alien who is seeking admission, but lift it from an alien who has entered the country illegally and faces a lawful removal order."

"Even so, Mr. Pereida contends that he can carry the burden of showing his crime did not involve moral turpitude using the so-called 'categorical approach.' Applying the categorical approach, a court considers not the facts of an individual's conduct, but rather whether the offense of conviction necessarily or categorically triggers a consequence under federal law. Under Mr. Pereida's view, because a person could hypothetically violate the Nebraska statute without committing fraud—*i.e.*, by carrying on a business without a license—the statute does not qualify as a crime of moral turpitude. But application of the categorical approach implicates two inquiries—one factual (what was Mr. Pereida's crime of conviction?), the other hypothetical (could someone commit that crime of conviction without fraud?). And the Nebraska statute is divisible, setting forth multiple crimes, some of which the parties agree are crimes of moral turpitude. In cases involving divisible statutes, the Court has told judges to determine which of the offenses an individual committed by employing a 'modified' categorical approach, 'review[ing] the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction.' *Mathis* v. *United States*, 579 U.S. ——, ——. This determination, like many issues surrounding the who, what, when, and where of a prior conviction, involves questions of historical fact. The party who bears the burden of proving these facts bears the risks associated with failing to do so. This point is confirmed by the INA's terms and the logic undergirding them. A different conclusion would disregard many precedents. See, *e.g., Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607. Just as evidentiary gaps work against the government in criminal cases where it bears the burden, see, *e.g., Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1, they work against the alien seeking relief from a lawful removal order. Congress can, and has, allocated the burden differently."

"It is not this Court's place to choose among competing policy arguments. Congress was entitled to conclude that uncertainty about an alien's prior conviction should not redound to his benefit. And Mr. Pereida fails to acknowledge some of the tools Congress seemingly did afford aliens faced with record-keeping challenges. See, *e.g.,* § 1229a(c)(3)(B)."

B. Notice to Appear Sufficient to Trigger Stop-Time Rule Is a Single Document Containing All Necessary Information

Niz-Chavez v. Garland, 141 S.Ct. 1474 (U.S., Gorsuch, 2021).

"Nonpermanent resident aliens ordered removed from the United States under federal immigration law may be eligible for discretionary relief if, among other things, they can establish their continuous presence in the country for at least 10 years. 8 U.S.C. § 1229b(b)(1). But the so-called stop-time rule included in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provides that the period of continuous presence 'shall be deemed to end ... when the alien is served a notice to appear' in a removal proceeding under § 1229a. § 1229b(d)(1). The term 'notice to appear' is defined as 'written notice ... specifying' certain information, such as the charges against the alien and the time and place at which the removal proceedings will be held. § 1229(a)(1). A notice that omits any of this statutorily required information does not trigger the stop-time rule. See *Pereira* v. *Sessions*, 585 U.S. ——, 138 S.Ct. 2105, 201 L.Ed.2d 433. Here, the government ordered the removal of petitioner Agusto Niz-Chavez and sent him a document containing the charges against him. Two months later, it sent a second document, providing Mr.

Niz-Chavez with the time and place of his hearing. The government contends that because the two documents collectively specified all statutorily required information for 'a notice to appear,' Mr. Niz-Chavez's continuous presence in the country stopped when he was served with the second document."

"Held: A notice to appear sufficient to trigger the IIRIRA's stop-time rule is a single document containing all the information about an individual's removal hearing specified in § 1229(a)(1)."

"Section 1229b(d)(1) states that the stop-time rule is triggered by serving 'a notice,' and § 1229(a)(1) explains that 'written notice' is 'referred to as a "notice to appear."' Congress's decision to use the indefinite article 'a' suggests it envisioned 'a' single notice provided at a discrete time rather than a series of notices that collectively provide the required information. While the indefinite article 'a' can sometimes be read to permit multiple installments (such as 'a manuscript' delivered over months), that is not true for words like 'notice' that can refer to either a countable object ('a notice') or a noncountable abstraction ('sufficient notice'). The inclusion of an indefinite article suggests Congress used 'notice' in its countable sense. More broadly, Congress has used indefinite articles to describe other case-initiating pleadings—such as an indictment, an information, or a civil complaint, see, *e.g.,* Fed. Rules Crim. Proc. 7(a), (c)(1), (e); Fed. Rule Civ. Proc. 3—and none suggest those documents might be delivered by installment. Nor does the Dictionary Act aid the government, as that provision merely tells readers of the U.S. Code to assume 'words importing the singular include and apply to several persons, parties, or things.' 1 U.S.C. § 1. That provision means only that terms describing a single thing ('a notice') can apply to more than one of that thing ('ten notices'). While it certainly allows the government to send multiple notices to appear to multiple people, it does not mean a notice to appear can consist of multiple documents."

"The IIRIRA's structure and history support requiring the government to issue a single notice containing all the required information. Two related provisions, §§ 1229(e)(1) and 1229a(b)(7), both use a definite article with a singular noun ('the notice') when referring to the government's charging document—a combination that again suggests a discrete document. Another provision, § 1229(a)(2)(A), requires 'a written notice' when the government wishes to change an alien's hearing date. The government does not argue that this provision contemplates providing 'the new time or place of the proceedings' and the 'consequences ... of failing ... to attend such proceedings' in separate documents. Yet the government fails to explain why 'a notice to appear' should operate differently. Finally, the predecessor to today's 'notice to appear' required the government to specify the place and time for the alien's hearing 'in the order to show cause or otherwise.' § 1252(a)(2)(A). The phrase 'or otherwise' has since disappeared, further suggesting that the required details must be included upfront to invoke the stop-time rule. Indeed, that is how the government itself initially read the statute. The year after Congress adopted IIRIRA, in the preamble to a proposed rule implementing these provisions, the government acknowledged that 'the language of the amended Act indicat[es] that the time and place of the hearing must be on the Notice to Appear.' 62 Fed. Reg. 449 (1997)."

"The government claims that not knowing hearing officers' availability when it initiates removal proceedings makes it difficult to produce compliant notices. It also claims that it makes little sense to require time and place information in a notice to appear when that information may be later changed. Besides, the government stresses, its own administrative regulations have always authorized its current practice. But on the government's account, it would be free to send a person who is not from this country—someone who may be unfamiliar with English and the habits of

American bureaucracies—a series of letters over the course of weeks, months, maybe years, each containing a new morsel of vital information. Congress could reasonably have wished to foreclose that possibility. And ultimately, pleas of administrative inconvenience never 'justify departing from the statute's clear text.' *Pereira*, 585 U.S., at ——, 138 S.Ct., at 2118. The modest threshold Congress provided to invoke the stop-time rule is clear from the text and must be complied with here."

C. Noncitizen Challenging Removal for Unlawful Re-Entry Must Prove All Three Requirements of § 1326(d)

United States v. Palomar-Santiago, 141 S.Ct. 1615 (U.S., Sotomayor, 2021).

"Respondent Palomar-Santiago, a Mexican national living in the United States, was convicted in California state court of felony DUI in 1988. At the time, lower courts understood that conviction to be an 'aggravated felony' subjecting a noncitizen to removal from the United States. 8 U.S.C. § 1227(a)(2)(A)(iii). Palomar-Santiago was removed following a hearing before an immigration judge and a waiver of his right to appeal. In 2017, Palomar-Santiago was found in the United States and indicted on one count of unlawful reentry after removal. See § 1326(a). The statute criminalizing unlawful reentry provides that a collateral challenge to the underlying deportation order may proceed only if the noncitizen first demonstrates that (1) 'any administrative remedies that may have been available' were exhausted, (2) 'the opportunity for judicial review' was lacking, and (3) 'the entry of the order was fundamentally unfair.' § 1326(d). Palomar-Santiago moved to dismiss the indictment on the ground that his prior removal order was invalid in light of the 2004 holding in *Leocal* v. *Ashcroft*, 543 U.S. 1, that felony DUI is not an aggravated felony. Following Ninth Circuit precedent, the District Court and Court of Appeals held that Palomar-Santiago was excused from proving the first two requirements of § 1326(d) because his felony DUI conviction had not made him removable. The District Court granted the motion to dismiss, and the Ninth Circuit affirmed.

"Held: Each of the statutory requirements of § 1326(d) is mandatory."

"The Ninth Circuit's interpretation is incompatible with the text of § 1326(d), which provides that defendants charged with unlawful reentry 'may not' challenge their underlying removal orders 'unless' they 'demonstrat[e]' each of three conditions. Section 1326(d)'s first two requirements are not satisfied just because a noncitizen was removed for an offense that should not have rendered him removable. The substantive validity of a removal order is quite distinct from whether the noncitizen exhausted administrative remedies or was deprived of the opportunity for judicial review."

"Palomar-Santiago's counterarguments are unpersuasive. First, he contends that further administrative review of a removal order is not 'available' for purposes of § 1326(a) when a noncitizen will not recognize a substantive basis to challenge an immigration judge's conclusion that a prior conviction renders the noncitizen removable. The immigration judge's error on the merits does not excuse the noncitizen's failure to comply with a mandatory exhaustion requirement if further administrative review, and then judicial review if necessary, could fix that very error. *Ross*, 578 U. S. 632, distinguished.

"Second, Palomar-Santiago contends that § 1326(d)'s prerequisites do not apply when a defendant argues that a removal order was substantively invalid. There can be no 'challenge' to or 'collateral

attack' on the validity of substantively flawed orders, he reasons, because such orders are invalid when entered. This position ignores the plain meaning of both 'challenge' and 'collateral attack.'

"Lastly, Palomar-Santiago invokes the canon of constitutional avoidance. But this canon 'has no application in the absence of statutory ambiguity.' *United States* v. *Oakland Cannabis Buyers' Cooperative,* 532 U.S. 483, 494. Here, the text of § 1326(d) unambiguously forecloses Palomar-Santiago's interpretation."

D. "Deemed-True-or-Credible Rule" Is Inconsistent with INA

Garland v. Dai, 141 S.Ct. 1669 (U.S., Breyer, 2021).
Garland v. Alcaraz-Enriquez, 141 S.Ct. 1669 (U.S., Breyer, 2021).

"In each of these cases, a foreign national appeared before an immigration judge (IJ) and requested that he not be returned to his country of origin. For Cesar Alcaraz-Enriquez, the IJ first had to determine whether Mr. Alcaraz-Enriquez had committed a disqualifying 'particularly serious crime' based on his prior California conviction for 'inflicting corporal injury on a spouse or cohabitant.' See 8 U.S.C. § 1231(b)(3)(B)(ii). The IJ considered both the probation report issued at the time of the conviction (which detailed a serious domestic violence incident) and Mr. Alcaraz-Enriquez's own testimony at the removal proceeding (which included an admission that he hit his girlfriend but allegedly did so in defense of his daughter). Relying in part on the version of events in the probation report, the IJ held Mr. Alcaraz-Enriquez ineligible for relief. On appeal, the Bureau of Immigration Appeals (BIA) affirmed. In Ming Dai's case, he testified that he and his family had suffered past persecution by Chinese officials and expected future persecution upon return. But Mr. Dai initially failed to disclose that his wife and daughter had both returned voluntarily to China since accompanying him to the United States. When confronted, Mr. Dai told the 'real story' of why he remained in the United States. The IJ found that Mr. Dai's testimony undermined his claims and denied relief. On appeal, the BIA affirmed. Mr. Alcaraz-Enriquez and Mr. Dai each sought judicial review, and in each case, the Ninth Circuit noted that neither the IJ nor the BIA made an explicit 'adverse credibility determination' under the Immigration Nationality Act (INA). §§ 1158(b)(1)(B)(iii), 1231(b)(3)(C), 1229a(c)(4)(C). Applying its own judge-made rule that a reviewing court must treat the noncitizen's testimony as credible and true absent an explicit adverse credibility determination, the Ninth Circuit granted relief.

"Held: The Ninth Circuit's deemed-true-or-credible rule cannot be reconciled with the INA's terms."

"The Ninth Circuit's rule has no proper place in a reviewing court's analysis. The INA provides that a reviewing court must accept 'administrative findings' as 'conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.' § 1252(b)(4)(B). And a reviewing court is 'generally not free to impose' additional judge-made procedural requirements on agencies. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 55 L.Ed.2d 460.

"Judicial proceedings in cases like these do not constitute 'appeals' in which the 'rebuttable presumption of credibility on appeal' applies absent an explicit credibility determination. §§ 1158(b)(1)(B)(iii), 1231(b)(3)(C), 1229a(c)(4)(C). Here, there is only one appeal—from the IJ to the BIA. See §§ 1158(d)(5)(iii)–(iv). Subsequent judicial review takes place not by appeal, but by means of a 'petition for review,' which the INA describes as 'the sole and exclusive means for

judicial review of an order of removal.' § 1252(a)(5). A presumption of credibility may arise in some appeals before the BIA, but no such presumption applies in antecedent proceedings before an IJ or in subsequent collateral review before a federal court. This makes sense because reviewing courts do not make credibility determinations, but instead ask only whether *any* reasonable adjudicator could have found as the agency did. The Ninth Circuit's rule gets the standard backwards by giving conclusive weight to any testimony that cuts against the agency's finding."

"Mr. Alcaraz-Enriquez and Mr. Dai offer an alternative theory for affirming the Ninth Circuit. Because, they say, they were entitled to a presumption of credibility in their BIA appeals, they are entitled to relief in court because no reasonable adjudicator obliged to presume their credibility could have found against them. Even assuming that there was no explicit adverse credibility determination here, the Ninth Circuit's reasoning is flawed for at least two reasons."

"The presumption of credibility on appeal under the INA is 'rebuttable.' And the INA contains no parallel requirement of explicitness when it comes to rebutting the presumption on appeal. Reviewing courts, bound by traditional administrative law principles, must 'uphold' even 'a decision of less than ideal clarity if the agency's path may reasonably be discerned.' *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438. In neither case did the Ninth Circuit consider the possibility that the BIA implicitly found the presumption of credibility rebutted. The BIA expressly adopted the IJ's decision in Mr. Alcaraz-Enriquez's case, which, in turn, noted that Mr. Alcaraz-Enriquez's story changed from the time of the probation report to the time of the hearing—a factor the statute specifically identifies as relevant to credibility, see §§ 1158(b)(1)(B)(iii), 1231(b)(3)(C), 1229a(c)(4)(C). And in Mr. Dai's case, the BIA also adopted the IJ's decision, which discussed specific problems with Mr. Dai's demeanor, candor, and internal inconsistency—an analysis that certainly goes to the presumption of credibility even if the agency didn't use particular words. See *ibid.* In each case, the Ninth Circuit should consider whether the BIA in fact found the presumption of credibility overcome. If so, it seems unlikely that the conclusion in either case is one no reasonable adjudicator could have reached."

"The presumption of credibility applies with respect to credibility but the INA expressly requires the noncitizen to satisfy the trier of fact on credibility, persuasiveness, and the burden of proof. §§ 1158(b)(1)(B)(ii), 1231(b)(3)(C), 1229a(a)(4)(B). Even if the BIA treats a noncitizen's testimony as credible, the agency need not find such evidence persuasive or sufficient to meet the burden of proof. Here, the Ninth Circuit erred by treating credibility as dispositive of both persuasiveness and legal sufficiency."

E. Adjustment of Status Process Unavailable to Change from Temporary Protected Status to Lawful Permanent Resident for Noncitizen Who Entered Unlawfully

Sanchez v. Mayorkas, 141 S.Ct. 1809 (U.S., Kagan, 2021).

"Petitioner Jose Santos Sanchez is a citizen of El Salvador who challenges the denial of his application to become a lawful permanent resident (LPR) of the United States. Sanchez entered the United States unlawfully in 1997. In 2001, the Government granted him Temporary Protected Status (TPS). The TPS program allows foreign nationals of a country designated by the Government as having unusually bad or dangerous conditions to live and work in the United States while the conditions last. See § 1254a. In 2014, Sanchez applied under § 1255 of the immigration laws to obtain LPR status. Section 1255 provides a way for a 'nonimmigrant'—a foreign national lawfully present in this country on a temporary basis—to obtain an '[a]djustment of status' to LPR.

8 U.S.C. § 1255. The United States Citizenship and Immigration Services determined Sanchez ineligible for LPR status because he entered the United States unlawfully. Sanchez successfully challenged that decision before the District Court, which reasoned that Sanchez's TPS required treating him as if he had been lawfully admitted to the country for purposes of his LPR application. The Third Circuit reversed, finding Sanchez's unlawful entry into the country precluded his eligibility for LPR status under § 1255, notwithstanding his TPS.

"Held: A TPS recipient who entered the United States unlawfully is not eligible under § 1255 for LPR status merely by dint of his TPS. Section 1255 provides that eligibility for LPR status generally requires an 'admission' into the country— defined to mean 'the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.' § 1101(a)(13)(A). Sanchez did not enter lawfully. And his TPS does not eliminate the effect of that unlawful entry. Section 1254a(f)(4) provides that a TPS recipient who applies for permanent residency will be treated as having nonimmigrant status—the status traditionally and generally needed to invoke the LPR process under § 1255. But that provision does not aid the TPS recipient in meeting § 1255's separate admission requirement. Lawful status and admission are distinct concepts in immigration law, and establishing the former does not establish the latter. Sanchez resists this conclusion, arguing that the statute's directive that a TPS recipient 'shall be considered ... as a nonimmigrant' for purposes of § 1255 means he must also be considered as admitted. But the immigration laws nowhere state that admission is a prerequisite of nonimmigrant status. So there is no reason to interpret the TPS provision's conferral of nonimmigrant status as including a conferral of admission. In fact, contrary to Sanchez's position, there are immigration categories in which individuals have nonimmigrant status without admission. See, *e.g.*, §§ 1101(a)(10), 1101(a)(15)(U), 1182(d)(14). Thus, when Congress confers nonimmigrant status for purposes of § 1255, but says nothing about admission, the Court has no basis for ruling an unlawful entrant eligible to become an LPR."

F. Bond Eligibility for Noncitizens Previously Removed; Applicability of § 1231

Johnson v. Guzman Chavez, 141 S.Ct. 2271 (U.S., Alito, 2021).

"Federal immigration law establishes procedures for removing aliens living unlawfully in the United States as well as for determining whether such persons are detained during removal proceedings. The Department of Homeland Security (DHS) may arrest and detain an alien 'pending a decision on whether the alien is to be removed from the United States.' 8 U.S.C. § 1226(a). An alien detained under § 1226(a) may generally apply for release on bond or conditional parole. § 1226(a)(2). If an alien is ordered removed and the order becomes 'administratively final,' detention becomes mandatory. §§ 1231(a)(1)(A)–(B), (a)(2). If an alien removed under this process reenters the country without authorization, that person faces reinstatement of 'the prior order of removal from its original date.' § 1231(a)(5). That order 'is not subject to being reopened or reviewed,' and the alien 'shall be removed under the prior order at any time after reentry.' *Ibid.*

"Respondents are aliens who were removed from the United States and later reentered without authorization. When DHS reinstated their prior removal orders, each respondent sought withholding-only relief to prevent DHS from executing those orders based on fear of returning to their home country as designated in the removal orders. While respondents' withholding-only proceedings were pending, DHS detained respondents, and respondents sought release on bond, which was initially denied. The Government opposed their release, maintaining that because respondents were detained under § 1231, not § 1226, they were not entitled to bond hearings.

Respondents filed habeas proceedings in District Court, seeking a declaration that § 1226 governs their detention, as well as an injunction ordering the Government to grant them individualized bond hearings consistent with § 1226. The District Court entered summary judgment for respondents, and the Fourth Circuit affirmed.

"Held: Section § 1231, not § 1226, governs the detention of aliens subject to reinstated orders of removal."

"Section 1231 authorizes detention 'when an alien is ordered removed' and enters the 'removal period,' which begins, as relevant here, on '[t]he date the order of removal becomes administratively final.' It is undisputed that each respondent was previously 'ordered removed' pursuant to a valid order of removal and that those orders were 'reinstated from [their] original date[s]' under § 1231(a)(5). Those reinstated removal orders were also 'administratively final.' By inserting the word 'administratively,' Congress made clear that DHS need not wait for the alien to seek or exhaust judicial review of that order. Respondents contend that even if § 1231 normally governs in such cases, it ceases to apply when the alien pursues withholding-only relief. Respondents' arguments cannot overcome the statute's plain text."

"Respondents misunderstand the nature of withholding-only proceedings when they argue that because an immigration judge or the Board of Immigration Appeals (BIA) might determine that DHS cannot remove an alien to the specific country designated in the removal order, the question whether the alien is 'to be removed' remains 'pending' and is therefore governed by § 1226. If an immigration judge grants an application for withholding of removal, DHS is prohibited from removing the alien *to* that particular country, not *from* the United States. The removal order remains in full force, and DHS retains the authority to remove the alien to any other authorized country. This Court and the BIA have long understood the nature of withholding-only relief this way. See, *e.g., INS* v. *Aguirre-Aguirre,* 526 U. S. 415, 419."

"Respondents next argue that a removal order does not become 'administratively final' until the withholding-only proceedings conclude. A reinstated removal order, they contend, loses its prior finality when the alien initiates withholding-only proceedings. This argument ignores that removal orders and withholding-only proceedings address two distinct questions and end in two separate orders. See *Nasrallah* v. *Barr*, 590 U. S. ___, ___. Because the validity of removal orders is not affected by the grant of withholding-only relief, an alien's initiation of withholding-only proceedings does not render non-final an otherwise 'administratively final' reinstated order of removal."

"Respondents submit that the 'except as otherwise provided in this section' language in the opening clause of § 1231(a)(1)(A)—which sets the default for the length of the removal period at 90 days—places a limit on when the removal period is triggered. The most natural reading of that phrase, however, is that the Government must remove an alien within 90 days *unless* another section of § 1231 specifically contemplates that the removal period can exceed 90 days. The presence of specific statutory provisions in § 1231 that relate to the length of the removal period leads to the conclusion that the opening clause of § 1231(a)(1)(A) refers to them and not the withholding-only provision, which does not mention the length of the removal period and does not stand in the way of removal to a third country."

"Statutory structure confirms this Court's textual reading. Every provision applicable to respondents is located in § 1231. It would thus be odd if the provision governing their detention was located in

§ 1226, rather than § 1231, which contains its own detention provision. Moreover, the inclusion of the statutory withholding provision in § 1231, grouped with other provisions that relate to *where* DHS may remove an alien, illustrates how withholding-only relief fits within the removal process generally. The order of the applicable Immigration and Nationality Act provisions provides further context for interpreting the proper application of § 1226 and § 1231. Section 1226 applies before an alien proceeds through the removal proceedings and obtains a decision; § 1231 applies after."

"Respondents' contrary reading would also undermine Congress's judgment regarding the detention of different groups of aliens who posed different flight risks. Aliens who have not been ordered removed are less likely to abscond because they have a chance of being found admissible, while aliens who have already been ordered removed are generally inadmissible, see § 1182(a)(9)(C)(ii), and have already demonstrated a willingness to violate the terms of a removal order, see § 1231(a)(6). Congress had obvious reasons to treat these two groups differently."

"Respondents remaining arguments are that withholding-only proceedings are a legal impediment that, like the three triggers to the start of the removal period listed in § 1231(a)(1)(B), must be eliminated before the removal period begins and that Congress could not have intended § 1231 to apply to an alien in withholding-only proceedings because withholding-only proceedings often take longer than 90 days. Neither argument is persuasive."

II. Effect of Shortened Limitations Period by Contract on Former Employee's Various Discrimination Causes of Action

Thompson v. Fresh Products, LLC, 985 F.3d 509 (6th Cir., Boggs, 2021).

"Plaintiff Cassandra Thompson brought this employment-discrimination action against her former employer, Fresh Products, LLC, and the human-resources manager of Fresh Products, Dawn Shaferly (together, 'Fresh Products'), after she was laid off as part of a reduction-in-force. Thompson alleged disability discrimination, in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12117; age discrimination, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–634; race discrimination, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2–2000e-5; and disability and race discrimination, in violation of Ohio law, Ohio Rev. Code §§ 4112.01–4112.99. The district court granted summary judgment to Fresh Products on all claims, and Thompson appealed.

"Because Thompson has not established a prima facie case of discrimination, we affirm the district court's grant of summary judgment."

"Thompson is African-American and was fifty-two years old at all times relevant to this appeal. Thompson has arthritis, which affects her knees, back, and neck and restricts her from doing heavy lifting. Because of her inability to do heavy lifting, her doctor gave her weight restrictions at one of her previous jobs, and she sought work 'that doesn't require heavy lifting.' Thompson testified that she receives treatment for her arthritis, including injections, pain medication, and pain cream, and that her arthritis inhibits her ability to '[l]ive a full life.' She testified that she was approved for Social Security Disability (SSD) payments in 2014 based on a primary disability of morbid obesity and a secondary disability of arthritis.

"Fresh Products manufactures odor-control products and has a production facility in Perrysberg, Ohio. Most of its employees are entry-level production workers. According to Fresh Products' job description, production workers perform 'assembly-type functions ... utilizing various light equipment and machinery.' Production workers must be able 'to stand on feet for up to 10–12 hours at a time, and to occasionally reach, bend, kneel, grasp, walk, or carry.'

"Fresh Products hired Thompson as a production worker in July 2016, after she interviewed with Shaferly, Fresh Products' human-resources manager, at a hiring event. Thompson did not mention her arthritis diagnosis to Shaferly during her interview.

"As a new hire, Thompson signed a 'Handbook Acknowledgment,' which stated:

> . . . .
> In consideration of my employment or continued employment, I agree that any claim or lawsuit arising out of my employment with Fresh Products must be filed no more than six (6) months after the date of the employment action that is subject [sic] of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein and I waive any statute of limitations to the contrary. Should a court determine in some future lawsuit that this provision allows an unreasonably short period of time to commence a claim or lawsuit, the court shall enforce this provision as far as possible and shall declare the lawsuit barred unless it was brought within the minimum reasonable time within which the claim or suit should have been commenced."

"Toward the end of 2016, Fresh Products began experiencing a reduction in sales. Rather than reducing employees' hours, management decided to move to a schedule of two ten-hour shifts and reduce the number of workers. On December 8, management held an all-employees meeting to inform employees about the upcoming shift change. They did not discuss layoffs during the meeting because they hoped to minimize the number of workers, if any, who would be laid off by choosing not to fill the positions of employees who quit or were terminated before the shift change took effect. Shaferly told the employees at the meeting that management 'want[ed] to get feedback,' and asked all employees to fill out a survey about the new shifts. The survey asked employees two questions: first, whether they could work four ten-hour shifts per week, and if not, why; and second, which of the two ten-hour shifts they preferred.

"Thompson indicated on the survey that she was unable to work the new schedule but did not provide an explanation. Thompson later testified that she did not believe the new shifts would work for her because the schedule interfered with the hours she had committed to taking care of her grandchildren. She did not communicate this to anyone at Fresh Products, and she says this schedule difficulty was not connected to her earlier request to work part time, which was due to her disability. Many other employees also responded that they could not work the new shifts 'for a variety of reasons.'"

"Thompson was laid off on January 27. Four other employees were laid off as well: Constance Kanary, a white woman between fifty-three and fifty-five, was laid off because she informed management that she was going to be incarcerated in February; Tabitha Wilson, a black woman in her late forties or early fifties, was laid off due to low productivity; Brenda Watt, a black woman in her early fifties, was also laid off due to low productivity; and Israel Diaz, a forty-five-year-old Hispanic man, volunteered to be laid off. All were offered a $500 severance payment conditioned on signing a release. Thompson did not sign the release and did not receive a severance payment."

"The district court granted summary judgment to Fresh Products on all claims. The district court found that Thompson's ADEA and ADA claims were untimely because the Handbook Acknowledgment obligated Thompson to bring those claims within six months of her termination. The court also determined that Thompson had failed to establish a prima facie case of discrimination on any of her claims. Thompson appeals."

"Fresh Products argued before the district court that all of Thompson's claims were untimely because, by signing the Handbook Acknowledgment, Thompson agreed to be bound by a six-month limitations period for any claim or lawsuit arising out of her employment with Fresh Products and waived any statute of limitations to the contrary.

"While Fresh Products' summary-judgment motion was pending, we issued our opinion in *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824 (6th Cir. 2019). In *Logan*, we were presented with the question of whether Title VII's statute of limitations may be contractually shortened. *Id.* at 825. Like Thompson, the plaintiff in *Logan* signed an agreement as a condition of employment, stating 'that any claim or lawsuit arising out of [her] employment ... must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit' and 'waiv[ing] any statute of limitations to the contrary.' *Id.* at 826."

"In deciding whether the contractual limitation rendered the claims untimely, we first discussed the usual processes and time limitations for filing a charge and bringing suit under Title VII. *Id.* at 827–31. We noted that by requiring employees to file charges with the EEOC before involving the federal courts, 'Congress chose '[c]ooperation and voluntary compliance ... as the preferred means' for eradicating workplace discrimination' and 'established a procedure whereby ... the [EEOC] would have an opportunity to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII.' *Id.* at 828 (alterations in original) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974))."

"The district court here held that although *Logan* rendered the Handbook Acknowledgment's shortened time period inapplicable to Thompson's Title VII claim, *Logan*'s reasoning did not extend to Thompson's ADA and ADEA claims, and those claims were therefore time-barred under the Handbook Acknowledgment's valid contract provision. We disagree. Reviewing *Logan* with the ADA and ADEA in mind, we conclude that the considerations that guided our decision in that case apply with equal force in the ADA and ADEA contexts."

III. 42 U.S.C. § 1983

A. Statute of Limitations Against City and Officers

Dibrell v. City of Knoxville, Tennessee, 984 F.3d 1156 (6th Cir., Murphy, 2021).

"This case comes on the heels of Tennessee's prosecution of Dibrell. *See State v. Dibrell*, 2018 WL 1474226, at *1 (Tenn. Crim. App. Mar. 26, 2018). On the afternoon of February 17, 2014, Officer Joey Whitehead with the Knoxville Police Department took his police cruiser to a car wash. *Id.* While there, an unknown person flagged Whitehead down and claimed that a man named Calvin Dibrell was selling drugs out of his Chrysler 300 at a nearby Walgreens. *Id.* Whitehead relayed this tip to three colleagues: Officers Thomas Turner, Richard White, and John Pickens. *Id.*

"These officers arrived at the Walgreens and stopped their cruisers in a manner that blocked in the Chrysler. Dibrell was sitting in its driver's seat. *Id.* An officer approached the car and spoke with Dibrell for a minute before asking him to get out. *Id.* at *7. Dibrell obliged. *Id.* The officer patted Dibrell down for weapons and told him to 'hang tight' on the sidewalk. *Id.* Officers casually conversed with Dibrell for the next three minutes or so until Officer Whitehead arrived with his police dog. *Id.* at *7–8. Upon Whitehead's arrival, his dog took two laps around Dibrell's car. *Id.* at *8. Whitehead asserted that the dog alerted to the smell of drugs. *Id.*

"Relying on the alert, the officers searched the Chrysler. *Id.* at *2. They found three pill bottles inside. *Id.* The first contained 9 hydrocodone pills; the second, 40 oxycodone pills; and the third, 42 alprazolam pills. *Id.* The officers suspected that Dibrell had been illegally selling these drugs because the drugs did not match the labels on their respective bottles. *Id.* They searched Dibrell and found a bag with 30 more oxycodone pills and around $800. *Id.* They arrested him. *Id.* at *3. He was released on bond the next day.

"Fifteen months later, in April 2015, a grand jury indicted Dibrell on twelve drug-trafficking counts under Tennessee law. *Id.* at *1. He moved to suppress the drugs and money uncovered by the officers, arguing that they lacked reasonable suspicion to detain him while waiting for the police dog to arrive. *Id.* at *9. The state trial court denied Dibrell's motion, reasoning that the officers had not detained Dibrell before the dog sniff. *Id.* at *5–6. In June 2016, a jury convicted Dibrell. *Id.* at *4. The trial court sentenced him to 12 years' imprisonment. *Id.* at *1, *4.

"In March 2018, an appellate court vacated Dibrell's convictions. *Id.* at *15. The court found that the officers had seized Dibrell before the dog sniff and that the anonymous tip did not give them reasonable suspicion to do so. *Id.* at *9–14. It held that the trial court should have suppressed the drugs under the Fourth Amendment and dismissed the charges. *Id.* at *14. Dibrell was released the next month.

"In September 2018, Dibrell sued the City of Knoxville, the officers involved in his arrest (Whitehead, Turner, White, and Pickens), and four other officers (Fred Kimber, Christopher Jones, Brian Baldwin, and Horace Lane). The district court granted summary judgment to the officers and the city. It rejected Dibrell's constitutional claims under 42 U.S.C. § 1983 on statute-of-limitations grounds or on the merits."

"The state appellate court found that the officers violated the Fourth Amendment when they initially detained Dibrell without reasonable suspicion. We need not consider the merits, however, because the district court correctly held that the statute of limitations barred Dibrell's claim asserting a false arrest and imprisonment for his initial detention and arrest.

"The parties agree on two points about this statute-of-limitations question. They agree that § 1983 does not include a statute of limitations and that § 1988(a) directs us to borrow the statute of limitations from Tennessee for personal-injury torts. *See Wilson*, 471 U.S. at 278–79, 105 S.Ct. 1938. They also agree that Tennessee has a one-year statute of limitations for those torts. Tenn. Code Ann. § 28-3-104(a)(1)(A). (Tennessee has another statute of limitations for actions 'under the federal civil rights statutes.' *Id.* § 28-3-104(a)(1)(B); *Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015). Because this statute also sets a one-year period, we need not consider which statute would apply if the two limitations periods differed.)

"The parties part ways only over the date on which Dibrell's claim 'accrued' and started the one-year clock. Although the statute of limitations turns on state law, the question of when a § 1983 claim accrues to trigger the statute turns on federal law. *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091. The 'standard' accrual 'rule' for federal claims starts the limitations period 'when the plaintiff has a complete and present cause of action' that can be raised in court. *Rotkiske v. Klemm*, —— U.S. ——, 140 S. Ct. 355, 360, 205 L.Ed.2d 291 (2019) (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418, 125 S.Ct. 2444, 162 L.Ed.2d 390 (2005)). The Supreme Court has contrasted this 'standard' rule with a 'discovery' rule that ties the start of the limitations period to when the plaintiff discovered (or should have discovered) the cause of action. *Id.* at 360–61. Any presumption favoring that discovery rule, the Court recently clarified, represents a 'bad wine of recent vintage.' *Id.* at 360 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 37, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) (Scalia, J., concurring in the judgment)).

"In this § 1983 context, the Court has started its accrual analysis with the standard rule: that a claim accrues when the plaintiff has a complete cause of action. *McDonough*, 139 S. Ct. at 2155; *Wallace*, 549 U.S. at 388, 127 S.Ct. 1091. Our § 1983 caselaw, by contrast, has started the accrual analysis with the competing discovery rule: that the claim accrues when the plaintiff knows of, or should have known of, that cause of action. *See King v. Harwood*, 852 F.3d 568, 578 (6th Cir. 2017); *Johnson*, 777 F.3d at 843. Do our cases imbibing this 'bad wine' warrant reconsideration in light of the Supreme Court's recent teachings? We need not resolve this tension now because Dibrell's claims would be untimely either way. If the standard rule were to apply here, the limitations period for a claim involving a false arrest and imprisonment would 'commence to run' from the date of the wrongful arrest because the plaintiff has a complete cause of action at that point. *Wallace*, 549 U.S. at 388, 390 n.3, 127 S.Ct. 1091. And if the discovery rule were to apply, Dibrell's knowledge that he had been arrested (allegedly wrongfully) would start the clock on the same date. Either approach thus would have triggered the statute of limitations on February 17, 2014.

"But the Court has not ended with the standard rule in this § 1983 context. Rather, it has proceeded to look to the accrual rules for the tort most like the constitutional claim at issue. *McDonough*, 139 S. Ct. at 2156. In *Wallace*, moreover, the Court made clear that the torts of false arrest and false imprisonment have special accrual rules. 549 U.S. at 388, 127 S.Ct. 1091. These torts, which again challenge a detention without legal process, accrue at the earlier of two dates. *Id.* at 389–90, 127 S.Ct. 1091. They accrue when the false *imprisonment* ends with the plaintiff's release. *See id.* at 389, 127 S.Ct. 1091 (citing 2 H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 187d(4), at 878 (rev. 4th ed. 1916); 2 Arthur Underhill, *Principles of the Law of Torts* 202 (1881)). Or, if the plaintiff remains detained, they alternatively accrue when the *false* imprisonment ends with the issuance of legal process—when, for example, the plaintiff is brought before a magistrate. *Id.* at 389–90, 127 S.Ct. 1091. 'From that point on,' a plaintiff relying on the law of torts to challenge any continuing detention must assert a malicious-prosecution claim. *Id.* at 390, 127 S.Ct. 1091.

"Dibrell's claim is untimely under these rules. His detention ended on February 18, 2014, when he was released on bond, so the limitations period likely started then. Underhill, *supra*, at 202; *see Fox v. DeSoto*, 489 F.3d 227, 233–35 (6th Cir. 2007). Dibrell makes no claim that the bond requirements imposed as a condition of his release qualified as a continuing 'detention' for statute-of-limitations purposes, so we need not consider that theory. *Cf. Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004). And regardless, his bond hearing likely triggered *Wallace*'s alternative accrual rule tied to the issuance of legal process. *See Reed v. Edwards*, 487 F. App'x

904, 906 (5th Cir. 2012) (per curiam); *White v. Hiers*, 652 F. App'x 784, 786 (11th Cir. 2016) (per curiam); *cf. Bradley v. Sheriff's Dep't St. Landry Par.*, 958 F.3d 387, 391–92 (5th Cir. 2020). At the latest, this 'legal process' issued when he was indicted in April 2015. *See King*, 852 F.3d at 579; *Lucas v. Holland*, 2017 WL 4764472, at *2 (6th Cir. Sept. 26, 2017) (order). Whether measured from the date of his bond hearing or the date of his indictment, the one-year statute of limitations had long run when Dibrell sued in September 2018."

B. Action by Owners of Horse Disqualified in Kentucky Derby

West v. Kentucky Horse Racing Commission, 972 F.3d 881 (6th Cir., Bush, 2020).

"'Whether true or perceived to be true, a referee's calls can "change the outcome of [a] game."' *Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 735 (6th Cir. 2020) (citation omitted). As is true for Kentucky basketball, the same is true for Kentucky horse racing. At issue here is a call made by racing stewards that changed the outcome in the most storied race of them all—the Kentucky Derby.

"In 144 uninterrupted years of Runs for the Roses, only one horse to cross the finish line first had been disqualified, and no winning horse had ever been disqualified for misconduct during the race itself. But, on the first Saturday in May 2019, fans were told to hold onto their tickets at the conclusion of the 145th Derby. 'Maximum Security,' the horse that had finished first, would not be declared the winner. Instead, he would come in last, thanks to the stewards' call that Maximum Security committed fouls by impeding the progress of other horses in the race.

"As a result of this ruling, Maximum Security's owners, Gary and Mary West, were not awarded the Derby Trophy, an approximate $1.5 million purse, and potentially even far greater financial benefits from owning a stallion that won the Derby. So, the Wests filed this civil rights lawsuit under 42 U.S.C. § 1983 against the individual stewards who made the controversial call, the individual members of the Kentucky Horse Racing Commission, and the Commission itself. The complaint alleged that the stewards' decision was arbitrary and capricious, was not supported by substantial evidence, and violated the Wests' right to procedural due process. The Wests also claimed that the regulation that gave the stewards authority to disqualify Maximum Security is unconstitutionally vague. They sought, among other things, a declaration from the district court that Maximum Security was the official winner of the 145th Kentucky Derby."

"On May 4, 2019, Maximum Security crossed the finish line first in the 145th running of the Kentucky Derby. Despite this, the horse was not declared the official winner of the race. After the race concluded, but before the official race results were posted, two other jockeys lodged objections with race officials alleging interference by Maximum Security during the race. After considering the objections, Chief Steward Barbara Borden announced the ruling of the three stewards who judged the race. They determined that during the race, Maximum Security impeded the progress of other horses. Because of those infractions, the stewards unanimously decided to disqualify Maximum Security from the first-place finish. Maximum Security was placed seventeenth in the race, behind the lowest-placed horse whose progress had been impeded."

"Two days later, the Wests delivered a notice of appeal to the Kentucky Horse Racing Commission. In this notice, the Wests contended that the stewards' decision to disqualify Maximum Security was arbitrary and capricious, did not comply with applicable regulations, and was not supported by substantial evidence. The Wests also sent a letter to the executive director of

the Horse Racing Commission requesting a hearing before the full Commission. That same day, the Commission's general counsel informed the Wests that 'the stewards' disqualification determination is not subject to appeal.'"

"After the Commission informed the Wests that the disqualification of Maximum Security was not subject to appeal, they filed this suit under 42 U.S.C. § 1983, alleging violations of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, as well as pendent state-law claims. The district court dismissed the Wests' action in its entirety."

"We first address whether there is a right to judicial review of the stewards' call under Kentucky law. The Wests argue that the stewards' decision to disqualify Maximum Security from the Derby was a 'final order[ ] of an agency' as that phrase is used in KRS § 13B.140(1). This statute, as noted, provides that '[a]ll final orders of an agency shall be subject to judicial review.' *Id.* § 13B.140(1). A 'final order' is defined as 'the whole or part of the final disposition of an administrative hearing, whenever made effective by an agency head ....' *Id.* § 13B.010(6). An 'administrative hearing,' in turn, is defined as 'any type of formal adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person.' *Id.* § 13B.010(2)."

"We conclude that the stewards' disqualification decision is not a 'final order[ ] of an agency.' Therefore, Kentucky statutory law establishes no right of judicial review of the stewards' call, which is otherwise barred by the applicable regulation. We reach this conclusion for two principal reasons. First, the process that the stewards undertook to make their decision was not an 'administrative hearing,' as that term is used in the statutory definition of 'final order of an agency.' *See* KRS § 13B.010(2), (6). Second, the stewards' call was not a 'final order' because it was not 'made effective by an agency head,' as is necessary to issue a final administrative order. *See* KRS § 13B.010(6)."

"Perhaps only a racehorse itself could tell us whether it was fouled during a race. *See* Jay Livingston & Ray Evans, 'Mr. Ed' (1961) ('Go right to the source and ask the horse. He'll give you the answer that you'll endorse.'). But horses can't speak, so the Commonwealth of Kentucky, similar to many other racing jurisdictions, has designated racing experts—the stewards, not the appointed members of the Commission or judges—to determine when a foul occurs in a horse race. It is not our place to second-guess that decision."

"We now address the Wests' argument that the stewards deprived them of constitutionally protected liberty and property interests by disqualifying Maximum Security. To plead a due process claim, the Wests must allege: '(1) a life, liberty, or property interest requiring protection under the Due Process Clause, and (2) a deprivation of that interest (3) without adequate process.' *Fields v. Henry County*, 701 F.3d 180, 185 (6th Cir. 2012). The Wests contend that they have a protected property interest in the winner's share of the Derby purse, and a liberty interest in an agency following its own regulations.

"'Property interests ... are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....' *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Thus, to have a protected property interest in the Derby winnings, the Wests 'must point to some policy, law, or mutually explicit understanding that both confers the benefit

and limits the discretion of the [state] to rescind the benefit.' *Med Corp., Inc. v. City of Lima*, 296 F.3d 404, 410 (6th Cir. 2002).

"Right out of the gate, the Wests fall behind. Kentucky law provides that 'the conduct of horse racing, or the participation in any way in horse racing, ... is a privilege and not a personal right; and that this privilege may be granted or denied by the racing commission or its duly approved representatives acting in its behalf.' KRS § 230.215(1). Furthermore, 'a party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary.' *Med Corp.*, 296 F.3d at 409."

"What should have been the fastest two minutes in sports turned into over a year of litigation. Neither Kentucky law nor the Fourteenth Amendment allows for judicial second-guessing of the stewards' call. For the foregoing reasons, we AFFIRM the judgment of the district court in full."

IV. Title VII; Retaliation; "Honest Belief" Rule Protects Employer

Nathan v. Great Lakes Water Authority, 992 F.3d 557 (6th Cir., Gibbons, 2021).

"This case involves numerous claims initiated by Nicole Massey against her former employer, Great Lakes Water Authority. After Massey filed bankruptcy proceedings, Kenneth Nathan, the Chapter 7 trustee of Massey's bankruptcy estate, was substituted as plaintiff. Nathan alleges that Great Lakes subjected Massey to a hostile work environment through sexual harassment, retaliated against Massey for opposing sexual harassment, and retaliated against Massey for taking leave guaranteed by the Family and Medical Leave Act. The district court granted summary judgment to Great Lakes on each of Nathan's claims. We affirm."

"Nathan first claims that Great Lakes subjected Massey to a hostile work environment in violation of Title VII and the ELCRA by failing to remedy known sexual harassment perpetrated against Massey by her supervisors and co-workers. Both Title VII and the ELCRA prohibit employment discrimination 'because of ... sex.' 42 U.S.C. § 2000e-2(a)(1); Mich. Comp. Laws § 37.2202(1)(a). Sexual harassment in the workplace constitutes discrimination in violation of these provisions '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.' *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)); *Wasek v. Arrow Energy Servs.*, 682 F.3d 463, 468 (6th Cir. 2012) (recognizing that the analysis is the same under Title VII and the ELCRA). We have broken this standard into five elements:

> (1) [The plaintiff] belonged to a protected group, (2) she was subject to unwelcome harassment, (3) the harassment was based on [sex], (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) the defendant knew or should have known about the harassment and failed to act.

"Waldo v. Consumers Energy Co., 726 F.3d 802, 813 (6th Cir. 2013) (second alteration in original) (quoting *Williams v. CSX Transp. Co.*, 643 F.3d 502, 511 (6th Cir. 2011)).

"Nathan identifies five instances of harassment at Great Lakes that he contends demonstrate that Massey was discriminated against because of her sex. First, Massey's supervisor Sergeant McNair told Massey that she 'needed a more supportive bra' while giving Massey a score of 69 on a performance evaluation. . . . Second, another supervisor, Lieutenant Sheard, told Massey that she 'needed a more supportive bra.' *Id.* at 614. Third, Lieutenant Sheard told Massey that she 'looked sloppy' in her uniform and that her 'breasts looked like they were drooping.' *Id.* Fourth, a co-worker told Massey that her 'breasts were so big, it looked like [Massey] could trip over them.' *Id.* at 616. Fifth, another co-worker told Massey that she looked 'sloppy' and said 'I wish the bitch would say something' while making fun of Massey with other co-workers. *Id.* at 628."

"The district court erred in granting summary judgment to Great Lakes on the 'based on sex' element of Nathan's hostile work environment claims. Harassment is based on sex when an employee is 'exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.' *Oncale*, 523 U.S. at 80, 118 S.Ct. 998 (quoting *Harris*, 510 U.S. at 25, 114 S.Ct. 367 (Ginsburg, J., concurring)). This standard requires Nathan to show that 'but for' Massey's sex, she would not have been harassed in the way that she was. *Williams v. General Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999)."

"At bottom, this case presents a simple question: When a woman is subjected to derogatory comments about her breasts, could a reasonable jury find that those comments were based on her sex? We conclude that the answer is yes. For that reason, the district court erred in granting Great Lakes' motion for summary judgment on the 'based on sex' element of Nathan's claims."

"The district court, however, correctly granted Great Lakes' motion for summary judgment on the 'severe or pervasive' element of Nathan's hostile work environment claim. Harassment is 'severe or pervasive' when it 'alter[s] the conditions of the victim's employment and create[s] an abusive working environment.' *Harris*, 510 U.S. at 21, 114 S.Ct. 367 (quoting *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)). This element has a subjective prong and an objective prong. *Id.*

"Nathan has provided sufficient evidence that Massey subjectively perceived the environment at Great Lakes to be abusive. Massey testified that the harassment made it difficult for her to sleep and that it was 'tak[ing] over a big part of [her] life on a daily basis.'. . . She also stated that one of the reasons that she chose to get breast-reduction surgery was the harassment at Great Lakes. Great Lakes disputes this fact and argues that Massey actually chose to get the surgery because of back and shoulder pain, not because she was tired of being harassed. But that is a dispute for trial, not for summary judgment. Taking the evidence in the light most favorable to Massey, a reasonable jury could find that a person who struggled sleeping and who decided to have an invasive surgery because of the harassment that she was facing at work subjectively found her work environment to be abusive.

"As to the objective prong, however, Nathan has not provided sufficient evidence that the environment at Great Lakes was objectively hostile. To determine whether a work environment was objectively hostile, courts must consider 'all the circumstances,' *Harris*, 510 U.S. at 23, 114 S.Ct. 367, from the perspective of 'a reasonable person in the plaintiff's position,' *Oncale*, 523 U.S. at 81, 118 S.Ct. 998. A non-exhaustive list of the relevant circumstances includes the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' *Harris*, 510 U.S. at 23, 114 S.Ct. 367. The district court correctly concluded that a

consideration of these factors demonstrates that a reasonable jury could not find that the environment at Great Lakes was objectively hostile."

"Even after taking these surrounding circumstances into account, however, we hold that a reasonable person would not have found the Great Lakes environment to be hostile, as that term is defined by our case law. Given the relatively low number of incidents at Great Lakes, the harassment Massey faced was closer to 'isolated incidents' than a pattern of conduct that altered 'the conditions of [Massey's] employment.' *Morris* [*v. Oldham County Fiscal Court*], 201 F.3d [784] at 790 [(6th Cir. 2000)]. These isolated incidents were also less severe than incidents that this court has found insufficient to survive summary judgment in the past, even when considered in light of the harassment at Detroit Water. *See, e.g.*, *Bowman*, 220 F.3d at 464. Additionally, Massey was never physically threatened. Although a reasonable jury may be able to find that the harassment unreasonably interfered with Massey's work performance, that factor alone is not sufficient to support the finding that the environment at Great Lakes was objectively hostile in this case. Therefore, we affirm the district court's grant of summary judgment to Great Lakes on Nathan's hostile work environment claims."

"Nathan next claims that Great Lakes retaliated against Massey in violation of Title VII and the ELCRA by firing Massey because she complained about sexual harassment. Title VII and the ELCRA prohibit retaliation against employees who oppose discriminatory employment practices. 42 U.S.C. § 2000e-3(a); MICH. COMP. LAWS § 37.2701(a). To establish a prima facie case of retaliation, Nathan must show that: '(1) [Massey] engaged in activity protected by Title VII; (2) this exercise of protected rights was known to [Great Lakes]; (3) [Great Lakes] thereafter took adverse employment action against [Massey]; and (4) there was a causal connection between the protected activity and the adverse employment action.' *Dixon v. Gonzales*, 481 F.3d 324, 333 (6th Cir. 2007); *Wasek*, 682 F.3d at 472 ('[T]he ELCRA [retaliation] analysis is identical to the Title VII analysis.'). If Nathan presents sufficient evidence of all of the elements of his prima facie case, 'the burden of production of evidence shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for its actions.' *Dixon*, 481 F.3d at 333 (quoting *Morris*, 201 F.3d at 792–93). If Great Lakes provides such a reason, Nathan must then show that Great Lakes' 'proffered reason was not the true reason for the employment decision.' *Id.* (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

"Nathan claims that Massey was fired because she complained that she was being sexually harassed by Sheard. As evidence, he points to the temporal proximity between Massey's complaints and her termination, Massey's testimony that Sheard joked about firing Massey in July of 2017, Sheard's later comment that he would fire Massey if she was ever one minute late for work again, and Stevenson's comment to another employee that Great Lakes would be 'getting rid of her' soon. . . .

"Great Lakes counters that it actually fired Massey for falsifying an incident report, not for complaining of sexual harassment. Specifically, Great Lakes claims that Massey failed to note in an incident report that she had been in an accident in a company car, even though she knew that she had been in an accident.

"Nathan admits that on October 29, 2017, Massey was driving a company car, the car was in an accident while she was driving it, and Massey turned in an incident report that did not inform her supervisors that the car had been in an accident. However, he claims that Massey did not know that she had been in an accident and that Great Lakes could not have actually believed that Massey had falsified the report because it never interviewed her to learn her side of the story.

"The district court found that Nathan had produced sufficient evidence to satisfy the first three elements of his prima facie case. However, the court held that Nathan had not provided sufficient evidence to satisfy the fourth element of his prima facie case—causation. Alternatively, the court concluded that even if Nathan had successfully presented a prima facie case, his claims would still fail because Great Lakes honestly believed that Massey had falsified her incident report.

"Even assuming that Nathan could make out a prima facie case of retaliation, Great Lakes is entitled to summary judgment because it held an honest belief that Massey falsified her report. If an employer holds an 'honest belief' that an adverse employment action is justified for a legitimate reason, summary judgment in their favor is appropriate. *Clay* [*v. United Parcel Serv., Inc.*], 501 F.3d [695] at 715 [(6th Cir 2007)]. 'The honest-belief rule is, in effect, one last opportunity for the defendant to prevail on summary judgment. The defendant may rebut the plaintiff's evidence of pretext, by demonstrating that the defendant's actions, while perhaps 'mistaken, foolish, trivial, or baseless,' were not taken with discriminatory intent.' *Id.* at 714-15 (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998)). The burden is on the employer to show that its belief was honestly held. *Id.* at 714.

"In this case, Great Lakes presented evidence that, based on the damage to the vehicle, Massey would have known that she was in an accident. For example, a section of the van's grill was ripped off of the front of the van and it appeared that the 'vehicle had been "run-a-ground" on something such as a parking breaker or a railroad tie, then when the driver backed off of the object [it] pulled the front clip out.'. . . Massey also indicated in her incident report that she 'observed orange anti[-]freeze leaking from the front of the vehicle,' and surveillance footage shows that there was visible front-end damage to the van. . . . It was reasonable for Great Lakes to infer that a driver who had to back off of an object which had caused significant damage to her car would have known that she had been in an accident, especially when the driver admitted to looking at the front of the vehicle after the accident. Considered alongside Sheard's unrebutted testimony that he honestly believed that Massey falsified her report, this evidence is sufficient to carry Great Lakes' burden that it honestly believed that Massey falsified her report."

V. Title IX; Standing

Doe v. University of Kentucky, 971 F.3d 553 (6th Cir., Donald, 2020).

"In this matter, we ask whether Plaintiff Jane Doe (hereinafter 'Doe') can bring a Title IX, 20 U.S.C. § 1681, claim against a university based on that university's alleged deliberate indifference to a sexual assault by a university student (*i.e.*, a Title IX *Davis* claim, *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999))."

"Doe attended Bluegrass Community and Technical College ('the Community College'). The Community College was previously known as Lexington Community College, which was an entity that was wholly owned, governed, and managed by the University. Although the administration of the Community College has now split off from the University, many of its buildings, grounds, and parking areas are still owned and operated by the University. Importantly for this case, students who chose to live on campus at the Community College lived in the *University's* residence halls, as did Doe. Both parties agree that living on campus contributes to learning and leads to more academic success. Doe paid various fees directly to the University, including payments for room, board, and fees for the student government association, student activities, access to the student

center, a student health plan, technology, access to the recreation center, and student affairs. The University has two programs that allow the Community College's students to transfer to or earn credits toward a degree at the University. Doe did not yet meet the requirements for either program because she had only been enrolled at the Community College for a few short weeks, but she alleges that she planned to enroll at the University.

"Doe alleges that, while she was living on the University's campus, a student enrolled at the University raped her on October 2, 2014. She reported the rape to the University's police department, and the University investigated the allegations. Over the course of two and half years, the University held four different disciplinary hearings. Although the alleged perpetrator was found responsible for the rape at the first three hearings, the University's appeal board overturned the decisions based on procedural deficiencies. At the fourth hearing, the alleged perpetrator was found not responsible. Doe dropped out of her classes and withdrew from the University's housing on October 15, 2014.

"Doe filed suit against the University on October 1, 2015, and has since filed multiple amended complaints, asserting that the University's deliberate indifference to her alleged sexual assault violated Title IX. The University moved for dismissal of Doe's third amended complaint on February 20, 2018. In its motion, the University argued, among other things, that Doe was not a student at the University and was thus not deprived of an 'education program or activity' under Title IX. 20 U.S.C. § 1681(a). Because the University attached multiple exhibits to its motion to dismiss, the district court treated the motion as a motion for summary judgment and allowed limited discovery related to the University's argument that, as a non-student, Doe could not bring suit. *Doe v. Univ. of Ky.*, 357 F. Supp. 3d 620, 623 (E.D. Ky. 2019). The district court concluded:

> Accordingly, the [c]ourt finds that while [Doe] was living on [the University]'s campus, paying various fees and costs associated with living on campus, and utilizing [the University]'s services, such as [the University]'s libraries and computer labs, [Doe] has failed to show she was either a [University] student or participating in any of [the University]'s educational programs or activities. Since [Doe] has failed to show she was either a [University] student or enrolled in a [University] education program or activity, [Doe] lacks standing to bring the present action under Title IX, and the Court need not consider [the University]'s arguments regarding the first three disciplinary hearings and [Doe]'s alleged failure to state a Title IX retaliation claim.

"*Id*. at 633-34. Plaintiff filed a timely appeal challenging the district court's grant of summary judgment."

"Title IX states that '[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.' 20 U.S.C. § 1681(a). This statute has spawned various theories of liability and provides relief broadly to those who face discrimination on the basis of sex in the American education system."

"In this case, however, we deal with a specific type of Title IX claim: a *Davis* claim. In *Davis v. Monroe County Board of Education*, the Supreme Court held that 'recipients of federal funding may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of *student-on-student* sexual harassment and the harasser is under the school's disciplinary authority.' 526 U.S. at 646-47, 119 S.Ct. 1661 (internal editing marks omitted)

(emphasis added). In *Vance v. Spencer County Public School District*, this Court explained that, under *Davis*:

> Title IX may support a claim for *student-on-student* sexual harassment when the plaintiff can demonstrate the following elements: (1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school, (2) the funding recipient had actual knowledge of the sexual harassment, and (3) the funding recipient was deliberately indifferent to the harassment.

"231 F.3d 253, 258-59 (6th Cir. 2000) (emphasis added). Our Court also recently emphasized that *Davis* claims 'against a school for its response to *student-on-student* sexual harassment [involve] a "high standard" that applies only in "certain limited circumstances."' *Kollaritsch* [*v. Michigan State University Board of Trustees*], 944 F.3d [613] at 619 [(6th Cir. 2019)] (emphasis added) (quoting *Davis*, 526 U.S. at 643, 119 S.Ct. 1661). As emphasized, in each of these cases, the courts have spoken in terms of *student-on-student* sexual harassment.

"Based on this language, the district court found that Doe did not have standing to bring her *Davis* claim because she was not a 'student' at the University. We disagree. Although this Court does not wish to extend *Davis* beyond the scope intended by the Supreme Court, we find that the district court's decision was too rigid in this case and that, although Does was not enrolled as a student at the University, she has shown that, for purposes of her *Davis* claim, there remain genuine disputes as to whether she was denied the benefits of an 'education program or activity' furnished by the University."

"For these reasons, we REVERSE and REMAND for further proceedings so that the district court can rule on the merits of Doe's *Davis* claim in light of our decision in *Kollaritsch*, 944 F.3d at 619-24."

VI. Religious Freedom Restoration Act; Money Damages

Tanzin v. Tanvir, 141 S.Ct. 486 (U.S., Thomas, 2020).

"The Religious Freedom Restoration Act of 1993 (RFRA) was enacted in the wake of *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, to provide a remedy to redress Federal Government violations of the right to free exercise under the First Amendment. Respondents are practicing Muslims who sued under RFRA, claiming that federal agents placed them on the No Fly List for refusing to act as informants against their religious communities. They sought injunctive relief against the agents in their official capacities and monetary damages against the agents in their individual capacities. As relevant here, the District Court found that RFRA does not permit monetary relief and dismissed their individual-capacity claims. The Second Circuit reversed, holding that RFRA's remedies provision encompasses money damages against Government officials.

"Held: RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities."

"RFRA's text provides that persons may sue and 'obtain appropriate relief against a government,' 42 U.S.C. § 2000bb–1(c), including an 'official (or other person acting under color of law) of the United States,' § 2000bb–2(1). RFRA supplants the ordinary meaning of 'government' with a different, express definition that includes 'official[s].' It then underscores that 'official[s]' are 'person[s].' Under RFRA's definition, relief that can be executed against an 'official ... of the United States' *is* 'relief against a government.' This reading is confirmed by RFRA's use of the phrase 'persons acting under color of law,' which has long been interpreted by this Court in the 42 U.S.C. § 1983 context to permit suits against officials in their individual capacities. See, *e.g.*, *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305–306, 106 S.Ct. 2537, 91 L.Ed.2d 249."

"RFRA's term 'appropriate relief' is 'open-ended' on its face; thus, what relief is 'appropriate' is 'inherently context dependent.' *Sossamon v. Texas*, 563 U.S. 277, 286, 131 S.Ct. 1651, 179 L.Ed.2d 700. In the context of suits against Government officials, damages have long been awarded as appropriate relief, and though more limited today, they remain an appropriate form of relief. The availability of damages under § 1983 is particularly salient here. When Congress first enacted RFRA, the definition of 'government' included state and local officials. In order to reinstate the pre-*Smith* substantive protections of the First Amendment *and* the right to vindicate those protections by a claim, § 2000bb(b), the remedies provision must have encompassed at least the same forms of relief authorized by § 1983. Because damages claims have always been available under § 1983 for clearly established violations of the First Amendment, that means RFRA provides, as one avenue for relief, a right to seek damages against Government employees. The presumption in *Sossamon*, 563 U.S. 277, 131 S.Ct. 1651, is inapplicable because this case does not involve sovereign immunity."

EMPLOYMENT LAW

I. Whistleblowing Statute

Chapter 556, Public Acts 2021, amending T.C.A. § 50-1-304(a)(3) eff. May 26, 2021.

Tennessee's Public Protection Act, also known as the whistleblowing statute, prohibits termination of an employee for refusing to participate in, or refusing to remain silent about, illegal activities. The Act has been modified to clarify it does not apply to discrimination cases.

II. Unemployment Compensation; Benefits Modified

Chapter 560, Public Acts 2021, amending T.C.A. § 50-7-301 eff. Dec. 1, 2023.

The benefits table has been modified. Those averaging wages of $780.01 to $4,420.00 per week will receive an increase in benefits of $25.00 per week. Those making $4,420.01 or more will receive an increase of $50.00 per week. Additionally, with regard to maximum benefits:

50-7-301(d).

"(1) Beginning with those benefit years established on July 4, 1983, and ending November 30, 2023, a claimant is eligible during a benefit year to a total amount of benefits equal to whichever is the lesser of:

(A) Twenty–six (26) times the claimant's weekly benefit amount; or
(B) One–fourth (1/4) of the claimant's wages for insured work paid.

"(2) Beginning with those benefit years established on December 1, 2023, a claimant is eligible during a benefit year to a total amount of benefits:

(A) Equal to:
  (i) Twelve (12) weeks, if the state average unemployment rate is at or below five and five-tenths percent (5.5%); and
  (ii) An additional week in addition to the twelve (12) weeks described in subdivision (d)(2)(A)(i) for each five-tenths percent (0.5%) increment in the state's average unemployment rate above five and five-tenths percent (5.5%); and
(B) Up to a maximum of twenty (20) weeks if the state's average unemployment rate exceeds nine percent (9%).

"(3) (A) The total amount of benefits, if not a multiple of one dollar ($1.00), must be computed at the next lower multiple of one dollar ($1.00).
(B) A claimant is not entitled to benefits if the claimant's base period earnings are less than forty (40) times the claimant's weekly benefit amount.
(C) A claimant is not entitled to benefits if the claimant's base period earnings, outside the claimant's highest calendar quarter of earnings, are less than the lesser of six (6) times the claimant's weekly benefit amount or nine hundred dollars ($900).

"(4) (A) For purposes of subdivision (d)(2)(A), the department shall determine the state average unemployment rate biannually, and the rate must be equal to the seasonally adjusted unemployment rate, as published by the United States department of labor.

(B) Notwithstanding subdivision (d)(2)(A), a claimant's maximum eligibility shall not be reduced or increased during a benefit year for a claim."

III. Employment Protection for Military

Chapter 284, Public Acts 2021, adding T.C.A. § 8-33-110 eff. July 1, 2021.

As enacted, this chapter establishes state employment protections for members of the national guard, state guard, and civil air patrol called to active state duty equivalent to the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for members of the national guard called to federal active service.

IV. Teachers

A. Teacher Tenure Act; Constructive Discharge Inapplicable; Immunity from Tort Liability for School Officials

Lemon v. Williamson County Schools, 618 S.W.3d 1 (Tenn., Kirby, 2021).

"Because this appeal requires us to review a trial court's grant of a motion to dismiss, we recite the facts as alleged in the complaint, presuming them to be true and giving the plaintiff the benefit of all reasonable inferences. *Webb v. Nashville Area Habitat for Human., Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (citing *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31 (Tenn. 2007)).

"Plaintiff/Appellee Melanie Lemon taught school for fourteen years. During the 2016–2017 school year, Ms. Lemon was a second-grade teacher at Walnut Grove Elementary School in Williamson County, Tennessee.

"Ms. Lemon asserts that, despite the fact that she was a well-respected teacher with no history of discipline and excellent evaluations, school officials embarked on a campaign of harassment intended to coerce her into resigning from her teaching position. The harassment included false accusations that Ms. Lemon caused emotional distress to a parent and broke the law by providing student tee-shirt sizes for shirts purchased by a parent in support of a school-approved off-campus fundraiser.

"After the tee-shirt incident, Ms. Lemon received unusually low evaluations, which she took as an indication that termination of her employment was imminent. Ms. Lemon reported her concerns to a union representative and to the assistant superintendent of the schools, but she did not get a satisfactory response.

"Subsequently, school officials told Ms. Lemon she was under criminal investigation for child abuse. Initially, she was not told the specifics of the allegations. School officials conducted an incomplete investigation into the matter, and Ms. Lemon received a three-day suspension without pay, the maximum amount of time school officials may impose a suspension without triggering

appeal rights. The child abuse allegations were ultimately deemed unfounded, and law enforcement declined to investigate.

"When Ms. Lemon returned to the classroom following the three-day suspension, school officials placed cameras in her classroom to monitor her performance. They also assigned a retired teacher to her classroom as an observer. The superintendent of Williamson County Schools sent Ms. Lemon an email informing her that he was monitoring her actions in the classroom via the cameras. During this time period, school officials criticized Ms. Lemon for going into the hallway during class to speak with a school psychologist. Her time on the computer during class, responding to work-related emails, was timed. Ms. Lemon felt that none of these actions were warranted and were instead intended to pressure her to leave her employment.

"After experiencing these events, Ms. Lemon felt she had no choice but to resign from her teaching position. She resigned on May 12, 2017.

"On June 9, 2017, Ms. Lemon filed a complaint in the Williamson County Circuit Court. She named as defendants Williamson County Schools; the principal of Walnut Grove Elementary School, Kathryn Donnelly; the superintendent of Williamson County Schools, Mike Looney; and the assistant superintendent of Williamson County Schools, Denise Goodwin.

"The primary claim in Ms. Lemon's complaint was for wrongful termination under the Teacher Tenure Act ('Tenure Act'), Tennessee Code Annotated sections 49-5-501 to -515, based on her allegation that she was constructively discharged. The complaint asserted other claims as well, including breach of contract, negligence, defamation, false light invasion of privacy, invasion of civil rights, and both negligent and intentional infliction of emotional distress. Ms. Lemon sought compensatory and punitive damages, including back pay, lost benefits, front pay, and compensation for her emotional distress.

"In response, the Defendants filed a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss all claims. The trial court granted the motion in part; it dismissed Ms. Lemon's claims for wrongful termination, negligence, negligent infliction of emotional distress, invasion of civil rights, and false light invasion of privacy, concluding that Ms. Lemon failed to state a claim upon which relief could be granted.

"With respect to Ms. Lemon's wrongful termination claims under the Tenure Act, the trial court outlined the pertinent facts, stated the legal standard, and concluded that the doctrine of constructive discharge could not be applied to claims under the Act. . . ."

"We granted permission to appeal in this case to address whether a claim for wrongful termination of employment can be asserted under the Tenure Act by classifying the teacher's resignation as a constructive discharge rather than a voluntary quit. We analyze that issue first and then address the remaining issues raised on appeal."

"It is undisputed in this case that Ms. Lemon resigned her employment as a teacher with Williamson County Schools. She maintains she was forced to resign and asserts a claim of wrongful termination under the Tenure Act by applying the doctrine of constructive discharge.

"Williamson County Schools contends that application of the doctrine of constructive discharge in this case would be contrary to the express language of the Tenure Act, which provides that a

teacher's tenured status ends upon resignation. Tenn. Code Ann. § 49-5-501(11)(B)(i) (2016). Reading the natural and ordinary meaning of the statute's text, it argues, the Act's procedural protections are no longer available once a teacher resigns. Williamson County Schools relies heavily on the emphasis in *Thompson v. Memphis City Schools Board of Education*, 395 S.W.3d 616 (Tenn. 2012), on the elaborate procedural protections adopted as part of the Tenure Act.

"Ms. Lemon's argument emphasizes the facts as alleged in her complaint—that she was an excellent teacher who was inexplicably targeted by the Defendants with a series of incidents that created intolerable work conditions and forced her to resign. Looking at the legislative intent behind the Tenure Act, she contends that the wrong or evil the Act seeks to prevent is the wrongful termination of a qualified teacher. Ms. Lemon argues that the doctrine of constructive discharge should be applicable to tenured teachers because the Tenure Act was intended to provide tenured teachers with 'more protection than the average worker, not less.' She says applying constructive discharge is not contrary to the Tenure Act because the Act's procedures 'fail to address intentional or negligent intolerable work conditions as a means by the employer to circumvent the Act.'"

"In *Thompson v. Memphis City Schools Board of Education*, this Court set out the purposes of the Tenure Act and outlined the protections afforded to tenured teachers under the Act:

> The primary purpose of the Tenure Act is 'to protect school teachers from arbitrary demotions and dismissals.' The Tenure Act also affords 'a measure of job security to those educators who have attained tenure status' and assures 'efficient administration of the local educational systems of this State' by creating stability.
> ....
> ... Once attained, ... tenure extends 'until such time as the teacher ... resigns, retires or is dismissed under [the] provisions of this part.' [Tenn. Code Ann.] § 49-5-501(11)(C). The Tenure Act declares in no uncertain terms that '[n]o teacher shall be dismissed or suspended except as provided in this part.' *Id.* § 49-5-511(a)(1).
>
> The five exclusive 'causes for which a teacher may be dismissed' are 'incompetence, inefficiency, neglect of duty, unprofessional conduct and insubordination as defined in [section] 49-5-501.' *Id.* § 49-5-511(a)(2).... [C]ertain procedures must be provided before a tenured teacher is dismissed. First, written charges must be presented to the board of education.... *Id.* § 49-5-511(a)(4). If the board of education determines that the 'charges are of such nature as to warrant the dismissal of the teacher, the director of schools shall give the teacher' written notice of the board's decision, [and] a copy of the charges against the teacher.... *Id.* § 49-5-511(a)(5). The teacher then 'may [...] demand a hearing before the board [...].' *Id.* § 49-5-512(a)(1)."

"Thus, the Court in *Thompson* outlined the panoply of procedural protections afforded tenured teachers who face dismissal. Written charges must be given to the board of education for review. Once the board approves, the teacher is given notice and may demand a hearing. A demand for a hearing triggers many procedural safeguards, including the teacher's right to testimony under oath and a written record. After the hearing, the teacher gets written notice of the board's decision and may obtain judicial review. *Thompson*, 395 S.W.3d at 623–24.

"The *Thompson* Court made it clear that the procedural framework for teacher discipline in the Tenure Act is not optional; it is there to be followed."

"Against this background, we consider whether the doctrine of constructive discharge is accordant with the Tenure Act. As outlined above, constructive discharge serves an important purpose in the context of discrimination and retaliatory discharge cases. It prevents employers from skirting claims for unlawful termination by knowingly permitting conditions of discrimination so intolerable that a reasonable person subject to them would resign. *Campbell* [*v. Fla. Steel Corp.*], 919 S.W.2d [26 (Tenn. 1996)] at 34.

"As mentioned, Williamson County Schools argues that constructive discharge is not compatible with the Tenure Act because the Act provides that a teacher's tenured status ends upon resignation. As a result, they contend, Ms. Lemon cannot claim the protections of the Act if she resigns. *See* Tenn. Code Ann. § 49-5-501(11)(B)(i). This argument sounds superficially satisfying but ultimately is circular. After all, the employment discrimination statutes generally apply only to employees. Wrongful termination claims may generally only be asserted by employees who were terminated. Nevertheless, constructive discharge is applicable in the context of employment discrimination precisely to prevent employers from escaping liability 'simply because they forced an employee to resign.' *Lemon*, 2019 WL 4598201, at *5 (quoting *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 612 (Tenn. Ct. App. 2007)). The whole point of the doctrine of constructive discharge is to legally regard a resignation as a firing rather than a voluntary quit."

"The most salient part of the reasoning in *Thompson* is its conclusion that the concept of 'constructive resignation' was inconsistent with the detailed procedural framework in the Tenure Act. The Court in *Thompson* found that the school board's decision to characterize the teacher's failure to return to duty as a 'constructive resignation' short-circuited the statutory procedures carefully laid out in the Act and caused it to 'not operate[ ] as designed.' *Id.* at 630.

"Similarly, constructive discharge is inconsistent with the comprehensive procedural framework in the Tenure Act. The doctrine of constructive discharge sits comfortably alongside the discrimination and retaliatory discharge statutes; it facilitates rather than frustrates the aims of those statutes. The same cannot be said of the Tenure Act. *Thompson* outlined the multi-layered procedures adopted in the Tenure Act, which are intended to give tenured teachers ample opportunity to be heard and ensure that dismissal decisions are made with transparency and by consensus of school administrators. Regardless of the reason for the decision, a tenured teacher who quits and then sues on the basis of constructive discharge leapfrogs over those procedures and frustrates a major aim of the Act."

"The procedures in the Tenure Act regarding discharge of a tenured teacher, outlined at length in *Thompson*, ensure that dismissal decisions are made with involvement by several layers of educational administrators and opportunity for the subject teacher to be heard. 395 S.W.3d at 623–24. Only after those procedures have been exhausted is the teacher entitled to judicial review of the termination of employment. *Id.* at 624. From a policy perspective, this process makes certain that discharge decisions about tenured teachers are made methodically and by consensus of professional educators, and that court review of such decisions is based on a complete record reflecting the steps that led to termination. The process is intended not only to protect tenured teachers; it is also intended to benefit the public served by school administrators and teachers alike.

"As explained in *Thompson*, the statutes presuppose that both school administrators and tenured teachers will act 'in compliance with the Tenure Act.' *Id.* at 629. All parties must do so. Even if school administrators are convinced that discharge is unavoidable, they must follow the Tenure Act's procedures for discipline. Similarly, even if a tenured teacher subjected to discipline believes

discharge is inevitable, the teacher must avail himself or herself of the available remedies along the way and follow the Act's procedures. As in *Thompson*, '[t]he Tenure Act has not operated as designed in this case because its requirements were ignored.' *Id.* at 630. Ms. Lemon did not act in accordance with the Tenure Act, and she is not entitled to rely on its provisions now."

"In short, we must conclude that superimposing the doctrine of constructive discharge onto the statutory framework of the Tenure Act would be inconsistent with Act. Respectfully, we disagree with the Court of Appeals' decision to apply the doctrine to Ms. Lemon's claims under the Tenure Act and hold that constructive discharge is not applicable to wrongful termination claims under the Act. Consequently, we agree with the trial court that, upon resignation, Ms. Lemon's status as a tenured teacher ended, and she was no longer entitled to the protections provided by the Tenure Act for tenured teachers who have been improperly dismissed."

"On cross-appeal, Ms. Lemon argues that the Court of Appeals erred in affirming the trial court's dismissal of her tort claims against Williamson County Schools and the individual Defendants, Dr. Donnelly, Mr. Looney, and Ms. Goodwin.

"As to the individual Defendants, the tort claims at issue are for intentional infliction of emotional distress. As to Williamson County Schools, the tort claim at issue is for negligence."

"We first consider whether the facts alleged in the complaint state a claim for intentional infliction of emotional distress. The elements of an intentional infliction of emotional distress claim are that 'the defendant's conduct was (1) intentional or reckless, (2) so outrageous that it is not tolerated by civilized society, and (3) resulted in serious mental injury to the plaintiff.' *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 205 (Tenn. 2012).

"The burden for a plaintiff to demonstrate outrageous conduct is a high burden indeed. Liability for intentional infliction of emotional distress 'does not extend to mere insults, indignities, threats, annoyances, petty oppression or other trivialities.' *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997) (quoting *Medlin v. Allied Inv. Co.*, 217 Tenn. 469, 398 S.W.2d 270, 274 (1966), *abrogated on other grounds by Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996))."

"The Court of Appeals detailed the factual allegations in Ms. Lemon's complaint relevant to her claims of intentional infliction of emotional distress. *Lemon*, 2019 WL 4598201, at *7–10. The alleged outrageous conduct includes: disciplining and interfering with a charity attempt for a co-worker outside of school; a false and inaccurate work review; accusing Ms. Lemon of child abuse in the form of physical contact to discipline a student; placing cameras in her classroom to monitor her actions; placing a retired teacher in her classroom to do in-person monitoring; warning community members and co-workers not to speak on her behalf; telling community members Ms. Lemon would not work in the State of Tennessee if they spoke on her behalf; telling community members Ms. Lemon had anger issues; telling community members there had been allegations of child abuse; and telling co-workers who sought to speak up for Ms. Lemon to 'remember who signs your paychecks.'

"Ms. Lemon argues this conduct meets the standard for intentional infliction of emotional distress, emphasizing community support for her after some of the allegations came to light. We disagree."

"We agree with the trial court that the facts in this case do not rise to the level of outrageous conduct required for intentional infliction of emotional distress.

"We also agree with the lower courts that the Tenure Act immunizes school officials from liability for actions taken in furtherance of prosecutorial duties that fall under the Act. The Tenure Act provides: 'The director of schools or other school officials shall not be held liable, personally or officially, when performing their duties in prosecuting charges against any teacher or teachers under this part.' Tenn. Code Ann. § 49-5-512(b). This immunity is absolute and available even if the school officials who bring charges against a tenured teacher act with ill will or bad faith. *See Buckner v. Carlton*, 623 S.W.2d 102, 104–06 (Tenn. Ct. App. 1981) (holding Tenure Act provided immunity to school officials despite their false claims of misappropriation of school funds against the plaintiff and conspiracy to testify falsely during the teacher's administrative hearing), *superseded by statute on other grounds*, Act of May 24, 1984, ch. 972, 1984 Tenn. Pub. Acts 1026 (codified as amended at Tenn. Code Ann. §§ 9-8-301 to -311 (2016)), *as recognized in Hardy v. Tournament Players Club at Southwind, Inc.*, 513 S.W.3d 427, 435 (Tenn. 2017).

"Here, the actions Ms. Lemon recites in her complaint were taken by the individual Defendants while Ms. Lemon was a tenured teacher with Williamson County Schools. Assuming for purposes of this appeal the truth of Ms. Lemon's allegation that their purpose was to coerce her into resigning, the Tenure Act immunized them from liability for their actions.

"We also agree with the lower courts that Williamson County Schools has immunity against the claims for infliction of mental anguish. Tennessee Code Annotated § 29-20-205 provides:
"Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:

....
(2) ... infliction of mental anguish....

"Tenn. Code Ann. § 29-20-205(2) (2012). This provision immunizes Williamson County Schools against Ms. Lemon's claims of infliction of emotional distress."

B. Continuing Contract Law; Termination

Chapter 378, Public Acts 2021, amending T.C.A. § 49-5-409 eff. May 11, 2021.

"(a) Teachers in service and under the control of the public elementary or high schools of this state may continue in such service unless written notice is sent to the teacher from the teacher's board of education or director of schools, as appropriate, of the teacher's dismissal or failure of reelection."

"(d) Written notice sent by a board of education or director of schools in accordance with this section must be sent by certified mail or overnight carrier to the teacher's physical mailing address on record with the LEA, or transmitted via electronic mail to the email address used by the LEA to communicate with the teacher.

"(e) As used in this section, 'last instructional day' means the last day of the school year on which students are required to report to school."

V. "Right to Work" Proposed Constitutional Amendment

Senate Joint Resolution 648 passed on second reading by Senate Mar. 8, 2021, and by House on Apr. 29, 2021.

"WHEREAS, this resolution is known as the 'Right to Work Amendment'; and

"WHEREAS, protecting the right of Tennesseans to join or refuse to join a labor union or employee organization is a fundamental civil right; and

"WHEREAS, this right to work has played a crucial role in Tennessee's thriving economy; now, therefore,

"BE IT RESOLVED BY THE SENATE OF THE ONE HUNDRED ELEVENTH GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE HOUSE OF REPRESENTATIVES CONCURRING, that a majority of all the members of each house concurring, as shown by the yeas and nays entered on their journals, that it is proposed that Article XI of the Constitution of Tennessee be amended by adding the following language as a new section:

> It is unlawful for any person, corporation, association, or this state or its political subdivisions to deny or attempt to deny employment to any person by reason of the person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization.

"BE IT FURTHER RESOLVED, that the foregoing be referred to the One Hundred Twelfth General Assembly and that this resolution proposing such amendment be published in accordance with Article XI, Section 3 of the Constitution of Tennessee by posting such amendment on the official website of the Secretary of State and on the official website of the General Assembly."

This proposed amendment will appear on the ballot for the Nov. 8, 2022 general election.

VI. FLSA; Primary-Beneficiary Test Applies to Determine Whether Janitorial Work Assigned to Cosmetology Students Is Compensable

Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006 (6th Cir., Cole, 2020), cert. denied June 7, 2021.

"Plaintiffs Joy Eberline, Tracy Poxson, and Cindy Zimmermann are former cosmetology school students who sued defendants Douglas J. Holdings, Inc., Douglas J AIC, Inc., Douglas J. Exchange, Inc., Douglas J. Institute, Inc., Scott Weaver, and T.J. Weaver (collectively, 'Douglas J'), the operators of the Michigan cosmetology schools that the plaintiffs previously attended. The plaintiffs claim that Douglas J owes them compensation under the Fair Labor Standards Act ('FLSA') for work performed during their time in school. The district court granted summary judgment to the plaintiffs on a subset of their claims, holding as a matter of law that the plaintiffs were owed compensation under the FLSA for certain cleaning and janitorial work they were required to complete during their time as students at Douglas J.

"We determine that the district court properly focused its partial summary judgment analysis on the specific work for which plaintiffs seek compensation, rather than on the entirety of the vocational training program in which plaintiffs participated. It failed, however, to correctly apply

our decision in *Solis v. Laurelbrook Sanitarium & School, Inc.*, which governs FLSA claims in an educational setting. *See* 642 F.3d 518, 529 (6th Cir. 2011). We therefore reverse the district court's order granting summary judgment to the plaintiffs and remand for proper application of *Laurelbrook* to the work at issue."

"Douglas J operates licensed cosmetology schools in Michigan. The plaintiffs in this case attended Douglas J's Ann Arbor, Grand Rapids, and East Lansing schools. At each school, Douglas J has classrooms that are used for theoretical instruction and operates a clinic salon where students work towards the 965-hour practical experience requirement set by the state. The clinic salons aim to 'emulate a true salon setting,' with 'numerous styling stations ... and a complete skin and nail spa.'. . . The salons are open to the general public, and customers pay for beauty services provided by students under the tutelage of Douglas J's instructors. The salons also have a retail floor where apparel, tools, merchandise, skin and hair care products, makeup, and other products are available for sale. Douglas J's curriculum materials state that this retail floor 'gives students the opportunity to enhance their product knowledge and retail sales abilities—skills essential to a successful career in the beauty and wellness industry.' (*Id.*)

"Only students perform cosmetology services for customers in the salons, doing so under the supervision of licensed instructors. The instructors assist and observe the students working in the salon in order to evaluate their performance and ensure that the customers receive the service for which they paid. Ultimately, the students are graded for their work in the salon based on the technical execution of the service performed and the customer service experience provided.

"Students sign an enrollment agreement with the school that does not include any mention of students being compensated for any of their time spent in salons, or for any other portion of their relationship with Douglas J. The plaintiffs in this case did not expect to be paid by Douglas J during their time at the school. The students also did not have an expectation of employment with Douglas J upon the completion of their educational training and knew that they would be responsible for finding employment as a cosmetologist after graduating.

"Although students are not paid for their time in the salons, Douglas J does make a profit from the salons. These profits come from tuition paid by students, products purchased as required equipment by students, beauty products sold to customers in salons, and sales from salon services to the public. Douglas J employs the aforementioned licensed instructors and other guest-services personnel and also contracts with a janitorial service. Among the guest services personnel employed by Douglas J are aesthetics workers who are expected to sweep, dust, and polish the salons; clean and stock the shelves; clean windows; and generally keep the school clean."

"Students are scheduled to work in the salons during set times, during which they may not always have a customer to work with. Douglas J provides its instructors with a list of acceptable activities to assign to students during such times. Some of these tasks appear to be related to the training of students for a career in cosmetology. Those activities include working on techniques using mannequins, assisting fellow students who are working with customers, and working on group projects with other students. Other tasks may be less related to the school's purpose. Students could also be asked to do laundry, restock shelves with products sold to customers, clean various stations where customer services are performed, and clean and replace coffee mugs, among other tasks."

"The plaintiffs argue that the cleaning and janitorial activities are not included in Douglas J's curriculum or in the state requirements for cosmetology schools. Moreover, Douglas J does not

provide classroom instruction on these tasks or supervise students as they perform them as it does for curriculum-related activities in the salons, because, unlike other tasks in the salon, student performance on these activities is not graded by Douglas J's instructors. To the extent that students did not complete the cleaning and janitorial tasks, they fell to paid workers.

"Students, however, received academic credit for the time spent on these tasks in the sense that the time went toward their total hours of practical experience required for graduation. Eberline testified that the students' logs for their hours—which specify how many hours were spent on particular tasks—did not include a spot for hours spent on these cleaning and janitorial tasks, so students were instructed to 'magically make those numbers work' by apportioning the hours spent on these tasks to the areas where the students were short. . . . Whether Douglas J was permitted to issue credit for this time under state regulation is unclear, *see* Mich. Admin. Code R. 338.2161, but the parties do not dispute that all plaintiffs were credited for their time working on janitorial and cleaning tasks while at Douglas J and graduated on time."

"In applying the FLSA's definition of employee status, courts have developed tests to analyze the question of whether an employment relationship exists. 'Whether a particular situation is an employment relationship is a question of law.' *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir. 1994). In general, 'it is the "economic reality" of the relationship between parties that determines whether their relationship is one of employment or something else.' *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) (quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985)). This standard 'is not a precise test susceptible to formulaic application.' *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012). Rather, the employment relationship 'is to be determined on a case-by-case basis upon the circumstances of the whole business activity.' *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947)).

"For vocational schools, we have rejected a proposed bright-line rule that no student can ever be considered an employee of his school. *Laurelbrook*, 642 F.3d at 523–24. In *Laurelbrook*, we explained that 'determining employee status by reference to labels used by the parties is inappropriate.' *Id.* at 524. Rather, 'the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship.' *Id.* at 529. To determine the primary beneficiary, we look at factors like whether the purported employee had an expectation of compensation, derives educational value from the work, or displaces paid employees. *Id.* And we may consider '[a]dditional factors that bear on the inquiry ... insofar as they shed light on which party primarily benefits from the relationship.' *Id.* A plaintiff who claims entitlement to compensation under the FLSA for work done in a training or learning situation will only be considered an employee when she does not derive the primary benefit from the relationship. *Id.*

"But before reaching the primary-beneficiary analysis in this case, we must answer two questions. First, do we apply the primary-beneficiary test at all when the work at issue is not part of the school's educational curriculum? Second, given that the students claim an entitlement to compensation for some, but not all, of the work they performed during the course of the vocational program, do we apply the primary-beneficiary test to only that targeted segment of the program at issue or to the educational program as a whole? As we explain below, the *Laurelbrook* test governs this case and applies only to the activities at issue in the claim for compensation."

"We turn first to the question whether the primary-beneficiary test applies to the subset of the plaintiffs' claims presently before us. The district court determined that the test does not apply."

"The district court erred in using this new test. Its error stems from its central premise for departing from *Laurelbrook*'s test: that the activities at issue are 'not within the training or learning situation.' *Id.* at 645. To be sure, the janitorial tasks assigned to the plaintiffs were not a part of Douglas J's written curriculum, not required by the state regulations governing cosmetology education, and not directly supervised by instructors. But other aspects of the relationship between Douglas J and its students lead us to conclude that the janitorial work took place within the educational *context*, regardless of its ultimate educational benefit. The students were in the salons as part of the educational program, were assigned the tasks at issue by the same instructors who oversaw their practical training, received academic credit for the time spent on the tasks, and were told that they would be sent home—potentially delaying their graduation from the school—if they failed to complete the assigned tasks. We therefore conclude that the tasks spring from the students' relationship with Douglas J, meaning that we must analyze this FLSA claim related to those tasks under the primary-beneficiary test as laid out in *Laurelbrook*."

"How does the primary-beneficiary test apply in a case where students in a training or learning environment seek compensation for some, but not all, of the work they perform during the course of the educational relationship with the school? The parties present competing visions. The plaintiffs contend that we should apply the primary-beneficiary test only to the segment of time for which they seek compensation, asking which party is the primary beneficiary of plaintiffs' janitorial work. Douglas J asks us to apply the test to the entire relationship between the parties and would have us conclude that FLSA plaintiffs are not entitled to compensation for any of the work they perform within the vocational training program so long as the trainees are the primary beneficiaries of the program as a whole.

"We conclude that when a plaintiff asserts an entitlement to compensation based only on a portion of the work performed in the course of an educational relationship, courts should apply the primary-beneficiary test we laid out in *Laurelbrook* only to that part of the relationship, not to the broader relationship as a whole."

"Today, we only address the proper test to analyze claims like the one before us. As we have discussed, the district court did not apply this test when it granted the plaintiffs' motion for summary judgment. And absent exceptional circumstances, we do not resolve issues until the district court has ruled on them first. *E.g.*, *United States v. Poole*, 407 F.3d 767, 773 (6th Cir. 2005). Exceptional circumstances are not present here, so we decline to reach a conclusion as to which party is the primary beneficiary of the time the plaintiffs spent working on general cleaning and janitorial tasks. Accordingly, we do not hold that either party should prevail under the test we now direct the district court to apply, and our analysis should not be read to imply that one party is more likely to prevail on the merits.

"Instead, we remand to the district court to apply the primary-beneficiary test to the plaintiffs' motion for partial summary judgment as described herein. This will allow the district court to consider the multitude of factors relevant to the primary-beneficiary inquiry in this case. Under *Laurelbrook* these include: the plaintiffs' lack of expectation of payment; the educational value, both tangible and intangible, of the tasks under scrutiny; and the displacement of paid employees to the school's competitive benefit in the commercial marketplace, *see* 642 F.3d at 522, 529, 531; as well as any other considerations that may 'shed light on which party primarily benefits from the

relationship,' *id.* at 529. Such additional considerations might include: the mandatory or voluntary nature of the tasks; the relationship of the work at issue to the school curriculum, state regulations, and the school's stated mission and educational philosophy; the type of work performed in the corresponding real-world commercial setting; and the academic credit received by the plaintiffs for the work. Additionally, before concluding any portion of plaintiffs' work for Douglas J is compensable, the district court should determine whether the work at issue is for de minimis amounts of time or is practically speaking too difficult to record. *Aiken*, 190 F.3d at 758."

"We therefore reverse the district court's order granting partial summary judgment to the plaintiffs and remand this case to the district court for further proceedings consistent with this opinion."

VII. Retirement; TCRS; Credit for Prior Service

Chapter 382, Public Acts 2021, adding T.C.A. § 8-34-607 eff. July 1, 2021.

"Any member of the Tennessee consolidated retirement system may obtain creditable service for prior service while a participating member of a city, metropolitan government, county, utility district, or other political subdivision retirement system by notifying the board of trustees of the Tennessee consolidated retirement system and the board of trustees of the city, metropolitan government, county, utility district, or other political subdivision retirement system. Upon receiving the notice, the board of trustees of the city, metropolitan government, county, utility district, or other political subdivision retirement system shall transfer to the Tennessee consolidated retirement system board all employer and employee contributions made by or on behalf of the member, together with regular interest thereon. Upon receipt of the funds, the member must be credited with the years of service, not to exceed the years of actual service, as the amount will warrant without creating any unfunded actuarially accrued liability."

VIII. Disability Benefits Under Railroad Retirement Act; Refusal to Reopen Prior Benefits Determination Is Subject to Judicial Review

Salinas v. United States Railroad Retirement Board, 141 S.Ct. 691 (U.S., Sotomayor, 2021).

"In 1992, petitioner Manfredo M. Salinas began seeking disability benefits under the Railroad Retirement Act of 1974 (RRA) based on serious injuries he suffered during his 15-year career with the Union Pacific Railroad. Salinas' first three applications were denied, but he was granted benefits after he filed his fourth application in 2013. He timely sought reconsideration of the amount and start date of his benefits. After reconsideration was denied, he filed an administrative appeal, arguing that his third application, filed in 2006, should be reopened because the U.S. Railroad Retirement Board (Board) had not considered certain medical records. An intermediary of the Board denied the request to reopen because it was not made '[w]ithin four years' of the 2006 decision, and the Board affirmed. 20 CFR § 261.2(b). Salinas sought review with the Fifth Circuit, but the court dismissed the petition for lack of jurisdiction, holding that federal courts cannot review the Board's refusal to reopen a prior benefits determination.

"Held: The Board's refusal to reopen a prior benefits determination is subject to judicial review."

"The RRA makes judicial review available to the same extent that review is available under the Railroad Unemployment Insurance Act (RUIA). See 45 U.S.C. § 231g. Thus, to qualify for judicial review, the Board's refusal to reopen Salinas' 2006 application must constitute 'any final decision of the Board.' § 355(f). It does.

"The phrase 'any final decision' 'denotes some kind of terminal event,' and similar language in the Administrative Procedure Act has been interpreted to refer to an agency action that 'both (1) mark[s] the consummation of the agency's decisionmaking process and (2) is one by which rights or obligations have been determined, or from which legal consequences will flow.' *Smith* v. *Berryhill*, 587 U.S. ___, ___, ___. The Board's refusal to reopen Salinas' 2006 denial of benefits satisfies these criteria. First, the decision was the 'terminal event' in the Board's administrative review process. After appealing the intermediary's denial of reopening to the Board, Salinas' only recourse was to seek judicial review. Second, the features of a reopening decision make it one 'by which rights or obligations have been determined, or from which legal consequences will flow.' For example, a reopening is defined as 'a conscious determination . . . to reconsider an otherwise final decision for purposes of revising that decision.' 20 CFR § 261.1(c). It therefore entails substantive changes that affect benefits and obligations under the RRA. The Board reads § 355(f)'s earlier reference to 'any other party aggrieved by a final decision under subsection (c)' to mean that each authorized party may seek review of only 'a final decision under' § 355(c). Section 355(f), however, uses the broad phrase 'any final decision' without tying it to the earlier reference to § 355(c)—a notable omission, since Congress used such limiting language elsewhere in § 355, see § 355(c)(5)."

"Any ambiguity in the meaning of 'any final decision' must be resolved in Salinas' favor under the 'strong presumption favoring judicial review of administrative action.' *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 486. The Board attempts to rebut that presumption by arguing that various cross-references within § 355 prove that § 355(f) and § 355(c) are coextensive. There are several indications, however, that § 355(f) is broader than § 355(c). For example, under § 355(g), determinations that certain unexpended funds may be used to pay benefits or refunds are subject to review exclusively under § 355(f), yet the Board concedes that such decisions fall outside § 355(c)."

"The Board's remaining arguments also fall short. First, the Board analogizes § 355(f) to the judicial-review provision addressed in *Califano* v. *Sanders*, 430 U.S. 99. But the latter provision contains an express limitation that § 355(f) does not, distinguishing *Califano* from this case. Second, the Board argues that reopening does not qualify for judicial review because it is simply a 'refusal to make a new determination' of rights or liabilities, like the denial of reopening in *Your Home Visiting Nurse Services, Inc.* v. *Shalala*, 525 U.S. 449. The statute in *Your Home*, however, did not implicate the presumption in favor of judicial review and was narrower than § 231g, which simply incorporates § 355(f) into the RRA. Finally, the fact that the Board could decline to offer reopening does not mean that, having chosen to provide it, the Board may avoid the plain text of § 355(f). The Board's decision to grant or deny reopening is ultimately discretionary, however, and therefore subject to reversal only for abuse of discretion. See 20 CFR § 261.11."

SECURITIES LAW

I. Class Action Fraud; Presumptions and Burden of Proof

Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System, 141 S.Ct. 1951 (U.S., Barrett, 2021).

"Respondent shareholders (Plaintiffs) filed this securities-fraud class action alleging that The Goldman Sachs Group, Inc., and certain of its executives (collectively, Goldman) violated securities laws and regulations prohibiting material misrepresentations and omissions in connection with the sale of securities. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b–5. Plaintiffs allege that Goldman maintained an artificially inflated stock price by repeatedly making false and misleading generic statements about its ability to manage conflicts. Under Plaintiffs' inflation-maintenance theory, Goldman's alleged misrepresentations caused its stock price to remain inflated until the market reacted to the truth about Goldman's practices—at which point Goldman's stock price dropped and Plaintiffs suffered losses. Seeking to certify a class of Goldman shareholders harmed by reliance on Goldman's alleged misrepresentations, Plaintiffs invoked the presumption, endorsed by the Court in *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194, that investors are presumed to rely on the market price of a company's security, which in an efficient market will reflect all of the company's public statements, including misrepresentations. The *Basic* presumption allows class-action plaintiffs to prove reliance through evidence common to the class. Goldman in turn sought to defeat class certification by rebutting the *Basic* presumption through evidence that its alleged misrepresentations had no impact on its stock price. After an initial round of litigation which resulted in a remand from the Second Circuit, the District Court certified the class based on Goldman's failure to establish by a preponderance of the evidence that its alleged misrepresentations had no price impact. The Second Circuit authorized an appeal under Federal Rule of Civil Procedure 23(f), and affirmed in a divided decision, finding that the District Court's price impact determination was not an abuse of discretion. Goldman now argues that the Second Circuit erred twice: first, by holding that the generic nature of Goldman's alleged misrepresentations is irrelevant to the price impact inquiry; and second, by assigning Goldman the burden of persuasion to prove a lack of price impact.

"Held:

"The generic nature of a misrepresentation often is important evidence of price impact that courts should consider at class certification, including in inflation-maintenance cases. That is true even though the same evidence may be relevant to materiality, an inquiry reserved for the merits phase of a securities-fraud class action. See *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 133 S.Ct. 1184, 185 L.Ed.2d 308. A court has an obligation before certifying a class to determine that Rule 23 is satisfied, *Comcast Corp. v. Behrend*, 569 U.S. 27, 35, 133 S.Ct. 1426, 185 L.Ed.2d 515, and a court cannot make that finding in a securities-fraud class action without considering all evidence relevant to price impact. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 284, 134 S.Ct. 2398, 189 L.Ed.2d 339 (*Halliburton II*). The parties now accept this legal framework but dispute whether the Second Circuit properly considered the generic nature of Goldman's alleged misrepresentations. Because the Court concludes that the Second Circuit's opinions leave sufficient doubt on this question, the Court remands for the Second Circuit to consider all record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue."

"Defendants bear the burden of persuasion to prove a lack of price impact by a preponderance of the evidence at class certification. The Court has held that nothing in Federal Rule of Evidence 301 constrains the Court's authority to change customary burdens of persuasion under a federal statute, see *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404, n. 7, 103 S.Ct. 2469, 76 L.Ed.2d 667, and the Court has exercised this authority to reassign the burden of persuasion to the defendant in other contexts. Goldman does not challenge the Court's relevant precedents, but questions whether the Court exercised this authority in establishing the *Basic* framework pursuant to the securities laws. The Court concludes that *Basic* and *Halliburton II* did allocate to defendants the burden of persuasion to prove a lack of price impact. As relevant here, *Basic* explains that defendants may rebut the presumption of reliance if they '*show* that the misrepresentation *in fact* did not lead to a distortion of price' by making '[a]ny *showing* that *severs the link* between the alleged misrepresentation and ... the price received (or paid) by the plaintiff.' 485 U.S., at 248, 108 S.Ct. 978 (emphasis added). Similarly, *Halliburton II* held that defendants may rebut the *Basic* presumption at class certification 'by *showing* ... that the particular misrepresentation at issue did not affect the stock's market price.' 573 U.S., at 279, 134 S.Ct. 2398 (emphasis added). These references to a defendant's 'showing' require a defendant to do more than produce some evidence relevant to price impact; the defendant must 'in fact' 'seve[r] the link' between a misrepresentation and the price paid by the plaintiff. Moreover, *Halliburton II*'s holding that plaintiffs need not directly prove price impact to invoke the *Basic* presumption, 573 U.S., at 278–279, 134 S.Ct. 2398, would be negated in almost every case if a defendant could shift the burden of persuasion to the plaintiffs by mustering any competent evidence of a lack of price impact (including, for example, the generic nature of the alleged misrepresentations). Thus, the best reading of the Court's precedents assigns defendants the burden of persuasion to prove a lack of price impact by a preponderance of the evidence. Even so, that allocated burden will be outcome determinative only in the rare case in which the evidence is in perfect equipoise."

ERISA

I. Pre-Emption Inapplicable to Pharmacy Reimbursement Statute

Rutledge v. Pharmaceutical Care Management Association, 141 S.Ct. 474 (U.S., Sotomayor, 2020).

"Pharmacy benefit managers (PBMs) act as intermediaries between pharmacies and prescription-drug plans. In that role, they reimburse pharmacies for the cost of drugs covered by prescription-drug plans. To determine the reimbursement rate for each drug, PBMs develop and administer maximum allowable cost (MAC) lists. In 2015, Arkansas passed Act 900, which effectively requires PBMs to reimburse Arkansas pharmacies at a price equal to or higher than the pharmacy's wholesale cost. To accomplish this result, Act 900 requires PBMs to timely update their MAC lists when drug wholesale prices increase, Ark. Code Ann. § 17–92–507(c)(2), and to provide pharmacies an administrative appeal procedure to challenge MAC reimbursement rates, § 17–92–507(c)(4)(A)(i)(*b*). Act 900 also permits Arkansas pharmacies to refuse to sell a drug if the reimbursement rate is lower than its acquisition cost. § 17–92–507(e). Respondent Pharmaceutical Care Management Association (PCMA), which represents the 11 largest PBMs in the country, sued, alleging, as relevant here, that Act 900 is pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA). Following Circuit precedent in a case involving a similar Iowa statute, the District Court held that ERISA pre-empts Act 900. The Eighth Circuit affirmed.

"Held: Arkansas' Act 900 is not pre-empted by ERISA."

"ERISA pre-empts state laws that 'relate to' a covered employee benefit plan. 29 U.S.C. § 1144(a). '[A] state law relates to an ERISA plan if it has a connection with or reference to such a plan.' *Egelhoff v. Egelhoff*, 532 U.S. 141, 147, 121 S.Ct. 1322, 149 L.Ed.2d 264. Act 900 has neither of those impermissible relationships."

"Act 900 does not have an impermissible connection with an ERISA plan. To determine whether such a connection exists, this Court asks whether the state law 'governs a central matter of plan administration or interferes with nationally uniform plan administration.' *Gobeille* v. *Liberty Mut. Ins. Co.*, 577 U.S. 312, 320, 136 S.Ct. 936, 194 L.Ed.2d 20. State rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage are not pre-empted by ERISA. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668, 115 S.Ct. 1671, 131 L.Ed.2d 695. Like the law at issue in *Travelers*, Act 900 is merely a form of cost regulation that does not dictate plan choices."

"Act 900 also does not 'refer to' ERISA. It does not 'ac[t] immediately and exclusively upon ERISA plans,' and 'the existence of ERISA plans is [not] essential to the law's operation.' *Gobeille*, 577 U.S. at 319–320, 136 S.Ct. 651. Act 900 affects plans only insofar as PBMs may pass along higher pharmacy rates to plans with which they contract, and Act 900 regulates PBMs whether or not the plans they service fall within ERISA's coverage. ERISA plans are therefore also not essential to Act 900's operation."

"PCMA's contention that Act 900 has an impermissible connection with an ERISA plan because its enforcement mechanisms both directly affect central matters of plan administration and interfere with nationally uniform plan administration is unconvincing. First, its claim that Act 900 affects plan design by mandating a particular pricing methodology for pharmacy benefits is simply a long way of saying that Act 900 regulates reimbursement rates. Second, Act 900's appeal procedure does not govern central matters of plan administration simply because it requires administrators to comply with a particular process and may require a plan to reprocess how much it owes a PBM. Taken to its logical endpoint, PCMA's argument would pre-empt any suits under state law that could affect the price or provision of benefits, but this Court has held that ERISA does not pre-empt 'state-law mechanisms of executing judgments against' ERISA plans, *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 831, 108 S.Ct. 2182, 100 L.Ed.2d 836. Third, allowing pharmacies to decline to dispense a prescription if the PBM's reimbursement will be less than the pharmacy's cost of acquisition does not interfere with central matters of plan administration. The responsibility for offering the pharmacy a below-acquisition reimbursement lies first with the PBM. Finally, any 'operational inefficiencies' caused by Act 900 are insufficient to trigger ERISA pre-emption, even if they cause plans to limit benefits or charge plan members higher rates. See *De Buono v. NYSA–ILA Medical and Clinical Services Fund*, 520 U.S. 806, 816, 117 S.Ct. 1747, 138 L.Ed.2d 21."

II. Overpaid Retirement Funds Must be Repaid by Recipient

Zirbel v. Ford Motor Company, 980 F.3d 520 (6th Cir., Sutton, 2020), reh'g en banc denied Dec. 16, 2020.

"Donna Zirbel received a $351,000 retirement-benefits payment from Ford Motor Company. But the payment was two sizes too big. When Ford learned of the mistake, it asked for the extra money back. Zirbel refused. She sued Ford, seeking a declaration that she could keep the money. Ford stood by its decision. The district court granted summary judgment to Ford, requiring Zirbel to return the $243,000 in overpayments. We affirm."

"Donna's former husband, Carl Zirbel, retired from Ford in 1998 and participated in Ford's retirement plan. The plan offers monthly pension payments. 'In the event of an error' in calculating a pension, the plan requires a beneficiary to 'return[ ]' the 'amount of the overpayment' to the fund 'without limitation.' R.25-37 at 2. But the committee that runs the plan has 'discretionary authority to reduce any repayment amount.' *Id.*

"When Carl and Donna divorced in 2009, the divorce decree said that Donna would receive half of the marital portion of Carl's pension, the portion attributable to his work during their marriage. Donna contacted Ford to discuss her pension benefits. After some back and forth, she agreed to postpone drawing down the pension. Then in 2013, she contacted Ford and it offered a lump sum payment. She accepted a large sum in place of her future monthly benefits and a $351,690 retroactive payment to make up for the postponed monthly benefits.

"After the government took its share of the retroactive payment through withholding taxes, Zirbel deposited the rest into her bank account. She eventually placed some of the windfall in her Investment Retirement Account, she invested some in mutual funds, she gave some to her children, and she paid more taxes.

"Four years later, Ford audited Zirbel's benefits. It discovered that the retroactive pension payment mistakenly included benefits going back to 1998, when Carl retired, instead of 2009, when the two divorced. Zirbel thus received an extra ten years' worth of monthly payments. The $351,690 payment should have been just $108,500, meaning she received $243,190 more than she should have.

"Ford asked for the money back. Zirbel appealed, first to the third-party actuarial service that operates Ford's plan, then to the committee that oversees the pension plan. Each appeal failed. The committee invited Zirbel to apply for a hardship reduction, which would require full disclosure of her finances, including her other substantial retirement funds, her other investments, and her inheritance from her mother. Zirbel did not apply.

"Zirbel sued Ford, seeking a declaration that she was entitled to keep the money. Ford counterclaimed, seeking restitution of the overpayment. The district court granted summary judgment to Ford."

"The first question is whether the plan committee permissibly required Zirbel to return the excess pension payments. It did."

"That Ford may demand repayment in federal court does not answer every question in these types of cases. Ford filed its counterclaim under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., which allows it 'to obtain ... appropriate equitable relief ... to enforce any provisions of this [Act] or the terms of the plan.' 29 U.S.C. § 1132(a)(3)(B). That prompts this question: Does the judgment directing Zirbel to pay Ford $243,190 in restitution provide 'equitable relief' as opposed to legal relief?"

"Under these principles, and so far as Zirbel has argued this case, the remedy in this case amounts to equitable restitution. The plan's reimbursement provision gave it a right to recover a particular fund: the overpayment. *Hall v. Liberty Life Assur. Co. of Bos.*, 595 F.3d 270, 275 (6th Cir. 2010). As soon as Zirbel received the overpayment, a lien attached, permitting the plan to seek equitable restitution in the amount of the $243,190.

"Nothing from the receipt of those funds to the start of the lawsuit changed that calculation. Once she received the overpayment, she placed it into her accounts. This commingling gave Ford an equitable lien against those accounts up to the overpayment. Because Zirbel does not argue that she dissipated the funds in those accounts into nontraceable items, that's all we need to know. Ford could recover through this equitable lien."

"Zirbel argues that Ford should be equitably estopped from recovering the overpayments. When she received the lump sum offer, she thought the numbers were wrong. As a result, she asked Ford to recalculate her benefits, and it did not change the sum owed. This confirmation, she claims, binds Ford now.

"But to bring an equitable-estoppel claim, Zirbel had to show that Ford made fraudulent representations to her, that she did 'not know the truth behind [Ford's] representations,' *Trs. of the Mich. Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 591 (6th Cir. 2000), and that she justifiably relied on Ford's representations to her detriment, *see Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991), *abrogated on other grounds*, *M & G Polymers USA, LLC v.*

Tackett, 574 U.S. 427, 135 S.Ct. 926, 190 L.Ed.2d 809 (2015). *Cf. Sprague v. General Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998).

"Zirbel cannot satisfy these requirements. She has not shown, for one, that Ford's inclusion of an incorrect retroactive-payment amount 'contain[ed] an element of fraud, either intended deception or such gross negligence ... as to amount to constructive fraud.' *Mich. Laborers' Health Care Fund*, 209 F.3d at 591 (quotation omitted). Ford did not know that it had the wrong number. At most, Zirbel has shown that the company made a mistake—that it was guilty of misfeasance, not the malfeasance that estoppel requires."

ETHICS AND PROFESSIONALISM

I. The Client-Lawyer Relationship (Rules 1.1 - 1.16)

A. Competence, Rule 1.1

In re Freeman, Board Release of Information.

Michael Lloyd Freeman of Nashville was suspended for three years, with three months to be served on active suspension and the remainder on probation. Mr. Freeman is also required to pay restitution of $750, obtain an evaluation with the Tennessee Lawyers Assistance Program, and engage the services of a Practice monitor.

"A Hearing Panel found Mr. Freeman failed to file an appropriate complaint in a contested divorce action resulting in the dismissal of the divorce for failure to prosecute, failed to reasonably communicate with his client and expedite his litigation, failed to review his client's file and respond to a pending motion for summary judgment, and failed to file an executed marital dissolution agreement and take appropriate action to confirm its filing with the Court in violation of RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication) and 3.2 (expediting litigation)."

In re Henry, Board Release of Information.

Arthur Wayne Henry of Loudon was disbarred.

Mr. Henry consented to disbarment because he could not successfully defend the charges alleged in a complaint filed against him with the Board.

Mr. Henry violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 8.1(b) (bar admission and disciplinary matters), and 8.4(a), (c), (d), and (g) (misconduct).

B. Scope of Representation and Allocation of Authority Between Client and Lawyer, Rule 1.2

In re Krenis, Board Release of Information.

James Randall Krenis of Jackson was publicly censured.

"Mr. Krenis was paid a portion of a non-refundable fee to assist a client but failed to provide legal services until the full amount of the non-refundable fee was paid. Mr. Krenis also charged other fees which were unreasonable. Mr. Krenis later changed the scope of his representation and increased his fees without obtaining the informed consent of his client in writing or giving his client the opportunity to meet with independent counsel. Mr. Krenis failed to file any pleadings or make any court appearances on behalf of his client and failed to adequately communicate with his client about the status of the representation."

Mr. Krenis violated RPCs 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.8(a) (conflict of interest), and 8.4(a)(d) (misconduct).

C. Diligence, Rule 1.3

In re Elsea, Board Release of Information.

Shannon David Elsea of Memphis was publicly censured.

"In the representation of a client, Mr. Elsea failed to diligently represent the client's interests and failed to adequately communicate with the client. Mr. Elsea also provided deceptive information to both his client and the Board.

"In the representation of a separate client, Mr. Elsea failed to diligently represent the client's interests, adequately communicate with the client, or expedite the litigation. Mr. Elsea also deceived his client into believing a settlement had occurred and deceived the court clerk and opposing counsel as to the true status of the case which interfered with the timely administration of justice. In mitigation, Mr. Elsea was experiencing personal issues that caused him undue stress and anxiety which Mr. Elsea is currently addressing."

Mr. Elsea violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 3.2 (expediting litigation), 4.1 (truthfulness in statements to others), 8.1(b) (disciplinary matters), and 8.4(a), (c), and (d) (misconduct).

In re Frazier, Board Release of Information.

Steven Carl Frazier of Kingsport was publicly censured and directed to reimburse $2,500 to his client.

"Mr. Frazier improperly shared a fee with an attorney outside his firm without obtaining the written consent of his client. Mr. Frazier failed to diligently prosecute a civil action for his client which resulted in the court's sua sponte dismissal of the action for lack of prosecution. Mr. Frazier was later able to have the dismissal set aside. Mr. Frazier failed to adequately communicate with both his client during the representation and the Board during the disciplinary process which resulted in his temporary suspension for a short period."

Mr. Frazier violated RPCs 1.3 (diligence), 1.4 (communication), 1.5(e) (fees), 3.2 (expediting litigation), 8.1(b) (disciplinary matters), and 8.4(a), and (d) (misconduct).

In re Golder, Board Release of Information.

Robert Harris Golder of Jackson was publicly censured.

"Mr. Golder represented two clients in petitions for post-conviction relief, and a third client in a petition for habeas relief. In all three matters, Mr. Golder delayed in taking proper action on behalf of his clients, failed to respond to inquiries from his clients, and failed to keep his clients updated on the status of their cases. In the habeas proceeding, Mr. Golder also missed applicable court deadlines and failed to deposit unearned fees into his trust account."

Mr. Golder, has violated RPCs 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property and funds), 3.2 (expediting litigation), and 3.4(c) (fairness to opposing party and counsel).

In re Harding, Board Release of Information.

John T. Harding of Hendersonville was suspended for one year, based on a conditional guilty plea, with thirty days to be served on active suspension and the remainder served on probation.

"A Petition containing one complaint was filed by the Board alleging Mr. Harding failed to reasonably communicate with his client regarding the status of the case; failed to act in a diligent manner and expedite the client's litigation."

Mr. Harding violated RPCs 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), and 8.4(a) (misconduct).

In re Kennedy, Board Release of Information.

James Lester Kennedy of Knoxville was permanently disbarred.

"A Hearing Panel found Mr. Kennedy distributed attorneys' fees and personal expenses in a probate matter to himself and others which were not authorized by the court. The Panel determined Mr. Kennedy failed to demonstrate good faith, diligence, prudence and caution and also failed to demonstrate loyalty and fidelity to the estate as required."

Mr. Kennedy violated RPCs 1.3 (diligence), 3.4(c) (fairness to opposing party and counsel), and 8.4(c) and (d) (misconduct).

In re Lopez, Board Release of Information.

Ivan Omar Lopez of Hermitage was publicly censured, based on a conditional guilty plea.

"The Board of Professional Responsibility filed a Petition for Discipline against Mr. Lopez based upon his failure to ensure the timely entry of a final decree of divorce in 2015, and his failure to take timely action in 2019 upon being advised the final decree was not in the court file and had not been entered."

Mr. Lopez violated RPCs 1.3 (diligence) and 8.4(d) (misconduct).

In re Montierth, Board Release of Information.

Eric John Montierth of Memphis was publicly censured.

"Mr. Montierth failed to timely file an appellate brief in two criminal cases. In both cases, the court then entered an order directing him to file the brief within ten days. In both cases, Mr. Montierth failed to file the brief or ask for an extension of time. Almost four months later, the court ordered Mr. Montierth to appear and explain his conduct in both cases, which he did. The court later accepted the late-filed brief in each case. Mr. Montierth's conduct resulted in potential harm to his clients."

Mr. Montierth violated RPCs 1.3 (diligence), 3.2 (expediting litigation), 3.4(c) (fairness to opposing party and counsel), and 8.4(d) (prejudice to the administration of justice).

In re Perry, Board Release of Information.

Steven Kenneth Perry of Evergreen Park, Illinois, was suspended for two years, retroactive to his January 2, 2019, temporary suspension and is required to pay restitution to his client and undergo a Tennessee Lawyers Assistance Program evaluation.

"On July 30, 2019, the Board filed a Petition for Discipline against Mr. Perry. The Petition included one complaint of misconduct. The Hearing Panel found Mr. Perry essentially abandoned his client's case and failed to respond to the Board."

Mr. Perry violated RPCs 1.3 (diligence), 1.4 (communication, 1.5 (fees), 1.16 (terminating representation), 3.2 (expediting litigation), 8.1(b) (bar admission and disciplinary matters), and 8.4(d) (conduct prejudicial to the administration of justice).

In re Sutton, Board Release of Information.

Kimberly Ogden Sutton of Bentonville, Arkansas, consented to permanent disbarment because she could not successfully defend the charges alleged in complaints filed against her.

"Ms. Sutton represented six clients in immigration related matters. Ms. Sutton was paid to provide legal services but failed to complete such services. Ms. Sutton collected fees which were not yet earned, and which should have remained in her trust account. Ms. Sutton effectively terminated her representation of the clients without notification to them and without returning client files or unearned fees. Ms. Sutton abandoned her legal practice without providing sufficient client protection. Ms. Sutton failed to respond to the disciplinary complaints filed against her and was temporarily suspended as a result. Ms. Sutton failed to comply with the notification requirements of suspended attorneys."

Ms. Sutton violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), 1.16 (terminating representation), 3.4(c) (disobeying obligations under rules of a tribunal), 8.1 (disciplinary matters), and 8.4(a), and (d) (misconduct).

In re Williamson, Board Release of Information.

Candace Lenette Williamson of Grenada, Mississippi, was publicly censured.

"Ms. Williamson was paid a fee to represent a client but neglected to take any substantive legal action on behalf of the client. Ms. Williamson deceived the client into believing that she had filed petitions in both Mississippi and Tennessee, but no petitions were ever filed. Ms. Williamson thereafter abandoned the representation and failed to respond to the disciplinary complaint against her."

Ms. Williamson violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16 (terminating representation), 8.1(b) (disciplinary matters), and 8.4(a), (c), and (d) (misconduct).

D. Communication, Rule 1.4

In re Barnette, Board Release of Information.

Jason Wade Barnette of Nashville was permanently disbarred, based upon his consent because he could not successfully defend the charges filed against him.

"Mr. Barnette represented eight clients in collection disputes and employment matters. His misconduct included failing to communicate with his clients and inform them that he had been suspended from the practice of law, allowing default judgments to be entered against clients, engaging in the unauthorized practice of law, posting misleading information on his web page suggesting he was authorized to practice law in another state, and failing to disburse settlement funds to his client."

Mr. Barnette violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), 1.16 (terminating representation), 5.5 (unauthorized practice of law), 7.1 (communications concerning a lawyer's services), 8.1 (disciplinary matters), and 8.4(a), (d), and (g) (misconduct).

In re Boykin, Board Release of Information.

Jamaal L. Boykin of Nashville was publicly censured.

Mr. Boykin was fully retained to represent a client in a bankruptcy proceeding. Mr. Boykin never filed a bankruptcy petition for his client but led his client to believe that a petition was filed. Mr. Boykin then ceased communicating with his client and effectively abandoned the representation. In mitigation, Mr. Boykin corrected the issues which led to his misconduct and provided a full refund to the client.

Mr. Boykin violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16 (terminating representation), and 8.4(a), (c), and (d) (misconduct).

In re Edwards, Board Release of Information.

Elbert Everett Edwards, III, of Memphis was publicly censured, based on a conditional guilty plea, and conditioned upon attending the Board's Ethics Workshop.

"While in private practice, Mr. Edwards worked as a contract attorney for a debt collection company. Mr. Edwards was retained by the company to collect a debt but never contacted or communicated with the client who was unaware of the representation. The client, not having retained Mr. Edwards or executed a written retainer agreement, objected to the contingency fee charged by Mr. Edwards after successfully collecting the debt."

Mr. Edwards violated RPC 1.2 (scope of representation), 1.4 (communication), and 8.4 (misconduct).

In re Williamson, Board Release of Information.

Candace Lenette Williamson of Grenada, Mississippi, was suspended for two years, retroactive to the date of her temporary suspension of December 21, 2018, with one year to be served on active suspension followed by one year of probation.

The Petition for Discipline filed against Ms. Williamson "included four complaints of misconduct and one self-report of misconduct. The Hearing Panel found that Ms. Williamson failed to adequately communicate with her clients, did not provide competent and diligent representation, engaged in the unauthorized practice of law, and failed to advise opposing counsel, her clients, and

the court that she had been temporarily suspended from the practice of law. In mitigation, Ms. Williamson was undergoing significant personal problems that she is now addressing."

Ms. Williamson violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.16(d) (terminating representation), 3.2 (expediting litigation), 3.3 (candor toward the tribunal), 5.5 (unauthorized practice of law), 8.1 (bar and disciplinary matters), and 8.4 (a) and (g) (misconduct).

E. Fees, Rule 1.5

Beier v. Board of Professional Responsibility, 610 S.W.3d 425 (Tenn., Kirby, 2020).

"In this appeal from attorney disciplinary proceedings, the hearing panel of the Tennessee Board of Professional Responsibility determined that the attorney's conduct in two cases violated the Rules of Professional Conduct. In one case, the hearing panel found that the attorney signed the name of a witness on an affidavit, falsely notarized the signature, and did not disclose to the trial court or opposing counsel that he had signed the witness's affidavit. In another case, the hearing panel found, the attorney persuaded a client in a probate matter to agree to an unreasonable contingency fee arrangement, took advantage of the client's disability, misrepresented to the probate court that the client was the decedent's sole heir, failed to disclose the existence of other heirs, and got the probate court to agree to close the estate without a detailed accounting in order to avoid judicial scrutiny of the unreasonable fee. The hearing panel suspended the law license of the appellant attorney for two years, with three months served as active suspension and the remainder on probation. The attorney and the Board both appealed the hearing panel's decision to the chancery court. The chancery court affirmed the hearing panel's findings as to rule violations and aggravating and mitigating factors, but it modified the sanction to two years active suspension. The attorney now appeals to this Court, arguing that his conduct was not dishonest, he did not take advantage of a vulnerable client, and his probate fee arrangement was not unreasonable. We affirm the hearing panel's factual findings and its findings as to rule violations. In view of the seriousness of the violations, we affirm the chancery court's modification of the sanction to two years active suspension."

"The discipline in this case centers on two matters, which we describe below."

"The first matter involves the signature on an affidavit. In 2015, Mr. Beier had a client who was a divorced father ('Father'). Father claimed that his daughter ('Daughter'), then five years old, was sexually abused by her teenage sister while both were in the custody of their mother, Father's ex-wife ('Mother'). Mr. Beier prepared to file two petitions on behalf of Father, both making the abuse allegations in support of his request to modify the custody arrangement for Daughter.

"Shortly before he was scheduled to leave for a trip out of town, Mr. Beier prepared an affidavit for Father and another affidavit for Daughter's paternal grandmother ('Grandmother'). The affidavits were to be used in court the next Monday. Mr. Beier left both affidavits at his office to be signed while he went to court on another matter.

"When Mr. Beier returned to his office later that same day, he saw that Father had signed his affidavit but Grandmother had not signed hers. Mr. Beier signed Grandmother's name to her affidavit (the 'Affidavit'). In his capacity as a notary public, Mr. Beier notarized Grandmother's Affidavit as well. He then left town on his scheduled trip.

"When Mr. Beier returned the next Monday, August 31, 2015, he filed the petitions, each with the Affidavit in support. Neither the petitions nor the Affidavit disclosed that Mr. Beier had signed Grandmother's name for her. Based on these filings, the juvenile court entered an order temporarily suspending Mother's parenting time.

"Months later, counsel for Mother took Grandmother's deposition. In the course of the deposition, the attorney asked Grandmother whether the signature at the bottom of the Affidavit was hers. Grandmother gave no answer. The attorney repeated the question, more than once, with no response. Finally, Mr. Beier interjected, 'That's where I subscribed your signature, right there.' Grandmother then agreed, 'Uh-huh. Yeah. He subscribed my signature.'

"In October 2015, Mr. Beier filed a re-verified affidavit making the same statements, signed by Grandmother. In January 2016, counsel for Mother filed a motion alleging misconduct by Mr. Beier with respect to the Affidavit and asking the juvenile court to assess sanctions against Mr. Beier.

"In April 2016, Mr. Beier contacted Tennessee's Board of Professional Responsibility (the 'Board') to self-report his infraction."

"The second matter involved Mr. Beier's representation of Ray Norton in connection with an estate.

"Mr. Norton contacted Mr. Beier for representation regarding the estate of his deceased aunt, Audrey Jenkins. Mr. Norton, 62 years old, had received Social Security Supplemental Security Income (SSI) benefits and Department of Veterans' Affairs disability benefits (as the child of a veteran) all of his adult life. Mr. Beier understood that Mr. Norton qualified for disability benefits because of a nervous condition.

"Mr. Norton brought a 'friend,' Paul Barnes, to his initial meeting with Mr. Beier. Mr. Norton explained that Mr. Barnes was the designated payee for some of the disability benefits Mr. Norton received. During the meeting, Mr. Beier proposed that, as compensation for his representation of Mr. Norton as to Ms. Jenkins's estate, Mr. Beier would receive a 33.3% contingency fee of the 'gross estate.' Mr. Norton agreed to the proposal.

"Mr. Norton's deceased aunt, Ms. Jenkins, was a widow without children. She died intestate. She was predeceased by a full-sister and by a half-brother. Mr. Norton was the only child of Ms. Jenkins's full-sister. The half-brother, Sheridan James, had four living children. Mr. Norton told Mr. Beier about these 'half-cousins' at their initial meeting.

"It appears from the record that Ms. Jenkins owned three parcels of real estate at the time of her death. However, the real property was never part of the Jenkins estate.

"In September 2013, Mr. Beier filed a petition on Mr. Norton's behalf, asking the chancery court to name Mr. Norton as Administrator of the Jenkins estate. The petition alleged that Mr. Norton was Ms. Jenkins's sole heir.

"Later that same month, the mother of Sheridan James's children saw the Jenkins estate's notice to creditors. She contacted Mr. Beier and told him about her children and their father, Ms. Jenkins's half-brother.

"Eleven months later, Mr. Beier filed a petition and proposed order to close the Jenkins estate. In the filing, Mr. Beier asserted that Mr. Norton, 'being the sole beneficiary, desires to close the estate without a detailed accounting.' Mr. Beier did not notify the James children he had filed this petition. He did not disclose to the chancery court the existence of the James children. Relying on Mr. Beier's representation, the chancery court granted the petition and closed the estate without a detailed accounting.

"In calculating his final fee, Mr. Beier included two of the three parcels of real estate Ms. Jenkins owned at the time of her death, even though they were never actually part of the estate. The only work Mr. Beier performed regarding the real property was preparation of an administrator's deed. The total fee Mr. Beier ultimately received for handling the Jenkins estate was $78,614. Because the estate was closed without a detailed accounting, there was no judicial approval of the fee.

"Later, Mr. Norton learned he was not Ms. Jenkins's sole heir, as Mr. Beier had represented to the chancery court; his half-cousins, the James children, were entitled to a portion of the Jenkins estate. Mr. Norton hired new counsel. In February 2016, the new attorney filed a petition on behalf of Mr. Norton to reopen the Jenkins estate.

"Mr. Norton's new attorney contacted Mr. Beier about the Jenkins estate. In June 2016, after the Jenkins estate was reopened, Mr. Beier reimbursed the estate his entire fee, with interest.

"On October 16, 2016, the Board received a complaint of misconduct regarding Mr. Beier's handling of the Jenkins estate from one of the James children. Mr. Beier self-reported this matter as well."

"Thus, in the Affidavit matter, regarding the testimony by Grandmother and Mr. Beier asserting that Grandmother gave Mr. Beier permission to sign her name to the Affidavit, the hearing panel found neither witness credible. The hearing panel also found that, by signing Grandmother's name and notarizing the signature, Mr. Beier represented to the chancery and juvenile courts that Grandmother had signed the document, something he knew to be false.

"As to the Jenkins estate matter, the hearing panel found that Mr. Beier took advantage of Mr. Norton's vulnerability to secure an unreasonable contingency fee agreement. It found Mr. Beier's testimony, that he did not inform the chancery court about the James children because he did not realize they might be heirs of Ms. Jenkins, was not credible. By failing to disclose this information to the chancery court, the hearing panel pointed out, Mr. Beier avoided court approval of his fee. It observed that Mr. Beier included two parcels of real property in the 'gross estate' for purposes of calculating his fee, even though his work regarding the real property was *de minimis.* Including these two parcels greatly increased the size of his contingency fee.

"Based upon these findings, the hearing panel concluded the Board had established several violations of the Rules of Professional Conduct. In the Affidavit matter, it found violations of the following rules:

> RPC 3.3(a)(1) (candor toward the tribunal), '[b]y filing the Affidavit ... when he signed [Grandmother's] name, by notarizing her purported signature when she did not sign, and by failing to inform the courts that [Grandmother]'s signature was made by himself....';

RPC 8.4(c) (misconduct), '[r]epresenting that the [A]ffidavit had been signed by [Grandmother] was an act of deceit, dishonesty[,] and misrepresentation....'

"In the Jenkins estate matter, it found violations of the following:

RPC 1.5(a) (fees), '[b]y charging a one-third fee, and by including the value of the real estate for purposes of computing his fee, Mr. Beier charged [Mr.] Norton, and collected, an unreasonable fee....'

RPC 1.5(a) (fees), the fee agreement between Mr. Beier and Mr. Norton was 'insufficiently clear to communicate to Mr. Norton the remittance to him and the method of its determination.'

RPC 3.3(a)(1) (candor toward the tribunal), '[b]y stating in the petition that Mr. Norton was Ms. Jenkins' sole heir....'

RPC 3.3(a)(3) (candor toward the tribunal), '[b]y failing to inform the court of the existence of the James descendants....'

RPC 8.4(c) (misconduct), '[b]y taking advantage of Mr. Norton's disability to charge and collect from him an unreasonable fee....'

RPC 8.4(c) (misconduct), '[b]y failing to include the James descendants in the administration of the estate in order to charge and collect from Mr. Norton an unreasonable fee....'

RPC 8.4(a) (misconduct), the '[v]iolation of the aforementioned Rule of Professional Conduct....'

"After finding these violations, the hearing panel looked to the ABA Standards to determine an appropriate type of discipline. It decided the Standards pointed to suspension as the appropriate discipline.

"Turning to the aggravating and mitigating factors, the hearing panel first noted Mr. Beier's 'dishonest or selfish motive' as an aggravating factor in filing Grandmother's Affidavit and also in his actions regarding the Jenkins estate. In the Jenkins estate matter, it determined Mr. Beier was also motivated by his attempt to get an unreasonable fee. The hearing panel observed that Mr. Beier's misconduct involved multiple offenses. It found that Mr. Beier refused to acknowledge the wrongful nature of his conduct, citing his continued insistence that the Affidavit was not a false representation, that his fee arrangement with Mr. Norton was reasonable, and that he did not knowingly misrepresent Mr. Norton's status as sole heir. The hearing panel also deemed Mr. Norton's vulnerability as a victim to be an aggravating factor. The final aggravating factor was Mr. Beier's substantial experience in the practice of law—over forty years, including time as a juvenile and municipal judge. The hearing panel found no mitigating factors.

"Considering the violations and the aggravating factors, the hearing panel imposed a sanction of a two-year suspension of Mr. Beier's law license, with three months served as active suspension and the remainder on probation."

"The Board appealed the hearing panel's decision to the Hamblen County Chancery Court, arguing disbarment would have been a more appropriate sanction.

"The chancery court issued its order on November 28, 2018. It first determined that the hearing panel's factual findings were supported by the evidence. It held that the hearing panel's conclusions regarding Rule violations and application of aggravating and mitigating factors were also supported by the evidence.

"Reviewing the discipline imposed by the hearing panel, the chancery court concluded the panel had abused its discretion. It performed a comparative analysis of similar cases and determined it would be more appropriate to make the entire two-year suspension an active suspension, in order to 'underscore the seriousness of the violations by Mr. Beier, protect the public from similar misconduct by members of the bar, and preserve the confidence of the public in the integrity and trustworthiness of lawyers in general.'

"Mr. Beier now appeals to this Court."

"We look at the evidence in the record as to each ethical violation found by the hearing panel."

"The record in this case contains substantial and material evidence to support the hearing panel's conclusion that the fee arrangement between Mr. Beier and Mr. Norton was unreasonable. The agreement provided for Mr. Beier's representation in the Jenkins estate in exchange for '33.3% of [the] gross estate.' Mr. Beier said he had never before charged a contingency fee in a probate case. In the initial telephone call between Mr. Beier and Mr. Norton, as well as in their first meeting, Mr. Norton told Mr. Beier that Ms. Jenkins had owned about three different parcels of real property. Reviewing his notes, Mr. Beier conceded he 'may' have called the Tax Assessor's office to ascertain the value of those properties. This supports the hearing panel's finding that, during his initial meeting with Mr. Norton, Mr. Beier learned of several parcels of property associated with the estate and the assessed values of those properties. As noted by the chancery court, Mr. Beier easily could have determined whether any of the properties had liens. Ultimately, all of this information should have caused him to realize that a fee arrangement for one-third of the gross estate would generate a fee that far exceeded the typical probate fee for a similar estate in that area."

"The record contains substantial and material evidence supporting the hearing panel's conclusion that 'the fee sought to be charged was clearly excessive.' *Id.*"

"The hearing panel in this case concluded Mr. Beier violated Rule 3.3(a)(1) in the Affidavit matter and also in the Jenkins estate matter. In the Affidavit matter, it found Mr. Beier knowingly made false statements of fact when he signed Grandmother's name to the Affidavit and filed it without disclosing he had done so. In the Jenkins estate matter, it found Mr. Beier knowingly made a false statement of fact and law by telling the probate court that Mr. Norton was Ms. Jenkins's sole heir. Also in the Jenkins estate matter, the hearing panel concluded Mr. Beier violated Rule 3.3(a)(3) by failing to inform the probate court about Mr. Norton's half-cousins. We address the findings in the Affidavit matter first, and then the findings in the Jenkins estate matter.

"As to the Affidavit matter, Mr. Beier argues the hearing panel ignored the fact that the information in the Affidavit was true. He characterizes as 'uncontradicted' his assertion that he signed the Affidavit with Grandmother's permission.

"Mr. Beier's argument that the statements in the Affidavit were true is beside the point. The falsity was in Mr. Beier's representation to the trial court that Grandmother had signed the Affidavit and thus had sworn to the statements it contained. By notarizing the signature on the Affidavit, Mr. Beier falsely affirmed that he had witnessed Grandmother sign the Affidavit. As cited by the hearing panel, 'A notary's acknowledgment says to the world that the execution of the instrument was carried out according to law.' *Beazley v. Turgeon*, 772 S.W.2d 53, 59 (Tenn. Ct. App. 1988).

"From our review of the evidence, Mr. Beier's assertion that it was 'uncontradicted' that he had Grandmother's permission to sign her name to the Affidavit is, well, contradicted. Indeed, the statements made by both Grandmother and Mr. Beier were so inconsistent they led the hearing panel to determine that neither was a credible witness."

"As to the Jenkins estate matter, Mr. Beier argues he did not 'knowingly' or 'intentionally' mislead the probate court by failing to disclose Mr. Norton's cousins. Instead, out of negligent ignorance of the law, he mistakenly did not equate the inheritance rights of half-siblings with those of full siblings.

"The hearing panel determined that Mr. Beier acted knowingly when he initially claimed Mr. Norton was the sole heir, when he failed to correct himself after the mother of Mr. Norton's cousins contacted him, and when he failed to inform the probate court of those cousins. Mr. Beier has practiced law since 1977; he has done probate work ever since he began. He said he 'probably open[s] two estates a month.' Tennessee Code Annotated § 31-2-107, titled 'Relatives of the half blood,' is concise and clear: 'Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.'

"Despite this, Mr. Beier maintains he was unaware of section 31-2-107 and his research only led him to Tennessee Code Annotated § 31-2-104, on intestate succession for an estate. Put simply, the hearing panel did not believe Mr. Beier's claim of ignorance. There is ample evidence to support this conclusion. In his deposition prior to the hearing, Mr. Beier indicated he learned on September 16, 2013, during his first meeting with Mr. Norton, that Ms. Jenkins had a deceased half-brother whose children were alive. Mr. Beier filed the petition asking the court to appoint Mr. Norton as administrator of the Jenkins estate—in which he professed Mr. Norton was his aunt's sole heir—two days later. During his testimony to the hearing panel, Mr. Beier equivocated that he was 'not exactly sure' when he learned of Mr. Norton's half-cousins. Regardless, it is undisputed that Mr. Beier was told about the half-cousins a week later, when he received a telephone call from their mother, Nancy James. Eleven months later, still acting ex parte, Mr. Beier asked the court to close the Jenkins estate, with no detailed accounting, based on his assertion that Mr. Norton was the sole heir. The court closed the estate on that basis.

"At no point did Mr. Beier inform the probate court of the existence of the James descendants. The omission of this information paved the way for Mr. Beier to collect an outsized fee without court oversight.

"We find substantial and material evidence in the record to support the hearing panel's conclusion that Mr. Beier made a false statement to the probate court during ex parte proceedings, in violation of RPC 3.3(a)(1) and (3)."

"As to this violation in the Jenkins estate matter, Mr. Beier argues the record is bereft of any proof supporting the Board's allegations that Mr. Norton suffered from 'low cognitive functioning,'

'severe anxiety disorder,' 'diminished mental capacity,' and was otherwise 'not capable of understanding.' Mr. Beier takes issue with the hearing panel's conclusion that he took advantage of Mr. Norton."

"The hearing panel's findings are well supported in the record. As discussed above, there is substantial and material evidence in the record to support the hearing panel's finding that Mr. Beier did not sufficiently communicate to Mr. Norton how his fee would be determined and that Mr. Norton did not understand the arrangement to which he had agreed. The record also supports the hearing panel's finding that Mr. Beier exploited Mr. Norton's disability. The evidence showed that Mr. Norton receives government benefits because of his disability and that Mr. Barnes, who accompanied Mr. Norton to meet with Mr. Beier, is the designated payee for them. Discussing his disability, Mr. Norton testified: 'Well, one, I have problems remembering things, and then not only that, I've had bad problems with my nerves about all my life.' Mr. Barnes described Mr. Norton as a trusting man who needs help with his affairs. In his testimony, Mr. Beier admitted he was made aware during his first meeting with Mr. Norton and Mr. Barnes that Mr. Norton needed a payee to receive benefits related to a nervous condition. Considered together, all of this constitutes substantial and material evidence to support the hearing panel's conclusions as to violations of Rule 8.4(a) and (c) in the Jenkins estate matter."

In re Dunn, Board Release of Information.

Matthew David Dunn of Brentwood was permanently disbarred and ordered him to pay restitution of $5,995.

"The [Hearing] Panel found Mr. Dunn accepted a referral from an intermediary organization not properly registered with the Board, received a fee for services from a client but did not perform any legal services, failed to respond to the client's requests for information about the representation or communicate in any manner, and abandoned the client."

Mr. Dunn violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 7.6 (intermediary organizations), and 8.1 (bar admissions and disciplinary matters).

In re Jones, Board Release of Information.

Kent Thomas Jones of Cleveland was publicly censured, with the condition that he refund $350 to his client.

"Mr. Jones received a $2,000 flat fee for the representation of a client on a DUI. The client signed a written fee agreement that said the fee was a flat fee. The fee agreement did not state that the fee was nonrefundable. On the day of court, however, in September 2017, Mr. Jones appeared late, smelled of alcohol, and was acting erratically. Court personnel removed Mr. Jones from the courthouse, and he was later charged with public intoxication. By email later that day, Mr. Jones agreed to provide his client a full refund. The criminal charges against Mr. Jones were later dismissed. In the two and a half years since then, Mr. Jones has made three partial reimbursement payments to his client amounting to $1,650. Mr. Jones did not keep the fee in his trust account."

Mr. Jones violated RPCs 1.15 (safekeeping funds), 8.4(b) (criminal conduct), 1.5 (fees), and 8.4(d) (prejudice to the administration of justice).

F. Confidentiality of Information, Rule 1.6

In re Johnson, Board Release of Information.

Jeffrey Dennis Johnson of Johnson City was publicly censured.

"Mr. Johnson received an on-line 'Google' review from a former client who included his name in the review. Mr. Johnson posted a response on-line which stated details about the former client, including health and medical conditions of the former client and the type of case in which Mr. Johnson represented the client. Mr. Johnson also stated that the former client asked him to make false representations to the court. Mr. Johnson's comments were not favorable to the former client and were posted on a publicly accessible website."

Mr. Johnson violated RPCs 1.9(c) (duties to former client).

In re Wright, Board Release of Information.

Charles Gammons Wright of Chattanooga was publicly censured.

"A Hearing Panel found Mr. Wright negligently disclosed client confidential information in an affidavit filed with his Motion to Withdraw from representation."

Mr. Wright violated RPC 1.6 (confidentiality).

ABA Formal Opinion 496, Responding to Online Criticism (Jan. 13, 2021).

Lawyers are regularly targets of online criticism and negative reviews. Model Rule of Professional Conduct 1.6(a) prohibits lawyers from disclosing information relating to any client's representation or information that could reasonably lead to the discovery of confidential information by another. A negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule. As a best practice, lawyers should consider not responding to a negative post or review, because doing so may draw more attention to it and invite further response from an already unhappy critic. Lawyers may request that the website or search engine host remove the information. Lawyers who choose to respond online must not disclose information that relates to a client matter, or that could reasonably lead to the discovery of confidential information by another, in the response. Lawyers may post an invitation to contact the lawyer privately to resolve the matter. Another permissible online response would be to indicate that professional considerations preclude a response.

ABA Formal Opinion 498, Virtual Practice (Mar. 10, 2021).

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm. When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such

information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

G. Conflict of Interest: Current Clients, Rule 1.7

Culpepper v. Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., No. E2019-01932-COA-R3-CV (Tenn. Ct. App., Frierson, Oct. 16, 2020), perm. app. denied Mar. 17, 2021.

"In this legal malpractice action, the trial court granted judgment on the pleadings in favor of the defendants, determining that the plaintiff had waived any conflict of interest in his signed engagement letter. The court also ruled that the plaintiff's legal malpractice claims were barred by the applicable statute of limitations. The plaintiff has appealed. Upon our review of the pleadings and acceptance as true of all well-pleaded facts contained in the plaintiff's complaint and the reasonable inferences that may be drawn therefrom, we determine that the plaintiff has pled sufficient facts in support of his claim of legal malpractice. We therefore reverse the trial court's grant of judgment on the pleadings with regard to the plaintiff's legal malpractice claim."

"On May 9, 2019, the plaintiff, Peter R. Culpepper, filed a complaint in the Knox County Circuit Court ('trial court') against the following defendants: Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. ('the Baker firm'); John S. Hicks; Tonya Mitchem Grindon; Martha L. Boyd; Samuel Lanier Felker; Lori B. Metrock; and Lori H. Patterson (collectively, 'Defendants'). In his complaint, Mr. Culpepper alleged legal malpractice arising out of Defendants' simultaneous representation of Mr. Culpepper and his former employer, Provectus Biopharmaceuticals, Inc. ('Provectus'). Mr. Culpepper filed an amended complaint on May 31, 2019, wherein he alleged, *inter alia*, that Defendants had represented him while also representing and advising Provectus to his detriment and that Defendants had continued to represent Provectus to his detriment after they withdrew from his representation.

"In his amended complaint, Mr. Culpepper explained that he was employed as the Chief Financial Officer for Provectus from 2004 until sometime in 2016 when he was named interim Chief Executive Officer. Mr. Culpepper maintained that position with Provectus until his employment termination effective December 28, 2016. According to Mr. Culpepper, Defendants represented him concerning matters before the United States Securities and Exchange Commission ('SEC') on August 4, 2016, and August 11, 2016. Mr. Culpepper alleged that on August 15, 2016, Defendants met with an independent forensic accountant and discussed Mr. Culpepper 'with respect to the SEC and other attorney-client privileged and confidential matters WITHOUT his knowledge' (emphasis in original).

"Additionally, Mr. Culpepper alleged that Defendants discussed matters regarding Mr. Culpepper and the SEC with Provectus's Board of Directors in 2016, without Mr. Culpepper's knowledge, while simultaneously representing Mr. Culpepper. Mr. Culpepper further averred, *inter alia*, that Defendants presented fabricated documentation to support his ultimate termination for cause by Provectus in December 2016. Mr. Culpepper claimed that Defendants had represented him and Provectus simultaneously despite an obvious conflict of interest and had continued to represent Provectus following termination of his representation on a substantially related matter. Additionally, Mr. Culpepper claimed that Defendants had concealed documentation in support of his claims until May 2018. Mr. Culpepper thus sought damages for legal malpractice, defamation, and false light invasion of privacy; a declaratory judgment regarding the proper amount owed by

him to Provectus pursuant to their settlement agreement; and indemnification for his attorney's fees."

"On August 13, 2019, Defendants filed a motion for judgment on the pleadings, asserting, *inter alia*, that Mr. Culpepper had waived any conflicts of interest in his August 31, 2016 engagement letter and had consented to Defendants' continued representation of Provectus, even if such representation was ultimately adverse to Mr. Culpepper's interests."

"On September 30, 2019, the trial court entered an order granting judgment on the pleadings in favor of Defendants and dismissing all of Mr. Culpepper's claims. In its order, the court stated in pertinent part:

> The Court rules that in the August 31, 2016 engagement, waiver and consent letter, [Mr. Culpepper] waived all conflicts of interest and consented to Defendants' representation of its other clients, including those clients adverse to [Mr. Culpepper]. [Mr. Culpepper] specifically agreed that he carefully read the foregoing letter and considered all the information necessary and useful in determining whether or not to consent to the representations outlined above. He was encouraged to consult with independent counsel regarding this waiver and consent letter and represented he was fully aware of his legal rights in this regard. The letter also provides, '[u]pon reasoned reflection, I hereby voluntarily consent to the representations by Baker Donelson as outlined above.' Therefore, the Court rules [Mr. Culpepper] voluntarily waived all conflicts of interest, which was the crux of the entire Amended Complaint."

"Mr. Culpepper asserts that the trial court erred by granting judgment on the pleadings in favor of Defendants with regard to Mr. Culpepper's legal malpractice claims, which were based on an alleged conflict of interest in Defendants' representation of Mr. Culpepper and Provectus. Mr. Culpepper postulates that (1) Defendants breached Tennessee's Rules of Professional Responsibility with regard to conflicts of interest and (2) he did not and could not knowingly and voluntarily waive the conflicts. In response, Defendants posit that the waiver contained in Mr. Culpepper's engagement letter, undisputedly executed by Mr. Culpepper, was a sufficient basis for the trial court's ruling.

"As Mr. Culpepper points out, this Court has previously addressed the issue of whether an alleged breach of a disciplinary rule equates to legal malpractice:

> There is no doubt that the Code of Professional Responsibility ('the Code') does not set the standard for determining the civil liability of an attorney. *See Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991). However, that fact does not preclude the possibility that violation of the Code is relevant evidence in a subsequent civil case. *Id.* at 405 ('[T]he standards stated in the Code are not irrelevant in determining the standard of care in certain actions for malpractice'). The Tennessee Supreme Court recognized that the Code may provide guidance in defining a lawyer's obligation to a client. Moreover, in some instances, conduct which violates the Code may also be a breach of the attorney's standard of care. While violation of the Code, standing alone, will not suffice to prove civil liability, it seems clear that such a violation may be relevant evidence of a breach of the standard of care.

"*Roy v. Diamond*, 16 S.W.3d 783, 790-91 (Tenn. Ct. App. 1999)."

"The engagement letter provides as follows in pertinent part:

1. Scope of Representation.
You will be our client in this matter. We will be engaged to advise you in connection with the SEC investigation entitled Provectus Biopharmaceuticals, Inc. ('Provectus') (H0-13000). Our acceptance of this engagement (the 'Matter') does not involve representing you or your interests in any other matter.

2. Fees and Expenses.
Provectus Biopharmaceuticals Company, Inc. (the 'Company') has agreed to pay our fees and costs. We will, therefore, seek payment from the Company.

3. Conflicts.
We are a large firm with offices in a number of cities in the United States, and we represent many other companies and individuals. Given the breadth of our practice, it is possible that during the time we are representing you, some of our present or future clients will be engaged in transactions, or encounter disputes, with you or the Company. You agree that we may continue to represent, and may undertake in the future to represent, existing or new clients in any matter that is not substantially related to our work for you even if the interests of such clients in those matters are directly adverse to you. At no time would we use or disclose any confidential or proprietary information relating to our representation of you in connection with our representation of another client without your written consent, as appropriate. You should know that, in similar engagement letters with many of our other clients, we have asked for similar agreements to preserve our ability to represent you.

4. Joint Representation.
As you know, we are representing you jointly with the Company, Timothy Scott and Eric Wachter. You have consented to this joint representation. In a situation where our firm represents multiple clients jointly in the same matter, we are free to share confidential information communicated to us by one client with the other joint clients in the course of and in furtherance of the joint representation. We would expect to share information we receive from you with the Company, but we will not necessarily share with you information that we receive from other clients, and you will not be entitled to obtain any confidential information provided to us by any other joint client either during the joint representation or thereafter. Please contact me immediately if you have any objections or concerns regarding this approach.

Based on the information we now have, we are not aware of any actual and present conflicts of interest between you and either the Company, Timothy Scott or Eric Wachter that would preclude this joint representation. However, in any situation in which a lawyer represents more than one client, there is the potential for the clients to have or to develop conflicting interests. If you are aware or become aware of any potential or actual conflict of interest with the Company, Timothy Scott or Eric Wachter, please notify us promptly. Likewise, if we become aware that a conflict has arisen or become apparent, we will notify you promptly.

If a conflict should arise between you and the Company, we will be required to withdraw from representing you, and you may need to engage another attorney to represent you. You agree that, should this occur, we would be free to continue to represent the Company and other joint clients (except in litigation directly adverse to you in this or a substantially related matter) and that we and they may use any information we have obtained during our representation of you, including any confidential information you may provide to us. This may include sharing information you provide to us with the Company and advising the Company with respect to

any issues raised by such information. In addition, if a conflict should arise between you and the Company, Timothy Scott or Eric Wachter, we may be required to withdraw from representing one or more of you, and you may need to engage another attorney to represent you.

You also understand that we may be asked to represent other individuals or entities who, by virtue of their current or former employment with or other relationship to the Company, may seek our advice in connection with these Matters, and you consent to such representation on the same terms as set forth above. You agree to waive any claim of conflict based on our past, current, and future representation of the Company and its current or former officers, employees, directors, etc. As noted above, our fees and costs for representing you in the Matter will be paid by the Company, and you agree that you waive any claim of conflict based upon our receipt of fees from the Company.

You should be aware that joint representation of multiple clients may result in significant benefits for each client, but it may also result in certain risks that might not arise if each client had his or its own separate counsel. Possible benefits may include a common strategy, access to privileged and other information held by other clients in the group, various other tactical advantages, and shared legal fees and costs. There are also potential risks. For example, as explained above, a conflict of interest between or among clients could arise or become apparent, which may require Baker Donelson to withdraw from representing one or more of the joint clients. In addition, the Company has decided as a condition of this joint representation, that confidential or privileged information disclosed to Baker Donelson by individual clients will be shared with the Company and that confidential or privileged information of the Company will not necessarily be shared with individual clients, including yourself. The Company may disclose, or direct us to disclose, to the SEC, or other federal or state regulatory agencies or other third parties confidential or privileged information provided by you and could decide to use such information in a manner that could be disadvantageous to you. And, although you will participate in decisions regarding our representation of you, you will not be consulted on all decisions regarding our representation of the Company or other joint clients in the Matter.

While the Company has agreed that Baker Donelson may represent you in the Matter, you are of course free at any time to consult with any other attorney, including with respect to whether you should enter into this agreement, and to make different arrangements for your representation."

"A provision at the conclusion of the engagement letter states as follows:

I have carefully read the foregoing letter, considered all information necessary and useful in determining whether or not to consent to the representations outlined above. I have been encouraged to consult with independent counsel regarding this consent to representation, and I am fully aware of my legal rights in this regard. Upon reasoned reflection, I hereby voluntarily consent to the representations by Baker Donelson as outlined above.

"Mr. Culpepper's signature appears thereon, dated August 31, 2016. Mr. Culpepper does not dispute that he signed the engagement letter, although he asserts in his brief that he does not specifically remember doing so.

"The parties agree that Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.7 ('RPC 1.7'), applies in this situation."

"Mr. Culpepper has not disputed that Defendants terminated their representation of him in December 2016. Because Defendants allegedly continued their representation of Provectus following termination of their representation of Mr. Culpepper in 2016, the parties are in accord that Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.9 ('RPC 1.9') would also apply in this situation."

"Defendants do not dispute that a conflict of interest arose between Provectus and Mr. Culpepper at some point; in fact, the existence of such a conflict was the reason provided by Defendants for terminating their representation of Mr. Culpepper in December 2016. Defendants assert, however, that Mr. Culpepper waived all conflicts of interest with other clients of the Baker firm and gave informed consent to Defendants' continued representation of Provectus in the event such a conflict arose. Although we agree with Defendants that Mr. Culpepper acknowledged his voluntary agreement to the waiver contained in the engagement letter, such acknowledgement is not determinative of the issue of whether Mr. Culpepper's consent was informed.

"'Informed consent' is defined in the Rules of Professional Conduct as 'the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.' Tenn. Sup. Ct. R. 8, RPC 1.0."

"In the case at bar, Mr. Culpepper executed an acknowledgement stating that he had 'carefully read' the engagement letter and had 'considered all information necessary and useful in determining whether or not to consent to the representations' stated therein. Mr. Culpepper further acknowledged that he had been encouraged to consult with independent counsel regarding his consent to representation. Mr. Culpepper affirmed that he had, upon 'reasoned reflection,' 'voluntarily consent[ed] to the representations by Baker Donelson as outlined above.'

"The question that remains unanswered, however, is whether Mr. Culpepper was provided information concerning 'the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege' or 'the potential ill effects of continued representation by counsel of record' such that he could 'fully understand[ ] the nature of the conflict and its effect.' *See Frazier*, 303 S.W.3d at 683-84; RPC 1.7, cmt. 18.

"Mr. Culpepper posits that his consent was not 'informed' in that he was not afforded sufficient information concerning the nature and extent of the conflict and its effect on his individual representation. We note that according to the engagement letter, although Mr. Culpepper expressly agreed that the Baker firm 'would expect to share information [the Baker firm] receive[d] from [Mr. Culpepper] with [Provectus],' he also agreed that the Baker firm would not necessarily share information received from Provectus with Mr. Culpepper."

"The letter further explained that although there were benefits to joint representation, there were also risks, such as 'that confidential or privileged information disclosed to Baker Donelson by individual clients will be shared with the Company and that confidential or privileged information of the Company will not necessarily be shared with individual clients, including yourself.' In addition, the letter provided that Provectus 'may disclose, or direct us to disclose, to the SEC, or other federal or state regulatory agencies or other third parties confidential or privileged information

provided by you and could decide to use such information in a manner that could be disadvantageous to you.' Moreover, the letter clarified that Mr. Culpepper would 'not be consulted on all decisions regarding our representation of the Company or other joint clients in the Matter.'

"Despite the aforementioned language, the letter also included that '[b]ased on the information we now have, we are not aware of any actual and present conflicts of interest between you and either the Company, Timothy Scott or Eric Wachter that would preclude this joint representation.' The letter further provided that 'if we become aware that a conflict has arisen or become apparent, we will notify you promptly.' However, according to the factual allegations contained in Mr. Culpepper's amended complaint, Defendants had met with a forensic accountant and discussed issues concerning Mr. Culpepper on August 15, 2016, without Mr. Culpepper's knowledge. This meeting occurred before Mr. Culpepper signed the conflict waiver on August 31, 2016. Mr. Culpepper alleged in his amended complaint that this meeting with the forensic accountant ultimately resulted in the fabrication of documentation to support Mr. Culpepper's termination from Provectus for cause. Mr. Culpepper further alleged that he was never made aware of the meeting until documents were disclosed in May 2018. We note that Defendants did not withdraw from their representation of Mr. Culpepper until after his termination from Provectus in December 2016.

"Accepting these allegations as true, as we must when reviewing a grant of judgment on the pleadings, we conclude that Mr. Culpepper's complaint stated sufficient facts to support his claim. We reiterate that this Court 'should uphold granting the [Rule 12.03] motion only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief.' *Young*, 130 S.W.3d at 63. Mr. Culpepper effectively alleged that Defendants engaged to represent him and continued that representation despite dealing simultaneously with Provectus and third parties to his detriment, thus establishing a potential violation of RPC 1.7. Mr. Culpepper further alleged that Defendants continued to represent Provectus on a substantially related matter after they withdrew from representing him and that Provectus's interests were materially adverse to his interests as a former client, thus establishing a potential violation of RPC 1.9. Such violations of the Rules of Professional Conduct can be evidence of a breach of the standard of care, *see Roy*, 16 S.W.3d at 790-91, and Mr. Culpepper claimed that he was damaged by wrongful termination from his employment and other monetary losses as a result of Defendant's breach of duty. We therefore conclude that Mr. Culpepper properly stated a claim for legal malpractice in his amended complaint. *See Jones*, 588 S.W.3d at 655-56.

"Moreover, Mr. Culpepper argues that even if it could be shown that he provided informed consent to the conflict in this matter, not all conflicts are waivable. We agree, observing that comment 15 to RPC 1.7 provides: 'Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.' Representation of a client 'is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.' *Id.* Analysis of this issue requires further factual determination that is inappropriate for judgment on the pleadings.

"For the foregoing reasons, we conclude that the trial court improperly granted judgment on the pleadings to Defendants concerning Mr. Culpepper's claim of legal malpractice. We therefore reverse the trial court's grant of judgment on the pleadings to Defendants regarding this issue."

In re Hines, Board Release of Information.

Jason Ralph Hines of Kingston was publicly censured, based on a conditional guilty plea.

"Mr. Hines, retained in a post-divorce action, engaged in inappropriate text communications with his client which potentially impaired his professional judgment and that of his client; failed to deposit client funds into his client trust account; provided inappropriate financial assistance to his client; and failed to promptly refund advance payment of unearned fees."

Mr. Hines violated RPCs 1.7(a) (conflict of interest), 1.15(a) (safekeeping property), 1.8(e) (conflict of interest: prohibited transactions), and 1.16(d) (declining or terminating representation).

In re Johannessen, Board Release of Information.

Scott David Johannessen of Nashville was publicly censured.

"Mr. Johannessen is the sole member of a limited liability company, and that company is a member of another company called FYI. On March 2, 2018, Mr. Johannessen was appointed by resolution as the attorney for FYI for particular issues. On October 15, 2018, Mr. Johannessen hired an attorney and filed an involuntary bankruptcy petition against FYI in his role as the sole member of the other limited liability company. On October 16, 2018, Mr. Johannessen then filed a notice of appearance in the bankruptcy proceeding, as a pro se creditor of FYI, alleging that there was a debt FYI owed him personally. The bankruptcy of FYI was later dismissed.

"Mr. Johannessen's filing of an involuntary bankruptcy petition against FYI, in his role as the sole member of a limited liability company, after a resolution had been passed naming him as FYI's attorney created a significant risk that the representation of his client would be materially limited by his interest as sole member of the other company. Mr. Johannessen's subsequent notice to also appear on his own behalf in the bankruptcy, against FYI, created a significant risk that his representation of FYI and his personal interest concerning the other company would be materially limited by his personal interest as a creditor against FYI."

Mr. Johannessen violated RPCs 1.7 (conflict of interest), 8.4(d) (prejudice to the administration of justice), and 1.1 (competence).

ABA Formal Opinion 494, Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel (July 29, 2020).

Model Rule 1.7(a)(2) prohibits a lawyer from representing a client without informed consent if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. A personal interest conflict may arise out of a lawyer's relationship with opposing counsel. Lawyers must examine the nature of the relationship to determine if it creates a Rule 1.7(a)(2) conflict and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client who must then give informed consent, confirmed in writing.

To assist lawyers in applying Rule 1.7(a)(2), this opinion identifies three categories of personal relationships that might affect a lawyer's representation of a client: (i) intimate relationships, (ii) friendships, and (iii) acquaintances. Intimate relationships with opposing counsel involve, e.g. cohabiting, engagement to, or an exclusive intimate relationship. These relationships must be disclosed to clients, and the lawyers ordinarily may not represent opposing clients in the matter,

unless each client gives informed consent confirmed in writing. Because friendships exist in a wide variety of contexts, friendships need to be examined carefully. Close friendships with opposing counsel should be disclosed to clients, and, where required as described in this opinion, their informed consent obtained. By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor must clients' informed consent be obtained. Regardless of whether disclosure is required, however, the lawyer may choose to disclose the relationship to maintain good client relations.

California State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2020-204.

"What ethical obligations arise when a lawyer represents a client whose case is being funded by a third-party litigation funder?"

"Two types of third-party litigation funding have emerged over the last several years: consumer litigation funding, which provides funds to a plaintiff with personal injury claims, typically for personal use rather than to fund their case, and commercial litigation funding, which typically involves advancing funds to pay a plaintiff's litigation expenses or otherwise. Both types of funding are non-recourse. This opinion addresses the ethical issues that arise from such funding arrangements. The principal ethical issues are maintaining independent professional judgment and complying with the lawyer's duty of confidentiality. In commercial litigation funding arrangements, the funding agreement will likely be negotiated. If the client asks the lawyer to represent him or her in such negotiations, the lawyer should consider whether the lawyer has the experience or learning required as well as whether the lawyer has any personal interest that creates a conflict. If so, the lawyer must address those by a written disclosure that describes the relevant circumstances and material risks and then obtain the client's written consent. If the funder seeks client confidential information, the lawyer must advise the client of the risks of disclosure and obtain the client's informed consent to disclose confidential information to the funder. The lawyer should also take appropriate steps to limit the risks to the client that the disclosure of such information will effect a waiver of attorney client privilege or work product protection which may include having the funder sign a non-disclosure agreement, appropriate labeling of shared materials as confidential or taking other steps to maintain the confidentiality of the shared materials."

"Scenario 1 : Lawyer represents Client with personal injury claim who is in need of money for living expenses. Lawyer advises Client that Client may qualify for litigation funding and provides Client with a list of funders that Lawyer's clients have used. At Client's request, Lawyer reviews the agreement and explains its terms carefully, emphasizing that the interest rate on the loan is high, there is also a large administrative fee, and Client might be able to get a bank loan at a lower rate. Despite this advice, Client enters into the funding agreement.

"Scenario 2 : Client, a company asserting a patent claim, is interested in litigation funding to avoid tying up its cash in legal fees. Lawyer has extensive experience with third-party funding and recommends a funder with which the firm has worked previously. Prior to agreeing to fund the case, Funder asks for a memo assessing the strengths of Client's case. Lawyer tells Funder that Lawyer will seek Client's consent to share this information. Lawyer advises Client there is some risk that sharing the memo could waive applicable privileges, that the risk is lessened if the information is communicated under a non-disclosure agreement ('NDA'), and that Client must also consider that Funder will probably not fund the case without receiving Lawyer's assessment of the strength of the claims. Client authorizes Lawyer to share the memo. Because of prior good

experience with Lawyer, Funder agrees to fund Client's case (the Client, in turn, is responsible for paying Lawyer's legal fees). Lawyer is able to negotiate a better than standard deal for Client because of Lawyer's relationship with Funder. Under the terms of the deal, Funder funds a portion of Lawyer's fees (the Lawyer is on a partial contingency) and pays litigation expenses. Such funds are provided to Client, who in turn pays Lawyer. Funder has the right to cease funding if it disagrees with the direction of the litigation. The funding agreement also gives Funder the right to review and approve any change in counsel, which approval will not be unreasonably withheld. Over the course of the litigation, Funder's employees communicate regularly with Lawyer.

"Scenario 3 : Same facts as Scenario 2, except under the funding agreement, Funder pays Lawyer's legal fees directly for the representation of Client."

"Litigation funding is the practice where a third-party unrelated to the lawsuit provides funds for litigation in return for a portion of any financial recovery. In this opinion, we consider the ethical issues an attorney may face in representing a client where litigation funding is involved.

"The type of third-party litigation funding addressed by this opinion is a relatively recent development in the United States, although more common and accepted elsewhere. The ethics and social utility of this type of litigation funding are the subject of debate. Some have raised concerns that litigation funding will lead to frivolous lawsuits or that vulnerable clients may be forced to accept unfair deals. Others argue litigation funding in the United States promotes access to justice and/or diversifies thinking about litigation."

"In some states, agreements between a litigant and a stranger to the litigation by which the stranger pursues or assists in pursuing the litigant's claim and in return receives part of any recovery are prohibited under laws against champerty and maintenance. These are legal doctrines dating from the Medieval England that developed to prevent feudal lords from financing other individuals' legal claims against the financer's political or personal enemies.

"Courts in states with laws against champerty and maintenance have considered whether litigation funding arrangements violate those laws. See *Charge Injection Technologies, Inc. v. E.I. DuPont De Nemours & Company* (2016) 2016 WL 937400 (finding that litigation funding contract did not violate Delaware's common law prohibition on champerty and maintenance because the funder did not exercise control over litigation); *Maslowski v. Prospect Funding Partners LLC* (2017) 890 N.W.2d 756 (finding that litigation funding agreement was unenforceable by Minnesota law against champerty)."

"A lawyer has a duty to provide competent representation, which includes applying the learning and skill reasonably necessary to perform legal services. Rule 1.1(b). A lawyer also has a duty to communicate with the client about the means by which to accomplish the client's objectives in the representation. Rule 1.4(a). To the extent the client's ability to accomplish its objectives depends on the client's ability to fund the litigation or fund the client's personal expenses while proceeding with the litigation, the lawyer's representation of the client may involve advising the client as to whether litigation funding would assist in accomplishing the client's goals. Such advice would likely need to include a discussion of the pros and cons of obtaining litigation funding and alternatives, if any.

"Furthermore, a lawyer representing a client in a matter funded by a litigation funder has an obligation to understand how the funding agreement impacts the litigation. If the client asks the

lawyer to advise on or negotiate a litigation funding contract, the lawyer must either have the expertise to do so, obtain such experience, or decline to provide the requested advice regarding litigation funding. See rule 1.1(c). But regardless of whether the attorney is advising a client on the funding contract, the lawyer must understand how the terms of the funding agreement impact decisions in the litigation."

"Rule 2.1 provides that '[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.' This rule dovetails with a lawyer's duty of loyalty to a client, which generally prohibits a lawyer from allowing obligations owed or potentially owed to a third-party to compromise the quality and soundness of advice offered to a client. . . ."

"Rule 1.7 prohibits a lawyer from representing a client if there is a significant risk that the representation will be materially limited by the lawyer's relationships with a third person or the lawyer's own interest without the lawyer's informed written consent. Rule 1.7(b)."

"Rule 1.8.6 prohibits a lawyer from entering into an agreement for or accepting compensation for representing a client from one other than the client unless the client gives informed written consent, the lawyer complies with the lawyer's duty of confidentiality, and the payment arrangement will not interfere with the lawyer's independent professional judgment or with the lawyer-client relationship. The rule would apply in an arrangement where the funder pays the lawyer directly."

"The lawyer's independent professional judgment may also be impaired if the funding arrangement imposes limitations on the how the case is litigated. Some ethics committees have suggested that there could be circumstances in which a funding agreement imposes such limitations on the attorney's judgment that the lawyer might not be able to competently represent the client. ABA Commission on Ethics 20/20, Informational Report to the House of Delegates 23 (2012). . . ."

"The Committee does not reach a general conclusion that any particular degree of control is per se unethical. However, it is clear that where the funder has some degree of control of the litigation, the lawyer has an obligation to advise the client about the impact of such limitations on the lawyer's representation. Rule 1.4; see also ABA Formal Opn. No. 01-421 (where lawyer represents insured and the insurer imposes limitations on the representation, lawyer must communicate limitations to the client early in the representation)."

"In order to determine whether to invest in a case, funders will likely require information about the case at the outset. A prospective funder may ask for the attorney's analysis of the merits of the case or other privileged materials. Once a funder has agreed to fund the case, that agreement will likely be memorialized in a contract which may reflect how the funder values the case which is likely to be based on the attorney's analysis. As the case proceeds, there may continue to be communications between the funder and client or between the funder and the client's counsel.

"Rule 1.6 prohibits a lawyer from sharing confidential information without the client's informed consent. In order for the client's consent to be informed, the lawyer must inform the client about 'the relevant circumstances and the material risks, including any actual and reasonably foreseeable adverse consequences.' Such risks include the client's adversary may seek to compel communications between the funder and the client or lawyer and a court may hold that the sharing effected a waiver of otherwise available evidentiary privileges."

"According to the facts of Scenario 2, Lawyer shares a legal analysis memo with Funder after Funder signed an NDA. Lawyer also engages in communications with Funder about the progress of the case. These activities implicate Lawyer's ethical obligation to maintain the confidentiality of information learned in the course of the representation and to apply diligence, learning and skill to avoid adverse consequences, such as a waiver of privileges and protections to which the clients is entitled.

"Case law concerning whether funding agreements and communications with funders are privileged is still developing. Most but not all courts that have considered the question have held that work product does not lose its work product status because an attorney or client shares that work product with a funder either orally or in writing. That is because work and work-product protection is only subject to waiver based on disclosure to a third-party where the disclosure 'substantially increase[es] the possibility that an opposing party will obtain the information.' 2 Mueller & Kirkpatrick, *Federal Evidence* (4th ed. 2016) § 5:38; see also *Laguna Beach County Water Dist. v. Superior Court* (2004) 124 Cal. App. 4th 1453, 1459 [22 Cal. Rptr. 3d 387] (disclosure operates as a waiver only where the otherwise protected information is divulged to someone with no interest in maintaining confidentiality). Taking steps to ensure that the funder will keep all information it receives confidential such as by entering into a confidentiality agreement and/or marking documents appropriately will decrease the risk that a court will find that work product is waived. Such steps are therefore consistent with Lawyer's ethical duty to safeguard confidential information. However, particularly because case law is still developing, Lawyer should also inform Client of the risks of waiver and obtain the Client's consent. See rule 1.6(a) (lawyer may not reveal client confidences without informed written consent in this context)."

H. Conflict of Interest: Current Clients; Specific Rules, Rule 1.8

In re Hall, Board Release of Information.

Wendell Kyle Hall of Lenoir City was permanently disbarred.

Mr. Hall was permanently disbarred "for failure to provide competent representation to his clients; failure to act with reasonable diligence and promptness in his representation; failure to respond to requests for information; failure to communicate with numerous clients and keep them informed about the status of their case; failure to inform them of his suspension from the practice of law; improperly requesting and receiving a loan from a client without memorializing the loan in writing and without advising the client in writing to seek independent legal counsel; failure to notify clients of his withdrawal as attorney of record or take appropriate steps to protect their interests; failure to expedite litigation; failure to respond to the Board's requests for responses to complaints; and failure to comply with the Order of Enforcement entered by the Supreme Court."

In re Parsley, Board Release of Information.

David Scott Parsley of Nashville was suspended for one year, with three months to be served on active suspension and the remainder on probation and with the requirement of a practice monitor.

"Mr. Parsley engaged in a business transaction with a client and friend without properly informing them of the conflict of interest in violation of RPC 1.3 (diligence) and 1.8 (conflict of interest)."

Humanitarian Aid by Non-Profit Legal Assistance Organizations, Tennessee Supreme Court Rule 8, RPC 1.8(e), No. ADM2021-00464 (Tenn. May 4, 2021).

"The Tennessee Alliance for Legal Service ("TALS") has asked this Court to enter an order clarifying that Tennessee Supreme Court Rule 8, RPC 1.8(e) does not preclude TALS and its four partners, Legal Aid of East Tennessee, Legal Aid of Middle Tennessee and the Cumberlands, Memphis Area Legal Aid Services, and West Tennessee Legal Services, from administering a proposed financial assistance program that will be funded by a grant from the Tennessee Department of Human Services ("DHS") using Temporary Assistance for Needy Families ("TANF") funds. Under this proposal, TALS will make payments to third parties on behalf of eligible clients for qualifying expenses, such as rent, rental/utility arrearages, housing debts, resettlement costs, food, clothing, or transportation expenses, and will subsequently seek reimbursement from DHS. TALS anticipates having up to $13.8 million dollars available to assist up to 1,160 families. TALS believes the opportunity DHS is providing is unique, will help families become more economically self-sufficient, and will have the added community benefit of financially assisting landlords, who have also suffered as a result of the COVID-19 pandemic.

"Upon due consideration of TALS' request, and in light of both the extreme hardships caused by the COVID-19 pandemic and this Court's ongoing commitment to improve access to justice in Tennessee, we hereby clarify Tennessee Supreme Court Rule 8, RPC 1.8 as follows:

> "When the Tennessee Alliance for Legal Services, Legal Aid of East Tennessee, Legal Aid of Middle Tennessee and the Cumberlands, Memphis Area Legal Aid Services, or West Tennessee Legal Services receives donations or other funding to provide humanitarian aid to persons in need, such as financial assistance to pay for food, clothing, shelter, or transportation, the organization's use of such donations or other funding to provide humanitarian aid to its clients or the clients' families shall not be deemed a violation of paragraph (e) of this Rule."

Maine State Bar Association Professional Ethics Commission Opinion 224 (Apr. 15, 2021).

"Can a lawyer pay a non-expert witness for time spent testifying at a deposition or a trial, preparing for such testimony, and other related costs?"

"A lawyer may advance court costs and litigation expenses without running afoul of the Maine Rules of Professional Conduct, including paying a non–expert witness's lost wages, expenses, and other costs related to preparing and providing testimony or otherwise assisting counsel, so long as the payment is reasonable and not conditioned on the content of the witness's testimony."

"An attorney may advance court costs and litigation expenses, including payment of costs and expenses to a non-expert witness.

"Following inquiries from members of the bar about the scope of Maine Rule of Professional Conduct 1.8(e), and specifically its application in the context of payment to a non– expert witness, also referred to as a 'fact witness' or 'occurrence witness', the Professional Ethics Commission provides the following analysis and clarification about the rule with respect to advancing court costs and litigation expenses. Rule 1.8(e) provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of

> litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. M.R. Prof. Conduct 1.8(e).

"This text both allows for traditional billing practices in which an attorney bills a client for costs incurred and advanced by the attorney during the course of the representation while also ensuring that a client with limited financial resources can nonetheless access the legal system in the context of a contingent fee agreement or, in the case of an indigent client, through the attorney paying those costs. Witness–related expenses are just one example of litigation costs that may arise and be addressed through either routine billing or contingent fee arrangements, so long as they are clearly addressed in the fee agreement between the attorney and client before such costs are incurred.

"While certain litigation costs and expenses may be paid to non-expert witness, some payments may violate M.R. Prof. Conduct 3.4(b). Rule 3.4(b) states that a lawyer is prohibited from 'offer[ing] an inducement to a witness that is prohibited by law.' The commentary to the Rule explains:

> [I]t is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee (except for expenses and reimbursement for lost wages) for testifying and that it is improper to pay an expert witness a contingent fee. M.R. Prof. Conduct 3.4(b) cmt. 3.

"Any payment made by an attorney to a non-expert witness must be for the limited purpose of reimbursing the witness for their time and expenses and must be reasonable.

"The American Bar Association Committee on Ethics and Professional Responsibility has addressed the issue of payments to non–expert witnesses and specifically the extent that Model Rule 3.4(b), which is identical to Maine's Rule 3.4(b), imposes any limitations on such payments. Formal Opinion 96–402, Propriety of Payments to Occurrence Witnesses, begins:

> A lawyer, acting on her clients behalf, may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction.

"ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96–402 at 1 (Aug. 2, 1996). The purpose of the payment, to reimburse the witness, is critical. As Opinion 96–402 further explains:

> As long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party, the Committee is of the view that such payments do not violate the Model Rules. Id. at 2.

"The Opinion emphasizes, however, that any such reimbursement payments made must be reasonable. It also notes:

> What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that [they have] sustained a direct loss of income because of [their] time away from work–as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony–as, for example, where the witness is retired or unemployed–the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances. *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 96-402 at 3 (Aug. 2, 1996).

"The Commission agrees. In short, payments to non–expert witnesses, if any, should be objectively reasonable and should reflect the witness's time spent testifying, preparing to testify, or otherwise helping prepare the case, and can include reimbursement of expenses related to those activities. Reasonable payments by an attorney to a non-expert witness can include compensation for (1) actual expenses incurred, (2) actual wages lost, and/or (3) the value of time spent by the witness."

I. Conflict of Interest: Duties to Former Clients, Rule 1.9

ABA Formal Opinion 497, Conflicts Involving Materially Adverse Interests (Feb. 10, 2021).

Rules 1.9(a) and 1.18(c) address conflicts involving representing a current client with interests that are "materially adverse" to the interests of a former client or prospective client on the same or a substantially related matter. But neither Rule specifies when the interests of a current client are "materially adverse" to those of a former client or prospective client. Some materially adverse situations are typically clear, such as, negotiating or litigating against a former or prospective client on the same or a substantially related matter, attacking the work done for a former client on behalf of a current client, or, in many but not all instances, cross-examining a former or prospective client. Where a former client is not a party to a current matter, such as proceedings where the lawyer is attacking her prior work for the former client, the adverseness must be assessed to determine if it is material. General economic or financial adverseness alone does not constitute material adverseness.

J. Client With Diminished Capacity, Rule 1.14

Washington State Bar Association Committee on Professional Ethics Opinion 202101 (2021).

"A lawyer representing a criminal defendant faces a dilemma if the client fails to appear in court due to civil commitment in a hospital under RCW Ch. 71.05. If the lawyer fails to disclose the commitment, the court may issue a warrant for the client's arrest or take other action detrimental to the client's interests. However, disclosure of the commitment risks violating RPC 1.6 Advisory Opinions 2099 (2005) and 2190 (2009) address a similar issue–whether or how to disclose to the court a concern about the client's competence to stand trial–but they do not address disclosure of a civil commitment proceeding. This opinion reviews ethical considerations presented by that dilemma, which is particularly acute when the lawyer does not learn of the civil commitment in advance of the hearing.

"RPC 1.6(a) provides: 'A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph b.' Paragraph (b) of the rule describes eight scenarios in which a lawyer may reveal information relating to the representation

without the client's informed or implied consent. Of these, subparagraph (b)(6), authorizing disclosure to comply with a court order, is relevant to this discussion.

"Although it is important to discuss a client's objectives early in the engagement and to review them periodically during the engagement, it can be particularly helpful to do so if the lawyer anticipates that mental health issues could complicate the client's defense. Should the client's condition subsequently deteriorate, it may become difficult for the client to make informed decisions about significant issues or, if the client is hospitalized, it may become difficult to communicate with the client at all.

"Discussion about the relative importance of confidentiality and liberty may be not be feasible early in an engagement. However, if feasible, such discussions may in some cases lead to express, informed consent to disclose information protected by RPC 1.6 to the court and/or the prosecutor. In other cases such discussions before circumstances become exigent may provide a basis for the lawyer to conclude later in the engagement that the client gave implied consent.

"'Informed consent' means the client's 'agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the propose course of conduct.' RPC 1.0A(e). RPC 1.6(a) does not require that informed consent be confirmed in writing. However, it may be advisable for the lawyer to provide the client a written description of the information that the client has authorized to be disclosed and the circumstances under which disclosure is authorized, together with the information that the client may revoke consent at any time. To avoid misunderstanding, the lawyer may ask the client to sign the authorization and may note that any revocation should be provided in writing. The scope of a disclosure pursuant to express, informed consent should be limited to the scope of the authorization.

"If early discussions do not progress to the point where the client makes a decision to give or refuse express, informed consent, the discussions may nevertheless progress to the point where the lawyer reasonably believes that the client has impliedly authorized disclosure of information in some circumstances to avoid adverse consequences to the client's liberty. When making a disclosure pursuant to implied authorization, the lawyer should disclose no more information than is reasonably necessary to accomplish the client's objective in preserving personal liberty. See RPC 1.6(b) and Comment [5].

"In some cases a court may order a lawyer to reveal information relating to the representation of a client. For example, if an issue has arisen concerning the competence of the client to stand trial, the court may order the lawyer to disclose information protected by RPC 1.6 related to that issue. Subparagraph (b)(6) authorizes a lawyer to disclose otherwise confidential information pursuant to court order. However, the introductory language of paragraph (b) cautions that the lawyer's disclosure should be limited in scope to information that the lawyer reasonably believes is necessary to disclose under the circumstances. Comment [15] provides this guidance regarding court-ordered disclosure: 'Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.' When complying with such an order, the lawyer may consider providing disclosure to the court in camera or in chambers and/or requesting that the record be sealed.

"RPC 1.14 may come into play if the lawyer does not have informed or implied consent and is not subject to a court order. This rule governs representation of a client with diminished capacity. Paragraph (b) authorizes a lawyer to take reasonably necessary protective action '[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest.'

"A client who is at risk of being arrested and jailed for failing to appear in court might conceivably face substantial physical harm in some circumstances. For example, mental health issues can sometimes cause an encounter with law enforcement to escalate quickly and unexpectedly, and confinement in jail during a pandemic can create increased risk of infection. In addition, a client who accumulates a series of arrest warrants has an increased risk of adverse rulings in court. The comments to RPC 1.14 do not discuss what types of harm might qualify as 'other harm,' meaning harm not considered physical or financial that could nevertheless merit protective action. Advisory Opinion 2190 observes: 'Because [of] the broad language of [RPC 1.14(b)], it would not be unreasonable to assume that 'other harm' did constitute harm to a client's constitutionally protected interest [in being competent to stand trial].' The same observation applies regarding a criminal defendant's liberty interest.

"Comment [6] to RPC 1.14 provides guidance for making a determination whether the client has diminished capacity. If the lawyer concludes that the other requirements of RPC 1.14(b) are also satisfied, the next question is whether disclosure to the court is 'reasonably necessary protective action.' Although such disclosure is not listed among the examples in Comment [5], the comment states: 'In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known [and] the client's best interests. . . .' Discussion about the client's objectives early in the engagement may provide a basis for concluding that disclosure to the court is an appropriate protective action under RPC 1.14. Comment [8] states: 'When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.'

"If the lawyer discloses information to the court, whether pursuant to RPC 1.6(a), RPC 1.6(b)(6) or RPC 1.14, the lawyer must comply with RPC 3.3 governing candor toward the tribunal.

"It is a separate question whether disclosure of the information that a client is in civil commitment may be prohibited by statute. The Committee does not opine on questions of law."

K. Safekeeping Property and Funds, Rule 1.15

In re Buchanan, Board Release of Information.

Michael Robie Buchanan of Signal Mountain was publicly censured, based on a conditional guilty plea.

"Mr. Buchanan failed to timely remit agreed employee deferral contributions to the firm's 401(k) plan and matching contributions."

By these acts, Mr. Buchanan violated RPCs 1.15 (safeguarding funds) and 5.3 (responsibilities regarding non-lawyer assistance).

In re Burks, Board Release of Information.

Addie Marie Burks of Memphis was publicly censured and required to attend the Board's Trust Account Workshop.

"Ms. Burks received funds on a client's case in November 2019, and she delayed distributing the funds until August 2020. Also, Ms. Burks distributed all the funds directly to the client instead of first resolving existing medical liens. Ms. Burks did not have a written fee agreement for a contingency fee agreement, and she commingled a small portion of her fee with client funds when she failed to timely remove her entire fee from trust. In another matter for the same client, Ms. Burks failed to timely distribute a small amount to a medical provider for over two years."

Ms. Burks violated RPCs 1.1 (competence), 1.3 (diligence), 1.15 (safekeeping funds), 1.5 (fees), and 8.4(d) (prejudice to the administration of justice).

In re Clelland, Board Release of Information.

Wilfred Shawn Clelland of Chattanooga was publicly censured.

"Mr. Clelland settled a client's personal injury claim and received settlement funds in August of 2017. The settlement proceeds were subject to outstanding medical bills and/or liens. Mr. Clelland performed little, if any, work in negotiating the liens for over three years. He also failed to provide updates to the client, held settlement funds in his IOLTA account for three years, and provided false or misleading statements to the client."

Mr. Clelland violated RPCs 1.3 (diligence), 1.4(a)(3) (communication), 1.15 (safekeeping property and funds), and 8.4 (misconduct).

In re Deas, Board Release of Information.

Charles David Deas of Maryville was publicly censured.

"Mr. Deas deposited his own funds into his trust account in order to issue a cashier's check from the account which is a violation of Rule 1.15 (safekeeping funds) and resulted in potential harm to his clients. Mr. Deas also failed to adequately protect the bank checks for his trust account, and he failed to have proper procedures in place to make sure his assistant was in compliance with the Rules of Professional Conduct, in violation of Rule 5.3 (nonlawyer assistance)."

Mr. Deas violated RPCs 1.15 (safekeeping funds) and 5.3 (nonlawyer assistance).

In re Dempsey, Board Release of Information.

Benjamin Dempsey of Huntingdon was suspended for five years, based on a conditional guilty plea, with the suspension retroactive to August 16, 2018, with three years to be served on active suspension and the remainder on probation.

"Mr. Dempsey admitted violating the Rules of Professional Conduct in two matters. In the first matter, Mr. Dempsey entered an Alford plea and was convicted of the Class B misdemeanor offense of simple assault by offensive touching. In the second matter, Mr. Dempsey was suspended for three years by the United States Bankruptcy Court for the Western District of Tennessee for

misappropriating funds, engaging in improper trust accounting, making misrepresentations to his client and the Court, and failing to refund fees to his client in a timely manner."

Mr. Dempsey violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), 1.16 (declining or terminating representation), 3.4 (fairness to opposing counsel), 5.3 (responsibilities regarding nonlawyer assistance), and 8.4(a), (b), (c), and (d) (misconduct).

In re Dowdy, Board Release of Information.

Jahari Mabry Dowdy of Memphis was publicly censured and directed to attend the Board's Trust Account Workshop.

"Ms. Dowdy agreed to facilitate payments on behalf of a client to a commercial lessor in fulfillment of an agreement regarding the client's rent arrears. On March 2, 2020, Ms. Dowdy signed a trust account check payable to the commercial lessor in partial payment of the client's rent arrears. Through an inadvertent office error, a check drawn on Ms. Dowdy's trust account was delivered to the commercial lessor before Ms. Dowdy received funds from the client to cover the check. As a result, the check was returned for insufficient funds. Ms. Dowdy failed to take proper remedial action after becoming aware of the error. Ms. Dowdy also subsequently deposited personal funds into her trust account to provide enough funds for a replacement check,
thereby comingling her personal funds with her trust account funds."

Ms. Dowdy violated RPCs 1.15 (safekeeping property and funds), 5.1 (responsibilities of partners, managers, and supervisory lawyers), and 5.3 (responsibilities regarding nonlawyer assistance).

In re Foy, Board Release of Information.

Robert John Foy of Murfreesboro was suspended for seven years, based on a conditional guilty plea, with five years to be served on active suspension and the remainder on probation, and ordered to obtain an evaluation from the Tennessee Lawyer Assistance Program and to engage the services of a practice monitor.

"Mr. Foy converted client settlement funds to his own business and personal use. He also failed to promptly pay third-party lien holders from the settlement funds. During the investigation of this matter, Mr. Foy falsified bank records to prevent discovery of his misappropriation. In addition, Mr. Foy failed to keep client funds and estate funds in his trust account. Mr. Foy reimbursed the estate and his clients in full for the funds he misappropriated."

Mr. Foy violated RPCs 1.15 (safekeeping property), 3.4 (fairness to the opposing party and counsel), 4.1 (truthfulness and candor in statements to others), and 8.4 (a) and (c) (misconduct).

In re Garton, Board Release of Information.

Jackie Lynn Garton of Burns was permanently disbarred and ordered to pay restitution of $1,365,203.42.

"Mr. Garton was previously suspended by the Supreme Court of Tennessee on May 29, 2019, after pleading guilty to a serious crime. On April 22, 2019, Mr. Garton pled guilty to Wire Fraud in

violation of 18 U.S.C. §1343, Aggravated Identity Theft in violation of 18 U.S.C. § 1028A, and Tax Fraud in violation of 26 U.S.C. § 7206(1). The Board of Professional Responsibility instituted a formal proceeding to determine the extent of final discipline to be imposed.

"In the first case, Mr. Garton knowingly and intentionally misappropriated funds held in trust for a minor child. In the second case, Mr. Garton knowingly, intentionally and systematically misappropriated funds in a probate matter and converted the funds to his personal or business use."

Mr. Garton violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.7 (conflict of interest), 1.15 (safekeeping property), 1.16 (declining and terminating representation), 3.3 (candor toward the tribunal), 4.1 (truthfulness and candor in statements to others), 8.1 (bar admission and disciplinary matters), and 8.4 (a), (b), (c), and (d) (misconduct).

In re Graham, Board Release of Information.

Mark Steven Graham of Knoxville was suspended for three years, based on a conditional guilty plea, retroactive to his temporary suspension on March 11, 2020, with one year to be served on active suspension and the remainder on probation. Mr. Graham must also obtain an evaluation with the Tennessee Lawyers Assistance Program, engage a Practice Monitor, and pay restitution.

"On May 8, 2020, a Petition for Discipline was filed against Mr. Graham that included one complaint of misconduct. Mr. Graham represented a foreign company involved in intellectual property litigation in the United States. The company retained an expert witness, and the client sent funds to Mr. Graham for payment of the expert witness fees. Mr. Graham failed to pay the expert as agreed and used a portion of the funds to pay his outstanding attorney fees."

Mr. Graham violated RPCs 1.15(a), (b), and (d) (safekeeping property and funds) and 8.4(a) and (c) (misconduct).

In re Hammet, Board Release of Information.

Lawrence Buford Hammet, II, of Nashville was publicly censured and required to satisfy the judgments against him on or before January 19, 2021.

"Mr. Hammet withdrew disputed funds from his client trust account and paid himself a fee which exceeded the amount that his client alleged was agreed upon at the commencement of the representation. The client filed a civil suit against Mr. Hammet which was appealed after trial. The Court of Appeals found that Mr. Hammet failed to keep the disputed funds in his client trust account until the dispute was resolved and that Mr. Hammet improperly calculated his fees which were unreasonable. The Court of Appeals awarded judgment to the client in the amount of $67,335.69 and remanded the case to the trial court for a determination of prejudgment interest. The trial court subsequently awarded pre-judgment interest to the client in an additional amount of $22,092.10."

Mr. Hammet violated RPCs 1.5 (fees) and 1.15(e) (safekeeping property).

In re Lawson, Board Release of Information.

William Branch Lawson of Erwin was permanently disbarred and ordered to pay restitution of $67,850.

"The Board filed a Petition for Discipline against Mr. Lawson consisting of five separate disciplinary complaints. The Hearing Panel found Mr. Lawson failed to appear in court or provide any legal services for which he was paid fees by clients, failed to refund unearned fees to his clients, misappropriated the fees paid to him, misappropriated funds held in his trust account for a third party to settle other obligations and cases, failed to act with diligence in the representation of his clients, abandoned his practice, failed to respond to the Board's lawful request for information and engaged in conduct involving dishonesty, fraud, deceit and misrepresentations in violation of RPCs 1.3 (diligence), 1.5 (fees), 1.15 (safekeeping property and funds), 1.16 (declining or terminating representation) 8.1 (bar admissions and disciplinary matters), and 8.4(a) and (c) (misconduct)."

In re Moore, Board Release of Information.

TeShaun David Moore of Memphis was suspended for six years, based on a conditional guilty plea, retroactive to March 5, 2018, with four years to be served on active suspension and the remainder on probation. Mr. Moore was also ordered to obtain an evaluation from the Tennessee Lawyers Assistance Program, engage the services of a Practice Monitor, and pay restitution.

"Mr. Moore admitted he failed to distribute funds to multiple clients following settlements, failed to distribute funds related to liens by insurance companies concerning money held in trust, missed scheduled court dates, failed to communicate with clients and failed to notify clients he had been suspended from the practice of law."

Mr. Moore violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), 1.16 (declining or terminating representation), 3.2 (expediting litigation), 3.3 (candor toward the tribunal), 4.1 (truthfulness in statements to others), 8.1 (disciplinary matters), and 8.4 (misconduct).

In re Percival, Board Release of Information.

Sherry Marie Percival of Jackson was suspended for five years, based on a conditional guilty plea, with six months to be served on active suspension and the remainder on probation, conditioned upon referral to TLAP, engagement of a practice monitor, engagement of an accountant to reconcile her trust account, and attendance at the Board's Trust Account Workshop.

Ms. Percival acknowledged that she failed to reconcile her trust account; mismanaged her trust account and settlement funds therein and executed a release on behalf of her client and endorsed client's name on settlement check without permission of her client in violation of RPCs 1.4 (communication), 1.15 (safekeeping property and funds), 4.1(a) (truthfulness in statements to others), and 8.4(a) (misconduct).

In re Springer, Board Release of Information.

Paul James Springer, Sr., of Memphis was permanently disbarred and ordered pay restitution to his client of $6,247.34 and close his law firm IOLTA account.

"After a hearing upon the disciplinary petition, a Hearing Panel determined Mr. Springer misappropriated settlement funds belonging to his client, made material misrepresentations to his client, failed to reasonably communicate with his client, and engaged in criminal conduct as well as conduct involving dishonesty, deceit, misrepresentations and fraud and knowingly failed to comply with a final court order entered in a proceeding in which he was a party."

Mr. Springer violated RPCs 1.2 (scope of representation and allocation of authority between client and lawyer), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), 8.1(b) (bar admission and disciplinary matters), and 8.4(a), (b), (c), and (g) (misconduct).

Florida State Bar Ethics Opinion 21-2 (Mar. 23, 2021).

"A lawyer ethically may accept payments via a Web-based payment-processing service (such as Venmo or PayPal), including funds that are the property of a client or third person, as long as reasonable steps are taken to protect against inadvertent or unwanted disclosure of information regarding the transaction and to safeguard funds of clients and third persons that are entrusted to the lawyer."

"The Florida Bar Ethics Department has received several inquiries whether lawyers may accept payment from clients via Web-based payment-processing services such as Venmo and PayPal. This also is an increasingly frequent question on the Bar's Ethics Hotline. Accordingly, the Professional Ethics Committee issues this formal advisory opinion to provide Florida Bar members with guidance on the topic.

"Several Web-based, mobile, and digital payment-processing services and networks ('payment-processing services') facilitate payment between individuals, between businesses, or between an individual and a business. Some are specifically designed for lawyers and law firms (e.g., LawPay and LexCharge), while others are not (e.g., Venmo, PayPal, ApplePay, Circle, and Square). These services operate in different ways. Some move funds directly from the payor's bank account to the payee's bank account, some move funds from a payor's credit card to a payee's bank account, and some hold funds for a period of time before transferring the funds to the payee. Service fees differ for various transactions, depending on the service's terms of operation. Some offer more security and privacy than others.

"The Committee sees no ethical prohibition per se to using these services, as long as the lawyer fulfills certain requirements. Those requirements differ depending on the purpose of the payment—i.e., whether the funds are the property of the lawyer (such as earned fees) or the property of a client or third person (such as advances for costs and fees and escrow deposits). The two principal ethical issues are (1) confidentiality and (2) safeguarding funds of clients and third persons that are entrusted to the lawyer."

"The use of payment-processing services creates privacy risk. This arises from the potential publication of transactions and user-related information, whether to a network of subscribers or to a population of users interacting with an application. For example, Venmo users, when making a payment, are permitted to input a description of the transaction (e.g., '$200 for cleaning service'). Transactions then are published to the feed of each Venmo user who is a party to the transaction. Depending on the privacy settings of each party to the transaction, other users of the application may view that transaction and even comment on it."

"For lawyers, accepting payment through a payment-processing service risks disclosure of information pertaining to the representation of a client in violation of Rule 4-1.6(a) of the Rules Regulating The Florida Bar. Rule 4-1.6(a) prohibits a lawyer from revealing information relating to representation of a client absent the client's informed consent. This prohibition is broader than the evidentiary attorney-client privilege invoked in judicial and other proceedings in which the lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The ethical obligation of confidentiality applies in situations other than those in which information is sought from the lawyer by compulsion of law and extends not only to information communicated between the client and the lawyer in confidence but also to all information relating to the representation, whatever its source. R. Regulating Fla. Bar 4-1.6 cmt. para. [4]. Likewise, a lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation. *Id.* R. 4-1.6(e); *see also id.* R. 4-1.6 cmt. paras. [24], [25]. The obligation of confidentiality also arises from a lawyer's ethical duty to provide the client with competent representation. *See id.* R. 4-1.1 cmt. para. [3]. This includes safeguarding information contained in electronic transmissions and communications. *Id.*

"Rule 4-1.6(c)(1) permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary to serve the client's interests. Although receipt of payment in connection with legal services benefits the client, the disclosure of information about the payment to a community of users would not. Wide publication of a Venmo payment 'for divorce representation' hardly would serve the client's interest."

"Payment-processing services typically offer various privacy settings. Venmo, for example, enables users to adjust their privacy settings to control who sees particular transactions. The options are (1) 'Public,' meaning anyone on the Internet will be able to see it, (2) 'Friends only,' meaning the transaction will be shared only with the 'friends' of the participants to the transaction, and (3) 'Private,' meaning it will appear only on the personal feeds of the user and the other participant to the transaction. Venmo has a default rule that honors the more restrictive privacy setting between two users: if either participant's account is set to Private, the transaction will appear only on the feeds of the participants to the transaction, regardless of the setting enabled by the other participant. If, as with Venmo, the service being used permits the recipient to control the privacy setting, the lawyer must select the most secure setting to mitigate against unwanted disclosure of information relating to the representation.

"Venmo is only one example of a payment-processing service. Each application has its unique privacy settings and potential risks. The lawyer should be aware that these options can and likely will change from time to time. Prior to using a payment-processing service, the lawyer must diligently research the service to ensure that the service maintains adequate encryption and other security features as are customary in the industry to protect the lawyer's and the client's financial information and to preserve the confidentiality of any transaction. The lawyer must make reasonable efforts to understand the manner and extent of any publication of transactions conducted on the platform and how to manage applicable settings to preempt and control unwanted disclosures. *See* R. Regulating Fla. Bar 4-1.6(e); *id.* R. 4-1.1 cmt. para. [3]. The lawyer must take reasonable steps to avoid disclosure by the lawyer as well as by the client, including advising clients of any steps that they should take to prevent unwanted disclosure of information. Although not ethically required, inserting such advice in the lawyer's retainer or engagement agreement or on each billing statement is wise. For example:

> As a convenience to our clients, we accept payment for our services via certain online payment-processing services. The use of these services carries potential privacy and confidentiality risks. Before using one of these services, you should review and elect the privacy setting that ensures that information relating to our representation of you is not inadvertently disclosed to the public at large.

"The foregoing is just an example. Variations to fit the circumstances may be appropriate.

"These confidentiality obligations apply to any payment that relates to the lawyer's representation of a client, regardless of the purpose of the payment."

"A customer's account with most payment-processing services such as Venmo and PayPal does not qualify as the type of bank account in which the trust-accounting rules require the funds of clients or third persons in a lawyer's possession be held. Indeed, with limited exceptions, they are not bank accounts at all, rather they are virtual ledgers of funds trading hands, with entries made by the service in the customers' names.

"Rule 5-1.1(a)(1) of the Rules Regulating The Florida Bar establishes the fundamental anti-commingling requirement that a lawyer hold in trust, separate from the lawyer's own funds, funds of clients or third persons that are in a lawyer's possession in connection with a representation ('entrusted funds'). It requires that all such funds, including advances for fees, costs, and expenses, 'be kept in a separate federally insured bank, credit union, or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account.'

"All nominal or short-term entrusted funds must be deposited in an IOTA account. R. Regulating Fla. Bar 5-1.1(g)(2). The IOTA account must be with an 'eligible institution,' namely, 'any bank or savings and loan association authorized by federal or state laws to do business in Florida and insured by the Federal Deposit Insurance Corporation, any state or federal credit union authorized by federal or state laws to do business in Florida and insured by the National Credit Union Share Insurance Fund, or any successor insurance entities or corporation(s) established by federal or state laws, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Florida.' *Id.* 5-1.1(g)(1)(D)."

"The Committee concludes that it is permissible for a lawyer to accept entrusted funds via a payment-processing service. To avoid impermissible commingling, the lawyer must maintain separate accounts with the service, one for funds that are the property of the lawyer (such as earned fees), which normally would be deposited in the lawyer's operating account, and one for entrusted funds (such as advances for costs and fees and escrow deposits), which when in a lawyer's possession are required to be held in a separate trust account. The lawyer must identify the correct account for the client or third party making the payment.

"Rule 5-1.1 applies to funds of clients and third persons that are 'in a lawyer's possession' and requires that any such funds be 'kept' in a particular type of account. It does not require that the funds be 'immediately' or 'directly' deposited into a qualifying account. A payee does not acquire possession—access to and control over—funds transmitted via a payment-processing service until the service makes those funds available in the payee's account. If the funds are the property of the lawyer, the lawyer may leave those funds in that account or transfer them to another account or payee at the lawyer's discretion. The lawyer, however, must transfer entrusted funds from the

service account into an account at a qualifying banking or credit institution promptly upon their becoming available to the lawyer. By transferring entrusted funds from the service account into a qualified trust account promptly upon acquiring access to and control over those funds, the lawyer complies with the requirement that those funds be *kept* in a qualified account.

"Many banks do not permit linking an IOTA account to an account with a paymentprocessing service such as Venmo or PayPal. In those situations, the lawyer should establish with the banking institution some type of suspense account to which the account established with the payment-processing service can be linked and into which the payments are transferred, then promptly swept into the lawyer's IOTA account.

"Depending upon how quickly the funds are released or other factors, a payment-processing service may charge the payee a transaction fee. Unless the lawyer and the client otherwise agree, the lawyer must ensure that any such fee is paid by the lawyer and not from client trust funds. Likewise, the lawyer must ensure that any chargebacks are not deducted from trust funds and that the service will not freeze the account in the event of a payment dispute. As with the concern for confidentiality, a lawyer must make a reasonable investigation into a payment-processing service to determine whether the service employs reasonable measures to safeguard funds against loss or theft and has the willingness and resources to compensate for any loss."

"In sum, the Committee concludes that a lawyer ethically may accept payments via a payment-processing service (such as Venmo or PayPal), including funds that are the property of a client or third person that must be held separately from the lawyer's own funds, under the following conditions:

"1. The lawyer must take reasonable steps to prevent the inadvertent or unwanted disclosure of information regarding the transaction to parties other than the lawyer and the client or third person making the payment.

"2. If the funds are the property of a client or third person (such as advances for costs and fees and escrow deposits), the lawyer must direct the payor to an account with the service that is used only to receive such funds and must arrange for the prompt transfer of those funds to the lawyer's trust account at an eligible banking or credit institution, whether through a direct link to the trust account if available, through a suspense account with the banking or credit institution at which the lawyer's trust account is maintained and from which the funds automatically and promptly are swept into the lawyer's trust account, or through another substantially similar arrangement.

"3. Unless the lawyer and client otherwise agree, the lawyer must ensure that any transaction fee charged to the recipient is paid by the lawyer and not from client trust funds. Likewise, the lawyer must ensure that any chargebacks are not deducted from trust funds and that the service will not freeze the account in the event of a payment dispute.

"The Rules of Professional Conduct are 'rules of reason' and 'should be interpreted with reference to the purposes of legal representation and of the law itself.' R. Regulating Fla. Bar ch. 4, pmbl. ('Scope'). When reasonable to do so, the rules should be interpreted to permit lawyers and clients to conduct business in a manner that society has deemed commercially reasonable while still protecting clients' interests. Permitting lawyers to accept payments via payment-processing services under the conditions expressed in this opinion satisfies those objectives.

"Note: The discussion about specific applications in this opinion is based on the technology as it exists when this opinion is authored and does not purport to address all such available technology. Web-based applications and technology are constantly changing and evolving. A lawyer must make reasonable efforts to become familiar with and stay abreast of the characteristics unique to any application or service that the lawyer is using."

New Hampshire Bar Association Ethics Committee Opinion #2020-21/01 (Oct. 15, 2020).

"New Hampshire attorneys are obligated under the Supreme Court Rules and the Rules of Professional Conduct to regularly reconcile their trust accounts. Attorneys must promptly follow up on all uncashed checks in their trust accounts. If an attorney is unable to resolve the issue with the payee, then the attorney should carefully review and utilize the provisions of the unclaimed and abandoned property act, RSA Chapter 471-C."

"An attorney has a handful of checks drawn on an IOLTA account that have not cleared. The checks are all nominal in amount. The checks were all written over a year earlier, with the oldest being about three years old."

"The New Hampshire Supreme Court has established an 'Interest on Lawyers Trust Accounts' (IOLTA) program. New Hampshire Supreme Court (SC) Rule 50. An attorney must deposit clients' funds which are nominal in amount or to be held for a short period of time in an IOLTA account. The IOLTA account must bear interest, and the interest must be paid to the New Hampshire Bar Foundation, rather than to the client. SC Rule 50(1)(C).

"Attorneys may write checks on the IOLTA account, in accordance with the direction of the client. Typically, the checks will be in the nature of accounts payable. They may be filing fees, witness fees, the attorney's fees, and other expenses of one sort or another. Sometimes, however, the checks are not cashed."

"Under SC Rule 50, lawyers are required to keep the records of all trust accounts, including their IOLTA account, current and in good order.

"A lawyer who practices in this jurisdiction shall maintain current financial records … , and shall retain the following records for a period of six years from the time of final distribution:

> (vii) copies of **monthly** reconciliations of the client trust accounts maintained by the lawyer.

"SC Rule 50(2)(B) (emphasis added). The lawyer's monthly reconciliation should reveal any uncashed checks."

"In addition to the duties imposed by SC Rule 50, New Hampshire lawyers have an ethical duty to resolve any trust fund issues expeditiously.

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer **shall promptly notify the client or third person**. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer **shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive** and upon request by the client or third person, shall promptly render a full accounting regarding such property.

"NH RPC Rule 1.15(e) (emphasis added).

"SC Rule 50 and RPC Rule 1.15 require the lawyer to follow up with uncashed checks, regardless of whether they are 'nominal in amount'. The monthly reconciliation requirement (SC Rule 50) impose a duty to promptly identify all uncashed checks, and the notification and delivery requirements (RPC Rule 1.15) impose a duty to follow up on those checks. This duty would seem to encompass, at a minimum, contacting the payee. The careful lawyer will keep detailed records of all attempts to contact the payee, in case issues arise later.

"Suppose the diligent lawyer has made every reasonable attempt to contact the payees and resolve the uncashed checks. Nevertheless, funds from some of the uncashed checks remain in the IOLTA or interest-bearing account for years. The lawyer will eventually need to clean up the accounts."

"One might suppose that the payee on a check loses the right to the funds by failing to cash the check, perhaps when the check goes stale after six months or so. *See* NH RSA 382-A:4-404. If that were not the cutoff point, one might suppose that the right to the funds would expire with the statute of limitations. *See* NH RSA 508:4 (personal actions); NH RSA 382-A:4-111 (actions under UCC Article 4).

"A statute of limitations, however, is an affirmative defense that a defendant must raise in a timely manner. *Glines v. Bruk*, 140 N.H. 180, 664 A.2d 79 (1995). Failure to plead the statute of limitations, within the time allowed, constitutes waiver of such defense. NH Super. Ct. Rule 9(d). Accordingly, the statute of limitations does not technically extinguish the claim, but rather provides a defense against enforcement.

"While this may seem like an overly technical distinction, it is important to properly answer the question of who 'has an interest' and who 'is entitled to receive' the funds represented by the uncashed checks. NH RPC Rule 1.15(e). The Committee concludes that unless and until the payee affirmatively relinquishes the claim, the right remains with the payee."

"While the payee may not have relinquished the claim, at some point the payee will be presumed to have abandoned the funds. The Committee has faced a somewhat similar question for clients who cannot be located, and whose funds remain in the lawyer's possession. *See* '*What to Do With Unclaimed Client Funds*' (December 13, 2013). That article essentially suggested that the lawyer could use the process established by the Abandoned Property Division of the New Hampshire State Treasury. Briefly, that process requires waiting for five years (NH RSA 471C:2), making a reasonable attempt to locate the client (NH RSA 471-C:3), and filing a report with the state (NH RSA 471-C:19).

"It is important to remember that these reports are **not** optional.

- A person holding property, tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this chapter **shall** report to the administrator concerning the property as provided in this section. NH RSA 471-C:19,I (emphasis added.)
- The report **shall** be filed before November 1 of each year for property presumed to be abandoned as of June 30 of that year. NH RSA 471-C:19, IV (emphasis added.)
- A person who fails to pay or deliver property within the time prescribed by this chapter may be **assessed interest** by the administrator at the annual rate of 18 percent on the

property or value thereof from the date the property should have been paid or delivered, or $25, whichever is greater. NH RSA 471-C:38,I (emphasis added.)

- A person who willfully fails to render any report or perform other duties required under this chapter may be **assessed a civil penalty** of $100 for each day the report is withheld or the duty is not performed, but not more than $5,000. NH RSA 471-C:38,II (emphasis added.)

"If that were not enough to make a lawyer uncomfortable, the State has a right to 'require any person who has not filed a report to file a verified report stating whether or not the person is holding any unclaimed property.' RSA 471-C:34,I. The State also has the right to examine records to determine compliance. RSA 471-C:34,II,III."

"If the payee has relinquished her claim on the money, it should probably revert to the person or entity that provided the funds, in many cases the client.

"Some of the uncashed checks may have represented expenses, such as witness fees, that may have been recovered as costs. *See* NH Super. Ct. Rule 45(b) (civil actions). If so, one might then argue that, when the witness no longer has a claim, the money belongs to the other side, as those costs were not actually incurred. Then, under NH RPC Rule 1.15(e), the lawyer would have a duty to 'promptly notify' the person having an interest in those funds.

"In addition, since the costs were not actually incurred, the lawyer's statement to the court becomes false. If that statement of fact is deemed material, the lawyer may have a duty to correct it. NH RPC 3.3(a)(1). Checks of nominal amount, such as for witness fees, might not be considered material.

"Finally, if you cannot determine who has the right to the fees, you should be mindful of NH RPC Rule 1.15(f):

> When in the course of representation, a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute."

"New Hampshire lawyers have an obligation under SC Rule 50 to regularly and frequently monitor their IOLTA account. As a result, any uncashed checks should be discovered within a few months.

"New Hampshire lawyers have an obligation under RPC Rule 1.15 to promptly follow up on uncashed checks with the people to whom those checks have been written. Reasonable attempts must be made, and should be documented, to locate the payees and ascertain if and when they intend to cash the checks.

"If all efforts to put the funds in the proper hands fail, remember that the provisions of the abandoned property statute provide an opportunity, and impose a duty on the lawyer, to resolve the situation.

"Uncashed checks present many pitfalls for the New Hampshire lawyer. The safest and most practical advice seems to be to locate the payees and see if they will cash the checks."

L. Terminating Representation, Rule 1.16

In re Tavarius M., No. M2020-00071-COA-R3-PT (Tenn. Ct. App., Bennett, Dec. 18, 2020).

"Darius M. ('Father M.') and Denzel W. ('Father W.') appeal the juvenile court's decision to terminate their parental rights. They also challenge the juvenile court's finding by clear and convincing evidence that termination of their parental rights was in the best interest of the children. Because the juvenile court erred in allowing Father W.'s attorney to withdraw from representation on the first day of trial, we vacate the court's termination of his parental rights on all grounds and remand for a new trial. We affirm the juvenile court's termination of Father M.'s parental rights."

"On April 7, 2017, DCS filed a petition for dependency and neglect. After hearing the petition, the juvenile court entered orders on April 11, 2017, finding that there was probable cause to believe that the children were dependent and neglected and placing them in the Department's custody. Approximately two years later, on July 8, 2019, DCS filed a petition to terminate the parental rights of Father M. and Father W.

"The juvenile court heard the termination petition on October 30 and November 6, 2019. When Father W. failed to appear on the first day of trial, his attorney made an oral motion to withdraw because Father W. had not maintained contact with him and had not followed the attorney's counsel and advice. The following exchange occurred between Father W.'s attorney and the trial judge:

> THE COURT: Any preliminary matters?
> [COUNSEL]: Your Honor, I -- if I may, I have not been able to be in touch with my client since we were last here September 21st. I have gone through roughly 2,000 pages of discovery. I have reached out to him multiple times. Obviously to protect my client, I would ask that we continue this so that he could be present and assist me in assisting him. If Your Honor would not entertain that, then I would make a motion -- an oral motion to withdraw simply because he's failed to maintain effective communication with me, he's failed to follow the effective advice of counsel, and I feel like our attorney-client relationship is irretrievably broken. As such, I would move the Court to entertain that also.
> THE COURT: All right. [Counsel], I will respectfully deny your motion to continue, but I will grant your motion to withdraw. Thank you.
> [COUNSEL]: I appreciate it, Your Honor.
> THE COURT: He had notice to be here. Any other preliminary matters?

"After granting the motion to withdraw, the court proceeded with the first day of trial. Father W. appeared on the second day of trial and made an oral motion for a continuance in order to secure new counsel. The juvenile court denied his motion and proceeded with the second day of trial with Father W. acting pro se.

"After the trial concluded, the court entered an order terminating Father W.'s and Father M.'s parental rights. The court determined that the following grounds had been proven by clear and convincing evidence as to Father W.: (1) abandonment by failure to visit, (2) substantial noncompliance with the permanency plans, and (3) failure to manifest an ability and willingness to assume custody. With regard to Father M., the court determined that the following grounds had been proven by clear and convincing evidence: (1) abandonment by exhibiting a wanton disregard and (2) failure to manifest an ability and willingness to assume custody. Finally, the court

determined that there was clear and convincing evidence that termination of Father W.'s and Father M.'s parental rights was in the best interest of the children.

"Both fathers appealed and present the following issues: whether the juvenile court erred in finding by clear and convincing evidence that grounds existed to terminate their parental rights, and whether the juvenile court erred in determining that termination of their parental rights was in the best interest of the children. Father W. raises the additional issue of whether the juvenile court erred in permitting his attorney to withdraw on the first day of trial."

"Father W. first argues that the manner in which the juvenile court permitted his appointed trial court counsel to withdraw violated his due process right to a fundamentally fair proceeding. Although the Due Process Clause of the United States Constitution does not 'require[ ] the appointment of counsel in every parental termination proceeding[,]' *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 31, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), 'Tennessee statutorily provides the right to appointed counsel for indigent parents in every parental termination proceeding,' *In re Carrington H.*, 483 S.W.3d at 527. . . . A parent's right to appointed counsel in parental termination proceedings is not absolute, however. This Court has recognized that a parent may effectively waive the right to appointed counsel if the parent fails 'to assist his counsel or communicate with her at all in the two months before the [parental termination] hearing.' *In re Elijah B.*, No. E2010-00387-COA-R3-PT, 2010 WL 5549229, at *6 (Tenn. Ct. App. Dec. 29, 2010).

"'An attorney appointed by the juvenile court for an indigent party in a parental termination case must seek leave of the court to withdraw.' *In re Jamie B.*, No. M2016-01589-COA-R3-PT, 2017 WL 2829855, at *5 (Tenn. Ct. App. June 30, 2017) (citing Tenn. Sup. Ct. R. 13, Sec. 1(e)(5)). The decision to grant or deny a motion to withdraw is a matter that falls within the juvenile court's discretion. *Id.* Thus, we review such determinations under an abuse of discretion standard. *Id.* An abuse of discretion occurs when a court 'causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.' *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

"When considering a request for leave to withdraw from representation and when determining whether a parent has effectively waived his or her right to counsel, a court must 'consider the principles embodied in the [Tennessee] Rules of Professional Conduct.' *In re A.P.*, No. M2017-00289-COA-R3-PT, 2019 WL 1422927, at *4 (Tenn. Ct. App. Mar. 29, 2019) (quoting *In re Jamie B.*, 2017 WL 2829855, at *5). The Rules of Professional Conduct permit a lawyer to withdraw from representing a client in several situations. *See* Tenn. Sup. Ct. R. 8, Rule 1.16(b). Pertinent to this case, the Rules of Professional Conduct permit a lawyer to withdraw when 'the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled' or when 'the representation ... has been rendered unreasonably difficult by the client.' Tenn. Sup. Ct. R. 8, Rule 1.16(b)(5), (6). '[A] failure to communicate and the failure to appear for trial can render a representation unreasonably difficult,' *In re Jamie B.*, 2017 WL 2829855, at *6, and 'can serve as a basis for withdrawal of representation under Rule 1.16,' *In re A.P.*, 2019 WL 1422927, at *5; *see also State Dep't of Children's Servs. v. Agbigor, Sr.*, No. M2000-03214-COA-R3-JV, 2002 WL 31528509, at *5-6 (Tenn. Ct. App. Nov. 15, 2002).

"Here, the juvenile court permitted Father W.'s trial counsel to withdraw and declined to appoint new counsel for him because Father W. failed to appear in court on the first day of trial despite having notice. We must determine whether the record is sufficient to show that Father W. effectively waived his right to counsel and whether the juvenile court followed the proper procedure in permitting the withdrawal. This Court has previously addressed this issue in situations similar to the one here."

"In the present case, Father W., like the father in *In re Elijah B.*, concedes that he had notice of the termination hearing, but the facts here are distinguishable from the facts in that case. Unlike in *In re Elijah B.*, Father W. offered a reason for his absence on the first day of trial. On the second day of trial, Father W. appeared and explained his absence to the court as follows:

> As of the court date of the 30th, I had -- I had it wrong, and I -- I had showed up on the 31st at 9 o'clock. And that's when I filed -- that's when I had to come back and do that motion, because I -- I had -- I had the court date wrong.

"The record contains some support for Father W.'s claim that he did not appear because he had the wrong date. Specifically, the record contains a pro se motion filed by Father W. on November 1, 2019, requesting a continuance of thirty days so he could obtain new counsel. This is the motion Father W. mentioned in his explanation to the juvenile court. Thus, unlike in *In re Elijah B.*, it is not clear that Father W. simply chose not to appear on the first day of trial. Further, similar to *In re Jamie B.* and *In re A.P.*, the record contains no evidence supporting Father W.'s attorney's allegations that he was unable to communicate with his client because the juvenile court made no inquiry about the attorney's efforts to communicate with Father W. In fact, while explaining his absence on the first day of trial, Father W. indicated that his attorney had not communicated with him: 'I have no legal counsel, and he -- he gave me no notice. He has my phone number; he has my home address and my email.' In light of this proof, we are hesitant to conclude that his 'failure to appear coupled with [his attorney's] unsupported allegations of lack of communication are sufficient to show that [he] effectively waived [his] statutory right to appointed counsel.' *In re A.P.*, 2019 WL 1422927, at *5.

"As in *In re Jamie B.* and *In re A.P.*, we are concerned that the record contains nothing indicating whether counsel 'provided [Father W.] any prior warning that he might withdraw.' *In re Jamie B.*, 2017 WL 2829855, at *6; *see also In re A.P.*, 2019 WL 1422927, at *6. In addition to failing to inquire about the attorney's efforts to communicate with Father W., the juvenile court made no attempt to discern whether Father W. knew of the attorney's intent to withdraw as counsel. Thus, the juvenile court's inquiry into the attorney's actions, unlike those in *In re Jamie B.* and *In re A.P.*, does not even rise to the level of ' 'limited' at best.' *In re A.P.*, 2019 WL 1422927, at *6 (quoting *In re Jamie B.*, 2017 WL 2829855, at *6). Under these circumstances, we cannot conclude that the record supports a finding that Father W. waived his right to appointed counsel. We, therefore, vacate the judgment of the juvenile court to the extent it terminated the parental rights of Father W., and the case against Father W. is remanded for a new trial."

In re Arevalo, Board Release of Information.

Carla L. Arevalo of Antioch was suspended for four years, retroactive to her temporary suspension of January 11, 2018, with three years to be served on active suspension and the remainder on probation. As a condition of reinstatement, she was ordered to pay restitution to her client and contact the Tennessee Lawyers Assistance Program for evaluation.

"Ms. Arevalo, while suspended for non-payment of the annual registration fee and non-compliance with IOLTA reporting requirements, engaged in the unauthorized practice of law and accepted fees in two matters. After Ms. Arevalo was terminated, she failed to promptly return the files to her client as requested and refund any fees. Ms. Arevalo also failed to respond to the Board concerning the disciplinary complaint. Ms. Arevalo admitted her conduct violated Rules of Professional Conduct 1.16(d) (declining or terminating representation), 5.5(a) (unauthorized practice of law), 8.1(b) (bar admission and disciplinary matters), and 8.4(a) (misconduct)."

II. Advocate (Rules 3.1 - 3.3)

A. Meritorious Claims and Contentions, Rule 3.1

In re Anyanwu, Board Release of Information.

Bede O.M. Anyanwu of Jackson was publicly censured and prohibited from seeking payment for any outstanding balance owed by his client.

"Mr. Anyanwu raised claims in a civil pleading which had no factual or legal basis. Mr. Anyanwu had an obligation to withdraw such claims upon his determination that the claims could not be supported but failed to do so. Mr. Anyanwu failed to keep his client informed of fees he had billed during the representation and many of Mr. Anyanwu's fees were unreasonable based upon the amount of time charged for simple and administrative tasks. Mr. Anyanwu also revealed confidential information in his Motion to Withdraw by stating that his client's claims were personally repugnant and could not be defended.

Mr. Anyanwu violated RPCs 1.4 (communication), 1.5 (fees), 1.6 (confidentiality), 3.1 (meritorious claims), and 8.4(a) and (d) (misconduct).

In re Holleman, Board Release of Information.

Jason Daniel Holleman of Nashville was publicly censured.

"The Board of Professional Responsibility filed a Petition for Discipline on February 28, 2018, regarding Mr. Holleman's representation of clients who sought to obtain a cemetery by adverse possession and move it to another location.

"Mr. Holleman filed a Petition to Quiet Title and Termination of a Cemetery known as the Rains Cemetery. The Hearing Panel found and the Trial Court affirmed that Mr. Holleman delegated to a non-lawyer the responsibility of contacting descendants of the Rains family and publishing Notice of the Petition in the Nashville Ledger without communicating directions appropriate to reasonably assure the non-lawyer's conduct was compatible with Mr. Holleman's professional obligations. Mr. Holleman misrepresented to the court that notice of the Petition to Quiet Title had been served by publication when, in fact, the notice had not been published. Mr. Holleman misrepresented to the court that a descendant of the family buried in the cemetery had agreed to re-inter the bodies at a perpetual care cemetery, and obtained a default judgment on pleadings that, at the time the motion was filed, were no longer true as the historic cemetery had been restored."

Mr. Holleman violated RPCs 1.1 (competence), 1.3 (diligence), 3.1 (meritorious claims and contentions), 5.3 (responsibilities regarding nonlawyer assistants), and 5.4 (professional independence of a lawyer).

New York State Bar Association Committee on Professional Ethics Opinion 1214 (Jan. 11, 2021).

"A lawyer is ethically prohibited from presenting a frivolous argument to a court. If the lawyer cannot find a non-frivolous basis on which to proceed with a client's motion and the client persists on putting before the court arguments the lawyer believes to be frivolous, the lawyer may seek permission from the court to withdraw from the representation. If the court will not permit the lawyer to withdraw, the lawyer must competently represent the client without engaging in frivolous conduct."

"The inquirer is a lawyer at a legal services office that represents homeowners in residential foreclosure proceedings without charge. That office was initially contacted by a homeowner seeking to challenge a judgment of foreclosure. Generally, the inquirer's office does not accept post-judgment cases, and the homeowner's case was declined. Thereafter, the homeowner filed a pro se application to vacate the judgment of foreclosure alleging defective service of process. The justice presiding in the matter, rather than deciding the motion, requested that the inquirer represent the homeowner and attempt a settlement. The inquirer agreed, and made it clear to the homeowner that the representation was limited to negotiating settlement terms with the foreclosing bank."

"The settlement negotiations failed, and the court contacted the inquirer to continue the homeowner's representation in connection with the homeowner's previously submitted application to vacate the judgment of foreclosure. The inquirer protested that the agreed scope of the representation had been limited to settlement negotiations, but the court stated, to the contrary, that the inquirer's scope of representation was unlimited and for the entire case."

"The inquirer has reviewed the motion papers prepared by the homeowner without the benefit of counsel and has concluded that there is no non-frivolous factual or legal basis for vacating the judgment of foreclosure, including the sole ground asserted in those papers."

"At oral argument of the motion to vacate the foreclosure judgment, may the inquirer rest on the motion papers prepared by the homeowner or, alternatively, simply state the homeowner's position, even though the inquirer believes the homeowner's position to be frivolous?"

"Rule 3.1(a) of the New York Rules of Professional Conduct (the 'Rules') provides: 'A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.' Here, the inquirer has concluded that there is no basis in law or fact that would support the sole ground the homeowner has raised for seeking to vacate the judgment of foreclosure, or any other ground."

"Frivolous conduct within the meaning of Rule 3.1(a) is not materially different from frivolous conduct as defined in 22 NYCRR Part 130. In the context of sanctioning attorneys for frivolous conduct in litigation, 22 NYCRR § 130-1.1(c) provides that conduct is 'frivolous' if: '(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong

the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.'"

"The inquirer may not argue or advance frivolous arguments to support the homeowner's motion. It is, however, important for the inquirer to distinguish between arguments that meet the high standard for 'frivolous conduct' set forth in 22 NYCRR § 130-1.1(c) and Rule 3.1(a), on the one hand, from arguments that are merely unlikely to succeed but are not frivolous, on the other hand. The inquirer may ethically continue representing the homeowner by advancing any non-frivolous arguments the inquirer reasonably believes support a vacatur application. If the inquirer develops such non-frivolous arguments, then the inquirer must discuss the proposed new or modified position with the homeowner before presenting it to the court. See Rule 1.4(a)(2) (a lawyer must 'reasonably consult with the client about the means by which the client's objectives are to be accomplished')."

"If the homeowner insists that the inquirer pursue the frivolous arguments contained in the motion papers the homeowner prepared while acting pro se, the inquirer may seek permission from the court to withdraw on the basis that 'the client insists upon taking action with which the lawyer has a fundamental disagreement,' see Rule 1.16(c) (4), as well as on any other mandatory or permissive grounds the inquirer has for withdrawal under Rule 1.16. The inquirer must be mindful, however, that : 'The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6.' N.Y. State 1057 ¶5 (2015)."

"If permission to withdraw is denied by the court, the inquirer must continue the homeowner's representation. See Rule 1.16 (d) ('When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.'). But even in that circumstance, the inquirer may still not engage in 'frivolous conduct' at the direction or behest of the homeowner. A client has no right to instruct a lawyer to violate a Rules of Professional Conduct, and a lawyer has no right to follow an instruction that the lawyer violate a Rule. Thus, the inquirer must find a means to competently represent the homeowner without putting forth frivolous arguments. Since the homeowner rather than the inquirer submitted the frivolous motion papers, the lawyer is not required to renounce or disavow them, but the inquirer may not rely on any frivolous factual or legal arguments in those papers."

"A lawyer is ethically prohibited from presenting frivolous arguments on behalf of a client who seeks to vacate a judgment of foreclosure. The lawyer's duty of competence is fulfilled by presenting whatever non-frivolous arguments can be developed to support vacatur. If the lawyer determines that there are no non-frivolous arguments in support of an application to vacate, then the lawyer shall not proceed with the motion. If the client insists on proceeding based on factual claims or legal arguments that are frivolous, the lawyer may seek permission of the court to withdraw from the representation, but the lawyer must not reveal confidential information unless an exception to the duty of confidentiality applies. If the court does not permit withdrawal, the lawyer must continue to represent the client and must provide competent representation to the client without engaging in frivolous conduct. Whether and under what circumstances a lawyer may decline a court order or request to represent a client is a question of law that is beyond this committee's jurisdiction."

B. Candor Toward the Tribunal, Rule 3.3

In re Hollis, Board Release of Information.

Phillip Gordon Hollis of Camden was publicly censured.

"Mr. Hollis failed to provide notice to his clients, opposing counsel, and the courts that he had been administratively suspended on March 11, 2020, and his clients were unable to get in touch with him. Mr. Hollis failed to appear for a scheduled court hearing and subsequently informed the court that he had provided written notice to his clients of his suspension. On June 23, 2020, Mr. Hollis was ordered by the court to provide copies of the notices he had provided to his clients but was unable to do so. Mr. Hollis later acknowledged he had not sent such letters to his clients and was removed as counsel by the court."

Mr. Hollis violated RPCs 1.3 (diligence), 1.4 (communication), 1.16(d) (terminating representation), 3.2 (expediting litigation), 3.3 (candor toward tribunal), 3.4(c) (disobeying obligation under rules of tribunal), and 8.4(a), (c), and (d) (misconduct).

III. Transactions With Persons Other Than Clients (Rules 4.1 - 4.4)

A. Truthfulness in Statements to Others, Rule 4.1

In re Fagan, Board Release of Information.

Glen Roy Fagan of Chattanooga was suspended for six years, with five years to be served on active suspension and the remainder on probation. Mr. Fagan was also ordered to engage a Practice Monitor and complete six additional continuing legal ethics CLE hours.

"A hearing panel found Mr. Fagan, a Georgia lawyer employed as in-house counsel in Tennessee, created a fictitious complaint; a fictitious settlement; and authorized the transfer of funds from his employer to himself under the company's mistaken belief the company was settling the complaint.… The Panel also found that Mr. Fagan falsified a second complaint and authorized the transfer of money from his employer to himself. The hearing panel found both aggravating and mitigating factors in the case."

Mr. Fagan violated RPCs 4.1 and 8.4(b), (c), and (d).

B. Communication With a Person Represented by Counsel, Rule 4.2

In re Bunstine, Board Release of Information.

Nicholas D. Bunstine of Knoxville was publicly censured.

"Mr. Bunstine represented a client in defense of a civil proceeding brought by the client's mother for rescission of a quit claim deed. At all relevant times during the representation, Mr. Bunstine was aware that his client's mother was represented by counsel. While the suit remained pending, Mr. Bunstine received word from his client that her mother no longer wished to have the quit claim deed rescinded. Mr. Bunstine prepared an affidavit for the mother's signature confirming the mother's changed position and provided the affidavit to his client. Mr. Bunstine's client presented

the affidavit to her mother, who proceeded to execute the affidavit. Mr. Bunstine filed a motion to dismiss the suit based upon the content of the affidavit, which was granted by the Court."

Mr. Bunstine violated RPCs 4.2 (communication with a person represented by counsel) and 8.4(d) (misconduct).

In re White, Board Release of Information.

Memorie Kristina White of Nashville was publicly censured.

"Ms. White, with knowledge that a corporation was represented by counsel, knowingly contacted corporate employees and negotiated a reduction of a judgment lien held by the corporation."

Ms. White violated RPC 4.2 (communication with a person represented by counsel).

In the Matter of Martin, 166 N.E.3d 345 (Ind. 2021).

"Upon review of the report of the hearing officer, the Honorable Christopher L. Burnham, who was appointed by this Court to hear evidence on the Indiana Supreme Court Disciplinary Commission's 'Disciplinary Complaint,' and the briefs of the parties, the Court finds that Respondent engaged in professional misconduct and imposes discipline on Respondent."

"Respondent represented 'Husband' in ongoing post-dissolution litigation involving Husband's marriage to 'First Wife.' In August 2018, a domestic dispute between Husband and 'Second Wife' led to criminal charges against Second Wife and Husband's petition for marital dissolution from Second Wife. Respondent also represented Husband in this dissolution action.

"Counsel for First Wife issued notice of a deposition of Second Wife. Respondent knew Second Wife was represented by counsel in the dissolution case and in the criminal case; however, neither Respondent nor First Wife's counsel informed either of Second Wife's attorneys of the deposition. At the deposition Respondent and First Wife's counsel elicited incriminating testimony from Second Wife and testimony about subjects relevant to the dissolution case, and Respondent later contacted the prosecutor and provided her with a copy of Second Wife's deposition."

"Respondent seeks review of the hearing officer's conclusion that she violated Indiana Professional Conduct Rule 4.2, which provides that '[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.' Respondent argues that the deposition was conducted in the post-dissolution case involving Husband and First Wife, that Second Wife was not a party to that case, and that Second Wife was not being represented by counsel in that case. However, Rule 4.2 protects 'a person' and not just a party. Moreover, all three underlying cases involved overlapping subject matter, and Second Wife was a party to the other two cases. By her own admission Respondent knew in advance that the deposition likely would touch upon subject matter relevant to the dissolution case and the criminal case (*see* Tr. at 166-67), and it is undisputed that the questioning of Second Wife at the deposition in fact did touch upon such subjects. Respondent also admitted that use of the deposition was not limited to the proceeding between Husband and First Wife but could also be used against Second Wife in the dissolution proceeding between her and Husband. (Id. at 176).

"Nonetheless, Respondent argues that 'the matter' referenced in Rule 4.2 should be read narrowly to mean the specific proceeding in which the deposition was taken rather than the subject matter of the representation. Respondent's interpretation finds no direct support in the text of the Rule itself, which earlier references 'the subject of the representation,' or the commentary to the Rule. Respondent's interpretation also runs directly contrary to the purpose of the Rule, which we agree with the Commission is aimed at protection of the rights of a represented person with respect to the subject of the representation and not merely the protection afforded in any given proceeding. *See Matter of Baker*, 758 N.E.2d 56, 58 (Ind. 2001) (citing 'the need to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship'). This need is equally important whether the representation involves the same proceeding, a different proceeding, multiple proceedings, or no proceeding at all.

"Finally, Respondent suggests that her questioning of Second Wife at the deposition was authorized by law because Respondent had a duty to protect Husband's interests at the deposition noticed by First Wife's counsel. But we agree with the hearing officer's conclusion that this argument presents a false choice. 'Respondent could have protected the rights of her client without disrespecting the rights of a third person by simply informing [Second Wife's] counsel that a deposition had been scheduled.' (Hearing Officer's Report at 17).

"For these reasons, the Court finds that Respondent violated Professional Conduct Rule 4.2 as charged."

New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion 739 (Mar. 10, 2021).

"The Advisory Committee on Professional Ethics received an inquiry from a lawyer who stated that when he sends email to opposing counsel, he often copies his client. He finds that opposing lawyers often 'reply all' with a response that is then delivered directly to his client without his prior consent. Inquirer suggested that this violates Rule of Professional Conduct 4.2.

"Lawyers who initiate a group email and find it convenient to include their client should not then be able to claim an ethics violation if opposing counsel uses a 'reply all' response. 'Reply all' in a group email should not be an ethics trap for the unwary or a 'gotcha' moment for opposing counsel. The Committee finds that lawyers who include their clients in group emails are deemed to have impliedly consented to opposing counsel replying to the entire group, including the lawyer's client.

"Rule of Professional Conduct 4.2 provides: 'In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter. . . .' This Rule is intended to protect clients from possible overreaching by opposing counsel. ABA Model Rule of Professional Conduct 4.2 Comment 1.

"There is no question that a lawyer who receives a letter from opposing counsel on which the sending lawyer's client is copied may not, consistent with Rule of Professional Conduct 4.2, send a responding letter to both the lawyer and the lawyer's client. In contrast, if a lawyer were to initiate a conference call with opposing counsel and include the client on the call, the lawyer would be deemed to have impliedly consented to opposing counsel speaking on the call and thereby communicating both with the opposing lawyer and that lawyer's client.

"Email is an informal mode of communication. Group emails often have a conversational element with frequent back-and-forth responses. They are more similar to conference calls than to written letters. When lawyers copy their own clients on group emails to opposing counsel, all persons are aware that the communication is between the lawyers. The clients are mere bystanders to the group email conversation between the lawyers. A 'reply all' response by opposing counsel is principally directed at the other lawyer, not at the lawyer's client who happens to be part of the email group. The goals that Rule of Professional Conduct 4.2 are intended to further – protection of the client from overreaching by opposing counsel and guarding the clients' right to advice from their own lawyer – are not implicated when lawyers 'reply all' to group emails.

"While there is no requirement that a lawyer use email or other forms of technology in professional communications,when a lawyer voluntarily chooses to do so, that choice carries with it an assumption upon which others may rely that the lawyer is conversant with the customary usages of that technology, and thus intends the natural result of those usages. While under RPC 4.2 it would be improper for another lawyer to initiate communication directly with a client without consent, by email or otherwise, nevertheless when the client's own lawyer affirmatively includes the client in an email thread by inserting the client's email address in the 'to' or 'cc' field, we think the natural assumption by others is that the lawyer intends and consents to the client receiving subsequent communications in that thread. If the lawyer merely wants the client to see a copy of the correspondence but does not want the client to receive subsequent emails from other lawyers, then use of the 'bcc' field would accomplish that goal.

"Moreover, many emails have numerous recipients and it is not always clear that a represented client is among the names in the 'to' and 'cc' lines. The client's email address may not reflect the client's name, making it difficult to ascertain the client's identity. Rather than burdening the replying lawyer with the task of parsing through the group email's recipients, the initiating lawyer who does not consent to a response to the client should bear the burden of omitting the client from the group email or blind copying the client.

"The Committee is aware that other jurisdictions have rejected the concept of implied consent to communications to represented parties in group emails and have decided that such conduct is a violation of Rule of Professional Conduct 4.2. Many of these opinions caution the sending lawyer that it is inadvisable to include the client on the email, acknowledging that the sending lawyer may be 'setting up' opposing counsel for an ethics violation. The Committee finds that these opinions from other jurisdictions do not fully appreciate the informal nature of group email or recognize the unfairness of exposing responding lawyers to ethical sanctions for this conduct.

"Accordingly, the Committee finds that lawyers who include their clients in the 'to' or 'cc' line of a group email are deemed to have provided informed consent to a 'reply all' response from opposing counsel that will be received by the client. If the sending lawyer does not want opposing counsel to reply to all, then the sending lawyer has the burden to take the extra step of separately forwarding the communication to the client or blind-copying the client on the communication so a reply does not directly reach the client."

C. Respect for the Rights of Third Persons, Rule 4.4

In re Adkins, Board Release of Information.

Terrill Lee Adkins of Knoxville was publicly censured.

"Mr. Adkins agreed to represent a defendant in a pending product liability trial when an attorney at his office had previously been substantially involved in the same matter at a law firm which continued to represent the plaintiff. Mr. Adkins' colleague then left employment of Mr. Adkins' firm. Thereafter, the attorney returned to the employment of Mr. Adkins' firm, and the attorney reminded Mr. Adkins of his prior work on the still-pending case. Mr. Adkins re-hired the attorney and attempted to put screening procedures in place. Because the attorney was substantially involved in the representation of the plaintiff in the matter, the screening procedures are not able to be used to avoid the imputed disqualification of Mr. Adkins' law firm under Rule 1.10(d) (imputation of conflicts of interest). Mr. Adkins' conduct resulted in harm to his client and prejudice to the administration of justice.

"In the same matter, Mr. Adkins was granted approval for a limited deposition of an opposing attorney on particular substantive topics. After the deposition, Mr. Adkins issued a subpoena for the employment file of the opposing attorney, seeking documents related to an alleged claim of sexual harassment made against the attorney in the course of his employment. The text of the subpoena described the documents sought in crass, sexist language. After a motion to quash was filed, Mr. Adkins withdrew the subpoena."

Mr. Adkins violated RPCs 1.10(d) (imputation of conflict of interest), 8.4(d) (prejudice to the administration of justice), and 4.4 (respect for rights of third persons).

In re Scruggs, Board Release of Information.

Mark Christopher Scruggs of Nashville was publicly censured.

"Mr. Scruggs was retained by the stepfather of an eleven-year-old girl to represent him against criminal charges alleging rape of the child. The child was the subject of a pending dependency and neglect action arising from the same events, and the Juvenile Court had removed the child from the home and removed the mother's custodial rights. After being informed by the mother that her daughter had recanted statements she previously made against the stepfather, Mr. Scruggs, without seeking or obtaining permission from the custodian of the minor child, arranged with the mother for her daughter to be interviewed by a private investigator at his law office to confirm the recantation. Thereafter, Mr. Scruggs provided the audio recording of the interview to the Assistant District Attorney and the Guardian Ad Litem who had been appointed by the Juvenile Court. Tennessee recognizes a witness, under ordinary circumstances, may alone decide by whom to be interviewed. However, Tennessee also recognizes that the legal custodian of a minor victim has an absolute right to refuse defense counsel's request to interview the minor victim.

"The interview in this matter was not under ordinary circumstances and required Mr. Scruggs to seek and obtain permission of the court-appointed custodian prior to interviewing the eleven-year-old victim. By conducting the interview at issue without providing the court-appointed custodian of the child an opportunity to exercise her legal right to refuse the interview, Mark Christopher Scruggs violated RPCs 4.4(a)(1) (respect for the rights of third persons) and 8.4(a) (misconduct)."

IV. Law Firms, Legal Departments, and Legal Service Organizations (Rule 5.5)

A. Unauthorized Practice of Law, Rule 5.5

In re Casas, Board Release of Information.

Michael Edward Casas of Knoxville, registered as in-house counsel in Tennessee, was publicly censured.

"Mr. Casas is licensed to practice law in the states of Florida and New York. Mr. Casas accepted a corporate counsel position in the state of Tennessee without timely registering with the Board of Law Examiners and the Board of Professional Responsibility. Mr. Casas provided legal services to his employer for a period of eight months before he completed the proper registration requirements."

Mr. Casas violated RPC 5.5(a) (unauthorized practice of law).

In re Flener, Board Release of Information.

Samantha Flener of Nashville was publicly censured.

"Ms. Flener was licensed to practice law only in New York when she relocated to Tennessee and began work at a Tennessee law firm. Ms. Flener applied for permission to be admitted by UBE Score Transfer with the Board of Law Examiners and her application referenced the need to apply for practice pending admission if she was currently working in Tennessee as a lawyer or other law-related position. Ms. Flener also certified on the application that she had read Tennessee Supreme Court Rule 7 and the Board policies and procedures posted on its website. Ms. Flener did not apply for practice pending admission and was not authorized to practice law in Tennessee until after she had been employed as a firm lawyer for a period of eight months."

Ms. Flener violated RPC 5.5 (unauthorized practice of law).

In re Olson, Board Release of Information.

Eric Trygve Olson of Franklin was publicly censured.

"Mr. Olson was hired in September 2016 as in-house counsel. At the time, he was licensed in two other states. He did not complete his registration with the Tennessee Board of Law Examiners within 180 days of the start of his employment as required by Tennessee Supreme Court Rule 7, Section 10.01.

"In January 2019, Mr. Olson applied for comity admission to the Board of Law Examiners and incorrectly stated that he had never registered as in-house counsel. In April 2019, Mr. Olson went to work as in-house counsel for a different company. He did not notify the Board of Law Examiners of his termination with the first company, and he did not register as in-house counsel with the Board of Law Examiners within 180 days of the date that second employment began."

Mr. Olson violated RPC 5.5 (unauthorized practice of law).

ABA Formal Opinion 495, Lawyers Working Remotely (Dec. 16, 2020).

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not

determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.

V. Information About Legal Services (Rules 7.1 - 7.6)

A. Communication Concerning a Lawyer's Services, Rule 7.1

In re Howard, Board Release of Information.

George Turner Howard, III, of Knoxville was publicly censured.

"Mr. Howard shared fees with outside counsel without first obtaining the informed consent of his clients in writing. Mr. Howard also provided financial assistance to clients, held out certain non-lawyer staff as persons holding corporate officer positions in his firm, and made deceptive statements through his advertising. Mr. Howard has corrected these issues and has agreed to discontinue such conduct."

Mr. Howard violated RPCs 1.5(e) (fees), 1.8(e) (conflict of interest), 5.4(d) (professional independence of a lawyer), 7.1 (communications concerning a lawyer's services), and 7.4 (communication of fields of practice and specialization).

B. Intermediary Organizations, Rule 7.6

In re Pulley, Board Release of Information.

Karl Emmanuel Pulley of Nashville was suspended for one year, based on a conditional guilty plea, with thirty days to be served on active suspension and the remainder served on probation, conditioned upon the appointment of a practice monitor.

"Mr. Pulley acknowledged that he failed to reasonably communicate with his clients regarding the status of their cases; failed to act in a diligent manner and expedite the clients' litigation; failed to timely respond to discovery requests; charged a non-refundable fee without the client executing a written fee agreement; accepted client referrals from a non-registered intermediary organization; and failed to take reasonable steps to protect the client's interest after terminating the representation in violation of RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 3.4(d) (fairness to opposing party and counsel), 1.16 (terminating representation), 7.6 (intermediary organization), and 8.4(a) (misconduct)."

VI. Maintaining the Integrity of the Profession (Rules 8.4(a) - 8.4(g))

A. Misconduct: Violation of Rules of Professional Conduct, Rule 8.4(a)

In re Phillips, Board Release of Information.

Judson Wheeler Phillips of Franklin was permanently disbarred, based on his consent because he could not successfully defend himself on charges alleged in pending disciplinary complaints.

B. Misconduct: Criminal Act, Rule 8.4(b)

In re Gray, Board Release of Information.

Bobby Gene Gray of Adamsville was suspended for three years, based on a conditional guilty plea, retroactive to May 1, 2020, with eight months to be served on active suspension and the remainder on probation

"Mr. Gray admitted to taking controlled substances from an evidence room while he served as an assistant district attorney. He entered a plea to official misconduct, theft of less than $1,000, and simple possession of a controlled substance and received judicial diversion."

Mr. Gray violated RPC 8.4(b) and (c) (misconduct).

In re Ledvina, Board Release of Information.

Matthew Ledvina of Claymont, Delaware, was suspended for six years, based on a conditional guilty plea, retroactive to March 11, 2020, with four years to be served on active suspension and the remainder on probation.

In addition to his suspension, Mr. Ledvina must file a petition to surrender his law license pursuant to Tennessee Supreme Court Rule 7, Section 15.01.

"The Board filed a Petition for Final Discipline against Mr. Ledvina based upon his felony conviction in the United States District Court for the District of Massachusetts for conspiracy to commit securities fraud."

Mr. Ledvina admitted violations of RPCs 8.4(a), (b), and (c).

In re Mayham, Board Release of Information.

Jennifer Lynn Mayham of Ripley was suspended for five years, based on a conditional guilty plea, with one year to be served on active suspension and the remainder on probation. Ms. Mayham was also ordered to obtain an evaluation with the Tennessee Lawyers Assistance Program, engage the services of a Practice Monitor, and pay restitution in the amount of $4,700.

"Ms. Mayham was convicted of misdemeanor drug possession and pled guilty to misdemeanor perjury. Ms. Mayham failed to reasonably communicate with seven clients regarding the status of their case and accepted retainers, after which she failed to perform the professional services for which she was retained. Ms. Mayham also failed to respond to the Board's request for information during the investigation and comply with the Order of Temporary Suspension entered June 21, 2018."

Ms. Mayham violated RPCs 1.3 (diligence), 1.4 (communication), 1.16 (declining or terminating representation), 3.3 (candor toward the tribunal), 8.1 (maintaining the integrity of the profession), and 8.4(a), (b), (c), (d), and (g) (misconduct).

In re Officer, Board Release of Information.

Albert Fitzpatrick Officer, III, of Rickman was suspended for six years, based on a conditional guilty plea, with six months to be served on active suspension and the remainder on probation. Mr. Officer was also ordered to continue his monitoring agreement with the Tennessee Lawyers Assistance Program, engage the services of a Practice Monitor, and pay restitution in the amount of $1,250.

"Mr. Officer entered a guilty plea to the amended criminal charge of misdemeanor DUI, failed to take action to prosecute or advance a client's case, failed to advise his client in a matter that had been appealed, failed to file appellate responses resulting in the court removing him as the attorney of record, failed to deposit client funds into his trust account and appeared in court representing his clients while administratively suspended."

Mr. Officer violated RPCs 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property - failing to deposit clients funds in his trust account), 1.16 (declining or terminating representation), 3.2 (expediting litigation), 5.5 (unauthorized practice of law), 8.1 (maintaining the integrity of the profession), and 8.4 (a), (b), (c), and (g) (misconduct).

In re Pomrenke, Board Release of Information.

Kurt J. Pomrenke of Bristol was permanently disbarred.

"On December 28, 2020, Mr. Pomrenke pled guilty to Count 1 of the Information, which is a charge brought by the United States Attorney. Court 1 charges Mr. Pomrenke with Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371. The maximum statutory penalty pursuant to 18 U.S.C. § 371 is a fine of $250,000 and/or imprisonment for a term of five years, plus a term of supervised release.

"As a result, on December 28, 2020, the Virginia State Bar Disciplinary Board entered an Consent to Revocation Order stating that 'Kurt Joseph Pomrenke presented to the Virginia State Bar Disciplinary Board an Affidavit Declaring Consent to Revocation of his license to practice law in the courts of this Commonwealth. By tendering his Consent to Revocation at a time when allegations of Misconduct are pending, the nature of which are specifically set forth in the attached Affidavit, Mr. Pomrenke acknowledges that the material facts upon which the allegations of Misconduct are true."

In re Reynolds, Board Release of Information.

Richard Louis Reynolds of Diamondhead, Mississippi, was suspended pending further orders of the Supreme Court upon his guilty plea and conviction Misprision of a Felony in the matter of *United States of America v. Richard Reynolds*, Case No. 3:20-CR-00227-M(1), in the United States District Court for the Northern District of Texas, Dallas Division. The matter has been referred to the Board to institute formal proceedings to determine the extent of the final discipline.

In re Troutman, Board Release of Information.

Jody Rodenborn Troutman, LaFollette, was suspended based on a criminal conviction for Driving Under the Influence, 2nd (DUI), a Class A misdemeanor, in violation of Tenn. Code Ann. § 55-10-501, in Campbell County General Sessions Court, pending formal proceedings to determine the extent of final discipline.

C. Misconduct: Dishonest Conduct, Rule 8.4(c)

In re Carter, Board Release of Information.

Bradley Michael Carter of Franklin was suspended for two years, with four months to be served on active suspension and the remainder on probation.

"Mr. Carter admitted to receiving client fees and failing to properly account to the partners in the firm for those fees, thereby under-reporting revenue owed to the firm pursuant to the terms of his employment. Mr. Carter admitted his conduct violated RPC 8.4(a) and (c) (misconduct)."

In re Smith, Board Release of Information.

C. LeAnn Smith of Nashville was publicly censured and directed to schedule and complete an assessment with the Tennessee Lawyers Assistance Program and follow any resulting recommendations.

"In a custody matter in which she was a party, Ms. Smith lied under oath in a deposition in response to six questions about her use of alcohol in the presence of the child. The subject matter of Ms. Smith's testimony was relevant to the pending custody matter. In mitigation, Ms. Smith's conduct was not done in the representation of a client, and Ms. Smith admitted her conduct under oath in her trial testimony in the same proceeding."

Ms. Smith violated RPC 8.4(c) (conduct involving dishonesty) and (d) (prejudice to the administration of justice).

D. Misconduct: Prejudicial to the Administration of Justice, Rule 8.4(d)

In re Sitton, 618 S.W.3d 288 (Tenn., Kirby, 2021).

"This case is a cautionary tale on the ethical problems that can befall lawyers on social media. The attorney had a Facebook page that described him as a lawyer. A Facebook 'friend' involved in a tumultuous relationship posted a public inquiry about carrying a gun in her car. In response to her post, the attorney posted comments on the escalating use of force. He then posted that, if the Facebook friend wanted 'to kill' her ex-boyfriend, she should 'lure' him into her home, 'claim' he broke in with intent to do her harm, and 'claim' she feared for her life. The attorney emphasized in his post that his advice was given 'as a lawyer,' and if she was 'remotely serious,' she should 'keep mum' and delete the entire comment thread because premeditation could be used against her 'at trial.' In the ensuing disciplinary proceedings, a Board of Professional Responsibility hearing panel found that the attorney's conduct was prejudicial to the administration of justice in violation of Rules of Professional Conduct 8.4(a) and (d). It recommended suspension of his law license for sixty days. Under Tennessee Supreme Court Rule 9, § 15.4, this Court determined that the

punishment imposed by the hearing panel appeared inadequate and, after briefing, took the matter under advisement. We now hold that the sanction must be increased. The attorney's advice, in and of itself, was clearly prejudicial to the administration of justice and violated the Rules of Professional Conduct. In addition, his choice to post the remarks on a public platform amplified their deleterious effect. The social media posts fostered a public perception that a lawyer's role is to manufacture false defenses. They projected a public image of corruption of the judicial process. Under these circumstances, the act of posting the comments on social media should be deemed an aggravating factor that justifies an increase in discipline. Accordingly, we modify the hearing panel's judgment to impose a four-year suspension from the practice of law, with one year to be served on active suspension and the remainder on probation."

"This matter arises out of a series of social media posts by the respondent attorney, Winston Bradshaw Sitton. Mr. Sitton has been licensed to practice law in Tennessee since 1997.

"Mr. Sitton maintained a Facebook page. His Facebook profile identified him as a lawyer.

"For roughly a year, Mr. Sitton was a 'Facebook friend' of Lauren Houston but evidently had not met her in person. Around December 2017, Ms. Houston was in the midst of a tumultuous break-up with Jason Henderson, the father of her child. Through his Facebook connection with Ms. Houston, Mr. Sitton became aware of allegations of abuse, harassment, violations of child custody arrangement, and requests for orders of protection.

"Against that backdrop, Ms. Houston wrote the following post on her Facebook page: 'I need to always carry my gun with me now, don't I? Is it legal to carry in TN in your car without paying the damn state?' The post was not directed to anyone specifically but rather was aimed at Ms. Houston's Facebook audience.

"Responding to Ms. Houston's post, Mr. Sitton commented:

> I have a carry permit Lauren. The problem is that if you pull your gun, you must use it. I am afraid that, with your volatile relationship with your baby's daddy, you will kill your ex--your son's father. Better to get a taser or a canister of tear gas. Effective but not deadly. If you get a shot gun, fill the first couple rounds with rock salt, the second couple with bird shot, then load for bear.
>
> If you want to kill him, then lure him into your house and claim he broke in with intent to do you bodily harm and that you feared for your life. Even with the new stand your ground law, the castle doctrine is a far safer basis for use of deadly force.

"Replying to Mr. Sitton's post, Ms. Houston commented, 'I wish he would try.' In response, Mr. Sitton posted further on Ms. Houston's Facebook page:

> As a lawyer, I advise you to keep mum about this if you are remotely serious. Delete this thread and keep quiet. Your defense is that you are afraid for your life--revenge or premeditation of any sort will be used against you at trial.

"Presciently, another Facebook user posted: 'He's likely already seen th[is] thread!'

"Consistent with Mr. Sitton's advice, Ms. Houston deleted her Facebook post. This had the effect of deleting all of the comments to her Facebook post, including her exchange with Mr. Sitton.

"Sure enough, Mr. Henderson soon became aware of the Facebook exchange between Ms. Houston and Mr. Sitton. He brought screenshots of Ms. Houston's public Facebook post and the comments, including those by Mr. Sitton, to the attention of Shelby County District Attorney General Amy Weirich. General Weirich in turn passed the screenshots along to Tennessee's Board of Professional Responsibility ('Board').

"The Board investigated the matter and received Mr. Sitton's explanation. In August 2018, it filed a petition for discipline against him. The petition alleged Mr. Sitton violated Rule of Professional Conduct 8.4(a)–(d) by 'counsel[ing] Ms. Houston about how to engage in criminal conduct in a manner that would minimize the likelihood of arrest or conviction.'

"Mr. Sitton admitted most of the basic facts alleged by the Board in its petition. He contended, however, that his Facebook comments were taken out of context. Mr. Sitton argued his comments could not be considered as counseling Ms. Houston on how to get away with criminal conduct and denied he had violated the Rules of Professional Conduct."

"The only testimony at the hearing was that of Mr. Sitton. The record does not include a transcript of his testimony, only the hearing panel's description and findings based on his testimony. In his brief to this Court, Mr. Sitton does not dispute the hearing panel's description of his testimony; rather, he disputes its inferences and conclusions.

"At the time of the hearing, Mr. Sitton had not met Ms. Houston in person. Nevertheless, in his testimony, he 'was able to describe her life, including her child, medical conditions, her [alleged] illegal drug use, her problems with her son's father, and other parts of her life in great detail.' He said he was aware of Ms. Houston's allegations that Mr. Henderson engaged in abuse and harassment and violated their child custody arrangements. Mr. Sitton understood Ms. Houston had sought orders of protection against Mr. Henderson and had brought his actions to the attention of law enforcement. At the time of their Facebook exchange, Mr. Sitton believed Mr. Henderson had recently broken into Ms. Houston's car and a judge had advised her to get a gun for personal protection. Mr. Sitton described Ms. Houston as a 'troubled woman.'

"Mr. Sitton testified he was concerned Ms. Houston would shoot and kill Mr. Henderson and find herself in legal trouble. He acknowledged that he identified himself as a lawyer in his Facebook posts and intended to give Ms. Houston legal advice and information. He noted Ms. Houston engaged with him on Facebook about his legal advice, and he felt she 'appreciated that he was helping her understand the laws of the State of Tennessee.'

"Mr. Sitton claimed his only intent in posting the Facebook comments was to convince Ms. Houston not to carry a gun in her car. He maintained that his Facebook posts about using the protection of the 'castle doctrine' to lure Mr. Henderson into Ms. Houston's home to kill him were 'sarcasm' or 'dark humor.'

"After hearing the testimony and reviewing the Facebook posts, the hearing panel observed that Mr. Sitton felt a personal connection with Ms. Houston and empathized with her situation. It believed he 'wanted to help her.'

"The hearing panel, however, found not credible Mr. Sitton's assertion that he intended only to dissuade Ms. Houston from carrying a gun in her car. The panel recounted Mr. Sitton's advice to Ms. Houston 'on the escalating use of force—beginning with the advice not to carry a gun in [her] car, but Taser o[r] tear gas would be ok.' If Ms. Houston felt she needed more force, Mr. Sitton counseled, 'then a shotgun loaded with rock salt, followed by bird shot.' The hearing panel said Mr. Sitton's next remarks to Ms. Houston 'included his legal advice ... about how to plan an effective defense to murder, if she came to need lethal force.' Referencing Mr. Sitton's comments on the 'castle doctrine,' the hearing panel emphasized that he explicitly told Ms. Houston that 'if she wanted "to kill him," then the "far safer basis for use of deadly force" would be to "lure him into your house and claim that he broke in with the intent to do you bodily harm."'

"The hearing panel found unpersuasive Mr. Sitton's assertion that his 'castle doctrine' comments were 'sarcasm' or 'dark humor,' noting that this characterization was contradicted by his own testimony and Ms. Houston's posts. The hearing panel found instead that Mr. Sitton intended to give Ms. Houston legal advice about a legally 'safer basis for use of deadly force.' Pointing out that the Facebook comments were made in a 'publicly posted conversation,' the hearing panel found that 'a reasonable person reading these comments certainly would not and could not perceive them to be "sarcasm" or "dark humor."'

"The hearing panel found Mr. Sitton lacked any remorse for his actions. It acknowledged that he conceded his Facebook posts were 'intemperate' and 'foolish,' but it also pointed out that he maintained, 'I don't think what I told her was wrong.'

"The hearing panel gave the 'most weight' to Mr. Sitton's advice that Ms. Houston delete all of the relevant Facebook posts:

> [A]fter Sitton gave Ms. Houston the advice about how to kill someone and still being [sic] able to claim a defense, Ms. Houston responded, 'I wish he would try.' Sitton engaged further in his discussion with Ms. Houston and replied, 'As a lawyer, I advise you to keep mum about this if you are remotely serious. Delete this thread and keep quiet. Your defense is that you are afraid for your life. . . [.]' The Panel finds that this further advice about deleting the Facebook posts confirms that this was no joke to Sitton. He intended this as legal advice about how to best plan a defense if she was 'remotely serious' about killing Mr. Henderson.The hearing panel found this to be an aggravating factor 'which justifies an increase in discipline.' The hearing panel also noted aggravating factors for Mr. Sitton's substantial experience in the practice of law and his prior disciplinary history, namely, an informal admonition in 2005 and a private reprimand in 2015. Consistent with Mr. Sitton's approach to the current petition, the hearing panel noted he contested the basis for the prior discipline and took 'no responsibility' for the conduct that was the reason for it.

"The hearing panel observed that Mr. Sitton put on no proof of any mitigating factors, and it found none.

"Based on these findings, the hearing panel concluded Mr. Sitton's act of '[g]iving advice as a lawyer about planning in advance how to claim a defense to killing someone' was 'conduct that is prejudicial to the administration of justice' under RPC 8.4(d). This conduct, it found, also violated RPC 8.4(a).

"Based on these rule violations, the applicable aggravating factors, and no mitigating factors, the hearing panel imposed a sixty-day suspension of Mr. Sitton's license to practice law.

"Neither Mr. Sitton nor the Board appealed the judgment of the hearing panel. Pursuant to Supreme Court Rule 9, § 15.4(b), once the time for appeal expired, the Board submitted to this Court a proposed order of enforcement to suspend Mr. Sitton's law license for sixty days.

"In accordance with the same rule, the Court reviewed the proposed order 'with a view to attaining uniformity of punishment throughout the State and appropriateness of punishment under the circumstances of each particular case.' Tenn. Sup. Ct. R. 9, § 15.4(b). The Court rejected the proposed order on the basis that the proposed sixty-day suspension of Mr. Sitton's law license seemed inadequate. Pursuant to Rule 9, § 15.4(c), both Mr. Sitton and the Board were given the opportunity to brief this issue. We took the matter under advisement."

"We now consider the attorney misconduct and the rule violations at issue. The hearing panel in this case found Mr. Sitton's Facebook comments violated subdivisions (a) and (d) of Rule of Professional Conduct 8.4. That rule, in the relevant part, states:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; [and]
>
> . . . .
>
> (d) engage in conduct that is prejudicial to the administration of justice[.]

"Tenn. Sup. Ct. R. 8, RPC 8.4.

"The Board accurately describes this case as presenting 'unique factual circumstances.' In our analysis, we focus on the actual words used by Mr. Sitton in the Facebook exchange.

"As the hearing panel observed, Mr. Sitton's initial comments were on 'the escalating use of force.' In response to Ms. Houston's public post about whether to carry a gun in her car, he advised:

> The problem is that if you pull your gun, you must use it. I am afraid that, with your volatile relationship with your baby's daddy, you will kill your ex--your son's father. Better to get a taser or a canister of tear gas. Effective but not deadly. If you get a shot gun, fill the first couple rounds with rock salt, the second couple with bird shot, then load for bear.

"Mr. Sitton's next comment was more troubling:

> If you want to kill him, then lure him into your house and claim he broke in with intent to do you bodily harm and that you feared for your life. Even with the new stand your ground law, the castle doctrine is a far safer basis for use of deadly force.

"In these comments, Mr. Sitton gives specific advice on how to plan in advance to use 'deadly force' and make it look like self-defense. He counsels that, if Ms. Houston wants 'to kill' Mr. Henderson, she should 'lure' him into her home, 'claim' he broke in with bad intent, and 'claim' she feared for her life.

"Making matters worse, after Ms. Houston responded 'I wish he would try,' Mr. Sitton added the following:

> As a lawyer, I advise you to keep mum about this if you are remotely serious. Delete this thread and keep quiet. Your defense is that you are afraid for your life--revenge or premeditation of any sort will be used against you at trial.

"In these follow-up comments, Mr. Sitton advises Ms. Houston—'as a lawyer'—that if she is 'remotely serious' about wanting to kill Mr. Henderson, she should 'keep mum,' delete the comment thread, and 'keep quiet.' He cautions her that premeditation can be used against her 'at trial,' so she should hide the fact that there was a plan in advance to make her use of deadly force appear as self-defense.

"The hearing panel did not make a finding about whether Ms. Houston should be considered to have been a 'client' of Mr. Sitton at the time of the Facebook posts. Nevertheless, the hearing panel rightly characterized Mr. Sitton's statements as gratuitous legal advice. Mr. Sitton emphasized his status 'as a lawyer' in the exchange, his Facebook profile likewise identified him as a lawyer, and his comments discuss her legal defense 'at trial.' Mr. Sitton does not dispute the fact that Ms. Houston perceived his comments as legal advice. Importantly, others reading Mr. Sitton's public comments could reasonably have had that same perception.

"Perhaps most surprising, Mr. Sitton's injudicious advice was virtually unprompted. As the Board observes: 'What began as a question by Ms. Houston regarding the legality of carrying a gun for defensive purposes morphed into Mr. Sitton providing advice on how to 'lure' Mr. Henderson into her home in order to kill him.'

"Lawyers may of course offer advice on the legal consequences of a proposed course of conduct and may offer counsel on the meaning or application of the law. *See* Tenn. Sup. Ct. R. 8, RPC 1.2(d). That is not what Mr. Sitton did here. In his capacity as a lawyer, Mr. Sitton offered specific legal advice on how to orchestrate a killing in a way calculated to provide the perpetrator a fabricated defense to criminal charges. Then, in an ultimately unsuccessful effort to conceal the conversation, he directed Ms. Houston to delete the comment thread. Our rules do not permit lawyers to offer advice on how to commit crime with impunity.

"The hearing panel interpreted Mr. Sitton's comments similarly. It said that Mr. Sitton gave 'legal advice to Ms. Houston about how to plan an effective defense to murder, if she came to need lethal force. This sounds harsh—but that is what happened here.... Fortunately for everyone involved, it never came to that.' In his brief, Mr. Sitton protests repeatedly that he did not have the requisite 'mens rea' or intent to support a finding that he violated the rules governing lawyers. He argues he never intended for Ms. Houston to take his words literally; rather, he meant them as a caution, 'hyperbolic, dark sarcasm' intended to persuade Ms. Houston to use non-lethal force and prevent her from inadvertently killing Mr. Henderson. He explains his words were 'written in haste' and characterizes them as perhaps 'harsh or intemperate or offensive.' He insists he was using 'sarcastic black humor' to 'emphasize the gravity' of Ms. Houston's Facebook comments and 'shock [her] out of her delusion that an extended discussion of the murder of her abuser ... was acceptable.' (Emphasis omitted). In Mr. Sitton's view, the hearing panel's conclusion that he was instructing Ms. Houston on 'how to commit murder' is 'wild speculative theory.' In support, he points to the fact that his comments were in a public forum:

> [T]he Panel's speculative theory cannot ... be reconciled with the fact that the correspondence was in public--in plain view. There is no conceivable reason that Petitioner, a lawyer with nearly 30-years of experience in New York and Tennessee, would have been stupid enough to publish such words openly in public view had there been any sinister intent or were this instruction to be taken literally.

"We agree with Mr. Sitton that it is hard to conceive of any reason why a lawyer, any lawyer, would offer instructions on how to commit murder and stage a concocted defense. But we disagree with Mr. Sitton that his publication of the advice on a public platform such as Facebook cuts in favor of his position. To the contrary, as discussed in detail below in our analysis of the aggravating and mitigating factors, Mr. Sitton's decision to publish these comments on a public forum made his situation exponentially worse.

"For now, it suffices to say that the hearing panel rejected Mr. Sitton's assertion that his Facebook comments were 'sarcasm' or 'dark humor,' intended only to convince Ms. Houston not to carry a gun in her car. This finding hinged in part on the hearing panel's assessment of Mr. Sitton's credibility, as well as the plain meaning of the words used in his social media posts. Credibility and the weight given to evidence are questions of fact; our standard of review requires us to give deference to the findings made by the hearing panel. Tenn. Sup. Ct. R. 9, § 33.1(b) ('[T]he court shall not substitute its judgment for that of the hearing panel as to the weight of the evidence on questions of fact.'); *Lockett v. Bd. of Prof'l Responsibility*, 380 S.W.3d 19, 24 (Tenn. 2012) (citing an older version of this Court's rules). The evidence and the plain meaning of the language used by Mr. Sitton support the hearing panel's finding.

"As to the rule violations, the hearing panel concluded: 'Giving advice as a lawyer about planning in advance how to claim a defense to killing someone is conduct that is prejudicial to the administration of justice in violation of Rule 8.4(d).' It found that this violation 'also constitutes a violation of Rule 8.4(a).'

"We agree. We hold there is ample evidence to support the hearing panel's conclusion that Mr. Sitton violated RPC 8.4(a) and (d) and that he is subject to discipline."

"In addition to the hearing panel's findings on aggravating and mitigating factors, we must consider an additional circumstance. As we have already noted, the factors listed in ABA Section 9 are illustrative, not exclusive, and other factors may be considered. *Cowan*, 388 S.W.3d at 268 (citing *Lockett*, 380 S.W.3d at 28). In this case, it is appropriate to consider—as an aggravating factor—the fact that Mr. Sitton's comments were made in a very public setting, on social media.

"Mr. Sitton's statements to Ms. Houston would have constituted a violation of our ethics rules had they been made in private or in public, for the reasons we have already explained. Here, however, in contemplating the appropriate discipline, the Court must also consider the fact that Mr. Sitton chose to give Ms. Houston his fateful advice on Facebook, a public platform. The larger Facebook audience for the exchange would have come away thinking: this is what lawyers do; they give advice on how to commit crimes and get away with it. Publicly fostering such a distorted image of the role of lawyers does grave damage to the administration of justice in our State.

"We acknowledge Mr. Sitton's apologia that his comments were 'intemperate' and 'written in haste.' Certainly, spur-of-the-moment posts on social media may feel almost like private text

messages to a friend made on a cell phone alone in one's home. Unfortunately, that perception is far from the reality.

"Of course, there is nothing wrong with lawyers participating in social media. Indeed, much good can come of it. Lawyers can establish an online presence, engage in their communities, show their personalities and interests outside the law, develop relationships on social-media platforms, and market their legal services. Lawyers participating in social media can do much to de-mystify the legal system.

"Nevertheless, attorneys in any setting—including on social media platforms—remain bound by our Rules of Professional Conduct. *See In re Vogel*, 482 S.W.3d at 545 (All attorneys licensed to practice law in this state have a duty to 'act at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.'). Lawyers who choose to post on social media must realize they are handling live ammunition; doing so requires care and judgment. Social media posts are widely disseminated, and the damage from a single illadvised comment is compounded and magnified.

"The fact that ethically problematic conduct occurs on a social media platform need not always be an aggravating circumstance. However, if the use of social media exacerbates the problem the ethics rule seeks to address, we hold that it may be considered an aggravating factor for purposes of lawyer discipline. Here, Mr. Sitton's choice to post his comments on a public platform amplified their deleterious effect. We can think of few things more prejudicial to the administration of justice than publicly fostering a view of lawyers as co-conspirators whose role is to manufacture plausible but untrue defenses against criminal charges for the premeditated use of deadly force. It promotes a cynical view of the justice system as something to be manipulated instead of respected. Moreover, while the danger to Mr. Henderson is obvious (had Ms. Houston followed Mr. Sitton's instructions), the public venue for Mr. Sitton's bad advice created a risk that others would use it as well.

"We deem it appropriate to view Mr. Sitton's choice to post his comments in a public forum as an aggravating factor that justifies an increase in discipline."

E. Misconduct: Failure to Comply with a Court Order, Rule 8.4(g)

In re Richardson, Board Release of Information.

Keisha Moses Richardson of Memphis was publicly censured.

"Ms. Richardson was convicted by a jury of Violation of an Order of Protection which was affirmed on appeal. Ms. Richardson's conduct reflected adversely upon her fitness as a lawyer and she failed to respond to the disciplinary complaint against her."

Ms. Richardson violated RPCs 8.1(b) (disciplinary matters) and 8.4(a), (b), (d), and (g) (misconduct).

VII. Licensure

A. Transfer of Law License to Disability Inactive Status

Kevin Carmack Angel, Clinton
Matilda Ann Batson, Acworth, Georgia
Debra Dawnn Davis Antoine, Cordova
Kathleen Laird Caldwell, Memphis
Lawrence McLean House, Knoxville
Stephen Alexander McSween, Knoxville
Robert Hamm Moyer, Clarksville
Deon Devall Owensby, Trenton, New Jersey
Nicholas Freeman Tominello, Memphis
Van Davis Villines, Springfield
Charles Terry Webber, Jr., Clinton

B. Transfer of Law License from Disability Inactive Status to Active Status

Angela Kay Washington, Columbia

C. Suspension for Failure to Respond to a Complaint of Misconduct

A. Sais Phillips Finney, Memphis
Andrew Nathan Hall, Wartburg
Robert R. Rexrode, Winchester, Virginia
David Brent Whelan, Murfreesboro

D. Suspension for Failure to Comply with TLAP Contract

C. LeAnn Smith, Nashville

E. Suspension for Conviction of a Serious Crime (Rule 9, § 22.3)

In re Vaughan, Board Release of Information.

Kyle Douglas Vaughan of Kingsport was suspended.

On July 21, 2020, Mr. Vaughan pled guilty to Theft of Property over $60,000 and under $250,000 in violation of Tenn. Code Ann. § 39-14-103, in the Criminal Court for Washington County, Tennessee.

The Board will institute a formal proceeding to determine the extent of final discipline to be imposed.

F. Suspension for Posting a Threat of Substantial Harm to the Public

Kevin Carmack Angel, Clinton
Charles David Deas, Maryville
Urura W. Mayers, Memphis

G. Permanent Disbarment

Jason Wade Barnette, Nashville
Matthew David Dunn, Brentwood
James Austin Dukes, Hammond, Louisiana
Jackie Lynn Garton of Burns
Wendell Kyle Hall, Lenoir City
James Lester Kennedy, Knoxville
William Branch Lawson, Erwin
Judson Wheeler Phillips, Franklin
Kurt J. Pomrenke of Bristol
Paul James Springer, Sr., Memphis
Kimberly Ogden Sutton, Springdale, Arkansas

H. Disbarment

Arthur Wayne Henry, Loudon

I. Reinstatement

Bradley Michael Carter, Franklin
A. Sais Phillips Finney, Memphis
Bobby Gene Gray, Adamsville
David Dwane Harris, Nashville
Newton S. Holiday, Nashville
Le'Dell Sanders Joiner, APO AE
Andrew Harrison Maloney, Brentwood
Jason R. McLellan, Kingsport
David Scott Parsley, Nashville
Aaron Alexander Smith, Charlotte, North Carolina
Kevin William Teets, Nashville
George H. Thompson, III, Nashville

J. Reciprocal Discipline

In re Dukes, Board Release of Information.

James Austin Dukes of Hammond, Louisiana, was permanently disbarred.

"Mr. Dukes was found guilty of theft of $25,000 or more; theft of assets of aged; and exploitation of the infirmed in Docket 1-703267 in the State of Louisiana, Parish of Tangipahoa. Mr. Dukes requested to permanently resign from the practice of law in Louisiana in lieu of discipline. As a result, on July 2, 2020, the Supreme Court of the State of Louisiana entered an order stating that 'James A. Dukes shall be permanently prohibited from practicing law in Louisiana' and 'shall be permanently prohibited from seeking readmission to the practice of law in this state.'"

K. Assessment of Costs

In re Parrish, 620 S.W.3d 326 (Tenn., Lee, 2021).

"This Court suspended an attorney from practicing law for six months, with one month on active suspension. The discipline resulted from a report of misconduct received by the Tennessee Board of Professional Responsibility in 2013. In 2018, we reinstated the attorney to the practice of law based on his eligibility for reinstatement and his compliance with the order of discipline. Before being reinstated, the attorney agreed to a monthly payment plan to satisfy the Board's assessed costs from the disciplinary case. Soon after he was reinstated, the attorney petitioned the Board to revoke the agreed costs. The attorney argued he did not owe the costs because the Board improperly assessed costs under Tennessee Supreme Court Rule 9 in effect when the 2013 disciplinary proceeding was initiated instead of Rule 9 in effect when he was reinstated. A hearing panel found the Board had properly assessed costs based on Rule 9 in effect when the disciplinary proceeding began. The attorney appealed. We affirm. Based on this Court's Order promulgating revised Rule 9 and our subsequent decisions, the version of Rule 9 that was in effect when the disciplinary case was initiated in 2013 governs the assessment of costs regardless of when this Court reinstated the attorney to the practice of law. Thus, we hold the Board followed the correct procedure in assessing costs. We order the attorney to pay the costs assessed against him within forty-five days of the filing of this opinion. Failure to timely pay the costs may serve as a ground for revocation of the attorney's reinstatement to practice law."

L. Amendments to Supreme Court Rules

Transfer to Disability Status, Tennessee Supreme Court Rule 9, Section 27.4, No. ADM2020-01180, amended eff. Oct. 7, 2020.

Addresses in a new section addressing procedure for suspended or disbarred lawyer who claims that mental or physical disability prevents the lawyer from defending themselves in a disciplinary investigation or proceeding.

Amendments Concerning Bar Admission, Tennessee Supreme Court Rule 7, No. ADM2020-00479, amended eff. Aug. 6, 2020.

Various amendments clarify the applicable standard for character and fitness in Section 6.01, clarify the conditions that may be imposed for conditional admission in Section 10.05, and make corrections for uniformity and consistency.

VIII. Judicial Ethics

A. Recusal

Cook v. State, 606 S.W.3d 247 (Tenn., Clark, 2020).

"On November 25, 2008, a Shelby County Grand Jury returned a two-count indictment charging the petitioner, Brice Cook, with first-degree premeditated murder for the fatal shooting of Ms. Shantell Lane and charging the petitioner's brother with facilitation of the murder. *State v. Cook*, No. W2012-00406-CCA-R3-CD, 2013 WL 9570493, at *1 (Tenn. Crim. App. Sept. 4, 2013), perm. app. denied (Tenn. Feb. 11, 2014). In December 2009, the men were tried jointly and convicted as charged. Id. On August 30, 2010, the trial court granted the petitioner a new trial, finding that testimony of a prosecution witness deprived the petitioner of his constitutional right to confront the witnesses against him in violation of *Bruton v. United States*, 391 U.S. 123, 137,

88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Cook, 2013 WL 9570493, at *1. Shortly after granting the petitioner's motion for new trial, the judge who presided at the petitioner's first trial retired, and another judge was assigned to the petitioner's case.

"The petitioner's second trial began on October 31, 2011. The petitioner admitted to shooting the victim but claimed he had acted in self-defense. In summary, the proof showed that Ms. Jasmin Harris ended a romantic relationship with the petitioner to pursue a romantic relationship with the victim. On the day the victim was killed, the petitioner exchanged a series of angry text messages with the victim and Ms. Harris and then drove to the apartment they shared with two others. The victim was not home when the petitioner arrived, but she arrived a short time later. Prosecution eyewitnesses to the shooting testified that when the victim exited her vehicle, the petitioner began shooting in her direction. According to these witnesses, the victim ran back to her vehicle and got inside, but the petitioner followed and shot the victim twice as she sat in the vehicle. Defense eyewitnesses to the shooting testified to seeing fire and flashes and what appeared to them to be gunfire emanating from the victim's vehicle before the petitioner fired his weapon. The proof showed that the victim died from two gunshots wounds—one to her abdomen and another to her back. *Cook*, 2013 WL 9570493, at *1.

"The jury at the second trial convicted the petitioner of first-degree premeditated murder, and he received a life sentence. The petitioner appealed. The Court of Criminal Appeals affirmed the petitioner's conviction and sentence, and this Court denied review. *State v. Cook*, No. W2012-00406-SC-R11-CD (Order) (Tenn. Feb. 11, 2014) (denying the petitioner's application for permission to appeal).

"On September 22, 2014, the petitioner timely filed a petition for post-conviction relief, which was assigned to Judge Lee V. Coffee, the same judge who presided over the petitioner's second trial. The petitioner claimed ineffective assistance of counsel and alleged several factual grounds in support of this claim, including, as relevant to this appeal, that his trial attorneys failed to communicate a plea offer to him in a timely manner."

"At the conclusion of the hearing, the post-conviction judge denied the petitioner relief, and in doing so, made the following comments that are the basis of the petitioner's claim that the post-conviction judge should have recused himself.

> Lastly, a plea bargain. A nonexistent plea bargain. A nonexistent deal. I've known Mr. Massey the 27 years I've been in Shelby County.... I've known Ms. McCluskey for all of her legal career.
>
> I've tried cases, multiple cases, as a trial lawyer against Lorna McCluskey and William Massey. I tried death penalty cases against Lorna McCluskey and William Massey. Those are two of the most preeminent lawyers in Memphis, in Shelby County, Tennessee. Two of the most preeminent lawyers in the United States of America. Two of the most preeminent lawyers in the world.
>
> As Ms. McCluskey has testified, she's a fellow in an organization that will not admit more than one percent of all trial lawyers in the world. Mr. Massey is one of the leading lawyers in criminal defense practice. President -- past president of the Tennessee Association of Criminal Defense Lawyers. A board member of the National [A]ssociation of Criminal Defense

Lawyers. These are two very, very talented, very good lawyers, very aggressive lawyers that will fight tooth and nail for their client.

And it's almost absolutely laughable that a lawyer can come to court and say I believe Ms. McCluskey and Mr. Massey ineffectively represented Mr. Cook and these are some things that maybe they should have done differently, sitting back as a Monday morning quarterback and evaluating their performance hindsight.

It reminds me of what Judge Axley used to say when I first got licensed in my first court in Criminal Court when I stopped three years practicing with the Public Defender's Office and was first assigned to Judge Axley's court.

And Judge Axley used to tell me, 'Mr. Coffee, it's kind of like generals in a war. They sit up on a hill on their white horses, beautiful white steed horses, don't do anything. And after the battle is over, they ride down into the middle of the conflict when people have lost their lives and that war is over and they try to tell those folks how they should have fought that battle differently, how they could have fought that battle better, when all they did was stand up on a hill on a white steed and look down at the action when these folks in the trenches are fighting this war and people are dying all around them.'

You have two very accomplished trial lawyers who absolutely told me that, 'Judge Coffee, looking back on this case some seven, six years later, there is absolutely nothing that I would have done differently. There's nothing that I could have done differently that would have make [sic] a difference in this case.'

These are two of the best trial lawyers in the world. There is absolutely nothing before this Court that would cause this Court to conclude that Mr. William Massey and Ms. Lorna McCluskey were deficient in their representation of [the petitioner].

There is nothing in this record that would cause the Court to question for a moment that these lawyers were not prepared in their representation of [the petitioner].

There is nothing in this record that would indicate that these lawyers were somehow misguided in not trying to negotiate a settlement on this case when what is before the Court is that there was never a formal offer made on this case by Mr. Zak.

....

And it's just pure speculation. It's pure second-guessing. It's pure, 'Let me guess at what this lawyer could have done better.'

And, between the two of them, they cannot even tell me how many first degree murder cases they have tried. I would venture a guess -- I would venture a guess that Mr. Massey -- Ms. McCluskey and Mr. Massey collectively have tried more first degree murder cases than any lawyers in the State of Tennessee. If you compared them with lawyers across the country, I'll be surprised if there's any lawyers that have tried more first degree murder cases than Mr. Massey and Ms. McCluskey.

And it is almost painful when lawyers start attacking other lawyers and saying -- my goodness. These lawyers did the absolute best they could. Did not the best they could, but did an

exemplary job. And even getting Mr. Cook a new trial in the beginning, which this Court finds, frankly, that there was skeptical grounds in which that motion was granted.

But convinced another Judge to grant a new trial, tried this case, and did absolutely everything that any reasonable lawyer could have done. And a jury found Mr. Cook guilty of first degree murder in another trial.

And it is something that bothers this Court and it's something that's unique to Tennessee. I practiced law in Houston for eight years. 23 felony courts. Not courts, 23 felony courts that dealt with felony cases.

In the eight years in the State of Texas, Harris County, Texas, I may have seen three or four post-conviction petitions in 23 felony courts in eight years. But it's part of the game -- and I do use the word game -- that goes on in Tennessee, goes on in Shelby County, Tennessee.

A person is tried. A person is tried and convicted by a jury, receives excellent representation from his lawyers, and will turn around on a post-conviction and sue a lawyer, in essence, and say, 'My lawyers did a bad job. They did an absolutely horrible job for me and, therefore, I should be given a third trial.'

Mr. Cook has wholly failed to prove ineffective representation. He's wholly failed to prove that he was prejudiced by his attorneys. He has wholly failed to sustain any of these allegations that are contained in some 70-plus pages of writings as to why Ms. McCluskey and Mr. Massey ineffectively represented him. This Court finds that Lorna McCluskey and Bill Massey, William Massey, provided excellent representation for Mr. Cook.

"The petitioner timely appealed and raised several issues on appeal, including his claim that the post-conviction judge should have recused himself. A majority of the Court of Criminal Appeals affirmed the post-conviction judge's denial of post-conviction relief and deemed the petitioner's challenge to the post-conviction judge's impartiality waived because the petitioner failed to file a motion seeking the post-conviction judge's recusal. See *Cook v. State*, No. W2018-00237-CCA-R3-PC, 2019 WL 2122798, at *13 (Tenn. Crim. App. May 14, 2019), perm. app. granted (Tenn. Oct. 14, 2019). Presiding Judge John Everett Williams dissented, concluding that 'the post-conviction judge's comments at the conclusion of the hearing were so egregious that the judge's impartiality might reasonably be questioned[.]' Id. at *13 (Williams, P.J., dissenting) (citing Tenn. Sup. Ct. R. 10, R.J.C. 2.11(A) ('A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned....')). Judge Williams would have reversed the post-conviction judge's order denying the petitioner post-conviction relief and remanded for a new hearing before a different judge. Id."

"[W]e hold that Rule of Judicial Conduct 2.11 obligated the post-conviction judge to recuse himself even though the petitioner did not file a motion for recusal. Our conclusion that a person of ordinary prudence in the judge's position knowing all of the facts known to the judge would find a reasonable basis for questioning the judge's impartiality is based on the comments the post-conviction judge made at the conclusion of the hearing when denying the petitioner relief. The post-conviction judge reiterated his longstanding professional acquaintance and familiarity with the petitioner's trial attorneys and his opinion that they are '[t]wo of the most preeminent lawyers' in the country and in the world. He recited their affiliations with legal professional organizations. He described the petitioner's claims of ineffective assistance of counsel against Mr. Massey and Ms.

McCluskey as 'almost absolutely laughable.' He characterized the petitioner's appointed counsel as 'sitting back as a Monday morning quarterback and evaluating their performance hindsight.' He declared it 'painful when lawyers start attacking other lawyers.' Under the applicable objective standard, these statements communicate that the post-conviction judge's decision to deny the petitioner relief was based on the post-conviction judge's personal knowledge and high personal regard for the professional abilities, skills, and reputations of the petitioner's trial attorneys and his belief that trial counsel were so preeminent, skilled, and knowledgeable that they could never be ineffective in any case. These comments constitute a reasonable basis for questioning the post-conviction judge's impartiality, which requires 'maintenance of an open mind in considering issues[.]' Tenn. Sup. Ct. R. 10, Terminology 'Impartial,' 'Impartiality,' 'Impartially.'

"Even more problematic and troubling, however, are the post-conviction judge's disparaging comments about not only Tennessee's post-conviction procedures but also post-conviction petitioners and their attorneys. The post-conviction judge described post-conviction claims as unique to Tennessee and as a 'game' 'that goes on in Tennessee, goes on in Shelby County, Tennessee.' He reiterated the word 'game' to emphasize his distaste for post-conviction proceedings and said the process 'bothers' him. He compared post-conviction petitioners and their attorneys to generals in a war who observe a battle from a hill '[and] don't do anything' but later tell those who fought 'how they should have fought that battle differently.' The post-conviction judge expressed a preference for the law of Texas, where he had practiced for eight years, explaining that he had worked in twenty-three felony courts but had dealt with only three or four post-conviction petitions during that time. As Judge Williams explained in his dissenting opinion:

> It is completely inappropriate for a judge to refer to a procedure enacted by the [L]egislature to ensure that a defendant's constitutional right to effective assistance of counsel is protected as a 'game.' Even though the judge disagree[d] with the law in Tennessee and preferred to follow the law in Texas, he swore an oath to follow the law in Tennessee and not Texas.

Cook, 2019 WL 2122798, at *16 (Williams, P.J., dissenting). The post-conviction judge should have been acutely aware of the impropriety of his remarks as he had already been admonished in another case for expressing his disagreement with Tennessee law concerning pretrial bonds and his preference for Texas law. Id. (citing *State v. Kizzie*, No. W2015-01977-CCA-R8-CO (Order) (Tenn. Crim. App. Dec. 3, 2015)). Applying the objective test, we have no hesitation in concluding that, to a reasonable person of ordinary prudence knowing all the facts known to the post-conviction judge, these comments would indicate that the post-conviction judge's decision denying the petitioner relief was based as much on the post-conviction judge's disdain for and disagreement with Tennessee law on post-conviction procedures and dissatisfaction with post-conviction petitioners and their lawyers as on the evidence presented at the hearing."

"The State argues that the petitioner waived this claim by failing to move for recusal either when the post-conviction judge made the inappropriate comments or during the fifty-one days that elapsed between the oral ruling and entry of the order denying relief. We conclude that waiver is not determinative in the circumstances of this case. As already explained, Rule of Judicial Conduct 2.11 obligates a judge to recuse himself or herself 'in any proceeding in which the judge's impartiality might reasonably be questioned,' even if no recusal motion is filed. In the circumstances of this case, where Rule of Judicial Conduct 2.11 obligated the post-conviction judge to recuse, the petitioner's failure to file a recusal motion is not dispositive. Here, the post-conviction judge chose to make remarks that were not only egregious but also global in nature, expressing disdain for the entire class of proceedings he was charged with conducting. Under these unique

circumstances, no recusal motion was required; the post-conviction judge should have known that the remarks compelled him to recuse himself.

"Because the post-conviction judge should have disqualified himself under Rule of Judicial Conduct 2.11, the petitioner is entitled to a new hearing before a different judge on his petition for post-conviction relief. We express no opinion on the merits of the petitioner's underlying post-conviction claims, as the evaluation of those claims must be made by the newly assigned judge based on the evidence presented at the new hearing.

"We stop short of reaching the broader question *implicitly* presented by this appeal, which is: whether the post-conviction judge's inappropriate comments in this case call his impartiality into reasonable question and require his disqualification from all future post-conviction cases. An argument certainly can be made for answering this question in the affirmative. However, we decline to do so at this time. First, this decision should serve as an unmistakable admonition to this judge, and all other Tennessee judges, to refrain from such inappropriate comments in future cases. It also should serve as a crystal-clear reminder to this judge, and every other Tennessee judge, of the obligation to recuse without any motion in any proceeding in which the judge's impartiality might reasonably be questioned. We have no reason to doubt that Judge Coffee will fulfill these obligations in future cases in compliance with the oath he has taken as a judge. See Tenn. Code Ann. § 17-1-104 (2009 & Supp. 2019). . . ."

"Nevertheless, we take seriously this Court's obligation to ensure that justice in Tennessee remains impartial both in fact and in appearance. *In re Cameron*, 151 S.W. at 76; *Lynn*, 924 S.W.2d at 898. As a result, if, in a future case, this Court determines that a judge has habitually made inappropriate comments that call into reasonable question the judge's impartiality in a particular category of cases, this Court will not hesitate to hold, in the exercise of its supervisory power over the Judicial Department, that the judge is disqualified from hearing all future cases in that category. See Tenn. Const. art. VI, § 1; *Moore-Pennoyer v. State*, 515 S.W.3d 271, 276 (Tenn. 2017) (citing cases); see also Tenn. Code Ann. § 16-3-501 (2009) (describing this Court's 'general supervisory control over all the inferior courts of the [S]tate'); id. § 16-3-503 (declaring that the Supreme Court has 'the power inherent in a court of last resort'); id. § 16-3-504 (declaring that the Supreme Court has 'a broad conference of full, plenary[,] and discretionary power'). The circumstances of this appeal placed it only inches away from the threshold that must be crossed for this Court to invoke that extraordinary remedy."

State v. Griffin, 610 S.W.3d 752 (Tenn., Per Curiam, 2020).

"The trial judge in this matter served as a deputy district attorney general in Knox County at the time the defendants were indicted by the Knox County Grand Jury. After a subsequent appointment to serve as a trial judge in Knox County Criminal Court, the trial judge was assigned to the defendants' cases. The defendants moved for recusal, arguing that the trial judge had supervisory authority over their cases as Deputy District Attorney General. The trial judge denied the motions for recusal, and the defendants filed an appeal in the Court of Criminal Appeals pursuant to Tennessee Supreme Court Rule 10B, section 2. The Court of Criminal Appeals reversed the trial judge's decision, holding that recusal of the trial judge was necessary. We then granted the State's accelerated application for permission to appeal to this Court. Having thoroughly reviewed the filings of the parties and the applicable law, we conclude that the trial judge's denial of the motion to recuse was appropriate in this case. Therefore, we reverse the decision of the Court of Criminal Appeals."

"In February 2019, Kyle A. Hixson was serving as Deputy District Attorney General for the Sixth Judicial District of Tennessee, which consists of Knox County. The Knox County Grand Jury indicted the defendants in this case on February 19, 2019, for conspiracy to possess a controlled substance with intent to sell or deliver, employing a firearm during a dangerous felony, violation of the RICO Act, first degree murder (Defendant Jackson), possession with intent to sell or deliver cocaine (Defendant Jackson), and possession of a firearm during a dangerous felony (Defendant Jackson).

"On December 10, 2019, Governor Bill Lee appointed Mr. Hixson to serve as the trial judge in the Knox County Criminal Court. Mr. Hixson took the oath of office on January 1, 2020, and was assigned to preside over the defendants' cases.

"On January 23, 2020, defendant Sidarius Jackson filed a motion to recuse the trial judge. On January 31, 2020, defendants Raffell Griffin, Robert Cody, III, and Thakelyn Tate each separately filed a motion to recuse the trial judge in this case. All of the defendants argued that, at the time the grand jury considered their cases, the trial judge had served as a deputy district attorney general in Knox County and that his supervisory role included 'review and approval of cases bound over from the General Sessions Court to the Grand Jury [and] approval of cases presented for direct review by the Grand Jury.' The defendants argued that the trial judge's prior employment created an appearance of impropriety necessitating recusal.

"As support for their argument at the hearing on this matter, the defendants submitted the trial judge's sworn application for nomination to judicial office, as well as a printed copy of a website for the trial judge. The trial judge's application stated, in pertinent part:

> I currently serve as Deputy District Attorney General for the Sixth Judicial District of Tennessee. Our office is solely responsible for all criminal prosecutions in Knox County. In order to fulfill this prosecutorial function, our office staffs three divisions of the Criminal Court, four criminal divisions of the General Sessions Court, the Grand Jury, and the Juvenile Court. As provided by law, our lawyers may also appear from time to time in Circuit Court, Chancery Court, or the civil division of the General Sessions Court.
>
> In my role as Deputy District Attorney General, I am the direct supervisor for a staff of almost [eighty] employees, including [forty] Assistant District Attorneys General. My supervisory duties include the setting of parameters for plea negotiations, review and approval of cases bound over from the General Sessions Court to the Grand Jury and Criminal Court, approval of cases presented for direct review by the Grandy Jury, regular meetings with personnel to ensure compliance with office policy and ethical standards, and the review of cases for possible appeal to the Court of Criminal Appeals.
> ....
> In addition to my supervisory duties, I have maintained my own caseload during my time as Deputy District Attorney General. I have prosecuted multiple cases to jury trials, including cases of first degree murder, second degree murder, voluntary manslaughter, vehicular homicide, aggravated rape, felony drug charges, aggravated assault, simple assault, and resisting arrest. I have personally prosecuted countless other cases that did not culminate in a jury trial. I have worked with law enforcement officers to coordinate investigative efforts prior to charge. In this capacity, I have worked with state and federal agents to obtain warrants and orders from state court judges.

"The website states the following, in pertinent part:

> Kyle has dedicated his career to public service. He has served two stints in the Office of the Knox County District Attorney General. First, he served as an Assistant District Attorney General, where he earned a reputation as a hardworking trial attorney capable of handling complex criminal cases, including homicides and sexual assaults. Second, since 2014, he has served in an executive position as Deputy District Attorney General. Kyle currently supervises all criminal prosecutions in Knox County, a jurisdiction where up to 60,000 new criminal cases arise every year. In addition to managing an office of [eighty] attorneys and support staff, Kyle oversees prosecutions in seven courtrooms plus the Knox County Grand Jury. He works closely with judicial staff and other public offices and agencies to ensure proper operation of the Knox County criminal justice system. Despite his busy management schedule, Kyle still personally participates in some of the Office's most complex criminal litigation in the courtroom.

"About Kyle Hixson, http://www.electkylehixson.com/about (last visited Oct. 22, 2020).

"On February 20, 2020, the trial judge entered an order denying the defendants' motions for recusal. Initially, the trial judge stated that Assistant District Attorney ('ADA') General TaKisha Fitzgerald, the prosecutor handling the case, had:

> stated that she has no indication that the [trial judge] directly worked on the instant prosecution during his previous employment. Further, ADA Fitzgerald indicated on the record that she does not recall ever discussing the instant case with the [trial judge] during his employment at the District Attorney's Office. These assertions are consistent with the [trial judge]'s recollection of his lack of involvement with this case."

"In analyzing the facts, the trial judge stated:

> In this case, it is clear that there is no actual conflict of interest that would prevent the [trial judge] from fairly adjudicating this matter. The [trial judge] never worked on nor discussed the facts of this case with others during his time as a prosecutor. Thus, the question becomes whether 'a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality.' *Bean v. Bailey*, 280 S.W.3d 798, 805 (Tenn. 2009) [(quoting *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564 (Tenn. 2001))]. The circumstances of this case call for the conclusion that a reasonable person would not question the [trial judge]'s continued involvement in this case as a trial judge.
>
> Similarly to *Cormia* [*v. State*, No. E2010-02290-CCA-R3-PC, 2011 WL 5027107, at *14 (Tenn. Crim. App. Oct. 21, 2011),] and *Wells* [*v. State*, No. M2002-01303-CCA-R3-PC, 2003 WL 21713423, at *5 (Tenn. Crim. App. July 23, 2003)], the [trial judge]'s responsibilities as Deputy DA did not include primary supervision of cases within ADA Fitzgerald's unit or the Grand Jury. These cases indicate that a conflict of interest is not imputed to a judge-then-prosecutor simply by virtue of his previous status as a supervisor within the prosecutor's office. While ADA Fitzgerald was free to consult with [the trial judge] when the need arose, that never occurred on this case.

> The [d]efendants raise the issue of their pending motions related to the sufficiency of the Presentment in this case. Their argument is that for the trial [judge] to rule in their favor on these motions, [he] must concede that [he] failed in his prior employment as Deputy DA as it relates to supervision of the Grand Jury. This argument fails because the trial [judge] never worked on any of the issues raised by the [d]efendants in their motions regarding the charging instrument. Carried to its logical conclusion, this argument means that the trial [judge] could never rule against the State on a case that pended during his prior employment without somehow impugning his job performance during that time. While this may be true for issues or cases on which the trial [judge] had direct involvement as a prosecutor, this connection is simply too tenuous for all other cases. A reasonable person of ordinary prudence would not question the trial [judge]'s ability to decide an issue when he had no involvement with that issue during his time as a prosecutor.
>
> The [trial judge] is confident that [his] continued involvement in this case would not be injurious to the public's perception of the impartial role of the judiciary. After careful consideration, the [trial judge] concludes that a person of ordinary prudence would not reasonably question the [trial judge]'s impartiality in this case."

"Thus, the trial judge denied the defendants' motions for recusal. On February 27, 2020, the defendants jointly filed a petition for recusal appeal from the trial judge's denial of recusal. On March 13, 2020, the Court of Criminal Appeals entered an order granting the petition for recusal and ordering that the trial judge be recused in this matter. Order, *State v. Griffin*, No. E2020-00327-CCA-T10B-CO (Tenn. Crim. App. Mar. 13, 2020)."

"The State then filed an accelerated application for permission to appeal on April 3, 2020, which this Court granted on June 4, 2020."

"The State argues that the Court of Criminal Appeals erred in reversing the trial judge's denial of recusal. The defendants, in response, argue that the trial judge's statements made in his judicial application and campaign website would indicate to a reasonable person that he had supervisory authority over this case while he was a deputy district attorney."

"Here, the trial judge served in a governmental position, namely as Deputy District Attorney General, in which he had broad and general supervisory authority over many cases. The pertinent question for purposes of this appeal, however, is whether this supervisory authority amounted to the trial judge participating 'personally and substantially' in this case such that his impartiality might reasonably be questioned. Tenn. Sup. Ct. R. 10, RJC 2.11(A)(6)(b).

"Our Court of Criminal Appeals has held that mere employment as an assistant district attorney while his or her office prosecuted the case, without more, does not require recusal. See *Owens v. State*, 13 S.W.3d 742, 757 (Tenn. Crim. App. 1999). . . ; *State v. Ellis*, No. W2000-02242-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 579, at *6 (Tenn. Crim. App. July 19, 2001). . . ."

"Additionally, this Court has held that a judge who served as the district attorney general for a judicial district during the time a defendant was indicted and convicted on other charges need not recuse himself in a later, unrelated criminal matter involving the same criminal defendant. *State v. Warner*, 649 S.W.2d 580, 581 (Tenn. 1983); see also *State v. Conway*, 77 S.W.3d 213, 225 (Tenn.

Crim. App. 2001). . . ; *State v. Byington*, No. E2008-01762-CCA-R3-CD, 2009 WL 5173773, at *4 (Tenn. Crim. App. Dec. 30, 2009). . . ."

"In this case, however, the trial judge was a deputy district attorney general, with general and extensive supervisory responsibilities, at the time the defendants were indicted for the charges in the present case. In deciding similar cases, our courts specifically have considered (1) whether the trial judge had direct supervisory authority over the assistant district attorney in the case; and (2) whether the trial judge had any direct involvement in the case."

"In the present case, the defendants based the recusal motions primarily on statements made by the trial judge in his judicial application and on his campaign website. In his judicial application, he states, in pertinent part:

> I currently serve as Deputy District Attorney General for the Sixth Judicial District of Tennessee. Our office is solely responsible for all criminal prosecutions in Knox County. In order to fulfill this prosecutorial function, our office staffs three divisions of the Criminal Court, four criminal divisions of the General Sessions Court, the Grand Jury, and the Juvenile Court. As provided by law, our lawyers may also appear from time to time in Circuit Court, Chancery Court, or the civil division of the General Sessions Court.
>
> In my role as Deputy District Attorney General, I am the direct supervisor for a staff of almost [eighty] employees, including [forty] Assistant District Attorneys General. My supervisory duties include the setting of parameters for plea negotiations, review and approval of cases bound over from the General Sessions Court to the Grand Jury and Criminal Court, approval of cases presented for direct review by the Grandy Jury, regular meetings with personnel to ensure compliance with office policy and ethical standards, and the review of cases for possible appeal to the Court of Criminal Appeals.

"On his campaign website, the trial judge described his role as supervising 'all criminal prosecutions in Knox County, a jurisdiction where up to 60,000 new criminal cases arise every year.'

"In his order denying recusal, the trial judge explained that he had some general supervisory responsibilities during his time as Deputy District Attorney General, but he had no knowledge or any involvement, supervisory or otherwise, in this case. The trial judge's explanation was corroborated by ADA Fitzgerald.

"We find credible the trial judge's explanations in the order denying recusal that he was not the direct supervisor of ADA Fitzgerald and that he did not participate personally or substantially in the present case during his time as a Deputy District Attorney General. Although his campaign website states that he supervised 'all' criminal prosecutions in Knox County, a reasonable person would be hard-pressed to believe that participation in up to 60,000 new criminal cases a year was 'personal and substantial.'"

[Footnote:] "Although we conclude in this particular instance that the trial judge's explanation is credible and that recusal is not required in this case, we also use this opportunity to caution applicants and candidates for judicial positions about potential adverse consequences arising from statements in applications or campaigns. Applicants and candidates must carefully refrain from overstating past experiences and responsibilities. Such actions can have significant unintended

consequences. Our decision today in no way should be construed as condoning the use of overstatements in judicial applications or campaigns."

"Thus, knowing all the facts known to the trial judge in this case, including that he did not supervise the ADA in this case and had no actual involvement with this case, a person of ordinary prudence would not find a reasonable basis for questioning the trial judge's impartiality. See id. Accordingly, the trial judge properly denied the motion for recusal in this case."

See also:
State v. Styles, 610 S.W.3d 746 (Tenn., Per Curiam, 2020).
State v. Clark, 610 S.W.3d 739 (Tenn., Per Curiam, 2020).

Salas v. Rosdeutscher, No. M2021-00157-COA-T10B-CV (Tenn. Ct. App., Goldin, Mar. 4, 2021).

"A Tennessee Supreme Court Rule 10B petition for recusal appeal was filed in this Court following the denial of a motion that sought the disqualification of the trial court judge. For the reasons stated herein, we affirm the trial court's denial of the motion."

"This is an accelerated interlocutory appeal filed pursuant to Tennessee Supreme Court Rule 10B. The appeal arises out of a medical malpractice case in the Davidson County Circuit Court, but according to the materials before us, the underlying substantive matter has already been dismissed. Still pending in the case, however, is a motion for sanctions against the Plaintiff's former counsel, Brian Manookian ('Mr. Manookian'), the Appellant herein. Judge Kelvin Jones ('Judges Jones') presides over the case, which is a point of contention for Mr. Manookian.

"When the trial court dismissed the underlying medical malpractice case due to a voluntary non-suit by the Plaintiff, it specifically noted that, despite the dismissal, it would 'retain jurisdiction over the issue of sanction[s].'"

"On December 17, 2020, before the aforementioned deposition could take place and before any hearing on the motion for sanctions against him ever occurred, Mr. Manookian filed a complaint with the Board of Judicial Conduct ('the Board') accusing Judge Jones of various alleged misdeeds which were wholly unrelated to Mr. Manookian personally, to any personal dealings he had with the Judge, or to the matter pending before the trial court. He then subsequently filed a 'Motion to Disqualify' in the trial court seeking Judge Jones' recusal from this case. In an order entered on January 14, 2021, the trial court denied Mr. Manookian's motion to disqualify. In the order, Judge Jones held, among other things, that 'Mr. Manookian is neither a party nor an attorney for a party in the above referenced litigation,' that he had no doubt as to his ability to preside impartially in this case, and that there was 'no reasonable appearance of bias to question the Court's impartiality.'

"The present appeal followed when Mr. Manookian filed a petition for recusal appeal in this Court on February 4, 2021 pursuant to Tennessee Supreme Court Rule 10B. *See* Tenn. Sup. Ct. R. 10B, § 2.01. . . ."

"As a preliminary consideration, we address Mr. Manookian's articulated concern related to the trial court's finding that he 'is neither a party nor an attorney for a party' in the case. Mr. Manookian asserts that he is a party to a sanctions motion, which is the only pending issue in the case. As to this point, we agree with Mr. Manookian that he is the subject of a pending motion for sanctions.

Although it is not entirely clear that the trial court considered Mr. Manookian to lack standing to assert a recusal motion based on its 'neither a party nor an attorney' finding, we would agree that such a conclusion as to standing would have been improper based upon the pendency of the sanctions motion. It is true that Mr. Manookian was not a party to the underlying medical malpractice case, and it is further true that he no longer represents the Plaintiff as counsel in the case. Indeed, concerning this latter point, when the trial court later officially relieved Mr. Manookian as counsel of record, it noted that the Tennessee Supreme Court had suspended Mr. Manookian from the practice of law in October 2019. Yet, as Mr. Manookian is the subject of the pending motion for sanctions, we agree with him that he has standing to raise the issue of recusal.

"Another concern raised by Mr. Manookian on appeal appears to relate to a finding by the trial court that he allegedly 'd[id] not state in his Motion [to Disqualify] when he learned of or reasonably should have learned of the facts establishing the basis for recusal.' Mr. Manookian interprets the trial court's order as containing a holding that his motion seeking Judge Jones' recusal was untimely. To the extent that the trial court was through its language criticizing the timeliness of the motion to recuse, we respectfully disagree with its assessment. Here, the motion to recuse was predicated upon the fact that Mr. Manookian had filed a complaint against Judge Jones with the Board. Insofar as the materials supporting Mr. Manookian's motion to recuse admit, he filed his motion to disqualify Judges Jones *the day after* he received confirmation from the Board concerning his submission. Again, it is not specifically clear that the trial court deemed Mr. Manookian's disqualification request untimely, but to the extent that it may have, we are of the opinion that his motion was in fact timely.

"Having addressed the above concerns, we now turn to the substantive merits of the recusal motion, something that Judge Jones did specifically deal with in his order. As noted earlier, Judge Jones held that he had no doubt as to his ability to preside impartially in this case and further concluded that there was 'no reasonable appearance of bias to question the Court's impartiality.' For the reasons that follow, we find no error in Judge Jones' decision to deny the request for his recusal.

"Mr. Manookian solely predicates his request for recusal on the fact that he previously filed a complaint against Judge Jones with the Board. This filing, submitted at a time when Judge Jones was permitting discovery into matters related to a pending sanctions motion leveled against Mr. Manookian, raised issues of alleged misdeeds by Judge Jones which were completely divorced of any relation to Mr. Manookian himself or the matter pending before the trial court. As our Supreme Court has explained, the judicial disqualification standards do not require recusal simply because the person seeking recusal has filed some type of complaint against the judge. *See Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 162 (Tenn. 2013) (collecting cases). For example, in one of the cases cited favorably by our Supreme Court in *Moncier*, the Court of Appeals of Ohio held that a disciplinary complaint filed against a judge will not by itself warrant the judge's recusal. *State v. Blankenship*, 115 Ohio App.3d 512, 685 N.E.2d 831, 833 (1996). The concern with strictly requiring recusal in such circumstances, of course, is that it could foster abuse of the judicial system by encouraging people to judge-shop and manufacture recusals. As a general matter, absent some additional showing of bias or prejudice resulting from the complaint against the judge, the complaint standing alone will not ordinarily require recusal. *Farm Credit Bank of St. Paul v. Brakke*, 512 N.W.2d 718, 722 (N.D. 1994).

"As discussed herein, Mr. Manookian's request for Judge Jones' recusal is singularly predicated upon his filing of a complaint against Judge Jones with the Board. Moreover, there is no evidence before us that Judge Jones possesses any actual bias or prejudice against Mr. Manookian.

Considering these limited facts and our discussion herein, we do not find there to be a reasonable basis for questioning Judge Jones' impartiality."

Alemarah v. General Motors, LLC, 980 F.3d 1083 (6th Cir., Per Curiam, 2020), reh'g en banc denied Dec. 21, 2020.

"Nosoud Alemarah sued her former employer, General Motors, in both state and federal court, claiming employment discrimination based upon identical factual allegations. The state suit asserted state claims, the federal suit, federal ones. The state court dismissed that case after the parties settled those claims; the federal district court granted summary judgment in favor of GM. Alemarah now challenges the court's grant of summary judgment, its order denying her motion to recuse the district judge, and an order awarding costs to GM. We affirm, albeit with some concerns as to the recusal motion."

"Alemarah argues that Judge Friedman should have recused himself from this case. We review a district court's denial of a recusal motion for an abuse of discretion. *See United States v. Howard*, 218 F.3d 556, 566 (6th Cir. 2000).

"A federal judge 'shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned' or '[w]here he has a personal bias or prejudice concerning a party[.]' 28 U.S.C. § 455(a), (b)(1). Here, Alemarah asserts that Judge Friedman demonstrated hostility toward her counsel through a sequence of events that she regards as retaliatory. In January 2020, the court scheduled a hearing for GM's summary-judgment motion at Wayne State University Law School. Three days later, Alemarah's counsel sent the case manager an email in which he asserted at some length that the law-school environment would be difficult for his client emotionally. Counsel also asserted the following:

> [N]either of the parties [sic] attorneys nor any judge would be able to completely set aside the theater atmosphere of attempting to educate students and play to the crowd which will detract from the job which needs to be performed by the attorneys and the court. Arguments will be overly drawn out and skewed for the purposes of educating and playing to the students, as will the commentaries of the court.

"Counsel therefore requested that, 'if oral argument is needed by the court in this case that oral argument be held in a court room.'

"Three days later, Judge Friedman sent a letter to Alemarah's counsel—by all appearances *ex parte*—in which he first agreed to change the hearing venue and then asserted as follows:

> Your additional comments I found to be highly offensive and entirely uncalled for. They reveal your lack of understanding of the purpose of hearing motions at a law school and your unfamiliarity with how the Court conducts these proceedings. Contrary to your uninformed assumptions, there is no 'theater atmosphere,' no one 'play[s] to the crowd,' the oral arguments are not 'overly drawn out and skewed for the purpose of educating and playing to the students,' and the attorneys are not called upon to 'perform.' Motion hearings held at a law school are official court proceedings, and the same procedures and rules, including those concerning decorum, apply there just as they do in the courtroom.

"Judge Friedman closed the letter as follows:

> Your objection to holding motion hearings at Wayne makes clear to me that you do not appreciate your professional obligation to participate in activities that are beneficial to the public. I therefore intend to ask Chief Judge Denise Page Hood, who is also the chair of this Court's pro bono program, to place your name on the list of attorneys who are to be assigned cases through this program.

"Judge Friedman thereafter cancelled the motion hearing and ruled in GM's favor on every remaining motion. In the court's order denying reconsideration of its grant of summary judgment, the court described Alemarah as 'apparently having been shocked awake' by that grant. In its order denying the motion to recuse, the court asserted that 'plaintiff's imagination has gotten the better of her' as to whether the court's letter had been 'angry'; and that, '[a]gain, plaintiff is hallucinating' as to her argument that the district court had retaliated against her and her counsel.

"We disagree with the court's assertion that its comments as described above—particularly the 'hallucination' one—were merely 'ordinary admonishments[.]' *Liteky v. United States*, 510 U.S. 540, 556, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). And a reasonable observer could conclude that the court's statement in its letter to Alemarah's counsel (which was itself out of the ordinary)—that '[y]our additional comments I found to be highly offensive and entirely uncalled for'—was an expression of anger on the court's part. Yet those comments were not 'so extreme as to display clear inability to render fair judgment.' *Id.* at 551, 114 S.Ct. 1147.

"Closer to the line was Judge Friedman's statement, in the same letter, that he intended to ask the court's chief judge 'to place your name on the list of attorneys who are to be assigned cases through' the court's pro bono program. That action could easily be seen as punitive, notwithstanding Judge Friedman's assertion that its purpose was to educate counsel about his 'professional obligation[s].' Viewed in the context of the frivolousness of several of Alemarah's motions, however, we conclude that the cited comments were the sort of 'expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.' *Id.* at 555–56, 114 S.Ct. 1147. Thus, though we by no means condone the court's actions, we hold that the court did not abuse its discretion in denying the motion to recuse."

B. Letters of Public Reprimand

In re Ledsinger, Board of Judicial Conduct (Sept. 28, 2020).

"This letter shall serve as a public reprimand pursuant to Tenn. Code Ann. § 17-7-5-303(e)(2)(B)(i)(c).

"On or about July 16, 2020, you made an inappropriate comment to a courtroom audience consisting of criminal defendants, some of whom were African-American. Specifically, referring to the Tennessee Supreme Court's requirement that face coverings be worn in court, you stated, 'the Grand Wizard of our Supreme Court said we have to wear these masks' or words to that effect.

"In a letter dated August 24, 2020, you admitted that you made the statement, explaining that your words were intended to 'soften any resistance by those present in the courtroom to the requirements of wearing a mask, as we have had negative feedback to this [Supreme Court] mandate.' You acknowledged that you were wrong to make the statement and that you meant no disrespect to anyone.

"On September 5, 2020, an investigative panel of this Board authorized a full investigation into this matter pursuant to Tenn. Code Ann. § 17-5-303(c)(3). In a letter dated September 8, 2020, you were given notice of the panel's decision to authorize the investigation as required by Tenn. Code Ann. § 17-5- 303(d)(l).

"In addition to your written response, you had a phone conversation with Disciplinary Counsel on September 23, 2020, to discuss this matter. During this conversation, you acknowledged the perception problem with your comment and reiterated your regret in making it. You emphasized that the comment was spontaneous and that you intended no disrespect.

"Judges are expected to maintain the highest standards of conduct and dignity of judicial office at all times. Preamble, Tenn. Sup. Ct. R. 10. This obligation includes the specific responsibility of avoid words or conduct that manifest bias or prejudice. Tenn. Sup. Ct. R. 10, RJC 2.3(B). A participant in a legal proceeding who hears racially insensitive comments, such as the one involved here, may reasonably perceive that the judge is biased or prejudiced, regardless of whether bias or prejudice actually exists. It is essential that all persons appearing in our courts have confidence that the judge will dispense justice respectfully and fairly. Comments like the one at issue do not inspire such confidence.

"In addition, judges must be dignified and courteous to those with whom they deal in an official capacity. Tenn. Sup. Ct. R. 10, RJC 2.8 (B). The statement involved here, said in open court, is neither dignified nor courteous.

"Further. judges are required to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary and must avoid impropriety and the appearance of impropriety. Tenn. Sup. Ct. R. 10, RJC 1.2. Comments like the one at issue undermine public confidence in the integrity and impartiality of the legal process, especially for those persons who, after hearing an insensitive comment from the judge, have their cases adjudicated by that judge. Such persons may reasonably question whether they received impartial and unbiased treatment even though, as here, there is nothing to suggest bias or prejudice in any case.

"Finally, in addition to the racial insensitivity or your comment, the comment impugned a higher court. While there is no evidence to doubt your assertion that you had no intent to cast aspersions on any member of the Tennessee Supreme Court or anyone else, those who heard your comment have no way or determining your intent apart from the words used. Once such comments are made, the damage is done.

"The investigative panel decided to impose a public reprimand, which you have accepted. In imposing this particular sanction, the panel considered that you have acknowledged the problem with your comment and that you fully cooperated with Disciplinary Counsel throughout this matter.

"In short, comments such as the one involved here, even if made off-the-cuff and with no intent to be offensive, reflect an ethical lapse that undermines public confidence that our judges are unbiased in fact and in appearance. The Board trusts that the reprimand imposed today will result in an elevated consciousness about how to approach this and similar situations going forward."

In re Young, Board of Judicial Conduct (Oct. 5, 2020).

"This letter shall serve as a public reprimand pursuant to Tenn. Code Ann. § 17-5-303(e)(2)(B)(i)(c).

"This reprimand concerns your actions relating to inappropriate messages you sent to multiple women on various social media platforms from 2015 to 2020. Recipients of the messages include, among other persons, a legal professional employed by a law firm that conducts business in your court and a litigant who formerly had a child custody matter before you. The messages include content ranging from flirtatious to overtly sexual. Most of these communications depict you in your judicial robe.

"On August 6, 2020, an investigative panel of this Board authorized a full investigation into this matter pursuant to Tenn. Code Ann. § 17-5-303(c)(3). In a letter dated August 7, 2020, you were given notice of the panel's decision to authorize the investigation as required by Tenn. Code Ann. § 17-5- 303(d)(l).

"In a written response dated August 31, 2020, you acknowledged that you sent the inappropriate messages and that doing so was beneath the dignity of judicial office. You took full responsibility for your actions.

"Judges are expected to maintain the highest standards of conduct and dignity of judicial office at all times. Preamble, Tenn. Sup. Ct. R. 10. Thus, the Code of Judicial Conduct applies to both the professional and personal conduct of a judge. Tenn. Sup. Ct. R. 10, RJC 1.2, cmt. 1. There is no exception to this principle for the use of social media.

"Your social media activities described above run afoul of a number of ethical standards designed to maintain public trust and confidence in the judiciary. First, judges are prohibited from engaging in personal activities that would appear to a reasonable person to be coercive. Tenn. Sup. Ct. R. 10, RJC 3.1(D). Engaging in sexual conversations and soliciting pictures while in your judicial robe would appear to a reasonable person to be coercive, particularly when the recipients of those communications include former litigants and persons whose job responsibilities intersect with the court system.

"Second, judges are prohibited from engaging in personal activities that would appear to a reasonable person to undermine the judge's integrity and impartiality. Tenn. Sup. Ct. R. 10, RJC 3.1(C). Here, your inappropriate use of social media has created ethical dilemmas for attorneys who litigate before you, especially in domestic relations matters. Some of these attorneys have had to seek advice from the Board of Professional Responsibility regarding their own ethical obligations to disclose to clients what they know about your activities. Also, in at least one instance, a party used this knowledge to their strategic advantage in a case. Thus, although you may have thought that your social media communications were private, your activities have adversely affected the administration of justice.

"Third, a participant in a legal proceeding, especially in a domestic relations matter, who learns that the judge sent inappropriate messages to women on social media may reasonably perceive that the judge is biased or prejudiced, regardless of whether bias or prejudice actually exists. *See* Tenn. Sup. Ct. R. 10, RJC 2.3(B) (a judge must avoid words or conduct that manifest bias or prejudice). While there is nothing to suggest that you were biased or prejudiced in any case, such litigants may reasonably question whether they received impartial and unbiased treatment. It is imperative that

judges conduct themselves on social media in a way that ensures litigants have no reason to believe their case was not fairly judged.

"Fourth, judges are prohibited from engaging in personal activities that interfere with the proper performance of their duties. Tenn. Sup. Ct. R. 10, RJC 3.1(A). Sending inappropriate messages on social media may well interfere with a judge's ability to preside over future litigation. These circumstances are a prime example, as you have had to recuse yourself in a case after a party learned of your social media activities and asked you to step aside. As this situation illustrates, it is essential that judges interact with others in a way that will not interfere with their work as judges. While judges may utilize social media, they must 'at all times remain conscious of the solemn duties they may later be called upon to perform.' *State v. Madden*, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *8 (Tenn. Crim. App. March 11, 2014).

"Fifth, judges are required to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Tenn. Sup. Ct. R. 10, RJC 1.2. Inappropriate messages sent by a sitting judge to anyone, much less to those who have ties to the court system like former litigants and legal professionals, do not inspire such confidence. To the contrary, such ethical lapses erode the confidence we ask the public to place in our judges. Indeed, 'every time a judicial officer engages in misconduct, he or she spends the goodwill of the judiciary as a whole.' *In re Kwan*, 443 P.3d 1228, 1238 (Utah 2019).

"The investigative panel decided to impose a public reprimand, which you have accepted. In imposing this particular sanction, the panel considered in mitigation that you acknowledged the problems created by your actions, that you fully cooperated with Disciplinary Counsel, and that you have no prior record of discipline since becoming a judge.

"Finally, as part of this public reprimand, you have agreed to the following: (1) a suspension of thirty days, which will be held in abeyance provided there are no meritorious complaints involving prospective ethical misconduct of any type for the remainder of your current term; (2) you will refrain from using a picture of yourself in your judicial robe as a profile picture on any social media platform unless conducting court business; (3) you will complete at your own expense, either in person or online, a judicial ethics program addressing ethical issues in the context of social media on or before December 31, 2020, and provide Disciplinary Counsel with a certificate of completion; (4) you will recuse yourself as a matter of course from all cases involving attorneys who will be identified separately from this letter; and (5) you will refrain from engaging in any similar misconduct while a judge.

"In short, as you have acknowledged, your use of social media has reflected poorly on you as a jurist. The sanctions imposed today are among the most severe that can be imposed short of removal from office, and the Board trusts that it will be unnecessary to revisit these issues in the future."

In re Hinson, Board of Judicial Conduct (Dec. 15, 2020).

"This letter shall serve as a public reprimand pursuant to Tenn. Code Ann. § 17-5-303(e)(2)(B)(i)(c).

"This reprimand concerns you conducting judicial business outside the parameters of the COVID-19 Judicial District Plan for the 21st Judicial District as approved by the Tennessee Supreme Court.

Specifically, you have failed to limit the number of persons in your courtroom and have not been enforcing social distancing requirements. To the contrary, your courtroom has at times been filled to capacity, even to the point of members of the public having to stand shoulder to shoulder along the walls because all the seats are taken. In addition, referring to the Tennessee Supreme Court's pandemic-related guidelines for the Judicial Branch, you commented to a courtroom audience that you wished Chief Justice Jeff Bivins would win an award so that the COVID-19 mandates from the Supreme Court would end.

"In correspondence and in phone conversations with Disciplinary Counsel, you admitted that you have failed to enforce the guidelines in the COVID-19 Judicial District Plan applicable to your court. You also admitted making the comment in court described above. You acknowledged that making the comment was wrong and that you intended no disrespect.

"On November 24, 2020, an investigative panel of the Board authorized a full investigation into this matter pursuant to Tenn. Code Ann. § 17-5-303(c)(3). In a letter dated December 4, 2020, you were given notice of the panel's decision to authorize the investigation as required by Tenn. Code Ann. § 17-5-303(d)(1).

"While we are mindful that your courtroom is small and that you have been trying to avoid a backlog of cases, the COVID-19 guidelines adopted by our Supreme Court are not mere suggestions. Conducting judicial business within those guidelines, which have been expressed in court orders, is not optional. *See Webb v. Nashville Area Habitat for Humanity Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011) ('[o]nce the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts'). By requiring all judicial districts to adopt measures designed to protect users and employees of the court system from the risks associated with COVID-19, the Supreme Court has recognized that the health and safety of litigants, witnesses, attorneys, court staff, and others, is of utmost importance. Thus, regardless of how logistically or administratively inconvenient, and no matter a judge's personal views concerning the pandemic generally, all judges are obligated to comply with and enforce the pertinent guidelines. You are no exception. *See* Tenn. Sup. Ct. R. 10, RJC 1.1 (a judge shall comply with the law); Tenn. Sup. Ct. R. 10, RJC 2.5(B) (a judge shall cooperate with other judges and court officials in the administration of court business).

"In addition, judges are expected to maintain the highest standards of conduct and dignity of judicial office at all times. Preamble, Tenn. Sup. Ct. R. 10. This obligation includes the specific responsibility of being dignified and courteous with those with whom a judge deals in an official capacity. Tenn. Sup. Ct. R. 10, RJC 2.8(B). Your comment to a courtroom audience expressing your desire that the Chief Justice receive an award so that the Supreme Court's pandemic-related requirements would end is neither dignified nor courteous. While there is no evidence to doubt your assertion that you had no intent to cast aspersions on any member of the Supreme Court, those who heard your comment have no way of determining your intent apart from the words used. Once such comments are made, the damage is done.

"Moreover, a judge is required to act at all times in a manner that promotes public confidence in the judiciary. *See* Tenn. Sup. Ct. R. 10, RJC 1.2. The public is more likely to respect and have confidence in the integrity and quality of justice administered by a judge if the judge is outwardly respectful and dignified. The comment involved here, stated in open court, does not inspire such confidence.

"The investigative panel decided to impose a public reprimand, which you have accepted. In imposing this particular sanction, the panel considered that you have acknowledged the problems with your actions and that you fully cooperated with Disciplinary Counsel throughout this matter. You have also agreed to abide by the COVID-19 guidelines adopted by the Supreme Court and your District Plan going forward.

"In short, injudicious comments such as the one involved here, even if made off-the-cuff and with no intent to be offensive, reflect an ethical lapse that undermines the public's confidence in the professionalism and integrity of our judges. In addition, as you have acknowledged, failing to abide by the directives of a higher court is unacceptable and reflects poorly on you as a jurist. The Board trusts that the reprimand imposed today will result in an elevated consciousness about how to approach this and similar situations going forward.

C. Deferred Discipline Agreement

In re Tomlinson, Board of Judicial Conduct (Feb. 1, 2021).

"This agreement entered into by and between an investigative panel of the Board of Judicial Conduct ('Board') and Joyce Tomlinson, Judicial Commissioner, Stewart County, Tennessee, is a Deferred Discipline Agreement as contemplated by Tenn. Code Ann. § 17-5-301(g)(1). This agreement has been approved by an investigative panel of the Board and is intended to resolve Complaint No. B20-8331 filed against Commissioner Tomlinson.

"Allegations: On or about November 15, 2020, Commissioner Tomlinson was asked to come to the Stewart County Sheriff's Department to consider issuing an arrest warrant. Citing a conflict of interest with the officer seeking the warrant, she refused to sign the warrant. Another commissioner was called in, and he issued the warrant.

"Rather than leaving the Sheriff's Department or conducting other judicial business, Commissioner Tomlinson engaged in a tense and sometimes angry discussion of an unrelated criminal case involving a family member with officers in the room. For more than thirty minutes, Commissioner Tomlinson questioned and challenged the officers about the facts of her family member's case, particularly the officer who had investigated the matter. A supervisor was summoned and, when he arrived, Commissioner Tomlinson questioned and challenged him about the case as well and continued doing so after he made clear, more than once, that it was inappropriate for the discussion to be taking place. Commissioner Tomlinson also informed the supervising officer that she had spoken with the Stewart County Sheriff about the case who, in turn, had spoken with the supervisor. Commissioner Tomlinson expressed her displeasure to the supervisor that he had not relayed her concerns about the case to the investigating officer. In addition, she complained about her family member's case to her colleague when he arrived to address the unrelated warrant that she declined to sign.

"During the encounter with the officers, Commissioner Tomlinson was sarcastic, argumentative, raised her voice, and banged her hands on the table. She threatened to call the investigating officer's family, dared him to stop her on the street, and taunted him by commenting that he was afraid of her even though he had a gun. She made it clear that she did not believe his version of the facts, and she offered alternative facts pertaining to her family member's case.

"In short, Commissioner Tomlinson injected herself into an active criminal case involving a family member and acted in a discourteous and intemperate manner inappropriate for a judicial officer. Her actions implicate the following: Tenn. Code Ann. § 17-5- 301(j)(1)(C) (a judicial offense includes a violation of the Code of Judicial Conduct); Tenn. Code Ann. § l7-5-301(j)(1)(H) (a judicial offense includes conduct calculated to bring the judiciary into public disrepute or to adversely affect the administration of justice); Tenn. Sup. Ct. R 10, RJC 1.1 (a judge shall comply with the law, including the Code of Judicial Conduct); Tenn. Sup. Ct. R 10, RJC 1.2 (a judge shall act at all times in a manner that promotes public confidence in the judiciary and avoid impropriety and the appearance of impropriety); Tenn. Sup. Ct R. 10, RJC 1.3 (a judge shall not abuse the prestige of judicial office to advance the personal interests of the judge or others); Tenn. Sup. Ct. R. 10, RJC 2.4(B) (a judge shall not permit family or other relationships to influence the judge's conduct or judgment); Tenn. Sup. Ct. R. 10, RJC 2.8(B) (a judge shall be patient, dignified, and courteous to those with whom the judge deals in an official capacity); and Tenn. Sup. Ct. R 10, RJC 3.l(D) (prohibiting personal activities that would appear to a reasonable person to be coercive).

"Terms of agreement: It is agreed between the investigative panel of the Board and Commissioner Tomlinson that for and in consideration of the Board not pursuing formal charges at this time, Commissioner Tomlinson will resign from her position no later than February 14, 2021. It is further agreed that she will not seek an appointed or elected judicial office in the future. If for any reason Commissioner Tomlinson becomes non-compliant with this agreement or another meritorious complaint is filed before February 14, 2021, Disciplinary Counsel will be authorized by the investigative panel to file formal charges. Upon the effective date of Commissioner Tomlinson's resignation, the pending complaint will be dismissed and no further action will be taken to prosecute the allegations."

D. Judicial Ethics Opinions

Judicial Ethics Committee Advisory Opinion 21-01 (May 10, 2021).

"The Judicial Ethics Committee has been asked for an opinion on whether a judge may use, or allow to be used, his or her likeness for the purpose of raising funds for a for profit organization that intends to donate a portion of those funds to legal aid societies and other organizations whose goal is to promote greater access to justice."

"No. The Code of Judicial Conduct prohibits a judge from aiding a for profit organization in planning related to fundraising and soliciting contributions for such an organization or entity. RJC 3.7(A)(l), (2). Additionally, while the Code of Judicial Conduct encourages judges to engage in educational, religious, charitable, fraternal or civic extrajudicial activities concerning the law, the legal system, the administration of justice, and even non-legal matters, such activity is to be conducted with not-for-profit organizations. RJC 3.1, Comment 1. Finally, 'A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.' RJC 2.4."

"The instant question was precipitated by a request from DASH4LAW, Inc. ('DASH') to use the likeness of certain judges to create a non-fungible token ('NFT') which would be auctioned off with a portion of the proceeds from the auction to be donated to legal aid groups who promote access to justice. In order to fully analyze the issue and how the Code of Judicial Conduct is implicated, we have highlighted specific portions of the participation agreement submitted by DASH, as well as the explanatory memorandum. The participation agreement proposed by DASH states that:

> [the] Judge agrees to provide DASH with a digital image ('Art') for posting by DASH and for DASH to create an associated a non-fungible token ('NFT') to www.opensea.io, www.rarible.com or any other NFT online marketplace ('Marketplace') for sale to the highest bidder. If and only as allowed by the Marketplace, DASH will provide a description of the Art and incorporate any additional terms or restrictions desired by the Parties. DASH will also create a digital wallet to accept donations ('Donations') in connection with the Marketplace ('Wallet'). Upon the sale of the NFT to the buyer or any subsequent buyers (collectively, 'Buyer'), DASH will deduct from the Donation (i) ten percent (10%) of the Donation as a fee, (ii) any costs to create the Wallet, and (iii) fees (if any) imposed by the applicable Marketplace (collectively, ''Fees') and donate the remainder as directed by the Judge to either or both of the Legal Aid Clinic of East Tennessee and the Knoxville Community Mediation Center (or such other charitable entities mutually agreed upon by the Partles).

"The accompanying explanatory memorandum attached to the agreement states that the purpose of the agreement is to create auctionable items with a portion of the proceeds of the auction to be donated to Knoxville Community Mediation Center (KCMC) and Legal Aid of East Tennessee (LAET). The memorandum explains that:

> [the] female Tennessee Supreme Court justices will be honored with non-fungible tokens which depict their digital image and the outstanding accomplishments of their careers. These NFT's will be auctioned and sold to the highest bidders who will then own the only authentically original digital image of the Justices .... The TVAJA's first NFT fundraising exclusively will benefit the Knoxville CMC and LAET. As customary in NFT transactions, DASH4Law, the technology provider, will only charge __% for each transaction. The donors receive a charitable deduction for their donation. The Justices receive no compensation for the gift of their image. Like a charity dinner, the Justices lend their image and reputation to charitable causes expecting nothing in return."

"As relevant to the agreement in question, the first concern is that DASH is a for profit company. While the Code of Judicial Conduct encourages judges to engage in certain extrajudicial activities, especially those that promote the legal system and access to justice issues and concerns, its rules are clear that such activities should be limited to dealings with not-for-profit organizations. As noted above, Comment 1 to RJC 3.1 states that: [t]o the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities *not conducted for profit*, even when the activities do not involve the law. *See* RJC 3.7.

"RJC 3.1, Comment 1 (emphasis added). Moreover, while judges are allowed to participate in such extrajudicial activities, a judge's ability to aid in fundraising and soliciting of contributions is limited both as to the type of organizations they may help and from whom they may solicit funds. Pursuant to RJC 3.7:

> a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations *not conducted forprofit*, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;

"RJC 3.7 (emphasis added).

"A review of the documents provided, as well as a search of the Secretary of the State's website, makes it clear that DASH is a for profit company. Per the documents, DASH deducts from the donation a 10% fee plus any other costs or fees associated with the creation of the NFT as well as the auction. While the agreement states that the judge will not receive any compensation from the proceeds of the auction, the rule does not make that distinction. Rather, the rule simply states that such activities are allowed when working with a not-for-profit organization. In addition, while the judge is not directly soliciting the funds for DASH and the organizations which DASH's donation will aid, the Code of Judicial Conduct limits from whom a judge may solicit funds, which includes members of the judge's family and judges over whom the judge in question does not have supervisory or appellate authority. Since the auction proposed is not limited as to who may bid on the NFT, it appears that a judge would, at least indirectly, be soliciting funds beyond the narrowly tailored list of acceptable individuals per the Code of Judicial Conduct.

"In addition to the concerns relating to extrajudicial activities with a for profit company, the Code of Judicial Conduct also address external influences on judicial conduct. More specifically, RJC 2.4 states that '[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.' RJC 2.4. While the concern here is perhaps subtle, there is a concern that the general public may perceive that DASH, KCMC and LAET, or the person who purchased the NFT of the judge would have a position of influence with the judge. When viewed in light of the preamble to the Code of Judicial Conduct that '[i]nherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system' and RJC 1.2 which states that '[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety,' it is clear that participation in the proposed agreement is not permissible as it can bring into question influence over a judge and, therefore, allow for questioning of 'the independence, integrity, and impartiality of the judiciary.'

"One additional subtle concern is raised by the 'Promotion' section of the participation agreement. Per that section,

[A] judge hereby grants to DASH a royalty free, non-exclusive, irrevocable, worldwide, fully-paid up license use, copy, modify, or display the Art and the Judge's name an appropriate information for the promotion of DASH or any of DAHS's products or services.

"This language appears to be in direct conflict with RJC 1.3 which states that 'A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.' While Comment 4 to this rule directly addresses the publication of a judge's personal writings, the caution expressed by the comment is directly on point. According to Comment 4, when a judge writes or contributes to a publication for a for profit entity,

> [a] judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. *In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation*.

"The granting of a royalty as defined in the participation agreement is clearly in direct conflict with the spit of RJC 1.3 if not the rule itself.

"For these reasons, it is the opinion of the Tennessee Judicial Ethics Committee that no judge should participate in the program as currently comprised."

TLI 2021 Ethics Last Hour

Our Brothers' and Sisters' Keepers: Helping Each Other Stay Healthy in a Post-COVID Profession

We've always known that practicing law is stressful. But we've come to better understand in recent years that it can be downright unhealthy mentally (and perhaps otherwise).

Recent research has highlighted the dangers of life in the legal profession to our mental health and well-being, including the enhanced risks of impairment from various sources and substance abuse. With those risks come ethics issues of numerous kinds.

In this program, we'll explore the ethics issues and the risks, as well as constructive strategies for addressing them. We'll also identify concrete steps we can all take to protect ourselves, to respond to signs of impairment in those we interact with, inside and outside our practices and offices. We'll also discuss the signs and symptoms to look for to spot potential problems before they become disabling or career-ending.

TENNESSEE RESOURCES

Tennessee Lawyer Assistance Program, www.TLAP.org, (615) 741-3238 or (877) 424-8527.

From the TLAP website: If you need to talk to a TLAP representative outside of business hours, please call 615-741-3238 and press "1." Leave a detailed message and someone will return your call as soon as possible.

APPLICABLE TENNESSEE ETHICS RULES

RULE 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in a violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

. . . .

RULE 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 8.3: Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the Disciplinary Counsel of the Board of Professional Responsibility.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Board of Judicial Conduct.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6 or information gained by a lawyer or judge while serving as a member of a lawyer assistance program approved by the Supreme Court of Tennessee or by the Board of Professional Responsibility.

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