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

FIFTY-FIRST 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 is a partner in Adams and Reese LLP, whose practice includes legal ethics, media law, and commercial litigation.The ABA Center for Professional Responsibility recently bestowed on him the prestigious Michael Franck Award, their highest award for work in the field of ethics and professional responsibility. For more than a decade he led the TBA committee that drafted Tennessee's current ethics rules and served on the ABA committee that substantially revised the ABA Model Rules of Professional Conduct in 2002. He has served as Treasurer of the ABA and President of the TBA.

Wade V. Davies is the Managing Partner at Ritchie, Dillard, Johnson & Stovall, 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 on the Executive Committee of the Tennessee Association of Criminal Defense Lawyers, and is a past President of the Knoxville Bar Association. He is also Board Chair of the McNabb Center.

Edward D. Lanquist, Jr. is a shareholder with Baker Donelson, located in its Nashville office. 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, and a Rule 31 mediator. Ed served as Tennessee Bar Association General Counsel for seven years, is the current Vice-President and will be TBA President in two years.

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, CONFLICTS, 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	CIVIL PROCEDURE, ALTERNATIVE DISPUTE RESOLUTION
11:15-12:15	CONTRACTS, BUSINESS ORGANIZATIONS, GOVERNMENT
12:15-1:30	BREAK
1:30-2:15	ESTATES, CONSERVATORSHIPS AND TRUSTS, TAXATION
2:15-3:15	INTELLECTUAL PROPERTY, TRADE REGULATION, CONSUMER LAW, ANTITRUST
3:15-3:25	BREAK
3:25-4:25	BANKRUPTCY, CONSTITUTIONAL LAW
4:25-4:30	BREAK
4:30-5:00	PROPERTY, ENVIRONMENTAL LAW
5:00-5:45	CIVIL RIGHTS, EMPLOYMENT 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. Termination of Parental Rights; Adoption

A. Voluntary Delivery of Infant

Chapter 1008, Public Acts 2022, amending T.C.A. § 36-1-142 and various other statutes eff. May 9, 2022.

T.C.A. § 36-1-142 and related statutes that permit the voluntary delivery of a newborn 14 days or younger to certain specified facilities now also permit the placing of the baby in a "newborn safety device" located in a participating police station, fire station or hospital. This can give the mother the ability to remain anonymous.

B. Standing to File for Termination

Chapter 937, Public Acts 2022, amending T.C.A. § 36-1-113 and various sections of Title 36, Chapter 1, Part 1 and adding T.C.A. § 36-1-149 eff. July 1, 2022.

This public act expands the definition of severe child abuse for purposes of termination of parental rights and giving a parent standing to file a petition to terminate the parental rights of the abusive parent, declares all adoption records to be a public record when 100 years have elapsed since the date the adoption was finalized, and makes various other changes in regard to termination of parental rights and adoption.

C. Exclusion of Mother's Rebuttal Witness Not a Denial of Fundamental Fairness

In re Matthew K., No. E2020-00773-COA-R3-PT (Tenn. Ct. App., Frierson, Aug. 13, 2021).

"This consolidated appeal involves termination of parental rights in a case focusing on Zayne R., the minor child of Brittney R. ('Mother') and Joseph D., and Matthew K., the minor child of Mother and Joshua K. In June 2019, Mother's parents, Larry R. ('Grandfather') and Bertha R. ('Grandmother') (collectively, 'Grandparents'), filed two petitions in the Hamilton County Circuit Court ('trial court'), seeking termination of Mother's parental rights, respectively, to Zayne R. and Matthew K. (collectively, 'the Children'). The Children had previously been removed from Mother's custody and placed in the custody of Grandparents pursuant to an order entered by the Hamilton County Juvenile Court ('juvenile court'). Following a consolidated bench trial, the trial court granted Grandparents' termination petitions based upon its finding by clear and convincing evidence that Mother had abandoned the Children by failing to visit and by failing to financially support them during the statutorily determinative period. The trial court further found that it was in the Children's best interest to terminate Mother's parental rights. Mother has appealed. Discerning no reversible error, we affirm the trial court's final orders terminating Mother's parental rights."

"Mother contends that the trial court erred in precluding her three rebuttal witnesses from testifying during trial, predicated on her failure to comply with Eleventh Judicial District (Hamilton County) Local Rule of Civil Practice 8.02(c) requiring parties to file and serve a witness list at least ten business days before trial. Mother specifically argues that (1) the trial court could not have

undertaken 'the thorough fact-finding' process required for parental termination hearings based solely on the parties' testimonies, particularly considering that all rebuttal witnesses would have had information relevant to the grounds of abandonment and best interest of the Children; (2) the trial court could have imposed a sanction less harsh than barring the testimony of the three witnesses; (3) Grandparents were not unfairly disadvantaged by the late notice and had 'implicit and explicit notice of the witnesses' because the witnesses were present in the gallery during the December 4, 2019 hearing and Grandparents knew each witness; and (4) Mother was not afforded a fundamentally fair procedure due to the trial court's ruling preventing these witnesses from testifying at trial."

"Although Mother's position is not entirely clear, we discern two primary arguments with regard to the trial court's enforcement of its local rule and exclusion of witness testimony. First, Mother ostensibly argues that the trial court's enforcement of Local Rule 8.02(c) and its resultant decision to exclude the testimony of her witnesses impaired her ability to receive a fundamentally fair termination proceeding. Moreover, although Mother never references the phrase, 'abuse of discretion,' she also appears to argue that the trial court abused its discretion by prohibiting her witnesses from testifying, particularly when these witnesses could have offered evidence relevant to the grounds for termination and the best interest of the Children.

"The question of whether a trial court's exclusion of rebuttal witnesses' testimony renders a parental termination proceeding fundamentally unfair appears to be a matter of first impression for this Court. Mother provides no authority for her contention that the trial court's enforcement of its local rule and exclusion of rebuttal witnesses' testimony rendered the termination trial fundamentally unfair. We likewise have found no such authority. Upon careful review, we determine that the trial court's decision to exclude the evidence did not render the termination trial fundamentally unfair.

"A parent's right to the care and custody of her children is 'among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions.' *In re Audrey S.*, 182 S.W.3d 838, 860 (Tenn. Ct. App. 2005). However, the contours of due process have not always been clear. As the United States Supreme Court noted in *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, '"due process" has never been, and perhaps can never be, precisely defined,' and it is 'not a technical conception with a fixed content unrelated to time, place, and circumstances.' 452 U.S. 18, 24 (1981) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Nevertheless, it is clear that the concept of due process 'expresses the requirement of "fundamental fairness."' *Lassiter*, 452 U.S. at 24.

"Beyond the essential requirements of notice and an opportunity to be heard in a meaningful time and manner, *see In re Carrington H.*, 483 S.W.3d at 534, fundamental fairness is also difficult to precisely define, *see Lassiter*, 452 U.S. at 24 (noting that 'fundamental fairness' is a 'requirement whose meaning can be as opaque as its importance is lofty'). However, the United States Supreme Court has delineated three elements to balance when determining exactly what due process requires of courts. Those three factors are as follows:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

"*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Although we have located no Tennessee appellate decision addressing this particular question, and as a result no Tennessee decision applying these elements to this specific issue, the Michigan Court of Appeals has done so in a decision, *In re S.M.*, that we discern to be instructive and persuasive. *See In re S.M.*, No. 220706, 2000 WL 33389746 (Mich. Ct. App. Dec. 26, 2000); *see also Summers Hardware & Supply Co. v. Steele*, 794 S.W.2d 358, 362 (Tenn. Ct. App. 1990) ('Cases from other jurisdictions ... are always instructive, sometimes persuasive, but never controlling in our decisions.'). We therefore will address in turn each due process element as applied to the facts of this case."

"The private interest at stake in this action is one of great significance and constitutional import because a parent's right to the care and custody of her children is a fundamental and 'recognized liberty interest[ ].' *In re Audrey S.*, 182 S.W.3d at 860. Moreover, the United States Supreme Court has explained that 'a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection."' *Lassiter*, 452 U.S. at 27 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). The termination of a person's parental rights has been described by the United States Supreme Court as a 'unique kind of deprivation,' *Lassiter*, 452 U.S. at 27, and recognized as 'final and irrevocable,' *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). By reason of the magnitude of the termination of parental rights, a 'parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one.' *Lassiter, 452 U.*S. at 27. As such, the stakes involved for Mother are 'profoundly high' and would weigh in favor of a finding that the preclusion of Mother's rebuttal witnesses' testimony rendered the termination proceeding fundamentally unfair. *In re Audrey S.*, 182 S.W.3d at 861."

"The second element to be considered is the risk that Mother would be erroneously deprived of her interest in the care and custody of the Children through the procedure used. In this case, the procedure relates to the trial court's enforcement of its local rule and consequent exclusion of testimonial evidence. Whether the trial court risked erroneously depriving Mother of her parental rights fundamentally depends on whether the testimony of her witnesses could have affected the outcome of the trial.

"We note that the question of a risk of erroneous deprivation of Mother's parental rights is significantly impacted by Mother's failure to make an offer of proof at trial in compliance with Tennessee Rule of Evidence 103(a). This failure ordinarily renders the issue waived. *See Hill* [*v. Hill*, No. M2006-01792-COA-R3-CV], 2008 WL 110101, at *5 [(Tenn. Ct. App. Jan. 9, 2008)] ('Generally, the appellate courts will not consider issues relating to the exclusion of evidence when this tender of proof has not been made.'). Tennessee Rule of Evidence 103(a) provides:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
> * * *
>
> (2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

"Therefore, we generally cannot assign error to the trial court's exclusion of evidence if the party failed to offer the trial court the substance of the evidence. *Hill*, 2008 WL 110101, at *5. A party may make an offer of proof by 'presenting the actual testimony, stipulating the content of the excluded evidence, or presenting a summary, oral or written, of the excluded evidence.' *Id.* In *Hill*,

this Court decided that it could not determine whether the trial court's erroneous exclusion of a parent's rebuttal witness testimony at a trial involving modification of custody had affected the outcome of the trial because the mother had not submitted an offer of proof. *Id.* at *6. The *Hill* Court concluded in pertinent part:

> An erroneous exclusion of evidence, however, does not require reversal unless we can determine the evidence would have affected the outcome of the trial had it been admitted. The appellate courts cannot make such a determination without knowing what the excluded evidence would have been.

"*Id.* at *5 (internal citations omitted).

"In Tennessee, two exceptions exist relative to the requirement for parties to make an offer of proof. *Id.* One exception is provided by the rule itself, stating that error may be found if 'the substance of the evidence and the specific evidentiary basis supporting admission ... were apparent from the context.' Tenn. R. Evid. 103(a)(2). The remaining exception derives from this Court's adoption of an exception expounded in *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1305 (8th Cir. 1991), and occurs when the 'exclusion of evidence seriously affects the fairness of the trial.' *Hill*, 2008 WL 110101, at *5 (citing *First Nat'l Bank & Trust Co. v. Hollingsworth*, 931 F.2d 1295, 1305 (8th Cir. 1991)). Considering the question before us, we determine that neither exception applies to our analysis.

"Regarding the first exception, although we find that a portion of Aunt's testimony was apparent from the context, this is insufficient to cure Mother's failure to make an offer of proof. Based on Mother's counsel's questioning of Grandfather, it appears that Mother was intending to call Aunt to testify that Grandfather had contacted her and asked her not to testify on Mother's behalf. This is the only substance of expected testimony from any of the three witnesses that is apparent from the context at trial. Although Mother's counsel informed the trial court that she needed to 'have additional testimony to rebut claims that were made and statements that were made here on the record' and included in her appellate brief that these rebuttal witnesses had 'relevant information related to the grounds for termination and a best interest analysis,' these broad statements do not constitute a sufficient offer of proof and do not illuminate the substance of what these witnesses' testimony would have been at trial.

"In the absence of an offer of proof, we have been provided no foundation upon which to analyze whether the exclusion of Mother's witnesses' testimony would have affected the outcome of the trial and thereby placed Mother's parental rights at risk of being erroneously terminated. Although we could surmise that these witnesses would have offered relevant information to specifically rebut Grandmother's claims regarding visitation and Grandmother's denial that she and Grandfather prevented Mother from visiting the Children, Mother's counsel did not proffer that evidence. Consequently, we will not presume that the testimony of Mother's rebuttal witnesses would have affected the outcome of the trial or that the trial court's decision to prohibit these witnesses from testifying created a risk of erroneous deprivation of Mother's parental rights.

"As noted previously, we find the Michigan Court of Appeals' decision in *In re S.M.*, a parental termination case, persuasive concerning this query. 2000 WL 33389746. The trial court in *In re S.M.* excluded testimony from the father's witnesses because he filed a witness list after the trial court's deadline and failed to include sufficient information for the opposing party to investigate the witnesses. *Id.* at *1. The trial court rejected the father's request for a one-week adjournment,

citing the court's 'congested docket, the risk of violating the six-month rule of MCR 5.972, and the inconvenience to the children's mother ... who had traveled to the court from North Carolina.' *Id.* at *1. In determining whether the trial court's enforcement of its scheduling order and exclusion of the evidence violated the due process requirements for a termination proceeding, the appellate court considered the due process elements enumerated in *Lassiter* and *Mathews*. *Id.* at *3.

"The Michigan appellate court ultimately concluded that there was no risk of an erroneous deprivation of the father's parental rights considering that the father's witnesses were all character witnesses, they did not observe the incidents that the petitioner alleged, and they would have 'offered little support to respondent's defense....' *Id.* In sum, the father could not show that the outcome of the trial would have been different had the trial court permitted him to present the witnesses. *Id.* Inasmuch as Mother failed to make an offer of proof before the trial court in the instant action, we determine that she similarly cannot demonstrate that the outcome of the trial would have been different or that the trial court risked erroneously terminating her parental rights."

"Notwithstanding the absence of an offer of proof from Mother, we can discern to some degree that there was little risk of an erroneous deprivation of Mother's parental rights because her own testimony supported the trial court's findings that she had failed to support the Children during the Determinative Period and failed to counter Grandparents' claims that Mother's visitation with the Children was anything more than token. With regard to her failure to support, Mother acknowledged that she did not provide regular support to the Children when she proffered that she was unaware she had an obligation to do so. Mother has failed to explain how additional testimony from other witnesses would have affected the trial court's conclusion that Mother failed to provide support during the Determinative Period when her own testimony confirmed such failure.

"Concerning her failure to visit, Mother testified that she had visited the Children between ten and thirteen times during the Determinative Period and that she would have visited more regularly had it not been for Grandparents' obstruction. However, in contrast to Grandmother, Mother did not provide specific dates and could only testify that she 'probably' visited the Children a certain number of times in February and May of 2019. In addition, Mother presented only one text message conversation occurring during the Determinative Period reflecting an unsuccessful attempt, and her only attempt, to schedule a visit with the Children on the same day, affording Grandparents little advance notice.

"Therefore, inasmuch as Mother's own testimony and documentary evidence did not rebut the trial court's findings that she had failed to support the Children and failed to engage in more than token visitation with them, we determine that there was little risk that the trial court would erroneously deprive Mother of her parental rights by declining to allow her to present testimony by her rebuttal witnesses in violation of the court's local rule."

"The third element to be considered is the government's interest, 'including the fiscal and administrative burdens that the additional or substitute procedures would entail.' *Mathews*, 424 U.S. at 321. In this case, the trial court maintained a responsibility to protect a stated government interest in an expeditious adjudication for the benefit of the Children. As our Supreme Court has previously noted:

> In parental termination proceedings, the burdens of extended litigation fall most heavily upon children—those most vulnerable and most in need of protection, stability, and expeditious finality. 'There is little that can be as detrimental to a child's sound development as uncertainty

> over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.' 'Due to the immeasurable damage a child may suffer amidst the uncertainty that comes with such collateral attacks, it is in the child's best interest and overall well[-]being to limit the potential for years of litigation and instability.'

"*In re Carrington H.*, 483 S.W.3d at 533 (internal citations omitted). This interest in 'expeditious finality' is also codified in Tennessee Code Annotated § 36-1-113(k) (Supp. 2020), which provides:

> The court shall ensure that the hearing on the petition takes place within six (6) months of the date that the petition is filed, unless the court determines an extension is in the best interests of the child. The court shall enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing. If such a case has not been completed within six (6) months from the date the petition was served, the petitioner or respondent shall have grounds to request that the court of appeals grant an order expediting the case at the trial level.

"In addition, the General Assembly has expressly stated its intent that 'the permanency of the placement of a child who is the subject of a termination of parental rights proceeding or an adoption proceeding not be delayed any longer than is absolutely necessary consistent with the rights of all parties....' Tenn. Code Ann. § 36-1-124(c) (Supp. 2020)."

"Finally, we note that 'Tennessee court rules, statutes, and decisional law are already replete with procedures, some previously described herein, designed to ensure that parents receive fundamentally fair parental termination proceedings.' *In re Carrington H.*, 483 U.S. at 533. We decline to add to these protections the requirement that trial courts must disregard their local rules, as well as a party's failure to comply with said rules, in order to ensure that parents can present rebuttal witnesses, particularly when the party had ample time to comply with the local rules and then failed to afford herself of procedural safeguards at trial by failing to make an offer of proof or request a continuance.

"Moreover, Tennessee Rule of Appellate Procedure 36(a) provides: 'Nothing in this 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.' Mother was responsible for failing to provide the opposing side with a witness list by the deadline prescribed by the local rules after being granted a nearly two-month continuance at her request. Not only did Mother fail to avail herself of procedural safeguards in the trial court, she also failed to preserve any objection or provide this Court with sufficient proof to properly evaluate her due process claim. Considering in total that Mother failed to establish that a risk existed that the trial court would erroneously deprive her of her parental rights, the trial court maintained a responsibility to protect a clear government interest in an expeditious adjudication, and Mother failed to request any substitute procedural safeguard, we hold that Mother's termination proceeding was fundamentally fair."

II. Parentage

A. Voluntary Acknowledgment of Paternity; Statute of Limitations Deleted

Chapter 863, Public Acts 2022, amending T.C.A. § 24-7-113 eff. July 1, 2022.

The five-year statute of limitations in which to challenge a voluntary acknowledgment of paternity has been deleted. Additionally, the statute has been amended to clarify its applicability is limited to a VAP signed by an unwed father.

B. Artificial Insemination; Sperm Donor Not Deemed a Legal Parent

Harrison v. Harrison, 643 S.W.3d 376 (Tenn. Ct. App., Bennett, 2021), perm. app. denied Feb. 10, 2022.

"Pamela Estelle Harrison and Shannon Nicole Hickman were married on February 25, 2011. Shannon took Pamela's last name of Harrison. The women were married in Iowa, because Tennessee did not recognize same-sex unions at the time of their marriage. Pamela had a son from a prior relationship, but the couple wished to have children of their own, so Shannon conceived via artificial insemination. Specifically, Joseph Compton provided semen in a urine specimen cup, with which Shannon was inseminated. Pamela and Shannon were acquainted with Mr. Compton because he was Pamela's son's football coach. Mr. Compton was married at the time of the artificial inseminations.

"Two children were conceived through Shannon's artificial inseminations—a daughter Chevelle Harrison (born in Tennessee in March 2014) and a daughter Stacei Harrison (also born in Tennessee in October 2015). Pamela's name was not included on Chevelle's birth certificate; however, Pamela's name was included on Stacei's birth certificate. The children call Pamela 'Mommy,' and they call Shannon 'Mama.' After the children were born, Mr. Compton did not take on the role of father in any way.

"Pamela filed for divorce on January 24, 2018 in the Montgomery County Circuit Court on the ground of irreconcilable differences. She also requested that her name be added to Chevelle's birth certificate. On February 2, 2018, Shannon answered and filed a counter-complaint for divorce requesting that Pamela's name be removed from Stacei's birth certificate. Shannon denied that Pamela 'has any parental rights to the children' because she is not their biological parent. Pamela filed a motion for a temporary parenting plan on February 16, 2018 and answered Shannon's counter-complaint for divorce on February 20, 2018.

"On March 21, 2018, Shannon filed a brief in the trial court asserting that Pamela did not have parental rights to the children because she had not taken the necessary steps to adopt them. She further argued that Tennessee's artificial insemination statute did not govern the case. On March 23, 2018, Shannon filed an affidavit signed by Mr. Compton stating, in relevant part:

3. That I believe myself to be the biological father of Chevelle and Stacei Harrison.
4. That I provided my sperm to the children's biological mother, Shannon Harrison.
5. That when I provided my sperm to Shannon Harrison, I did not sign any type of agreement waiving my parental rights, nor did I intend to waive my parental rights.
6. That I want to be part of my children's lives.
7. That I intend to file a Petition to establish myself as the father of these children.
8. That I believe it is in the best interest of the children that I be a part of their lives."

"The court ultimately held:

> Tennessee's artificial insemination statute as written applies to the parties and that the evidence shows that the parties intended to artificially inseminate Ms. Shannon Harrison and raise the children as a family. The Court finds that Mr. Compton was merely a sperm donor in the process with no intent to be a legal parent."

"The primary issue in this appeal is whether Tenn. Code Ann. § 68-3-306 applies to establish Pamela as a legal parent of the children born during the marriage. Tennessee Code Annotated section 68-3-306 states: 'A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife.' The trial court held that Tenn. Code Ann. § 68-3-306 applies to establish Pamela as the legal parent of the children. In so holding, the trial court interpreted the artificial insemination statute in connection with Tenn. Code Ann. § 1-3-104(b) and the United States Supreme Court's opinion in *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). Mr. Compton asserts that the artificial insemination statute should not apply to confer parentage because, in this context, 'consent' requires an 'express written agreement' and there was no written agreement between Pamela and Shannon regarding the artificial insemination. He further argues that Tenn. Code Ann. § 36-2-302(5) applies to establish him as the children's legal father in this case.

"We begin by reviewing the United States Supreme Court's landmark decision in *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015) because it bears on our interpretation of Tenn. Code Ann. § 68-3-306. In *Obergefell*, the United States Supreme Court held that 'same-sex couples may exercise the fundamental right to marry,' and that state laws are 'invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite sex couples.' *Obergefell*, 576 U.S. at 675-76, 135 S.Ct. 2584. Importantly, and as relevant to this case, the *Obergefell* Court recognized the 'constellation of benefits that the States have linked to marriage' includes:

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; *birth and death certificates*; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; *and child custody, support, and visitation rules.*

"Id. at 670, 135 S.Ct. 2584 (emphasis added). The Court further explained that because 'States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order[,]' there should be 'no difference between same- and opposite-sex couples with respect to [these rights].' *Id.*

"Following *Obergefell*, the United States Supreme Court decided *Pavan v. Smith*, —— U.S. ——, 137 S.Ct. 2075, 198 L.Ed.2d 636 (2017), a case that expounds upon and illustrates *Obergefell*'s commitment to extend the 'constellation of benefits ... linked to marriage' to same-sex couples. *Id.* at 2078. In *Pavan*, two married, same-sex couples who conceived their children through anonymous sperm donation sought to list both the birth mother and her same-sex spouse as parents on their children's birth certificates in Arkansas. *Pavan*, 137 S.Ct. at 2077. The Arkansas Department of Health refused to list the same-sex spouses on the birth certificates with the birth mothers. *Id.* The parents filed a lawsuit against the Arkansas Department of Health and sought a determination that the following statutory language applied to them: '[a]ny child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the

woman and the woman's husband....' *Id.* (citing Ark. Code § 9-10-201(a) (2015)). The Arkansas Supreme Court concluded that this statute would not extend to same-sex couples. *Id.* at 2077-78. The United States Supreme Court reversed the judgment of the Arkansas Supreme Court holding that such 'differential treatment infringes *Obergefell*'s commitment to provide same-sex couples "the constellation of benefits that the States have linked to marriage."' *Id.* at 2077 (citing *Obergefell*, 576 U.S. at 670, 135 S.Ct. 2584). The Court held that under the challenged law, 'same-sex parents in Arkansas lack the same right as opposite-sex parents to be listed on a child's birth certificate, a document often used for important transactions like making medical decisions for a child or enrolling a child in school.' *Id.* at 2078. The Court went on to state:

> Arkansas has thus chosen to make its birth certificates more than a mere marker of biological relationships: ... [giving] married parents a form of legal recognition that is not available to unmarried parents. Having made that choice, Arkansas may not, consistent with *Obergefell*, deny married same-sex couples that recognition.

"*Id.* at 2078-79. Thus, in *Pavan*, the Supreme Court made clear that same-sex couples are entitled to not only the symbolic recognition of marriage, but also to all of the benefits attendant to it.

"With these principles in mind, we turn to Tenn. Code Ann. § 68-3-306 and its applicability to Pamela in this case. Tennessee's artificial insemination statute provides married couples who pursue artificial insemination a form of legal recognition by deeming the child born during their marriage to be their 'legitimate child.' Indeed, the Tennessee Supreme Court has acknowledged that the artificial insemination statute '*confers parental status* on a husband even though the child conceived in his wife via artificial insemination is not necessarily genetically related to him.' *In re C.K.G.*, 173 S.W.3d at 728 (emphasis added). Construing Tennessee Code Annotated section 68-3-306 literally, in a non-gender-neutral manner, places it at odds with the United States Supreme Court's holdings in *Obergefell* and *Pavan* because it would deny same-sex married couples the same 'constellation of benefits' that married opposite-sex couples enjoy. Specifically, it would deem a child born to a married woman as a result of artificial insemination to be the legitimate child of a male spouse of that woman but not the legitimate child of a female spouse of that woman. We are not constrained to this unconstitutional interpretation, however, because courts have a duty to construe a statute in a way that will sustain it and avoid constitutional conflict if such a reasonable construction exists. *See Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 529-30; *see also In re Swanson*, 2 S.W.3d 180, 186 (Tenn. 1999) ('We recognize that there are occasions in which it is appropriate to reject a literal reading of a statute when it would result in the statute being declared unconstitutional.').

"Construing Tenn. Code Ann. § 68-3-306 in tandem with Tenn. Code Ann. § 1-3-104(b) will avoid constitutional conflict. *See Witt v. Witt*, No. E2017-00884-COA-R3-CV, 2018 WL 1505485, at *2 (Tenn. Ct. App. Mar. 27, 2018) (noting the Tennessee Attorney General filed a memorandum in defense of the constitutionality of Tenn. Code Ann. § 68-3-306 and interpreted it by employing Tenn. Code Ann. § 1-3-104(b)). Tennessee Code Annotated section 1-3-104(b) states that '[w]ords importing the masculine gender include the feminine and neuter, except when the contrary intention is manifest.' By virtue of Tenn. Code Ann. § 1-3-104(b), and in light of the principles gleaned from *Obergefell* and *Pavan*, we hold that the word 'husband' in Tenn. Code Ann. § 68-3-306 must be interpreted to include both the male and female genders. Therefore, section 68-3-306 applies in a gender-neutral manner to Pamela who was Shannon's wife during the artificial inseminations, and both children born to Shannon via artificial insemination during her marriage to Pamela are 'deemed' to be Pamela's 'legitimate children.'

"Next, we turn to Mr. Compton's argument that there must have been an 'express written agreement' between Pamela and Shannon for the artificial insemination statute to apply. We find nothing in Tenn. Code Ann. § 68-3-306 that requires a written agreement between spouses for a child conceived through artificial insemination to be deemed a legitimate child of the marriage. The statute simply requires that the artificial insemination be performed '*with consent* of the married woman's husband.' Tenn. Code Ann. § 68-3-306 (emphasis added). Mr. Compton urges this Court to turn to the adoption statutes, in a separate section of the Code, to define consent. *See* Tenn. Code Ann. § 36-1-102(15)(A), (B) (defining consent as 'written' authorization or permission). However, if our legislature wished to require spouses engaging in artificial insemination to enter into a written agreement consenting to the procedure, it would have explicitly required one. *See, e.g.*, Tenn. Code Ann. § 36-2-403(a) (requiring a 'written contract' when establishing embryo parentage prior to embryo transfer). Mr. Compton's arguments that consent must be in writing are not well taken. While written consent is not required, our Supreme Court has acknowledged that the artificial insemination statute 'reflects a policy which favors taking into account *intent* in establishing parentage when technological assistance is involved.' *In re C.K.G.*, 173 S.W.3d at 728 (emphasis added). The trial court considered intent when applying the artificial insemination statute to Pamela in this case and made the following pertinent findings of fact:

> 16. It was the intent of both parties (Pamela and Shannon Harrison) that these children would be their own and they would raise them as a family.
> ...
> 20. Ms. Shannon Harrison never had the intent for Mr. Compton to be a father figure to her children.

"Furthermore, the trial court held, 'In this case, the evidence was clear and convincing that there was an oral agreement and that there was no intent by Mr. Compton to be the legal parent of the children.' The court went on to expressly hold: 'Mr. Compton was merely a sperm donor in the process with no intent to be a legal parent.'"

III. Custody/Co-Parenting

A. Cases Between Unmarried Persons to be Expedited if Paternity Test

Chapter 1028, Public Acts 2022, adding T.C.A. § 36-2-314 eff. May 11, 2022.

"(a) In all contested custody cases involving unmarried parties and where a paternity test by an accredited laboratory is known to exist or has been requested of or by the court, the court shall, consistent with due process, expedite the contested custody proceeding by entering such scheduling orders as are necessary to ensure that the case is not delayed, and such case must be given priority in setting a final hearing of the proceeding and must be heard at the earliest possible date over all other civil litigation other than contested adoption and termination of parental rights cases pursuant to § 36–1–124 and child protective services cases arising under title 37, chapter 1, parts 1, 4, and 6.

"(b) In all contested custody cases involving unmarried parties that are appealed from the decision of a trial court, the appellate court shall, consistent with its rules, expedite the contested custody case if a paternity test by an accredited laboratory is a part of the record, by entering such scheduling orders as are necessary to ensure that the case is not delayed, and such case must be given priority over all other civil litigation, other than contested adoption and termination of

parental rights cases pursuant to § 36–1–124 and child protective services cases arising under title 37, chapter 1, parts 1, 4, and 6.

"(c) It is the intent of the general assembly that the permanency of the placement of a child who is the subject of a contested custody proceeding involving unmarried parties and a paternity test by an accredited laboratory not be delayed any longer than is absolutely necessary consistent with the rights of all parties, but that the rights of the child to permanency at the earliest possible date be given priority over all other civil litigation other than adoption and termination of parental rights cases pursuant to § 36–1–124 and child protective services cases arising under title 37, chapter 1, parts 1, 4, and 6."

B. Factors; Failure to Pay Child Support for Three Years or More

Chapter 671, Public Acts 2022, adding T.C.A. § 36-6-106(a)(16) eff. Mar. 18, 2022.

Factors to be considered by a court in making a custody/co-parenting decision now include:

> "Whether a parent has failed to pay court-ordered support for a period of three (3) years or more."

IV. Grandparent Visitation

Cupples v. Holmes, No. W2021-00523-COA-R3-CV (Tenn. Ct. App., Frierson, Mar. 31, 2022), perm. app. denied Aug. 4, 2022.

"This case originated with the filing of a petition for grandparent visitation, pursuant to Tennessee Code Annotated § 36-6-306, by David Cupples ('Grandfather') and Brigette Cupples ('Grandmother') (collectively, 'Grandparents') on April 24, 2020, in the Decatur County Chancery Court ('trial court'), concerning their minor grandchild, M.H. ('the Child'), who was approximately six years old by the time of trial. Grandparents named as respondents the Child's parents, Shayna Perez Holmes ('Mother') and Jonathan Alan Holmes ('Father') (collectively, 'Parents'). Grandparents averred that as the maternal grandparents of the Child, they had enjoyed a significant relationship with the Child since her birth until that relationship was severely limited by Father following Parents' divorce and the subsequent restriction of Mother's visitation rights due to Mother's use of illegal drugs and her admission to an inpatient rehabilitation facility. Grandparents claimed that inasmuch as Father had been granted custody of the Child, they would have no ability to maintain their relationship with the Child unless they were granted specific visitation rights. Grandparents further averred that maintenance of their relationship with the Child was in the Child's best interest and that severe limitation of that relationship would cause substantial emotional harm to the Child."

"Father posits that the trial court erred by granting visitation to Grandparents when Grandparents failed to present sufficient evidence meeting the requirements of Tennessee Code Annotated § 36-6-306 concerning, *inter alia*, the length of time the Child resided with Grandparents, whether Grandparents were full-time caretakers of the Child, whether Grandparents maintained a significant relationship with the Child, whether that relationship was severed by Father, and whether severance of the relationship would cause harm to the Child. Father further argues that Grandparents failed to demonstrate that he had denied them the opportunity to visit with the Child or had severely

reduced their visitation prior to the petition's filing. Grandparents counter that sufficient evidence satisfying the statutory requirements was presented. Upon our thorough review, we agree with Grandparents."

"In the instant cause, the trial court made extensive findings and conclusions, too lengthy to be recounted verbatim herein. As pertinent to this issue, the trial court found that the Child would likely experience severe emotional harm if she were unable to visit with Grandparents, based on, *inter alia*, the following circumstances: (1) the Child had enjoyed a close and significant relationship with Grandparents before the cessation of visitation; (2) Grandparents had spent time with the Child almost daily for approximately two years and had, at times, been the Child's only caregivers; (3) the Child was six years of age and was therefore unlikely to understand why she could no longer see Grandparents; and (4) Grandparents and the Child enjoyed a strong emotional bond. The evidence presented at trial supports these findings."

"The trial court found that Father had 'terminated the visitation in March of 2020 [when] the child had been with the grandparents for well over two years on a substantial basis.' We agree. We have previously determined that Grandparents had enjoyed daily and then frequent contact with the Child from December 2017 or January 2018 until March 2020. Although Father claimed that he was not opposed to Grandparents' visiting the Child, he refused to allow visits from March to June 2020, proffering concerns respecting the pandemic and apprehension that the Child would be allowed to be around Mother before her arrest. However, Father failed to explain why he allowed the Child to visit his mother and attend day care during that same time period without similar concerns regarding illness or why Grandparents could not have been allowed visitation somewhere other than their home while Mother allegedly was still residing on Grandparents' property. In addition, Father not only refused in-person contact between Grandparents and the Child, he disallowed all telephone contact except for one call on the Child's birthday.

"Despite his protestations to the contrary, the exhibits presented at trial demonstrate that Father sent a text message to Grandparents in April 2020 asking them to cease having contact with him. This predated the filing of Grandparents' petition for visitation. In doing so, Father denied visitation to Grandparents by refusing to allow them further contact such that they could not request visits. In addition, although Father points to the single visit in June 2020 as evidence of his lack of opposition to visitation, we note that Father placed significant restrictions on that visit by limiting Grandparents' time with the Child to one hour and requiring that the visit be supervised by him. This amounts to a constructive denial of visitation. *See Coleman v. Olson*, 551 S.W.3d 686, 699 (Tenn. 2018) ('Constructive denial occurs when the custodial parent limits or restricts the frequency or conditions of visitation so that it is the same as a denial of visitation.'). Grandparents have clearly established that Father opposed and severely reduced their visitation with the Child after he obtained custody in March 2020."

"For the foregoing reasons, we affirm the trial court's order awarding visitation to Grandparents."

V. Divorce

A. Antenuptial Agreement Signed One Day Before Wedding

Law v. Law, No. E2021-00206-COA-R3-CV (Tenn. Ct. App., Davis, Apr. 26, 2022).

"On May 1, 1992, Barbara Matthews Law ('Wife') and Halbert Grant Law, Jr. ('Husband'), executed a prenuptial agreement. They married the following day. Wife filed for divorce in the Chancery Court for Hamilton County in December of 2017. The parties disputed, *inter alia*, the enforceability of the prenuptial agreement, as well as the classification and division of several assets. Trial was held over multiple days in 2019 and 2020, and the trial court entered its final decree divorcing the parties on July 31, 2020. The trial court held that the prenuptial agreement was valid and enforceable, classified the parties' assets, and divided the marital estate. Wife was awarded the parties' family home and $4,500.00 per month in alimony *in futuro*. Husband appeals, challenging the classification of the parties' home as marital property, as well as the classification of one bank account. Wife cross-appeals, challenging the enforceability of the prenuptial agreement and the classification of several assets. Wife also requests increased alimony. We affirm the trial court's finding that the parties' prenuptial agreement is valid and enforceable. We reverse the trial court's classification of three assets – the parties' home, a checking account, and an investment account. We vacate the trial court's decision as to those three assets and remand for proceedings consistent with this opinion. In light of the changes in classification of several major assets, we also vacate and remand the trial court's award of alimony for reconsideration."

"In her posture as appellee, Wife challenges the trial court's ruling that the prenuptial agreement is valid. Because the outcome of this issue informs the rest of our analysis as to the parties' property, we address it first."

"Tennessee's public policy favors prenuptial agreements. *Perkinson v. Perkinson*, 802 S.W.2d 600, 601 (Tenn. 1990). These agreements are enforceable when entered into 'freely, knowledgeably, and in good faith and without the exertion of duress or undue influence.' *Randolph v. Randolph*, 937 S.W.2d 815, 819 (Tenn. 1996); *see also* Tenn. Code Ann. § 36-3-501.[7] These elements must be established by a preponderance of the evidence by the party seeking enforcement of the agreement, and the 'existence of each element is a question of fact to be determined from the totality of the circumstances surrounding the negotiation and execution of the [agreement].' *Boote*, 198 S.W.2d at 741 (citing *Randolph*, 937 S.W.2d at 821). A 'narrow focus on the precise moment the parties' signatures were affixed to the agreement would be misguided.' *Id.* at 746. Although not dispositive, 'the participation of independent counsel representing each party' is the 'best assurance that the legal prerequisites will be met and that' the agreement will be enforceable. *Id.* at 741 (citing *Randolph*, 937 S.W.2d at 822).

"Here, based on all of the circumstances surrounding the Agreement's preparation and execution, Wife argues Husband failed to act in good faith. She takes particular issue with Husband's failure to provide a copy of the Agreement in a timely manner, as Wife and her counsel were only provided a copy the day of the Agreement's execution. She also asserts that given her pregnancy and the proximity in time to the parties' wedding, she acted under duress in signing the Agreement. We are unpersuaded by these arguments and agree with the trial court's conclusion that the Agreement is valid and enforceable.

"As the proponent of the Agreement, it was Husband's burden to establish that Wife entered into the Agreement freely, knowledgably, and in good faith. In her appellate brief, Wife takes issue with the 'good faith' element."

"[T]he evidence does not preponderate against the trial court's factual finding that 'Wife knew the contents of the documents and had a full opportunity to examine them.' Considering the totality of the circumstances, we agree that Husband did not act in bad faith. He and Wife discussed the

Agreement as early as two weeks before the wedding, and there is no indication that Wife at any point raised an objection to entering the Agreement. Moreover, Wife is an educated individual with experience in the legal industry and access to independent counsel.

"While we agree with Wife that, ideally, she would have been provided a copy of the Agreement earlier than the day of its execution, Wife spent forty-five minutes to two hours going over the Agreement with her attorney prior to signing. Neither party could recall Wife having any particular objections to the terms of the Agreement; further, there has been no allegation . . . that Husband deliberately hid a major asset from Wife. Wife testified that prior to the marriage she knew about the Fleetwood house as well as Newton Chevrolet. . . . [T]here is no evidence of insufficient disclosure, or bad faith overall, in the present case. *Id.*

"Wife also maintained at trial that Husband's attorney told her there would be no wedding should Wife refuse to sign the Agreement. In this sense, Wife's argument that the Agreement is marred by bad faith dovetails with her argument that she executed the Agreement under duress."

"Here, we disagree that Wife entered the Agreement out of duress. Wife knew that Husband wanted a prenuptial agreement at least two weeks prior to the wedding and had no objections. Although Wife contends that Husband would have refused to marry Wife if she had not signed the agreement, the evidence supporting this assertion is scant, at best. Wife urges on appeal that the rushed timeline of the Agreement's execution and proximity to the wedding amount to duress, but the record establishes that the parties agreed about marrying quickly. The circumstances of the parties' union were mutually agreed upon and do not amount to unlawful restraint, intimidation, or compulsion. Moreover, quite unlike the wife in *Ellis*, Wife was educated and familiar with the legal system. Wife was also represented by an attorney, whom she met with both the day before the Agreement was executed and on the day of execution. Consequently, the totality of the circumstances here does not satisfy the 'rather stringent' requirements of legal duress. *Ellis*, 2014 WL 6662466, at *11.

"Husband satisfied his burden of demonstrating the validity of the Agreement. We affirm the trial court's conclusion that the parties' prenuptial agreement is valid."

B. Mediation by Video Conference

Chapter 697, Public Acts 2022, adding T.C.A. § 36-4-131(e) eff. July 1, 2022.

"(e) The court may order mediation between the parties to take place by video conference when appropriate."

C. Attempted Revocation of Consent to Marital Dissolution Agreement

Polster v. Polster, No. M2020-01150-COA-R3-CV (Tenn. Ct. App., Bennett, Sept. 14, 2021), perm. app. denied Jan. 12, 2022.

"Lee Ann Polster ('Wife') and Russell Polster ('Husband') were married in June 1992. They separated in February 2020, and Wife filed a complaint for divorce on April 23, 2020, based, in part, on the ground of irreconcilable differences.

"On May 4, Husband and Wife executed a marital dissolution agreement ('MDA'), which was filed with the court the next day. It provided that the marriage should be terminated on the ground of irreconcilable differences and that Husband should pay Wife alimony in the amount of $500 per month for 60 months. The MDA also provided for distribution of the marital home and their personal property, specifically referencing two vehicles and two retirement accounts, and stated the parties' intentions that the marital debts were to be 'paid down by the retirement accounts.' Husband was unrepresented at the time, but the MDA contains a paragraph stating in part that he 'was given the opportunity to consult with counsel of his own choosing.'

"By notice filed May 7 and mailed to Husband at the marital residence, the matter was set for final hearing on June 24, 2020. At the time, in-person court proceedings had largely been suspended due to the COVID-19 pandemic. On the afternoon of June 24, Husband, acting pro se, filed a pleading styled 'Extension to Final Notice of Final Hearing on Uncontested Divorce.' The pleading states:

> Lee Ann Polster means everything to me. If a divorce is the only thing I can do to make her happy, an uncontested divorce is what she will get.... All I am asking for is 3 months of court-ordered marital counseling.... I just would like every possibility to save my marriage if possible. I am willing to pay for the counseling, and I will even pay all her attorney and court fees. If she agrees after the 3 months to continue working this out, her attorney can keep papers on file for an immediate divorce in case she decides to follow through with the divorce of which I will pay for.
>
> You can sign off on the dispersion of our marital property, I don't care about that. At this point I feel she feels compelled to follow through with the divorce because she has gone this far. All I care about is saving my marriage to my God given soul mate[.] I beg you to please grant my request.

"A few hours later, the court clerk filed the final decree of divorce that had been approved by the trial court. In the final decree, the trial court found that '[Husband] has not contested or denied that irreconcilable differences have arisen between the parties' and that 'the parties ... have made adequate and sufficient provisions by written agreement for an equitable distribution of any property rights between the parties.' The court incorporated the MDA into the final decree.

"Husband subsequently retained counsel, and on July 17, he filed a sworn motion to alter or amend and/or set aside the final decree and the MDA. In the motion, he sought that the court alter, amend, or set aside the property division or the entire final decree because he was not represented by counsel throughout the proceedings and was under duress and depressed at the time Wife presented the MDA to him. He alleged that Wife 'fraudulently and intentionally misrepresented her intentions of the Marital Dissolution Agreement to Defendant' and that the MDA was 'utterly inequitable and should be set aside in its entirety.' He claimed that he received notice of the June 24 hearing, which 'led [him] to believe he could appear at the hearing and present his position to the judge,' so he 'appeared at the courthouse on June 24, 2020, but was not allowed to enter.' Wife responded, denying most of the allegations of husband's motion and attaching two exhibits illustrating Husband's involvement in the drafting of the MDA.

"Husband's counsel set the matter for a hearing on the pleadings on July 31, and on that day, the trial court entered an order, denying Husband's motion on the basis that:

> [Husband] may have made a bad deal but had ample time to seek counsel or repute his agreement prior to the finalization of his divorce. No showing of how a soon to be ex-wife could overcome the free will of a fifty year old man. Doesn't meet the threshold of mistake, inadvertence, excusable neglect, or fraud required by TRCP 60.02.

"Husband has appealed, raising the following issues for our review:

1. Whether the trial court lacked the legal authority to enter the final decree of divorce on the grounds of irreconcilable differences after [Husband] withdrew consent.
2. Whether the trial court lacked legal authority to incorporate the MDA into the final decree of divorce after [Husband] withdrew consent to the MDA.
3. Whether the trial court erred in not reviewing the MDA for fairness and equity after [Husband] withdrew consent and requested a hearing.
4. Whether the trial court erred by not allowing [Husband] to appear at the final hearing.
5. Whether the trial court erred by hearing [Husband]'s Rule 59 motion on the pleadings.

"For her part, Wife contends that the trial court properly entered the final decree of divorce on the ground of irreconcilable differences. She also requests her attorney fees on appeal."

"Husband's first three issues attack the validity of the final decree and the MDA. All three issues center on his belief that he withdrew his consent to the uncontested divorce and to the entry of the MDA and communicated that fact to the court prior to its entry of the final decree by filing a pleading and attempting to appear in court on the date the court heard the matter. Husband argues that the contract defenses of incapacity, duress and coercion, and, for the first time ever, unconscionability apply. Thus, he asserts that the court should have reviewed the MDA for fairness and equity and set it aside.

"In support of his argument, Husband relies on the case of *Nahon v. Nahon*, which held, '[A] valid consent judgment can not be entered by a court when one party withdraws his consent and this fact is communicated to the court prior to entry of the judgment.' *Nahon v. Nahon,* W2004-02023-COA-R3CV, 2005 WL 3416415, at *4 (Tenn. Ct. App. Dec. 14, 2005) (quoting *Harbour v. Brown for Ulrich*, 732 S.W.2d 598, 599 (Tenn. 1987)). However, the holding in *Nahon* has been superseded by the Tennessee Supreme Court's decision in *Barnes v. Barnes*, 193 S.W.3d 495 (Tenn. 2005). *See Olson v. Beck*, No. M2013-02560-COA-R3CV, 2015 WL 899381, at *4 (Tenn. Ct. App. Feb. 27, 2015) (citing *Barnes v. Barnes*, 193 S.W.3d 495 (Tenn. 2006)). In *Barnes*, the Tennessee Supreme Court held that '[a] marital dissolution agreement may be enforceable as a contract even if one of the parties withdraws consent prior to the entry of judgment by the trial court, so long as the agreement is otherwise a validly enforceable contract.' *Barnes*, 193 S.W.3d at 499. 'Husband cannot repudiate the contract simply by withdrawing his consent prior to the court's approval.' *Olson*, 2015 WL 899381, at *4.

"As in *Barnes*, the MDA in this case was reduced to writing and signed by both parties, as witnessed by a notary public. Thus, it is a contract, and its enforceability is governed by contract law. *Barnes*, 193 S.W.3d at 499; *see also Olson*, 2015 WL 899381, at *4. Because construction of a contract is a matter of law, our review of Husband's contentions as to the invalidity of the contract, which will be discussed in section III of our analysis, is de novo with no presumption of correctness. *Barnes*, 193 S.W.3d at 498; *see also Vick v. Hicks*, No. W2013-02672-COA-R3-CV, 2014 WL 6333965, at *2 (Tenn. Ct. App. Nov. 17, 2014)*; Gray v. Estate of Gray,* 993 S.W.2d 59, 63 (Tenn. Ct. App. 1998).

"Assuming the June 24 pleading Husband filed was before the trial court when it heard the case, nowhere in that pleading did Husband assert that he was under duress or suffering from a mental incapacity at the time he entered into the MDA. Neither did he assert any statement that could be relied upon to show that the property division was inequitable.

"We recognize that Husband was proceeding pro se at this point and is thus entitled to some leeway; accordingly, our focus is on the substance, not the form, of the papers he filed. *See Young v. Barrow*, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003).

"Husband argues that 'by requesting a hearing and filing his Motion to Extend Time, [he] contested that the parties did not have irreconcilable differences.' We do not agree with his characterization, as the second sentence of the pleading illustrated his assent to the pending divorce: 'If a divorce is the only thing I can do to make her happy, an uncontested divorce is what she will get.' Furthermore, in requesting three months of counseling, Husband noted that 'her attorney can keep papers on file for an immediate divorce in case she decides to follow through with the divorce....' Husband styled his pleading as 'Extension to Final Notice of Final Hearing on Uncontested Divorce,' and it contains only his request that the court require the parties to attend marriage counseling. At best, this pleading could be construed as a motion to continue. But the reality is that nowhere in Husband's June 24 pleading did he make any statement that can be reasonably construed to indicate that he was withdrawing his consent to a divorce based on the parties' irreconcilable differences.

"Even if we were to construe Husband's June 24 pleading as contesting the uncontested nature of their divorce, the trial court's entry of the final decree and MDA still would not constitute error. Tennessee's irreconcilable differences statute provides:

> If there has been a contest or denial of the grounds of irreconcilable differences, no divorce shall be granted on the grounds of irreconcilable differences. However, a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if a properly executed marital dissolution agreement is presented to the court.

"Tenn. Code Ann. § 36-4-103(e). The parties executed the MDA fifty days prior to the court's consideration of the record and entry of the final decree. Importantly, Husband's June 24 pleading contained no statement that could have led the court to conclude that he no longer agreed to the terms of the MDA or that he was experiencing duress or suffering from a mental incapacity when he executed it. The pleading also contained no statement indicating that he believed that the MDA's property division was inequitable. To the contrary, he said that the court 'can sign off on the dispersion of our marital property, I don't care about that.' Moreover, the MDA contains the following language:

> (17) RECONCILIATION: This agreement shall take effect immediately upon the signing of the same by the parties, subject to the approval of the court granting the parties' divorce. It is the parties' intention that a reconciliation, either temporary or permanent, shall in no way affect the provisions of this agreement having to do with the settlement and disposition of their property rights in their respective realty, if any, and personal property, unless a new agreement is entered into in writing mutually revoking and rescinding this agreement and entering into a new one.

"Thus, even if Husband's desire to participate in court-ordered counseling had been granted and resulted in reconciliation with Wife, it would not have an effect on the terms of the MDA. The pleading he filed on June 24 provided no basis for the court to invalidate the MDA.

"In conclusion, at the time the trial court entered the divorce decree, Husband's only pleading contained nothing that could have led the court to conclude that Husband had withdrawn his consent to the divorce or believed the MDA was invalid. Thus, the court had the authority to grant the parties an irreconcilable differences divorce. Tenn. Code Ann. § 36-4-103(e). We discern no merit to the first three issues raised by Husband."

VI. Division of Property and Debts

A. Separate v. Marital Property; Was Partnership Interest a Gift?

Long v. Long, 642 S.W.3d 803 (Tenn. Ct. App., Frierson, 2021), perm. app. denied Feb. 10, 2022.

"Following a bench trial in this divorce action, the trial court entered an order in October 2018, granting the parties a divorce and distributing the marital estate. Upon the wife's appeal, this Court vacated the trial court's distribution of marital property and remanded, directing the trial court to make sufficient findings of fact and conclusions of law, pursuant to Tennessee Rule of Civil Procedure 52.01, concerning the classification and valuation of various real estate and real estate partnership assets. Following an evidentiary hearing on remand, the trial court entered a final order in September 2020. Noting that the parties had stipulated that the wife's interests in a realty company and two property partnerships were separate property, the trial court found that the wife's partnership interest in a fourth realty enterprise at issue was marital property and also found that several specific realty assets were marital property. The trial court determined its valuation of each property or property interest and, pursuant to the factors provided in Tennessee Code Annotated § 36-4-121(c), set forth what it found to be an equitable distribution of the marital property. Wife has appealed. Discerning no reversible error, we affirm."

"Wife asserts that the trial court erred by classifying her partnership interest in Pioneer Properties as marital property. She acknowledges that the fact that she obtained the partnership interest during the course of the marriage creates a statutory presumption that the interest is marital property. *See* Tenn. Code Ann. § 36-4-121(b)(1)(A)(2021). However, she argues that she carried her burden to rebut the presumption by presenting her testimony and the testimonies of her mother and brother to the effect that the interest was a gift. Wife also argues that the trial court erred by finding that any appreciation in value of the asset was marital and by finding that the doctrines of transmutation and commingling applied. Husband asserts that Wife did not meet her burden of rebutting the statutory presumption because she failed to prove that the partnership interest was a gift. Husband also argues that the trial court correctly found that appreciation in the partnership interest's value was marital because he had made substantial contributions to the value of Pioneer Properties. Husband further argues that the doctrines of transmutation and commingling applied. Upon thorough review of the record and applicable authorities, we determine that the evidence does not preponderate against the trial court's classification of the partnership interest in Pioneer Properties as marital property because Wife obtained the partnership interest during the parties' marriage and failed to rebut the statutory presumption."

"It is well settled that assets acquired during a marriage are presumed to be marital property and that a party desirous of disputing this classification has the burden of proving by a preponderance of the evidence that the asset is separate property. *See Owens v. Owens*, 241 S.W.3d 478, 486 (Tenn. Ct. App. 2007). This presumption can be rebutted, however, by evidence of circumstances or communications clearly indicating an intent that the property remain separate. *See Batson v. Batson*, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988); *see also Dunlap v. Dunlap*, 996 S.W.2d 803, 814 (Tenn. Ct. App. 1998) ('Despite the fact that certain property may have been acquired during the marriage, a party may rebut any presumption that the property is marital by demonstrating that the property actually was a gift to that spouse alone.').

"Concerning the partnership interest in Pioneer Properties, this Court directed the trial court on remand to make specific findings regarding whether '(1) the interest was a separate gift to wife, (2) husband made a substantial contribution to the preservation and appreciation of the asset, and (3) the doctrines of commingling and/or transmutation apply.' *Long I*, 2019 WL 3986281, at *6. In determining that the partnership interest was marital property, the trial court stated in its final order:

> The Court finds that ownership of Pioneer Properties and its status as separate or marital was a significantly disputed issue both in the original trial, on appeal, and as a large focus of the new evidence and testimony submitted on remand. Husband testified during the original trial and reaffirmed on remand and [in] additional testimony that he had made significant contributions to Pioneer Properties during the course of the marriage, including helping to establish values from various properties, evaluating property of members for consider[ation], and performing activities for the upkeep of property owned by Pioneer Properties. Wife testified that Wife's parents were the originators of Pioneer Properties and gifted interest in the entity to their children, including the Wife, and that Husband did not substantially contribute to the value.
>
> The Court further notes Wife's admission that distributions from Pioneer Properties, over $70,000, were deposited into a joint bank account. Wife admits that these distributions were marital, claiming that they were a gift to the marriage. Wife did not produce evidence of payment of gift taxes or gift tax returns concerning the supposed gift by Wife's parents, and both Wife's mother [L.W.] or brother [S.R.] had no information in response to Husband's questions concerning gift taxes or gift tax returns. The absence of such evidence along with Wife's evasive responses to questions by Husband's counsel, the Court finds significant in connection with Wife's burden of proving that this asset indisputably acquired during the marriage was separate rather than marital. The Court finds that Wife's admitted treatment of the distributions as marital assets, supports Husband's credible testimony that the asset itself was a joint asset, and the Court further finds Wife's testimony lacks credibility.
>
> The Court finds that Wife acquired the interest in Pioneer Properties during the marriage, and the Court notes the initial presumption that this asset is marital property. The Court further credits Husband's testimony that he made significant contributions to Pioneer Properties during the course of the marriage, and finds this testimony credible. The Court finds that Wife's testimony is less credible, and does not accept Wife's testimony that the property was a gift to her alone, and further that the other factors including Husband's contributions separately preponderate in favor of a finding that this asset is marital property. For either of these reasons, the Court finds that Wife has not carried her burden of proving by the preponderance of the evidence that this asset is separate property. The Court further makes the alternative finding that transmutation and commingling would apply, even if the asset had

been separate, based on Wife's affirmative acts to join the Husband in the business, to involve him and his substantial contributions to the business, and to share in the distributions, to the joint account, all as a marital asset. The Court therefore finds that Pioneer Properties is marital property, subject to division by the Court.

"Wife asserts that the trial court's analysis was 'flawed' in part because '[w]hether Husband contributed to the business and whether the distributions from the business were put into a joint bank account are completely separate issues from whether Wife has met her burden in proving the business is her separate property.' To the extent that Wife is arguing that Husband's subsequent contributions to the value of Pioneer Properties and Wife's deposit of distributions in a joint marital account should not affect an analysis of whether the partnership interest was originally a gift to Wife, we agree. We also confirm this Court's previous determination in *Long I* that Wife's deposits over time into a joint marital account of the $71,000.00 she had received in distributions from Pioneer Properties would not, 'in and of itself,' have 'transmute[d] the corpus of the asset into marital property' because the distributions always remained separate from the partnership interest itself. *See Long I*, 2019 WL 3986281, at *5 (citing *Telfer v. Telfer*, No. M2012-00691-COA-R3-CV, 2013 WL 3379370, at *11 (Tenn. Ct. App. June 28, 2013); *Luttrell v. Luttrell*, No. W2012-02279-COA-R3-CV, 2014 WL 298845, at *5 (Tenn. Ct. App. Jan. 28, 2014)).

"In *Long I*, this Court noted that in the original judgment then appealed from, the trial court had not made a finding 'regarding whether wife met her burden to prove [the partnership interest] was a gift.' *Long I*, 2019 WL 3986281, at *3. Inasmuch as '[s]everal possible inferences could be drawn from the trial court's order' finding that the partnership interest was marital property, this Court directed the trial court on remand to make specific findings of fact concerning whether the interest was a gift, whether Husband had contributed to the appreciation of the partnership interest, and whether the doctrines of commingling and transmutation would apply in this case to convert a separate property interest into a marital one. *Id.* at *3-6.

"However, upon the trial court's determination on remand that Wife had failed to prove that the Pioneer Properties partnership was a gift, pursuant to Tennessee Code Annotated § 36-4-121(b)(2)(D), the trial court essentially found that Wife had failed to rebut the statutory presumption of marital property acquired during the marriage, meaning that the Pioneer Properties partnership interest had never been Wife's separate property. Therefore, upon affirmation of this finding, any further analysis as to Husband's contributions to the preservation and appreciation of the partnership interest would be relevant only as to the equitable distribution of the marital estate, which we will address in a subsequent section of this Opinion. *See* Tenn. Code Ann. § 36-4-121(c)."

"Concerning whether the partnership interest was a gift, we address at the outset a question raised by Husband as to the proper standard of review. Husband asserts that unlike other factual findings relative to classification of marital and separate property, Wife was required to prove by clear and convincing evidence that the partnership interest was an individual gift to her. Wife maintains that proof of a gift in the context of a divorce must only be proven by a preponderance of the evidence. Upon careful review of the applicable authorities, we agree with Husband to the extent that the elements required to prove that property was a gift must be established by clear and convincing evidence. *See Trezevant v. Trezevant*, 568 S.W.3d 595, 615 (Tenn. Ct. App. 2018) ('The party asserting that they acquired the property by gift has the burden of proving the essential elements of a gift by clear and convincing evidence[.]'). We note, however, that the trial court's ultimate

'classification and division of marital property enjoys a presumption of correctness and will be reversed or modified only if the evidence preponderates against the court's decision.' *See id.* at 607 (quoting *Dunlap*, 996 S.W.2d at 814) (emphasis added)."

"We therefore determine that Wife's evidence offered in support of the Pioneer Properties interest as a gift was not clear and convincing. *See In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010) ('Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings.') (internal citations omitted). The trial court did not err in finding that Wife failed to carry her burden of proving that the partnership interest in Pioneer Properties was a gift to her alone."

"In the case at bar, although the trial court's distribution of marital property is not exactly mathematically equal with a 51-49 ratio in Wife's favor, we determine that it is equitable based on consideration of the statutory factors. In response to Wife's argument, we do not find that the trial court overemphasized Wife's separate assets, especially when coupled with the trial court's finding that she had the greater ability to earn future income and acquire future assets. We determine that the manner in which the trial court weighed the factors contained in Tennessee Code Annotated § 36-4-121(c) was consistent with logic and reason and that the result to these parties was equitable. As such, we conclude that the trial court's distribution of marital property did not lack proper evidentiary support and did not result in an 'error of law or misapplication of statutory requirements and procedures.' *See Keyt*, 244 S.W.3d at 327 (quoting *Herrera v. Herrera*, 944 S.W.2d 379, 389 (Tenn. Ct. App. 1996)). We therefore affirm the trial court's equitable distribution of marital property."

B. Definition and Allocation of Marital Debt; Can Include Attorney Fees and Expenses

Chapter 762, Public Acts 2022, amending T.C.A. § 36-4-121 eff. Mar. 31, 2022.

36-4-121(a).

"(1) In all actions for divorce or legal separation, prior to any determination as to whether it is appropriate to order the support and maintenance of one (1) party by the other, the court having jurisdiction thereof shall:

(A) Equitably divide, distribute, or assign the marital property between the parties without regard to marital fault in proportions as the court deems just based on the factors set forth in subsection (c); and

(B) Allocate responsibility for paying the marital debt in proportions as the court deems just based on the factors set forth in subsection (i). The court may order the payment of all or a portion of the marital debt from the marital property prior to distribution of the marital property to the parties."

"(2) In all actions for legal separation, the court, in its discretion, may equitably divide, distribute, or assign the marital property in whole or in part, or reserve the division or assignment of marital property until a later time. If the court makes a final distribution of marital property at the time of the decree of legal separation, then any property acquired after the date of the decree of legal separation is separate property. The court, in its discretion, may also make a final allocation of all or part of the marital debt existing at the time of the decree of legal separation, or the court may reserve the allocation of marital debt until a later time. If the court makes a final allocation of

marital debt at the time of the decree of legal separation, then any debt acquired after the date of legal separation is separate debt."

36-4-121(b).

"(1) 'Marital debt':
(A) Means all debt incurred by either or both spouses during the course of the marriage through the date of the final hearing and any proceedings brought pursuant to Rule 59 of the Tennessee Rules of Civil Procedure; and
(B) Includes debt incurred to pay attorney fees and expenses incurred in connection with the proceedings, and unpaid attorney fees and expenses incurred in connection with the proceedings through the date of the final hearing and any proceedings brought pursuant to Rule 59 of the Tennessee Rules of Civil Procedure. . . ."

"(3) 'Separate debt' means:
(A) All debt incurred by either spouse prior to the date of the marriage; and
(B) All debt incurred after the entry of a decree of legal separation if the court allocated responsibility for payment of marital debt as part of the decree of legal separation."

36-4-121(i).

"(1) In allocating responsibility for the payment of marital debt, the court shall consider the following factors:
(A) The purpose of the debt;
(B) Which party incurred the debt;
(C) Which party benefitted from incurring the debt; and
(D) Which party is best able to repay the debt.

"(2) In allocating responsibility for payment of unpaid attorney fees and expenses incurred in connection with the proceedings, the court shall consider the factors in subdivision (i)(1) and the following factors:
(A) The total amount of attorney fees and expenses incurred by each party in connection with the proceedings;
(B) The total amount of attorney fees and expenses paid by each party in connection with the proceedings;
(C) Whether the attorney fees and expenses incurred by each party are reasonable under the factors set forth in Rule 1.5 of the Tennessee Rules of Professional Conduct; and
(D) Whether the attorney fees and expenses were necessary.

"(3) The court may order the payment of all or a portion of the marital debt from the marital property prior to the allocation of responsibility for paying marital debt by either party, and may charge the party's share of the marital estate with all or a portion of the attorney fees and expenses paid by that party."

36-4-121(c).

[In making an equitable division of marital property, the court should consider all relevant factors including:]

"(13) The total amount of attorney fees and expenses paid by each party in connection with the proceedings; whether the attorney fees and expenses were paid from marital property, separate property, or funds borrowed by a party; and the reasonableness, under the factors set forth in Rule 1.5 of the Tennessee Rules of Professional Conduct, and necessity of the attorney fees and expenses paid by each party."

C. MDA Reformation Due to Mutual Mistake

Lawrence v. Lawrence, No. W2020-00979-COA-R3-CV (Tenn. Ct. App., Armstrong, Nov. 11, 2021).

"In this post-divorce case, the trial court granted Appellee/Wife's petition to modify paragraph 4(A)(d) of the parties' Marital Dissolution Agreement ('MDA') on its finding of mutual mistake. The trial court declined to: (1) reform paragraph 4(A)(e) of the MDA; (2) find Appellant/Husband in contempt of the MDA for failure to reimburse Wife for certain college expenses of the parties' son; (3) hold Husband in contempt for his alleged failure to satisfy his support obligations; and (4) award Wife her attorney's fees under the MDA. Because there was no mutual mistake, we reverse the trial court's reformation of paragraph 4(A)(d) of the MDA. The trial court's orders are otherwise affirmed, and Wife's motion for appellate attorney's fees is denied."

"As noted above, at the close of mediation, the parties signed off on a 'Mediated Agreement,' which includes the mediator's notations, to-wit:

7. Although disputed, and in my opinion not a viable element of recovery in this case, Mr. Lawrence will designate a $70,000.00 figure as dissipation in this case, one-half of which or $37,500.00. Mr. Lawrence will transfer to Mrs. Lawrence the remainder of his 401(k) account. Counsel for Wife shall prepare the QDRO at Wife's expense. Additionally, Mr. Lawrence will pay ~~$125,000.00~~ to Mrs. Lawrence for the loan and withdrawal he took out against the 401(k) to fund this litigation in the total amount of ~~$250,000.00~~. Husband will also pay to Wife one-half (½) of the value of the gold and silver at National Security & Trust that existed at the time of mediation or $80,722.04. Mr. Lawrence will pay the sum of the dissipation figure, the 401(k) loan/withdrawal and the gold and silver at National Security & Trust or $243,222.04 to Mrs. Lawrence in monthly payments of $10,134.25 over a twenty-four (24) month period beginning thirty (30) days after the entry of the Final Decree of Divorce.

"Paragraph 4(A)(d) of the parties' MDA was drafted based on the foregoing section of the 'Mediated Agreement.' This paragraph of the MDA states:

> As a division of marital property, Wife will also receive the sum of $298,588.64 representing one-half of a claimed dissipation by Husband, one-half of the value of the gold and silver at National Security and Trust that existed at the time of the mediation, and further representing loans Husband made and a withdrawal he took out of his 401(K). Such sum shall be paid over a twenty-four (24) month period in equal installments commencing on the first day of the first month following the entry of the Final Decree. Accordingly, Husband shall pay to Wife the sum of $14,441.19 each month for a period of 24 months....

"In its February 5, 2020 order, the trial court found that the parties agreed that the foregoing section of the MDA contained a drafting mistake:

> Both parties admit that there was a mistake in drafting this provision. Wife contends that the mistake was that $298,588.64 represented the amount that Wife was to receive for the loans and withdrawals Husband made from his 401(k) and therefore, she was only to receive a total of $267,516.36. Regardless, again, both parties admit mistake. Husband, however, is not seeking reformation.

"To resolve this alleged error, the trial court employed the doctrine of mutual mistake to reform paragraph 4(A)(d). The Tennessee Supreme Court recently addressed the equitable remedy of reformation on the ground of mutual mistake:

> 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); *Sikora v. Vanderploeg*, 212 S.W.3d 277, 287 (Tenn. Ct. App. 2006) (citing *Greer v. J.T. Fargason Grocer Co.*, 168 Tenn. 242, 77 S.W.2d 443, 443–44 (1935); *Tenn. Valley Iron & R.R. Co. v. Patterson*, 158 Tenn. 429, 14 S.W.2d 726, 727 (1929)). Reformation is an equitable remedy 'by which courts may correct a mistake in a writing "so that it fully and accurately reflects the agreement of the parties."' *Lane v. Spriggs*, 71 S.W.3d 286, 289 (Tenn. Ct. App. 2001) (quoting 22 Tenn. Jur. Rescission, Cancellation and Reformation § 46 (1999)).
>
> A court may reform an instrument to correct a mutual mistake. *Sikora*, 212 S.W.3d at 286 (citing *Alexander v. Shapard*, 146 Tenn. 90, 240 S.W. 287, 291-94 (1922); *Cromwell v. Winchester*, 39 Tenn. 389, 390-91 (1859)); *Lane*, 71 S.W.3d at 289 (citing *Williams v. Botts*, 3 S.W.3d 508, 509 (Tenn. Ct. App. 1999)). Mutual mistake 'is a mistake common to all the parties to the written contract or the instrument or in other words it is a mistake of all the parties laboring under the same misconception.' *Collier v. Walls*, 51 Tenn. App. 467, 369 S.W.2d 747, 760 (1962). A party seeking to reform a contract because of mutual mistake must show by clear and convincing evidence that:
>
> > (1) the parties reached a prior agreement regarding some aspect of the bargain; (2) they intended the prior agreement to be included in the written contract; (3) the written contract materially differs from the prior agreement; and (4) the variation between the prior agreement and the written contract is not the result of gross negligence on the part of the party seeking reformation.
>
> *Sikora*, 212 S.W.3d at 287-88 (footnotes omitted) (citing 7 Corbin on Contracts § 28.45 at 283; 27 Williston on Contracts §§ 70:19 at 256, 70:23 at 264-65).

"Trent v. Mountain Commerce Bank, 606 S.W.3d 258, 263 (Tenn. 2020).

"In finding mutual mistake and reforming the parties' MDA, the trial court specifically held:

> The clear and unambiguous terms of the Marital Dissolution Agreement state that Husband will pay to Wife a sum representing one-half of the value of the gold and silver, one-half of the value of the dissipation, and the loans Husband made and a withdrawal he took out of his 401(k). While the term 'one-half' modifies the gold and silver and the dissipation, it does not appear in the language identifying the loan and withdrawal from the 401(k). It is admitted that the total amount of the withdrawal and loans was $298,588.64. This is in fact the amount entered into the Marital Dissolution Agreement for total payment from all three categories, further demonstrating this mistake. Further, Wife was to receive the entirety of Husband's

401(k). It is logical that to effectuate her receipt of 100% of this asset that she would additionally receive 100% of the loans or withdrawal that he made from the account.

* * *

The Court finds that, based upon clear and convincing evidence, the parties agreed that Wife was to receive one-half of the dissipation amount ($37,500), one-half of the value of gold and silver at National Security and Trust ($80,722.04), and the total amount of the loans or withdrawal from Husband's 401(k) ($298,588.64). Thus, the total amount Wife was to receive is $416,810.68. Per the agreement, this amount is to be paid in twenty-four monthly increments or at the rate of $17,367.11 per month. Accordingly, the Marital Dissolution Agreement shall be reformed as such and Wife is entitled to a judgment in the amount of $88,666.56 representing the deficiency in payments made from August 2018 through January 2020 ($4,925.92 for 18 months).

"On appeal, Wife contends that the trial court's reformation of paragraph 4(A)(d) was correct. However, Husband disagrees. As set out in his appellate brief, Husband argues that:

Admittedly, there is an immaterial math error in the first line [of the 'Mediated Agreement'] where one-half of $70,000 is shown as $37,500 and not $35,000. This is a nonissue for either party as neither sought correction or alteration but rather accepted the $37,500. However, what is clear with all due respect to the trial court (what the Court improperly failed to consider in the context of reformation), is that this paragraph reflects the parties' intended agreement and Former Husband intended to pay $125,000 or one-half of the total loan of $250,000. However, [the mediator] altered the numbers pursuant to the parties' agreement that Former Husband would pay $149,294.32, which is one-half of the total amount of the loan of $298,588.64. As the paragraph states, one-half of the dissipation is $37,500. The $298,588.64 figure being inserted by [the mediator] represented the then current total amount of the loan(s)/withdrawal(s) (not $250,000), and $149,294.32 representing one-half of that current amount (not $125,000). Third, Former Husband will pay $80,722.04 as one-half of the value of the gold and silver at National Security and Trust. What is clear is that whatever the total number is, Former Husband is agreeing to pay, and Former Wife is agreeing to accept, three items, in addition to the remainder of the 401(K), namely: (1) one-half dissipation - $37,500, (2) one-half of the loan(s)/withdrawal(s) from 401(K) - $149,294.32, and (3) one-half the value of the gold and silver at National Security and Trust - $80,722.04. These three items mathematically will equal a sum certain. That number is $267,516.36, certainly not $416,810.68 as the trial court ruling determined.

* * *

Admittedly, and frankly inexplicably, when the MDA got drafted and signed off on by the parties and their counsel, what was clearly intended to be the number $267,516.36 (representing one-half of the 401(K) loan(s)/withdrawal(s), dissipation and gold) was replaced in the MDA paragraph 4(A)(d) as the $298,588.64 sum certain to be paid Former Wife.

"From their respective positions concerning the trial court's reformation of the MDA, it is clear that although the parties concede that a mistake was made in the drafting of the MDA, they do not agree on what that mistake was. In seeking affirmance of the trial court's reformation of paragraph 4(A)(d), we infer that Wife is of the opinion that the parties agreed that she would receive the full amount of Husband's withdrawal from the 401(k), i.e., $298,588.64. Husband, however, maintains that the parties agreed that Wife would receive only one-half of the withdrawn amounts, i.e.,

$149,294.32. In short, Wife ostensibly argues that there was no mistake in the MDA, and Husband contends that the MDA awarded Wife twice the agreed upon amount for his withdrawals from the 401(k). Stated another way, there is no mutual mistake in this case. As the Tennessee Supreme Court explained, a 'mutual mistake' 'is a mistake *common to all the parties* to the written contract or the instrument or in other words *it is a mistake of all the parties laboring under the same misconception*.' *Trent*, 606 S.W.3d at 263 (citing *Collier*, 369 S.W.2d at 760) (emphases added). 'Reformation is an equitable remedy 'by which courts may correct a mistake in a writing so that it fully and accurately reflects the agreement of the parties.' ' *Id*. (citation omitted). Here, the parties do not agree concerning whether Wife was to receive the full amount of Husband's 401(k) withdrawal, or whether she was to received one-half of that amount. In this regard, the parties are not 'laboring under the same misconception.' In the absence of a mutual mistake, the remedy of reformation is not available, and the trial court erred in reforming paragraph 4(A)(d) of the parties' MDA.

"In the absence of mutual mistake, the trial court's ability to modify the MDA to comport with the 'Mediated Agreement,' or to otherwise look beyond the four corners of the MDA, is limited by the parole evidence rule. Parole evidence is only admissible to remove a latent ambiguity. *Ward v. Berry & Assoc. Inc.*, 614 S.W.2d 372 (Tenn. Ct. App. 1981). However, if the language of a written instrument is unambiguous, the court must interpret it as written rather than according to the unexpressed intention of one of the parties. *Pitt*, 90 S.W. 3d at 252 (citation omitted). A contract is not ambiguous merely because the parties have different interpretations of the contract's various provisions, *Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Systems*, 884 S.W.2d 458, 462 (Tenn. 1994) (citing *Oman Constr. Co. v. Tennessee Valley Authority*, 486 F. Supp. 375, 382 (M.D. Tenn. 1979)), nor can this Court create an ambiguity where none exists in the contract. *Id.* (citing *Edwards v. Travelers Indem. Co.*, 300 S.W.2d 615, 617–18 (Tenn. 1957)).

"As set out in context above, paragraph 4(A)(d) of the MDA contemplates that Wife will receive a sum certain of $298,588.64 payable in twenty-four monthly installments of $12,441.19. A sum certain is not ambiguous. Furthermore, the MDA clearly and unambiguously states that the $298,588.64 represents 'one-half of a claimed dissipation by Husband, one-half of the value of the gold and silver at National Security and Trust that existed at the time of mediation, and further represent[s] loans Husband made and a withdrawal he took out of his 401(k).' There is no ambiguity as the MDA clearly states that the $298,588.64 represents the sum total of Wife's interest in the dissipation, the gold and silver, and the withdrawals from the 401(k). Although the parties may have contemplated some other arrangement or amounts in their 'Mediated Agreement,' the plain and unambiguous language used in the MDA governs the interpretation of their contract. If the contract is plain and unambiguous, the meaning thereof is a question of law, and it is the Court's function to interpret the contract as written according to its plain terms. *Pitt*, 90 S.W.3d at 252 (citing *Petty*, 277 S.W.2d at 355). As such, under paragraph 4(A)(d), Wife is entitled only to a total of $298,588.64 (not $416,810.68), and Husband is to pay the $298,588.64 in twenty-four monthly payments of $12,441.19. Accordingly, we reverse the trial court's reformation of paragraph 4(A)(d) of the MDA."

"Paragraph 4(A)(e) of the parties' MDA provides, in its entirety, as follows:

> Wife shall receive one-half the value of the remaining gold in the total approximate amount of $320,625 (Wife's one-half portion shall equal $128,250.00). The parties acknowledge that Husband shall cause the gold to be transferred from Switzerland to the United States as soon

> as possible, and, upon receipt of such gold, Husband will use these funds to borrow against the gold in order to pay to Wife the sum of $128,250.00....

"Citing the fact that $128,250.00 is not one-half of $320,625.00, Wife petitioned the trial court, pursuant to Rules 60.01 and 60.02 of the Tennessee Rules of Civil Procedure, to correct the alleged clerical mistake to award her $160,312.50 (one-half of $320,625.00). The trial court denied Wife's petition, finding, in relevant part:

> Like paragraph 4[(A)](d), Wife contends that this paragraph also contains a mistake that should be reformed. Contrary to Paragraph 4[(A)](d), there is not clear and convincing proof of a mistake meeting the required elements for reformation. Husband submits that the parties' agreed to a sum certain for Wife to receive. Unlike paragraph 4[(A)](d), this paragraph clearly reflects a sum certain without any other indications. Husband asserts that they agreed to a sum certain due to the requirements of him securing the gold from Switzerland and then obtaining the loan to fund his payment and the possibility of fluctuations in the price of the gold. Accordingly, Wife has not shown, by clear and convincing evidence, that reformation of this provision is appropriate. Wife's Petition as to paragraph 4[(A)](d) is denied.

"Wife's argument that she is entitled to one-half of $320,625.00, i.e., $160,312.50 as opposed to the $128,250.00 stated in the MDA, ignores the modifying language 'total approximate amount.' By including this adjectival phrase to modify the $320,625.00, the parties clearly expressed their intent that the $320,625.00 is not a sum certain. Rather, the $320,625.00 is a mere approximation. The only sum certain in paragraph 4(A)(e) of the MDA is the $128,250.00 amount. As discussed above, a sum certain is not ambiguous. By giving full effect to all clauses and words in the parties' contract, the clear and unambiguous language shows the parties' intent that Wife's portion of this marital asset 'shall equal $128,250.00,' and that Husband will 'pay to Wife the sum of $128,250.00.' As such, the trial court did not err in denying Wife's petition to reform or otherwise modify the $128,250.00 amount."

D. TCRS Retirement; Coverture Share

Thompson v. Thompson, No. M2020-01293-COA-R3-CV (Tenn. Ct. App., Clement, Feb. 9, 2022), perm. app. denied June 8, 2022.

"The sole issue on appeal in this divorce action pertains to the coverture formula employed to fund the husband's marital interest in the wife's retirement account via a deferred distribution method. On the morning the case was set for a final hearing, the parties and their attorneys appeared in open court and announced they had agreed to the division of the marital estate with the exception of the implementing language required to fund the husband's marital interest in the wife's retirement account. Because the wife had a substantially larger account than the husband but lacked the financial resources to fund a present distribution of her retirement account, the parties announced in open court that they had agreed to an offset of their respective pensions and authorized the court to enter a final judgment using the coverture formula to affect a deferred distribution. Following the entry of the final order, the wife filed a Tennessee Rule of Civil Procedure 59.04 motion to set aside the order, contending that the trial court applied a deferred distribution method that did not reflect the parties' agreement. The trial court denied the motion, and this appeal followed. Finding no error, we affirm the trial court in all respects."

"Robert Martin Thompson ('Husband') and Christie Lee Thompson ('Wife') were married on September 22, 1995. This divorce action was commenced by Husband on August 25, 2015. Following contentious proceedings, the parties were declared divorced on December 22, 2017, resulting in a marriage totaling 22 years. Other issues, including specifically the division of marital assets, remained unresolved.

"During the majority of their marriage, both parties were employed as public educators, and each individually participated in and accumulated rights to retirement investments through Tennessee Consolidated Retirement System ('TCRS').

"Wife began working as a teacher and participating in her TCRS account in October 1995. Husband began working as a teacher and participating in his TCRS account in 2000. Both Husband and Wife were still participating in their respective TCRS accounts when Husband filed for divorce in 2015 and when the final decree was entered.

"The values of the marital assets and debts were not disputed. Aside from their respective TCRS accounts, the marital estate consisted primarily of debt at the time of their divorce. The retirement benefits Wife accumulated during the marriage significantly exceeded those accumulated by Husband due to her longer service, vesting, and higher pay. David Pitts, Husband's actuarial expert, assigned a present value of $365,314 to Wife's account and a present value of $115,013 to Husband's TCRS account; however, neither account vested during the divorce proceedings because the parties continued to work and participate in their respective TCRS account. *See Cohen v. Cohen*, 937 S.W.2d 823, 826 (Tenn. 1996) (explaining that '[a]n unvested retirement account is one in which the time requirements have not been fulfilled')."

"We begin our discussion with the agreement as announced by the parties in open court on March 19, 2018. With both Husband and Wife in attendance, their respective counsel announced that an agreement had been made resolving the division of marital property. Following this announcement, the trial court and counsel proceeded to outline, in detail, the provisions upon which the parties agreed. Notably, the parties agreed to the application of the coverture formula with a coverture percentage of 27%. In response to a question by the trial court, Wife acknowledged that she understood and agreed to pay 'a coverture percentage of 27 percent of the marital portion of the retirement to [Husband] upon her retirement.' (Emphasis added). Husband made a similar acknowledgment. Moreover, at no point during the hearing in open court did Wife or her counsel state any objection to the terms presented to the court. The Final Order that followed reads in pertinent part:

> 2. The Court finds that the parties relied upon and agreed to a coverture percentage division of [Wife's] retirement account, and arrived at the percentage in part based upon actuarial valuations that assumed the parties would continue working and would receive periodic raises, and that the following language shall be used to divide [Wife's] Tennessee Consolidated Retirement System (TCRS) account and the TCRS is directed to abide by said order of the Court:
>
> > *Husband shall receive a share calculated by using a coverture percentage of twenty-seven percent (27%), and that the following formula shall be used to calculate Husband's share of Wife's retirement: twenty-two (22) years of marriage* ***divided by Wife's total years of TCRS service****, said fraction being multiplied by twenty-seven percent (27%). The resulting percentage shall be applied to any payment from Wife's TCRS retirement of any*

nature, including lump sum, monthly payments, beneficiary distributions or otherwise, and shall be paid directly to Husband by TCRS.

"(Emphasis added).

"Wife contends the trial court's order is not consistent with the parties' agreement. Specifically, she contends it erroneously affords Husband a greater division of Wife's TCRS retirement benefits. This argument is based on Wife's contention that she agreed to Husband's receipt of a specific percentage of the TCRS account accrued *during their marriage*, but that the trial court's inclusion of the phrase *divided by Wife's total years of TCRS service* in the coverture fraction affords Husband a greater distribution of her benefits than the parties agreed to and permits Husband to receive benefits based off an increase in value accumulated by post-divorce contributions.

"For his part, Husband maintains that the deferred distribution method provides a workable framework for the division of Wife's unvested retirement benefits and limits Husband's award to his martial portion of Wife's retirement account. Husband takes the position that the standard coverture formula only applies to the marital share of unvested pension benefits because the coverture fraction requires the years of Wife's service *accrued during the marriage* to be divided by Wife's *total years of service calculated on the date of her retirement*. Husband further argues that application of the agreed-upon coverture percentage ensures an equitable division of the marital portion of Wife's retirement benefits.

"Tennessee authorizes two methods for the division of pensions in divorce proceedings: present value or deferred distribution. *Cohen*, 937 S.W.2d at 831. Present value is an actuarial method of calculating the current value of a future income stream that 'requires the trial court to place a present value on the retirement benefit as of the date of the final decree.' *Id.* 'Once the present cash value is calculated, the court may award the retirement benefits to the employee-spouse and offset that award by distributing to the other spouse some portion of the marital estate that is equivalent to the spouse's share of the retirement interest.' *Id.* The present cash value method is preferable when 'the marital estate includes sufficient assets to offset the award.' *Id.*

"In contrast, 'deferred distribution' does not require a determination of the present value. Instead, 'the court may determine the formula for dividing the monthly benefit at the time of the decree *but delay the actual distribution until the benefits become payable.*' *Id.* (emphasis added). Thus, the deferred distribution method permits the non-employee spouse to receive their marital share in the future rather than at the time of divorce. *See Kendrick*, 902 S.W.2d at 927–28 (explaining that deferred distribution is preferred when the marital estate does not contain sufficient property to offset an award upon divorce of the parties). *When vesting or maturation is uncertain or when the retirement benefit is the parties' greatest or only economic asset, courts have preferred the 'deferred distribution' method to distribute unvested retirement benefits*. *Cohen*, 937 S.W.2d at 831 (citing *Kendrick*, 902 S.W.2d at 927–28) (emphasis added).

"It is undisputed that Wife's TCRS account had not vested when the Final Order was entered. This is because Wife is still working and still contributing to her plan. It is also undisputed that Wife's TCRS account was her greatest asset and that she lacked sufficient liquid assets to fund a present distribution of the present value of Husband's marital interest in her TCRS account. Finding no error with the trial court's decision to apply the deferred distribution method to the facts of this case, we proceed with our analysis of the trial court's application of deferred distribution method."

"The trial court used the following to compute the first step: 22 years of marriage divided by Wife's total years of TCRS service at retirement, said fraction to be multiplied by 27%. The resulting percentage of that calculation was then ordered to be applied to Wife's monthly TCRS retirement.

"The formula used by the trial court reflects the parties' agreement. At the final hearing, counsel for both parties agreed to use the deferred distribution method. The parties do not dispute that they were married from September 22, 1995, until December 22, 2017, totaling 22 years of marriage, which is the number represented by the numerator in the trial court's coverture fraction. The trial court left the denominator as an unknown—Wife's total years of TCRS service at retirement—a number that will only be determinable at Wife's retirement. The parties agreed that Husband should receive '27% of the marital portion of the retirement account,' which is reflected in the Final Order. Nothing in the trial court's application of the coverture formula was erroneous or in contradiction to Tennessee Law.

"The trial court properly applied the deferred distribution method with respect to the division of Wife's future monthly benefit and the parties' agreement. Accordingly, we affirm the judgment of the trial court in all respects."

VII. Alimony

A. In Solido May Be Awarded for Attorney Fees and Expenses

Chapter 762, Public Acts 2022, amending T.C.A. § 36-5-121(h) eff. Mar. 31, 2022.

36-5-121(h).

"(1) (A) Alimony in solido, also known as lump sum alimony, is a form of long-term support, the total amount of which is calculable on the date the decree is entered, but which is not designated as transitional alimony. Alimony in solido may be paid in installments if the payments are ordered over a definite period of time and the sum of the alimony to be paid is ascertainable when awarded. The purpose of this form of alimony is to provide financial support to a spouse, to enable the court to equitably divide and distribute marital property, or both.

(B) Alimony in solido may be awarded for attorney fees and expenses incurred in connection with the proceedings through the date of the final hearing and any proceedings brought pursuant to Rule 59 of the Tennessee Rules of Civil Procedure. When determining whether attorney fees and expenses should be awarded as alimony in solido, the court shall consider the following:

(i) The factors enumerated in subsection (i);

(ii) The total amount of attorney fees and expenses incurred and the total amount of attorney fees and expenses paid by each party in connection with the proceedings;

(iii) Whether the attorney fees and expenses requested are reasonable under the factors set forth in Rule 1.5 of the Tennessee Rules of Professional Conduct; and

(iv) Whether the attorney fees and expenses were necessary."

B. Transitional Alimony Recipient Successfully Rebutted Presumption of Alimony Suspension

Strickland v. Strickland, 644 S.W.3d 620 (Tenn. Ct. App., Bennett, 2021), perm. app. denied Mar. 23, 2022.

"Tennessee recognizes four types of alimony: '(1) alimony *in futuro*, also known as periodic alimony; (2) alimony *in solido*, also known as lump-sum alimony; (3) rehabilitative alimony; and (4) transitional alimony.' *Scherzer v. Scherzer*, No. M2017-00635-COA-R3-CV, 2018 WL 2371749, at *6 (Tenn. Ct. App. May 24, 2018) (citing Tenn. Code Ann. § 36-5-121(d), and *Mayfield v. Mayfield*, 395 S.W.3d 108, 115 (Tenn. 2012)). At issue in this case is transitional alimony, which 'is appropriate when a court finds that rehabilitation is not required but that the economically disadvantaged spouse needs financial assistance in adjusting to the economic consequences of the divorce.' *Gonsewski*, 350 S.W.3d at 109."

"Wife first contends that the trial court erred in determining that the transitional alimony award was subject to modification pursuant to Tenn. Code Ann. § 36-5-121(g)(2)(C) because the alimony provision in the MDA expressly prohibited the court from modifying alimony. Marital dissolution agreements are contracts that are 'valid and enforceable between the parties.' *Winne*, 2019 WL 5606928, at *2 (citing *Eberbach v. Eberbach*, 535 S.W.3d 467, 474 (Tenn. 2017); *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006)). Although 'transitional alimony is generally subject to modification post-divorce if one of the contingencies in Tennessee Code Annotated § 36-5-121(g)(2) is established,' the parties may 'expressly agree in a marital dissolution agreement that a transitional alimony obligation shall not be modifiable.' *Vick v. Hicks*, No. W2013-02672-COA-R3-CV, 2014 WL 6333965, at *4 (Tenn. Ct. App. Nov. 17, 2014). Thus, 'where the parties agree in a marital dissolution agreement to terms different from those set out in the [alimony] statutes,' the statutes do not apply. *Vick*, 2014 WL 6333965, at *4 (citing *Honeycutt v. Honeycutt*, 152 S.W.3d 556, 563 n.5 (Tenn. Ct. App. 2003); *Myrick v. Myrick,* No. M2013-01513-COA-R3-CV, 2014 WL 2841080, at *4-6 (Tenn. Ct. App. June 19, 2014) (footnote omitted))."

"According to Wife, the MDA evidenced an intent to preclude modification of the award pursuant to the alimony statute simply because the alimony provision includes the word 'non-modifiable.' This argument, however, entirely ignores the remaining language in the alimony provision. Specifically, the provision provides that Husband's $2,000 per month transitional alimony obligation 'is non-modifiable except it terminates upon Wife's death or remarriage, *or may be modified pursuant to the statute upon Wife's cohabitation with a romantic partner.*' (Emphasis added). The clear and unambiguous language in the alimony provision, therefore, provides that the award is generally 'non-modifiable,' *but* it may be subject to modification in a particular circumstance—Wife cohabitating 'with a romantic partner.' Moreover, the alimony provision clearly and unambiguously allows for the award to be modified pursuant to the alimony statute, Tenn. Code Ann. § 36-5-121, if Wife began cohabitating 'with a romantic partner.'

"Wife admitted that Dr. Pinyard was her romantic partner and that she was cohabitating with him. We thus conclude that the trial court did not err in determining that the MDA permitted modification under these circumstances."

"When an alimony recipient cohabitates with a third person, a rebuttable presumption is raised that the alimony recipient is no longer in need of the previously awarded amount of alimony because the recipient is either supporting or receiving support from the third person. Tenn. Code Ann. § 36-5-121(g)(2)(C); *Winne*, 2019 WL 5606928, at *4 (citing *Wright v. Quillen*, 83 S.W.3d 768, 775 (Tenn. Ct. App. 2002)). This presumption is located in Tenn. Code Ann. § 36-5-121(g)(2)(C), which provides that transitional alimony shall not be modified unless:

> The alimony recipient lives with a third person, in which case a rebuttable presumption is raised that:
> (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or
> (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

"Once the presumption has been raised, the burden of proof shifts to the alimony recipient to demonstrate a continuing need for the full amount of the alimony award despite the cohabitation. *Hickman v. Hickman*, No. E2013-00940-COA-R3-CV, 2014 WL 786506, at *7 (Tenn. Ct. App. Feb. 26, 2014). To determine whether an alimony recipient has successfully rebutted the presumption, a court must consider not only whether the alimony recipient had contributed to or received support from the third person but also whether the recipient demonstrated his or her continuing need for transitional alimony. *Scherzer*, 2018 WL 2371749, at *10 (citing *Hickman*, 2014 WL 786506, at *7)."

"Because it was undisputed that Wife was cohabitating with Dr. Pinyard, the trial court properly found that the presumption had been raised. Wife contends that the trial court erred in concluding that she failed to rebut the presumption because she demonstrated that she was neither supporting nor receiving support from Dr. Pinyard due to them equally contributing to all of the household bills."

"When determining whether the alimony recipient has rebutted the presumption by demonstrating a continuing need for the full amount of the previously awarded alimony, 'a court must examine the financial circumstances of the alimony recipient at the time of the modification hearing.' *Hickman*, 2014 WL 786506, at *7. We have previously held that alimony recipients 'rebutted the presumption by showing a deficit of funds despite the third-party's support or cohabitation.' *Howard v. Beasley*, No. W2019-01972-COA-R3-CV, 2020 WL 6149577, at *3 (Tenn. Ct. App. Oct. 20, 2020) (citing *Gordon v. Gordon*, No. M2017-01275-COA-R3-CV, 2018 WL 5014239, at *10 (Tenn. Ct. App. Oct. 16, 2018); *Hickman*, 2014 WL 786506, at *8; *Audiffred v. Wertz*, No. M2009-00415-COA-R3-CV, 2009 WL 4573417, at *1, *3-4 (Tenn. Ct. App. Dec. 4, 2009)).

"Here, at the time of the modification hearing, Wife remained unemployed. Her only sources of income were $2,000 per month in alimony and $1,831 per month in child support, for a total monthly income of $3,831. Wife still lived in the same apartment she had lived in at the time of the divorce, but she shared the cost of rent, utilities, and other household expenses equally with Dr. Pinyard. We agree with the trial court's finding that '[t]his arrangement allow[ed] each of them to obtain housing accommodations at half the cost they would otherwise incur,' but Wife's income and expense statement shows that, despite this arrangement, she still paid $1,513.50 each month toward these expenses. Her income and expense statement further shows that Wife has approximately $3,941.75 in monthly general living expenses she shares with the parties' daughter. Thus, despite 'obtain[ing] housing accommodations at half the cost,' Wife still had monthly expenses totaling $5,455.25. Even receiving the full amount of alimony, Wife has a monthly deficit of $1,524.25. The trial court acknowledged this deficit finding that, 'in order to make up the difference between her income and expenses, Wife has been consuming cash distributed to her in the division of marital property.'

"Notwithstanding this finding, the court concluded that Wife failed to rebut the presumption that she no longer needed the previously awarded amount of alimony. The trial court made its decision by heavily relying on its finding that, '[a]lthough she is trained and qualified to earn income as a massage therapist, Wife chooses to be unemployed.' The record does not support this finding, however. Wife testified that, prior to the marriage, she had trained as a massage therapist and had held licensure for massage therapy in Texas. She has never held a message therapy license in Tennessee, and she stated that she has not been formally employed in that field or any other since 2006. As Wife points out in her appellate brief, '[i]t is not logical to believe Wife [is] presently able to obtain employment in a field she has not practiced for nearly fifteen years, in a state where she is not licensed, during a pandemic with soaring unemployment in service-based industries with restrictions on in-person activities.'

"Lastly, the trial court found that Wife no longer needed alimony because she was no longer transitioning to the status of a single person due to her 'living in a domestic partnership' with Dr. Pinyard."

"As discussed in detail earlier in this opinion, the record shows that Wife and Dr. Pinyard were very intentional in how they paid their shared expenses in order to avoid commingling their finances. Therefore, the nature of Wife's relationship with Dr. Pinyard had no bearing on whether she continued to need the alimony previously awarded.

"Based on the foregoing, we conclude that, under these circumstances, Wife has rebutted the statutory presumption and demonstrated her continuing need for the previously awarded amount of alimony and that the trial court abused its discretion in suspending the alimony award. The trial court's judgment suspending her transitional alimony award is reversed."

VIII. Domestic Abuse; Order of Protection for Human Trafficking Victim

Chapter 1115, Public Acts 2022, amending T.C.A. §§ 36-3-601, -602, -605 and -613 eff. July 1, 2022.

Human trafficking offenses have been added to the list of circumstances in which an order of protection may be issued.

CONFLICTS

I. Hague Convention; "Grave Risk of Harm"; No Requirement to Examine All Possible Ameliorative Measures Before Denying Petition for Return of Child

Golan v. Saada, 142 S.Ct. 1880 (U.S., Sotomayor, 2022).

"The Hague Convention on the Civil Aspects of International Child Abduction requires the judicial or administrative authority of a Contracting State to order a child returned to the child's country of habitual residence if the authority finds that the child has been wrongfully removed to or retained in the Contracting State. The authority 'is not bound to order the return of the child,' however, if the authority finds that return would expose the child to a 'grave risk' of 'physical or psychological harm or otherwise place the child in an intolerable situation.' The International Child Abduction Remedies Act (ICARA) implements the Convention in the United States, granting federal and state courts jurisdiction over Convention actions and directing those courts to decide cases in accordance with the Convention.

"Petitioner Narkis Golan, a United States citizen, married respondent Isacco Saada, an Italian citizen, in Italy, where they had a son, B. A. S., in 2016. In 2018, Golan flew with B. A. S. to the United States to attend a wedding and, instead of returning to Italy, moved into a domestic violence shelter with B. A. S. Saada thereafter timely filed a petition with the U. S. District Court for the Eastern District of New York, seeking an order returning B. A. S. to Italy pursuant to the Hague Convention. The District Court concluded that B. A. S. would face a grave risk of harm if returned to Italy, given evidence that Saada had abused Golan and that being exposed to this abuse harmfully affected B. A. S. The court, however, ordered B. A. S.' return to Italy, applying Second Circuit precedent obligating it to 'examine the full range of options that might make possible the safe return of a child' and concluding that ameliorative measures could reduce the risk to B. A. S. sufficiently to require his return. The Second Circuit vacated the return order, finding the District Court's ameliorative measures insufficient. Because the record did not support concluding that no sufficient ameliorative measures existed, the Second Circuit remanded for the District Court to consider whether such measures, in fact, existed. After an examination over nine months, the District Court identified new ameliorative measures and again ordered B. A. S.' return. The Second Circuit affirmed.

"Held: A court is not categorically required to examine all possible ameliorative measures before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm."

"(a) 'The interpretation of a treaty, like the interpretation of a statute, begins with its text.' *Abbott v. Abbott*, 560 U.S. 1, 10, 130 S.Ct. 1983, 176 L.Ed.2d 789 (internal quotation marks omitted). When 'a child has been wrongfully removed or retained' from his country of habitual residence, Article 12 of the Hague Convention generally requires the deciding authority (here, a district court) to 'order the return of the child.' T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11, p. 9. But Article 13(b) of the Convention leaves a court with the discretion to grant or deny return, providing that a court 'is not bound to order the return of the child' if it finds that the party opposing return has established that return would expose the child to a 'grave risk' of physical or psychological harm. *Id.,* at 10. Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion."

"(1) Saada's primary argument is that determining whether a grave risk of harm exists necessarily requires considering whether any ameliorative measures are available. The two questions, however, are separate. A court may find it appropriate to consider both questions at once, but this does not mean that the Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return based on a grave-risk determination."

"(2) The discretion to courts under the Convention and ICARA includes the discretion to determine whether to consider ameliorative measures that could ensure the child's safe return. The Second Circuit's contrary rule—which imposes an atextual, categorical requirement that courts consider all possible ameliorative measures in exercising discretion under the Convention, regardless of whether such consideration is consistent with the Convention's objectives—'in practice, rewrite[s] the treaty,' *Lozano v. Montoya Alvarez*, 572 U.S. 1, 17, 134 S.Ct. 1224, 188 L.Ed.2d 200."

"(b) A district court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the Convention and ICARA. The Second Circuit's rule improperly elevated return above the Convention's other objectives. The Convention does not pursue return exclusively or at all costs. Courts must remain conscious of all the Convention's objectives and requirements, which constrain courts' discretion to consider ameliorative measures. First, the Convention explicitly recognizes that any consideration of ameliorative measures must prioritize the child's physical and psychological safety. Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts 'act expeditiously in proceedings for the return of children.' A court therefore reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings."

"(c) In this case, the District Court made a finding of grave risk, but never had the opportunity to inquire whether to order or deny return under the correct legal standard. Accordingly, it is appropriate to allow the District Court to apply the proper legal standard in the first instance, see *Monasky v. Taglieri*, 589 U.S. ——, ——, 140 S.Ct. 719, 206 L.Ed.2d 9. The District Court should determine whether the measures considered are adequate to order return in light of the District Court's factual findings concerning the risk to B. A. S., bearing in mind that the Convention sets as a primary goal the safety of the child."

JUVENILE LAW

I. Foster Care

A. Relative Caregiver

Chapter 785, Public Acts 2022, adding T.C.A. § 37-2-422 eff. Jan. 1, 2023.

"(a) As used in this section:
(1) 'Department' means the department of children's services; and
(2) 'Relative caregiver' means a person with a first, second, or third degree of relationship to the parent or stepparent of a child who may be related to the child through blood, marriage, or adoption.

"(b) The department must pay a reimbursement to eligible relative caregivers to support the cost of raising the child, in accordance with this section.

"(c) A relative caregiver must receive payment equal to fifty percent (50%) of the full foster care board rate for the care of a child, if the following conditions are met:
(1) The child is not in state custody;
(2) The relative caregiver is twenty-one (21) years of age or older;
(3) The relative caregiver has been awarded custody of the child by a final order of a court acting under chapter 1, part 1 of this title;
(4) The relative caregiver's total household income does not exceed twice the current federal poverty guidelines based on the size of the family unit. As used in this subdivision (c)(4), 'household income' is determined by including the income of the relative caregiver, the spouse of the relative caregiver, and adult children of the relative caregiver who are living in the same home as the relative caregiver;
(5) A parent of the child does not reside in the relative caregiver's home;
(6) The relative caregiver agrees to seek the establishment and enforcement of child support, including the naming of the father of a child for the purposes of paternity establishment; and
(7) The relative caregiver and the child meet all other requirements as prescribed by rules promulgated by the department.

"(d) A payment made pursuant to this section is subject to the initial and continuing eligibility of the relative caregiver and the child, as determined by the department pursuant to this section and rules promulgated by the department. A payment made pursuant to this section is conditional upon sufficient appropriations being received by the department or other paying agency. The department may establish procedures for dispersing available funds in the event that the department or other paying agency does not receive sufficient appropriations to make payments pursuant to this section.

"(e) The department may establish additional requirements by rule pursuant to subdivision (c)(7); provided, that the department must not require that the child currently is or has been in custody of the department. The department must provide notice of additional requirements in writing to the relative caregiver within ten (10) days prior to the requirement's effective date.

"(f) Beginning February 1, 2024, and no later than February 1 following the conclusion of each calendar year during which the relative caregiver reimbursement program established under this section is in effect, the department must publish an annual report on the department's website on the payments made under this section. The report must include, but is not limited to:

(1) The total amount of payments made in the previous calendar year;
(2) The total number of children for whom a relative caregiver received a payment during the previous calendar year;
(3) The total number of children who have entered state custody after being in the custody of a relative caregiver who received a payment during the previous calendar year; and
(4) The total number of children who remain in the custody of a relative caregiver who received a payment during the previous calendar year.

"(g) The commissioner of children's services may promulgate rules necessary to carry out this section pursuant to the Uniform Administrative Procedures Act, compiled in title 4, chapter 5."

B. Limited Tort Exposure

Chapter 777, Public Acts 2022, adding T.C.A. § 37-2-421 eff. July 1, 2022.

"(a) Notwithstanding a provision of this chapter to the contrary, non-governmental independent contractors that contract with, or enter into an agreement with, the department of children's services for the provision of foster care continuum services to children in the department's custody are granted limited tort exposure under this chapter from civil actions or claims filed by the children and families who are the intended or actual recipients of those services. This grant of limited tort exposure is provided only when the non-governmental independent contractors are providing by contract or agreement foster care continuum services to children in the department's custody.

"(b) In performing or providing foster care continuum services, the non-governmental independent contractors are deemed to be the functional equivalent of the department of children's services. The non-governmental independent contractors are performing or providing these foster care continuum services in the stead of the department of children's services and by such are fulfilling a public purpose that is authorized to be performed by the department of children's services. The department's contracting party for the provision of foster care continuum services will not be afforded limits to its tort exposure for gross negligence in the performance of the contract or agreement.

"(c) In performing or providing foster care continuum services, the monetary limits of tort exposure for the department of children's services contracting party or party to the agreement are the same as the limits set for the department of children's services in § 9–8–307; provided, that a claim against the contractor arising from the contractor's provision of foster care continuum services to children in the department's custody shall be filed with a court of competent jurisdiction and shall not be heard by the Tennessee claims commission."

II. Child Abuse Investigation; Anonymous Report

Chapter 849, Public Acts 2022, adding T.C.A. § 37-1-406(e)(2) eff. Apr. 20, 2022.

"(2) Notwithstanding subdivision (e)(1), if the report of harm was made to the department anonymously, then the juvenile court shall not order the parents or person responsible for the care of the child or the person in charge of any place where the child may be, to allow the department entrance for purposes of interview, examination, and investigation unless the department has presented evidence corroborating the anonymous report of harm."

III. Child Sexual Abuse

A. Sex Trafficking Victims

Chapter 984, Public Acts 2022, adding T.C.A. § 37-1-603(b)(7) eff. May 3, 2022.

"(7) The district attorneys general conference shall work with the Tennessee bureau of investigation, the department of children's services, the Tennessee Sheriffs' Association, the Tennessee Association of Chiefs of Police, and the Children's Advocacy Centers of Tennessee to develop recommendations on the creation of multidisciplinary teams to provide responses specific to child sex trafficking cases. The purposes of these teams will be to enhance the services to victims of child sex trafficking, improve the coordination of investigations and the tracking of child sex trafficking cases, and identify gaps in services. These entities may consult with other public and private groups, organizations, and agencies that have knowledge of the child sex trafficking population and are willing to assist in this goal. The district attorneys general conference shall report the recommendations to the chairs of the judiciary committee of the senate and the criminal justice committee and the children and family affairs subcommittee of the house of representatives by January 15, 2023."

B. Child Protective Team

Chapter 649, Public Acts 2022, amending T.C.A. § 37-1-607(a)(2) eff. Mar. 15, 2022.

"Each [child protective] team may also include a representative from one (1) of the mental health disciplines and one (1) appropriately credentialed medical provider, as needed."

EDUCATION LAW

I. School Voucher Program Not Rendered Unconstitutional by the Home Rule Amendment

Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education, 645 S.W.3d 141 (Tenn., Page, 2022).

"This case is before us on an interlocutory appeal limited to a single claim: Plaintiffs' constitutional challenge to the Tennessee Education Savings Account Pilot Program (the 'ESA Act' or the 'Act'), Tenn. Code Ann. §§ 49-6-2601 to -2612, under article XI, section 9 of the Tennessee Constitution (the 'Home Rule Amendment' or the 'Amendment'). The trial court held that Plaintiffs had standing to pursue this claim and denied Defendants' motions to dismiss on that basis. The court held that the ESA Act is unconstitutional under the Home Rule Amendment and granted Plaintiffs' motion for summary judgment on this claim. The trial court then sua sponte granted Defendants an interlocutory appeal, and the Court of Appeals granted their application for an interlocutory appeal by permission pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Appeals affirmed the trial court's judgment with respect to the issue of standing and the issue of the constitutionality of the ESA Act under the Home Rule Amendment. We hold that Plaintiffs have standing to bring their Home Rule Amendment claim and affirm the judgment of the Court of Appeals with respect to that issue. However, we hold that the ESA Act does not implicate the Home Rule Amendment such that the Act is not rendered unconstitutional by the Amendment, and we reverse the judgment of the Court of Appeals with respect to that issue. Accordingly, the judgment of the trial court with respect to Plaintiffs' claim under the Home Rule Amendment is vacated, and the case is remanded to the trial court for entry of a judgment dismissing that claim, for further proceedings consistent with this opinion, and for consideration of Plaintiffs' remaining claims."

"As previously noted, the portion of the Home Rule Amendment at issue is found at article XI, section 9, clause 2 of the Tennessee Constitution, which provides:

> [A]ny act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

"The ESA Act does not require the approval by a two-thirds vote of the local legislative body of Plaintiffs or require approval in an election by a majority of those voting in said election. Consequently, if the ESA Act implicates the Home Rule Amendment, the Act is unconstitutional and void thereunder. If the Act does not implicate the Amendment, Plaintiffs' constitutional challenge fails as a matter of law.

"Like the Court of Appeals, we too find on the basis of the language of the Home Rule Amendment three requirements for its application: 1) the statute in question must be local in form or effect; 2) it must be applicable to a particular county or municipality; and 3) it must be applicable to the particular county or municipality in either its governmental or proprietary capacity. In this case, we find dispositive and so limit our analysis to the second requirement—that the ESA Act must be 'applicable to' Plaintiffs in order to implicate the Home Rule Amendment.

"By its terms, the ESA Act applies to Local Education Agencies ('LEAs'). See Tenn. Code Ann. § 49-6-2602(3)(C) (2020) (defining an 'eligible student' to participate in the ESA program as one attending a school in certain limited LEAs); id. § 49-6-2602(7) (defining an LEA by reference to Tenn. Code Ann. § 49-1-103 (2020), which defines an LEA as 'any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public-school system or school district created or authorized by the general assembly'). By its terms, the ESA Act does not facially apply to cities or counties such as Plaintiffs. However, the trial court and intermediate appellate court found, and Plaintiffs contend in this Court, that the ESA Act is applicable to them within the meaning of the Home Rule Amendment. We disagree.

"The trial court found that the ESA Act is applicable to Plaintiffs because of what it viewed as the inseparable partnership between the LEAs and Plaintiffs. The trial court explained that 'school systems (which are the same as LEAs) cannot be viewed as separate and distinct from the local governments that fund them. They are truly in a partnership.' The Court of Appeals similarly relied on the financial relationship between Plaintiffs and their respective LEAs in finding that the ESA Act is applicable to Plaintiffs. As the Court of Appeals summarized:

> We have already addressed the LEA argument in the context of standing. Tennessee Code Annotated section 49-1-103(2) defines an LEA as 'any county school system, city school system, special school district, unified school system, metropolitan school system or any other local public[-]school system or school district created or authorized by the general assembly.' Thus, LEAs include metropolitan and county school systems. Giving an entity a new name does not change the nature of the entity or its relationship to the county government that funds it.

"*Metro. Gov't of Nashville & Davidson Cnty.*, 2020 WL 5807636, at *4. In particular, the Court of Appeals noted that Tennessee Code Annotated section 49-6-2605(b)(1), which has been characterized as the 'counting requirement,' requires that each participating student still be counted in the enrollment figures for the LEA in which the student resides. This results in Plaintiffs being required to appropriate, tax, and fund their LEAs for those participating students. The Court of Appeals characterized the effect of the counting requirement, in conjunction with the maintenance of effort statute, as inflating the amount of local taxes that must be raised and appropriated by Plaintiffs and keeping Plaintiffs' appropriations for the county school system artificially high. Id. at *3 n.1.

"In this Court, Plaintiffs have argued that while the ESA Act applies in form to LEAs, it applies in effect to them. According to Plaintiffs, they must tax and fund their LEAs under the ESA Act at the same level as when the participating students were still attending schools in the LEAs. The ESA Act, thus, impacts Plaintiffs' funding of public education and so, according to Plaintiffs, is applicable to them.

"The Natu Bah Intervenors, and now the State as well, argue that the lower courts and Plaintiffs conflate two distinct requirements for the application of the Home Rule Amendment and the distinct language used in those two requirements—namely, that 1) the statute in question must be 'local in form or *effect*'; and that 2) it must be '*applicable to* a particular county or municipality.' The State asserts that, for purposes of the Home Rule Amendment, the common understanding of the phrase 'applicable to' is that the statute 'regulates' or 'governs' the county or municipality. We agree."

"Here, we conclude that the ESA Act regulates and governs only the conduct of the LEAs, not of the Plaintiffs. Tennessee Code Annotated section 49-6-2605(b)(1) specifically states that '[f]or the purpose of funding calculations, each participating student must be counted in the enrollment figures for the LEA in which the participating student resides.' The practical impact of this language was explained by the Greater Praise Intervenors at oral argument: 'The language of the [ESA Act] sets *responsibilities on the LEA as to how they count.* [The LEAs] then turn those counts over to the counties, but it's not that the county is doing any different counting. It's the LEA that's doing a different count and then turning those numbers over to the county, *which then responds according to formula.*' (Emphasis added). In other words, it is the conduct of the LEA in how it counts its students that the Act governs and regulates. The obligations of the counties to fund the LEAs are derived from other statutory provisions related to school funding outside of the ESA Act. See, e.g., Tenn. Code Ann. § 49-3-356(a) (2020) ('Every local government shall appropriate funds sufficient to fund the local share of the BEP.'); Tenn. Code Ann. § 49-3-315 (2020) (requiring the county trustee, in cooperation with the county director of schools, to distribute '[a]ll school funds for current operation and maintenance purposes collected by [the] county' pro rata among all LEAs in the county in accordance with weighted full-time equivalent average daily attendance ('WFTEADA')); Tenn. Code Ann. § 49-3-307(a)(10) (2020) (outlining the considerations for determining the local portion of the BEP). See generally *Tenn. Comptroller of the Treasury, Basic Education Program (BEP)*, https://comptroller.tn.gov/office-functions/research-and-education-accountability/interactive-tools/bep.html (last visited May 3, 2022). We simply do not agree with Plaintiffs that the effects of the interplay between the ESA's counting requirement and the statutes establishing their funding obligations are enough to trigger the application of the Home Rule Amendment. While Plaintiffs may be affected by the Act, we do not agree with the dissent that this is enough to render the ESA Act 'applicable to' them for purposes of the Home Rule Amendment."

"The Court also rejects the trial court's finding that Plaintiffs are so intimately related to their respective LEAs as to render them one and the same, thus making the ESA Act applicable to Plaintiffs. This argument is contrary to this Court's long-standing precedent with respect to the structure and operation of the educational system under Tennessee law. That jurisprudence establishes beyond refute that the LEAs are distinct from the county or municipal governments. See *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 225 (Tenn. 1988) (describing the distinct roles and responsibilities of the State, the county boards of education, and the county governments, and noting the limited role of the county governments in the provision of education in Tennessee). . . ."

"This argument also is contrary to the Court's precedent establishing that, while county boards of education operate in a sense as county government entities through their role in the educational partnership between themselves, the State, and the county governments, the county boards of education themselves are not bestowed with home rule authority. See *S. Constructors*, 58 S.W.3d at 715 n.10. In the absence of home rule authority, LEAs cannot logically be deemed to be endowed with the protection of the Home Rule Amendment.

"For the foregoing reasons, the Court concludes that the ESA Act is not applicable to Plaintiffs for purposes of the Home Rule Amendment, the Home Rule Amendment is not implicated by the ESA Act, and Plaintiffs' claim that the ESA Act is unconstitutional under the Home Rule Amendment, therefore, fails as a matter of law."

II. K-12; Funding; "Tennessee Investment in Student Achievement Act" [TISA]

Chapter 966, Public Acts 2022, amending T.C.A. §§ 49-3-101 et seq. eff. July 1, 2023.

TISA replaces the Basic Education Plan (BEP) as the funding legislation for K-12 public education, effective for the 2023-24 school year. It is intended to increase funding for all school districts. It includes base funding calculated on a per-pupil basis. The second tier of funding increases funding to districts with students who have higher needs, including more economically disadvantaged students and those with unique learning needs. A third funding tier provides additional funds for high-impact programs, such as K-3 literacy efforts. The funding mechanism also provides for student outcome incentives when students in an LEA achieve outcome goals established by the department of education.

III. Blocking Obscene Materials on School Computers

Chapter 1002, Public Acts 2022, amending T.C.A. § 49-1-221(a)(1)(C) and adding -221(c) eff. July 1, 2022.

49-1-221(a)(1)(C).

"(C) Select technology for the LEA's computers having internet access that will:
- (i) Filter, block, or otherwise prevent access to pornography or obscenity through online resources; and
- (ii) Prohibit and prevent a user from sending, receiving, viewing, or downloading materials that are deemed to be harmful to minors, as defined in § 39–17–901."

49-1-221(c).

"(c) (1) A provider of digital or online resources, with which an LEA or a state agency contracts for the provision of digital or online materials created and marketed for kindergarten through grade twelve (K–12) school use, shall:
- (A) Verify that the digital or online materials do not violate § 39–17–902;
- (B) Filter, block, or otherwise prevent access to pornography or obscenity through one's use of the digital or online materials;
- (C) Verify, in writing, that the provider's technology prevents a user from sending, receiving, viewing, or downloading materials that are harmful to minors, as defined in § 39–17–901; and
- (D) Remove, upon the contracting LEA's or state agency's request, access to digital or online materials for ages or audiences for which the contracting LEA or state agency has determined the material to be age- or audience-inappropriate. A provider must remove access to digital or online materials described in this subdivision (c)(1)(D) within one (1) business day of the provider's receipt of the contracting LEA's or state agency's request, unless the deadline for removal is extended by mutual consent of the contracting parties.

(2) An LEA or a state agency that contracts for the provision of digital or online materials created and marketed for kindergarten through grade twelve (K–12) school use shall adopt and implement a policy that:
- (A) Allows a person to file a complaint with the respective LEA or state agency concerning an alleged violation of subdivision (c)(1); and

(B) Requires the LEA or state agency to review a complaint as described in subdivision (c)(2)(A) to determine if action is necessary.

(3) This subsection (c) does not apply to medical resources or archival collections."

IV. Library Materials

Chapter 744, Public Acts 2022, adding T.C.A. §§ 49-6-3801–3803 eff. Mar. 24, 2022.

"49–6–3801. Short title.

"This part is known and may be cited as the 'Age-Appropriate Materials Act of 2022.'

"49–6–3802. Definitions.

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

(1) 'Library collection' means the materials made available to students by a school operated by an LEA or by a public charter school, but does not include materials made available to students as part of a course curriculum; and

(2) 'Materials' means books, periodicals, newspapers, manuscripts, films, prints, documents, microfilm, discs, cassettes, videotapes, videogames, applications, and subscription content in any form.

"49–6–3803. Materials review; removal.

"(a) Beginning with the 2022–2023 school year, each school operated by an LEA and each public charter school shall maintain a current list of the materials in the school's library collection. The list must be posted on the school's website.

"(b) By the 2022–2023 school year, each local board of education and public charter school governing body shall adopt a policy for developing and reviewing school library collections. The policy must include:

(1) A procedure for the development of a library collection at each school that is appropriate for the age and maturity levels of the students who may access the materials, and that is suitable for, and consistent with, the educational mission of the school;

(2) A procedure for the local board of education or public charter school governing body to receive and evaluate feedback from a student, a student's parent or guardian, or a school employee regarding one (1) or more of the materials in the library collection of the student's or employee's school; and

(3) A procedure to periodically review the library collection at each school to ensure that the school's library collection contains materials appropriate for the age and maturity levels of the students who may access the materials, and that is suitable for, and consistent with, the educational mission of the school.

"(c) A local board of education or public charter school governing body shall evaluate each material for which feedback is provided according to the procedure established pursuant to subdivision (b)(2) to determine whether the material is appropriate for the age and maturity levels of the students who may access the materials, and to determine whether the material is suitable for, and consistent with, the educational mission of the school.

"(d) If the local board of education or public charter school governing body determines that material contained in the school's library collection is not appropriate for the age and maturity levels of the students who may access the materials, or is not suitable for, or consistent with, the educational mission of the school, then the school shall remove the material from the library collection.

"(e) The procedures adopted pursuant to this section are not the exclusive means to remove material from a school's library collection, and do not preclude an LEA, a school operated by an LEA, a public charter school, or the governing body of a public charter school from developing or implementing other policies, practices, or procedures for the removal of materials from a library collection."

Chapter 1137, Public Acts 2022, adding T.C.A. § 49-6-2201(m) eff. June 3, 2022.

"(m) (1) Notwithstanding any law to the contrary, the commission shall:

(A) Issue guidance for LEAs and public charter schools to use when reviewing materials in a library collection to ensure that the materials are appropriate for the age and maturity levels of the students who may access the materials, and that the materials are suitable for, and consistent with, the educational mission of the school. The guidance must be issued to LEAs and public charter schools no later than December 1, 2022, and annually reviewed and updated by the commission by each December 1 thereafter;

(B) Assist LEAs and public charter schools in:

(i) Evaluating the appropriateness of materials in a library collection for which the LEA or public charter school has received feedback from a student, a student's parent or guardian, or a school employee challenging or questioning the appropriateness of materials under review by the LEA or public charter school; and

(ii) Responding to feedback, complaints, or appeals challenging the appropriateness of materials contained in the library collection of one (1) or more of the LEA's schools, or of the public charter school, filed with the LEA or public charter school as part of a review or appeals process established by the policies of the respective LEA or public charter school, if applicable; and

(C) Establish a timeline and process for a student, a student's parent or guardian, or a school employee to appeal a determination made by the student's or employee's local board of education or public charter school governing body that materials in the student's or employee's school's library collection are inappropriate for the age or maturity levels of the students who may access the materials, or that the materials are not suitable for, or are otherwise inconsistent with, the educational mission of the school, resulting in the materials' removal from the school's library collection. The commission:

(i) May limit the number of times the removal of a particular material may be appealed to the commission; the number of appeals that may be filed with the commission by an individual within a certain period of time; and the number of materials removed by a local board of education or public charter school governing body that an individual may appeal to the commission at one (1) time; and

(ii) Shall issue the commission's findings on appeal in writing to each LEA and public charter school. Each LEA and public charter school shall include, or

remove, the challenged material in, or from, the library collection for each of the LEA's schools, or for the public charter school, as applicable, for the grade levels for which the commission has found the challenged material to be appropriate or inappropriate for students.

(2) As used in this subsection (m), 'materials' and 'library collection' have the same meaning as defined in § 49–6–3802."

V. Curriculum

A. Virtues of Capitalism to be Included for Grades 9-12

Chapter 959, Public Acts 2022, adding T.C.A. § 49-6-1028(b)(2)(B) eff. Apr. 29, 2022.

"(B) Students in grades nine through twelve (9–12) must be taught about the virtues of capitalism and the constitutional republic form of government in the United States and Tennessee, as compared to other political and economic systems such as communism and socialism."

B. Black History and Black Culture

Chapter 938, Public Acts 2022, amending T.C.A. § 49-6-1006 eff. July 1, 2025.

"(a) Each LEA shall include in the course of instruction for students in grades five through eight (5–8) curricula designed to educate students in:

(1) Black history and black culture; and

(2) The contribution of black people to the history and development of this country and of the world.

"(b) The state board of education shall include multicultural diversity when developing frameworks and curricula to be taught at appropriate grade levels for students in kindergarten through grade twelve (K–12)."

VI. Administrative Matters

A. Human Trafficking Training Requirement for LEA Employees Who Work With Children

Chapter 1021, Public Acts 2022, amending T.C.A. § 49-6-3004(c) eff. July 1, 2022.

Now all LEA employees who work with children, not just teachers, are required to receive training every three years on the detection, intervention, prevention and treatment of human trafficking in which the victim is a child.

B. Remote Learning Readiness

Chapter 936, Public Acts 2022, adding T.C.A. §§ 49-2-139 and 49-5-108(g) eff. July 1, 2022.

49-2-139.

"(a) An LEA shall conduct a remote learning drill at least once, but not more than twice, each school year to ensure that schools, students, and parents of students can easily transition from in-person learning to remote learning. The drill must accurately reflect the LEA's plan for transitioning students to remote learning in the event of a disruption to school operations. An LEA shall not require or ask a student to transition to remote learning at any time during a remote learning drill conducted by the LEA.

"(b) An LEA shall address any issues that are identified during the remote learning drill.

"(c) The department of education shall develop guidance to assist LEAs in conducting remote learning drills."

49-5-108(g).

"(g) Each teacher training program shall provide instruction on effective strategies for virtual instruction to candidates seeking a license to teach or a license to serve as an instructional leader. The department of education shall review teacher training programs to ensure compliance with this subsection (g) during the course of the regularly scheduled review cycle established in the state board of education's rules."

C. Discipline; Withholding of Student Cell Phone

Chapter 707, Public Acts 2022, adding T.C.A. § 49-6-4002(h) eff. Mar. 18, 2022.

"(h) A discipline policy or code of conduct adopted by a local board of education or charter school governing body may authorize a teacher to withhold a student's phone from the student for the duration of the instructional time if the student's phone is a distraction to the class or student."

D. Suicide Prevention

Chapter 748, Public Acts 2022, adding T.C.A. § 49-6-1904 eff. Mar. 24, 2022, and applies to the 2022-2023 school year and subsequent school years.

"(a) This act is known and may be cited as the 'Save Tennessee Students Act.'

"(b) If an LEA issues new student identification cards for students in grades six through twelve (6–12), then the LEA shall include on the identification cards:

(1) The telephone number for the National Suicide Prevention Lifeline; and
(2) The social media handle, telephone number, or text number for at least one (1) additional crisis resource selected by the LEA, which may include, but not be limited to, the crisis text line or, if available, a local suicide prevention hotline.

"(c) An LEA shall publish the telephone number for the National Suicide Prevention Lifeline and the social media handle, telephone number, or text number for at least one (1) additional crisis resource selected by the LEA, which may include, but not be limited to, the crisis text line or, if available, a local suicide prevention hotline in a conspicuous place in each school of the LEA that serves students in grades six through twelve (6–12) or any combination thereof."

E. K-12; Access to Testing Materials Available to Members of General Assembly

Chapter 1032, Public Acts 2022, adding T.C.A. § 49-6-6016 eff. July 1, 2022.

"(a) An LEA or the department of education shall provide any testing materials or proposed testing materials that are in the LEA's or department of education's possession to a member of the general assembly upon the member's request to inspect and review the materials.

"(b) The state board of education shall promulgate rules to protect the integrity and confidentiality of materials that are disclosed pursuant to this section. The rules must be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

"(c) The release of assessment information pursuant to this section shall not include:
(1) Items required by the department to validate future administrations of the assessments;
(2) Items that are being field tested for future administrations of the assessments;
(3) Passages, content, or related items if the release would be in violation of copyright infringement laws; or
(4) Items that would that impact the validity, reliability, or cost of administering the assessment or proposed assessment.

"(d) The release of information pursuant to this section must comply with the Data Accessibility, Transparency and Accountability Act, compiled in chapter 1, part 7 of this title; the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. 1232g); and § 10–7–504."

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

Chapter 909, Public Acts 2022, adding T.C.A. § 49-6-310(e) and amending § 49-6-310(b) eff. July 1, 2022.

49-6-310(e).

"(e) The commissioner of education shall withhold a portion of the state education finance funds that an LEA is otherwise eligible to receive if the LEA fails or refuses to comply with the requirements of this section. This subsection (e) does not apply to an LEA that fails or refuses to comply with the requirements of this section in response to a court or other legally binding order that prohibits the LEA from complying."

49-6-301(b).

"(b) (1) The state board of education shall promulgate rules to ensure compliance with this section and to establish a procedure for how a portion of the state education finance funds are withheld pursuant to subsection (e). The rules must be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.
(2) Each local board of education and each governing body of a public charter school shall adopt and enforce a policy to ensure compliance with subsection (a) and the rules promulgated pursuant to subdivision (b)(1) in the public schools governed by the respective entity."

VIII. Higher Education

A. Athletics; Males [at Birth] Prohibited From Participating in Public Higher Education Sports Designated for Females

Chapter 1005, Public Acts 2022, adding T.C.A. § 49-7-180 eff. July 1, 2022.

"(a) (1) Intercollegiate or intramural athletic teams or sports that are designated for 'females,' 'women,' or 'girls' and that are sponsored, sanctioned, or operated by a public institution of higher education or by a private institution of higher education whose students or teams compete against public institutions of higher education shall not be open to students of the male sex.

(2) Subdivision (a)(1) does not restrict the eligibility of a student to participate in an intercollegiate or intramural athletic team or sport designated for 'males,' 'men,' or 'boys' or designated as 'coed' or 'mixed.'

"(b) For purposes of this section, an institution of higher education shall rely upon the sex listed on the student's original birth certificate, if the birth certificate was issued at or near the time of birth. If a birth certificate provided by a student is not the student's original birth certificate issued at or near the time of birth or does not indicate the student's sex, then the student must provide other evidence indicating the student's sex.

"(c) A government entity, a licensing or accrediting organization, or an athletic association or organization shall not:

(1) Accept a complaint, open an investigation, or otherwise take an adverse action against an institution of higher education for maintaining separate intercollegiate or intramural athletic teams or sports for students of the female sex; or

(2) Retaliate or take an adverse action against a student who reports a violation of this section to an employee or representative of the institution of higher education, athletic association, or organization, or to a state or federal agency with oversight of the institution of higher education.

"(d) Each institution of higher education shall adopt and enforce a policy to ensure compliance with this section."

B. Divisive Concepts in Schools

Chapter 818, Public Acts 2022, adding T.C.A. §§ 49-7-1901–1907 eff. Apr. 8, 2022.

"The general assembly finds that the divisive concepts described in Section 3 of this act exacerbate and inflame divisions on the basis of sex, race, ethnicity, religion, color, national origin, and other criteria in ways contrary to the unity of the United States of America and the well-being of this state and its citizens.

"As used in this part:

(1) 'Divisive concept' means a concept that:

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

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

(C) An individual should be discriminated against or receive adverse treatment because of the individual's race or sex;
(D) An individual's moral character is determined by the individual's race or sex;
(E) 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;
(F) An individual should feel discomfort, guilt, anguish, or another form of psychological distress solely because of the individual's race or sex;
(G) A meritocracy is inherently racist or sexist, or designed by a particular race or sex to oppress another race or sex;
(H) This state or the United States is fundamentally or irredeemably racist or sexist;
(I) Promotes or advocates the violent overthrow of the United States government;
(J) Promotes division between, or resentment of, a race, sex, religion, creed, nonviolent political affiliation, social class, or class of people;
(K) Ascribes 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;
(L) The rule of law does not exist, but instead is a series of power relationships and struggles among racial or other groups;
(M) 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;
(N) Governments should deny to any person within the government's jurisdiction the equal protection of the law;
(O) Includes race or sex stereotyping; or
(P) Includes race or sex scapegoating;

(2) 'Race or sex scapegoating' means assigning fault, blame, or bias to a race or sex, or to members of a race or sex, because of their race or sex, and includes any claim that, consciously or subconsciously, and by virtue of a person's race or sex, members of a race are inherently racist or inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others;
(3) 'Race or sex stereotyping' means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex; and
(4) 'Training' includes seminars, workshops, trainings, and orientations."

"In furtherance of the general assembly's findings in Section 2, the following restrictions apply to public institutions of higher education in this state:

(1) A student or employee of a public institution of higher education shall not be penalized, discriminated against, or receive any adverse treatment due to the student's or employee's refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to one (1) or more divisive concepts;
(2) A student or employee of a public institution of higher education shall not be required to endorse a specific ideology or political viewpoint to be eligible for hiring, tenure, promotion, or graduation, and institutions shall not ask the ideological or political viewpoint of a student, job applicant, job candidate, or candidate for promotion or tenure; and
(3) An individual who believes that a violation of this Section 4 has occurred may pursue all equitable or legal remedies that may be available to the individual in a court of competent jurisdiction."

C. Possible In-State Tuition for Non-Resident Veteran or Military Affiliated Students

Chapter 791, Public Acts 2022, amending T.C.A. §§ 49-7-1303 and -1304 eff. Apr. 8, 2022.

49-7-1303.

"(1) 'Military-affiliated' means active-duty military personnel, reservists, members of the national guard, and reserve officer training corps program cadets."

49-7-1304.

"(b) The board of regents, the board of trustees of the University of Tennessee, and each state university board of trustees may classify a veteran or military-affiliated individual as a Tennessee resident who is not required to pay out-of-state tuition or an out-of-state fee if the veteran or military-affiliated individual is:

(1) Enrolled in the public institution of higher education; and
(2) Resides outside the state of Tennessee."

D. University of Tennessee Southern

Chapter 648, Public Acts 2022, adding T.C.A. § 49-9-1101 eff. Mar. 15, 2022.

"(a) There is created and established by the state a campus of the University of Tennessee in Giles County, to be known as the University of Tennessee Southern.

"(b) The trustees of the University of Tennessee are given the same power, authority, and discretion to take all actions necessary, proper, or convenient for the accomplishment of the University of Tennessee's mission at the University of Tennessee Southern as the trustees now have and exercise at the other colleges and schools of the University of Tennessee, including, but not limited to, the power, authority, and discretion to prescribe and offer courses, curricula, and degree programs; acquire land and construct buildings; inaugurate and carry out all necessary supporting work and activities; and award degrees of the University of Tennessee."

COMMERCIAL LAW

I. Failure to Pay Promissory Note; Bank Not Required to Mitigate Damages by Selling Stock Held as Collateral

Tennessee Bank & Trust v. Boruff, No. M2021-00552-COA-R3-CV (Tenn. Ct. App., Bennett, Mar. 15, 2022).

"This appeal involves an action to collect on a promissory note. On December 3, 2013, Scott M. Boruff executed a $3,000,000 note to Tennessee Bank & Trust ('TBT'). The note was a Variable Rate Commercial Revolving Draw Note, due on December 1, 2014, and all proceeds of the loan were to be used by Mr. Boruff for business or commercial purposes. The note required Mr. Boruff to make monthly interest payments, 'calculated at a variable rate equal to the Wall Street Prime Rate ... plus 1.50%' but never less than 4.75% per year.

"To secure the note, Mr. Boruff pledged as collateral publicly-traded stock he held in Miller Energy, an oil and gas exploration company based in Knoxville of which Mr. Boruff was president and CEO. At the time he pledged the stock as collateral, his 3,344,925 shares of stock were valued at $27,562,182 and were held in a brokerage account at TD Ameritrade. Mr. Boruff executed a Pledged Asset Agreement for Collateral Loans that gave TBT control over the brokerage account, including the right to sell the stock as collateral at any time without Mr. Boruff's consent or knowledge.

"Due to volatility in the oil and gas market in 2014, the value of the stock began to decrease in value. In light of those changes, the parties executed the first of nine modifications of the note in March 2014. The first modification increased the principal amount of the note to $3,300,000 and extended the maturity date from December 1, 2014, to October 1, 2015. This modification also set up a payment schedule that required Mr. Boruff to begin making his monthly interest payments in May 2014 (instead of January 2014), to pay off any principal balance over $2,000,000 on October 1, 2014, and to pay off any principal balance over $1,500,000 on March 31, 2015. It also imposed certain conditions for advances, including that the price of the stock be not less than $4 per share and that the principal balance of the note not exceed 20% loan-to-value between March 31 and October 1, 2014, 25% between October 1, 2014 and March 31, 2015, or 30% between March 31 and October 1, 2015."

"Ultimately, Mr. Boruff did not pay off the note when it was due on July 25, 2018, and TBT filed a complaint on the note on November 26, 2019, seeking a judgment of $2,219,178.87 for the outstanding principal of $1,907,573.75 plus interest; TBT also sought its attorney's fees and costs. Mr. Boruff answered, and, with leave of the court, later amended his answer. He admitted most allegations but denied the following: that he had defaulted on the note; that he owed $1,907,573.75 in unpaid principal and $311,605.12 in interest; that he agreed in the note to pay TBT's attorney's fees and expenses; and that TBT was incurring attorney's fees at $275 per hour plus 'the associated legal expenses of collection and this lawsuit.' Mr. Boruff also asserted several affirmative defenses, stemming from his position that the Bank failed to mitigate its damages and also breached the contract by 'unreasonably refusing to sell the stock securing the note upon reasonable and timely request by the Defendant,' which he contended would have resulted in the balance on the note being paid in full."

"A bench trial was held in April 2021, at which four witnesses testified: three TBT representatives and Mr. Boruff.

"Walker Choppin, Jr., who was senior vice president at TBT when the loan was made to Mr. Boruff but has since retired, testified that the loan was 'a line of credit that Mr. Boruff could access for really whatever investment needs he might have' and that the loan was secured by shares of stock held in Miller Energy. Pertinent to Mr. Boruff's failure to mitigate damages defense, Mr. Choppin testified that at the December 2014 meeting between Mr. Boruff and bank leaders, Mr. Boruff did not ask the bank to sell the shares of stock to repay the loan. To the contrary, Mr. Choppin testified that Mr. Boruff 'asked us not to sell.' Moreover, Mr. Choppin testified that the loan was not in default at that time, that the bank never declared the loan to be in default, and that at no time did Mr. Boruff ever ask the bank to sell his shares of stock prior to them becoming 'worthless' in October 2015.

"Roddy Story, Jr., who was executive vice president and manager for commercial banking at TBT when the loan was made, testified that Mr. Boruff made a substantial payment in early October 2014 that reduced the balance owed on the loan to $22,780, but that over the next month, he made withdrawals amounting to a balance owed of $1,587,656.36. Mr. Story testified that he and Mr. Choppin and another bank official had a meeting with Mr. Boruff, Mr. Boruff's father-in-law, and their attorney, in December 2014 over 'concern ... because of what was happening in the oil industry.' Mr. Story testified that Mr. Boruff was 'somebody we had a lot of confidence in' and that 'we came away feeling much better about the prognosis for the company ... [and] relieved that he thought the company would forbear the industry.' Mr. Story testified that Mr. Boruff told the bank officials that he was asked by the board of Miller Energy to not have his shares pledged on any personal loans and asked to be given until May 2015 to get the bank 'taken care of.' Mr. Story testified that at no point in his working relationship with Mr. Boruff did Mr. Boruff ask the bank to sell the shares of stock in Miller Energy. He also agreed on cross examination that while the bank had the right to declare the loan to be in default, the bank did not declare a default, and that there was a distinction in the banking industry between there being an event of default versus the bank declaring a loan to be in default. He explained that TBT did not declare a default because there 'seemed to be what we felt to be good faith and cooperation between us, and there also seemed to be possible solutions that would benefit [Mr. Boruff] and us.'

"Dan Andrews, Jr., president of TBT, testified that he was present for the meeting in December 2014 with Mr. Boruff, during which Mr. Boruff gave assurances that the matter would be resolved by May 2015. Mr. Andrews stated that he and the other bank officials 'felt much better after the meeting' and that '[his] impression from the meeting itself was that they came out here to bring us up to speed on Miller, the industry, and the stock so that we wouldn't sell. And he never in that meeting asked me or us or anybody to sell the stock.' Mr. Andrews testified about the relationship between Mr. Boruff and the bank: 'at the end of the day ... Scott seemed to have the wherewithal, the ties, the connections, the history, the professionalism to kind of continue, and whether the stock was there or not there, to make it work.'

"Mr. Boruff then presented his case and testified that he obtained the loan at issue in December 2013 at the same time as receiving a personal loan in roughly the same amount from CapStar Bank. The CapStar loan was secured by a first mortgage on his home and the Miller Energy stock. He testified that an oil crisis began in the spring of 2014 and accelerated that fall, resulting in a change in value of the stock from $27,562,182 in December 2013 to $7,025.88 on December 31, 2015, and prompting 'constant talk' with TBT about the value of the collateral that secured its note. Contrary

to the testimony offered by the bank officials, Mr. Boruff testified that he asked the bank officials to sell the stock in December 2014 and did not understand why they did not do so. He explained, through a graph entered into evidence as Exhibit 15, that the stock was worth approximately $4 per share in October 2014 and $3 per share in November 2014.

"At the conclusion of the trial, the trial court issued a ruling from the bench and entered an order memorializing that ruling on April 23, 2021, in which it made the following findings of fact and conclusions of law:

> Defendant did not contest that he borrowed the money from the Bank, that he signed the note and the nine modification agreements, or that the [B]ank calculated the balance due in principal and interest correctly. Defendant contended that he orally instructed the Bank to sell his collateral shares of stock in Miller Energy Resources, Inc. prior to the stock decreasing in value. Since the parol evidence rule precludes the oral modification of an unambiguous contract, the Court finds that defendant is justly indebted to plaintiff for an unpaid loan, with a principal balance due in the amount of $1,907,573.75, plus pre-judgment interest of $411,285.00, and plaintiff's reasonable attorney's fees.

"The court ordered Mr. Boruff to pay TBT $2,318,285.75, accruing post-judgment interest at the default rate of 15% per annum, pursuant to Tenn. Code Ann. § 47-14-121. It further ordered Mr. Boruff to pay $150,000 for TBT's attorney's fees and assessed the court costs against Mr. Boruff.

"Mr. Boruff appeals, raising the following issue: 'Whether the trial court erred when it failed to consider the defense ... that [TBT] failed to mitigate its damages by failing and/or refusing to sell the stock collateral.'"

"There is no dispute that Mr. Boruff failed to pay amounts he owed when they were due. Mr. Boruff asserts that 'TBT could have sold the stock in December of 2014 at the Defendant's request and the Note would have been satisfied' in support of his affirmative defense that TBT failed to mitigate its damages. The trial court summarily dismissed that defense by concluding that, based on section 5 of the note concerning modifications, consideration of Mr. Boruff's oral instructions to sell the stock were precluded by operation of the parol evidence rule.

"The parol evidence rule does not prohibit consideration of evidence that does not contradict the written contract. *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 695 (Tenn. 2019). '[T]he parol evidence rule assumes that the parties deliberately chose to put their agreement in writing to avoid the uncertainties of oral evidence, including the possibility of false testimony as to oral conversations.' *Farmers & Merchants Bank v. Petty*, 664 S.W.2d 77, 82 (Tenn. Ct. App. 1983). This Court discussed the parol evidence rule in *GRW Enterprises, Inc. v. Davis*:

> The parol evidence rule is a rule of substantive law intended to protect the integrity of written contracts. Since courts should not look beyond a written contract when its terms are clear, the parol evidence rule provides that contracting parties cannot use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract.
>
> The rule appears to be quite all-encompassing. However, the courts have been reluctant to apply it mechanically and have now recognized that it has numerous exceptions and limitations. Thus, the rule does not prevent using extraneous evidence to prove the existence

> of an agreement made after an earlier written agreement, or to prove the existence of an independent or collateral agreement not in conflict with a written contract. In each of these circumstances, the courts have conceived that the parol evidence is not being used to vary the written contract but rather to prove the existence of another, separate contract.

"797 S.W.2d 606, 610-11 (Tenn. Ct. App. 1990) (citations omitted). Concerning oral modifications to existing contracts, this Court has stated:

> A modification to a contract is a change to one or more contract terms which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect of the contract undisturbed.
>
> After a written contract is made, it may be modified by the express words of the parties in writing or by parol, where both parties consent to such modifications. Generally, Tennessee courts follow the rule that allows contracts to be orally modified even if the contracts specifically state that the contract can only be modified in writing. Even where the written contract prohibits oral modifications of the agreement, oral alterations will still be given effect if otherwise valid, as men cannot tie their hands or bind their wills so as to disable them from making any contract allowed by law, and in any mode in which it may be entered into. A party's agreement to a modification need not be express, but may be implied from a course of conduct; this is true even where the agreement expressly specifies, as in this case, that the parties may only modify the agreement in writing.

"*Lancaster v. Ferrell Paving, Inc.*, 397 S.W.3d 606, 611-12 (Tenn. Ct. App. 2011) (internal citations and quotations omitted). *But see* Tenn. Code Ann. § 47-50-112(c) (providing that if a note or other contract 'contains a provision to the effect that no waiver of any terms or provisions thereof shall be valid unless such waiver is in writing, no court shall give effect to any such waiver unless it is in writing').

"The evidence presented at trial was conflicting as to whether Mr. Boruff even requested TBT sell the stocks to pay off the loan. He testified that he made such a request to TBT in December 2014; however, three bank representatives testified that he never made such a request, that he in fact asked them not to sell the stock, and that he represented to them that he would be able to repay the note without needing to resort to selling the stock."

"While the value of the stock was certainly falling at the time of his supposed request in December 2014, no event of default had actually occurred, so the bank had no right to sell the collateral to satisfy its debt. Accordingly, any action to sell the collateral by the bank at that time would have required a modification of the terms of the parties' agreement. There is no evidence of an oral agreement or behavior on the part of the parties to indicate that they had agreed to modify the terms of the parties' note to allow TBT to sell the collateral prior to a default, and the note itself would have required such a modification to be in writing, as found by the trial court.

"When events of default did occur shortly thereafter, TBT still chose not to sell the stock, which brings us to a consideration of Mr. Boruff's contentions on appeal that he 'was not asking the Trial Court to change, modify or alter the terms of the contract ... [but] to require [TBT] to mitigate its damages.' Mr. Boruff argues that because TBT failed to sell shares of stock at a time when they were much more valuable, the bank failed to eliminate or significantly reduce the balance due on his note, such that it should be 'absolved in its entirety or reduced to $527,488.60.'"

"In this case, TBT received stock as collateral and did not assume an obligation to act as an investment adviser. Thus, it was under no duty to sell the stock at a reasonable time to secure repayment of the loan. As the value of the collateral continued to decline, the evidence showed that TBT took reasonable steps to protect itself from loss by regularly communicating and collaborating with Mr. Boruff and seeking additional collateral, which he provided in the form of a deed of trust on his real property in Knox County and a pledge of his interest in an LLC. Mr. Andrews testified that the bank did not sell the stock because Mr. Boruff 'asked us not to' and also because Mr. Boruff 'had the wherewithal in his financial statement with other assets to add to that in place of the stock.' The parties memorialized their efforts to get the loan repaid in a mutually beneficial way with written modifications to their initial agreement. Though Mr. Boruff benefitted from the bank's forbearance at the time, he now asserts that it is evidence of 'ulterior motives' and a failure to mitigate damages. On the record presented, we conclude that Mr. Boruff has not carried his burden to demonstrate that TBT's actions were unreasonable; accordingly, his failure to mitigate damages defense fails."

II. Personal Guaranty; Guarantor Liable Even Though Creditor Declined to Pursue Distributorship

New Dairy Kentucky, LLC v. Tamarit, No. M2021-00091-COA-R3-CV (Tenn. Ct. App., Clement, Feb. 2, 2022).

"Borden Dairy Kentucky, LLC ('Plaintiff') is a producer of dairy products. In January 2014, Mike Tamarit ('Defendant') signed a credit application and terms agreement with Plaintiff on behalf of Borden Southern Distribution, LLC ('BSD'), pursuant to which BSD was authorized to distribute Plaintiff's dairy products within a specified region. At the same time, Defendant signed a personal guaranty that obligated him to pay any amounts not paid by BSD. Defendant was the original owner of all membership interests in BSD, a limited liability company, and was the sole member—sole owner—of BSD when the agreements were signed.

"Acting pursuant to the agreements, Plaintiff and BSD proceeded to do business together. By the end of May 2015, BSD owed Plaintiff $60,484.95 on an open account. A few months later, Plaintiff learned that Defendant had sold his membership interest in BSD to a third party while BSD continued its distribution relationship with Plaintiff.

"After learning that Defendant had sold his membership interest in BSD, Plaintiff created a new account for BSD, effective June 1, 2015. Plaintiff then sent a demand for payment on the old account for the amount owed as of the end of May 2015 to both BSD and Defendant. Neither BSD nor Defendant paid the debt. Thus, in February 2016, Plaintiff commenced this action by filing a Complaint on Sworn Account against Defendant and BSD under Tennessee Code Annotated § 24-5-107. Defendant filed an answer in March 2018, generally denying liability for the debt. For reasons not explained in the record, Plaintiff later voluntarily nonsuited BSD.

"After conducting discovery, Plaintiff moved for summary judgment based on the undisputed fact that Defendant signed the personal guaranty as part of the distribution agreement. Following a hearing, the trial court granted summary judgment as to liability but reserved ruling on damages until an evidentiary hearing could be held.

"At the evidentiary hearing in November 2020, Plaintiff introduced business records for the old BSD account via Plaintiff's witness and the records' custodian, Ron Knox. After the hearing, the

trial court found that the records and Mr. Knox's testimony established that, as of May 29, 2015, the principal amount owed on the account was $60,484.95, and that no payment had been made on the account since that time. After calculating interest and fees, the trial court entered a final judgment against Defendant for $130,102.12; including the principal amount of $60,484.95; prejudgment interest of $54,495.94; and $15,121.23 in attorney's fees. The court ordered that post-judgment interest would accrue at the statutory rate of 5.25% per year."

"Defendant contends that Plaintiff violated its duty of good faith and fair dealing by assigning a new account number for BSD after Defendant sold his membership interest and electing to collect the old account balance from only Defendant while continuing to do business with BSD under the new account. Specifically, Defendant asserts in his appellate brief:

> For unknow[n], nonlegal reasons Plaintiff unilaterally elected to seek collection of the Indebtedness only from [Defendant] while ignoring [BSD]; all the while continuing to sell Dairy Products to [BSD]. The Guaranty Agreement was a pay if not paid arrangement which would be subject to the contract princip[les] of good faith and fair dealings. Plaintiff's actions toward [Defendant] clearly evidence Plaintiff's violations of said good faith and fair dealing princip[les]."

"We agree with Defendant that the personal guaranty obligated him to pay BSD's debt only if BSD did not pay the same. The guaranty provided as follows:

> I, (we) _____, for and in consideration of your extending credit at my request to (Name of Company) _____ (the 'Company'), personally guarantee prompt payment of any obligation of the company to BORDEN DAIRY and each of its subsidiaries and affiliated entities ('Seller'), whether now existing or hereinafter incurred, and I further agree to bind myself to pay on demand any sum which is due by the Company to Seller whenever the Company fails to pay same. It is understood that this guaranty shall be an absolute, continuing and irrevocable guaranty for such indebtedness of the Company.

"(Emphasis added).

"The record shows that BSD failed to pay sums due to Plaintiff after Plaintiff sent BSD a demand letter in September 2015. This fact was undisputed. Thus, under the language of the guaranty, Defendant had to pay the same on demand. But Defendant now argues that he is excused from his personal guaranty because BSD breached its implied duty of good faith and fair dealing by nonsuiting BSD in this action. We disagree."

"Here, the guaranty provided that Defendant was waiving any right to require Plaintiff to collect from BSD before seeking payment from Defendant:

> I expressly waive presentment, demand, protest, notice of protest, dishonor, diligence, notice of default or nonpayment.... *I further waive any right to require Seller to proceed against, or make any effort at collection of the guarantied indebtedness from the Company or any other party liable for such indebtedness*.

"(Emphasis added).

"Thus, we find that the implied duty of good faith and fair dealing did not obligate Plaintiff to pursue collection efforts against BSD before seeking payment from Defendant. The duty of good faith and fair dealing protects the parties' 'right to receive the benefits of their agreement.' *Long*, 221 S.W.3d at 9. Requiring Plaintiff to proceed against BSD was not one of those benefits.

"For these reasons, we agree with the trial court's finding that Defendant is liable for the sums that were due."

III. Economic Loss Doctrine

Commercial Painting Company Inc. v. Weitz Company LLC, No. W2019-02089-COA-R3-CV (Tenn. Ct. App., Stafford, Mar. 11, 2022), perm. app. granted Aug. 4, 2022.

"This is the third appeal arising from a commercial construction project. Most recently, the case went to trial before a jury, which awarded the plaintiff subcontractor $1,729,122.46 in compensatory damages under four separate theories and $3,900,000.00 in punitive damages. The trial court further awarded the plaintiff pre- and post-judgment interest and attorney's fees and costs. We conclude the economic loss rule is applicable to construction contracts negotiated between sophisticated commercial entities and that fraud is not an exception under the particular circumstances of this case. Because punitive damages and interest are not authorized under the parties' agreement, those damages are reversed. The compensatory damages of $1,729,122.46 awarded for breach of contract are affirmed. The award of attorney's fees incurred at trial are vacated for a determination of the attorney's fees incurred in obtaining the compensatory damages award. No attorney's fees are awarded on appeal. We therefore reverse in part, affirm in part, and vacate in part."

"This is the third appeal in this case. . . . The genesis of this lawsuit is a contract dispute between general contractor, Defendant/Appellant The Weitz Company, Inc. ('Weitz'), and its drywall subcontractor, Plaintiff/Appellee Commercial Painting Company, Inc. ('Commercial Painting'). Around the end of 2003, Weitz entered into a contract ('the Prime Contract') with the owner of the project to construct a continuing care retirement community ('the Project'). In connection with the Prime Contract, Weitz and its sureties (together with Weitz, 'Appellants'), issued a payment bond that obligated them to pay for labor, materials, and equipment furnished for use in the performance of the Prime Contract. The payment bond, however, became void if Weitz made prompt payment for all sums due. The payment bond was properly registered.

"In October 2003, Commercial Painting bid on the drywall portion of the project. Weitz decided to award the drywall work to Commercial Painting after receiving this bid. Eventually, Mark Koch, on behalf of Commercial Painting as its President, executed a subcontract with Weitz ('the Subcontract') on November 1, 2004, with an effective date of September 28, 2004. At that time, Mr. Koch reviewed the terms of the Subcontract, made some changes to it, and initialed every page of the 93-page document.

"The Subcontract establishes a 'Subcontract Sum' of $3,222,400.00 as the agreed-upon price that Commercial Painting was entitled to in exchange for full performance on the Subcontract. The Subcontract referenced various drawings and specifications from the Prime Contract to which Commercial Painting's work was required to adhere. In some areas, Commercial Painting was required to perform a Level 3 drywall finish, while in other areas a Level 5 drywall finish was

required. Whether Commercial Painting actually performed at this level would become an issue of much dispute as the project progressed.

"The Subcontract also required that Commercial Painting's work be performed according to Weitz's project schedule and authorized Weitz to add extra work to Commercial Painting's scope of work. In order to do so, however, the Subcontract indicated that the work would be 'authorized in writing in advance' by Weitz. The Subcontract also addressed the payment process and authorized Weitz to deduct from its payments to Commercial Painting any amount necessary to protect Weitz or the owner from losses related to Commercial Painting's untimely, defective, or non-conforming work. The Subcontract further provided that the Project schedule could be updated periodically to reflect actual job progress. But the Subcontract obligated Commercial Painting to provide sufficient crews, materials, and equipment to maintain or improve Weitz's schedule and gave Weitz the authority to reschedule or re-sequence Commercial Painting's work."

"Allegedly, at the time the parties entered into the subcontract, Weitz was already approximately six to eight months behind schedule on the project. Commercial Painting would later assert that Weitz improperly and unreasonably compressed construction schedules in order to make up for the delay on the project. According to Weitz, however, the project became further behind once Commercial Painting began working on the project in the winter of 2004 due to Commercial Painting's allegedly poor worksmanship and failure to provide enough workers to timely complete the project. Because of this, Weitz allegedly began negotiating with the project owner regarding an extension on the contract completion date. It appears that the project owner eventually allowed a six-month extension, but Commercial Painting was only informed that an extension of approximately four months had been granted. According to Commercial Painting, Weitz intentionally and fraudulently failed to disclose the full extent of the extension, in violation of the letter and spirit of the contract. Even with the extension, however, Commercial Painting alleged that Weitz continued to compress its schedules and improperly supplement its work because the extension did not entirely mitigate the eight-month delay on the project.

"As previously discussed, the parties also disagreed as to the level of work required by the contract, and both parties asserted that they incurred additional delays and additional costs to bring the work to the desired level. Eventually, Weitz hired additional workers to supplement the work done by Commercial Painting, alleging that it was required due to Commercial Painting's delays. Commercial Painting objected to the supplementation and later alleged that they were required to perform even more work to correct the work of the supplemental workers. At the conclusion of the contract, Weitz paid Commercial Painting on Pay Applications 1 through 12. However, Weitz refused to pay Commercial Painting on Pay Applications 13 through 17, which allegedly included previously agreed-upon work, as well as additional work beyond the contract amount.

"Commercial Painting filed a complaint for damages on August 11, 2006, seeking an award of $1,929,428.74, constituting damages for unpaid progress payments, interest on retainage, extra work, unjust enrichment, plus attorney's fees and interest."

"A jury trial began on September 17, 2018, on claims of negligent and intentional misrepresentation, breach of contract, unjust enrichment, as well as a request for damages pursuant to the payment bond. Commercial Painting presented proof that Weitz misled them from the very beginning of the relationship with regard to the bids made by other subcontractors, how far behind the Project was, and the fact that Weitz had received an extension on the time contracted for completion of the Project. In addition, before the Subcontract was signed, a representative from

Weitz urged Commercial Painting to expedite delivery of Commercial Painting's payment and performance bonds. According to Commercial Painting, the execution of these bonds meant that Commercial Painting was required to complete work on the Project no matter what Weitz demanded.

"According to Commercial Painting, the delays on the Project only got worse as time went on. In order to recover from the delays, by at least November 2004, Commercial Painting claimed that Weitz decided to compress the schedule on the work to be completed, which involved allegedly improper supplementation of Commercial Painting's work and the work of other contractors. Mr. Koch testified that he would not have signed the Subcontract had he known that Weitz was contemplating compressing the construction schedule to make up for delays in the Project that were not attributable to Commercial Painting. Moreover, the compression of the schedule led Commercial Painting to perform extra work that was not contemplated under the Subcontract. According to the proof submitted by Commercial Painting, however, Weitz refused to execute change orders reflecting the extra work performed and thereafter refused to pay for such work."

"The trial concluded on October 18, 2018, when the jury found in favor of Commercial Painting, awarding $1,729,122.46 in compensatory damages in addition to prejudgment interest. Specifically, the jury found in favor of Commercial Painting on four of the theories alleged: breach of contract; unjust enrichment/quantum meruit; intentional misrepresentation; and under the payment bond. The jury further concluded that Weitz was liable for punitive damages. After a second hearing, the jury awarded Commercial Painting $3,900,000.00 in punitive damages."

"Several post-trial orders were entered throughout the end of 2018. First, on October 11, 2018, the trial court entered an order granting the parties' motions to amend the pleadings to conform to the evidence. On the same day, the parties filed a stipulation regarding a $456,170.00 extrajudicial payment that would be credited against the compensatory damages, which reduced the amount owed on the compensatory damages to $1,272.952.46. The next day, the trial court entered an order approving the jury verdict. On October 15, 2018, the trial court entered an order denying Appellants' motion for a directed verdict that was lodged after the close of all proof.

"On October 29, 2018, Commercial Painting filed a motion to determine pre-judgment and post-judgment interest, which was later supported by the affidavits of counsel and Commercial Painting's accountant. Commercial Painting amended this motion on November 16, 2018. On November 19, 2018, Commercial Painting filed a motion for an award of attorney's fees and costs, as well as for the entry of a final judgment; this motion was also later supplemented with affidavits.

> On December 12, 2018, the trial court entered an order captioned as follows: Order Adopting Findings Of Facts And Conclusions Of Law Supporting Punitive Damages Award, Granting Motion To Determine Amount Of Prejudgment Interest To Be Added To Final Judgment And Determination Of Post-Judgment Interest Rate, Granting Motion For Award Of Attorney's Fees, Expenses And Costs And For Entry Of Final Judgment And Order Of Final Judgment.

"This order approved the punitive damages awarded by the jury in their entirety. In addition, the trial court award Commercial Painting a $2,083,362.16 judgment for pre-judgment interest, as well as costs and attorney's fees in the amount of $1,103,549.00. In addition, the trial court ruled that Commercial Painting was entitled to post-judgment interest. Thus, the trial court awarded Commercial Painting a total judgment of $8,359,863.83, plus post-judgment interest."

"The next issue presented involves the decision to allow Commercial Painting to recover in tort, rather than solely under the contract. Commercial Painting argues that this case does not involve only contractual claims, but a claim of intentional misrepresentation—a tort. As such, Commercial Painting contends that its ability to recover is not limited by the parties' contract but may include all damages that flow from the wrong, including punitive damages. In response, Appellants contend that Commercial Painting may not recover under tort theories under two separate doctrines—the independent duty rule and the economic loss doctrine.

"We begin with the independent duty rule, as this argument is easily disposed of. . . . The independent duty rule is closely related to the economic loss rule to the extent that these rules may be interdependent. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wash. 2d 380, 393, 241 P.3d 1256, 1264 (2010) ('In sum, the economic loss rule does not bar recovery in tort when the defendant's alleged misconduct implicates a tort duty that arises independently of the terms of the contract.'); *cf. Milan Supply Chain Sols., Inc. v. Navistar, Inc.*, 627 S.W.3d 125, 147 (Tenn. 2021) (discussing certain approaches in which fraud is not an exception to the economic loss rule because the duty to not commit fraud is independent from the contract itself). Still, to the extent that that the independent duty rule provides a separate basis for Appellants' arguments, we conclude that it is waived."

"We therefore must turn to the much more difficult question of whether the economic loss rule is applicable in this case, as this issue was properly raised in Appellants' motion for new trial. The economic loss doctrine, or economic loss rule, is a judicially-created rule that was developed in response to concerns that 'tort law would erode or consume contract law.' *Milan Supply Chain Sols., Inc. v. Navistar, Inc.*, 627 S.W.3d 125, 142 (Tenn. 2021) (citing *Lincoln General Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 488 (Tenn. 2009)). 'It has been described as a "judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship."' *Id.* (quoting *Plourde Sand & Gravel v. JGI E., Inc.*, 154 N.H. 791, 917 A.2d 1250, 1253 (N.H. 2007)). In other words, the rule 'prevents a party who suffers only economic loss from recovering damages under a tort theory.' *Milan Supply Chain Sols. Inc. v. Navistar Inc.*, No. W2018-00084-COA-R3-CV, 2019 WL 3812483, at *3 (Tenn. Ct. App. Aug. 14, 2019), *aff'd in part on other grounds,* 627 S.W.3d 125 (Tenn. 2021) (hereinafter *Milan Supply Chain COA*) (quoting Jeffrey L. Goodman et al., *A Guide to Understanding the Economic Loss Doctrine*, 67 Drake L. Rev. 1, 2 (2019)); *see also Ins. Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI 139, ¶ 24, 276 Wis. 2d 361, 372, 688 N.W.2d 462, 467 ('In general, tort offers a broader array of damages than contract. The economic loss doctrine precludes parties under certain circumstances from eschewing the more limited contract remedies and seeking tort remedies.')."

"In *Milan Supply Chain*, the plaintiff, a commercial trucking company purchased a number of diesel engine trucks from the defendant seller. During the negotiations, the defendant made certain representations about the trucks, including as to the amount of testing that had occurred on them and as to the reliability of the engines. *Id.* at 132–33. The parties eventually entered into a contract that required the defendant to repair or replace defective truck components, but waived all other warranties. The contract further excluded liability for loss of time or use of the vehicle, loss of profits, inconvenience, or incidental or consequential damages. *Id.* at 133.

"Eventually, the plaintiff experienced issues that led it to believe that the trucks did not meet the representations of reliability that the defendant had given. When these issues increased, the plaintiff filed suit against the defendant seller, alleging both contract claims, negligent and fraudulent

misrepresentation, and a violation of the Tennessee Consumer Protection Act ('TCPA'). *Id.* at 134. The trial court granted the defendant summary judgment as to the contract claims, concluding that the defendant had met its obligations to repair or replace the truck parts as required by the contract. The trial court further found that the contract disclaimed warranties and that the negligent misrepresentation claim was barred by the economic loss doctrine. The case went to trial only on the fraud and TCPA claims. The jury found for the plaintiff as to both claims, awarding plaintiff $8,236,109.00 in benefit-of-the-bargain damages and $2,549,481.00 in lost profit damages, for a total of $10,785,590.00 in compensatory damages. The jury also found that the plaintiff was eligible for an award of punitive damages. Following a second hearing, the jury warded $20,000,000.00 in punitive damages. *Id.* at 140. The defendant filed several post-trial motions arguing, *inter alia*, that the fraud claim was barred by the economic loss doctrine. The trial court denied the motions and entered judgment on the jury's verdict. *Id.* at 141. Both parties appealed. As is relevant to this case, we held that the economic loss doctrine barred the plaintiff's fraud claim. *See generally Milan Supply Chain COA*, 2019 WL 3812483, at *7–9. The Tennessee Supreme Court thereafter granted the plaintiff's application for permission to appeal.

"One of the central questions before the Tennessee Supreme Court was whether Tennessee should recognize an exception to the economic loss doctrine for fraud. *Milan Supply Chain*, 627 S.W.3d at 145. In order to resolve that issue, the court looked at the three approaches that courts in other jurisdictions had taken to that question—the strict approach, the broad fraud exception, and the limited or narrow fraud exception. *Id.* at 146."

"Having detailed the forgoing options, the Tennessee Supreme Court 'follow[ed] the Utah Supreme Court' by declining 'to announce a broad rule either extending the economic loss rule to all fraud claims or exempting all fraud claims from the economic loss rule.' *Id.* at 153. Instead, the Court held that where a situation involves a contract between sophisticated commercial entities and the plaintiff seeks to recover economic losses only, 'the economic loss doctrine applies if the only misrepresentation[s] by the dishonest party concern[ ] the quality or character of the goods sold.' *Id.* at 154 (quoting *Huron Tool*, 532 N.W.2d at 545). This rule, according to the supreme court, strikes 'a careful balance' between the 'freedom of contract and the abhorrence of fraud.' *Id.*

"Appellants have maintained since the outset of this appeal that Commercial Painting's claim for intentional misrepresentation is barred by the economic loss rule because the only losses that Commercial Painting alleges it suffered were economic. Appellants therefore argue that Commercial Painting should be limited to the damages authorized under the contract and that the claimed damages that were not authorized by the parties' contract but flow from the tort claim—namely the award of punitive damages and pre- and post-judgment interest—should be reversed."

"In sum, the Tennessee Supreme Court's reasons for adopting a limited fraud exception to the economic loss rule apply with equal force outside the products liability context when the contract at issue was negotiated between sophisticated commercial entities. Here, both parties are sophisticated commercial business entities. The parties' contract was drafted after negotiation and investigation by the parties. The misrepresentations as issue here clearly involved the subject matter of the parties' agreement. Specifically, the question presented to the jury concerning Weitz's intention misrepresentation asked whether Weitz made false misrepresentations about the length of time Commercial Painting would have to perform its work or about the amount of work Commercial Painting would be required to perform. Issues of time, duration, and the scope of work were covered by the Subcontract. There can also be little dispute that the damage that allegedly

resulted from Weitz's tortious conduct completely overlaps with the damage that resulted from their breach of contract; indeed, Commercial Painting insists in this appeal that a single damage calculation included in an exhibit is proof of the damage that resulted from all the various causes of action that it asserts. As a result, we must conclude that Commercial Painting's fraud claim is barred by the economic loss rule and must be dismissed."

"Commercial Painting asserts that even if the economic loss rule is applicable to bar it from raising a tort against Weitz, punitive damages may still be recovered under a contract theory."

"We respectfully disagree. Importantly, as previously discussed, because the economic loss rule is applicable here, Commercial Painting is limited to its own contract remedies. *See Milan Supply Chain*, 627 S.W.3d at 152 (quoting *Lincoln General*, 293 S.W.3d at 491 ('[T]he remedies available ... should derive from the parties' agreements[.]')); *Milan Supply Chain COA*, 2019 WL 3812483, at *3–4 (citing Goodman et al., *supra*, at 55–56) (noting that the economic loss doctrine limits parties to 'their contractual remedies'). Unlike the typical cases in which punitive damages have been awarded in breach of contract cases, the parties here agreed to specific provisions related to the damages that could be recovered in relation to the Project. *See, e.g.*, *Goff v. Elmo Greer & Sons Const. Co.*, 297 S.W.3d 175, 187 (Tenn. 2009) (affirming an award of punitive damages in a nuisance/contract case, noting the four arguments against the award, none of which involved any limitation on liability contained in the parties' contract); *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 909 (Tenn. 1999) (holding that the plaintiff could elect between statutory penalties and punitive damages, but mentioning no limitation on liability contained in the parties' contract nor any argument that the punitive damages were barred by any such contractual provision); *Dog House Invs., LLC v. Teal Properties, Inc.*, 448 S.W.3d 905, 916 (Tenn. Ct. App. 2014) (mentioning no limitation on liability nor any argument that the punitive damages were barred by such a contractual provision); *Riad v. Erie Ins. Exch.*, 436 S.W.3d 256 (Tenn. Ct. App. 2013) (same); *Mohr v. DaimlerChrysler Corp.*, No. W2006-01382-COA-R3-CV, 2008 WL 4613584, at *14 (Tenn. Ct. App. Oct. 14, 2008) (same); *see also Rogers*, 367 S.W.3d at 212 (Tenn. 2012) (holding that the breach of contract was not egregious enough to support a claim for punitive damages; including no discussion of the terms of the contract vis-à-vis a limitation on damages); *cf. Sprint Sols., Inc. v. LaFayette*, No. 2:15-CV-2595-SHM-CGC, 2018 WL 3097027, at *16 (W.D. Tenn. June 22, 2018) (awarding punitive damages with no discussion of a contractual provision limiting liability or an argument based on such a provision).

"In this case, item 11.6 of the Subcontract contains a rather broad limitation on damages that precludes recovery of anticipatory profit or indirect, special, or consequential damages. Even further, this section provides that Commercial Painting 'specifically agrees that it shall not be entitled to assert, and it hereby waives, any Claims in quantum meruit, interest on late payments, or any other measure of damages other than as specifically provided in items 11.4 and 11.5 above.' Items 11.4 and 11.5, however, authorize Commercial Painting generally only to receive the agreed upon Subcontract Sum. Finally, item 5.6 of the Subcontract provides that Commercial Painting is not entitled to any delay damages attributable to breach of contract, tort, or conduct not contemplated by the parties.

"Commercial Painting argues in its brief, however, that item 5.6 does not waive punitive damages and that item 11.6 only concerns 'termination rights.' Appellants contend that these provisions affect a waiver of punitive damages. In resolving this dispute, we keep the following principles in mind:

> The central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern. The purpose of interpreting a written contract is to ascertain and give effect to the contracting parties' intentions, and where the parties have reduced their agreement to writing, their intentions are reflected in the contract itself. Therefore, the court's role in resolving disputes regarding the interpretation of a contract is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language used.

"*Pylant v. Spivey*, 174 S.W.3d 143, 151 (Tenn. Ct. App. 2003) (internal quotation marks and citations omitted). 'All provisions in the contract should be construed in harmony with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract.' *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999).

"The damages allowed under the Subcontract are governed by items 5.6, 11.4, 11.5, and 11.6. It is true that items 11.4 and 11.5 appear to apply only in the event of termination of the contract by Weitz—11.4 applying to termination for cause, while 11.5 applies to termination without cause. But item 11.6 is not so limited. Instead, it provides that '[i]n no event' shall Weitz be liable for damages for anticipatory profit, or indirect, special, or consequential damages. Further, the item states that Commercial Painting waives 'any' damages not specified in items 11.4 and 11.5. Nothing in this particular provision indicates that these waivers apply only in the event of termination of the contract. Thus, we must conclude that item 11.6 provides for a limitation on damages that applies even outside the context of termination by Weitz."

"Because Commercial Painting offers no other basis from which to avoid the consequences of its own agreements, we reverse the award of punitive damages as not authorized by the Subcontract. All remaining issues related to the punitive damages award are therefore pretermitted."

"The next issue involves attorney's fees. The trial court awarded Commercial Painting costs and attorney's fees in the amount of $1,103,549.00. It is undisputed that the Subcontract provides as follows:

> In the event it shall become necessary for either party to institute legal proceedings against the other party for recovery of any amounts due and owing under the Agreement, it is expressly agreed that the prevailing party in any such action shall be entitled to recover from the non-prevailing party all costs, including reasonable attorney's fees, of pre-suit collection attempts, suit, and post judgment or settlement collection including those incurred on appeal."

"Commercial Painting contends that it was the prevailing party in the trial court. As such, it asserts that the attorney fees award by the trial court should be affirmed, and asks that it be awarded attorney's fees on appeal. In contrast, Appellants assert that Commercial Painting should not be awarded any attorney's fees; Appellants do not, however, seek an award of attorney's fees in their favor, either at trial or on appeal.

"We conclude that despite the reversal of much of the damages in this case, Commercial Painting did prevail in the trial court, in that it was awarded substantial compensatory damages. Because the costs and attorney's fees awarded by the trial court do not segregate those costs and fees solely associated with the compensatory damages award, however, we deem it necessary to vacate the award and remand to the trial court for reconsideration. On remand, the trial court shall determine the reasonable costs and attorney's fees incurred by Commercial Painting in securing the award of

compensatory damages in the trial court proceedings. We must conclude, however, that in obtaining reversal of a significant portion of the damages awarded by the jury in this appeal, Appellants are properly termed the prevailing party of this appeal. Commercial Painting is therefore not entitled to attorney's fees incurred on appeal."

IV. Defective Nonjudicial Foreclosure; No Notice to Attorney General of Constitutional Challenge

Daniels v. Trotter, No. E2020-01452-COA-R3-CV (Tenn. Ct. App., Swiney, July 20, 2022).

"This appeal involves the mortgagors' petition to set aside the non-judicial foreclosure of a piece of real property, alleging that the mortgagors and owner of the property were not given proper notice of the non-judicial foreclosure sale. The mortgagee and the beneficiary of the deed of trust concerning the property at issue is the City of Chattanooga. The property was sold to Vince Trotter in a foreclosure auction. In a court order, which was certified as final pursuant to Tenn. R. Civ. P. 54.02, the trial court granted summary judgment in favor of Mr. Trotter, determining that Tenn. Code Ann. § 35-5-106 prevented the foreclosure sale from being considered void or voidable due to lack of notice and that the mortgagors had a constitutionally adequate remedy of monetary damages. Despite the mortgagors arguing that Tenn. Code Ann. § 35-5-106 is unconstitutional as applied to governmental entities, the Tennessee Attorney General's Office was not notified of the constitutional challenge to the statute, as required by Tenn. R. Civ. P. 24.04, Tenn. R. App. P. 32, and Tenn. Code Ann. § 29-14-107(b). Therefore, we vacate the trial court's grant of summary judgment in favor of Mr. Trotter and remand to the trial court to provide the required notice to the Tennessee Attorney General's Office."

V. LIBOR Discontinuance and Replacement Act

Chapter 651, Public Acts 2022, adding T.C.A. §§ 47-33-101–104 eff. Mar. 15, 2022.

"47-33-101. Short title.

"This chapter is known and may be cited as the 'LIBOR Discontinuance and Replacement Act.'

"47-33-102. Chapter definitions.

"As used in this chapter:

"(1) 'Benchmark' means an index of interest rates or dividend rates that is used, in whole or in part, as the basis of, or as a reference for, calculating or determining a valuation, payment, or other measurement under or in respect of a contract, security, or instrument;

"(2) 'Benchmark replacement' means a benchmark, or an interest rate or dividend rate, that may be based in whole or in part on a prior setting of LIBOR, to replace LIBOR or an interest rate or dividend rate based on LIBOR, whether on a temporary, permanent, or indefinite basis, under or in respect of a contract, security, or instrument;

"(3) 'Benchmark replacement conforming changes':

(A) Means technical, administrative, or operational changes, alterations, or modifications that are associated with and reasonably necessary to the use, adoption, calculation, or implementation of a recommended benchmark replacement and that have been selected or recommended by a relevant recommending body; and

(B) Includes, if, in the reasonable judgment of the calculating person, the benchmark replacement conforming changes selected or recommended pursuant to subdivision (3)(A) do not apply to the contract, security, or instrument or are insufficient to permit administration and calculation of the recommended benchmark replacement, other changes, alterations, or modifications that:

(i) In the reasonable judgment of the calculating person, are necessary to permit administration and calculation of the recommended benchmark replacement under or in respect of the contract, security, or instrument in a manner consistent with market practice for substantially similar contracts, securities, or instruments and, to the extent practicable, the manner in which the contract, security, or instrument was administered immediately prior to the LIBOR replacement date; and

(ii) Would not result in a disposition of the contract, security, or instrument for United States federal income tax purposes;

"(4) 'Calculating person' means, with respect to a contract, security, or instrument, a person responsible for calculating or determining a valuation, payment, or other measurement based on a benchmark, and may be the determining person;

"(5) 'Contract, security, or instrument' means a contract, agreement, mortgage, deed of trust, lease, instrument, other obligation, or security, whether representing debt or equity, and including an interest in a corporation, a partnership, or a limited liability company;

"(6) 'Determining person' means, with respect to a contract, security, or instrument, in the following order of priority:

(A) A person so specified; or

(B) A person with the authority, right, or obligation to do the following:

(i) Determine the benchmark replacement that will take effect on the LIBOR replacement date;

(ii) Calculate or determine a valuation, payment, or other measurement based on a benchmark; or

(iii) Notify other persons of a LIBOR replacement date or a benchmark replacement;

"(7) 'Fallback provisions' means terms in a contract, security, or instrument that set forth a methodology or procedure for determining a benchmark replacement, including terms relating to the date on which the benchmark replacement becomes effective, without regard to whether a benchmark replacement can be determined in accordance with the methodology or procedure;

"(8) 'LIBOR' means, for purposes of the application of this chapter to a particular contract, security, or instrument, United States dollar LIBOR, formerly known as the London Interbank Offered Rate, as administered by ICE Benchmark Administration Limited, or a predecessor or successor thereof, and a tenor thereof, as applicable, that is used in making a calculation or determination thereunder;

"(9) 'LIBOR replacement date':

(A) Means:

(i) In the case of one-week and two-month tenors of LIBOR, the effective date of this act; and
(ii) In the case of all other tenors of LIBOR, the first London banking day after June 30, 2023, unless the relevant recommending body determines that the other LIBOR tenors will cease to be published or cease to be representative on a different date; and

(B) Does not mean a date that affects one (1) or more tenors of LIBOR with respect to a contract, security, or instrument that:
(i) Provides for only one (1) tenor of LIBOR, if the contract, security, or instrument requires interpolation and the affected tenor can be interpolated from LIBOR tenors that are not so affected; or
(ii) Permits a party to choose from more than one (1) tenor of LIBOR and any of the tenors is not so affected or, if the contract, security, or instrument requires interpolation, the affected tenor can be interpolated from LIBOR tenors that are not so affected;

"(10) 'Recommended benchmark replacement' means a benchmark replacement based on SOFR, including a recommended spread adjustment and benchmark replacement conforming changes, that has been selected or recommended by a relevant recommending body with respect to the type of contract, security, or instrument;

"(11) 'Recommended spread adjustment' means a spread adjustment, or method for calculating or determining the spread adjustment, that:
(A) Has been selected or recommended by a relevant recommending body for a recommended benchmark replacement for a particular type of contract, security, or instrument and for a particular term to account for the effects of the transition or change from LIBOR to a recommended benchmark replacement; and
(B) May be a positive or negative value or zero (0);

"(12) 'Relevant recommending body' means the federal reserve board, the federal reserve bank of New York, or the Alternative Reference Rates Committee, or a successor to those entities; and

"(13) 'SOFR' means with respect to a day, the secured overnight financing rate published for that day by the federal reserve bank of New York, as the administrator of the benchmark, or a successor administrator, on the federal reserve bank of New York's website."

"47-33-03. Recommended benchmark replacement for certain contracts, securities, or instruments; fallback provisions.

"(a) On the LIBOR replacement date, the recommended benchmark replacement, by operation of law, is the benchmark replacement for a contract, security, or instrument that uses LIBOR as a benchmark and:
(1) Contains no fallback provisions; or
(2) Contains fallback provisions that result in a benchmark replacement, other than a recommended benchmark replacement, that is based in any way on a LIBOR value.

"(b) Following the effective date of this act, fallback provisions in a contract, security, or instrument that provide for a benchmark replacement based on or otherwise involving a poll, survey, or inquiries for quotes or information concerning interbank lending rates or an interest rate or dividend

rate based on LIBOR must be disregarded as if not included in the contract, security, or instrument and are void.

"(c) (1) This subsection (c) applies to a contract, security, or instrument that uses LIBOR as a benchmark and contains fallback provisions that permit or require the selection of a benchmark replacement that:
(A) Is based in any way on a LIBOR value; or
(B) Is the substantive equivalent of § 47–33–104(a)(1), (a)(2), or (a)(3).
(2) A determining person has the authority under this chapter, but is not required, to select the recommended benchmark replacement as the benchmark replacement. The selection of the recommended benchmark replacement:
(A) Is irrevocable;
(B) Must be made by the earlier of either the LIBOR replacement date, or the latest date for selecting a benchmark replacement according to the contract, security, or instrument; and
(C) Must be used in determinations of the benchmark under or with respect to the contract, security, or instrument occurring on and after the LIBOR replacement date.

"(d) If a recommended benchmark replacement becomes the benchmark replacement for a contract, security, or instrument pursuant to this section, then all benchmark replacement conforming changes that are applicable to the recommended benchmark replacement become an integral part of the contract, security, or instrument by operation of law.

"(e) This chapter does not alter or impair the following:
(1) A written agreement by all requisite parties that, retrospectively or prospectively, provides, without necessarily referring specifically to this chapter, that a contract, security, or instrument is not subject to this chapter. For purposes of this subdivision (e)(1), 'requisite parties' means all parties required to amend the terms and provisions of a contract, security, or instrument that otherwise would be altered or affected by this chapter;
(2) A contract, security, or instrument that contains fallback provisions that would result in a benchmark replacement that is not based on LIBOR, including, but not limited to, the prime rate or the federal funds rate, except that the contract, security, or instrument is subject to subsection (b);
(3) A contract, security, or instrument subject to subsection (c) as to which a determining person does not elect to use a recommended benchmark replacement or as to which a determining person elects to use a recommended benchmark replacement prior to the effective date of this act, except that the contract, security, or instrument is subject to subsection (b); and
(4) The application to a recommended benchmark replacement of a cap, floor, modifier, or spread adjustment to which LIBOR had been subject pursuant to the terms of a contract, security, or instrument.

"(f) Notwithstanding the uniform commercial code or another law of this state, this chapter applies to all contracts, securities, and instruments, including contracts with respect to commercial transactions and is not displaced by another law of this state."

"47-33-104. Construction and effect of selection or use of a recommended benchmark replacement; liability.

"(a) The selection or use of a recommended benchmark replacement as a benchmark replacement under or in respect of a contract, security, or instrument by operation of § 47–33–103 constitutes:

(1) A commercially reasonable replacement for and a commercially substantial equivalent to LIBOR;
(2) A reasonable, comparable, or analogous term for LIBOR under or in respect of the contract, security, or instrument;
(3) A replacement that is based on a methodology or information that is similar or comparable to LIBOR; and
(4) Substantial performance by a person of a right or obligation relating to or based on LIBOR under or in respect of a contract, security, or instrument.

"(b) A LIBOR replacement date, or an event or condition giving rise to a LIBOR replacement date; the selection or use of a recommended benchmark replacement as a benchmark replacement; or the determination, implementation, or performance of benchmark replacement conforming changes, by operation of § 47–33–103, does not:

(1) Impair or affect the right of a person to receive a payment, or affect the amount or timing of the payment, under a contract, security, or instrument;
(2) Have the effect of discharging or excusing performance under a contract, security, or instrument for a reason, claim, or defense, including, but not limited to, a force majeure or other provision in a contract, security, or instrument;
(3) Have the effect of giving a person the right unilaterally to terminate or suspend performance under a contract, security, or instrument;
(4) Have the effect of constituting a breach of a contract, security, or instrument; or
(5) Have the effect of voiding a contract, security, or instrument.

"(c) A person does not have liability for damages to another person, and is not subject to a claim or request for equitable relief, arising out of or related to the selection or use of a recommended benchmark replacement or the determination, implementation, or performance of benchmark replacement conforming changes, in each case, by operation of § 47–33–103, and the selection or use of the recommended benchmark replacement or the determination, implementation, or performance of benchmark replacement conforming changes does not give rise to a claim or cause of action by a person in law or in equity.

"(d) Neither the selection or use of a recommended benchmark replacement nor the determination, implementation, or performance of benchmark replacement conforming changes, by operation of § 47–33–103, amends or modifies a contract, security, or instrument or prejudices, impairs, or affects a person's rights, interests, or obligations under or in respect of a contract, security, or instrument.

"(e) Except as provided in § 47–33–103(a) or (c), this chapter does not create a negative inference or negative presumption regarding the validity or enforceability of:

(1) A benchmark replacement that is not a recommended replacement benchmark;
(2) A spread adjustment, or method for calculating or determining a spread adjustment, that is not a recommended spread adjustment; or
(3) A change, alteration, or modification to or in respect of a contract, security, or instrument that is not a benchmark replacement conforming change."

I. Assaultive Offenses

A. Grave Torture

Chapter 1062, Public Acts 2022, adding T.C.A. § 39-13-117 eff. July 1, 2022.

39-13-117.

"(a) Grave torture is the infliction of severe physical and mental pain and suffering upon the victim with the intent to perpetrate first degree murder, in violation of § 39-13-202, and accompanied by three (3) or more of the following:

(1) The defendant also commits against the victim the offense of especially aggravated rape, as defined in Section 1; aggravated rape, as defined in § 39–13–502; especially aggravated rape of a child, as defined in Section 2; or aggravated rape of a child, as defined in § 39–13–531;
(2) The defendant also commits the offense of kidnapping, as defined in § 39–13–303, or false imprisonment, as defined in § 39–13–302, against the victim;
(3) The defendant has, at the time of the commission of the offense, more than one (1) prior conviction for a sexual offense or a violent sexual offense, as those terms are defined in § 40–39–202;
(4) The defendant mutilates the victim during the commission of the offense;
(5) Force or coercion is used to accomplish the act, and the defendant is armed with a weapon or an article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon;
(6) The defendant's commission of the offense involved more than one (1) victim; or
(7) The defendant knows or has reason to know that the victim is:
    (A) Mentally defective;
    (B) Mentally incapacitated;
    (C) Physically helpless; or
    (D) A vulnerable adult, as defined in § 39–15–501.

"(b) Grave torture 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 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 defendant shall be punished by:
    (A) Imprisonment for life without possibility of parole; or
    (B) Death; provided, that a punishment of death shall not be imposed until at least the thirtieth day following the occurrence of either of the following circumstances:
        (i) The issuance of the judgment in a decision of the United States supreme court overruling, in whole or in relevant part, *Kennedy v. Louisiana,* 554 U.S. 407 (2008), thereby allowing the use of the death penalty as punishment for an offense involving the infliction of severe physical and mental pain and suffering upon the victim with the intent to perpetrate first degree murder that does not result in the death of the victim; or

(ii) The ratification of an amendment to the Constitution of the United States approving the use of the death penalty as punishment for the conviction of an offense involving the infliction of severe physical and mental pain and suffering upon the victim with the intent to perpetrate first degree murder that does not result in the death of the victim.

"(c) A person may not be convicted of both a violation of this section and a violation of Section 1, Section 2, § 39–13–502, or § 39–13–531 if the facts supporting the prosecution arise out of the same criminal conduct."

B. First Degree Murder; Definition Expanded

Chapter 718, Public Acts 2022, amending T.C.A. § 39-13-202(a) eff. Mar. 18, 2022.

"(a) First degree murder is: . . .
(5) A killing of another in the perpetration or attempted perpetration of an aggravated rape, rape, rape of a child, or aggravated rape of child."

C. Aggravated Assault; Higher Punishment if Firearm Discharged from Motor Vehicle

Chapter 1136, Public Acts 2022, adding T.C.A. § 39-13-102(e)(6) eff. July 1, 2022.

"(6) Notwithstanding this subsection (e), a person convicted of a violation of subdivision (a)(1)(A)(iii) or (a)(1)(B)(iii) shall be punished one (1) classification higher than is otherwise provided if the violation was committed by discharging a firearm from within a motor vehicle, as defined in § 55–1–103."

II. Aggravated Human Trafficking

Chapter 1089, Public Acts 2022, adding T.C.A. §§ 39-13-316, 40-35-501(dd) and 39-11-703(c)(1)(A)(ix) eff. July 1, 2022.

39-13-316.

"(a) Aggravated human trafficking is the commission of an act that constitutes any of the following criminal offenses, if the victim of the criminal offense is under thirteen (13) years of age:
(1) Involuntary labor servitude, under § 39–13–307;
(2) Trafficking persons for forced labor or services, under § 39–13–308;
(3) Trafficking for commercial sex act, under § 39–13–309;
(4) Patronizing prostitution, under § 39–13–514; or
(5) Promoting prostitution, under § 39–13–515.

"(b) (1) Aggravated human trafficking is a Class A felony.
(2) Notwithstanding title 40, chapter 35, a person convicted of a violation of this section shall be punished as a Range II offender; however, the sentence imposed upon the person may, if appropriate, be within Range III but in no case shall it be lower than Range II.
(3) Section 39–13–525(a) does not apply to a person sentenced for a violation of this section under subdivision (a)(3), (a)(4), or (a)(5).

(4) Notwithstanding another law to the contrary, the board of parole may require, as a mandatory condition of supervision for a person convicted of a violation of this section under subdivision (a)(3), (a)(4), or (a)(5), that the person be enrolled in a satellite-based monitoring program for the full extent of the person's term of supervision consistent with the requirements of § 40–39–302.

"(c) Title 40, chapter 35, part 5, regarding release eligibility status and parole, does not apply to or authorize the release of a person convicted of a violation of this section prior to service of the entire sentence imposed by the court.

"(d) Title 41, chapter 1, part 5, does not give either the governor or the board of parole the authority to release or cause the release of a person convicted of a violation of this section prior to the service of the entire sentence imposed by the court."

40-35-501(dd).

"(dd) Notwithstanding other provisions of this section to the contrary, there shall be no release eligibility for a person committing the offense of aggravated human trafficking, as defined in § 39–13–316, on or after July 1, 2022. 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 a purpose other than the reduction of the sentence imposed by the court."

39-11-703(c)(1)(A)(ix).

Added to the list of offenses that make assets subject to criminal forfeiture is:

"(ix) Aggravated human trafficking, as defined in § 39–13–316."

Various other subsections of Title 39, Chapter 13 were also revised, including the penalties for involuntary labor servitude, trafficking for commercial sex act, and promoting prostitution.

III. Sex Crimes

A. Continuous Sexual Abuse of a Child

Chapter 1025, Public Acts 2022, adding T.C.A. §§ 39-13-518(a)(2)(I) and (J), -518(c)(1)(G) and (H), and amending -518(c)(2), (3) and (4) eff. July 1, 2022.

39-13-518(a)(2).

"(a) (2) 'Sexual abuse of a child' means to commit an act upon a minor child that is a violation of:

* * *

(I) Trafficking for a commercial sex act pursuant to § 39–13–309, if the victim is a minor; or

(J) Promoting prostitution pursuant to § 39–13–515, if the victim is a minor."

39-13-518(c)

"(c) (1) A violation of subsection (b) [continuous sexual abuse of a child] is a Class A felony if three (3) or more of the acts of sexual abuse of a child constitute violations of the following offenses:

* * *

(G) Trafficking for a commercial sex act pursuant to § 39–13–309, if the victim is a minor; or

(H) Promoting prostitution pursuant to § 39–13–515, if the victim is a minor.

(2) A violation of subsection (b) is a Class B felony if two (2) of the acts of sexual abuse of a child constitute violations of offenses listed in subdivision (c)(1).

(3) A violation of subsection (b) is a Class C felony if one (1) of the acts of sexual abuse of a child constitutes a violation of an offense listed in subdivision (c)(1).

(4) A violation of subsection (b) is a Class C felony if at least three (3) of the acts of sexual abuse of a child constitute violations of the offenses of sexual battery by an authority figure pursuant to § 39–13–527 or statutory rape by an authority figure pursuant to § 39–13–532."

B. Especially Aggravated Rape; Especially Aggravated Rape of a Child

Chapter 1062, Public Acts 2022, adding T.C.A. §§ 39-13-534 and -535 eff. July 1, 2022.

39-13-534.

"(a) Especially aggravated rape is unlawful sexual penetration of a victim by the defendant or the defendant by a victim that would constitute aggravated rape under § 39–13–502 accompanied by two (2) or more of the following circumstances:

(1) The defendant tortures the victim during the commission of the offense;

(2) The defendant mutilates the victim during the commission of the offense;

(3) The defendant also commits the offense of kidnapping, as defined in § 39–13–303, or false imprisonment, as defined in § 39–13–302, against the victim;

(4) The defendant also commits the offense of involuntary labor servitude, as defined in § 39–13–307, or trafficking for a commercial sex act, as defined in § 39–13–309, against the victim;

(5) The defendant has, at the time of the commission of the offense, more than one (1) prior conviction for a sexual offense or a violent sexual offense, as those terms are defined in § 40–39–202;

(6) The offense occurs during an attempt by the defendant to perpetrate first degree murder in violation of § 39–13–202;

(7) The defendant subjects the victim to extreme cruelty during the commission of the offense;

(8) The defendant's commission of the offense involved more than one (1) victim: or

(9) The defendant knows or has reason to know that the victim is:

(A) Mentally defective;

(B) Mentally incapacitated;

(C) Physically helpless; or

(D) A vulnerable adult, as defined in § 39–15–501.

"(b) Especially aggravated rape 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 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 defendant shall be punished by imprisonment for life without possibility of parole.

"(c) A person may not be convicted of both a violation of this section and a violation of § 39–13–502, Section 2, or Section 3 if the facts supporting the prosecution arise out of the same criminal conduct."

39-13-535.

"(a) Especially aggravated rape of a child is unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if the victim is less than eighteen (18) years of age, accompanied by three (3) or more of the following circumstances:
(1) The defendant tortures the victim during the commission of the offense;
(2) The defendant mutilates the victim during the commission of the offense;
(3) The defendant also commits the offense of kidnapping, as defined in § 39–13–303, or false imprisonment, as defined in § 39–13–302, against the victim;
(4) The defendant also commits the offense of involuntary labor servitude, as defined in § 39–13–307, or trafficking for a commercial sex act, as defined in § 39–13–309, against the victim;
(5) The defendant has, at the time of the commission of the offense, more than one (1) prior conviction for a sexual offense or a violent sexual offense, as those terms are defined in § 40–39–202;
(6) (A) The defendant is, at the time of the offense, in a position of trust, or has supervisory or disciplinary power over the victim by virtue of the defendant's legal, professional, or occupational status and uses the position of trust or power to accomplish the sexual penetration; or
(B) The defendant has, at the time of the offense, parental or custodial authority over the victim by virtue of the defendant's legal, professional, or occupational status and uses the position to accomplish the sexual penetration;
(7) The offense occurs during an attempt by the defendant to perpetrate first degree murder in violation of § 39–13–202;
(8) The defendant subjects the victim to extreme cruelty during the commission of the offense;
(9) Force or coercion is used to accomplish the act, and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon;
(10) The defendant causes serious bodily injury to the victim;
(11) The defendant's commission of the offense involved more than one (1) victim; or
(12) The defendant knows or has reason to know that the victim is:
(A) Mentally defective;
(B) Mentally incapacitated; or
(C) Physically helpless.

"(b) Especially 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 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 defendant shall be punished by imprisonment for life without possibility of parole.

"(c) A person may not be convicted of both a violation of this section and a violation of § 39–13–502, § 39–13–531, Section 1, or Section 3 if the facts supporting the prosecution arise out of the same criminal conduct."

IV. Child Abuse or Neglect; Child's Emotional and Mental Health and Welfare

Chapter 985, Public Acts 2022, amending T.C.A. § 39-15-401 eff. July 1, 2022.

T.C.A. § 39-15-401, which criminalizes abuse or neglect of a child, has been amended to specifically include actions that adversely affect the emotional and mental health and welfare of the child.

V. Invasion of Privacy

A. Drones; Surveillance by TEMA Related to Disaster Permissible

Chapter 922, Public Acts 2022, amending T.C.A. § 39-13-902(a) and (c) eff. Apr. 27, 2022.

39-13-902(a).

"(a) Notwithstanding § 39-13-903, it is lawful to capture an image using an unmanned aircraft in this state if:

* * *

(22) If the image is captured by the Tennessee emergency management agency, created in § 58–2–104, for emergency management purposes, including surveying the scene of a catastrophe or other damage to determine whether a state of emergency should be declared, coordinating a disaster response, and conducting preliminary damage assessments of real property and infrastructure following a disaster. An image of a person or thing on private property captured by the Tennessee emergency management agency pursuant to this subdivision (a)(22) is deemed to be an image captured incidental to the lawful capturing of an image for purposes of § 39–13–905."

39-13-902(c).

"(c) An image captured pursuant to subdivision (a)(22) for the purpose of damage assessment may be retained by the Tennessee emergency management agency for no longer than one (1) year or, if the disaster is later declared a major disaster by the President of the United States, for the retention period required by the federal emergency management agency for data related to damage assessment. All images captured for any other purpose shall not be retained by the Tennessee emergency management agency for more than fifteen (15) business days."

B. Unlawful Photography

Chapter 920, Public Acts 2022, amending T.C.A. § 39-13–605(a) and (d) eff. July 1, 2022.

39-13-605(a).

"(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 legal guardian, if the photograph:

* * *

(2) (A) Includes the unclothed intimate area of the individual and would be considered offensive or embarrassing by the individual;
(B) Was taken for the purpose of offending, intimidating, embarrassing, ridiculing, or harassing the victim; and
(C) Was disseminated by the defendant, the defendant threatened to disseminate the photograph, or the defendant permitted the dissemination of the photograph, to another person."

39-13-605(d)(1)(B).

"(B) A first violation of subdivision (a)(2) is a Class B misdemeanor. A second or subsequent violation of subdivision (a)(2) is a Class A misdemeanor."

C. Unlawful Exposure; Distribution of Image of Intimate Parts or of Person Engaged in Sex

Chapter 923, Public Acts 2022, amending T.C.A. § 39-17-318(a) and (b) eff. July 1, 2022.

39-17-318(a).

"(a) A person commits unlawful exposure who, with the intent to cause emotional distress, distributes an image of the intimate part or parts of another identifiable person or an image of an identifiable person engaged in sexually explicit conduct if:
(1) The image was photographed or recorded under circumstances where the parties agreed or understood that the image would remain private; and
(2) The person depicted in the image suffers emotional distress."

39-17-318(b).

"(3) 'Identifiable person' means a person who is identifiable from the image itself or from information transmitted in connection with the image;

"(4) 'Sexually explicit conduct' has the same meaning as defined in § 39–13–301."

VI. Offenses Against Property

A. Police and Other Service Animals; Joker's Law

Chapter 1106, Public Acts 2022, adding T.C.A. § 39-14-219 and amending § 39-14-205 eff. July 1, 2022.

39-14-219.

"(a) It is an offense to knowingly and unlawfully cause serious bodily injury to or kill a police dog, fire dog, search and rescue dog, service animal, or police horse without the owner's effective consent.

"(b) (1) An offense under subsection (a) is a Class D felony.
(2) If conduct that is in violation of this section is also a violation of § 39–14–205 or any other criminal offense, the offense may be prosecuted under any of the applicable statutes.

"(c) A person is justified in killing or injuring the animal of another if the person acted under a reasonable belief that the animal was creating an imminent danger of death or serious bodily injury to that person or another or an imminent danger of death to an animal owned by or in the control of that person. A person is not justified in killing or injuring the animal of another if, at the time of the killing, the person is trespassing upon the property of the owner of the animal. The justification for killing or injuring the animal of another authorized by this subsection (c) does not apply to a person who, while engaging in or attempting to escape from criminal conduct, kills or injures a police dog that is acting in its official capacity. In that case, subsection (a) applies to the person."

39-14-205.

"(a) (1) It is an offense to knowingly and unlawfully kill the animal of another without the owner's effective consent.
(2) A violation of subdivision (a)(1) is theft of property, graded according to the value of the animal, and punished in accordance with § 39–14–105.

"(b) A person is justified in killing the animal of another if the person acted under a reasonable belief that the animal was creating an imminent danger of death or serious bodily injury to that person or another or an imminent danger of death to an animal owned by or in the control of that person. A person is not justified in killing the animal of another if, at the time of the killing, the person is trespassing upon the property of the owner of the animal."

B. Littering

1. Aggravated Criminal Littering

Chapter 1105, Public Acts 2022, adding T.C.A. § 39-14-501(6) and amending § 39-14-505 eff. July 1, 2022.

39-14-501(6).

"(6) 'Tire' means the continuous solid or pneumatic rubber covering encircling the wheel of a motor vehicle and includes a waste tire as defined in § 68–211–802."

39-14-505.

"(a) Aggravated criminal littering is littering:
(1) In an amount exceeding ten pounds (10 lbs.) in weight or fifteen (15) cubic feet in volume; or

(2) In any amount for any commercial purpose, including knowingly placing, dropping, or throwing two (2) or more tires on any public or private property without permission and without immediately removing it.

"(b) (1) Except as provided in subdivision (b)(2), aggravated criminal littering is a Class A misdemeanor. If the amount of litter exceeds one hundred pounds (100 lbs.) in weight or thirty (30) cubic feet in volume, then the defendant is subject to imprisonment as provided by law or a fine of not less than two thousand five hundred dollars ($2,500), nor more than four thousand dollars ($4,000), or both.

(2) Aggravated criminal littering is a Class E felony upon:

(A) The third conviction in any amount exceeding ten pounds (10 lbs.) in weight or fifteen (15) cubic feet in volume;

(B) The second conviction in any amount exceeding one thousand pounds (1,000 lbs.) in weight or two hundred (200) cubic feet in volume or in any amount for a commercial purpose; or

(C) The first conviction involving more than eight (8) tires that were placed, dropped, or thrown for a commercial purpose."

Chapter 941, Public Acts 2022, adding T.C.A. § 40-35-123(b)(1)(I) eff. July 1, 2022.

A homeowners' association or certain neighborhood associations may seek an injunction or restraining order to prohibit an offender from entering the boundaries of a residential area if the offender has been convicted three times of certain offenses. The list now includes:

"(I) Aggravated criminal littering, as defined in § 39–14–505, if the conviction is for an amount of litter that exceeds one hundred pounds (100 lbs.) in weight or thirty (30) cubic feet in volume."

2. Mitigated Criminal Littering

Chapter 899, Public Acts 2022, amending T.C.A. § 39-14-503 eff. July 1, 2022.

The offense of mitigated criminal littering is now a Class B misdemeanor punishable by a $500 fine, rather than a Class C misdemeanor punishable by a $50 fine.

C. Tennessee Personal and Commercial Computer Act

Chapter 1042, Public Acts 2022, amending T.C.A. § 39-14-602(a)-(c) eff. July 1, 2022.

This amendment specifies that all misdemeanor violations under the act are Class A misdemeanors. It also adds possession of a computer contaminant as a prohibited, Class A misdemeanor.

VII. Drugs and Drug Paraphernalia

A. Medical Cannabis

Chapter 1054, Public Acts 2022, amending T.C.A. § 39-17-402(16)(F)(i)(b)(2) eff. May 25, 2022.

This public chapter adds quadriplegia as a qualifying medical condition for the lawful possession of cannabis oil.

B. Tianeptine Added as Schedule II Controlled Substance

Chapter 1135, Public Acts 2022, adding T.C.A. §§ 39-17-408(h) and -418(g) eff. July 1, 2022.

39-17-408(h).

"(h) Tianeptine and any salt, sulfate, free acid, or other preparation of tianeptine, and any salt, sulfate, free acid, compound, derivative, precursor, or other preparation thereof that is substantially chemically equivalent or identical with tianeptine [has been added to the list of Schedule II controlled substances]."

39-17-418(g).

"(g) Notwithstanding any other subsection to the contrary, a violation of subsection (a) [simple possession or casual exchange] with respect to tianeptine and any salt, sulfate, free acid, or other preparation of tianeptine and any salt, sulfate, free acid, compound, derivative, precursor, or other preparation thereof that is substantially chemically equivalent or identical with tianeptine is a Class A misdemeanor."

C. *Mens Rea* Required for Conviction of Prescribing Controlled Substance

Ruan v. United States, 142 S.Ct. 2370 (U.S., Breyer, 2022).

"Petitioners Xiulu Ruan and Shakeel Kahn are medical doctors licensed to prescribe controlled substances. Each was tried for violating 21 U.S.C. § 841, which makes it a federal crime, '[e]xcept as authorized[,] ... for any person knowingly or intentionally ... to manufacture, distribute, or dispense ... a controlled substance.' A federal regulation authorizes registered doctors to dispense controlled substances via prescription, but only if the prescription is 'issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.' 21 C.F.R. § 1306.04(a). At issue in Ruan's and Kahn's trials was the *mens rea* required to convict under § 841 for distributing controlled substances not 'as authorized.' Ruan and Kahn each contested the jury instructions pertaining to *mens rea* given at their trials, and each was ultimately convicted under § 841 for prescribing in an unauthorized manner. Their convictions were separately affirmed by the Courts of Appeals.

"Held: Section 841's 'knowingly or intentionally' *mens rea* applies to the statute's 'except as authorized' clause. Once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner."

"(a) Criminal law generally seeks to punish conscious wrongdoing. Thus, when interpreting criminal statutes, the Court 'start[s] from a longstanding presumption ... that Congress intends to require a defendant to possess a culpable mental state.' *Rehaif* v. *United States*, 588 U.S. ——, ——, 139 S.Ct. 2191, ——, 204 L.Ed.2d 594. This culpable mental state, known as scienter, refers to the degree of knowledge necessary to make a person criminally responsible for his or her acts. See *ibid.* The presumption of scienter applies even when a statute does not include a scienter

provision, and when a statute *does* 'includ[e] a general scienter provision,' 'the presumption applies with equal or greater force' to the scope of that provision. *Ibid.* The Court has accordingly held that a word such as 'knowingly' modifies not only the words directly following it, but also those other statutory terms that 'separate wrongful from innocent acts.' *Id.,* at ——, 139 S.Ct., at ——.

"Here, § 841 contains a general scienter provision—'knowingly or intentionally.' And in § 841 prosecutions, authorization plays a 'crucial' role in separating innocent conduct from wrongful conduct. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73, 115 S.Ct. 464, 130 L.Ed.2d 372. Moreover, the regulatory language defining an authorized prescription is 'ambiguous' and 'open to varying constructions,' *Gonzales v. Oregon*, 546 U.S. 243, 258, 126 S.Ct. 904, 163 L.Ed.2d 748, meaning that prohibited conduct (issuing invalid prescriptions) is 'often difficult to distinguish' from acceptable conduct (issuing valid prescriptions). *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, 98 S.Ct. 2864, 57 L.Ed.2d 854. A strong scienter requirement helps reduce the risk of 'overdeterrence,' *i.e.,* punishing conduct that lies close to, but on the permissible side of, the criminal line. *Ibid.*

"The statutory provisions at issue here are also not the kind to which the Court has held the presumption of scienter does not apply. Section 841 does not define a regulatory or public welfare offense that carries only minor penalties. Cf. *Rehaif*, 588 U.S., at ——, 139 S.Ct., at ——; *Staples v. United States*, 511 U.S. 600, 618–619, 114 S.Ct. 1793, 128 L.Ed.2d 608. Nor is the 'except as authorized' clause a jurisdictional provision. Cf. *Rehaif,* 588 U.S., at ——, 139 S.Ct., at 2191."

"(b) Analogous precedent reinforces the Court's conclusion here. In *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434, *United States v. X-Citement Video*, 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372, and *Rehaif* v. *United States*, 588 U.S. ——, 139 S.Ct. 2191, 204 L.Ed.2d , the Court interpreted statutes containing a general scienter provision ('knowingly'), and considered what mental state applied to a statutory clause that did not immediately follow the 'knowingly' provision. In all three cases, the Court held that 'knowingly' modified the statutory clause in question because that clause played a critical role in separating a defendant's wrongful from innocent conduct. See *Liparota*, 471 U.S. at 426, 105 S.Ct. 2084; *X-Citement Video*, 513 U.S. at 72–73, 115 S.Ct. 464; *Rehaif*, 588 U.S., at ——, 139 S.Ct., at ——. As in those cases, the Court today concludes that § 841's *mens rea* applies to the '[e]xcept as authorized' clause, which serves to separate a defendant's wrongful from proper conduct."

"(c) Neither the Government's nor the concurrence's contrary arguments are convincing. First, the Government and the concurrence correctly note that the statutory clauses in the cases just described set forth *elements* of an offense. Here, the Government and the concurrence say, § 841's '[e]xcept as authorized' clause does not set forth an element of the offense. In support, they point to a separate statutory provision—§ 885. Section 885 says that the Government need not 'negative any exemption or exception ... in any complaint, information, indictment, or other pleading or in any trial,' and that 'the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit,' not upon the prosecution. But even assuming that lack of authorization is unlike an element in these two ways, § 885 has little or nothing to do with scienter requirements. Section 885 simply absolves the Government of having to allege, in an indictment, the inapplicability of every statutory exception in each Controlled Substances Act prosecution. Section 885 also shifts the burden of production—but not the burden of persuasion—regarding statutory exceptions to the defendant, thereby relieving the Government of having to disprove, at the outset of every prosecution, the inapplicability of all exceptions.

"Section 885 thus does not provide a basis for inferring that Congress intended to do away with, or weaken, ordinary and longstanding scienter requirements. At the same time, the factors discussed above—the language of § 841; the crucial role authorization plays in distinguishing morally blameworthy conduct from socially necessary conduct; the serious nature of the crime and its penalties; and the vague, highly general regulatory language defining the scope of prescribing authority—all support applying normal scienter principles to the 'except as authorized' clause. And the Government does not deny that, once a defendant satisfies his burden of production under § 885 by invoking the authorization exception, the Government must then prove lack of authorization by satisfying the ordinary criminal law burden of proof—beyond a reasonable doubt.

"The Government also offers a substitute *mens rea* standard. Instead of applying the statute's 'knowingly or intentionally' language to the authorization clause, the Government instead asserts that the statute implicitly contains an 'objectively reasonable good-faith effort' or 'objective honest-effort standard.'. . . But § 841 uses the words 'knowingly or intentionally,' not 'good faith,' 'objectively,' 'reasonable,' or 'honest effort.' And the Government's standard would turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, rather than on the mental state of the defendant himself or herself. The Court has rejected analogous suggestions in other criminal contexts. See *Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001, 192 L.Ed.2d 1. And the Government is wrong to assert that the Court effectively endorsed its honest-effort standard in *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333, as that case did not address *mens rea* at all. Nor does *United States v. Yermian*, 468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53, support the Government here, as that case dealt with a jurisdictional clause, to which the presumption of scienter does not apply.

"Finally, the Government argues that requiring it to prove that a doctor knowingly or intentionally acted not 'as authorized' will allow bad-apple doctors to escape liability by claiming idiosyncratic views about their prescribing authority. But the Court has often rejected this kind of argument, see, *e.g., Rehaif*, 588 U.S., at ——, 139 S.Ct., at ——, and does so again here."

"(d) The Court of Appeals in both cases evaluated the jury instructions relating to *mens rea* under an incorrect understanding of § 841's scienter requirements. On remand, those courts may address whether the instructions complied with the *mens rea* standard set forth here, as well as whether any instructional error was harmless."

D. Paraphernalia

1. Pill Press Device

Chapter 804, Public Acts 2022, adding T.C.A. § 39-17-402(12)(D) eff. July 1, 2022.

["Drug paraphernalia" includes:]

"(D) Pill press devices and pieces of a pill press device, unless the pill press device or piece of a pill press device is used by a person or entity that lawfully possesses drug products in the course of legitimate business activities, including a pharmacy or pharmacist licensed by the board of pharmacy; a wholesale drug distributor, or its agents, licensed by the board of pharmacy; and a manufacturer of drug products, or its agents, licensed by the board of pharmacy."

2. Narcotic Drug Testing Equipment Excluded from Definition

Chapter 764, Public Acts 2022, amending T.C.A. § 39-17-402(12)(B) eff. Mar. 31, 2022.

"['Drug paraphernalia'] does not include narcotic testing equipment used to determine whether a controlled substance contains a synthetic opioid, unless the narcotic testing equipment is possessed for purposes of the defendant's commission of an offense under § 39-17-417. This subdivision (12)(B)(ii) is repealed on July 1, 2025."

VIII. Weapons

A. Short-Barrel Rifle or Shotgun No Longer Prohibited

Chapter 1038, Public Acts 2022, amending T.C.A. § 39-17-1302(a)(4) eff. July 1, 2022.

"Tennessee Code Annotated, Section 39–17–1302, is amended by deleting subdivision (a)(4) [short-barrel rifle or shotgun] in its entirety [from the list of weapons prohibited by law]."

B. Concealed Handgun Carry Permit Renewal; Criminal Records Check

Chapter 1000, Public Acts 2022, adding T.C.A. §§ 39-17-1366(o) and (j)(3) eff. July 1, 2022.

39-17-1366(o).

"(o) (1) After the initial issuance of a concealed handgun carry permit, the department shall conduct a name-based criminal history record check every four (4) years or upon receipt of an application.

(2) If the applicant is prohibited from purchasing or possessing a firearm in this state pursuant to § 39–17–1307(b), 18 U.S.C. § 922(g), or any other state or federal law, the department shall revoke the applicant's permit pursuant to § 39–17–1352."

39-17-1366(j)(3).

"(3) The department shall charge a renewal fee of fifty dollars ($50.00)."

IX. Prohibitions Against Camping in Vicinity of State or Interstate Highway or on Public Property (Referred to by Governor as "Criminalizing Homelessness")

Chapter 986, Public Acts 2022, adding T.C.A. § 55-8-212 and amending § 39-14-414 eff. July 1, 2022.

55-8-212.

"(a) It is unlawful for a person to engage in camping:

(1) On the shoulder, berm, or right-of-way of a state or interstate highway; or

(2) Under a bridge or overpass, or within an underpass, of a state or interstate highway.

"(b) Notwithstanding § 39–14–414, a violation of this section is a Class C misdemeanor, punishable only by a fine of fifty dollars ($50.00) and community service work not less than twenty (20) hours

nor more than forty (40) hours; except, that a person who violates this section must receive a warning citation for a first offense. In lieu of a fine and community service, the court may require a person convicted under this section to remove litter from the state or local highway system, public playgrounds, public parks, or other appropriate public locations for not less than twenty (20) hours nor more than forty (40) hours.

"(c) For purposes of this section, 'camping' means:
(1) Erecting, placing, maintaining, or using temporary structures, such as tents, tarps, and other temporary shelters, for living accommodation activities, such as sleeping or making preparations to sleep;
(2) Carrying on cooking activities, whether by fire or use of artificial means, such as a propane stove or other heat-producing portable cooking equipment; or
(3) Sleeping outside of a motor vehicle or making preparations to sleep outside of a motor vehicle, including laying down a sleeping bag, blanket, or other material used for bedding."

39-14-414.

The Equal Access to Public Property Act, T.C.A § 39-14-414, which made camping on state-owned property a Class E felony unless done in a designated camping area, has been amended. It now applies to all public property, not just state owned property.

X. Rules of the Road

A. Failure to Stop for School Bus; Fine

Chapter 792, Public Acts 2022, amending T.C.A. § 55-8-151 eff. July 1, 2022.

The maximum fine for a first offense citation for failure to stop upon approaching a stopped school bus, based solely on school bus mounted camera evidence, has been increased from $50 to $200.

B. Aggravated Reckless Driving

Chapter 1022, Public Acts 2022, adding T.C.A. § 55-10-209 eff. July 1, 2022.

"(a) A person commits aggravated reckless driving who:
(1) Commits the offense of reckless driving, as defined in § 55–10–205; and
(2) Intentionally or knowingly impedes traffic upon a public street, highway, alley, parking lot, or driveway, or on the premises of a shopping center, trailer park, apartment house complex, or any other premises accessible to motor vehicles that are generally frequented by the public at large.

"(b) (1) A violation of this section is a Class A misdemeanor.
(2) In addition to the penalty authorized by subdivision (b)(1), the court may assess a fine of two thousand five hundred dollars ($2,500) to be collected as provided in § 55–10–412(b) and distributed as provided in § 55–10–412(c)."

C. DUI Offenses; Ignition Interlock Devices

Chapter 964, Public Acts 2022, amending various portions of Title 55, Chapter 10, Part 4 eff. in part July 1, 2022, and in part Jan. 1, 2023.

55-11-409(b)(2)(B)(iv).

The following have been added to the list of prior convictions for which an ignition interlock device must be ordered for issuance of a restricted license:

"(e) Reckless endangerment under § 39–13–103, if the charged offense was driving under the influence under § 55–10–401;

"(f) Driving under the influence under § 55–10–401."

This public act makes various other changes regarding ignition interlock devices and creates a licensing system for interlock manufacturers and others.

D. Special Designation on Driver License for One Convicted of Human Trafficking

Chapter 1015, Public Acts 2022, adding T.C.A. §§ 55-50-353(b) and 39-13-314(f) eff. July 1, 2022.

55-50-353(b).

"When the department issues or renews a driver license or photo identification license to a person convicted of a human trafficking offense, as defined in § 39–13–314, the driver license or photo identification license must bear a designation sufficient to enable a law enforcement officer to identify the bearer of the license as a person who has been convicted of a human trafficking offense."

39-13-314(f).

"A person who is convicted of a human trafficking offense is required, if eligible, to obtain a valid driver license or photo identification license that has been properly designated by the department of safety pursuant to § 55–50–353(b)."

E. Financial Responsibility Law

Chapter 788, Public Acts 2022, deleting T.C.A. § 55-12-129(g)(5) eff. July 1, 2022.

T.C.A. § 55-12-129(g)(5), which provided that a person who defaults on any installment payment plan shall not be eligible for future payment plans, has been deleted.

XI. Miscellany

A. Operating Child Care Agency Without License

Chapter 985, Public Acts 2022, amending T.C.A. § 71-3-505 eff. July 1, 2022.

"(a) (1) A person or entity operating a child care agency, as defined in § 71–3–501, without being licensed by the department commits a Class A misdemeanor.
(2) It is a Class E felony for a person or entity to operate a child care agency:
(A) While a suspension of a license issued by the department is in effect;
(B) Following the effective date of a denial or revocation of a license by the department; or
(C) Without being licensed by the department and within ten (10) years of a previous finding by the department that the person or entity operated a child care agency without being licensed by the department."

B. Smokeless Nicotine Products; Age Restrictions

Chapter 810, Public Acts 2022, amending various provisions in T.C.A. Title 39, Chapter 17, part 15 eff. Apr. 8, 2022.

39-17-1503(11).

"'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 for absorption into the human body by any means other than inhalation;
(B) Does not include tobacco or tobacco products; and
(C) Does not include nicotine replacement therapy products as defined and approved by the federal food and drug administration."

Smokeless nicotine products are now restricted to those age 21 and older, like tobacco, smoking hemp and vapor products, in various statutory provisions.

C. Employer's Coercion of Employee Who Is Public Servant

Chapter 1142, Public Acts 2022, adding T.C.A. § 39-16-506 eff. July 1, 2022.

39-16-506.

"(a) As used in this section:
(1) 'Coercion' means a threat, however communicated, to:
(A) Commit any offense;
(B) Wrongfully accuse any person of any offense;
(C) Expose any person to hatred, contempt, or ridicule;
(D) Harm the credit or business repute of any person; or
(E) Take or withhold action related to the employment of a public servant or a family member of a public servant;
(2) 'Employee' includes, but is not limited to:
(A) A person employed by the state or any municipality, county, department, board, commission, agency, instrumentality, political subdivision, or any other entity of the state;
(B) A person employed by a private employer; or

(C) A person who receives compensation from the federal government for services performed for the federal government, notwithstanding that the person is not a full-time employee of the federal government; and

(3) 'Employer' includes, but is not limited to:

(A) The state or any municipality, county, department, board, commission, agency, instrumentality, political subdivision, or any other entity of the state;

(B) A private employer; or

(C) The federal government, as to an employee who receives compensation from the federal government for services performed for the federal government, notwithstanding that the person is not a full-time federal employee.

"(b) An employer, or an agent of an employer acting on behalf of the employer, commits an offense who by means of coercion:

(1) Influences or attempts to influence an employee who is a public servant to vote or not to vote in a particular manner; or

(2) Influences or attempts to influence an employee who is a public servant to resign as a public servant or unnecessarily recuse themselves from a public body with the intent to influence the action or inaction of a public body.

"(c) A violation of this section is a Class E felony."

D. Disposition of Forfeited Property; Restitution

Chapter 982, Public Acts 2022, amending T.C.A. §§ 39-11-703(a)(c) and -713(a) eff. July 1, 2022.

39-11-703(a)(c).

"(c) (1) The items enumerated in subdivision (c)(2) are subject to judicial forfeiture as provided in this part for a violation of the following offenses:

(A) For an offense committed on or after July 1, 2022:

(i) Kidnapping, as defined in § 39–13–303;

(ii) Aggravated kidnapping, as defined in § 39–13–304;

(iii) Especially aggravated kidnapping, as defined in § 39–13–305;

(iv) Aggravated rape of a child, as defined in § 39–13–531;

(v) Rape of a child, as defined in § 39–13–522;

(vi) Aggravated rape, as defined in § 39–13–502;

(vii) Rape, as defined in § 39–13–503; and

(viii) Commission of an act of terrorism, as defined in § 39–13–805; and

(B) For an offense committed on or after July 1, 2011:

(i) Involuntary labor servitude, as defined in § 39–13–307;

(ii) Trafficking for forced labor or services, as defined in § 39–13–308; and

(iii) Trafficking for commercial sex acts, as defined in § 39–13–309.

(C) For an offense committed on or after July 2, 2022:

(i) Especially aggravated rape;

(ii) Especially aggravated rape of a child; or

(iii) Grave torture;

(2) The items to which subdivision (c)(1) applies are:

(A) When used or intended to be used in connection with such violation:

(i) Conveyances, including aircraft, motor vehicles, and other vessels;
(ii) Books, records, telecommunication equipment, or computers;
(iii) Money or weapons; and
(iv) Real property;

(B) Everything of value furnished, or intended to be furnished, in exchange for an act in violation of such statutes, including all proceeds traceable to the exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate the violation;

(C) Any property, real or personal, directly or indirectly acquired by or received in violation of such statutes, or as an inducement to violate such statutes, or any property traceable to the proceeds from the violation; and

(D) Any real property, including any right, title, and interest in the whole of or any part of any lot or tract of land and any property used as an instrumentality in or used in furtherance of such violation."

39-11-713(a).

"(a) All property ordered forfeited shall be sold at public auction. The proceeds from all property forfeited and sold at public auction shall be disposed of by the court as directed by this part. If the property seized and ordered forfeited was taken from the lawful owner through theft or fraud, then the property shall be returned to the lawful owner, or restitution provided, as the court determines. If the defendant owes restitution, the proceeds shall first be directly applied to satisfy any judgments against the defendant for restitution in favor of the victim. The attorney general shall then be compensated for all expenses incident to the litigation, as approved by the court. Any such costs for appeals shall be provided for by the trial court upon conclusion of the litigation. The attorney general shall then direct that any public agency be reimbursed for out-of-pocket expenses resulting from the investigation, seizure, and storage of the forfeited property."

CRIMINAL PROCEDURE

I. Bail

A. Professional Bondsman's Capacity When Collateral Pledged Is Cash or an Item Readily Convertible to Cash

Chapter 800, Public Acts 2022, amending T.C.A. § 40-11-302(e)(1) eff. Apr. 8, 2022.

"Tennessee Code Annotated, Section 40–11–302(e)(1), is amended by deleting the language 'ten (10) times the amount of the collateral pledged' and substituting instead the language 'fifteen (15) times the amount of the collateral pledged.'"

B. Payment by Debit Card or Mobile Cash Application

Chapter 999, Public Acts 2022, amending T.C.A. § 40-11-118(a) eff. July 1, 2022.

"(a) (1) Any defendant for whom bail has been set may execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money in cash equal to the amount of the bail. The clerk may accept a deposit by means of a debit card or mobile cash application and, if the clerk accepts such methods of payment, may charge a fee to pay for any cost charged to the clerk for accepting the applicable method of payment.

(2) Upon depositing this sum, the defendant shall be released from custody subject to the conditions of the bail bond. Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required."

C. Requirement for Use of Ignition Interlock Device for Defendant with DUI or Other Alcohol-Related Charges

Chapter 1134, Public Acts 2022, amending T.C.A. § 40-11-118(d) eff. July 1, 2022.

"(d) (1) (A) Unless the court determines that the requirement would not be in the best interest of justice and public safety, when the court is determining the amount and conditions of bail to be imposed upon a defendant who has been charged with driving under the influence of an intoxicant, under § 55–10–401, vehicular assault, under § 39–13–106, aggravated vehicular assault, under § 39–13–115, vehicular homicide, under § 39–13–213(a)(2), or aggravated vehicular homicide, under § 39–13–218, and the alleged offense involved the use of alcohol, the court shall require the defendant to operate only a motor vehicle equipped with a functioning ignition interlock device if:

(i) The offense resulted in a collision involving property damage;

(ii) A minor was present in the vehicle at the time of the alleged offense;

(iii) The defendant's driver license has previously been suspended for a violation of § 55–10–406; or

(iv) The defendant has a prior conviction for:

(*a*) Reckless driving, under § 55–10–205;

(*b*) Reckless endangerment, under § 39–13–103;

(*c*) Driving under the influence of an intoxicant, under § 55–10–401;

(*d*) Vehicular assault, under § 39–13–106;
(*e*) Aggravated vehicular assault, under § 39–13–115;
(*f*) Vehicular homicide, under § 39–13–213(a)(2); or
(*g*) Aggravated vehicular homicide, under § 39–13–218.

(B) If the court imposes a condition under subdivision (d)(1)(A), then the defendant must demonstrate compliance with the condition by submitting proof of ignition interlock installation to the district attorney general's office within ten (10) days of being released on bail. Proof of compliance may be submitted electronically. If the court determines the defendant is indigent, the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund, established in § 55–10–419.

(C) If the court does not require the defendant to operate only a motor vehicle equipped with a functioning ignition interlock device, then the court shall include in its order written findings on why the requirement would not be in the best interest of justice and public safety.

(2) If the defendant is charged with an offense listed in subdivision (d)(1) and has one (1) or more prior convictions for any of the listed offenses and is not subject to the requirements of subsection (f), then the court shall also consider the use of special conditions for the defendant, including the following:

(A) The use of transdermal monitoring devices or other alternative alcohol monitoring devices. If the court orders the use of a monitoring device on or after July 1, 2016, and determines the defendant is indigent, then the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund, established in § 55–10–419;

(B) The use of electronic monitoring with random alcohol or drug testing; or

(C) Pretrial residency in an in-patient alcohol or drug rehabilitation center.

(3) As used in this subsection (d), 'court' includes any person authorized by § 40–11–106 to take bail."

D. Additional Factors in Determining Amount; Aggravated Assault of Domestic Violence Victim

Chapter 828, Public Acts 2022, adding T.C.A. § 40-11-150(n) eff. July1, 2022.

"(n) (1) Following the arrest of a person for the offense of aggravated assault, under § 39–13–102(a)(1)(i), (a)(1)(iii), or (a)(1)(iv), in which the alleged victim of the offense is a domestic abuse victim as defined in § 36–3–601, the court or magistrate shall make a finding whether there is probable cause to believe the respondent:

(A) Caused serious bodily injury, as defined in § 39–11–106, to the alleged domestic abuse victim;

(B) Strangled or attempted to strangle the alleged domestic abuse victim; or

(C) Used or displayed a deadly weapon, as defined in § 39–11–106.

(2) If the court or magistrate finds probable cause to believe that one (1) or more of the circumstances in subdivision (n)(1) did occur, unless the court or magistrate finds the offender no longer poses a threat to the alleged victim or public safety:

(A) The court or magistrate may, in addition to the twelve-hour hold period and victim notification requirements in subsection (h), extend the twelve-hour hold period up to twenty-four (24) hours after the time of arrest; and

(B) Prior to the offender's release on bond, the court or magistrate shall issue a no contact order containing all of the bond conditions set out in this section that are applicable to the protection of the domestic abuse victim."

E. Revocation Upon Conviction of Continuous Sexual Abuse of Child

Chapter 643, Public Acts 2022, amending T.C.A. § 40-11-113(b) eff. Mar. 11, 2022.

This provision adds the offense of continuous sexual abuse of a child, T.C.A. § 39-13-518, to the list of offenses for which bail must immediately be revoked upon conviction, notwithstanding sentencing hearings, motions for a new trial, or related post-guilt determination hearings.

II. Sentencing

A. "Transparency in Sentencing for Victims Act"

Chapter 952, Public Acts 2022, amending T.C.A. § 40-35-210(e) eff. July 1, 2022.

"(e) (1) In order to ensure fair and consistent sentencing, at a sentencing hearing the court shall place on the record, either orally or in writing, the following:
(A) What enhancing or mitigating factors were considered, if any;
(B) The reasons for the sentence; and
(C) For a sentence of continuous confinement, the estimated number of years and months the defendant will serve before becoming eligible for release.
(2) The department of correction shall provide the court with a form to assist in determining the estimation referenced in subdivision (e)(1)(C).
(3) The estimation provided pursuant to subdivision (e)(1)(C) is not a basis for post-conviction relief or for a direct appeal of the defendant's sentence."

B. Drug Crimes in Drug-Free School Zone

State v. Linville, 647 S.W.3d 344 (Tenn., Bivins, 2022).

"A jury convicted Douglas E. Linville of multiple drug offenses that occurred in a drug-free zone, in this case within 1,000 feet of a city park. Because the offenses occurred in a drug-free zone, the trial court imposed sentences that required full service of at least the minimum term within the appropriate sentencing range prior to release. See Tenn. Code Ann. § 39-17-432(c) (2014) (amended 2020 & 2022). On appeal, the Court of Criminal Appeals rejected challenges to the convictions. However, consistent with Mr. Linville's brief, the intermediate appellate court noted that the judgment for one of the convictions erroneously referred to the controlled substance at issue—Xanax or Alprazolam—as Schedule III when it was actually Schedule IV. In so noting, the court also concluded sua sponte that the felony class reflected on the judgment for that conviction was incorrect because Tennessee law required a one-class enhancement for an offense that occurred in a drug-free zone. See Tenn. Code Ann. § 39-17-432(b)(1) (2014). We accepted Mr. Linville's appeal. Based on our review of the relevant statutory provisions, we conclude that because the drug-free zone in this case related to a public park, the offenses were not subject to a one-class enhancement. We, however, further conclude that the offenses were subject to the requirement to serve in full at least the minimum sentence for the appropriate range prior to release. Accordingly,

we reverse the decision of the Court of Criminal Appeals in part, affirm the judgments of the trial court, and remand this matter to the trial court for correction of a clerical error in one judgment.

"In this appeal, we must interpret statutory provisions that govern sentencing for certain drug offenses that occur within what are commonly known as drug-free zones. More than twenty-five years ago, our General Assembly took steps to provide students with a learning environment free from dangers associated with drug activity. See Act of May 26, 1995, ch. 515, 1995 Tenn. Pub. Acts 918–19 ('the 1995 Act'). To that end, the legislature delineated an area around elementary, middle and secondary schools—referred to as drug-free school zones—in which the commission of certain drug offenses would merit heightened criminal penalties. The penalties included: (1) the offense would be punished as if it were one classification higher than it ordinarily would be, and (2) the offender would be required to serve in full at least the minimum sentence within the appropriate range of punishment prior to release. Act of May 26, 1995, ch. 515, § 1, 1995 Tenn. Pub. Acts 918–19.

"Ten years later, in 2005, the General Assembly amended the drug-free school zones statute to expand the list of protected places beyond schools to areas around a 'preschool, child care agency, or public library, recreational center or park.' Act of May 19, 2005, ch. 295, § 2, 2005 Tenn. Pub. Acts 670 ('the 2005 Act'). The question presented in this appeal is whether the General Assembly intended for one, both, or neither of the original two penalty provisions to apply when the drug-free zone relates to the protected places added in 2005."

"On June 4, 2018, law enforcement officers searched a Hardin County home pursuant to a warrant. There were five individuals in the home at the time, including Douglas E. Linville ('the Defendant'). The search yielded various controlled substances and drug paraphernalia. Trial testimony established that the home was located within 1,000 feet of the Savannah City Park.

"At the conclusion of trial, the jury convicted the Defendant of five drug offenses. Three of the convictions were for possessing various controlled substances, with the intent to deliver, in a drug-free zone. See Tenn. Code Ann. §§ 39-17-417(a)(4), 39-17-432, 39-17-434(a)(4) (2014). The drugs at issue in counts one through three were: (1) less than 0.5 grams of methamphetamine, a Schedule II controlled substance; (2) hydrocodone, a Schedule II controlled substance; and (3) Xanax (or Alprazolam), a Schedule IV controlled substance. The drug-free zone related to the home's location with respect to the Savannah City Park. See id. § 39-17-432(b)(1) (2014) (identifying a drug-free zone, in part, as a location within 1,000 feet of the real property that comprises a 'public library, recreational center or park').

"For sentencing, the Defendant qualified as a Range III Persistent Offender. The methamphetamine and hydrocodone convictions in counts one and two, respectively, were Class C felonies. Id. § 39-17-417(c)(2)(A) (2014). Accordingly, the applicable sentencing range for the Defendant was ten to fifteen years. Id. § 40-35-112(c)(3) (2014). At the sentencing hearing, the trial court sentenced the Defendant to twelve years on each count, running concurrently. The judgment for each conviction corresponded with the trial court's verbal ruling at the sentencing hearing.

"Sentencing for the Xanax conviction in count three reflects some confusion. At the sentencing hearing, the parties mistakenly informed the trial court that the offense was a Class C felony. Thus, at the sentencing hearing, the trial court imposed the same twelve-year sentence for the Xanax conviction as for the methamphetamine and hydrocodone convictions. In fact, however, the Xanax offense was a Class D felony. Id. §§ 39-17-412(c)(2) (Supp. 2017), 39-17-417(e)(2) (2014). For

a Class D felony, the applicable sentencing range for the Defendant was eight to twelve years. Id. § 40-35-112(c)(4) (2014). For reasons the record does not reveal—and contrary to the trial court's verbal ruling at the sentencing hearing—the judgment for count three correctly identified the offense as a Class D felony, and it identified the sentence imposed as eight years. However, the judgment incorrectly identified the offense as involving a Schedule III controlled substance instead of a Schedule IV controlled substance.

"The judgments for all three convictions reflected that the offense occurred in a drug-free zone. Each of the judgments also identified a mandatory minimum sentence length associated with the offense, ten years for counts one and two, and eight years for count three.

"On direct appeal, the Defendant attacked the sufficiency of the evidence and raised an evidentiary issue. In his brief before the Court of Criminal Appeals, the Defendant specifically noted that he was 'not raising an issue as to sentencing in this appeal.' In two footnotes, however, the Defendant pointed out the confusion surrounding his sentence for the Xanax offense in count three. The Defendant suggested that the Court of Criminal Appeals remand to the trial court for correction of a clerical error.

"The Court of Criminal Appeals affirmed the Defendant's convictions. *State v. Linville*, No. W2019-02180-CCA-R3-CD, 2021 WL 4476681 (Tenn. Crim. App. Mar. 12, 2021), perm. app. granted, (Tenn. Aug. 5, 2021). With respect to the clerical-error issue identified by the Defendant, the Court of Criminal Appeals agreed that '[t]he judgment form should be corrected to reflect that the Defendant was convicted of possessing a Schedule IV substance.' Id. at *5. However, citing Tennessee Code Annotated section 39-17-432(b)(1), the court also went on to state:

> Second, the judgment form reflects that the Defendant was convicted of a Class D felony in count three, when he was punished one class higher by the trial court under the drug-free zone statute according to the transcript[.] See T[enn]. C[ode] A[nn]. § 39-17-432(b)(1) (2019) ('A violation of § 39-17-417' occurring 'within one thousand feet (1,000') of the real property that comprises ... a park shall be punished one (1) classification higher than is provided in § 39-17-417(b)–(i) for such violation'). Accordingly, the judgment form should be corrected to reflect that the Defendant was convicted of a Class C felony.

"Id. (omission in original). The intermediate appellate court did not note the fact that the judgment reflected an eight-year sentence for count three, which would not be within the appropriate range for a Class C felony, nor did the court note the discrepancy between the twelve-year term imposed at the sentencing hearing and the eight-year term reflected on the judgment. In addition, the court did not order enhancement of the classification for counts one and two, which were also subject to the drug-free zone statute.

"The Defendant sought permission to appeal to this Court. With respect to sentencing, the Defendant identified the issue in his application as: 'Whether the Court of Criminal Appeals erred in its statutory interpretation of Tennessee Code Annotated section 39-17-432(b) when it found that a defendant is subject to sentencing at one classification higher than is provided for in section 39-17-417(b)–(i) when the drug-free school zone is created by a park.' We granted the Defendant's application solely with respect to the sentencing issue, and the order granting permission to appeal recites the Defendant's statement of the issue nearly verbatim. In his brief before this Court, however, the Defendant complains of his sentence in two respects. The Defendant argues that because the drug-free zone in this case was related to a public park, his Xanax offense was not

subject to the one-class enhancement ordered by the Court of Criminal Appeals. The Defendant also argues that because the drug-free zone was related to a public park, he was not subject to the requirement 'to serve at least the minimum sentence for the defendant's appropriate range of sentence' prior to release. Tenn. Code Ann. § 39-17-432(c) (2014).

"Based on our review of the relevant statutory provisions, we hold that the Court of Criminal Appeals erred by concluding that the Defendant's Xanax conviction was subject to a one-class enhancement. We also hold that, with respect to the three offenses that were subject to the drug-free zone statute, the Defendant is required to serve in full at least the minimum sentence for the appropriate range prior to release, even though the drug-free zone related to a public park."

Chapter 927, Public Acts 2022, adding T.C.A. § 39-17-432(h) eff. Apr. 29, 2022.

"(h) (1) Notwithstanding subsection (d) or (e) or any other law to the contrary, the court that imposed a sentence for an offense committed under this section that occurred prior to September 1, 2020, may, upon motion of the defendant or the district attorney general or the court's own motion, resentence the defendant pursuant to subsections (a)–(g). The court shall hold an evidentiary hearing on the motion, at which the defendant and district attorney general may present evidence. The defendant shall bear the burden of proof to show that the defendant would be sentenced to a shorter period of confinement under this section if the defendant's offense had occurred on or after September 1, 2020. The court shall not resentence the defendant if the new sentence would be greater than the sentence originally imposed or if the court finds that resentencing the defendant would not be in the interests of justice. In determining whether a new sentence would be in the interests of justice, the court may consider:

(A) The defendant's criminal record, including subsequent criminal convictions;

(B) The defendant's behavior while incarcerated;

(C) The circumstances surrounding the offense, including, but not limited to, whether the conviction was entered into pursuant to a plea deal; and

(D) Any other factors the court deems relevant.

(2) If the court finds that the defendant is indigent, using the criteria set out in § 40–14–202(c), the court shall appoint counsel to represent the defendant on such a motion.

(3) The court shall not entertain a motion made under this subsection (h) to resentence a defendant if:

(A) A previous motion made under this subsection (h) to reduce the sentence was denied after a review of the motion on the merits;

(B) Resentencing the defendant to a shorter period of confinement for this offense would not reduce the defendant's overall sentence or lead to an earlier release; or

(C) The defendant has previously applied to the governor for a grant of executive clemency on or after December 2, 2021, for the same offense and has been denied.

(4) This subsection (h) does not require a court to reduce any sentence pursuant to this section."

C. Sentence Longer Than Agreed-Upon Cap in Plea Agreement Reduced on Appeal

State v. Looper, No. M2021-00652-CCA-R3-CD (Tenn. Crim. App., Wedemeyer, Aug. 11, 2022).

"The Defendant, Phillip Myron Looper, pleaded guilty to two counts of aggravated animal cruelty and one count of aggravated assault. The trial court sentenced the Defendant to 364 days to be served in the county jail, followed by twelve years of probation, including a restriction from leaving the county of residence except for medical treatment. The Defendant did not object to the sentence but filed a timely appeal, contending that the trial court erred when it imposed a sentence in excess of the agreed upon five years and by improperly imposing travel restrictions. After review, we reverse the trial court's judgments and remand the case for entry of an order as set forth herein."

"This case arises from the Petitioner's shooting in Sumner County, Tennessee, of two dogs at the home of a person not known to him, but who was present at the time of the shooting."

"On December 14, 2020, the trial court held a hearing during which the Defendant offered his plea of guilty to two counts of aggravated animal cruelty and one count of aggravated assault. During the hearing, the Defendant testified that he was sixty-eight years old, had graduated from high school, and was entering his plea of his own free will with no promises made to him.

"The trial court informed him that, as he was pleading guilty to aggravated assault, his sentence could be between three and six years, to be served at thirty percent. The trial court said that, pursuant to the agreement, 'the number of years that I can impose is capped at five years; do you understand?' He reminded the Defendant that the trial court would determine his sentence after a sentencing hearing and that the trial court would determine if the Defendant would serve his sentence, all or part, in confinement or on probation. The trial court informed the Defendant that his guilty plea to aggravated animal cruelty, a class E felony, carried a sentencing range of one to two years. The trial court said he would also determine at the sentencing hearing, 'whether or not these convictions can be expunged....'"

"Based upon this evidence and the arguments of counsel, and in consideration of the nature of the criminal conduct, the mitigating and enhancement factors, and the Defendant's statements, the trial court sentenced the Defendant. In so doing, it stated:

> * * *
> We have the fact that we must avoid depreciating the seriousness of the offense, and we've got to consider the deterrent effect. So probation will not be ... complete probation will not be ordered here. There will be jail time.
>
> And I have considered what I think would be served in TDOC and then coming out on parole. I've weighed the options of having a bureaucracy such as the parole board and parole officers supervising this [D]efendant for the rest of a sentence in the TDOC and not being able to rest comfortably. So I'm going to impose a sentence where I retain considerable control over this [D]efendant.
>
> These sentences will run concurrently with each other, but they will be suspended after 11/29 at 100 percent in the Sumner County jail beginning today. Probation will be for 12 years. That's the maximum period of time that the [D]efendant will be eligible for. So under the law he can be put on probation for 12 years now. Instead of having that supervision under the department of parole, he's going to be under my jurisdiction for 12 years, and he must attend aftercare at Cornerstone, and I'll let him be furloughed one day a month while he's in jail to go to treatment. He has somebody pick him up, take him, and bring him back one time a month, and he's got to continue that after he is released from jail.

> He cannot – he absolutely cannot leave Maury County after he's on probation unless there are medical reasons. And he must ... report every month, and he must provide the probation officer every month with a list of the medications that he takes every day. If he does not take his medications as prescribed, then there will be a probation violation warrant obtained and we'll consider sending him to the penitentiary for the remainder of this time which probably would not be much more, if anything.
>
> Lastly, I order restitution to [the victim] in the amount of $1200 for the two dogs. That needs to be made within two years after his release from jail as a condition of probation.

"The judgment forms indicate that the trial court sentenced the Defendant to a five-year sentence with 364 days to be served in jail. In the alternative sentence section, the judgments ordered twelve years of probation. It is from these judgments that the Defendant now appeals."

"The first issue we address is whether the trial court erred when it sentenced the Defendant to twelve years of probation, rather than the agreed-to sentence of five years. The Defendant cites to *State v. Raymond Brandon Saffles*, E2020-01116-CCA-R3-CD, 2021 WL 4075030, at *6 (Tenn. Crim. App., at Knoxville, Sept. 8, 2021), *no Tenn. R. App. P. 11 application filed*, for the proposition that it is reversible error for a trial court to sentence a defendant to a term that exceeds the sentence term agreed to in the plea agreement. The State attempts to distinguish *Saffles*.

"In *Saffles*, the defendant therein pleaded guilty in exchange for a six-year sentence, with the trial court to determine total restitution and payment amount. At a subsequent hearing, the trial court sentenced the defendant to 364 days in jail followed by six years of probation, for a total effective sentence of seven years. This court held:

> Once a plea agreement is approved by the trial court, it becomes a binding and enforceable contract. *See State v. Howington*, 907 S.W.2d 403, 407 (Tenn. 1995); *see* Tenn. R. Crim. P. 11(c)(4) ('If the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.'). Pursuant to the Defendant's plea agreement, the only item to be determined by the trial court was the amount of restitution and payment schedule. Therefore, when the trial court accepted the Defendant's guilty plea, it was bound by all of the terms of the plea agreement, including the length of the sentence and the amount of time spent on supervised probation.

"As stated by the court, the plea agreement in this case, since it was approved by the trial court, was a binding and enforceable contract. The State argues:

> Here, the plea agreement provided a possible period of capped incarceration of five years, with 'manner of service' to be determined by the trial court. The [D]efendant got what he bargained for, a five year sentence. If the [D]efendant thought the plea agreement meant only a total maximum sentence, incarceration and probationary, of five years, he no doubt would have spoken up at the sentencing. The probation statute is clear that probation, e.g. 'manner of service,' can exceed the sentence imposed.

"We respectfully disagree with this line of reasoning. This Defendant, who by all accounts suffers from mental illness, was told by the trial court during a plea colloquy that the pleas he was entering and the agreed-to sentence was 'capped' at five years. While the trial court was to determine the 'manner of service,' the Defendant would be reasonably entitled to assume that the trial court's

sentencing determinations would all fall within the five-year time frame. By its plain meaning, the term, 'manner of service' means incarceration, probation, or split confinement. The term does not by its plain meaning mean extension of the duration of the sentence agreed to by seven years. To allow defendants to be sentenced to restrictive terms of probation years beyond an 'agreed to' sentence length, negotiated by the attorneys and approved by the trial court, would be totally improper.

"As such, we conclude that the trial court erred when it sentenced the Defendant to a term of probation beyond the five-year term that the parties agreed to in the binding and enforceable plea agreement."

"The Defendant next contends that the trial court erred when it included as a condition of his probation that he not leave Maury County while serving his probation.

"Tennessee Code Annotated section 40-35-303(d) permits trial courts to impose conditions of probation that are 'reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience[.]' *Mathes*, 114 S.W.3d at 918, *see also* T.C.A. § 40-35-303(d)(9). It is the Defendant's burden to demonstrate the impropriety of a probation condition. *Burdin*, 924 S.W.2d at 84.

"While a case of first impression in Tennessee, we first note that federal statutes codify that that there are situations and cases in which it is justified to require a defendant to remain in a jurisdiction except when granted permission to leave by the court or his or her probation officer. *See* 18 U.S.C.A. § 3563(b)(14). In a Colorado case, a geographical restriction imposed as a condition of probation in an assault case, which prohibited a defendant from being found in the area where the victim lived, was reasonably related to the underlying offense, the condition was designed to prevent the possibility of physical contact between the defendant and the victim for a period of probation, and the defendant neither lived nor worked in the area covered by restriction. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997), *reh'g denied,* (Apr. 14, 1997). In a California case, the appellate court found it was not unreasonable or an unconstitutional violation of the defendant's right to travel to have as a probation condition that the defendant must maintain a distance of at least fifty yards from the victim's home. *People v. Petty*, 213 Cal. App. 4th 1410, 154 Cal. Rptr. 3d 75 (1st Dist. 2013). In that case, the victim had known defendant for years, defendant admitted to returning to victim's home on several later occasions uninvited, intrusion on defendant's travel was minimal, and forbidden zone was specifically linked to his past crime. *Id.*

"In all travel restrictions, as with other conditions of probation, they must be reasonably related to the purpose of the defendant's sentence. In this case, we conclude that the travel restriction requiring that the Defendant not leave his county of residence for a period of twelve years is overly broad and not reasonably related to the purpose of his sentence and is unduly restrictive.

"Tennessee Code Annotated section 40-35-401(c) (2019) specifies how the appellate court may proceed when a defendant appeals his sentence, providing that if a sentence is appealed, the appellate court may:

1. Dismiss the appeal;
2. Affirm, reduce, vacate or set aside the sentence imposed;
3. Remand the case or direct the entry of an appropriate sentence or order; or
4. Direct any further proceedings appropriate or required under the circumstances.

"In the interest of judicial economy and in accordance with our holdings, we remand the case to the trial court with direction for the trial court to enter amended judgments that reflect the following: the Defendant be sentenced to a term 364 days of incarceration followed by four years and one day of probation, for a total term of five years, as agreed to by the parties. We further include as a condition of probation that he not knowingly go within fifty miles of the victim or her residence, except as required by any pending civil litigation, and that he willingly leave were he to unwittingly encounter her or her family. We agree with the trial court that a condition of the Defendant's probation shall be that he remain on his medication and that, as a felon, he not own or attempt to possess a firearm.

"We recognize that, if the Defendant were to violate his probation, the trial court could extend his term of probation and or change the conditions of his probation. *See State v. Brandon L. Brawner*, No. W2013-01144-CCA-R3-CD, 2014 WL 465743, at *2 (Tenn. Crim. App. Feb. 4, 2014), *no perm. app. filed* (citing T.C.A. §§ 40-35-308(a), (c), -310, - 311(e)(1); *State v. Hunter*, 1 S.W.3d 643, 648 (Tenn. 1999)) (stating that upon finding that a defendant has violated the conditions of probation, the trial court is statutorily authorized to: '(1) order confinement; (2) order execution of the sentence as originally entered; (3) return the Defendant to probation on appropriate modified conditions; or (4) extend the defendant's probationary period by up to two years.')."

D. Armed Career Criminal Act

Wooden v. United States, 142 S.Ct. 1063 (U.S., Kagan, 2022).

"A jury convicted William Dale Wooden of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The Government asked the District Court to sentence Wooden under the Armed Career Criminal Act (ACCA). ACCA mandates a 15-year minimum penalty for § 922(g) offenders with at least three prior convictions for specified felonies 'committed on occasions different from one another.' § 924(e)(1). Wooden's relevant criminal record included ten burglary convictions arising out of a single criminal episode in 1997, during which Wooden had unlawfully entered a one-building storage facility and stolen items from ten different storage units. Prosecutors indicted Wooden on ten counts of burglary—one for each storage unit—and Wooden pleaded guilty to all counts. Years later, at Wooden's sentencing hearing on his § 922(g) conviction, the District Court applied ACCA's penalty enhancement in accordance with the Government's view that Wooden had commenced a new 'occasion' of criminal activity each time he left one storage unit and entered another. The resulting sentence was almost sixteen years, much higher than the statutory maximum for Wooden's crime absent such an enhancement. The Sixth Circuit affirmed, reasoning that ACCA's occasions clause is satisfied whenever crimes take place at different moments in time—that is, sequentially rather than simultaneously.

"Held: Wooden's ten burglary offenses arising from a single criminal episode did not occur on different 'occasions' and thus count as only one prior conviction for purposes of ACCA."

"(a) Wooden's successive burglaries occurred on one 'occasion' under a natural construction of that term. An ordinary person using language in its normal way would describe Wooden's entries into the storage units as happening on a single occasion, rather than on ten 'occasions different from one another.' § 924(e)(1). The Government's contention that an 'occasion' ends at the discrete moment when an offense's elements are established contravenes the ordinary usage of the word. An occasion may itself encompass multiple, temporally distinct activities. For example, the occasion of a wedding may include a ceremony, cocktail hour, dinner, and dancing. Those activities need

not—and often do not—occur simultaneously; yet they nevertheless compose one occasion. The same is true for sequential criminal offenses. Indeed, the Court has often used the word 'occasion' to encompass multiple, temporally discrete offenses. See, *e.g., United States* v. *Bryant*, 579 U.S. 140, 151. The Government's contrary view—that each sequential offense forms its own 'occasion'—can make someone a career offender in the space of a minute. But that view goes far toward collapsing ACCA's two separate statutory conditions for imposing an enhanced penalty on a § 922(g) offender. ACCA's enhancement kicks in only if (1) the offender has three previous convictions for specified felonies; and (2) those predicate felonies were committed on 'occasions different from one another.' § 924(e)(1). The Government's approach would largely collapse the two conditions and give ACCA's three-occasions requirement no work to do."

"(b) Given what 'occasion' ordinarily means, whether criminal activities occurred on one occasion or different occasions requires a multi-factored inquiry that may depend on a range of circumstances, including timing, location, and the character and relationship of the offenses. For the most part, the determination will be straightforward and intuitive. In many cases, a single factor—especially of time or place—can decisively differentiate occasions. In hard cases, the inquiry may involve keeping an eye on ACCA's history and purpose. Here, every relevant consideration shows that Wooden burglarized ten storage units on a single occasion. Indeed it was because the burglaries 'ar[ose] from the same conduct' that Georgia law required the prosecutor to charge all ten in a single indictment. Ga. Code Ann. § 16–1–7(b)."

"(c) Statutory history and purpose confirm the Court's view of the occasions clause's meaning, as well as the Court's conclusion that Wooden is not a career offender. Congress added the occasions clause only after a court applied ACCA's enhancement to Samuel Petty—an offender who, much like Wooden, was convicted of multiple counts of robbery for one night in one restaurant. See *United States* v. *Petty*, 798 F.2d 1157. Petty sought review in this Court, and the Solicitor General confessed error, stating that ACCA should not be construed to reach multiple felony convictions arising out of a single criminal episode. Shortly thereafter, Congress amended ACCA to require that the requisite offenses occur on 'occasions different from one another.' Minor and Technical Criminal Law Amendments Act of 1988, § 7056, 102 Stat. 4402. That statutory change, rejecting the original outcome in *Petty* in light of the Solicitor General's confession of error, is at odds with the Government's current view of the occasions clause. The Government attempts to distinguish the facts of *Petty*, but nothing about the Solicitor General's confession of error, or Congress's amendment of ACCA, suggests any concern for whether an offender's crimes were committed simultaneously or sequentially. Instead, each was based on another idea—that a person who has robbed a restaurant, and done nothing else, is not a career offender. The history of the occasions clause thus aligns with what this Court has always recognized as ACCA's purpose: to address the 'special danger' posed by the eponymous 'armed career criminal.' *Begay* v. *United States*, 553 U.S. 137, 146. Wooden's burglary of a single storage facility does not suggest that kind of danger, any more than Petty's robbery of a single restaurant did."

E. Boating Under the Influence and DUI Convictions for Purposes of Determining Prior Convictions

Chapter 910, Public Acts 2022, adding T.C.A. §§ 55-10-405(c)(2) and 69-9-219(c)(3)(B) eff. July 1, 2022.

55-10-405(c).

"(2) For purposes of determining if a person convicted of § 55–10–401 is a repeat or multiple offender, a prior conviction for boating under the influence under § 69–9–217(a) must be treated the same as a prior conviction for driving under the influence of an intoxicant under § 55–10–401 if the person was convicted of the prior offense within ten (10) years of the date of the present violation."

69-9-219(c)(3).

"(B) For purposes of determining if a person convicted of § 69–9–217(a) is a repeat or multiple offender, a prior conviction for driving under the influence of an intoxicant under § 55–10–401 must be treated the same as a prior conviction for boating under the influence under § 69–9–217(a) if the person was convicted of the prior offense within ten (10) years of the date of the present violation."

69-9-219(c)(5).

"(B) In the prosecution of second or subsequent offenders, the indictment or charging instrument must allege each prior conviction for violation of § 69–9–217(a), driving under the influence of an intoxicant under § 55–10–401, vehicular assault under § 39–13–106, aggravated vehicular assault under § 39–13–115, vehicular homicide under § 39–13–213(a)(2), or aggravated vehicular homicide under § 39–13–218, setting forth the time and place of each prior conviction."

F. First Step Act; Consideration of Intervening Changes of Law or Fact Permitted

Concepcion v. United States, 142 S.Ct. 2389 (U.S., Sotomayor, 2022).

"Congress passed the Fair Sentencing Act of 2010 to correct the wide disparity between crack and powder cocaine sentencing. Section 2 of that Act increased the amount of crack cocaine needed to trigger a 5-to-40-year sentencing range from 5 grams to 28 grams. § 2(a)(2), 124 Stat. 2372. The Fair Sentencing Act did not apply retroactively, but in 2011, the Sentencing Commission amended the Sentencing Guidelines to lower the Guidelines range for crack-cocaine offenses and applied that reduction retroactively for some defendants. In 2018, Congress enacted the First Step Act, authorizing district courts to 'impose a reduced sentence' on defendants serving sentences for certain crack-cocaine offenses 'as if sections 2 and 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed.' Pub. L. 115–391, § 404(b), 132 Stat. 5222.

"In 2007, petitioner Carlos Concepcion pleaded guilty to one count of distributing five or more grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1), and he was sentenced in 2009 to 19 years (228 months) in prison. When Concepcion was sentenced, he qualified for sentencing as a 'career offender.' The career offender provision and other enhancements increased Concepcion's Sentencing Guidelines range from 57 to 71 months to 262 to 327 months. Because Concepcion was sentenced as a career offender, he was not eligible for relief under the Sentencing Commission's 2011 amendment.

"In 2019, Concepcion filed a *pro se* motion for a sentence reduction under the First Step Act. He argued that he was serving a sentence for a 'covered offense' because § 2 of the Fair Sentencing Act 'modified' the statutory penalties for his conviction under 21 U.S.C. § 841(a)(1). Concepcion contended that retroactive application of the Fair Sentencing Act lowered his Guidelines range from 262 to 327 months to 188 to 235 months. The Government conceded Concepcion's eligibility for

relief but opposed the motion, emphasizing that Concepcion's original sentence of 228 months fell within the new Guidelines range of 188 to 235 months, and citing factors in Concepcion's prison record that the Government believed counseled against a sentence reduction. In his reply brief, represented by counsel, Concepcion made two primary arguments in support of a reduced sentence. First, he argued that he would no longer be considered a career offender because one of his prior convictions had been vacated and his remaining convictions would not constitute crimes of violence that trigger the enhancement. Without the enhancement, Concepcion contended that his revised Guidelines range should be 57 to 71 months. Second, Concepcion pointed to postsentencing evidence of rehabilitation.

"The District Court denied Concepcion's motion. It declined to consider that Concepcion would no longer qualify as a career offender based on its judgment that the First Step Act did not authorize such relief. . . . The District Court did not address Concepcion's evidence of rehabilitation or the Government's countervailing evidence of Concepcion's disciplinary record. The Court of Appeals affirmed in a divided opinion, and added to the disagreement among the Circuits as to whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact.

"Held: The First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence."

"(a) Federal courts historically have exercised broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. District courts' discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence."

"(1) There is a 'long' and 'durable' tradition that sentencing judges 'enjo[y] discretion in the sort of information they may consider' at an initial sentencing proceeding. *Dean* v. *United States*, 581 U.S. 62, 66, 137 S.Ct. 1170, 197 L.Ed.2d 490. That unbroken tradition also characterizes federal sentencing history. Indeed, '[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.' *Koon v. United States*, 518 U.S. 81, 113, 116 S.Ct. 2035, 135 L.Ed.2d 392. Accordingly, a federal judge in deciding to impose a sentence 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.' *United States v. Tucker*, 404 U.S. 443, 446, 92 S.Ct. 589, 30 L.Ed.2d 592."

"(2) The discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings. The Court in *Pepper v. United States*, 562 U.S. 476, 131 S.Ct. 1229, 179 L.Ed.2d 196, found it 'clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing.' *Id.*, at 490, 131 S.Ct. 1229. Accordingly, federal courts resentencing individuals whose sentences were vacated on appeal regularly consider evidence of rehabilitation, or evidence of rule breaking in prison, developed after the initial sentencing. Where district courts must calculate new Guidelines ranges as part of resentencing proceedings, courts have also exercised their discretion to consider nonretroactive Guidelines changes. In some cases, a district court is prohibited from recalculating a Guidelines range to account for nonretroactive

Guidelines amendments, but the court may nevertheless find those amendments to be germane when deciding whether to modify a sentence at all, and if so, to what extent."

"(3) The only limitations on a court's discretion to consider relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution. See *Pepper*, 562 U.S., at 489, n. 8, 131 S.Ct. 1229; *Mistretta v. United States*, 488 U.S. 361, 364, 109 S.Ct. 647, 102 L.Ed.2d 714. Congress has placed such limits where it deems them appropriate. See 18 U.S.C. §§ 3582(a), 3583(c). Congress has further imposed express statutory limitations on one type of sentencing modification proceeding, expressly cabining district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements. See also § 3582(c)(1)(A) (compassionate release)."

"(b) Congress in the First Step Act did not contravene well-established sentencing practices."

"(1) Nothing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion. The text of the First Step Act does not so much as hint that district courts are prohibited from considering evidence of rehabilitation, disciplinary infractions, or unrelated Guidelines changes. The only two limitations on district courts' discretion appear in § 404(c): A district court may not consider a First Step Act motion if the movant's sentence was already reduced under the Fair Sentencing Act or if the court considered and rejected a motion under the First Step Act. Neither limitation applies here. By its terms, § 404(c) does not prohibit district courts from considering any arguments in favor of, or against, sentence modification. In fact, § 404(c) only underscores that a district court is not required to modify a sentence for any reason. 'Drawing meaning from silence is particularly inappropriate' in the sentencing context, 'for Congress has shown that it knows how to direct sentencing practices in express terms.' *Kimbrough v. United States*, 552 U.S. 85, 103, 128 S.Ct. 558, 169 L.Ed.2d 481.

"The 'as if' clause in § 404(b) does not impose any limit on the information a district court can consider in exercising its discretion under the First Step Act. The term 'as if' simply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act, necessary to overcome 1 U.S.C. § 109, which creates a presumption that Congress does not repeal federal criminal penalties unless it says so 'expressly.' The 'as if' clause also directs district courts to apply the Fair Sentencing Act as if it applied at the time of the commission of the offense, not at the time of the original sentencing, suggesting that Congress did not intend to constrain district courts to considering only the original sentencing record. Thus, the 'as if' clause requires district courts to apply the legal changes in the Fair Sentencing Act when recalculating a movant's Guidelines, but it does not limit the information a district court may use to inform its decision whether and how much to reduce a sentence."

"(2) Consistent with this text and structure, district courts deciding First Step Act motions regularly have considered evidence of postsentencing rehabilitation and unrelated Guidelines amendments when raised by the parties. First Step Act movants have amassed prison records of over a decade. See § 404(a), 132 Stat. 5222 (requiring the movant to have been sentenced for an offense 'committed before August 3, 2010'). Those records are naturally of interest to judges authorized by the First Step Act to reduce prison sentences or even to release movants immediately. Likewise, when deciding whether to grant First Step Act motions and in deciding how much to reduce sentences, courts have looked to postsentencing evidence of violence or prison infractions as probative. Moreover, when raised by the parties, district courts have considered nonretroactive Guidelines amendments to help inform whether to reduce sentences at all, and if so, by how much.

Nothing express or implicit in the First Step Act suggests that these courts misinterpreted the Act in considering such relevant and probative information."

"(3) The Court therefore holds that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act. When deciding a First Step Act motion, district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' nonfrivolous arguments. See *Golan* v. *Saada*, 596 U.S. ——, ——. The district court is not required to articulate anything more than a brief statement of reasons. See *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203.

"The broad discretion that the First Step Act affords to district courts also counsels in favor of deferential appellate review. See *Solem v. Helm*, 463 U.S. 277, 290, n. 16, 103 S.Ct. 3001, 77 L.Ed.2d 637. Section 404(c) of the First Step Act confers particular discretion because the Act does not 'require a court to reduce any sentence.' Other than legal errors in recalculating the Guidelines to account for the Fair Sentencing Act's changes, see *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445, appellate review should not be overly searching."

G. Release Eligibility; No or Limited Release Eligibility for Certain Crimes

Chapter 988, Public Acts 2022, adding T.C.A. §§ 40-35-501(bb) and (cc) and 40-35-501(i)(4) and (5) eff. July 1, 2022.

40-35-501.

"(bb)

(1) Notwithstanding this section to the contrary, there is no release eligibility for a person committing an offense, on or after July 1, 2022, that is enumerated in subdivision (bb)(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 is permitted to earn credits pursuant to § 41–21–236 for satisfactory program performance, and those 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 (bb)(1) applies are:

(A) Attempted first degree murder, as defined in § 39–13–202;
(B) Second degree murder, as defined in § 39–13–210;
(C) Vehicular homicide, as defined in § 39–13–213(a)(2);
(D) Aggravated vehicular homicide, as defined in § 39–13–218;
(E) Especially aggravated kidnapping, as defined in § 39–13–305;
(F) Especially aggravated robbery, as defined in § 39–13–403;
(G) Carjacking, as defined in § 39–13–404; and
(H) Especially aggravated burglary, as defined in § 39–13–1004.

"(cc)

(1) (A) Notwithstanding this section to the contrary, there is no release eligibility for a person committing an offense, on or after July 1, 2022, that is enumerated in subdivision (cc)(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; provided, that credits earned by the person pursuant to § 41–21–236 for satisfactory program performance may be used to reduce by up to fifteen percent (15%) the percentage of the sentence imposed by the court that the person must serve before becoming eligible for release on parole but shall not alter the sentence expiration date.

(B) Notwithstanding § 40–28–122(c), § 40–35–506, or another law to the contrary, a person released on parole pursuant to subdivision (cc)(1)(A) for an offense listed in subdivision (cc)(2) may, upon a revocation for violating the conditions of parole, be required to serve a term of incarceration, not to exceed the remainder of the sentence.

(C) A person who commits an offense enumerated in subdivision (cc)(2) is permitted to earn credits for which the person is eligible, and the credits may be used, in addition to the use of program performance credits as provided in subdivision (cc)(1)(A), 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 (cc)(1) applies are:

(A) Aggravated assault, as defined in § 39–13–102(a)(1)(A)(iii) or § 39–13–102 (a)(1)(B)(iii), if the offense involved the use of a deadly weapon;

(B) Aggravated assault, as defined in § 39–13–102(a)(1)(A)(iv);

(C) Aggravated assault, as defined in § 39–13–102, if the offense resulted in serious bodily injury to or the death of another;

(D) Aggravated assault against a first responder or nurse, as defined in § 39–13–116 (b)(3), if the offense involved the use of a deadly weapon;

(E) Aggravated assault against a first responder or nurse, as defined in § 39–13–116 (b)(1), (b)(2), or (b)(4);

(F) Voluntary manslaughter, as defined in § 39–13–211;

(G) Vehicular homicide, as defined in § 39–13–213(a)(1), (a)(3), or (a)(4);

(H) Reckless homicide, as defined in § 39–13–215;

(I) Aggravated kidnapping, as defined in § 39–13–304;

(J) Involuntary labor servitude, as defined in § 39–13–307;

(K) Trafficking persons for forced labor or services, as defined in § 39–13–308;

(L) Aggravated robbery, as defined in § 39–13–402;

(M) Aggravated burglary, as defined in § 39–13–1003;

(N) Aggravated arson, as defined in § 39–14–302;

(O) Possessing or using a firearm or antique firearm during commission of or attempt to commit a dangerous felony, as defined in § 39–17–1324;

(P) The manufacture, delivery, or sale of a controlled substance, as defined in § 39–17–417, where the instant offense is classified as a Class A, B, or C felony and the person has two (2) or more prior convictions for the manufacture, delivery, or sale of a controlled substance classified as a Class A, B, or C felony, pursuant to § 39–17–417, prior to or at the time of committing the instant offense; and

(Q) Criminally negligent homicide, as defined in § 39–13–212.

(3) (A) 'Prior conviction' means, for purposes of this subsection (cc), unless the context otherwise requires, that the person serves and is released or discharged from, or is serving, a separate period of incarceration or supervision for the commission of the applicable offense listed in subdivision (cc)(2)(P).

(B) 'Prior conviction' includes convictions under the laws of any other state, government, or country that, if committed in this state, would constitute the applicable offense listed in subdivision (cc)(2)(P). If a relevant offense in a jurisdiction other than this state is not identified as the applicable offense listed in

subdivision (cc)(2)(P) in this state, then it is considered a prior conviction if the elements of the felony are the same as the elements for the applicable offenses listed in subdivision (cc)(2)(P).

(C) 'Separate period of incarceration or supervision' includes a sentence to any of the sentencing alternatives set out in § 40–35–104(c)(3)–(9). The applicable offense listed in subdivision (cc)(2)(P) is deemed as having been committed after a separate period of incarceration or supervision if the offense is committed while the person was:

(i) On probation, parole, or community correction supervision for the applicable offense listed in subdivision (cc)(2)(P);

(ii) Incarcerated for the applicable offense listed in subdivision (cc)(2)(P);

(iii) Assigned to a program whereby the person enjoys the privilege of supervised release into the community, including, but not limited to, work release, educational release, restitution release, or medical furlough for the applicable offense listed in subdivision (cc)(2)(P); or

(iv) On escape status from any correctional institution when incarcerated for the applicable offense listed in subdivision (cc)(2)(P)."

40-35-501(I).

"(4) For the offenses of murder in the second degree, especially aggravated kidnapping, aggravated kidnapping, especially aggravated robbery, or aggravated arson, this subsection (i) only applies to offenses committed on or after July 1, 1995, and before July 1, 2022.

"(5) For the offenses of rape, aggravated sexual battery, aggravated child abuse, sexual exploitation of a minor, aggravated sexual exploitation of a minor, or especially aggravated sexual exploitation of a minor, this subsection (i) only applies to offenses committed on or after July 1, 1995, and before July 1, 2021."

H. Prisoner's Method of Execution Claim; § 1983 Is Appropriate Vehicle

Nance v. Ward, 142 S.Ct. 2214 (U.S., Kagan, 2022).

"A prisoner who challenges a State's proposed method of execution under the Eighth Amendment must identify a readily available alternative method that would significantly reduce the risk of severe pain. If the prisoner proposes a method already authorized under state law, the Court has held that his claim can go forward under 42 U.S.C. § 1983, rather than in habeas. See *Nelson* v. *Campbell*, 541 U.S. 637, 644–647. But the prisoner is not confined to proposing a method already authorized under state law; he may ask for a method used in other States. See *Bucklew* v. *Precythe*, 587 U.S. ——, ——. The question presented is whether a prisoner who does so may still proceed under § 1983.

"Petitioner Michael Nance brought suit under § 1983 to enjoin Georgia from using lethal injection to carry out his execution. Lethal injection is the only method of execution that Georgia law now authorizes. Nance alleges that applying that method to him would create a substantial risk of severe pain. As an alternative to lethal injection, Nance proposes death by firing squad—a method currently approved by four other States. The District Court dismissed Nance's § 1983 suit as untimely. The Eleventh Circuit rejected it for a different reason: that Nance should have advanced his method-of-execution claim by way of a habeas petition rather than a § 1983 suit. A habeas

petition, that court stated, is appropriate when a prisoner seeks to invalidate his death sentence. And the Eleventh Circuit thought that was what Nance was doing. It asserted that Georgia law—which again, only authorizes execution by lethal injection—had to be taken as 'fixed.' 981 F.3d 1201, 1211. Under that 'fixed' law, the court said, enjoining Georgia from executing Nance by lethal injection would mean that he could not be executed at all. The court therefore 'reconstrued' Nance's § 1983 complaint as a habeas petition. *Id.*, at 1203. Having done so, the court then dismissed Nance's petition as 'second or successive,' because he had previously sought federal habeas relief. 28 U.S.C. § 2244(b).

"Held: Section 1983 remains an appropriate vehicle for a prisoner's method-of-execution claim where, as here, the prisoner proposes an alternative method not authorized by the State's death-penalty statute.

"Both § 1983 and the federal habeas statute enable a prisoner to complain of 'unconstitutional treatment at the hands of state officials.' *Heck* v. *Humphrey*, 512 U.S. 477, 480. A prisoner may generally sue under § 1983, unless his claim falls into that statute's 'implicit exception' for actions that lie 'within the core of habeas corpus.' *Wilkinson* v. *Dotson*, 544 U.S. 74, 79. When a prisoner seeks relief that would 'necessarily imply the invalidity of his conviction or sentence,' he comes within the core and must proceed in habeas. *Heck*, 512 U.S., at 487.

"The Court has twice held that prisoners could bring method-of-execution claims under § 1983. See *Nelson*, 541 U.S., at 644–647; *Hill* v. *McDonough*, 547 U.S. 573, 580–583. Although these cases predated the Court's requirement that prisoners identify alternative methods of execution, each prisoner had still said enough to leave the Court convinced that alternatives to the challenged procedures were available. See *Nelson*, 541 U.S., at 646; *Hill*, 547 U.S., at 580–581. Because alternatives were available, the prisoners' challenges would not '*necessarily* prevent [the State] from carrying out [their] execution[s].' *Nelson*, 541 U.S., at 647 (emphasis in original); see *Hill*, 547 U.S., at 583. That made § 1983 a proper vehicle.

"In *Nelson* and *Hill*, the Court observed that using a different method required only a change in an agency's uncodified protocol. Here, Georgia would have to change its statute to carry out Nance's execution by firing squad. Except for that fact, this case would even more clearly than *Nelson* and *Hill* be fit for § 1983. Since those cases, the Court has required a prisoner bringing a method-of-execution claim to propose an alternative way of carrying out his death sentence. Thus, an order granting the prisoner relief does not, as required for habeas, '*necessarily* prevent' the State from implementing the execution. *Nelson*, 541 U.S., at 647 (emphasis in original). Rather, the order gives the State a pathway forward.

"That remains true even where, as here, the proposed alternative is one unauthorized by present state law. Nance's requested relief still places his execution in Georgia's control. If Georgia wants to carry out the death sentence, it can enact legislation approving what a court has found to be a fairly easy-to-employ method of execution. Although that may take more time and effort than changing an agency protocol, *Hill* explained that the 'incidental delay' involved in changing a procedure is irrelevant to the vehicle question—which focuses on whether the requested relief would 'necessarily' invalidate the death sentence. 547 U.S., at 583. And anyway, Georgia has given no reason to think that passing new legislation would be a substantial impediment.

"The Court of Appeals could reach the contrary conclusion only by wrongly treating Georgia's statute as immutable. In its view, granting Nance relief would necessarily imply the invalidity of

his death sentence because Georgia law must be taken as 'fixed.' 981 F. 3d, at 1211. But one of the 'main aims' of § 1983 is to 'override'—and thus compel change of—state laws when necessary to vindicate federal constitutional rights. *Monroe* v. *Pape*, 365 U.S. 167, 173. Indeed, courts not uncommonly entertain prisoner suits under § 1983 that may, if successful, require changing state law.

"Under the contrary approach, the federal vehicle for bringing a federal method-of-execution claim would depend on the vagaries of state law. Consider how Nance's claim would fare in different States. In Georgia (and any other State with lethal injection as the sole authorized method), he would have to bring his claim in a habeas petition. But in States authorizing other methods when a court holds injection unlawful, he could file a § 1983 suit. It would be strange to read state-by-state discrepancies into the Court's understanding of how § 1983 and the habeas statute apply to federal constitutional claims. That is especially so because the use of the vehicles can lead to different outcomes: An inmate in one State could end up getting his requested relief, while an inmate in another might have his case thrown out.

"The approach of the Court of Appeals raises one last problem: It threatens to undo the commitment this Court made in *Bucklew*. The Court there told prisoners they could identify an alternative method not 'presently authorized' by the executing State's law. 587 U.S., at ——. But under the approach of the Court of Appeals, a prisoner who presents an out-of-state alternative is relegated to habeas—and once there, he will almost inevitably collide with the second-or-successive bar. That result, precluding claims like Nance's, would turn *Bucklew* into a sham.

"Finally, recognizing that § 1983 is a good vehicle for a claim like Nance's does not countenance 'last-minute' claims to forestall an execution. *Id*., at ——. Courts must consider delay in deciding whether to grant a stay of execution, and outside the stay context, courts have tools to streamline § 1983 actions and protect a sentence's timely enforcement."

I. Witnesses at Execution; Member of Clergy

Chapter 735, Public Acts 2022, amending T.C.A. § 40-23-116(a)(3) eff. Mar. 24, 2022.

Witnesses entitled to be present at the carrying out of a death sentence include "[a] member of the clergy who has been preparing the condemned person for death;" rather than a "priest or minister of the gospel."

J. Restitution; Intoxicated Defendant to Pay Maintenance for Vehicular Homicide Victim's Minor Children

Chapter 1056, Public Acts 2022, adding T.C.A. § 39-13-219 eff. May 25, 2022.

"(a) Notwithstanding any law to the contrary, if a defendant is convicted of a violation of § 39–13–213(a)(2) or § 39–13–218 and the deceased victim of the offense was the parent of a minor child, then the sentencing court shall order the defendant to pay restitution in the form of child maintenance to each of the victim's children until each child reaches eighteen (18) years of age and has graduated from high school, or the class of which the child is a member when the child reached eighteen (18) years of age has graduated from high school.

"(b) The court shall determine an amount that is reasonable and necessary for the maintenance of the victim's child after considering all relevant factors, including:

(1) The financial needs and resources of the child;
(2) The financial resources and needs of the surviving parent or guardian of the child, including the state if the child is in the custody of the department of children's services;
(3) The standard of living to which the child is accustomed;
(4) The physical and emotional condition of the child and the child's educational needs;
(5) The child's physical and legal custody arrangements; and
(6) The reasonable work-related child care expenses of the surviving parent or guardian.

"(c) The court shall order that child maintenance payments be made to the clerk of court as trustee for remittance to the child's surviving parent or guardian. The clerk shall remit the payments to the surviving parent or guardian within ten (10) working days of receipt by the clerk. The clerk shall deposit all payments no later than the next working day after receipt.

"(d) If a defendant who is ordered to pay child maintenance under this section is incarcerated and unable to pay the required maintenance, then the defendant must have up to one (1) year after the release from incarceration to begin payment, including entering a payment plan to address any arrearage. If a defendant's child maintenance payments are set to terminate but the defendant's obligation is not paid in full, then the child maintenance payments shall continue until the entire arrearage is paid.

"(e) (1) If the surviving parent or guardian of the child brings a civil action against the defendant prior to the sentencing court ordering child maintenance payments as restitution and the surviving parent or guardian obtains a judgment in the civil suit, then no maintenance shall be ordered under this section.

(2) If the court orders the defendant to make child maintenance payments as restitution under this section and the surviving parent or guardian subsequently brings a civil action and obtains a judgment, then the child maintenance order shall be offset by the amount of the judgment awarded in the civil action."

III. Probation

A. Violation of Provisions; Issuance of Summons for Technical Violations

Chapter 1060, Public Acts 2022, amending T.C.A. § 40-35-311(a) and (d) and adding -311(g) eff. July 1, 2022.

"(a) (1) Whenever it comes to the attention of the trial judge that a defendant who has been released upon suspension of sentence has been guilty of a breach of the laws of this state or has violated the conditions of probation, the trial judge shall have the power to cause to be issued under the trial judge's hand:

(A) A warrant for the arrest of the defendant as in any other criminal case; or
(B) For a technical violation brought by a probation officer, and subject to the discretion of the judge, a criminal summons.

(2) Regardless of whether the defendant is on probation for a misdemeanor or felony, or whether the warrant or summons is issued by a general sessions court judge or the judge

of a court of record, a probation officer or a peace officer of the county in which the probationer is found may execute the warrant or serve the summons."

"(d) (1) If the trial judge finds by a preponderance of the evidence that the defendant has violated the conditions of probation and suspension of sentence, then the court may revoke the defendant's probation and suspension of sentence, in full or in part, pursuant to § 40–35–310. The court may sentence the defendant to a sentence of probation for the remainder of the unexpired term.

(2) Notwithstanding subdivision (d)(1), the trial judge shall not revoke a defendant's probation and suspension of sentence for a felony offense, whether temporarily under subdivision (e)(1) or otherwise, based upon one (1) instance of technical violation or violations."

"(g) As used in this section, 'technical violation' means an act that violates the terms or conditions of probation but does not constitute a new felony, new Class A misdemeanor, zero tolerance violation as defined by the department of correction community supervision sanction matrix, absconding, or contacting the defendant's victim in violation of a condition of probation."

B. Revocation Proceeding Involves Two-Step Inquiry

State v. Dagnan, 641 S.W.3d 751 (Tenn., Page, 2022).

"This appeal concerns the revocation of a criminal defendant's probation. We granted Defendant's application for permission to appeal to consider whether revocation proceedings are a one-step or two-step process on the part of the trial court and the appropriate appellate standard of review to be employed in reviewing such determinations. Defendant in this case pleaded guilty to theft of property over $1,000 but less than $10,000 and received a six-year sentence, which the trial court suspended to supervised probation. A series of revocation proceedings ensued. At Defendant's fifth and final revocation hearing, the trial court fully revoked his probation. Defendant took issue with the consequence imposed for his probation violation; however, the Court of Criminal Appeals found no abuse of discretion on the part of the trial court and affirmed its decision. Judge Timothy L. Easter filed a separate concurring opinion in which he emphasized his belief that a trial court, after it has determined probation should be revoked, is not statutorily required to hold an additional hearing or make any additional findings to determine the manner in which the original sentence should be served. We granted Defendant's application for permission to appeal. While we do not agree with Defendant that the trial court abused its discretion in ordering him to serve the balance of his six-year sentence in prison, we do take this opportunity to clarify and bring uniformity to the standards and principles applied by the trial courts and appellate courts in probation revocation proceedings. We conclude that a probation revocation proceeding ultimately involves a two-step inquiry. A trial court, upon finding by a preponderance of the evidence that a defendant violated the conditions of his or her probation, must determine (1) whether to revoke probation, and (2) the appropriate consequence to impose upon revocation. On appeal, the appellate court must review both decisions separately for abuse of discretion. More specifically, if the trial court has properly placed its findings on the record, the standard of review for probation revocations is abuse of discretion with a presumption of reasonableness. Considering this Court's prior opinions establishing the appellate standard of review of a trial court's sentencing decisions, we expressly extend the same principles to appellate review of a trial court's decision to revoke probation. Because we conclude that the trial court did not abuse its discretion in Defendant's case, we affirm the decision of the Court of Criminal Appeals."

IV. Release and Parole; Factors in Granting Parole

Chapter 944, Public Acts 2022, adding T.C.A. § 40-35-503(g)(2) eff. July 1, 2022.

"(2) In cases in which the offender was convicted of a homicide, the board shall also consider as a factor the extent to which the offender obstructed or continues to obstruct the ability of law enforcement to recover the remains of the victim."

V. Expunction

A. Limits on Eligibility

Chapter 677, Public Acts 2022, amending T.C.A. § 40-32-101(g)(2) eff. July 1, 2022.

Notwithstanding the provisions of this section, effective July 1, 2022, an eligible petitioner may file a petition for expunction of that person's public records involving a criminal offense if:

"(A)(i) The person has not been convicted of a criminal offense that is ineligible for expunction, including federal offenses and offenses in other states, that occurred prior to the offense for which the person is seeking expunction; provided, that a moving or nonmoving traffic offense shall not be considered an offense as used in this subdivision (g)(2)(A)(i); and
(ii) The person has not previously been granted expunction under this subsection (g) for another criminal offense;

"(B)At the time of the filing of the petition for expunction at least:
(i) Five (5) years have elapsed since the completion of the sentence imposed for the offense the person is seeking to have expunged, if the offense is a misdemeanor or Class E felony; or
(ii) Ten (10) years have elapsed since the completion of the sentence imposed for the offense the person is seeking to have expunged, if the offense is a Class C or D felony. . . ."

B. Eligibility Requirements Concerning Convictions for Felony or Misdemeanor Committed Prior to November 1, 1982

Chapter 1027, Public Acts 2022, amending T.C.A. § 40-32-101(g)(1)(C) eff. July 1, 2022.

"Except as provided in subsection (g)(15), . . . 'eligible petitioner' means:

"(C) A person who was convicted of a felony or misdemeanor committed prior to November 1, 1989, if:
(i) The person has never had a previous conviction expunged as the result of the successful completion of a diversion program pursuant to §§ 40-15-102 – 40-15-106 or § 40-35-313; and
(ii) The offense for which the person was convicted:
(*a*) Did not have as an element the use, attempted use, or threatened use of physical force against the person of another;
(*b*) Did not involve, by its nature, a substantial risk that physical force against the person of another would be used in the course of committing the offense;

(*c*) Did not involve the use or possession of a deadly weapon;
(*d*) Was not a sexual offense for which the offender is required to register as a sexual offender or violent sexual offender under chapter 39, part 2 of this title; or any sexual offense involving a minor;
(*e*) Did not result in the death, serious bodily injury, or bodily injury of a person;
(*f*) Did not involve the use of alcohol or drugs and a motor vehicle;
(*g*) Did not involve the sale or distribution of a Schedule I controlled substance or a Schedule II controlled substance in an amount listed in § 39–17–417(i);
(*h*) Did not involve a minor as the victim of the offense; and
(*j*) Did not result in causing the victim or victims to sustain a loss of sixty thousand dollars ($60,000) or more."

C. TBI Must Comply with Expunction Order

Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. Rausch, 645 S.W.3d 160 (Tenn., Lee, 2022).

"This appeal arises from the trial court's denial of cross-motions for partial judgment on the pleadings. The parties do not dispute the relevant facts, and the following summary derives from the allegations of the complaint, which are taken as true, and from admissions in the record.

"In February 2015, the Plaintiff, an unnamed citizen of McNairy County, Tennessee, negotiated a judicial diversion agreement in McNairy County Circuit Court Case Number 3279. Tenn. Code Ann. § 40-35-313(a) (2019 & Supp. 2021). This agreement resolved two criminal charges. The State agreed to dismiss one criminal charge, and the Plaintiff consented to complete four years of probation in exchange for the dismissal of the remaining charge and expungement of both charges.

"By February 2019, the Plaintiff had successfully completed four years of probation. He petitioned for expungement of his records and paid the then-applicable $350 expungement fee. The State of Tennessee, through an assistant district attorney general, consented to expungement and submitted an agreed, joint, proposed expungement order to the trial judge, who approved and entered the order on February 19, 2019. The order provides:

> It is ordered that all PUBLIC RECORDS relating to such offense above referenced be expunged and immediately destroyed upon payment of all costs to clerk and that no evidence of such records pertaining to such offense be retained by any municipal, county or *state agency*, except non-public confidential information retained in accordance with T.C.A. § 10-7-504 and T.C.A. § 38-6-118.

"(Emphasis added). Neither the State nor the Plaintiff filed any post-judgment motion or appeal following entry of the expunction order. The TBI did not seek to intervene in the expungement proceeding.

"Thirty days later, in March 2019, the expunction order became final. *State v. Allen*, 593 S.W.3d 145, 154 (Tenn. 2020) ('[A] trial court's order becomes final thirty days after its entry, unless a timely notice of appeal or appropriate post-trial motion is filed.'). A copy of the expunction order was sent to the TBI within thirty days of its entry as required by law. The TBI's receipt of the expunction order triggered another statute, Tennessee Code Annotated section 40-32-102(b), which

provides that '[t]he [TBI] shall remove expunged records from the person's criminal history within sixty (60) days from the date of receipt of the expunction order.'

"Later in 2019, however, the Plaintiff learned that the TBI had not removed all records related to Case No. 3279 from his criminal history and had continued to report the existence of one of the expunged charged offenses. The Plaintiff, through counsel, notified the TBI by email that it should abide by the expunction order and that its noncompliance violated the expunction order and state law. The TBI responded that it had been advised by an assistant attorney general with the Tennessee Attorney General's Office that the TBI did not have to remove the expunged records from the Plaintiff's criminal history because Tennessee Code Annotated section 40-32-101(a)(1)(D) makes sexual offenses ineligible for expunction, even if a person successfully completes a judicial diversion program under Tennessee Code Annotated section 40-35-313.

"The Plaintiff sued the TBI in the Chancery Court for Davidson County, and as relevant to this appeal, sought declaratory and injunctive relief under Tennessee Code Annotated section 1-3-121. The Plaintiff and the TBI filed cross-motions for partial judgment on the pleadings. *See* Tenn. R. Civ. P. 12.03. By its motion, the TBI challenged the trial court's subject matter jurisdiction, asserting that Tennessee Code Annotated section 1-3-121 does not clearly and explicitly waive sovereign immunity. The TBI also argued that, even if the trial court had jurisdiction, the lawsuit lacked merit. The TBI maintained that it did not have to comply with the Plaintiff's expunction order in Case No. 3279 because sexual offenses are statutorily ineligible for expunction. The TBI moved for permission to file under seal the unredacted criminal record of Case No. 3279 for the trial court's review.

"The Plaintiff argued that final expunction orders are binding on the TBI and that it cannot substitute its judgment of an offense's eligibility for expungement for the determination of a court. The Plaintiff also asserted that principles of res judicata preclude the TBI from even contesting the propriety of the Plaintiff's expunction order. And finally, the Plaintiff argued that the TBI's only statutorily assigned duty in expungement proceedings is to remove expunged records from a person's criminal history within sixty days of receiving an expunction order."

"[T]he trial court declined to grant either party's motion for partial judgment on the pleadings, explaining that the pleadings did not establish whether Case No. 3279 involved a sexual offense for purposes of the exception the trial court had recognized. The trial court also reserved a ruling on the TBI's motion to file under seal the unredacted criminal record in Case No. 3279."

"The trial court certified the question for interlocutory appeal as 'under what circumstances, if any, the Tennessee Bureau of Investigation may refuse to comply with a final expungement order issued by a court of record.' Order, *Recipient of Final Expunction Ord. in McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch*, No. 20-967-III (Ch. Ct., Davidson Cnty. Apr. 21, 2021). . . . We granted the Plaintiff's application for permission to appeal to consider '[u]nder what circumstances, if any, may the Tennessee Bureau of Investigation refuse to comply with a final expungement order issued by a court of record.' Order, *Recipient of Final Expunction Ord. in McNairy Cnty. Cir. Ct. Case No. 3279 v. Rausch*, No. M2021-00438-SC-R11-CV (Tenn. Aug. 9, 2021) (granting application for permission to appeal)."

"The TBI challenges the trial court's subject matter jurisdiction over the Plaintiff's claim based on sovereign immunity."

"Courts will construe a statute as a waiver of sovereign immunity only if the statute '"clearly and unmistakably" express[es] the General Assembly's intent to permit claims against the State.' *Smith*, 551 S.W.3d at 709 (quoting *Davidson v. Lewis Bros. Bakery*, 227 S.W.3d 17, 19 (Tenn. 2007))."

"The General Assembly clearly and unmistakably waived sovereign immunity by enacting Tennessee Code Annotated section 1-3-121. The statute broadly declares: '*Notwithstanding any law to the contrary*, a cause of action *shall exist* ... for any affected person who seeks *declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action.* A cause of action shall not exist under this chapter to seek damages.' Tenn. Code Ann. § 1-3-121 (Supp. 2021) (emphases added). The plain meaning of this text expressly recognizes the existence of causes of action 'regarding the legality or constitutionality of a governmental action' that seek declaratory or injunctive relief. Causes of action 'regarding the legality or constitutionality of governmental action' must of necessity be brought against governmental entities, and no statutory text excludes the State from the broad term 'governmental entities.' The use of this language distinguishes section 1-3-121 from general statutes that this Court has held are not sufficiently clear waivers of sovereign immunity."

"We hold that section 1-3-121 waives sovereign immunity for causes of action seeking 'declaratory or injunctive relief ... regarding the legality or constitutionality of a governmental action.' Tenn. Code Ann. § 1-3-121. The Plaintiff's claim seeking declaratory or injunctive relief regarding the legality of the TBI's action in refusing to comply with the Plaintiff's final expunction order falls squarely within this statutory waiver of sovereign immunity. The trial court correctly rejected the TBI's challenge to subject matter jurisdiction."

"We turn next to the certified question—under what circumstances, if any, may the TBI refuse to comply with a final expungement order issued by a trial court. The TBI claims that statutes obligate it to disregard final expunction orders encompassing offenses that are statutorily ineligible for expungement. The Plaintiff responds that statutes simply obligate the TBI to remove expunged records from a person's criminal history within sixty days of receipt of an expunction order and entrust courts with adjudicating whether an offense is eligible for expungement. We agree with the Plaintiff."

"The TBI is correct that certain offenses are statutorily ineligible for expungement. *Id.* § -101(a)(1)(D) (stating that 'the records of a person who successfully completes ... a judicial diversion program ... shall not be expunged pursuant to this section, if the offense for which the person was diverted was a sexual offense,' as defined by the relevant section of the code); *see also id.* § 40-35-313(b) (providing that 'no records ... shall be expunged if the offense for which deferral and probation was granted was a sexual offense' under the relevant section). But no statute vests the TBI with authority to enforce these statutory ineligibility provisions by disregarding final expunction orders. As already explained, the relevant expungement statutes assign to courts the responsibility of adjudicating expungement petitions. The State's interests in such proceedings are represented by the district attorney general, not the TBI. *See id.* § 40-32-101(g)(3); *id.* § 8-7-103(1) (2016) (stating that district attorneys general '[s]hall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto')."

"The Plaintiff's expunction order is res judicata and binding on the State and the persons and entities in privity with the State, including the TBI. As the Supreme Court of the United States has recently stated, if citizens 'must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them.' *Niz-Chavez*

v. Garland, 141 S. Ct. 1474, 1486 (2021). For all these reasons, we conclude that the TBI lacked authority to refuse to comply with the Plaintiff's expunction order. The determination of whether an offense is eligible for expunction is an obligation entrusted to courts, not the TBI."

VI. 2022 Changes to Tennessee Rules of Procedure

A. Right to and Assignment of Counsel

Tennessee Rule of Criminal Procedure 44, amended eff. July 1, 2022.

"Advisory Commission Comment [2022]
The Advisory Commission adds this Comment to clarify that the waiver provisions of subparagraph (b) of the rule apply to both indigent and non-indigent defendants."

B. Serving and Filing Papers

Tennessee Rule of Criminal Procedure 49(c)(1), added eff. July 1, 2022.

"(c) Filing Served Papers with Court. Papers required to be served shall be filed with the court as follows:

"(1) Signature: 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 information sufficient to identify the signer, including but not limited to the signer's address, telephone number, e-mail address, and Tennessee Board of Professional Responsibility number, if any. An unsigned paper may be stricken by the court unless omission of the signature is corrected promptly after being called to the attention of the attorney or party."

"Advisory Commission Comment [2022]
Rule 49(c) is amended by the addition of a new sub-paragraph (1) requiring that pleadings, motions, and other papers filed with the clerk shall identify the filing attorney or party, if unrepresented, and shall include the information identified in the amendment. Non-compliant filings are subject to being stricken by the court. The remaining sub-paragraphs have been renumbered."

C. Form of Briefs and Other Papers

Tennessee Rule of Appellate Procedure 30(e), amended eff. July 1, 2022.

"(e) Word Limitations of Briefs and Other Papers. Except by order of the court, briefs and other specifically referenced papers shall comply with the following word limitations: (1) principal briefs and applications pursuant to Rule 11 shall be limited to 15,000 words, (2) reply briefs, answers pursuant to Rule 11, and supplemental briefs pursuant to Rule 11 shall be limited to 5,000 words, and (3) amicus briefs shall be limited to 7,500 words.

"The following sections of a brief and other referenced papers shall be excluded from these word limitations: Title/Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, Attorney Signature Block, and Certificate of Service.

"All briefs and other papers subject to word limitations under these rules must include a certificate by the attorney or unrepresented party that the brief or other paper complies with the applicable word limitation and must state the number of words in the brief or other paper. The person certifying compliance may rely on the word count of the word processing system used to prepare the brief or other paper."

"Advisory Commission Comment [2022]
This rule adopts a word limitation provision for all briefs and other referenced papers. This rule is also amended to require a certification of compliance with the word limitation provisions of this rule."

VII. Standard of Review for Violation of Right to Speedy Trial

State v. Moon, 644 S.W.3d 72 (Tenn., Page, 2022).

"William Eugene Moon ('Defendant') was convicted of attempted second degree murder and unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony. Defendant appealed his conviction and asserted, among other things, that he had been denied the right to a speedy trial and that the trial court erred by allowing improper impeachment of a defense witness. The Court of Criminal Appeals affirmed the judgments of the trial court, holding that Defendant was not denied a speedy trial and, although the trial court erred in allowing the prosecution to improperly impeach a defense witness, the error was harmless. This Court granted Defendant's application for permission to appeal to consider whether the Court of Criminal Appeals applied the proper standard of review to Defendant's claim that he was denied a speedy trial, to address the merits of Defendant's speedy trial claim, and to determine whether the trial court committed reversible error in allowing improper impeachment of a defense witness. We hold that the standard of review for an alleged speedy trial violation is de novo with deference to the trial court's findings of fact unless the evidence preponderates otherwise. When reviewed under this standard, we determine that the Court of Criminal Appeals properly held that the Defendant was not denied a speedy trial."

"Both the United States Constitution and the Tennessee Constitution guarantee criminal defendants the right to a speedy trial. *See* U.S. Const. amend. VI; Tenn. Const. art. 1 § 9. Defendant argues that his Sixth Amendment right to a speedy trial was violated and the charges against him must be dismissed. As always, our analysis of an allegation of error is subject to a particular standard of review, but the parties here disagree on the proper standard of review to apply to an allegation of a speedy trial violation."

"Defendant urges this Court to adopt a de novo standard of review and asserts that the majority of intermediate court panels have conducted a de novo review. *See, e.g.*, *State v. Hutchings*, No. M2008-00814-CCA-R3-CD, 2009 WL 1676057 at *5 (Tenn. Crim. App. June 16, 2009); *State v. Watson*, No. W2004-00153-CCA-R3-CD, 2005 WL 659020, at *4 (Tenn. Crim. App. Mar. 22, 2005); *State v. Picklesimer*, No. M2003-03087-CCA-R3-CD, 2004 WL 2683743, at *2 (Tenn. Crim. App. Nov. 24, 2004) (explaining that the question regarding the right to a speedy trial is a

mixed question of law and fact subject to de novo review). Defendant concedes, however, that a number of intermediate court panels have applied the abuse of discretion standard without noting the conflict in authority. *See, e.g.*, *State v. Crippen*, No. E2011-01242-CCA-R3-CD, 2012 WL 5397109, at *3 (Tenn. Crim. App. Nov. 6, 2012); *Hudgins*, 188 S.W.3d 663 at 667; *Easterly*, 77 S.W.3d 226 at 236*; Jefferson*, 938 S.W.2d 1 at 14.

"Defendant further cites to cases from several federal circuits that have adopted the de novo standard of review, giving deference only to the trial court's view of the facts. *See, e.g.*, *United States v. Molina-Solorio*, 577 F.3d 300, 303-04 (5th Cir. 2009). . . ."

"In contrast, the State suggests that, although the United States Supreme Court has not explicitly announced a standard of review for speedy trial claims, the Court's analysis in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), indicates it would use discretionary review. Further, the State submits that the Court should adopt the abuse of discretion standard because Tennessee courts apply this standard to a trial court's decision to dismiss an indictment for pre- or post-indictment delay under Tennessee Rule of Criminal Procedure 48(b). *See State v. Benn*, 713 S.W.2d 308, 311 (Tenn. 1986).

"After review, we agree with Defendant that de novo review is appropriate. More specifically, we conclude that the standard for appellate review of whether a criminal defendant was denied his constitutional right to a speedy trial is de novo review with respect to whether the court correctly interpreted and applied the law. The appellate court should give deference to the trial court's findings of fact unless the evidence preponderates otherwise. We determine this to be the most appropriate standard because, by nature, a speedy trial violation claim is a mixed question of law and fact. Many of the material facts required to analyze such claims are undisputed and require no discretion by the trial court. Determining whether such facts violate a defendant's right to a speedy trial is a question of law to be determined de novo by a reviewing court."

"Having determined the proper standard by which we review a speedy trial claim, we now turn to the merits of Defendant's assertion that his right to a speedy trial was violated.

"The relevant undisputed facts in this case are as follows: After being shot on December 17, 2017, Defendant was transported to a hospital in Alabama to recover. He was charged in general sessions court on December 21, 2017, and held in an Alabama jail awaiting transport to Tennessee after his release from the hospital. On January 24, 2018, Defendant was transported to Tennessee and served with an arrest warrant charging him with attempted first-degree murder and resisting arrest. February 2, 2018, was Defendant's first court date in general sessions court, but the preliminary hearing was continued to March 8, 2018. On March 7, 2018, Defendant filed a motion for a speedy trial. At the preliminary hearing on March 8, 2018, Defendant was bound over to circuit court. On April 10, 2018, Defendant was indicted by the Coffee County Grand Jury for attempted first-degree murder, resisting arrest, aggravated assault, and two counts of possession of a firearm during the commission or attempt to commit a dangerous felony. Defendant was arraigned in circuit court on April 17, 2018. Defendant's trial was set for November 28, 2018, but on November 6, 2018, the State moved to continue the trial due to a scheduling conflict with a three-year-old rape case. The trial court granted the State's motion over Defendant's objection and rescheduled the trial for February 1, 2019. On January 16, 2019, Defendant filed a motion to dismiss the indictment due to the violation of his right to a speedy trial. On February 7, 2019, the trial court entered a written order denying Defendant's motion to dismiss. The trial was again continued four more days to

allow Defendant's trial to proceed over three consecutive weekdays. Ultimately, the trial began on February 11, 2019, and concluded on February 14, 2019.

"Defendant argues the Court of Criminal Appeals erred in holding that his constitutional right to a speedy trial was not violated. In determining whether a criminal defendant was denied a speedy trial, the court examines four factors: (1) the length of the delay; (2) the reason for the delay; (3) whether there was a demand for a speedy trial; and (4) the presence and extent of prejudice to the defendant. *Barker*, 407 U.S. at 530, 92 S.Ct. 2182. We will analyze each factor in turn.

"(1) *Length of Delay*

"Defendant asserts that the pretrial delay in this case of little more than one year weighs in favor of dismissal, but he admits only 'moderately so.' The State submits that the trial was minimally delayed and that the length of the delay was 'not egregious.' Defendant was charged with four felonies in this case, including attempted first-degree murder. The trial itself required three days on the court's calendar and testimony from multiple witnesses. The trial began less than fourteen months after the alleged crimes were committed and less than thirteen months after Defendant was served with the arrest warrant and transferred to a Tennessee jail. In light of the complex nature of this case, we agree with the Court of Criminal Appeals that the Defendant received his trial with 'customary promptness' of Tennessee courts and that this factor weighs against Defendant's claim. *See Moon*, 2021 WL 531308, at *19-20.

"(2) *Reason for Delay*

"Defendant asserts that the delay was caused almost entirely by the government, which should weigh in favor of dismissal. The trial court acknowledged that the delay in this case was caused almost exclusively by the State, and the evidence does not preponderate otherwise. The only delay that appears to have been mutually agreed upon by the State and Defendant was at arraignment to allow time for discovery.

"While we agree that the State was responsible for the majority of the (very brief) delays in this trial, Defendant has pointed to nothing in the record to support his assertion that the State's requests for delays were due to its 'negligence or bureaucratic indifference.' *See Doggett v. United States*, 505 U.S. 647, 657, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (noting that negligence on the part of the government 'falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun'). Defendant's trial date was initially set for November 28, 2018. The two continuances that followed delayed the trial only minimally and were to accommodate a rape trial in a significantly older case and to ensure that Defendant's case could be tried over three consecutive weekdays. We agree with the Court of Criminal Appeals that the reasons for delay were valid and reasonable. This factor also weighs against Defendant.

"(3) *Defendant's Demand for a Speedy Trial*

"The third factor contemplates that a defendant requested a speedy trial. *See State v. Berry*, 141 S.W.3d 549, 568-69 (Tenn. 2004). It is undisputed that Defendant requested a speedy trial in this case. We agree with the intermediate court that this factor weighs in Defendant's favor.

"(4) *Prejudice to Defendant*

"The State argues that Defendant can only show minimal prejudice, if any, as a result of the pretrial delay in this case. Defendant asserts he suffered prejudice in the form of pretrial anxiety and pretrial incarceration. There is no evidence in the record, however, that the circumstances of Defendant's pretrial incarceration were unusual or egregious. As the Court of Criminal Appeals has previously noted, pretrial 'anxiety and concern are "always present to some extent, and thus absent some unusual showing [are] not likely to be determinative in [a] defendant's favor."' *State v. Hernandez*, No. M2016-02511-CCA-R3-CD, 2019 WL 2150171 at *40 (Tenn. Crim. App. May 15, 2019), *perm. app. denied*, (Tenn. Sept. 18, 2019) (alterations in original) (quoting 5 - Wayne Lafave, Criminal Procedure, § 18.2(e) (4th ed. 2017) (footnotes omitted)). Defendant was incarcerated for barely more than a year before his trial began. He points to no witnesses whose testimony he lost during that time nor to any other impairments in his ability to prepare a defense caused by the delay. In the absence of any discernable prejudice to Defendant, we determine that this factor also weighs against him.

"In consideration of the foregoing, the only *Barker* factor that weighs in Defendant's favor is that he requested a speedy trial. Indeed, he received one. We agree, therefore, with the Court of Criminal Appeals that Defendant was not denied his constitutional right to a speedy trial."

VIII. Abuse of Discretion Standard Applies to Review For-Cause Challenge to Prospective Juror; Penalty Phase Considerations; Proportionality Review of Death Penalty

State v. Miller, 638 S.W.3d 136 (Tenn., Page, 2021).

"A Madison County jury convicted the defendant, Urshawn Eric Miller, of first-degree premeditated murder and first-degree felony murder for fatally shooting a convenience store employee during an attempted robbery of the store. The jury also convicted the defendant of the attempted second-degree murder of another store employee and of attempted especially aggravated robbery, aggravated assault, employing a firearm during the commission of a dangerous felony, evading arrest, and resisting arrest. The jury imposed the death penalty for the first-degree murder convictions. The trial court merged the felony murder conviction into the premeditated murder conviction and the aggravated assault conviction into the attempted second-degree murder conviction, and it imposed an effective thirty-year sentence for the remaining convictions to run concurrently with the death sentence. The Court of Criminal Appeals affirmed the convictions and sentences but vacated the application of the felony murder aggravating circumstance as to the felony murder conviction. Upon our automatic review, we conclude: (1) the trial court properly ruled on challenges to certain jurors for cause during individual voir dire; (2) the evidence was sufficient to establish the defendant's identity as the perpetrator and his guilt of the convicted offenses; (3) the trial court did not abuse its discretion by allowing the State to introduce a video recording of the defendant's prior aggravated robbery during the penalty phase; (4) the death penalty generally, and lethal injection specifically, do not constitute cruel and unusual punishment; and (5) the death sentence satisfies our mandatory review pursuant to Tennessee Code Annotated section 39-13-206. Accordingly, we affirm the defendant's convictions and sentence of death; however, we reverse the portion of the intermediate court's judgment vacating the application of the felony murder aggravating circumstance."

"On November 25, 2015, a man wearing black clothing, gray gloves, and a white face covering entered the Bull Market in Jackson, Tennessee. The man pointed a gun at the twenty-four-year-old clerk, Ahmad Dhalai, and instructed him to 'Drop that sh*t off or I'ma shoot you dead in the head.'

The man looked briefly in the direction of another employee, Lawrence Austin, before turning back to Mr. Dhalai stating, 'Drop that sh*t off.' The man fired an initial shot that barely missed Mr. Dhalai's head. As Mr. Dhalai slowly turned to walk away, the man again demanded, 'Drop that sh*t off. Quit playing.' The man then shot Mr. Dhalai in the back of the head. Next, he fired a shot in the direction of Mr. Austin and jumped over the counter. He banged on the cash register with his elbow to no avail before jumping back over the counter and fleeing the store. Mr. Dhalai died moments later. The entire encounter was captured on the store's surveillance cameras.

"The defendant, Urshawn Eric Miller, was charged with first-degree murder, first-degree murder in perpetration of attempted especially aggravated robbery, attempted especially aggravated robbery, attempted first-degree murder, aggravated assault, employing a firearm in the attempt to commit a dangerous felony, being a convicted felon in possession of a handgun, resisting arrest, and evading arrest. The trial began on February 26, 2018."

"In three related issues, the defendant complains that the trial court erred by either removing or failing to remove prospective jurors for cause during individual voir dire based on their views on the death penalty. The underlying contention is that these rulings by the trial court denied the defendant his right under the United States and Tennessee Constitutions to an impartial jury. U.S. Const. amend VI ('In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ....); Tenn. Const. art. I, § 9 ('That in all criminal prosecutions, the accused hath the right to ... a speedy public trial, by an impartial jury....)."

"In *Wainwright v. Witt*, the United States Supreme Court adopted a standard to be utilized when a potential juror is challenged for cause based on his or her views on the death penalty: The trial court must determine whether the potential juror's views would 'prevent or substantially impair the performance of his duties as juror in accordance with his instructions and his oath.' *Wainwright*, 469 U.S. at 424, 105 S.Ct. 844 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). This standard, which we refer to as the '*Wainwright* standard,' does not require that a juror's bias be proven with 'unmistakable clarity.' *See id.* at 424-25, 105 S.Ct. 844 (recognizing that some in the venire simply cannot be asked enough questions to establish their bias on the 'printed record'). In certain instances, a potential juror may be excused for cause when the trial judge is left with the 'definite impression' based on the juror's demeanor that he or she would be unable to follow the law. *Id.* at 426, 105 S.Ct. 844.

"We will also take this opportunity to clarify the standard of review that our appellate courts should employ when reviewing a trial court's decision concerning a juror under the *Wainwright* standard. The *Wainwright* court determined that a reviewing federal court must accord the factual findings of the state trial court a presumption of correctness under the federal habeas corpus statute because these findings are 'based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.' *Id.* at 428, 105 S.Ct. 844 (citing *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)). Following that decision, this Court, in *State v. Alley*, 'th[ought] it appropriate to adopt the same standard of review prescribed in *Wainwright*,' and stated that 'the trial court's finding of bias of a juror because of his views of capital punishment shall be accorded a presumption of correctness and the burden shall rest upon the appellant to establish by convincing evidence that that determination was erroneous.' *State v. Alley*, 776 S.W.2d 506, 518 (Tenn. 1989); *see also State v. Schmeiderer*, 319 S.W.3d 607, 633 (Tenn. 2010); *State v. Reid*, 213 S.W.3d 792, 835-36 (Tenn. 2006); *State v. Thomas*, 158 S.W.3d 361, 378 (Tenn. 2005); *State v. Austin*, 87 S.W.3d 447, 473 (Tenn. 2002). However, upon review of relevant case law, it appears that some courts of this state have applied an abuse of discretion standard without referencing the *Alley*

standard. *See, e.g.*, *State v. Howell*, 868 S.W.2d 238, 249 (Tenn. 1993). And still others have applied the abuse of discretion standard in conjunction with the *Alley* standard. *See, e.g.*, *Sexton*, 368 S.W.3d at 392-95 (citing *State v. Hugueley*, 185 S.W.3d 356, 390 (Tenn. 2006) (appendix); *State v. Kilburn*, 782 S.W.2d 199, 203 (Tenn. Crim. App. 1989)). We believe that abuse of discretion is the appropriate standard of review of a trial court's decision concerning a juror's 'death qualification.' To the extent the standard from *Alley* can be interpreted inconsistently with our decision today, we want to be clear that the abuse of discretion standard shall be used in this context moving forward. Trial judges base their decisions on a full view of the potential jurors' responses to questions during voir dire, including the jurors' facial expressions, degree of candor, and overall demeanor. A trial judge's decision as to a challenge for cause should be reversed only when the judge abuses his or her discretion—a standard that appellate courts are very familiar with in criminal cases. 'A court abuses its discretion when it 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)." [Defendant's issues regarding jury selection are without merit.]

"The defendant argues the trial court erred in allowing the State to introduce during the penalty phase a video recording of his prior aggravated robbery. The defendant previously pleaded guilty to aggravated robbery of a convenience market in Madison County, Tennessee. Prior to trial, the State gave notice of its intent to use this prior aggravated robbery conviction to establish the (i)(2) statutory aggravating circumstance. In addition, the State provided the defendant with a copy of a surveillance video that captured the defendant's actual participation in the prior aggravated robbery.

"The defendant filed a pre-trial motion in limine to exclude the video pursuant to Tennessee Rule of Evidence 403 because its probative value was substantially outweighed by the danger of unfair prejudice. The defendant argued the certified judgment of conviction would have sufficed. The State maintained the evidence was admissible under Tennessee Code Annotated section 39-13-204(c). After considering the arguments and viewing the video, the trial court denied the motion, concluding the evidence was reliable and relevant to establish the (i)(2) aggravating circumstance based on section 39-13-204(c) and *State v. Reid*. The surveillance video was played to the jury during the penalty phase.

"The defendant raised this issue on direct review, and the Court of Criminal Appeals concluded the trial court did not abuse its discretion. *Miller*, 2020 WL 5626227 at *19. The defendant continues to argue in this Court that admission of the video was error. The introduction of evidence at the penalty phase is governed by Tennessee Code Annotated section 39-13-204(c) which provides as follows:

> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment, and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence that the court deems to have probative value on the issue of punishment may be received, regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection (c) shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution

> of Tennessee. In all cases where the state relies upon the aggravating factor that the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person, *either party shall be permitted to introduce evidence concerning the facts and circumstances of the prior conviction.* Such evidence shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury and shall not be subject to exclusion on the ground that the probative value of the evidence is outweighed by prejudice to either party. Such evidence shall be used by the jury in determining the weight to be accorded the aggravating factor. The court shall permit a member or members, or a representative or representatives of the victim's family to testify at the sentencing hearing about the victim and about the impact of the murder on the family of the victim and other relevant persons. The evidence may be considered by the jury in determining which sentence to impose. The court shall permit members or representatives of the victim's family to attend the trial, and those persons shall not be excluded because the person or persons shall testify during the sentencing proceeding as to the impact of the offense.

"Tenn. Code Ann. § 39-13-204(c) (emphasis added). The bold/italic language resulted from the 1998 amendment to the statute. *See generally State v. Odom*, 137 S.W.3d 572 (Tenn. 2004) (discussing the 1998 amendment to section 39-13-204(c)). Unlike the prior version, the current statute specifically authorizes the introduction of evidence concerning the facts and circumstances of the prior violent felony.

"The statute reflects the reality that, although a capital case, the rules of evidence are somewhat relaxed during a capital sentencing hearing. *Cf. Reid*, 91 S.W.3d at 305 (Birch, J., concurring in part and dissenting in part) (explaining that the Rules of Evidence should not be applied to preclude the introduction of otherwise reliable evidence that is relevant to the issue of punishment in the capital sentencing arena). In fact, the 1998 amendment seems to suggest that Tennessee Rule of Evidence 403 does not routinely impede the admission of such evidence.

"Although such a video recording is somewhat prejudicial by its very nature, we cannot conclude that its probative value was outweighed by the danger of unfair prejudice when properly introduced at the penalty phase pursuant to section 39-13-204(c) after the defendant's guilt had been determined. Accordingly, the trial court did not abuse its discretion in admitting the surveillance video of the prior aggravated robbery."

"Our second consideration is whether the evidence supports the jury's findings of statutory aggravating circumstances. The relevant inquiry is whether a rational jury, taking the evidence in the light most favorable to the State, could have found the existence of the aggravating circumstances beyond a reasonable doubt. *Clayton*, 535 S.W.3d at 850; *State v. Kiser*, 284 S.W.3d 227, 272 (Tenn. 2009). In the instant case, the jury found two aggravating circumstances. Therefore, we conduct an independent review to determine whether the evidence presented at the penalty phase was sufficient to support the jury's findings.

"The penalty phase jury verdict forms indicate the jury unanimously found the State had proven beyond a reasonable doubt the following two statutory aggravating circumstances as to both first-degree murder convictions:

> (2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person;
> ....

> (7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any aggravated robbery.

"Tenn. Code Ann. § 39-13-204(i)(2), (7). In support of the (i)(2) aggravating circumstance, the State introduced a certified judgment indicating the defendant had been previously convicted of aggravated robbery in Madison County, a written statement signed by the defendant admitting his role in the prior robbery, the testimony of a victim in the robbery, and a video recording of the prior robbery that showed the defendant and two other men committing the robbery. As to the (i)(7) aggravating circumstance, the proof clearly established that the defendant 'knowingly' murdered the victim at the market and obviously had a substantial role in the attempted aggravated robbery as the sole perpetrator. Indeed, the evidence is more than sufficient to support the jury's finding of these statutory aggravating circumstances.

"In considering this prong, the Court of Criminal Appeals concluded that the (i)(7) aggravating circumstance cannot be applied to a conviction for felony murder, and therefore, vacated the application of this aggravating circumstance for the felony murder conviction. *Miller*, 2020 WL 5626227, at *21 (citing *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992), *superseded by statute as stated in State v. Pruitt*, 415 S.W.3d 180 (Tenn. 2013)). Indeed, this Court determined in *Middlebrooks* that the (i)(7) aggravating circumstance could not support the death penalty for a defendant convicted solely of felony murder because the then-existing aggravating circumstance and felony murder statute contained duplicative language. *Middlebrooks*, 840 S.W.2d at 346. However, as the Court explained in *State v. Banks*,

> The Tennessee General Assembly responded to [*Middlebrooks*] in 1995 by amending the aggravating circumstance in Tenn. Code Ann. § 39–13–204(i)(7) to require that the murder 'was *knowingly* committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit' one of the enumerated felonies. This amendment narrowed the class of offenders to whom the death penalty could be applied sufficiently so as to leave no *State v. Middlebrooks* problem *even in cases where Tenn. Code Ann. § 39–13–204(i)(7) was the only aggravating circumstance established and the conviction was for felony murder.*

"*Banks*, 271 S.W.3d at 152 (emphasis added) (footnote omitted). As noted, the jury in this case specifically found the State had proven the (i)(7) aggravating circumstance with the 'knowing' requirement beyond a reasonable doubt. Accordingly, the portion of the judgment of the Court of Criminal Appeals vacating the application of the (i)(7) aggravating circumstance to the felony murder conviction is reversed."

"Finally, we are statutorily required to review the defendant's sentence of death in order to determine whether it is excessive or disproportionate to the penalty imposed in similar cases. Our review is intended to determine whether the defendant's death sentence is aberrant, arbitrary, or capricious insofar as it is 'disproportionate to the punishment imposed on others convicted of the same crime.' *Bland*, 958 S.W.2d at 662 (quoting *Pulley v. Harris*, 465 U.S. 37, 43, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)). Our review employs the precedent-seeking method of comparative proportionality review, in which we compare this case with other cases involving similar crimes and similar defendants in order to 'identify and invalidate the aberrant death sentence.' *Thacker*, 164 S.W.3d at 233 (quoting *Bland*, 958 S.W.2d at 664). The relevant pool of cases consists of 'those first degree murder cases in which the State sought the death penalty, a capital sentencing

hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment without possibility of parole, or death.' *Rice*, 184 S.W.3d at 679 (citing *State v. Godsey*, 60 S.W.3d 759, 783 (Tenn. 2001); *Bland*, 958 S.W.2d at 666)."

"Under our proportionality review, the instant case need not be identical to the other cases in every respect, and, as we have previously recognized, a death sentence is not disproportionate simply because another defendant received a life sentence under similar circumstances. Having compared the defendant's case with other cases in which the death penalty was imposed while acknowledging the differences, we can conclude the defendant's sentence of death is not an 'aberrant death sentence' and is not 'plainly lacking in circumstances' consistent with those cases in which the death penalty was imposed. The defendant is not entitled to relief on this basis."

IX. Post-Conviction Case; Three-Prong Test re: Ineffective Assistance of Counsel

Phillips v. State, 647 S.W.3d 389 (Tenn., Bivins, 2022).

"In this post-conviction matter, we clarify the appropriate burden of proof and legal standard to be applied when a criminal defendant claims ineffective assistance of counsel based on trial counsel's failure to move to suppress evidence on Fourth Amendment grounds. The Petitioner, Tommie Phillips ('Petitioner') was convicted of several offenses, including felony murder, attempted first-degree murder, aggravated rape, especially aggravated kidnapping, and especially aggravated burglary. The Court of Criminal Appeals modified the especially aggravated burglary conviction to aggravated burglary. The Petitioner filed a petition for post-conviction relief, asserting, among other things, that his trial counsel was constitutionally ineffective by failing to seek suppression of various statements he made to police on Fourth Amendment grounds. The post-conviction court denied the petition, and the Court of Criminal Appeals affirmed the decision of the post-conviction court. We granted the Petitioner's application for permission to appeal and directed the parties to discuss the applicable standard of review in this case. Specifically, the Court sought to clarify the petitioner's burden to establish prejudice when he or she alleges counsel was constitutionally ineffective for failing to file a motion to suppress on Fourth Amendment grounds. Upon our review of the record and applicable law, we conclude that to establish prejudice with this type of claim, the petitioner must prove that 'his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence.' *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In applying this standard to the case before us, we conclude that the Court of Criminal Appeals properly affirmed the post-conviction court's denial of relief. Accordingly, we affirm the judgment of the Court of Criminal Appeals."

"In his petition, the Petitioner argued, *inter alia*, that trial counsel failed to provide effective assistance of counsel based on counsel's alleged failure to challenge the admissibility of his statement to police on Fourth Amendment grounds. See *Phillips v. State*, No. W2019-01927-CCA-R3-PC, 2021 WL 8693816, slip op. at 4 (Tenn. Crim. App. Feb. 26, 2021), perm. app. granted, (Tenn. June 17, 2021). An evidentiary hearing was held in four parts on May 11 and August 20, 2018, and May 14 and September 20, 2019."

"Tennessee's Post-Conviction Procedure Act provides a criminal defendant relief from a conviction or sentence that is 'void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.' Tenn. Code Ann. § 40-30-103

(2018 & Supp. 2020). Because the United States Constitution and Tennessee Constitution guarantee assistance of counsel to all criminal defendants during critical stages of the adversarial process, U.S. Const. amend. VI; Tenn. Const. art. I, § 9, the denial of effective assistance of counsel is a cognizable claim under the Act. *Mobley*, 397 S.W.3d at 79–80. 'Counsel's representation becomes ineffective when it "so undermine[s] the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."' Id. at 80 (alteration in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))."

"We agree with the parties that *Kimmelman* defines the appropriate standard for prejudice under the circumstances and should be utilized by Tennessee courts moving forward. However, we do not believe, as the Petitioner suggests, that *Cecil* is necessarily 'bad law.' Whether under *Kimmelman* or *Cecil*, to demonstrate prejudice, a petitioner is required to prove that he has a meritorious Fourth Amendment claim and that there is a reasonable probability the outcome of the proceedings would have been different had the evidence complained of been excluded. *Kimmelman*, 477 U.S. at 375, 106 S.Ct. 2574; *Cecil*, 2011 WL 4012436, at *8. The Petitioner takes issue with the fact that Cecil includes the legal standard 'clear and convincing' within its statement of the standard. See 2011 WL 4012436, at *8 ('In order to show prejudice, Petitioner must show *by clear and convincing evidence* that....' (emphasis added)). The Petitioner argues that this imposes an improper burden on petitioners to prove prejudice by clear and convincing evidence rather than prove the *factual allegations* in support of such claim by clear and convincing evidence, as is required by the statute.

"This is not the first time that this Court has addressed this type of alleged error regarding a lower court's recitation of the standard in post-conviction cases. See *Fields*, 40 S.W.3d at 458; *Dellinger*, 279 S.W.3d at 294. In the past, this Court looked to the lower court's analysis of the underlying claim to determine if the lower court actually applied the correct legal standard even if the language of the opinion appeared imprecise. See *Fields*, 40 S.W.3d at 458 & n.6. ('[T]his error ... appears to be only one of imprecision in the use of its language, as it is clear from its opinion that the court applied the correct legal standard and properly concluded that the appellant's claim was without merit.'); *Dellinger*, 279 S.W.3d at 294 ('Although this statement is imprecise, we agree with the State that the post-conviction trial court did not misapply the law.').

"We acknowledge that the *Cecil* panel could have been more precise when reciting the petitioner's burden of proof. However, it is clear from the court's reference to Tennessee Code Annotated section 40-30-110(f) and its analysis of the petitioner's proof provided at the post-conviction hearing that the court applied the correct legal standard and considered whether the petitioner presented clear and convincing evidence to support the factual allegation of prejudice. *Cecil*, 2011 WL 4012436, at *8 ('Even though we could easily conclude that there is nothing in the record to show that trial counsel rendered deficient performance, we conclude that Petitioner failed to put on any proof of *Strickland* prejudice even assuming, *arguendo*, that trial counsel had been deficient by not filing any motion to suppress evidence.'). Thus, we do not agree with the Petitioner that *Cecil* is 'bad law,' and we conclude that *Cecil's* test is for all intents and purposes is the same test from *Kimmelman*. Regardless, moving forward, Tennessee courts should utilize the test directly from *Kimmelman* to assess whether a petitioner has carried his or her burden to prove prejudice in this context.

"We also find it helpful to provide further guidance to our lower courts to successfully implement *Kimmelman* alongside *Strickland* when this type of claim arises. In our research, we have found that other state courts use a variety of methods to integrate the *Kimmelman* standard into the

Strickland analysis. For example, some courts simply cite and discuss *Kimmelman* as the definition for prejudice under *Strickland* in this specific context. Others articulate a wholistic test with steps or guiding questions to aide in integrating the *Strickland* and *Kimmelman* standards into one test. Ultimately, we believe a clearly articulated three-pronged inquiry reflects the interconnected nature of *Kimmelman* and *Strickland* and supports the idea that this type of ineffective assistance of counsel claim creates an additional step in the traditional *Strickland* analysis. Therefore, to establish a successful claim of ineffective assistance of counsel based on counsel's failure to file a motion to suppress evidence on Fourth Amendment grounds, the Petitioner must prove: '(1) a suppression motion would have been meritorious; (2) counsel's failure to file such motion was objectively unreasonable; and (3) but for counsel's objectively unreasonable omission, there is a reasonable probability that the verdict would have been different absent the excludable evidence.' *Khalil-Alsalaami v. State*, 313 Kan. 472, 486 P.3d 1216, 1239 (Kan. 2021) (citing *United States v. Ratliff*, 719 F.3d 422, 423 (5th Cir. 2013); *Zakrzewski v. McDonough*, 455 F.3d 1254, 1260 (11th Cir. 2006)); see W. Mark Ward, *Tennessee Criminal Trial Practice* § 32:18, Westlaw (database updated October 2021)."

"We begin our analysis with the observation that the Petitioner surrendered himself to police at approximately 12:40 p.m. on December 10, 2008. For purposes of our analysis, we assume this is the time of his arrest. When an individual is arrested without a warrant, as the Petitioner was in the present case, that individual is entitled to a 'fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty,' and the determination 'must be made by a judicial officer either before or promptly after arrest.' *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). A jurisdiction that provides a determination of probable cause 'within [forty-eight] hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein.' *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991); see *State v. Bishop*, 431 S.W.3d 22, 42 (Tenn. 2014) ('[A] delay of less than forty-eight hours is presumptively reasonable.'). The exclusionary rule applies when officers fail 'to bring an arrestee before a magistrate within the [forty-eight hours] allowed by *McLaughlin*.' *Bishop*, 431 S.W.3d at 42 (alteration in original) (quoting *State v. Huddleston*, 924 S.W.2d 666, 673 (Tenn. 1996)). '[A]ny evidence obtained as a result of an arrestee's unlawful detention must be excluded from evidence unless the arrestee's statement was 'sufficiently an act of free will to purge the primary taint' of the illegal detention.' *State v. Clayton*, 535 S.W.3d 829, 849 (Tenn. 2017) (quoting *Bishop*, 431 S.W.3d at 42).

"In the present case, the Petitioner surrendered himself to police on December 10, 2008, at approximately 12:40 p.m. A judicial commissioner made a probable cause determination that same day at 7:13 p.m., less than seven hours later. Thus, the Petitioner's detention is presumptively reasonable. See *McLaughlin*, 500 U.S. at 56, 111 S.Ct. 1661; *Bishop*, 431 S.W.3d at 42. However, a probable cause determination made within forty-eight hours of arrest may still violate Gerstein if the arrested individual establishes that his probable cause determination was unreasonably delayed. *McLaughlin*, 500 U.S. at 56, 111 S.Ct. 1661. 'Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.' Id. In evaluating the reasonableness of a delay, 'courts must allow a substantial degree of flexibility' and 'cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.' Id. at 56–57, 111 S.Ct. 1661. When a probable cause determination is not held

within forty-eight hours, the burden shifts to the State 'to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.' Id. at 57, 111 S.Ct. 1661.

"The Petitioner argues that his probable cause determination was unreasonably delayed due to the Memphis Police Department's forty-eight-hour hold policy that was in place at the time of his arrest. This Court previously has criticized the use of the forty-eight-hour hold policy:

> If the Memphis Police Department is, in fact, arresting suspects without probable cause and using this 48-hour hold procedure to gather 'additional evidence to justify the arrest,' this procedure clearly runs afoul of [*McLaughlin*]. Such a practice would be unconstitutional, even if limited to 48 hours or less. Our Court of Criminal Appeals has condemned the practice in the past, and we echo that court's concerns.

"*Bishop*, 431 S.W.3d at 43 n.9 (citations omitted).

"However, despite the Fourth Amendment concerns brought about by the Memphis Police Department's use of this policy, the proof in this case does not establish that the Petitioner's probable cause determination was unreasonably delayed. No evidence was presented suggesting that there was 'a delay motivated by ill will' against the Petitioner nor that there was a 'delay for delay's sake.' *McLaughlin*, 500 U.S. at 56, 111 S.Ct. 1661. In addition, the proof does not establish that there was a delay for the purpose of gathering additional evidence to justify the arrest, as the evidence available at that time was sufficient to provide probable cause to arrest the Petitioner. By the time the Petitioner surrendered himself to police, the police had responded to a crime scene where, at a minimum, two individuals had been stabbed and one had died of apparent strangulation. The perpetrator had fled the scene, but the three surviving victims each identified the Petitioner as the perpetrator from a photographic array. One of the surviving victims also had identified the Petitioner as the attacker by first and last name. These identifications established probable cause to believe that multiple felonies had been committed and that the Petitioner was the perpetrator. Because the Petitioner's arrest was supported by probable cause and his probable cause determination was not unreasonably delayed, there was no Gerstein violation. As a result, we agree with the post-conviction court and the Court of Criminal Appeals that the Petitioner has not established that his Fourth Amendment claim is meritorious. Therefore, we conclude that a suppression motion filed on Fourth Amendment grounds would not have been successful."

"In *Carpenter v. State*, this Court stated that '[i]f a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, as it is in this case, then the reviewing court must determine the merits of the issue.' 126 S.W.3d 879, 887 (Tenn. 2004) (citing *Kimmelman*, 477 U.S. at 375, 106 S.Ct. 2574). Counsel's performance is not deficient if the issue they failed to raise has no merit or is weak. Id. We previously analyzed the merits of a suppression motion filed on Fourth Amendment grounds in this case, and we determined that such a motion would not have been successful had one been filed. Consequently, we need not further analyze trial counsel's decision not to seek suppression of the Petitioner's statements on Fourth Amendment grounds. Given that the issue lacked merit, trial counsel's decision to seek suppression on grounds other than Fourth Amendment grounds cannot be said to have been objectively unreasonable."

*"*Lastly, the Petitioner must show that there is a reasonable probability that the verdict would have been different absent the excludable evidence. *Kimmelman*, 477 U.S. at 375, 106 S.Ct. 2574. Once again, we reiterate that a motion to suppress filed on Fourth Amendment grounds in this case would not have been successful. However, even assuming such a motion would have been granted and

the Petitioner's inculpatory statements to police had been suppressed, the proof does not demonstrate that the result of the Petitioner's case would have been different.

"In his first statement to police, the Petitioner admitted to stabbing both C.L. and M.L., though he claimed he did so in self-defense. *Phillips*, 2013 WL 6529308, at *7–8. In his second statement, the Petitioner again admitted responsibility for the injuries to C.L. and M.L. but also admitted that he was responsible for the death of F.G. Id. at *8. While we recognize that these statements were indeed inculpatory, they added little substance to the other evidence of the Petitioner's guilt that was presented to the jury.

"The jury heard testimony from all three surviving victims regarding the events of December 9, 2008. See id. at *1–6. M.L., C.L., and M.J.L. each described the attack and identified the Petitioner in court as the perpetrator. Id. Detective Tim Reynolds of the Memphis Police Department, who responded to the crime scene, testified that a crowd gathered while he at the victims' home, and some members of the crowd stated that the Petitioner was the perpetrator. Id. at *7. Detective Reynolds testified that, the next day, he transported the Petitioner to the police station and overheard the Petitioner tell his side of the story to his mother. Id. While explaining the story, the Petitioner admitted to fighting C.L. with a knife. Id.

"In addition, the jury heard testimony from M.L. and C.L. that, following the attack, they each identified the Petitioner as the perpetrator from a photographic array shown to them by the police. Id. at *5–6. C.L. even testified that he had known the Petitioner socially for several years. Id. at *5. The trial court found that these identifications were reliable, and the Court of Criminal Appeals affirmed that finding in the Petitioner's direct appeal, stating:

> The record shows that each victim had ample opportunity to view the [Petitioner] at the time of the crime. The victims' testimony made clear that they were attentive for at least portions of the incident, conversing with the [Petitioner] and struggling with him face-to-face. The record also shows that the victims' prior descriptions of the assailant were accurate and that one of the victims knew the [Petitioner] prior to the incident and another victim had previously met the [Petitioner]. The record further shows that the victims immediately, and with certainty, identified the [Petitioner] from the array and that the length of time between the crime and the confrontation was within hours. The record does not preponderate against the trial court's finding that the totality of the circumstances shows that the identifications were reliable.

"Id. at *21.

"Given this proof of the Petitioner's guilt, we conclude that the Petitioner has not established a reasonable probability that his verdict would have been different had his statements to police been suppressed."

"Because the Petitioner has failed to prove the three prongs necessary to satisfy *Strickland* and *Kimmelman*, we conclude that the Petitioner cannot prevail on his claim for ineffective assistance of counsel. Consequently, we affirm the judgment of the Court of Criminal Appeals."

X. Habeas Proceedings

A. Federal Habeas Court May Not Conduct Evidentiary Hearing on Ineffective Assistance of Counsel Case

Shinn v. Ramirez, 142 S.Ct. 1718 (U.S., Thomas, 2022).

"Respondents David Martinez Ramirez and Barry Lee Jones were each convicted of capital crimes in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed each case on direct review, and each prisoner was denied state postconviction relief. Each also filed for federal habeas relief under 28 U.S.C. § 2254, arguing that trial counsel had been ineffective for failing to conduct adequate investigations. The Federal District Court held in each case that the prisoner's ineffective-assistance claim was procedurally defaulted because it was not properly presented in state court. To overcome procedural default in such cases, a prisoner must demonstrate 'cause' to excuse the procedural defect and 'actual prejudice.' *Coleman* v. *Thompson,* 501 U.S. 722, 750. To demonstrate cause, Ramirez and Jones relied on *Martinez* v. *Ryan,* 566 U.S. 1, which held that ineffective assistance of postconviction counsel may be cited as cause for the procedural default of an ineffective-assistance-of-trial-counsel claim. In Ramirez's case, the District Court permitted him to supplement the record with evidence not presented in state court to support his case to excuse the procedural default. Assessing the new evidence, the court excused the procedural default but rejected Ramirez's ineffective-assistance claim on the merits. The Ninth Circuit reversed and remanded for more evidentiary development to litigate the merits of Ramirez's ineffective-assistance-of-trial-counsel claim. In Jones' case, the District Court held a lengthy evidentiary hearing on 'cause' and 'prejudice,' forgave his procedural default, and held that his state trial counsel had provided ineffective assistance. The State of Arizona petitioned this Court in both cases, arguing that § 2254(e)(2) does not permit a federal court to order evidentiary development simply because postconviction counsel is alleged to have negligently failed to develop the state-court record.

"Held: Under § 2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel."

"(a) To respect federal-state dual sovereignty, see *Printz* v. *United States,* 521 U.S. 898, 918, the availability of federal habeas relief is narrowly circumscribed, see *Brown* v. *Davenport*, 596 U.S. —, —. For example, only rarely may a federal habeas court hear a claim or consider evidence that a prisoner did not previously present to the state courts in compliance with state procedural rules."

"(1) Federal habeas review overrides the States' core power to enforce criminal law—an intrusion that 'imposes special costs' on the federal system. *Engle* v. *Isaac,* 456 U.S. 107, 128. Two of those costs are particularly relevant here. First, a federal order to retry or release a state prisoner overrides the State's sovereign power to enforce 'societal norms through criminal law.' *Calderon* v. *Thompson,* 523 U.S. 538, 556. Second, federal intervention imposes significant costs on state criminal justice systems. See, *e.g., Wainwright* v. *Sykes,* 433 U.S. 72, 90."

"(2) In light of these costs, this Court recognizes that federal habeas review is not 'a substitute for ordinary error correction through appeal,' but is an 'extraordinary remedy' that guards only against 'extreme malfunctions in the state criminal justice systems.' *Harrington* v. *Richter,* 562 U.S. 86, 102–103. To ensure that federal habeas retains its narrow role, both Congress and federal habeas courts have set out strict rules requiring prisoners to raise all of their federal claims in state court before seeking federal relief. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)

requires state prisoners to 'exhaus[t] the remedies available in the courts of the State' before seeking federal habeas relief. § 2254(b)(1)(A). And the doctrine of procedural default—'an important 'corollary' to the exhaustion requirement,' *Davila* v. *Davis*, 582 U.S. —, _—, generally prevents federal courts from hearing any federal claim that was not presented to the state courts 'consistent with [the State's] own procedural rules,' *Edwards* v. *Carpenter,* 529 U.S. 446, 453. Together, exhaustion and procedural default promote federal-state comity by affording States 'an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights,' *Duckworth* v. *Serrano,* 454 U.S. 1, 3 (*per curiam*), and by protecting against 'the significant harm to the States that results from the failure of federal courts to respect' state procedural rules, *Coleman*, 501 U.S., at 750."

"(3) Nonetheless, a federal court is not required to automatically deny unexhausted or procedurally defaulted claims. For instance, when a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. And if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal court is appropriate."

"(i) Federal courts may excuse procedural default only if a prisoner 'can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.' *Coleman*, 501 U.S., at 750. With respect to cause, 'attorney error cannot provide cause to excuse a default' 'in proceedings for which the Constitution does not guarantee the assistance of counsel at all.' *Davila*, 582 U.S., at —. But in *Martinez*, this Court recognized a 'narrow exception' to that rule, holding that ineffective assistance of state postconviction counsel may constitute 'cause' to forgive procedural default of a trial-ineffective-assistance claim, but only if the State requires prisoners to raise such claims for the first time during state collateral proceedings. 566 U.S., at 9."

"(ii) Excusing a prisoner's failure to develop the state-court record faces an even higher bar. Section 2254(e)(2) applies when a prisoner 'has failed to develop the factual basis of a claim,' *i.e.,* is 'at fault' for the undeveloped record in state court, *Williams* v. *Taylor,* 529 U.S. 420, 432. If a prisoner is 'at fault,' a federal court may hold 'an evidentiary hearing on the claim' in only two limited scenarios not relevant here. See §§ 2254(e)(2)(A)(i), (ii). The prisoner also must show that further factfinding would demonstrate, by clear and convincing evidence, that he is innocent of the crime charged."

"(b) Although respondents do not satisfy § 2254(e)(2)'s narrow exceptions, the Court of Appeals forgave respondents' failures to develop the state-court record because, in its view, they each received ineffective assistance of state postconviction counsel. The Court of Appeals erred."

"(1) Respondents primarily argue that a prisoner is not 'at fault' for the undeveloped record if state postconviction counsel negligently failed to develop the state record for a claim of ineffective assistance of trial counsel. But under AEDPA and this Court's precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner."

"(i) A prisoner 'bears the risk in federal habeas for all attorney errors made in the course of the representation.' *Coleman*, 501 U.S., at 754. And, because there is no constitutional right to counsel in state postconviction proceedings, a prisoner must ordinarily 'bea[r] responsibility' for all attorney errors during those proceedings, *Williams*, 529 U.S., at 432, including responsibility for counsel's negligent failure to develop the state postconviction record. This Court's prior cases make this point clear. See, *e.g., Keeney* v. *Tamayo-Reyes,* 504 U.S. 1; *Williams*, 529 U.S. 420; *Holland*

v. *Jackson,* 542 U.S. 649 (*per curiam*). Thus, a prisoner is 'at fault' even when state postconviction counsel is negligent."

"(ii) Respondents propose extending *Martinez* so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record under § 2254(e)(2). But unlike judge-made exceptions to procedural default, § 2254(e)(2) is a statute, and thus, this Court has no power to redefine when a prisoner 'has failed to develop the factual basis of a claim in State court proceedings.' Nor is it plausible, as respondents contend, that Congress might have enacted § 2254(e)(2) with the expectation that this Court would one day open the door to allowing the ineffective assistance of state postconviction counsel to be cause to forgive procedural default. Finally, *Martinez* itself cuts against respondents' proposed result. *Martinez* foreclosed any extension of its holding beyond the 'narrow exception' to procedural default at issue in that case. See 566 U.S., at 9. That assurance has bite only if the State can rely on the state-court record. The cases here demonstrate the improper burden imposed on the States when *Martinez* applies beyond its narrow scope, with the sprawling evidentiary hearing in Jones' case being particularly poignant."

"(2) Respondents propose a second reading of § 2254(e)(2) that supposedly permits consideration of new evidence in their habeas cases. First, they argue that because § 2254(e)(2) bars only 'an evidentiary hearing on the claim,' a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice. Second, respondents contend that the habeas court may then consider that new evidence to evaluate the merits of the underlying ineffective-assistance claim. By considering already admitted evidence, respondents reason, the habeas court is not holding a 'hearing' prohibited by § 2254(e)(2). But, in *Holland*, this Court explained that § 2254(e)(2)'s 'restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence without an evidentiary hearing.' 542 U.S., at 653 (emphasis deleted). Therefore, when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise reviews any evidence for any purpose, it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in § 2254(e)(2) are satisfied."

B. Defendant Shackled During Trial; *Brecht* and AEDPA Tests Apply in Determining Habeas Relief

Brown v. Davenport, 142 S.Ct.1510 (U.S., Gorsuch, 2022).

"Ervine Davenport was convicted of first-degree murder following a jury trial where, at times, he sat shackled at a table with a 'privacy screen.' On appeal, he argued that his conviction should be set aside in light of *Deck v. Missouri*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), in which this Court held that the Fourteenth Amendment's Due Process Clause generally forbids shackling a criminal defendant at trial absent 'a special need.' *Id.*, at 626, 125 S.Ct. 2007. Finding no 'special need' articulated in the record, the Michigan Supreme Court agreed that a *Deck* violation had occurred and remanded the case to the trial court to determine under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), whether the prosecution could establish that the *Deck* error was harmless beyond a reasonable doubt. On remand, the trial court conducted an evidentiary hearing at which jurors testified that the shackles had not affected their verdict and concluded that the State had carried its burden. Mr. Davenport appealed again, and the Michigan Court of Appeals affirmed the trial court. The Michigan Supreme Court declined review.

"Mr. Davenport petitioned for federal habeas relief. The District Court found relief unwarranted under the Antiterrorism and Effective Death Penalty Act of 1996, which limits the power of federal

courts to issue habeas relief to state prisoners. See 28 U.S.C. § 2254(d). A divided Sixth Circuit panel reversed, declining to analyze the case under AEDPA. Instead, the court held that its review was governed only by *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), which held that a state prisoner seeking to challenge his conviction on the basis of a state court's *Chapman* error must show that the error had a 'substantial and injurious effect or influence' on the trial's outcome, *id.*, at 637, 113 S.Ct. 1710. Persuaded that Mr. Davenport could satisfy *Brecht*, the Sixth Circuit granted federal habeas relief and ordered Michigan either to retry or release Mr. Davenport. This Court granted certiorari to resolve a circuit conflict about the proper interaction between the tests found in *Brecht* and AEDPA.

"Held: When a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant habeas relief without applying both the test this Court outlined in *Brecht* and the one Congress prescribed in AEDPA; the Sixth Circuit erred in granting habeas relief to Mr. Davenport based solely on its assessment that he could satisfy the *Brecht* standard."

"(a) When Congress supplies a constitutionally valid rule of decision, federal courts must follow it. In AEDPA, Congress instructed that a federal court 'shall not ... gran[t]' relief with respect to a claim that has been adjudicated on the merits in state court 'unless' certain conditions are met. § 2254(d). To be sure, the court below in this case was required to ensure that petitioner carried his burden under the terms of *Brecht*. But satisfying *Brecht* is only a necessary condition to habeas relief here; AEDPA must also be satisfied. The Sixth Circuit erred in holding otherwise."

"(b) Since the founding, Congress has authorized federal courts to issue habeas writs to federal custodians, and since the Civil War, Congress has extended that authority to include issuance of writs to state custodians. All along, Congress's statutes used permissive rather than mandatory language; federal courts enjoy the 'power to' grant writs of habeas corpus in certain circumstances. That structure persists today; federal courts 'may' grant habeas relief 'as law and justice require.' 28 U.S.C. §§ 2241, 2243.

"Under the traditional understanding of habeas corpus, a prisoner could not usually use the writ to challenge a final judgment of conviction issued by a court of competent jurisdiction. But by 1953, this Court had begun to depart from that understanding. In *Brown* v. *Allen*, 344 U.S. 443, 458, it held that a state-court judgment 'is not *res judicata*' in federal habeas proceedings with respect to a petitioner's federal constitutional claims. After *Brown*, federal courts struggled with an exploding caseload of habeas petitions from state prisoners.

"Eventually, this Court responded by devising new rules aimed at separating the meritorious needles from the growing haystack of habeas petitions. The Court's decision in *Brecht*—which reasoned that *Chapman*'s harmless-error rule for direct appeals was inappropriate for use in federal habeas review of final state-court judgments, 507 U.S., at 633–634, 113 S.Ct. 1710—was part of that effort. *Brecht*, like this Court's other equitable doctrines restricting habeas relief, stems ultimately from the discretion preserved by Congress's habeas statutes.

"Congress later introduced its own reforms in AEDPA, instructing that, if a state court has adjudicated the petitioner's claim on the merits, a federal court 'shall not' grant habeas relief 'unless' the state court's decision was (1) 'contrary to' or an 'unreasonable application of' clearly established federal law, as determined by the decisions of this Court, or (2) based on an 'unreasonable determination of the facts' presented in the state-court proceeding. 28 U.S.C.

§ 2254(d). AEDPA thus left intact the equitable discretion invested in federal courts by earlier federal habeas statutes."

"(c) Mr. Davenport's two arguments in defense of the Sixth Circuit's decision lack merit."

"(1) Mr. Davenport argues that because the AEDPA inquiry represents a logical subset of the *Brecht* test, the Sixth Circuit necessarily found that he satisfied AEDPA when he satisfied *Brecht.* That argument is mistaken. Proof of prejudice under *Brecht* does not equate to a successful showing under AEDPA. The inquiries under *Brecht* and AEDPA are different. Where AEDPA asks whether *every* fair-minded jurist would agree that an error was prejudicial, *Brecht* asks only whether a federal habeas court *itself* harbors grave doubt about the petitioner's verdict. The legal materials a court may consult when answering each test also differ. Where AEDPA requires state-court decisions to be measured against this Court's clearly established holdings, *Brecht* invites analysis based on the whole body of law. Assuming that the Sixth Circuit's analysis was enough to satisfy *Brecht*, it was not enough to warrant eligibility for relief under AEDPA."

"(2) Mr. Davenport argues that this Court's precedents in *Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007), and *Davis v. Ayala*, 576 U.S. 257, 135 S.Ct. 2187, 192 L.Ed.2d 323 (2015), require a ruling in his favor. But the holding in neither case helps Mr. Davenport, and neither case resolved the question now before the Court. Instead, Mr. Davenport focuses on a brief passage from *Fry*, repeated in *Ayala*—'it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former,' 551 U.S., at 120, 127 S.Ct. 2321—that he believes supports the theory that a court may grant relief without applying AEDPA. It does not. In any event, this Court has long stressed that 'the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute.' *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). The Court will not override a lawful congressional command on the basis of curated snippets extracted from decisions with no reason to pass on the arguments Mr. Davenport presses here."

"(d) Even assuming that Mr. Davenport's claim can survive *Brecht*, he cannot satisfy AEDPA. Mr. Davenport argues the Michigan Court of Appeals' disposition of his shackling claim is contrary to, or an unreasonable application of, this Court's decision in *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). *Holbrook* rejected the defendant's claim that he was denied a fair trial due to the prejudicial effect of supplemental courtroom security on the jury. *Id*., at 562, 106 S.Ct. 1340. The language in *Holbrook* Mr. Davenport highlights casts doubt only on attempts to assess trial prejudice based on speculative testimony by prospective jurors. Nothing in *Holbrook* is inconsistent with the Michigan Court of Appeals' reliance on post-trial testimony from actual jurors concerning the effect on deliberations of security measures at Mr. Davenport's trial. Nor did the Michigan court unreasonably apply *Chapman* when it found that the prosecution had established Mr. Davenport's shackling was harmless beyond a reasonable doubt. This Court cannot say that *every* fairminded jurist applying *Chapman* must reach a different conclusion. Similarly, the Court cannot say that every fairminded court would have both identified and adopted Mr. Davenport's forfeited theory that his shackling might have influenced the jury toward a first-degree, rather than second-degree, murder conviction."

C. All Writs Act Curtailed in Habeas Proceedings

Shoop v. Twyford, 142 S.Ct. 2037 (U.S., Roberts, 2022).

"Respondent Raymond Twyford was convicted by an Ohio jury of aggravated murder and other charges and was sentenced to death. The Ohio appellate courts affirmed his conviction and sentence. Twyford then sought state postconviction relief, claiming that his trial counsel was ineffective for failing to present evidence of a head injury Twyford sustained as a teenager. The Ohio courts rejected his claim, concluding that trial counsel had simply presented a competing psychological theory for Twyford's actions. Twyford then filed a petition for federal habeas relief. The District Court dismissed most of Twyford's claims as procedurally defaulted but allowed a few to proceed. He then moved for an order compelling the State to transport him to a medical facility, arguing that neurological testing would plausibly lead to the development of evidence to support his claim that he suffers neurological defects. The District Court granted Twyford's motion under the All Writs Act, which authorizes federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C. §1651(a). The Court of Appeals affirmed. Both courts concluded that it was unnecessary to consider the admissibility of any resulting evidence prior to ordering the State to transport Twyford to gather it.

"Held: A transportation order that allows a prisoner to search for new evidence is not 'necessary or appropriate in aid of' a federal court's adjudication of a habeas corpus action when the prisoner has not shown that the desired evidence would be admissible in connection with a particular claim for relief."

"(a) The State argues that the All Writs Act does not authorize the issuance of transportation orders for medical testing at all. The State also argues that the order issued in this case was not 'necessary or appropriate in aid of' the District Court's jurisdiction because Twyford failed to show that the evidence he hoped to find would be useful to his habeas case. Because this Court agrees with the State's second argument, it does not address the first.

"In habeas cases such as this, the Antiterrorism and Effective Death Penalty Act (AEDPA) restricts a federal court's authority to grant relief. AEDPA provides that a federal habeas court cannot grant relief in a case adjudicated on the merits in state court unless the state court (1) contradicted or unreasonably applied this Court's precedents, or (2) handed down a decision 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' §§2254(d)(1)–(2). AEDPA also restricts the ability of a federal habeas court to develop and consider new evidence, limiting review of factual determinations under §2254(d)(2) to 'the evidence presented in the State court proceeding,' and review of legal claims under §2254(d)(1) 'to the record that was before the state court.' *Cullen* v. *Pinholster*, 563 U.S. 170, 181. A federal court may admit new evidence only in two limited situations: Either the claim must rely on a 'new' and 'previously unavailable' 'rule of constitutional law' made retroactively applicable by this Court, or it must rely on 'a factual predicate that could not have been previously discovered through the exercise of due diligence.' §2254(e)(2)(A). But before a federal court may decide whether to grant an evidentiary hearing or 'otherwise consider new evidence' under §2254(e)(2), it must first determine that such evidence could be legally considered in the prisoner's case. *Shinn* v. *Martinez Ramirez*, 596 U.S. —_, —. That is because a federal court 'may *never* needlessly prolong a habeas case, particularly given the essential need to promote the finality of state convictions.' *Id.,* at — (internal quotation marks omitted).

"Twyford's transportation request was granted under the All Writs Act. This Court has held that the All Writs Act cannot be used to circumvent statutory requirements or otherwise binding procedural rules. See *Pennsylvania Bureau of Correction* v. *United States Marshals Service,* 474

U.S. 34, 43. In federal habeas proceedings, AEDPA provides the governing rules. And this Court's precedents explain that a district court must consider AEDPA's requirements before facilitating the development of new evidence. By the same token, if an order issued under the All Writs Act enables a prisoner to fish for unusable evidence, such a writ would not be 'necessary or appropriate in aid of' the federal court's jurisdiction, as all orders issued under the Act must be. §1651(a). '[G]uided by the general principles underlying [this Court's] habeas corpus jurisprudence,' *Calderon* v. *Thompson,* 523 U.S. 538, 554, a writ that enables a prisoner to gather evidence that would not be admissible would 'needlessly prolong' resolution of the federal habeas case, *Shinn*, 596 U.S., at ___, and frustrate the 'State's interest[ ] in finality,' *Calderon*, 523 U.S., at 556. A federal court order requiring a State to transport a prisoner to a public setting not only delays resolution of his habeas case, but may also present serious risks to public safety. Commanding a State to take such risks so that a prisoner can search for unusable evidence would not be a 'necessary or appropriate' means of aiding a federal court's limited habeas review."

"(b) The District Court and Court of Appeals in this case concluded that directing the State to transport Twyford to a medical facility would aid the adjudication of his habeas petition, but they never determined how this could aid his cause. For the reasons discussed, that was error. Applying the proper standard here is straightforward. Twyford never explained how the results of the neurological testing could be *admissible* in his habeas proceedings, and it is hard to see how they could be, since the District Court's AEDPA review is limited to 'the record that was before the state court,' *Pinholster*, 563 U.S., at 181, and Twyford made no attempt to explain how that bar would be inapplicable in his case. Twyford suggested that the results of his brain testing could 'plausibly' bear on the question whether to excuse procedural default, but he did not identify the particular defaulted claims nor explain how the testing would allow him to resurrect those claims."

XI. Miscellaneous New Statutes

A. Correctional Institutions; Limitations on Use of Restraints on Pregnant Inmates

Chapter 1041, Public Acts 2022, adding T.C.A. § 41-51-202 eff. July 1, 2022.

41-51-202.

"(a) Except as provided in subsection (b), beginning on the date on which a pregnancy is known to a law enforcement agency and confirmed by a healthcare professional, an inmate in the custody of a correctional institution must not be placed in restraints.

"(b) The prohibition under subsection (a) does not apply if:

(1) An inmate is restrained solely by handcuffs in front of her body during internal escort or at any time outside of the incarceration facility;

(2) An appropriate corrections officer makes a determination that:

(A) The inmate is an immediate and credible flight risk that cannot reasonably be prevented by other means;

(B) The inmate poses an immediate and serious threat of harm to herself, the unborn child, or others that cannot reasonably be prevented by other means; or

(C) The custody or classification level of the inmate requires the use of restraints; or

(3) A healthcare professional responsible for the health and safety of the inmate determines that the use of restraints is appropriate for the medical safety of the inmate or the unborn child.

"(c) If restraints are used pursuant to an exception under subsection (b), only the least restrictive restraints may be used that are necessary to prevent harm to the inmate, unborn child, or others, or to prevent the risk of escape.

"(d) The exceptions under subsection (b) must not be applied:
(1) To place restraints around the ankles, legs, or waist of an inmate who is in labor or delivery;
(2) To restrain an inmate's hands behind her back; or
(3) To attach an inmate to another inmate. . . ."

B. Sex Offenders; Prohibition Against Renting Out Swimming Pool or Other Recreational Water Feature

Chapter 1058, Public Acts 2022, amending T.C.A. § 40-39-215(b) eff. July 1, 2022.

"(b) While mandated to comply with the requirements of this chapter, it is an offense for a sexual offender, violent sexual offender, or a violent juvenile sexual offender, if the offender's victim was a minor, to knowingly rent or offer for rent a swimming pool, hot tub, or other body of water to be used for swimming that is located on property owned or leased by the offender or is otherwise under the control of the offender."

C. Mental Health Treatment Programs

Chapter 1071, Public Acts 2022, adding T.C.A. §§ 16-19-101–108 eff. May 25, 2022.

This chapter establishes the framework to expand mental health treatment courts to all counties in the state.

D. Victim's Rights; Criminal Proceedings Notification System

Chapter 1140, Public Acts 2022, adding T.C.A. § 40-38-507 eff. June 3, 2022.

"(a) As an extension of the existing victim notification system created by this part, the Tennessee sheriffs' association shall establish a criminal proceedings notification system as a pilot program for the purpose of increasing the transparency and efficiency of the criminal justice process by providing timely information about each stage of the criminal process to interested parties.

"(b) The information in the criminal proceedings notification system must be available twenty-four (24) hours per day over the telephone, through the internet, or by email. Any interested party may register with the Tennessee sheriffs' association to be automatically notified:
(1) At least twenty-four (24) hours before any hearing in the matter for which the person registered, including, but not limited to, bail hearing, pretrial hearings, trial, and sentencing. The notice must include information on what type of hearing will occur and the date, time, and location for the hearing; and

(2) No more than twenty-four (24) hours after a hearing was conducted in the matter for which the person registered. The notice must include information on whether the hearing occurred as scheduled and, if so, a brief summary of the outcome of the hearing.

"(c) Funding for the criminal proceedings notification system must be appropriated by the general assembly, and moneys from the statewide automated victim information and notification system fund created in § 67–4–602(h)(2) must not be used for the criminal proceedings notification system.

"(d) The pilot program established by this section begins July 1, 2022, and ends June 30, 2025."

E. Drug Offender Registry

Chapter 654, Public Acts 2022, adding T.C.A. § 39-17-436(g) eff. Mar. 15, 2022.

"(g) The Tennessee bureau of investigation shall remove from the registry the name and other identifying information of persons who are convicted of a violation of the offenses described in subsection (a) upon receipt of notice of the death of such person. Bureau officials shall verify the person's death by checking the social security death index, obtaining a copy of the offender's certificate of death, or obtaining court documentation, a law enforcement report, or any other credible documentation as determined by the bureau."

F. Rules of the Road; Speeding; Removal of Points from Record

Chapter 710, Public Acts 2022, adding T.C.A. § 55-8-207 eff. July 1, 2022.

"A person who is charged with speeding and subsequently convicted and who successfully completes a department-approved defensive driving course within ninety (90) days of the conviction shall have the points charged to the person's driving record for the speeding conviction removed; provided, that five (5) points is the maximum number of points that may be removed from the person's driving record. This section may be applied to only one (1) speeding offense for each driving course completed and only once in a four-year period."

XII. 2022 Changes to Federal Rules of Criminal Procedure

Federal Rule of Criminal Procedure 16 amended eff. Dec. 1, 2022.

"Rule 16. Discovery and Inspection

"(a) Government's Disclosure.

(1) Information Subject to Disclosure.
* * * * *
(G) Expert Witnesses.

(i) Duty to Disclose. At the defendant's request, the government must disclose to the defendant, in writing, the information required by (iii) for any testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has

timely disclosed under (b)(1)(C). If the government requests discovery under the second bullet point in (b)(1)(C)(i) and the defendant complies, the government must, at the defendant's request, disclose to the defendant, in writing, the information required by (iii) for testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 on the issue of the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the government to make its disclosures. The time must be sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure for each expert witness must contain:

- a complete statement of all opinions that the government will elicit from the witness in its casein-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The government must supplement or correct its disclosures in accordance with (c).

* * * * *

"(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

* * * * *

(C) Expert Witnesses.

(i) Duty to Disclose. At the government's request, the defendant must disclose to the government, in writing, the information required by (iii) for any testimony that the defendant intends to use under Federal Rule of Evidence 702, 703, or 705 during the defendant's case-in-chief at trial, if:

- the defendant requests disclosure under (a)(1)(G) and the government complies; or
- the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Disclose. The court, by order or local rule, must set a time for the defendant to make the defendant's disclosures. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. The disclosure for each expert witness must contain:

- a complete statement of all opinions that the defendant will elicit from the witness in the defendant's case-in-chief;
- the bases and reasons for them;
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting a Disclosure. The defendant must supplement or correct the defendant's disclosures in accordance with (c)."

EVIDENCE

I. Rule 404(b); Prior Bad Acts

A. Evidence of Gang Membership

State v. Reynolds, 635 S.W.3d 893 (Tenn., Bivins, 2021).

"Jeremy Reynolds was convicted of premeditated first-degree murder at the conclusion of a jury trial in which the State was permitted to introduce evidence related to gang membership. On appeal, the Court of Criminal Appeals concluded that the evidence of premeditation was legally insufficient and reversed the conviction. The intermediate appellate court noted that the evidence was legally sufficient to support a conviction for the lesser-included offense of second-degree murder, but it nevertheless remanded for a new trial based on its determination that the trial court had abused its discretion in admitting certain pieces of evidence related to gang membership. We accepted the State's appeal. After a thorough review of the record, we conclude that the evidence was legally sufficient to support the conviction for premeditated first-degree murder. We further conclude that there was no reversible error on the part of the trial court in admitting evidence related to gang membership. Accordingly, we reverse the decision of the Court of Criminal Appeals and reinstate Reynolds's conviction for premeditated first-degree murder."

"From our review, the record reveals that the victim's girlfriend heard the victim's music as he arrived home and parked across the street, prompting her to walk to the front door. She saw the victim's face through a window in the front door, but as she began to open the door, she heard a voice she did not recognize. Thus, the proof shows that the deadly encounter was initiated just after the victim arrived home. Based on the forensic evidence and the hospital surveillance video, a rational jury could conclude that the Defendant, Duncan, and an unknown third person were at the scene. They were not invitees, since the victim did not bring anyone other than family to his house. Thus, a rational jury also reasonably could conclude that the Defendant and his compatriots initiated the deadly encounter. The evidence supports an inference that the victim was concerned or sensed the danger of the encounter from the beginning, as he pulled the door shut after his girlfriend had started to open it. Shortly thereafter, one or two gunshots rang out, followed by 'a bunch' of additional gunshots. Considering all of the evidence, a rational jury could conclude not only that the Defendant armed himself for an encounter that he initiated, but also that the Defendant was face to face with the victim on the porch. Furthermore, a rational jury could conclude that the Defendant shot the victim in the chest at close range. The proof also supports a conclusion that the victim attempted to retreat when he turned away from the Defendant and headed toward the front door, which was his only escape route. As the victim turned for the door, he was shot four times in the back of the left arm and twice in the back. The wounds in his back were the fatal wounds. The Defendant and his compatriots then fled the scene, leaving the victim mortally wounded on the front porch."

"The evidence supports the procurement and use of multiple weapons for an encounter that the Defendant and his compatriots initiated just after the victim arrived at the scene. The evidence further establishes the infliction of multiple wounds on the victim, including a close-range gunshot to the chest and two gunshots to the back. The evidence also establishes that there were a 'bunch' of gunshots after the first gunshot or two, thus supporting an inference that the vast majority of the victim's seven gunshot wounds occurred once the victim had begun to retreat as he turned toward

the only available path of escape from his assailants. Although perhaps the proof supporting the jury's finding of premeditation in this case may not be overwhelming, that is not required by the applicable legal standards. As a result, we conclude that the proof was legally sufficient to support the verdict, and we reverse the contrary holding of the Court of Criminal Appeals."

"Having determined that the evidence supports the Defendant's conviction for premeditated first-degree murder, we turn to examine whether any evidentiary issues nonetheless require that the Defendant be granted a new trial. We first address the admission of gang-related evidence. Given the manner in which the issue was litigated at trial and later addressed by the Court of Criminal Appeals, we must take care to set forth with precision both what occurred below and the posture before this Court.

"In reviewing the Defendant's direct appeal, the Court of Criminal Appeals found no error in the trial court's admission of evidence of the fact of gang membership of the Defendant, Duncan, and Jackson—through the testimony of Investigator Penney, the gang validation forms, and the three photographs. *Reynolds*, 2020 WL 3412275, at *26. However, the Court of Criminal Appeals determined that the trial court abused its discretion by admitting 'background information about the Gangster Disciples and the origins of various gang signs.' Id. The court concluded that unfair prejudice associated with this evidence outweighed 'its nonexistent probative value.' Id. The court further determined that 'because the jury issued a verdict contrary to the law and evidence'—that is, a conviction for premeditated first-degree murder when the evidence was legally insufficient to support the verdict—it could not say 'that the improper admission of the extraneous background gang evidence was harmless beyond a reasonable doubt.' Id.

"Having found reversible error on that basis, the intermediate appellate court went on to identify two other instances of what it deemed to be improper evidentiary rulings to give direction to the trial court upon remand. First, the court found improper the testimony of Officer Early that the Hi-Point handgun was recovered from Jackson's car during an investigation of two robberies. The court stated that the evidence linking the gun to robberies unrelated to the killing of the victim 'was wholly irrelevant to the Defendant's case and should have been excluded.' Id. at *27. Second, the court found improper the mention of the names of gang members unconnected to the case, stating that such evidence was 'irrelevant and improperly admitted.' Id. In neither instance did the court engage in an analysis of whether the error was or was not harmless. See id."

"Tennessee law provides that proof of other crimes, wrongs, or acts committed by the defendant is not admissible to prove the defendant's propensity to commit a crime. See Tenn. R. Evid. 404(b). See generally *State v. Rodriguez*, 254 S.W.3d 361, 375–76 (Tenn. 2008) (discussing general exclusion of propensity evidence). The trial court admitted evidence that the Defendant, Duncan, and Jackson were members of the Gangster Disciples. The parties agree that the admissibility of evidence that the Defendant was a gang member is governed by Tennessee Rule of Evidence 404(b). Rule 404(b) provides:

> Other Crimes, Wrongs, or Acts. — 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.

"The record in this case demonstrates that the trial court complied with the structure detailed in Rule 404(b). Thus, we will reverse the trial court's decision to admit evidence of gang membership only upon finding an abuse of discretion. See *State v. Clark*, 452 S.W.3d 268, 287 (Tenn. 2014); *State v. Thacker*, 164 S.W.3d 208, 240 (Tenn. 2005)."

"In deciding to admit evidence that the Defendant, Duncan, and Jackson were all members of the Gangster Disciples, the trial court found the evidence admissible for the non-propensity purposes of: (1) proving the identity of the Defendant as the perpetrator, see *State v. Gilliland*, 22 S.W.3d 266, 271 n.6 (Tenn. 2000) (recognizing the admissibility of Rule 404(b) evidence to prove identity), and (2) providing necessary contextual background, see id. at 272 (recognizing the admissibility of contextual background evidence because knowledge of events surrounding the commission of the crime may be necessary for the jury to 'realistically evaluate the evidence' (quoting *Albrecht v. State*, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972))); see also *Clark*, 452 S.W.3d at 288 (identifying various non-propensity purposes to admit Rule 404(b) evidence recognized under Tennessee law). The record demonstrated that the State did not seek to introduce evidence of gang membership to prove that the Defendant killed the victim in conformity with his gang membership. Instead, as the trial court observed, the evidence was relevant to prove a connection between the Defendant, Duncan, and Jackson and thereby offered an explanation of how the Hi-Point handgun could end up in Jackson's car three months after the victim was killed even though Jackson was not at the scene on the night of the shooting. The trial court also found that the danger of unfair prejudice associated with the evidence of gang membership did not outweigh the probative value of the evidence. The Court of Criminal Appeals upheld the trial court's decision to admit evidence of the fact of gang membership through Investigator Penney's testimony, the gang validation forms, and the photographs. *Reynolds*, 2020 WL 3412275, at *26.

"We conclude that the trial court did not abuse its discretion in admitting the evidence of gang membership. The record shows that the State recovered a handgun forensically linked to the crime scene, evidence of obvious significance. Although a .45-caliber live round was recovered at the hospital along with the Defendant's effects, the Hi-Point handgun was not. Instead, the Hi-Point handgun was recovered from Jackson's car three months after the victim was killed. Given these facts, an association or connection between the three men was relevant because the connection made it more probable that the Defendant was linked to the Hi-Point handgun even though the handgun was not located with the Defendant's effects immediately after the killing. See Tenn. R. Evid. 401 (defining relevant evidence as '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'). Furthermore, the gang validation forms were evidence that directly established the fact of the Defendant's, Duncan's, and Jackson's common gang membership. The photographs helped explain how the Defendant qualified for points toward validation in various categories on the form and provided the jury with information to evaluate the persuasiveness of the evidence of gang membership. Thus, this evidence was relevant and admissible because it provided important contextual background by establishing an association or

connection between the Defendant, Duncan, and Jackson. See *Gilliland*, 22 S.W.3d at 271 ('If the contextual evidence is relevant to an issue other than criminal propensity and its probative value is not outweighed by the danger of unfair prejudice, then that evidence may be properly admissible.').''

''Additionally, we agree with the courts below that the danger of unfair prejudice did not outweigh the probative value of the evidence. The probative value of the evidence of shared gang membership among the three men was significant. Proof of common gang membership served as circumstantial evidence supporting an inference that the Defendant possessed a gun directly linked to the shooting of the victim.''

''In contrast to the ruling with respect to evidence of gang membership, the Court of Criminal Appeals concluded that the trial court abused its discretion in admitting background information about the Gangster Disciples and the origins of various gang signs. The intermediate appellate court further concluded that the error was not 'harmless beyond a reasonable doubt.' *Reynolds*, 2020 WL 3412275, at *26.''

''We first address the testimony from Investigator Penney explaining that certain hand signs depicted a 7, a 4, and a pitchfork. Penney explained that the 7 and 4 referred to the letters G and D, for Gangster Disciples, and that the pitchfork was also associated with Gangster Disciples. In our view, this testimony was clearly relevant and probative in that it would assist the jury in understanding the photographic evidence—which we determined above was properly admitted—so that it could decide whether the State had proved that the Defendant was a member of the Gangster Disciples. Moreover, we believe there was little danger of unfair prejudice, as we discern no undue tendency from this testimony to suggest decision on an improper basis. Investigator Penney's testimony was simply an explanation of the signs and how they represented a tie to the Gangster Disciples. Nowhere was his testimony inflammatory or disquieting, and nowhere did he associate the gang signs with violence. We conclude that the danger of unfair prejudice did not outweigh the probative value of the testimony, and thus the trial court did not abuse its discretion in admitting the testimony.

''We reach the same conclusion as to Investigator Penney's explanation of the six-point star. The six-point star appeared in one of the photographs (the Defendant was wearing a six-point-star belt buckle), and it thereby supported points attributed to the Defendant on the gang validation form. Penney's testimony was relevant and had probative value, for without it the jury would have no idea that the Defendant's belt buckle exhibited a tie to the Gangster Disciples. In fact, even the testimony linking the symbol to David Barksdale—while arguably less relevant—had value, for it assisted the jury's understanding of how the Star of David could be considered a symbol of membership in the Gangster Disciples. Furthermore, we discern minimal danger of unfair prejudice associated with the testimony, even that mentioning how the six-point star was a Gangster Disciples symbol because it was a sign of reverence for David Barksdale. This testimony, like the testimony about gang hand signs, was explanatory, not inflammatory or disquieting. Therefore, we conclude that the danger of unfair prejudice did not outweigh the probative value of the testimony. Thus, the trial court did not abuse its discretion in admitting the testimony.

''We next address Investigator Penney's testimony that the Gangster Disciples arose from two different gangs in Chicago, that the Gangster Disciples fall under the 'Folk Nation,' and that there is another group in the gang system known as the 'People Nation.' Although this testimony was more background evidence than may have been necessary, we cannot conclude that there was no

relevance to this testimony. Investigator Penney mentioned the concept of Folk Nation when explaining how the pitchfork hand sign was a Gangster Disciples symbol. Additionally, like the testimony about the gang signs, this testimony was explanatory rather than inflammatory, and thus it carried minimal danger of unfair prejudice.

"We finally address one additional issue regarding evidence of background information about the Gangster Disciples, that which drew the first contemporaneous objection from defense counsel. Investigator Penney, testifying about the process of validating the Defendant as a Gangster Disciples member, referred to the gang validation form. The form attributed points to the Defendant for gang tattoo/brands. In that regard, the form identified that the Defendant had a 720 tattoo. Investigator Penney explained that the 720 tattoo is a Gangster Disciples symbol because it refers to one type of Gangster Disciples ideology. We conclude that this testimony was relevant to the question of whether the Defendant was a gang member, had probative value, and had minimal danger of unfair prejudice.

"However, as Investigator Penney explained that 720 refers to a type of Gangster Disciples ideology, he transitioned to testifying about a different type of ideology, 360. Investigator Penney stated, 'This was part of their, for lack of better terms, during this time period, this was their idea of 'shoot and ask questions later.' The – years later – [.]'

"This testimony carries a danger of unfair prejudice. Additionally, we fail to discern any relevance for this particular evidence, at least not from Investigator Penney's testimony as it stands in the record. While the existence of a 360 ideology conceivably could help explain the 720 ideology, the simple fact is that Investigator Penney's testimony never connected those dots, and the Defendant's tattoo was a 720, not a 360. Under these circumstances, we believe the trial court erred by allowing this testimony to stand and not issuing a curative instruction."

"From our review of the entire record, see *Clark*, 452 S.W.3d at 288, we conclude that the Defendant has not carried the burden of showing that Investigator Penney's improper testimony more probably than not affected the verdict. Penney's testimony was unfairly prejudicial in that it attributed the 'idea of 'shoot and ask questions later' ' to Gangster Disciples members, and the State's evidence sought to prove that the Defendant was a member of the Gangster Disciples. However, Penney's testimony itself appeared to attribute the idea to the 360 ideology, and there was never any evidence linking the Defendant to the 360 ideology. The evidence showed that the Defendant's tattoo was a 720, not a 360. In addition, Penney's testimony also gave the impression that the 'shoot and ask questions later' idea was associated with a past time period. In his testimony, Penney linked the idea to 'during this time period,' and followed that statement with 'years later,' at which point his testimony was interrupted by defense counsel's objection. From this testimony, it is unclear whether the idea coincided with the time period of the victim's killing.

"We again note that the trial court gave the jury limiting instructions on three different occasions during the trial, including at the beginning of Investigator Penney's testimony. The instructions directed the jury not to consider evidence of the Defendant's gang membership—if the jury indeed found the Defendant to be a gang member—to prove his disposition to commit a crime such as the one for which he was on trial. We presume that the jury followed the trial court's instructions. *Harbison*, 539 S.W.3d at 163; *State v. Parker*, 350 S.W.3d 883, 897 (Tenn. 2011). We do not agree with the intermediate appellate court that the jury's verdict was contrary to the law and evidence, and thus we do not conclude that the Defendant has shown by clear and convincing evidence that the jury failed to follow the trial court's instructions. See *Harbison*, 539 S.W.3d at 163. Instead, we

conclude that the Defendant has not carried the burden of showing that the improper testimony more probably than not affected the verdict. Thus, any error in the admission of the testimony was harmless."

B. Impeachment by Prior Bad Act Was Reversible Error

State v. Moon, 644 S.W.3d 72 (Tenn., Page, 2022).

"On December 17, 2017, Corporal Michael Wilder was on patrol near apartments he previously searched for drug trafficking when he saw a black sports utility vehicle with spray-painted windows. Corporal Wilder drove by the vehicle and observed four individuals he believed to be avoiding him. He parked in a side alley and watched the vehicle, noticing the occupants entering and exiting the vehicle to walk to a trailer park on the other side of the road. Corporal Wilder considered this to be strange behavior and drove through the trailer park 'to figure out what [was] going on.' At the trailer park, Corporal Wilder observed several people outside, including one man who lowered his head and ran up to a trailer when he saw Corporal Wilder approaching.

"Corporal Wilder spoke with Larry Woods, an employee of the trailer park, outside of Mr. Woods' trailer. Corporal Wilder asked Mr. Woods who was inside the trailer, and Mr. Woods told Corporal Wilder it was Defendant. Corporal Wilder asked Mr. Woods to retrieve Defendant from the trailer, and Mr. Woods complied. Defendant emerged from the trailer, standing atop a set of steps. Corporal Wilder believed Defendant appeared 'fidgety' and 'nervous' and that Defendant's breathing 'start[ed] to pick up.' To Corporal Wilder, these were signs of 'evasion' or 'possible violence.' Corporal Wilder noticed a plastic bag inside Defendant's mouth that he believed contained methamphetamine. He instructed Defendant to spit out the plastic bag, and a tussle ensued between Corporal Wilder and Defendant. Precisely what happened during that conflict is at the core of this case.

"According to Corporal Wilder, Defendant began cursing and actively fighting against him. Corporal Wilder testified that, during the scuffle, Defendant pulled a gun and held it against Corporal Wilder's abdomen. Corporal Wilder tried to get the gun away from Defendant. He believed Defendant was attempting to use deadly force against him. According to Corporal Wilder, as a 'last resort' he pushed Defendant back and shot at him.

"Defendant's version of events differs substantially. While he admitted he had a gun in the waistband of his pants that day, Defendant insisted he did not fight against Corporal Wilder and he never took the gun out. Rather, Defendant claimed that the gun fell out of his pants and underneath him after Corporal Wilder shot him.

"It is undisputed that Corporal Wilder shot Defendant five times. Defendant was transported to a hospital in Alabama for medical treatment, and his arrest warrant was issued by the General Sessions Court on December 21, 2017, while he was still hospitalized. The record indicates that Defendant was served with the warrant for his arrest and incarcerated in Tennessee on January 24, 2018.

"On April 10, 2018, Defendant was indicted for attempted first-degree murder, resisting arrest, aggravated assault, and two counts of unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony."

"Before the trial began, the State moved to dismiss three counts of the indictment: Count 2 (resisting arrest), Count 3 (aggravated assault), and Count 4 (one count of unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony). Thus, the trial proceeded against Defendant on Count 1 (attempted first-degree murder), and Count 5 (unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony). The trial began on February 11, 2019, and concluded on February 14, 2019.

"In addition to Defendant and Corporal Wilder, the court heard testimony from several other law enforcement officers and eyewitnesses. Most notably, and relevant to the issues presented on appeal before this Court, the State called as a witness Detective Karl Pyrdom. Detective Pyrdom testified that he arrived at the scene after Officer Wilder called for backup. He arrived in time to see a 'scuffle,' and ran toward the trailer. He heard Corporal Wilder shouting instructions but did not hear him tell Defendant to drop a weapon. He stated that he could not see either party's hands and that he could not see Defendant holding a weapon. After gunshots were fired, Detective Pyrdom was instructed by Officer Wilder to 'get that gun,' and Detective Pyrdom testified that he picked up a weapon that he saw on the ground at the foot of the steps to the trailer.

"The defense, in turn, called eyewitness Larry Woods. Mr. Woods described witnessing the altercation from close range. He emphasized that he did not see Defendant holding a gun and that, after Corporal Wilder shot Defendant, he did not initially see a gun on the ground. He later saw Detective Pyrdom kick a gun out from under Defendant, who was lying on the ground. Mr. Woods son, Donald, was also present at the scene and testified that he never saw a gun in Defendant's hand. In addition, J.J., a friend of Defendant's who was fourteen years old at the time of the incident, testified that he saw Defendant place a gun in his pants prior to the altercation with Corporal Wilder. He stated that he observed the altercation and that there was not a gun in Defendant's hands.

"The jury convicted Defendant of the lesser-included offense of attempted second-degree murder and also convicted him of unlawful employment of a firearm during the commission of or attempt to commit a dangerous felony. The trial court sentenced Defendant to consecutive sentences of ten years for the attempted second-degree murder conviction and six years for the employment of a firearm conviction, for a total effective sentence of sixteen years imprisonment.

"The Court of Criminal Appeals affirmed the judgments of the trial court. *See State v. Moon*, No. M2019-01865-CCA-R3-CD, 2021 WL 531308, at *1 (Tenn. Crim. App. Feb. 12, 2021), *perm. app. granted*, (Tenn. May 13, 2021)."

"Larry Woods was called as a defense witness at trial. During cross-examination, the State sought to question him about his prior bad acts. Mr. Woods was an employee at the trailer park where the incident occurred, and it was his trailer at which the incident took place. Mr. Woods had known Defendant for approximately twelve to thirteen years. During direct testimony, Mr. Woods testified that Defendant asked to use the restroom inside his residence, and Mr. Woods obliged. While Defendant was inside the trailer, Corporal Wilder pulled his car into the trailer park. Mr. Woods testified that he approached the Corporal's vehicle and asked if he could help him. Corporal Wilder responded that Mr. Woods had a lot of people in his yard that day. Mr. Woods said he did not see a problem with that and people were outside because the sun was out after a period of bad weather. Corporal Wilder asked Mr. Woods if he could speak with Defendant. Mr. Woods found Defendant in the trailer and told him that the Corporal would like to speak with him. Thereafter, Mr. Woods continued looking for something in his yard, and Defendant emerged from the trailer.

"Continuing his direct testimony, Mr. Woods stated that Defendant was not upset or cursing during the ensuing conversation between Corporal Wilder and Defendant. This directly contradicted Corporal Wilder's testimony. At some point during the conversation, Defendant asked Corporal Wilder if he could have a beer. Another man who was present during the incident gave a beer to Defendant, and Corporal Wilder did not respond to Defendant's drinking a beer. Mr. Woods testified that he never heard Corporal Wilder mention Defendant being under arrest and he never heard Defendant say he would not allow Corporal Wilder to arrest him.

"Defense counsel asked Mr. Woods what led Corporal Wilder to 'put his hands on' Defendant. Mr. Woods responded that he did not know but heard Defendant say 'Why have you got to be like that?' and Corporal Wilder say 'Stop, or I'm going to taze you.' Mr. Woods testified that Corporal Wilder then 'jumped back and shot' Defendant. Defendant fell off the stairs he was standing on and was lying on the ground on his back. Throughout his testimony, Mr. Woods unequivocally maintained that he did not see Defendant with a gun during the altercation. When asked whether he would have been able to see a gun if Defendant was holding one, Mr. Wilder stated: 'I was three feet away. I stepped back around where I could see, you know. If he would have had a gun, I would have seen the gun. I didn't see no gun.' According to Mr. Woods, after shooting Defendant, Corporal Wilder turned the gun on Mr. Woods. Mr. Woods testified that he put his hands up. Mr. Woods did not see a gun on the ground near Defendant. After the shooting, officers found it and kicked it out from under Defendant.

"On cross-examination, without any apparent foundation, the State very quickly began to question Mr. Woods about whether he sold methamphetamine out of his trailer. Defense counsel objected to the line of questioning and the court excused the jury. The court conducted a jury-out hearing, during which defense counsel argued that the State had no basis to pursue this line of questioning. The State responded by saying that Mr. Woods had been indicted for selling drugs to a confidential informant three months prior to the incident at issue. According to the State, the evidence that Mr. Woods sold methamphetamine showed Mr. Woods 'ha[d] motivation not to be completely honest with what happened that day.' The State insisted that 'the fact that [Mr. Woods] is a drug dealer selling drugs from that location would suggest maybe he is not going to be fully cooperative with police.' Without any additional proof, the trial court found the evidence relevant and that any potential unfair prejudice was outweighed by the probative value. The State then introduced the indictments against Mr. Woods for identification purposes only – not as evidence. The trial court warned Mr. Woods about implicating himself in a crime and recessed for the day to allow Mr. Woods to consult with counsel.

"When trial resumed the next morning, defense counsel renewed his objection to the questioning of Mr. Woods. The trial court once again overruled the objection, finding that the allegation that Mr. Woods was selling drugs was probative 'as it gives a complete story of motivation[ ], bias, and other things that involve witnesses and a complete story of the crime.' The jury returned to the courtroom, and as the prosecution resumed its questioning, Mr. Woods invoked his Fifth Amendment privilege against self-incrimination regarding the indicted drug sales. Later in the trial after Defendant's testimony, the trial court returned to its earlier ruling concerning Mr. Woods' drug charges and noted that his prior bad acts had been proven by clear and convincing evidence.

"Tennessee Rule of Evidence Rule 404(b) states as follows:

> (b) Other Crimes, Wrongs, or Acts. 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.

"We note that Rule 404(b) has been held to only apply to criminal defendants. *State v. Stevens*, 78 S.W.3d 817, 837 (Tenn. 2002). However, the unusual 404(b) type of evidence at issue here falls under Tennessee Code Annotated section 24-7-125 (2017), which is essentially identical to Rule 404(b) except for the following 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.' Tenn. Code Ann. § 24-7-125 (known as the 'Channon Christian Act' which expanded Rule 404(b)'s protections to all witnesses in a criminal case). Thus, section 24-7-125 makes Mr. Woods, as a witness, within the scope of people against whom this evidence is to be excluded.

"Obviously, the type of evidence the State successfully sought to admit against Mr. Woods falls squarely within the scope of evidence excluded by Rule 404(b) and section 24-7-125. The State was attempting to prove Mr. Woods was of bad character in order to show he was acting in conformity therewith when testifying. The Court of Criminal Appeals provided a lengthy and thorough examination of precisely why the questioning of Mr. Woods was in error. It concluded that the trial court's decision to allow the State to cross-examine the witness regarding prior bad acts violated Tennessee Rule of Evidence 404(b) because the prior bad acts had not been proven by clear and convincing evidence, the evidence was not relevant to any material issue, the evidence was not admissible to give the 'complete story,' and the evidence could not be used to establish bias. *Moon*, 2021 WL 531308, at *13-*14. Indeed, neither party appears to take issue with this portion of the Court of Criminal Appeals' holding.

"Defendant instead argues that the Court of Criminal Appeals improperly determined that the trial court's error was harmless. As this Court has previously explained:

> The harmlessness of non-constitutional errors is analyzed using the framework provided by [Tennessee Rule of Appellate Procedure] 36(b). Where an error is not of a constitutional variety, Tennessee law places the burden on the defendant who is seeking to invalidate his or her conviction to demonstrate that the error 'more probably than not affected the judgment or would result in prejudice to the judicial process.'

"*State v. Rodriguez*, 254 S.W.3d 361, 371-72 (Tenn. 2008) (citing Tenn. R. App. P. 36(b); *State v. Ely*, 48 S.W.3d 710, 725 (Tenn. 2001); *State v. Harris*, 989 S.W.2d 307, 315 (Tenn. 1999))."

"While we agree with the Court of Criminal Appeals that the improper impeachment of Mr. Woods was error, we are inclined to disagree with its harmless error analysis. The improper impeachment evidence arguably sullied the reputations of multiple defense witnesses—not just that of Mr.

Woods—by emphasizing the witnesses' association with the alleged drug dealer and their proximity to his trailer. The 'drug dealer' evidence was presented by the prosecution multiple times and in the questioning of three different witnesses. Initially, it was introduced as evidence of Mr. Woods' actions/character. It was also included in the prosecution's cross-examination of Defendant himself. The evidence was again repeated in the cross-examination of Mr. Woods' son. *See Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976) (noting that the length and repeated nature of improper remarks by a prosecutor can impact whether they were indeed harmful).

"In our view, the evidence used to convict Defendant was not overwhelming. Four eyewitnesses in close proximity to the incident testified that they never saw Defendant holding a gun. This includes Detective Pyrdom, one of Corporal Wilder's fellow officers. It also includes Larry Woods, Donald Woods (Larry Woods' son), and J.J. (another defense witness). This does not include Defendant himself who obviously denied he wielded a gun, stating that his gun remained in his pants and he never pulled it out. '[T]he line between harmless and prejudicial error is in direct proportion to the degree by which the proof exceeds the standard required to convict.' *State v. Toliver*, 117 S.W.3d 216, 231 (Tenn. 2003) (internal citation omitted). And again, the State's proof was not overwhelming. Corporal Wilder himself—who, as Defendant points out in his brief, arguably had ample reasons to assert Defendant drew a gun—was the only witness to say Defendant used a gun or otherwise struggled against him during their encounter. On the other hand, Defendant presented multiple witnesses who gave consistent accounts undermining Corporal Wilder's testimony. In the end, the jury viewed all of the witnesses and chose to accredit Corporal Wilder's version of events, but it is extremely difficult to assess the impact the improper impeachment may have had on the verdict under these particular circumstances.

"In sum, we agree with Defendant that the evidence of bad acts against Mr. Woods was not trivial or harmless. We conclude that the improper impeachment of defense witness Larry Woods more probably than not affected the judgment, and thus, the trial court committed reversible error."

C. Federal Death Penalty Act Provisions

United States v. Tsarnaev, 142 S.Ct. 1024 (U.S., Thomas, 2022).

"On April 15, 2013, brothers Dzhokhar and Tamerlan Tsarnaev planted and detonated two homemade pressure-cooker bombs near the finish line of the Boston Marathon, killing three and wounding hundreds. Three days later, as investigators began to close in, the brothers fled. In the process, they murdered a Massachusetts Institute of Technology campus police officer, carjacked a graduate student, and fought a street battle with police during which Dzhokhar inadvertently ran over and killed Tamerlan. Dzhokhar eventually abandoned the vehicle and hid in a covered boat being stored in a nearby backyard. He was arrested the following day.

"Dzhokhar was indicted for 30 crimes, including 17 capital offenses. To prepare for jury selection, the parties proposed a 100-question screening form, which included several questions regarding whether media coverage may have biased prospective jurors. The District Court declined to include a proposed question that asked each prospective juror to list the facts he had learned about the case from the media and other sources. According to the District Court, the question was too 'unfocused' and 'unguided.' Following three weeks of in-person questioning, a jury was seated. The jury found Dzhokhar guilty on all counts, and the Government sought the death penalty.

"At sentencing, Dzhokhar sought mitigation based on the theory that Tamerlan had masterminded the bombing and pressured Dzhokhar to participate. In an attempt to show Tamerlan's domineering nature, Dzhokhar sought to introduce the statements of Ibragim Todashev, who had alleged during an FBI interview that, years earlier, Tamerlan had participated in a triple homicide in Waltham, Massachusetts. The Government asked the trial court to exclude any reference to the Waltham murders on the grounds that the evidence either lacked relevance or, alternatively, lacked probative value and was likely to confuse the issues. The Government also pointed out that, because FBI agents had killed Todashev in self-defense after he attacked them during the interview, there were no living witnesses to the Waltham murders. The District Court excluded the evidence, and the jury concluded that 6 of Dzhokhar's crimes warranted the death penalty.

"The Court of Appeals vacated Dzhokhar's capital sentences on two grounds. First, the court held that the District Court abused its discretion during jury selection by declining to ask about the kind and degree of each prospective juror's media exposure, as required by that court's decision in *Patriarca* v. *United States*, 402 F.2d 314. Second, the court held that the District Court abused its discretion during sentencing when it excluded evidence concerning Tamerlan's possible involvement in the Waltham murders.

"Held: The Court of Appeals improperly vacated Dzhokhar's capital sentences."

"(a) The District Court did not abuse its discretion by declining to ask about the content and extent of each juror's media consumption regarding the bombings. Jury selection falls 'particularly within the province of the trial judge,' *Skilling* v. *United States,* 561 U.S. 358, 386, whose broad discretion in this area includes deciding what questions to ask prospective jurors, see *Mu'Min* v. *Virginia,* 500 U.S. 415, 427. Here, the District Court did not abuse that discretion when, recognizing the significant pretrial publicity concerning the bombings, the court refused to allow the question at issue because it wrongly emphasized what a juror knew before coming to court, rather than potential bias. That decision was reasonable and well within the court's discretion.

"The rest of the jury-selection process in this case dispels any remaining doubt. The District Court used the 100-question juror form—which asked prospective jurors what media sources they followed and whether any of that information had caused them to form an opinion about Dzhokhar's guilt or punishment—to cull down the number of prospective jurors. The District Court then subjected those remaining prospective jurors to three weeks of individualized *voir dire*, including questions that probed for bias. Finally, the court instructed the prospective jurors during *voir dire*, and the seated jurors during trial, that their decisions must be based on the evidence presented at trial and not any other source.

"The Court of Appeals erred when it concluded that the District Court abused its discretion by failing to put Dzhokhar's proposed media-content question to the jury. Following its decision in *Patriarca*, the court concluded that it had 'supervisory authority' to require the District Court, as a matter of law, to ask the jurors that specific question. The supervisory power of federal courts, however, does not extend to the creation of prophylactic supervisory rules that circumvent or supplement legal standards set out in decisions of this Court. See *United States* v. *Payner,* 447 U.S. 727, 733–737."

"(b) Nor did the District Court abuse its discretion in excluding from the sentencing proceedings evidence of the Waltham murders. The Federal Death Penalty Act provides that, at the sentencing phase of a capital trial, 'information may be presented as to any matter relevant to the sentence,

including any mitigating or aggravating factor.' 18 U.S.C. § 3593(c). But the district court may exclude information 'if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury.' *Ibid.* Such evidentiary decisions are reviewed for abuse of discretion. See *United States* v. *Abel*, 469 U.S. 45, 54. Here, Dzhokhar sought to introduce evidence linking Tamerlan to the unsolved Waltham murders to support his mitigation defense that Tamerlan was the ringleader of the bombing. That evidence, however, did not allow the jury to confirm or assess Tamerlan's alleged role in the Waltham murders. The District Court did not abuse its discretion when it reasonably excluded the evidence for its lack of probative value and potential to confuse the jury.

"Dzhokhar's counterarguments are unconvincing. First, § 3593(c) does not violate the Eighth Amendment. That provision falls well within the the Federal Government's 'traditional authority' 'to decide that certain types of evidence may have insufficient probative value to justify their admission,' *Skipper* v. *South Carolina,* 476 U.S. 1, 11, 15 (Powell, J., concurring in judgment), and 'to set reasonable limits upon the evidence a [capital] defendant can submit, and control the manner in which it is submitted,' *Oregon* v. *Guzek,* 546 U.S. 517, 526. Section 3593(c) sets up a highly permissive regime that allows criminal defendants to introduce a wide range of normally inadmissible evidence and channels that evidence through an individualized balancing test that affords a capital defendant every reasonable opportunity to place relevant mitigation evidence before the penalty-phase jury. Here, the bare inclusion of the Waltham-murders evidence risked producing a confusing mini-trial where the only witnesses who knew the truth were dead. That the evidence excluded by the District Court was considered reliable enough to include in a search warrant has no bearing here, where the District Court was free to evaluate the information independently when deciding whether to admit it under § 3593(c).

"The dissent recognizes that the District Court enjoyed significant discretion over its evidentiary decisions. But because this is a death penalty case, the dissent scrutinizes those decisions with particular care to find that the District Court abused its discretion. In doing so, the dissent ignores the traditional abuse-of-discretion standard, which calls for a reviewing court to defer to the sound judgment of a district court unless the decision was 'manifestly erroneous.' *General Elec. Co.* v. *Joiner*, 522 U.S. 136, 142. More specifically, the dissent suggests that a district court presiding over death-penalty proceedings should be more hesitant to find that evidence risked confusing the jury. But nothing in § 3593(c) suggests that Congress intended for any such hesitancy. Ultimately, the District Court reasonably decided to exclude the evidence under § 3593(c)'s balancing test."

D. Sex Offense Cases; Relevance of Victim's Sexual Behavior

Tennessee Rule of Evidence 412(d)(2), amended eff. July 1, 2022.

"(d) Procedures. If a person accused of an offense covered by this Rule intends to offer under subdivision (b) reputation or opinion evidence or under subdivision (c) specific instances of conduct of the victim, the following procedures apply:

(1) the person must file a written motion to offer such evidence.

* * *

(2) Motions required by subdivision (d)(1) shall be filed under seal. When a motion required by subdivision (d)(1) is filed and found by the court to comply with the requirements of this rule, the court shall hold a hearing in chambers or otherwise out of the hearing of the public

and the jury to determine whether the evidence described in the motion is admissible. The hearing shall be on the record, but the record shall be sealed except for the limited purposes of facilitating appellate review, assisting the court or parties in their preparation of the case, and to impeach under subdivision (d)(3)(iii)."

"Advisory Commission Comment [2022]
This amendment adds the requirement that motions filed by subdivision (d)(1) of the rule shall be filed under seal."

II. Privileged Communication; State Secrets Privilege

United State v. Husayn, 142 S.Ct. 959 (U.S., Breyer, 2022).

"In the aftermath of the September 11, 2001, terrorist attacks, the Central Intelligence Agency believed that Abu Zubaydah was a senior al Qaeda lieutenant likely to possess knowledge of future attacks against the United States. Zubaydah—currently a detainee at the Guantánamo Bay Naval Base—says that in 2002 and 2003 he was held at a CIA detention site in Poland, where he was subjected to 'enhanced interrogation' techniques. In 2010, Zubaydah filed a criminal complaint in Poland, seeking to hold accountable any Polish nationals involved in his alleged mistreatment at the CIA site ostensibly located in that country. The United States denied multiple requests by Polish prosecutors for information related to Zubaydah's claim on the ground that providing such information would threaten national security. Zubaydah filed a discovery application pursuant to 28 U.S.C. § 1782, which permits district courts to order production of testimony or documents 'for use in a proceeding in a foreign ... tribunal.' Zubaydah asked for permission to serve two former CIA contractors with subpoenas requesting information regarding the alleged CIA detention facility in Poland and Zubaydah's treatment there. The Government intervened and asserted the state secrets privilege in opposition to Zubaydah's discovery request.

"The District Court rejected the Government's claim that merely confirming that a detention site was operated in Poland would threaten national security. The District Court nevertheless dismissed Zubaydah's discovery application. It concluded that the state secrets privilege applied to operational details concerning the CIA's cooperation with a foreign government, and that meaningful discovery could not proceed without disclosing privileged information. On appeal, the Ninth Circuit agreed with the District Court that much of the information sought by Zubaydah was protected from disclosure by the state secrets privilege, but the panel majority concluded that the District Court had erred when it dismissed the case. It believed that the state secrets privilege did not apply to publicly known information. The panel majority also concluded that because the CIA contractors were private parties and not Government agents, they could not confirm or deny anything on the Government's behalf. Given these holdings, the panel majority determined that discovery into three topics could continue: the existence of a CIA detention facility in Poland, the conditions of confinement and interrogation at that facility, and Zubaydah's treatment at that location.

"Held: The judgment is reversed, and the case is remanded."

Federal Bureau of Investigation v. Fazaga, 142 S.Ct. 1051 (U.S., Alito, 2022).

"Respondents Yassir Fazaga, Ali Malik, and Yasser Abdel Rahim, members of Muslim communities in California, filed a putative class action against the Federal Bureau of Investigation

and certain Government officials, claiming that the Government subjected them and other Muslims to illegal surveillance under the Foreign Intelligence Surveillance Act of 1978 (FISA). FISA provides special procedures for use when the Government wishes to conduct foreign intelligence surveillance. Relevant here, FISA provides a procedure under which a trial-level court or other authority may consider the legality of electronic surveillance conducted under FISA and order specified forms of relief. See 50 U.S.C. § 1806(f). The Government moved to dismiss most of respondents' claims under the 'state secrets' privilege. See, *e.g., General Dynamics Corp.* v. *United States,* 563 U.S. 478. After reviewing both public and classified filings, the District Court held that the state secrets privilege required dismissal of all respondents' claims against the Government, except for one claim under § 1810, which it dismissed on other grounds. The District Court determined dismissal appropriate because litigation of the dismissed claims 'would require or unjustifiably risk disclosure of secret and classified information.' 884 F. Supp. 2d 1022, 1028–1029. The Ninth Circuit reversed in relevant part, holding that 'Congress intended FISA to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance.' 965 F. 3d 1015, 1052.

"Held: Section 1806(f) does not displace the state secrets privilege."

"(a) The case requires the Court to determine whether FISA affects the availability or scope of the long-established 'Government privilege against court-ordered disclosure of state and military secrets.' *General Dynamics Corp*., 563 U.S., at 484. Congress enacted FISA to provide special procedures for use when the Government wishes to conduct foreign intelligence surveillance in light of the special national-security concerns such surveillance may present. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 402. When information is lawfully gathered pursuant to FISA, § 1806 permits its use in judicial and administrative proceedings but specifies procedures that must be followed before that is done. Subsection (f) of § 1806 permits a court to determine whether information was lawfully gathered 'in camera and ex parte' if the 'Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States.' § 1806(f).

"Central to the parties' argumentation in this Court, and to the Ninth Circuit's decision below, is the correct interpretation of § 1806(f). The Ninth Circuit's conclusion that Congress intended FISA to displace the state secrets privilege rested in part on its conclusion that § 1806(f)'s procedures applied to this case. The Government contends that the Ninth Circuit erred because § 1806(f) is a narrow provision that applies only when an aggrieved person challenges the admissibility of surveillance evidence. Respondents interpret § 1806(f) more broadly, arguing that it also can be triggered when a civil litigant seeks to obtain secret surveillance information, as respondents did here, and when the Government moves to dismiss a case pursuant to the state secrets privilege. The Court does not resolve the parties' dispute about the meaning of § 1806(f) because the Court reverses the Ninth Circuit on an alternative ground."

"(b) Section 1806(f) does not displace the state secrets privilege, for two reasons."

"(1) The text of FISA weighs heavily against the argument that Congress intended FISA to displace the state secrets privilege. The absence of any reference to the state secrets privilege in FISA is strong evidence that the availability of the privilege was not altered when Congress passed the Act. Regardless of whether the state secrets privilege is rooted only in the common law (as respondents argue) or also in the Constitution (as the Government argues), the privilege should not be held to have been abrogated or limited unless Congress has at least used clear statutory language. See

Norfolk Redevelopment and Housing Authority v. *Chesapeake & Potomac Telephone Co. of Va.,* 464 U.S. 30, 35; *Jennings* v. *Rodriguez*, 583 U.S. —, —."

"(2) Even on respondents' interpretation of § 1806(f), nothing about the operation of § 1806(f) is incompatible with the state secrets privilege. Although the Ninth Circuit and respondents view § 1806(f) and the privilege as 'animated by the same concerns' and operating in fundamentally similar ways, that is simply wrong. As an initial matter, it seems clear that the state secrets privilege will not be invoked in the great majority of cases in which § 1806(f) is triggered. And in the few cases in which an aggrieved party, rather than the Government, triggers the application of § 1806(f), no clash exists between the statute and the privilege because they (1) require courts to conduct different inquiries, (2) authorize courts to award different forms of relief, and (3) direct the parties and the courts to follow different procedures.

"First, the central question for courts to determine under § 1806(f) is 'whether the surveillance of the aggrieved person was lawfully authorized and conducted.' By contrast, the state secrets privilege asks whether the disclosure of evidence would harm national security interests, regardless of whether the evidence was lawfully obtained.

"Second, the relief available under the statute and under the privilege differs. Under § 1806, a court has no authority to award any relief to an aggrieved person if it finds the evidence was lawfully obtained, whereas a court considering an assertion of the state secrets privilege may order the disclosure of lawfully obtained evidence if it finds that disclosure would not affect national security. And under respondents' interpretation of § 1806(f), a court must award relief to an aggrieved person against whom evidence was unlawfully obtained, but under the state secrets privilege, lawfulness is not determinative. Moreover, the potential availability of dismissal on the pleadings pursuant to the state secrets privilege shows that the privilege and § 1806(f) operate differently.

"Third, inquiries under § 1806(f) and the state secrets privilege are procedurally different. Section 1806(f) allows 'review in camera and ex parte' of materials 'necessary to determine' whether the surveillance was lawful. Under the state secrets privilege, however, examination of the evidence at issue, 'even by the judge alone, in chambers,' should not be required if the Government shows 'a reasonable danger that compulsion of the evidence' will expose information that 'should not be divulged' in 'the interest of national security.' *United States* v. *Reynolds,* 345 U.S. 1, 10."

"(c) This decision answers the narrow question whether § 1806(f) displaces the state secrets privilege. The Court does not decide which party's interpretation of § 1806(f) is correct, whether the Government's evidence is privileged, or whether the District Court was correct to dismiss respondents' claims on the pleadings."

III. Witnesses

A. Therapy Dog in Court

State v. Cox, No. E2020-01388-CCA-R3-CD (Tenn. Crim. App., Ayers, Feb. 3, 2022), perm. app. denied June 8, 2022.

"This case arises from the sexual abuse of the minor victim by Defendant during a period of time from September 11, 2013, until December 13, 2016. The Scott County Grand Jury returned an

indictment against Defendant charging him with nine counts of aggravated sexual battery and one count of continuous sexual abuse of a child. The State later obtained a superseding indictment charging Defendant with eighty-one counts of rape of a child, one count of aggravated sexual battery, and one count of continuous sexual abuse of a child."

"Defendant contends that trial court erred in allowing the victim to testify at trial with the assistance of a therapy dog because the trial court did not hold an evidentiary hearing concerning the dog's qualifications and necessity of its use by the victim. Defendant further argues that the dog was 'paraded' in and out of the courtroom, 'in front of the jury in blatant defiance of this Court's directive.' The State asserts that the trial court did not abuse its discretion in allowing the victim to use a therapy animal at trial.

"Rule 611 of the Tennessee Rules of Evidence charges the trial court with 'exercis[ing] appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel.' *See State v. Cazes*, 875 S.W.2d 253, 260 (Tenn. 1994). The advisory commission comments to Rule 611 of the Tennessee Rules of Evidence provides:

> Nothing in these rules prohibits the court in its inherent authority from permitting a suitable animal, toy, or support person to accompany a witness who is shown to be at risk or unable to communicate effectively without the aid of such comfort. *See State v. Juan Jose Reyes*, No. M2015-00504-CCA-R3-CD, 2016 WL 3090904 (Tenn. Crim. App., May 24, 2016), perm. app. denied (Tenn. Sept. 23, 2016).

"Tenn. R. Evid. 611 (2017 Advisory Comment) (emphasis added).

"In *State v. Reyes*, 505 S.W.3d 890, 896 (Tenn. Crim. App. 2016), the sole case in Tennessee addressing the use of a therapy dog at trial, which was referred to in the case as a 'facility' dog, this court, relying on *State v. Dye*, 309 P.3d 1192, 1198 (Wash. 2013), *People v. Chenault*, 227 Cal. App. 4th 1503 (Cal. Ct. App. 2014), and *People v. Tohom*, 969 N.Y.S. 2d 123 (NY App. Div. 2013), pointed out that '[w]hile the cases involving the use of a [therapy] dog during trial are not plentiful, it is clear that the evolving law permits their use.' In *Reyes*, the trial court permitted the minor victim of a sexual offense to testify at trial with use of a therapy dog. The court in *Reyes* conducted a pretrial hearing on the defendant's motion in limine concerning the dog's presence in the courtroom during the victim's testimony. Testimony concerning the dog's qualifications and its effect on the minor witness was presented at the hearing. The State explained at the hearing that the therapy dog would not be taken in or out of the courtroom in the jury's presence. *Id.* at 896. The State also indicated that the dog would be positioned in the witness stand in such a manner that it would be partially hidden from the jury's view. *Id.* Furthermore, the trial court instructed the jury to make no inferences concerning the therapy dog's presence nor to allow sympathy to arise from the dog's presence. *Id.* at 898."

"The trial court in this case did not abuse its discretion by allowing Lucia to accompany the victim during her testimony at trial. Although the trial court did not conduct a hearing and make explicit findings concerning Lucia's qualifications and the necessity of the dog's use during trial, this is not mandated by *Reyes* or by Rule 611 of the Tennessee Rules of Evidence. The State's motion set forth that Lucia was trained to accompany victims who suffer from traumatic experience and further set out Lucia's effect on the victim in this case.

"We disagree with Defendant's characterization that the Lucia was paraded 'in and out of the courtroom, in front of the jury, in blatant defiance of this court's directive.' In *Reyes*, this court quoted the court in *Chenault*, in which the court explained that the trial court should 'attempt to make the presence of the support dog as unobtrusive and as least disruptive as reasonably possible.' *Reyes*, 505 S.W.3d at 896 (quoting *Chenault*, 227 Cal. App. 4th at 1517). In this case, the witness stand was rearranged to limit the jury's view of the dog. While Lucia was brought into the courtroom in front of the jury, there is nothing in the record to indicate that this was done in an obtrusive or disruptive manner. Also, the record is not clear as to whether the dog left the courtroom in front of the jury. At the hearing on the motion for new trial, the trial court specifically stated that it did not recall Lucia 'having any play in a question by the jury or anything of that nature.' The trial court further noted that the dog's presence at trial was a 'very neutral event and would not raise error that – that's steeped in prejudice' and that 'the dog was basically a non-event.' As for its reasoning for allowing Lucia to enter the courtroom in front of the jury, the trial court said:

> As far as bringing the dog in, I will do that every time because what I've learned over the years is you don't fool the jury. You don't hide the dog because somebody will see that dog and then all of a sudden, it takes on a life of its own. I would rather give full disclosure to what the dog is, let them see the dog, as I recall, this may have been one -- no, in Claiborne County she fell asleep. I mean, she just -- the dog just fell asleep. We forgot about her for about an hour. My point is having a jury wonder about what this animal or a stuffed animal or whatever it is, is a whole lot worse than just telling them up front, this is what this animal does, this is why it's here, you are not to place any significance on it, you're not to have any -- it should not have any [e]ffect on your weighing the credibility of the witnesses. It's simply here to draw comfort for this particular witness and can be drawing comfort for any witness. I'll stand on that one all day long. I guess I want to be in the record, because I -- fooling the jury is a mistake. You don't leave shells left to turn over for a jury because they will wonder about it. I've had too many questions from juries come in about what about this. You know, we didn't -- we didn't explain that, and that potentially can lead to bad verdicts. As far as I recall, this left no questions.

"The trial court's logic was not incorrect or unreasonable. Additionally, as was done in *Reyes*, the trial court gave the jury a special instruction concerning use of the therapy dog:

> The law allows either the prosecution or the defense to use a facility dog during the testimony of witnesses. This dog is not a pet, does not belong to any witness. It is a highly trained professional animal available for use by either side. The presence of the facility dog is in no way to be interpreted as reflecting upon the credibility of any witness. You may not draw any inference either favorably or negatively for or against either the prosecution or the defense because of the dog's presence and should attach no significance to the use of a facility dog by any side or witness.
>
> You may also – you also may not allow any sympathy or prejudice to enter into your consideration of the evidence during deliberations merely because of the use of a facility dog.

"*See Reyes*, 505 S.W.3d at 897. Jurors are presumed to follow the instructions of the trial court. *State v. Reid*, 164 S.W.3d 286, 342 (Tenn. 2005). The trial court did not abuse its discretion by allowing the victim to testify with the assistance of a therapy dog. Defendant is not entitled to relief on this issue."

B. Child Victim's Testimony by Closed Circuit Television

Chapter 1115, Public Acts 2022, amending T.C.A. § 24-7-120 eff. July 1, 2022.

The statute that allows a child victim of various crimes to testify via two-way closed circuit television has been modified to apply to any such victim under age eighteen. The prior statute applied to children thirteen years of age and younger.

IV. Expert Testimony, Rules 702 and 703

A. Admissibility of Probabilistic Genotyping DNA Analysis

State v. Watkins, No. M2020-00035-CCA-R3-CD (Tenn. Crim. App., Montgomery, Dec. 16, 2021), perm. app. denied June 8, 2022.

"The Defendant, Demontez D. Watkins, was convicted by a Davidson County Criminal Court jury of first degree felony murder; two counts of attempted first degree premeditated murder, a Class A felony; second degree murder, a Class A felony; attempted especially aggravated robbery, a Class B felony; and two counts of employing a firearm in the commission of a dangerous felony, a Class C felony. *See* T.C.A. §§ 39-13-202(a)(2) (2018) (first degree murder), 39-13-210 (2014) (subsequently amended) (second degree murder); 39-13-403 (2018) (especially aggravated robbery); 39-17-1324(b)(1), (2) (2018) (employing a firearm during the commission of a dangerous felony); 39-12-101 (2018) (criminal attempt). The trial court merged the first degree felony murder and second degree murder convictions and imposed an effective sentence of life plus twenty-seven years. On appeal, the Defendant contends that: (1) the evidence is insufficient to support his convictions, (2) the trial court erred in admitting expert testimony regarding probabilistic genotyping regarding DNA evidence, (3) the court erred in denying his motion to suppress his pretrial statement, (4) the court erred in admitting evidence because the chain of custody was not adequately shown, and (5) the court erred in imposing consecutive sentencing. We affirm the judgments of the trial court."

"The Defendant contends that the trial court abused its discretion in denying his motion to exclude evidence related to the DNA evidence. The record reflects that the State obtained evidence which showed, through probabilistic genotyping DNA analysis, that the DNA mixture collected from the victim's pants pocket contained DNA that was 470,000 times more likely to have come from the Defendant than from an unrelated person. The parties engaged in substantial pretrial litigation regarding the State's proposed evidence. The Defendant sought exclusion of the evidence pursuant to Tennessee Rules of Evidence 104, 702, and 703; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 573 (1993); and *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997). The trial court denied the motion to exclude the evidence. The Defendant argues in his brief that the evidence should have been excluded because (1) probabilistic genotyping and its use of a likelihood ratio are 'not foundationally valid' and do not substantially assist the trier of fact in understanding the evidence or determining a fact in issue, (2) the TrueAllele software used to generate the analysis is not reliable because it was not properly validated in this case, and (3) the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. At oral argument, the Defendant further refined his argument. Defense counsel argued, '[The Defendant] is not arguing that probabilistic genotyping is not valid in certain circumstances. Indeed it is.' Rather, counsel argued, the issue before this court was how many contributors could be

involved in a mixture before the science became unreliable. The State counters that the trial court did not abuse its discretion in admitting the evidence. Our research reflects that the question of the admissibility of probabilistic genotyping evidence is one of first impression for a Tennessee appellate court.

"Tennessee Rule of Evidence 702 provides the following foundation for the admission of expert testimony:

> If 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.

"Rule 703 provides, 'The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.' In *McDaniel*, our supreme court listed the following nonexclusive factors a trial court may consider 'in determining reliability' of proposed expert testimony:

> (1) whether scientific 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.

"955 S.W.2d at 265. Our supreme court has also said that, in assessing the reliability of an expert's methodology, a trial court may consider the expert's qualifications and the connection between the expert's knowledge and the basis of his or her opinion. *See Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 274-75 (Tenn. 2005). '[Q]uestions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of trial court.' *McDaniel*, 955 S.W.2d at 263; *see State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). An appellate court may disturb the trial court's ruling only if the trial court abused or arbitrarily exercised its discretion. *McDaniel*, 955 S.W.2d at 263-64; *see State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000).

"As regards expert evidence of DNA analysis, our legislature has recognized the general trustworthiness and reliability of such evidence by enacting a statute providing for its admissibility:

> (a) As used in this section, unless the context otherwise requires, 'DNA analysis' means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes.
> (b) (1) In any civil or criminal trial, hearing or proceeding, the results of DNA analysis, as defined in subsection (a), are admissible in evidence without antecedent expert testimony that DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material upon a showing that the offered testimony meets the standards of admissibility set forth in the Tennessee Rules of Evidence.
> (2) Nothing in this section shall be construed as prohibiting any party in a civil or criminal trial from offering proof that DNA analysis does not provide a trustworthy and reliable

method of identifying characteristics in an individual's genetic material, nor shall it prohibit a party from cross-examining the other party's expert as to the lack of trustworthiness and reliability of such analysis.

(c) In any civil or criminal trial, hearing or proceeding, statistical population frequency evidence, based on genetic or blood test results, is admissible in evidence to demonstrate the fraction of the population that would have the same combination of genetic markers as was found in a specific biological specimen. For purposes of this subsection (c), 'genetic marker' means the various blood types or DNA types that an individual may possess.

"T.C.A. § 24-7-118 (2017) (formerly codified at § 24-7-117).

"As we have stated, the issue of the admissibility of DNA analysis involving probabilistic genotyping is one of first impression in Tennessee. The Defendant acknowledges that evidence of DNA analysis is generally admissible pursuant to Code section 24-7-118 but argues that the statute 'narrowly defines' DNA analysis in a manner that includes '"traditional" DNA analysis' involving comparison of a known DNA sample with 'a single-source sample or simple mixture of two individuals where one of the contributors is known' and does not contemplate 'the subsequent statistical analysis of the [MNPD Crime Laboratory's] findings by a computer program like TrueAllele.' We are unpersuaded by the Defendant's argument. The record reflects that the initial processing of the DNA evidence was completed by the MNPD Crime Laboratory and that Mr. DeBlanc and another, unnamed individual separately concluded that the computations required for further analysis of the mixture were beyond human capacity and that computer analysis was needed. Cybergenetics used TrueAllele's established mathematical and statistical methodology to complete the computations.

"The trial court conducted lengthy hearings regarding the admissibility of the DNA evidence developed through probabilistic genotyping. After receiving the evidence, the court engaged in a *McDaniel* analysis and determined that the evidence was admissible."

"After receiving the testimony and the voluminous documentary and audiovisual exhibits, the trial court entered its order denying the Defendant's motion to exclude the evidence. As we have stated, the court conducted an analysis pursuant to the Rules of Evidence and *McDaniel*.

"Our analysis begins with the question of whether the proper analysis of the question of admissibility of probabilistic DNA evidence involves Code section 24-7-118, or whether the statute does not apply and, instead, the full *McDaniel* analysis is proper. In that regard, we observe that despite the lack of guidance in Tennessee specific to probabilistic genotyping evidence, our supreme court has had the opportunity to consider whether Code section 24-7-118 applies to different scientific methods of DNA analysis.

"To date, our supreme court has resisted efforts to limit application of the DNA admissibility statute to only certain types of DNA analysis. In applying the statute to evidence involving polymerase chain reaction (PCR) analysis of DNA evidence, our supreme court has said that the evidence is admissible pursuant to the statute but that the parties 'are nevertheless allowed to offer proof that DNA analysis is not trustworthy and reliable' and that such evidence 'will go to the weight, not the admissibility, of DNA evidence.' *State v. Begley*, 956 S.W.2d 471, 478 (Tenn. 1997) ('For example, a party can challenge the reliability of a particular test in any given case by a showing of sloppy handling of samples, failure to train the personnel performing the testing, failure to follow protocol, and the like.'); *see State v. Reid*, 164 S.W.3d 286, 336 (Tenn. 2005). In a case involving

mitochondrial DNA (mtDNA), the supreme court held that the plain language of the statute compelled a conclusion that the trial court did not err in denying the defendant's request for a pretrial hearing on the admissibility of DNA evidence. *See Scott*, 33 S.W.3d at 756-59 ('Because the very purpose of a *McDaniel* hearing is to determine the *reliability* of scientific or technical evidence, it would make little sense for this Court to require such a hearing for evidence that is statutorily admissible without antecedent testimony that it is a reliable method of identification.'). A panel of this court has applied the statute to a question of admissibility of restriction fragment length polymorphism (RFLP) DNA analysis and associated statistical probability evidence. *See State v. James Thomas Manning*, No. M2004-03035-CCA-R3-CD, 2006 WL 163636, at *3-6 (Tenn. Crim. App. Jan. 24, 2006), *perm. app. denied* (Tenn. May 1, 2006).

"We acknowledge that the science regarding DNA analysis is advancing. However, the plain language of the DNA admissibility statute is clear, and our supreme court has enforced it accordingly: Evidence of DNA analysis involving comparison of a human biological specimen with another biological specimen for identification purposes is admissible, and no foundational testimony regarding trustworthiness and reliability is required, provided the evidence is otherwise admissible in accord with the Tennessee Rules of Evidence. *See* T.C.A. § 24-7-118(a), (b)(1). While a party may cross-examine a DNA expert about the trustworthiness and reliability of the evidence, such evidence goes to the weight to be afforded the evidence, not to its admissibility. *See id.* at (b)(2). The statute makes no distinction as to the admissibility of various methods of DNA analysis, and to date, our supreme court has not recognized any exceptions to our legislature's broad rule relative to the admissibility of DNA analysis evidence. As an intermediate appellate court, we are compelled to follow the statutes promulgated by our legislature and are guided by our supreme court's prior interpretations of those statutes.

"As applied to the facts of this case, Code section 24-7-118 provides for the admissibility of DNA evidence regarding identification, and the record reflects the trial court's finding that the probabilistic genotyping evidence offered by the State was relevant and material to the question of the Defendant's identity as a perpetrator of the crimes. *See* Tenn. R. Evid. 401, 402. The court's findings addressed the requirement of Rule 702 that the evidence must substantially assist the trier of fact. With respect to these matters, the court stated:

> Here, the Court finds the TrueAllele analysis relevant under Rule 401 because it tends to identify the Defendant as a participant in the aggravated robbery. The State's proposed expert, Dr. Mark Perlin, was shown to be extensively qualified, by education and experience, in the fields of DNA interpretation and computer science. His testimony would substantially assist the jury to understand the complex genotyping evidence.

"Although Dr. Perlin ultimately did not testify at the trial, the court accepted Cybergenetics employee Jennifer Hornyak as an expert in forensic DNA and probabilistic genotyping at the trial. As our supreme court has recognized, the requirement of Rule 703 that the evidence be trustworthy has been addressed by Code section 24-7-118's acceptance of DNA identification evidence as trustworthy and reliable. *See Begley*, 956 S.W.2d at 477.

"We conclude that based on our supreme court's decisions analyzing Code section 24-7-118, probabilistic genotyping DNA analysis is 'DNA analysis' encompassed by the broad language of the statute. As a result, there is no threshold admissibility requirement pursuant *McDaniel* for admission of DNA analysis which utilizes probabilistic genotyping and otherwise meets the standards of admissibility set for in the Tennessee Rules of Evidence. The record reflects that the

court considered and made findings relative to the relevant Rules of Evidence, and those findings are supported by the record. We conclude that the trial court did not abuse its discretion in admitting the evidence.

"The Defendant argues that the evidence of the likelihood ratio should have been excluded pursuant to Tennessee Rule of Evidence 403 because its probative value was substantially outweighed by the danger of unfair prejudice. He argues that the likelihood ratio evidence was too difficult for the jury to understand without misinterpretation. As we have stated, the trial court found that the probabilistic genotyping evidence would substantially assist the trier of fact, and Code section 24-7-118 provides for the admissibility of DNA identification evidence. The record reflects that the likelihood ratio is a component of probabilistic genotyping DNA identification evidence and that it explains the relative strength or weakness of the association between the known sample and the unknown mixture. Thus, it is an integral part of the probabilistic genotyping DNA identification evidence. The question of whether the likelihood ratio evidence's probative value outweighs the danger of unfair prejudice is answered by the trial court's finding that the probabilistic genotyping evidence was relevant, probative, and would substantially assist the trier of fact. We conclude after a review of the record and the relevant law that Rule 403 did not bar the admission of the likelihood ratio evidence.

"We note that the Defendant has not alleged that he was prevented from cross-examining the State's experts about the trustworthiness and reliability of the DNA evidence. *See* T.C.A. § 24-7-118. In his brief, the Defendant argues that TrueAllele has not been shown to be reliable and trustworthy for DNA analysis for complex mixtures involving as many as seven contributors or for mixtures that may involve related persons. The record reflects that the defense thoroughly explored these issues at the trial, both on cross-examination of the State's witnesses and through the testimony of a defense expert. As contemplated by the statute, the weight and credibility to be afforded to the DNA identification evidence was placed before the jury. The Defendant is not entitled to relief on this basis."

B. Post-Conviction Fingerprint Analysis Act

Smith v. State, No. M2021-01339-CCA-R3-PD (Tenn. Crim. App., Easter, Mar. 23, 2022), perm. app. denied Apr. 6, 2022.

"Petitioner, Oscar Smith, a death row inmate, appeals from the Davidson County Criminal Court's summary dismissal of his petition requesting analysis of evidence pursuant to the Post-Conviction Fingerprint Analysis Act of 2021. Based upon our review of the record, oral arguments, and the parties' briefs, we affirm the judgment of the post-conviction court.

"Over 32 years ago, Petitioner murdered his estranged wife, Judith (Judy) Lynn Smith, and her two minor children, Chad and Jason Burnett, at their home in Nashville. *State v. Smith*, 868 S.W.2d 561 (Tenn. 1993). He received death sentences for each of the three murders. *Id.* As to the murder of Ms. Smith, the jury found the murder was especially heinous, atrocious, or cruel and that Petitioner committed mass murder. T.C.A. §§ 39-2-203(i)(5) and (12) (1982). In addition to these two aggravating circumstances, the jury also found two more aggravators for the murders of the two children: the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution and the murder was committed during the perpetration of the murder of Ms. Smith. T.C.A. §§ 39-2-203(6) and (7) (1982). Petitioner's convictions and sentences were upheld on direct appeal. *Smith*, 868 S.W.2d at 582. He was unsuccessful in his subsequent pursuit

of state post-conviction and federal habeas corpus relief. *Oscar Franklin Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998), *perm. app. denied* (Tenn. Jan. 25, 1999); *Oscar Smith v. Ricky Bell, Warden*, No. 3:99-0731, 2005 WL 2416504 (M.D. Tenn. Sep. 30, 2005), *vacated sub nom. Smith v. Colson*, 566 U.S. 901 (2012) (Order); *Oscar Smith v. Tony May, Warden*, No. 18-5133, 2018 WL 7247244 (6th Cir. Aug. 22, 2018)."

"This is a case of first impression involving statutory construction of the Fingerprint Act."

"The Fingerprint Act permits an appropriate party, such as Petitioner in this case, to file a petition, *at any time*, 'requesting the performance of fingerprint analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in a judgment of conviction and that may contain fingerprint evidence.' T.C.A. § 40-30-403. Depending on the situation, and after notice to the prosecution and an opportunity to respond, the trial court *shall* or *may* order the requested fingerprint analysis. *Compare* T.C.A. § 40-30-404(1) (the court *shall* order analysis if '[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis') *with* T.C.A. § 40-30-405(1) (the court *may* order analysis if '[a] reasonable probability exists that analysis of the evidence will produce fingerprint results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction'). Both Sections 404 and 405 presume the evidence is still available and in such a condition susceptible to analysis, that it has not already been subjected to the type of analysis being sought by the petition, and that the petition is not being made to unreasonably delay execution of the sentence. T.C.A. §§ 40-30-404(2) to (4) and 405(2) to (4). Petitioner filed his petition pursuant to Section 405. Thus, our analysis will be confined to the terms of that section. As noted above, the trial court has the discretion to order analysis under Section 405.

"If the trial court decides to order analysis, based upon the satisfaction of the requirements of Section 405,

> the court must select the laboratory used by the original investigating agency if the laboratory is capable of performing the required analysis. If the laboratory used by the original investigating agency is not capable of performing the required analysis, the court shall select a laboratory that the court deems appropriate.

"T.C.A. § 40-30-410. The Fingerprint Act also requires the court to order both parties to produce the reports from any previous independent fingerprint analysis. *Id.* § 40-30-408. Section 408 provides, in its entirety:

> If evidence has previously been subjected to fingerprint analysis by either the prosecution or defense, the court may order the prosecution or defense to provide all parties and the court with access to the laboratory reports prepared in connection with the fingerprint analysis, as well as the underlying data and laboratory notes. If any fingerprint or other evidence analysis was previously conducted by either the prosecution or defense without knowledge of the other party, the analysis shall be revealed in the motion for analysis or response, if any. If the court orders fingerprint analysis in connection with a proceeding brought under this part, the court shall order the production of any laboratory reports prepared in connection with the fingerprint analysis and may, in the court's discretion, order production of the underlying data and laboratory notes.

"*Id.* It is clear this section contemplates a situation where, like in this case, a party already obtained independent analysis before filing its petition under Section 403. Section 408 obviously precedes Section 410 which requires a court, if it grants the petition and orders analysis, to select the original (or similar) lab that conducted the analysis in the first instance.

"Finally, if the results of the court-ordered fingerprint analysis are not favorable to Petitioner, the trial court is directed to dismiss the petition. T.C.A. § 40-30-412. If, however, the results are favorable, the court shall then schedule a hearing and thereafter issue any order required by the Rules of Criminal Procedure or the Post-Conviction Procedure Act. *Id.*"

"In support of the instant petition, Petitioner again secured the services of Bright-Birnbaum on his own accord. Bright-Birnbaum's recent 'Declaration,' signed and dated June 29, 2021, is attached to the petition. Bright-Birnbaum states 'the prevailing accepted analysis, procedures and articulation of latent print examination has significantly changed' since 1990. To that end, she states:

> It is no longer accepted to make a match solely on a specified number of points. (Another change is that identifications are no longer testified to as absolute.) Instead of simply counting the number of 'points,' latent print examiners in the United States and most other countries around the world utilize three levels of detail, using both quantitative-qualitative measures.

"Having examined the bloody palm print (which she says is of poor 'clarity/quality') pursuant to the quantitative-qualitative model, Bright-Birnbaum opined 'the evidence is *inconclusive* as to whether [Petitioner] is the source of the palm print from the crime scene.' (Emphasis added). She further stated, 'Mr. Hunter utilized outdated analysis that focused exclusively upon the number of points to make a comparison. In my opinion, there is insufficient support for Mr. Hunter's conclusion of identification of the print using current analysis procedures.' Bright-Birnbaum concluded her report by stating: 'It is my professional opinion, to a reasonable degree of scientific certainty under the currently accepted standards for latent print identification, that Mr. Hunter's conclusion that the bloody print on the bed left 'no doubt' as to the identity of the perpetrator is not supported.'

"After discussing the Fingerprint Act and pertinent case law, the trial court initially determined Petitioner satisfied three of the four requirements of Section 405. *See* T.C.A. § 40-30-405(2) to (4). However, it ultimately concluded that no reasonable probability existed that the jury would have returned a more favorable verdict or sentence if expert testimony had been offered for the opinion that the source of the bloody palm print could not be identified. *See* T.C.A. § 40-30-405(1). The trial court thus ruled that Petitioner was not entitled to court-ordered fingerprint analysis. The trial court also ruled Petitioner failed to satisfy all four requirements of Section 404."

"The trial court found no reasonable probability the jury would have returned a more favorable verdict or sentence if evidence was presented at the time of trial that the source of the bloody palm print was inconclusive. T.C.A. § 40-30-405(1). There is substantial evidence in the records to support that conclusion. Again, '[a] reasonable probability of a different result exists when potentially favorable [fingerprint] results "undermine the confidence in the outcome of the prosecution."' *Charles Elsea*, 2018 WL 2363589, at *4. As the trial court observed, 'the State possessed extensive circumstantial evidence against Petitioner other than the palm print, including (1) Petitioner's prior threats against and/or prior violence involving the victims; (2) a neighbor seeing Petitioner's car in the victims' driveway the night of the murders; (3) life insurance policies

taken out by Petitioner on the lives of the three victims, and (4) one of the child victims yelling out "Frank, no!" on the 911 recording.' Moreover, as the trial court noted, '[t]he evidence introduced at trial suggested Petitioner (and nobody else) had motive to kill the victims.' Two of Petitioner's co-workers testified Petitioner solicited them to kill his wife. Likewise, as summarized above, evidence, in addition to the neighbor's testimony, was introduced to contest Petitioner's alibi defense. The jury also learned Petitioner referred to his estranged wife in the past tense during questioning by the police and he did not 'ask the officers the logical questions of where, when, how and by whom' when he was informed about the murders. *Oscar Smith*, 2005 WL 2416504, at *4. The post-conviction evidence also revealed Petitioner 'was not contesting that the print was his; he was claiming that someone planted the print at the scene.' *Oscar Franklin Smith*, 1998 WL 345353, at *15. Even Bright-Birnbaum could not conclusively state Petitioner did not leave the bloody palm print at the crime scene."

"Pursuant to the discussion above, the ruling of the post-conviction court is affirmed."

C. Admissibility of Expert Testimony Regarding Human Remains Detection Dog's Alert

State v. Cannon, 642 S.W.3d 401 (Tenn. Crim. App., Wedemeyer, 2021), perm. app. denied Jan. 14, 2022.

"A Davidson County jury convicted the Defendant, Caleb Josiah Cannon, of premeditated first-degree murder, and the trial court sentenced him to life in prison. On appeal, the Defendant contends that: (1) the trial court erred when it denied his motion *in limine* to exclude evidence that a human remains detection dog alerted to the presence of the scent of human remains in the Defendant's home and car; (2) the evidence is insufficient to prove that the victim was deceased or that the Defendant caused her death; (3) the trial court erred when it admitted testimony from a witness identifying him in court because such testimony was tainted; and (4) the trial court erred when it excluded defense proof. After review, we affirm the judgment of the trial court.

"This case arises from the disappearance of Nicole Burgess, who was last seen by the Defendant, the father of one of her sons. A Davidson County grand jury indicted the Defendant for one count of premeditated first-degree murder."

"The Defendant contends that the trial court erred when it did not exclude the expert testimony regarding the searches of the HRD dogs because the dogs' alerts were not corroborated by 'scientific verification of the presence of human remains.' He contends that this error harmed him because it allowed the State to argue that it had proven beyond a reasonable doubt that the victim was dead based upon the alerts of the HRD dogs. The Defendant further contends that the trial court used an improper standard when deciding this issue and that the dogs in this case were not reliable. The Innocence Project filed an *amicus curiae* brief in which it argued that the trial court erred in admitting the dog evidence and that such error was 'highly prejudicial.' The State counters that the trial court used the correct standard, that the dogs' findings were corroborated by other evidence, and that the trial court did not err.

"The trial court possesses the sound discretion to determine the admissibility of evidence, and we review a trial court's denial of a motion *in limine* to restrict the admission of evidence under an abuse of discretion standard. *See State v. Robinson*, 146 S.W.3d 469, 490 (Tenn. 2004). More particularly, a trial court's decisions regarding the admissibility of expert evidence are reviewed for abuse of discretion. *State v. Schiefelbein*, 230 S.W.3d 88, 130 (Tenn. Crim. App. 2007); *State v.*

Rhoden, 739 S.W.2d 6, 13 (Tenn. Crim. App. 1987). A trial court does not abuse its discretion unless it 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.' *State v. Herron*, 461 S.W.3d 890, 904 (Tenn. 2015).

"The criteria for the admissibility of expert testimony is set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). The admission of expert testimony is governed by Tennessee Rules of Evidence 702 and 703. *State v. Copeland*, 226 S.W.3d 287, 301 (Tenn. 2007) (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 273 (Tenn. 2005)). Rule 702 provides, 'If 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. Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made 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. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

"Tenn. R. Evid. 703. It is well-settled that 'the allowance of expert testimony, the qualifications of expert witnesses, and the relevancy and competency of expert testimony are matters which rest within the sound discretion of the trial court.'

"In *Daubert*, the United States Supreme Court held that Federal Rule of Evidence 702 requires that a trial court 'ensure that any and all scientific testimony ... is not only relevant, but reliable.' 509 U.S. at 589, 113 S.Ct. 2786. Our supreme court, in *McDaniel*, set forth the following list of factors for determining the reliability of scientific evidence:

> (1) whether scientific 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.

"955 S.W.2d at 265. Rigid application of these factors is unnecessary. *Copeland*, 226 S.W.3d at 302. Not all expert testimony will 'fit' with these factors, thus, the exact considerations that may be appropriate will vary depending upon 'the nature of the issue, the witness's particular expertise, and the subject of the expert's testimony.' *Brown*, 181 S.W.3d at 277.

"The trial court in this case allowed expert testimony by multiple witnesses that their HRD dogs alerted to the presence of human remains in two places in the victim's house and in the trunk of the Defendant's car. Neither this court, nor any court in Tennessee, has ruled on the admissibility of expert testimony regarding an HRD dog's alert.

"This court has discussed trailing scent dogs, the admissibility of expert testimony regarding their alerts, and the necessary foundation required for the admission of evidence of a scent dog, namely a trailing dog. In *State v. Barger*, 612 S.W.2d 485, 491 (Tenn. Crim. App. 1980), the defendant contended that the trial court had erred by admitting evidence that a bloodhound had tracked the defendant's scent to stolen merchandise. The *Barger* court noted that: 'The majority rule in the United States, held by twenty-two states including Tennessee, provides that if a proper foundation is laid, evidence of trailing by bloodhounds is admissible.' *Id.* (citations omitted). It further noted that there was a five-step procedure to be followed to establish a requisite foundation. *Id.* (citing *People v. Centolella*, 61 Misc. 2d 726, 305 N.Y.S.2d 460 (Oneida County Ct. 1969); *Copley v. State*, 153 Tenn. 189, 281 S.W. 460 (1926)).

"The *Barger* court went on to delineate those five steps as follows:

> (1) Pure blood. The dog must be of pure blood, and of a stock characterized by acuteness of scent and power of discrimination. *Copley, supra*, 153 Tenn. at 194, 195, 281 S.W. 460; *People v. Centolella*, supra, 305 N.Y.S.2d at 462; *State v. McLeod*, 196 N.C. 542, 146 S.E. 409, 411 (1929); *Pedigo v. Commonwealth*, 103 Ky. 41, 44 S.W. 143, 145 (1898); *State v. Steely*, 327 Mo. 16, 33 S.W.2d 938, 940 (1930)....
>
> (2) Proper training. The dog must possess 'acuteness of scent and power of discrimination,' and must have been accustomed and trained to track human scents. *Copley, supra*, 153 Tenn. at 195-96, 281 S.W. 460; *People v. Centolella, supra*, 305 N.Y.S.2d at 462; *McLeod, supra*, 146 S.E. at 411; *Pedigo, supra*, 44 S.W. at 145; *State v. Harrison*, 149 La. 83, 88 So. 696, 697 (1921); *Moore v. State*, 26 Ala. App. 607, 164 So. 761, 762 (1935)....
>
> (3) History of reliability. The dog must be shown by experience in actual cases to be reliable in tracking humans. *Copley, supra*, 153 Tenn. at 195-96, 281 S.W. 460; *People v. Centolella, supra*, 305 N.Y.S.2d at 462; *McLeod, supra*, 146 S.E. at 411; *Pedigo, supra*, 44 S.W. at 145-46; *Steely, supra*, 33 S.W.2d at 940; *Harris v. State*, 143 Miss. 102, 108 So. 446, 447 (1926)....
>
> (4) Placed at reliable point. The dog must have been placed on the trail at a spot where the suspect in the crime was known to have been, *People v. Centolella, supra*, 305 N.Y.S.2d at 463, 'or on a track which the circumstances indicated to have been made by him.' *Copley*, supra, 153 Tenn. at 195, 281 S.W. 460. *See also Terrell* [*v. State*]*, supra*, [3 Md.App. 340] 239 A.2d [128] at 138 [(1968)]; *McLeod, supra*, 146 S.E. at 411....
>
> (5) Placed within period of efficiency. The dog must be placed upon the trail within its period of efficiency, i.e., before rainstorms or the passage of time have weakened the scent beyond the point of reliability. *Copley, supra*, 153 Tenn. at 196-97, 281 S.W. 460; *People v. Centolella, supra*, 305 N.Y.S.2d at 463-64; *State v. Brown*, 103 S.C. 437, 88 S.E. 21, 23 (1916)....

"*Barger*, 612 S.W.2d at 491-492. Based upon these factors, the *Barger* court ruled that the trial court had not erred when it admitted the scent-dog evidence. *Id.* Although our court found the evidence admissible in *Barger*, it suggested that the jury should be cautioned that the performance of the scent dog is not infallible, should not be given undue weight, and is not alone sufficient to convict. *Id.* at 492-93; *see also State v. Brewer*, 875 S.W.2d 298 (Tenn. Crim. App. 1993)."

"Tennessee law has not excluded dog scent evidence as unreliable and, as previously stated, the *Barger* court delineated a five-step standard for determining the reliability. We hold herein that the five-step standard for determining the reliability of tracking and trailing scent dogs articulated in *Barger* and *Brewer* is applicable to HRD dogs. In sum, we conclude that expert testimony about an HRD dog's alert is sufficiently reliable under *Daubert* and *McDaniel* standard if the proponent of the evidence establishes the foundation that: (1) the dog is of a breed and type that is well-suited for HRD work; (2) the dog must have been accustomed and trained to alert to the scent of human remains; (3) the dog must be shown by experience to be reliable in detecting human remains; (4) the dog must have been taken to a location where a crime was known to have occurred or where there is circumstantial evidence to corroborate the dog's alert; (5) the dog must be taken to the location or search the location within its period of efficiency.

"The Defendant contends that the trial court applied the improper standard when reviewing the expert testimony. He argues that the trial court rejected engaging in an analysis pursuant to *McDaniel* or *Daubert,* finding it 'unnecessary' in light of the standard articulated in *Barger* and *Brewer*. We disagree. Both *Barger* and *Brewer* are cases involving scent dogs that specifically discussed the analysis a trial court should engage in pursuant to *McDaniel* and *Daubert.* Both *McDaniel* and *Daubert* govern the determination of the reliability of all expert testimony, and *Barger* and *Brewer* make that examination more specific to scent dogs. We conclude that these standards apply to the trial court's determinations, and that the trial court in this case did not apply an incorrect standard.

"The Defendant next contends that expert testimony about uncorroborated cadaver dog scent alerts must be excluded. The Defendant relies heavily on testimony from his expert, Carl Alexander, who said that HRD dogs may not be able to distinguish between items shed by humans every day, i.e. hair and blood, and human remains. The amicus curiae brief by The Innocence Project also takes issue with the lack of corroboration.

"After review of the testimony, arguments, and briefs, none of it persuades this court that the trial court erroneously exercised its discretion when it deemed the canine scent evidence admissible. Neither *Daubert*, *McDaniel*, nor Tennessee Rules of Evidence 702 and 703 conditioned the admissibility of expert opinion testimony on it being unassailable. Several of the factors that may be considered clearly establish that something less than complete accuracy is acceptable. Where to draw that line is a decision to be made by the trial court in exercising its discretion after considering all the relevant factors. Any deficiencies in the theory, methodology, or application can be explored on cross-examination, and the jury can then give the opinion whatever weight it deems appropriate."

V. Material Evidence Supports Jury Verdict; Application of Sixth Amendment Confrontation Clause to Testimonial Evidence

Hemphill v. New York, 142 S.Ct. 681 (U.S., Sotomayor, 2022).

"In April 2006, a stray 9-millimeter bullet killed a 2-year-old child after a street fight in the Bronx. Eyewitnesses described the shooter as wearing a blue shirt or sweater. Police officers determined Ronnell Gilliam was involved and that Nicholas Morris had been at the scene. A search of Morris' apartment revealed a 9-millimeter cartridge and three .357-caliber bullets. Gilliam initially identified Morris as the shooter, but he subsequently said that Darrell Hemphill, Gilliam's cousin,

was the shooter. Not crediting Gilliam's recantation, the State charged Morris with the child's murder and possession of a 9-millimeter handgun. In a subsequent plea deal, the State agreed to dismiss the murder charges against Morris if he pleaded guilty to a new charge of possession of a .357 revolver, a weapon that had not killed the victim. Years later, the State indicted Hemphill for the child's murder after learning that Hemphill's DNA matched a blue sweater found in Gilliam's apartment shortly after the murder. At his trial, Hemphill elicited undisputed testimony from a prosecution witness that police had recovered 9-millimeter ammunition from Morris' apartment, thus pointing to Morris as the culprit. Morris was not available to testify at Hemphill's trial because he was outside the United States. Relying on *People* v. *Reid*, 19 N.Y.3d 382, 388, 971 N.E. 2d 353, 357, and over the objection of Hemphill's counsel, the trial court allowed the State to introduce parts of the transcript of Morris' plea allocution to the .357 gun possession charge as evidence to rebut Hemphill's theory that Morris committed the murder. The court reasoned that although Morris' out-of-court statements had not been subjected to cross-examination, Hemphill's arguments and evidence had 'opened the door' and admission of the statements was reasonably necessary to correct the misleading impression Hemphill had created. The State, in its closing argument, cited Morris' plea allocution and emphasized that possession of a .357 revolver, not murder, was the crime Morris committed. The jury found Hemphill guilty. Both the New York Appellate Division and the Court of Appeals affirmed Hemphill's conviction.

"Held: The trial court's admission of the transcript of Morris' plea allocution over Hemphill's objection violated Hemphill's Sixth Amendment right to confront the witnesses against him."

"(a) The State's threshold argument—that Hemphill's failure to present his claim adequately to the state courts should prevent the Court from deciding his federal-law challenge to the state-court decision—is rejected. Hemphill satisfied the presentation requirement in state court. See *Street* v. *New York*, 394 U.S. 576, 584. At every level of his proceedings in state court, Hemphill argued that the admission of Morris' plea allocution violated his Sixth Amendment right to confrontation as interpreted by this Court. And '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim.' *Yee* v. *Escondido*, 503 U.S. 519, 534."

"(b) The Confrontation Clause of the Sixth Amendment provides a criminal defendant the bedrock right 'to be confronted with the witnesses against him.' In *Crawford* v. *Washington*, 541 U.S. 36, the Court examined the history of the confrontation right at common law and concluded that 'the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure,' which allowed the 'use of *ex parte* examinations as evidence against the accused.' *Id*., at 50. The *Crawford* Court reasoned that because 'the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts,' the confrontation guarantee was 'most naturally read' to admit 'only those exceptions established at the time of the founding.' *Id*., at 54; see also *Giles* v. *California*, 554 U.S. 353, 377. Because 'the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination,' the Court rejected its previous 'reliability approach' to the Sixth Amendment's confrontation right described in *Ohio* v. *Roberts*, 448 U.S. 56, 66, which had permitted the admission of statements of an unavailable witness so long as those statements had 'adequate indicia of reliability.'"

"(c) The Court rejects the State's contention that the 'opening the door' rule incorporated in *People* v. *Reid* and applied here is not a Confrontation Clause exception at all but merely a 'procedural rule' limiting only the manner of asserting the confrontation right, not its substantive scope. While

the Court's precedents do recognize that the Sixth Amendment leaves States with flexibility to adopt reasonable procedural rules that bear on the exercise of a defendant's confrontation right, see, *e.g.*, *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 327, the door-opening principle discussed in *Reid* is not in the same class of procedural rules. *Reid*'s door-opening principle is a substantive principle of evidence that dictates what material is relevant and admissible in a case. The State would have trial judges weigh the reliability or credibility of testimonial hearsay evidence, but that approach would negate *Crawford*'s emphatic rejection of the reliability-based approach to the Confrontation Clause guarantee. Here, it was not for the trial judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence, nor whether this evidence was reasonably necessary to correct that misleading impression."

"(d) The Court also rejects the State's insistence that the *Reid* rule is necessary to safeguard the truth-finding function of courts because it prevents the selective and misleading introduction of evidence. The Court has not allowed such considerations to override the rights the Constitution confers to criminal defendants. And none of the cases the State relies upon for support—*Kansas* v. *Ventris*, 556 U.S. 586; *Harris* v. *New York*, 401 U.S. 222; *Walder* v. *United States*, 347 U.S. 62—involved exceptions to constitutional requirements."

"(e) The State's concern that a reversal will leave prosecutors without recourse to protect against abuses of the confrontation right is overstated. '[W]ell-established rules' of evidence 'permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.' *Holmes* v. *South Carolina*, 547 U.S. 319, 326. Finally, the rule of completeness does not apply here, as Morris' plea allocution was not part of any statement that Hemphill introduced. The Court does not address whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant."

VI. 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: Mich Ultra
2022:

TORTS

I. Claims Commission; Written Notice of Consortium Claim to Division of Claims and Risk Management Mandatory

Kampmeyer v. State, 639 S.W.3d 21 (Tenn., Kirby, 2022).

"On December 11, 2017, Tennessee Department of Transportation ('TDOT') employees parked two TDOT trucks on an overpass in the center lane of State Highway 111 in Sequatchie County, Tennessee, not far from the exit to Dunlap, Tennessee. After exiting the trucks, two TDOT employees applied a de-icing agent to the overpass. The TDOT employees placed no signs or other devices to warn oncoming drivers of the presence of the trucks in the middle of the highway. As the employees worked on the overpass, neither TDOT vehicle displayed hazard signals.

"Meanwhile, Plaintiff/Appellant Steven Kampmeyer, a Florida resident, was driving his vehicle north on State Highway 111 toward that same overpass and the TDOT vehicles parked in the middle of the road. Mr. Kampmeyer's vehicle plowed into the rear of one of the TDOT vehicles. Mr. Kampmeyer suffered extensive injuries in the collision, including a broken leg, broken facial bones, and traumatic brain injury.

"On August 9, 2018, Mr. Kampmeyer filed written notice of a claim for damages with Tennessee's Division of Claims and Risk Management. Pursuant to Tennessee Code Annotated § 9-8-402(c), once ninety days passed without resolution of Mr. Kampmeyer's claim, the Division of Claims and Risk Management transferred the claim to the Tennessee Claims Commission. Both entities are housed administratively within the Tennessee Department of Treasury.

"On December 5, 2018, Mr. Kampmeyer and his wife, Plaintiff/Appellant Melissa Kampmeyer, jointly filed a complaint with the Claims Commission based on the same factual allegations in the written notice Mr. Kampmeyer filed with the Division of Claims and Risk Management. The complaint alleged that TDOT violated Tennessee law and its own safety standards. It also contained a claim for loss of consortium by Mrs. Kampmeyer that had not been included in the written notice of claim Mr. Kampmeyer filed with the Division of Claims and Risk Management.

"In response, the State filed a motion to dismiss. In pertinent part, the State argued that Mrs. Kampmeyer did not give written notice of her claim against the State to the Division of Claims and Risk Management as required by Tennessee Code Annotated § 9-8-402(a)(1). As a result, the State asserted, her claim for loss of consortium was barred by the one-year statute of limitations.

"In reply, the Plaintiffs acknowledged that Mr. Kampmeyer's notice of claim with the Division of Claims and Risk Management did not include Mrs. Kampmeyer's claim for loss of consortium. They noted, however, that the Kampmeyers' joint complaint was filed with the Claims Commission within the one-year statute of limitations. Consequently, as to Mrs. Kampmeyer, the Claims Commission should have treated the complaint as a written notice of claim mistakenly filed with the Claims Commission instead of the Division of Claims and Risk Management and transferred it to the Division. For those reasons, they contended, the Claims Commission should deem Mrs. Kampmeyer's consortium claim timely.

"The Claims Commission granted the State's motion to dismiss Mrs. Kampmeyer's consortium claim. It held Mrs. Kampmeyer was a separate claimant and had to give written notice of her claim to the Division of Claims and Risk Management within the statute of limitations. Because she had not, the Claims Commission dismissed her claim.

"At Mrs. Kampmeyer's request, the Claims Commission made its dismissal order final and appealable pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. Mrs. Kampmeyer then appealed to the Court of Appeals.

"On appeal, the Court of Appeals agreed with the Claims Commission that Tennessee Code Annotated § 9-8-402(a)(1) required Mrs. Kampmeyer to give written notice of her loss of consortium claim to the Division of Claims and Risk Management. *Kampmeyer v. State*, No. M2019-01196-COA-R3-CV, 2020 WL 5110303, at *3 (Tenn. Ct. App. Aug. 28, 2020), *perm. app. granted*, (Tenn. Jan. 13, 2021). It affirmed the dismissal of Mrs. Kampmeyer's claim.

"The Kampmeyers then sought permission to appeal to this Court, which was granted."

"On appeal, the Kampmeyers contend that they gave the requisite notice of Mrs. Kampmeyer's consortium claim by including it in the complaint with the Claims Commission, which was filed within the one-year statute of limitations. They argue that the relationship between the Claims Commission and the Division is such that the Claims Commission complaint provided notice to the Division. Relying on *Hunter v. State*, No. 01-A-01-9210-BC00425, 1993 WL 133240 (Tenn. Ct. App. Apr. 28, 1993), the Kampmeyers contend that the Claims Commission should have simply forwarded the complaint containing Mrs. Kampmeyer's claim to the Division.

"In *Hunter*, claimant Anthony Hunter did not file written notice of his wrongful death claim with the Division of Claims and Risk Management. Instead, he sent a complaint by Federal Express to the Claims Commission; it arrived one day before the statute of limitations ran. *Id.* at *1. The Claims Commission transferred the complaint to the Division, which *Hunter* described as in keeping with the Claims Commission's 'practice' when 'claims [were] mistakenly filed there.' *Id.* The complaint, however, did not arrive at the Division until after the limitations period had lapsed. *Id.*

"After it received Mr. Hunter's complaint, the Division determined it could not act on it within the statutory ninety-day period, so it transferred the complaint back to the Claims Commission. *Id.* The Commission then dismissed the complaint as time-barred. *Id.* The claimant appealed.

"On appeal, the Court of Appeals in *Hunter* reversed. Interpreting the statutes that govern the Claims Commission and the Division of Claims and Risk Management, the intermediate appellate court first noted that Tennessee Code Annotated § 9-8-307(a) describes the Claims Commission as having 'exclusive' jurisdiction over certain types of claims. *Id.* Despite this exclusivity, the court observed, Tennessee Code Annotated § 9-8-402(c) gives the Division of Claims and Risk Management authority to make settlement offers on claims. They are transferred to the Claims Commission only after the Division has first had an opportunity to settle them. *Id.*"

"Though not explicitly stated in *Hunter*, the court in that case implicitly interpreted Tennessee Code Annotated § 9-8-402 (a)(1), which states that claimants must give written notice of claims 'to the division of claims and risk management' as a condition precedent to recovery of damages. *Hunter*'s interpretation of that provision essentially adds 'or the Claims Commission' to that statute based

on the perceived conflict between sections 9-8-307(a) and 9-8-402(c), as well as the *Hunter* court's description of the Division of Claims and Risk Management as 'an extension or adjunct' of the Claims Commission.

"Is *Hunter*'s interpretation warranted? We think not. In statutory interpretation, '[t]he text of the statute is of primary importance.' *In re Kaliyah S.*, 455 S.W.3d at 552 (quoting *Mills v. Fulmarque*, 360 S.W.3d 362, 368 (Tenn. 2012)). A statute should be read naturally and reasonably, with the presumption that the legislature says what it means and means what it says. *Chattanooga-Hamilton Cnty. Hosp. Auth. v. UnitedHealthcare Plan of the River Valley, Inc.*, 475 S.W.3d 746, 758 (Tenn. 2015). Here, the General Assembly could have added language to section 9-8-402(a)(1) stating that claimants can give written notice of claims to either the Division of Claims and Risk Management or to the Claims Commission. It chose not to do so.

"Nor is there a conflict between sections 9-8-307(a) and 9-8-402(c) that would necessitate implication of additional language to section 9-8-402(a)(1). The Division of Claims and Risk Management has a limited function as to claims against the State—it can settle them, deny them, or choose not to act. Under section 9-8-402, the Division is 'designed to afford the State ample opportunity to resolve a claim administratively, without the need for a lawsuit.' *Moreno*, 479 S.W.3d at 804 (citing *Brown v. State*, 783 S.W.2d 567, 572 (Tenn. Ct. App. 1989) (Koch, J., concurring)). The Claims Commission retains exclusive jurisdiction to 'determine,' i.e., decide, claims that are not settled and proceed to litigation. *See* Tenn. Code Ann. § 9-8-307(a)(1) (2020 & Supp. 2021). The function assigned to the Division of Claims and Risk Management does not infringe on the Claims Commission's ability to exercise exclusive jurisdiction over claims that are litigated. Thus, there is no conflict between sections 9-8-307(a) and 9-8-402(c) that would require us to hold, as *Hunter* did, that written notice of a claim against the State can be filed with either the Claims Commission or the Division of Claims and Risk Management.

"We see little in the statutes to support *Hunter*'s assertion that the Division of Claims and Risk Management 'is but an extension or adjunct of the Claims Commission.'1993 WL 133240, at *2."

"In sum, we find little to support *Hunter*'s holding. Consequently, we expressly overrule *Hunter*."

"Ultimately, our decision must rest on the text of Tennessee Code Annotated § 9-8-402(a)(1). It plainly requires claimants to give written notice of their claim 'to the division of claims and risk management as a condition precedent to recovery.' Tenn. Code Ann. § 9-8-402(a)(1). The statute does not provide claimants the option of giving written notice to the Claims Commission. 'We presume the legislature intentionally omitted such an option.' *Ken Smith Auto Parts v. Thomas*, 599 S.W.3d 555, 565 (Tenn. 2020). Reading the text of the statute naturally and reasonably, we must conclude that Mrs. Kampmeyer was required to give written notice of her consortium claim to the Division of Claims and Risk Management in order to recover in this case. She failed to do so. For that reason, we affirm."

"We hold that Tennessee Code Annotated § 9-8-402(a)(1) requires claimants to give written notice of their claim to the Division of Claims and Risk Management as a condition precedent to recovery. In doing so, we overrule *Hunter v. State*, No. 01-A-01-9210-BC00425, 1993 WL 133240 (Tenn. Ct. App. Apr. 28, 1993). Because Mrs. Kampmeyer did not give written notice of her loss of consortium claim to the Division of Claims and Risk Management within the one-year statute of limitations, we affirm the Claims Commission's grant of the State's motion to dismiss Mrs. Kampmeyer's claim."

II. Sexual Abuse of Children by Pastor; Fraudulent Concealment; Negligent Infliction of Emotional Distress; Release of Plaintiffs' Names

Doe 1 v. Woodland Presbyterian, No. W2021-00353-COA-R3-CV (Tenn. Ct. App., Swiney, June 3, 2022).

"This appeal arises from a lawsuit alleging that a number of Presbyterian church entities were negligent regarding the sexual abuse of minors by a Presbyterian clergyman. John Doe 1, John Doe 2, and John Doe 3 ('Plaintiffs') members and/or attendees of Woodland Presbyterian Church ('Woodland') in the 1990s, sued former pastor James B. Stanford ('Stanford') and a host of Presbyterian institutional defendants for negligence in the Circuit Court for Shelby County ('the Trial Court'). The institutional defendants filed motions to dismiss, which were granted by the Trial Court. Plaintiffs appeal arguing, among other things, that the statute of limitations was tolled due to fraudulent concealment. They argue further that the Trial Court erred in dismissing their claim of negligent infliction of emotional distress stemming from certain of the institutional defendants allegedly releasing Plaintiffs' names to the media in 2019. We affirm the Trial Court's dismissal of Presbyterian Church (U.S.A.), A Corporation and Evangelical Presbyterian Church for lack of personal jurisdiction. However, we hold further, *inter alia*, that in view of the Tennessee Supreme Court's holding in *Redwing v. Catholic Bishop for the Diocese of Memphis*, 363 S.W.3d 436 (Tenn. 2012), the Trial Court erred in dismissing Plaintiffs' complaint at the motion to dismiss stage based upon the statute of limitations when Plaintiffs alleged that efforts were made by certain of the institutional defendants to hide the sexual abuse and a 'whitewash' ensued. As Plaintiffs successfully alleged fraudulent concealment, we reverse the Trial Court with respect to the statute of limitations issue. We also reverse the Trial Court's dismissal of Plaintiffs' negligent infliction of emotional distress claim against Woodland and Presbytery of the Central South, Inc. We, therefore, affirm in part and reverse in part the judgment of the Trial Court, and remand for further proceedings consistent with this Opinion."

"In *Redwing*, our Supreme Court articulated the elements necessary to establish fraudulent concealment, as set out above. In line with those elements, Plaintiffs' complaint alleges (1) that the institutional defendants in question failed to disclose and/or concealed material facts regarding the injury or the wrongdoer despite a duty to do so; (2) that Plaintiffs could not have discovered the institutional conduct despite reasonable care and diligence in view of the 'whitewash'; (3) that the institutional defendants in question knew or should have known of the sexual abuse in the church to include Plaintiffs' allegations against Stanford; and (4) that the institutional defendants in question concealed material information from Plaintiffs by means of a 'whitewash.' In addition, Plaintiffs allege they discovered in June 2019 new information about their experiences when John Doe 3 contacted Pastor Matt Miller at Woodland and was told Miller believed Plaintiffs because he had heard stories supporting their claims. Whether Plaintiffs can substantiate their claims is another matter, but at this stage they have alleged that The Presbytery of the Mid-South, Inc., and Synod of Living Waters Presbyterian Church (U.S.A.), Inc. are liable for Woodland's conduct based upon principles of agency and vicarious liability. Plaintiffs' factual allegations related to agency and vicarious liability as well as these defendants' own negligence, while not richly detailed as to the Presbyterian Church's structure, are sufficient to withstand the institutional defendants' motions to dismiss for failure to state a claim.

"Plaintiffs' allegations are not identical to those in *Redwing*, but they are sufficiently analogous. We are obliged to adhere to our Supreme Court's precedents, and *Redwing* has never been

overruled. Plaintiffs have successfully alleged that the applicable one-year statute of limitations did not begin to run until June 2019 due to fraudulent concealment. We take no position on the merits of Plaintiffs' lawsuit, and the institutional defendants may yet successfully assert their statute of limitations defense in this case. However, consonant with our Supreme Court's Opinion in *Redwing*, we hold that dismissal of Plaintiffs' complaint based upon the running of the statute of limitations was premature at the motion to dismiss stage given the factual allegations contained in Plaintiffs' complaint. We reverse the Trial Court's dismissal of Plaintiffs' complaint based upon the running of the statute of limitations against Woodland; The Presbytery of the Mid-South, Inc.; and Synod of Living Waters Presbyterian Church (U.S.A.), Inc.

"We next address whether the Trial Court erred in dismissing Plaintiffs' negligent infliction of emotional distress claim from 2019 against Woodland; Presbytery of the Central South, Inc.; and Evangelical Presbyterian Church. We already have affirmed the dismissal of Evangelical Presbyterian Church on personal jurisdiction grounds. 'The elements of a claim for negligent infliction of emotional distress include the elements of a general negligence claim, which are duty, breach of duty, injury or loss, causation in fact, and proximate causation.' *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 206 (Tenn. 2012) (citation and footnote omitted). The plaintiff must also prove that the defendant's negligence caused the plaintiff 'serious or severe emotional injury.' *Id.* (citation and footnote omitted). Plaintiffs alleged that Woodland disclosed their names to the media in 2019, and that Presbytery of the Central South, Inc. is vicariously liable because Woodland is a member of that body. Woodland argues in its brief that Plaintiffs failed to established that Woodland had any legal duty toward Plaintiffs in 2019; that no special relationship such as the clergy-parishioner relationship existed between Woodland and Plaintiffs in 2019; that the alleged release of Plaintiffs' names was not so extreme or outrageous as to cause a reasonable person to suffer serious or severe emotional injury; and that Plaintiffs did not allege that the media disseminated their names to the public.

"With respect to the question of Woodland's duty of care to Plaintiffs in 2019, our Supreme Court in *Redwing* stated that '[a] religious institution's fiduciary obligations cannot be predicated on a religious duty and cannot arise solely from the relationship between the institution and its members.' 363 S.W.3d at 455. However, we do not interpret our Supreme Court's instructions regarding a religious institution's fiduciary obligations to exclude the possibility that Woodland owed a duty of care to Plaintiffs in 2019 on grounds other than those ruled out in *Redwing*. In *Marla H. v. Knox County*, 361 S.W.3d 518, 521 (Tenn. Ct. App. 2011), which involved an action for negligent infliction of emotional distress, this Court addressed whether a school resource officer owed a duty to exercise reasonable care when showing graphic accident photographs to a class of seventh grade students and whether that duty was breached. One of the photographs was of a student's deceased father. *Id.* We reversed the trial court's finding at a bench trial that the school resource officer failed to exercise reasonable care. *Id.* However, we concluded that the officer did owe a duty. *Id.* In our discussion of the issue, we noted that whether a duty of care exists is a question of law which we review de novo, and '[w]hen the existence of a particular duty is not a given or when the rules of the established precedents are not readily applicable, courts will turn to public policy for guidance.' *Id.* at 531, 534 (quoting *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 365 (Tenn. 2008); additional citation omitted). This Court further set out a number of factors to consider in determining whether a duty of care exists:

> (1) the foreseeable probability of the harm or injury occurring; (2) the possible magnitude of the potential harm or injury; (3) the importance or social value of the activity engaged in by the defendant; (4) the usefulness of the conduct to the defendant; (5) the feasibility of

alternative conduct that is safer; (6) the relative costs and burdens associated with that safer conduct; (7) the relative usefulness of the safer conduct; and (8) the relative safety of alternative conduct.

"*Marla H.*, 361 S.W.3d at 531 (quoting *Satterfield*, 266 S.W.3d at 365).

"In the present case, Plaintiffs have alleged that Woodland released their names to the media, causing them emotional distress. We have little difficulty concluding that releasing Plaintiffs' names to the media could, foreseeably, cause them significant emotional distress. We also are hard-pressed to identify the importance or social value attendant to Woodland's releasing the names of alleged sexual abuse victims to the media, or how that would be useful to Woodland. On the contrary, the socially useful or valuable activity would be that of encouraging victims of sexual abuse and alleged institutional cover-up to come forward, not chilling disclosure by releasing their names to the media so they might well have to relive their experiences exposed in the public eye. As to safer, more feasible and useful alternative conduct, it is unclear how the conduct alleged was either useful or necessary to begin with so as to warrant an alternative—based on Plaintiffs' complaint, Woodland could simply have refrained from releasing Plaintiffs' names to the media. We conclude that Woodland owed Plaintiffs a duty of reasonable care in safeguarding Plaintiffs' identities. In addition, while Plaintiffs' not alleging that the media further disseminated their names may be relevant to damages, it is not dispositive as to whether a duty existed. Our conclusion that Woodland owed Plaintiffs a duty of care in 2019 in no way derives from Plaintiffs' former membership or attendance of, or religious relationship with, Woodland. Our conclusion would be the same if Woodland were a secular organization facing the same allegations.

"We further disagree with Woodland in its contention that the act of releasing Plaintiffs' names to the media was insufficiently extreme or outrageous to sustain a claim of negligent infliction of emotional distress. While Woodland notes correctly that '[v]iable NIED claims commonly arise from extreme and outrageous events resulting in death, dismemberment, or serious physical injury to someone other than the named plaintiff' (citations omitted), Tennessee law does not preclude the possibility that a negligent infliction of emotional distress claim may be based upon the kind of conduct asserted here. With respect to Presbytery of the Central South, Inc., Plaintiffs have alleged it is liable as well through principles of agency and vicarious liability. We are ill-suited at this stage of the proceedings to tease out the relationship between Woodland and this Tennessee-based organization, Presbytery of the Central South, Inc. Plaintiffs have alleged enough to survive these defendants' motions to dismiss for failure to state a claim with respect to negligent infliction of emotional distress. We reverse the Trial Court in its dismissal of Plaintiffs' negligent infliction of emotional distress claim against Woodland and Presbytery of the Central South, Inc."

III. Negligence Regarding Animals

A. Duty of Care of Landlord Who Already Evicted Tenant for Guest Injured by Pit Bull

Harrill v. PI Tennessee, LLC, No. M2021-00424-COA-R3-CV (Tenn. Ct. App., Bennett, Apr. 26, 2022).

"PI Tennessee, LLC ('PI' or 'Owner'), owns and operates a fifty-lot mobile home park known as Brandywine Estates. On March 1, 2015, PI entered into a monthly rental agreement ('the Lease')

leasing Lot 31 to Gina Branch ('Ms. Branch' or 'Lessee'). The Lease contained a pet provision that stated, in pertinent part:

> All LESSEES who own their mobile home and are renting a mobile home lot space from the OWNER are permitted to own one (1) docile, domestic pet which must be pre-approved by the park manager. However, all LESSEES who own their mobile home and are renting a mobile home lot space from the OWNER are prohibited from possessing or having any of the following: Live poultry, rabbits, fowl, horses, cows or reptiles of any kind or other exotic animals, pit bull dogs, Dobermans, Rottweilers, chows and/or wolf hybrids. No dogs over 30 pounds allowed.

"The Lease also contained the following provision regarding the removal of a tenant's property:

> OWNER may and LESSEE does hereby authorize and contract that OWNER shall have the absolute and incontestable right to remove or cause to be removed from the space hereby rented from [PI] all/or part of LESSEE'S property at any time with or without notice or reason, and additionally to remove same without notice should ... LESSEE or LESSEE'S property violate any part of this lease.

"Between March 15, 2015 and February 24, 2016, Ms. Branch's son, Jonathan Pitts, resided with her at Lot 31. While living with his mother at Lot 31, Mr. Pitts kept his pit bull, Ruger, in the home despite the Lease's prohibition against pit bulls. PI sent Ms. Branch the following warning in March 2016:

> Pitbulls are not allowed in the park ever, even to visit! Any guests you have cannot bring their Pitbulls to your home and you cannot dog sit any dogs.... If a pit bull is found in your possession again, I will personally file your eviction without notice, as you have been warned multiple times.

"Nearly two years later, Mr. Pitts, his girlfriend, Madison McGill, and Ruger were visiting Ms. Branch at Lot 31 when Ruger bit Ms. McGill. PI learned of this attack on January 10, 2018, and its member-manager, Eleanor Porter, ordered Ms. Branch to remove Ruger from the property and issued her a 30-day notice of eviction for violating the Lease's pet provision. PI neither saw Ruger at Lot 31 nor received any reports of him being present on PI property following January 10.

"Twenty-one days after receiving the eviction notice, on January 31, 2018, Ms. Branch once again permitted Ruger onto Lot 31 and kept him inside the mobile home. Caroline Harrill was at Lot 31 that day assisting Ms. Branch with packing and moving her belongings. While inside the mobile home, Ruger injured Ms. Harrill by biting her.

"Ms. Harrill filed a complaint against PI on January 29, 2019, claiming that her injuries were caused by PI's negligent failure to remove or restrain Ruger after learning of the attack on Ms. McGill. PI filed an answer and, after engaging in discovery, filed a motion for summary judgment. According to PI, it was entitled to summary judgment because Ms. Harrill failed to allege facts establishing that it breached any duty owed to her. Ms. Harrill filed a response contending that, as the owner of Lot 31, PI had a duty to maintain the lot in a reasonably safe condition and that substantial evidence in the record created an issue of material fact regarding whether PI's failure to invoke the immediate removal provision of the Lease amounted to a breach of that duty.

"PI responded by filing the affidavit of Ms. Porter which provided that, although the Lease contemplates no-notice removal, it was not something that had ever been done while she worked for PI because it would actually take more time than the 30-day notice removal and would cost approximately $4,000. Ms. Harrill filed a motion to strike those statements from Ms. Porter's affidavit on the basis that they were not based on personal knowledge. After hearing arguments on both motions, the trial court entered an order denying the motion to strike and granting summary judgment to PI."

"Ms. Harrill's claim sounds in negligence. To establish prima facie proof of negligence, a plaintiff must prove five essential elements: '(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause.' *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005). This case involves the duty and breach of duty elements."

"A. Duty owed on January 10.

"There is no dispute that PI learned of Ruger's attack on Ms. McGill on January 10, 2018, and therefore became aware that Ms. Branch was harboring an animal with vicious propensities. Furthermore, there is no dispute that PI had authority under the Lease to remove the animal from the property. In light of this, the parties agree that, on January 10, PI owed a duty to protect third persons from injury inflicted by Ruger. The parties' primary dispute centers on whether an issue of material fact exists regarding the reasonableness of PI's actions after learning of Ruger's vicious propensities. According to Ms. Harrill, under the circumstances of this case, the duty of reasonable care required PI to invoke the Lease's no-notice removal provision to remove Ms. Branch from Lot 31 because it would have taken less time to complete than using the 'lengthy' 30-day notice process and would have therefore prevented her injury."

"In her deposition, Ms. Porter testified that, immediately after learning on January 10 about the attack on Ms. McGill, PI ordered Ms. Branch to remove Ruger from Lot 31 and issued Ms. Branch a 30-day notice to vacate the premises. Ms. Harrill admitted that, after January 10, Ruger was, in fact, removed from the premises because Mr. Pitts relocated him to a friend's home. Following Ruger's relocation, PI neither saw him on Lot 31 nor received any reports that he was there. The undisputed facts, therefore, establish that, on January 10, PI satisfied its duty of care because the dangerous condition had been removed from the property. Thus, Ms. Harrill's assertion that the 30-day notice eviction process may have taken longer to complete than the no-notice eviction process is of no relevance to PI's duty on January 10.

"B. Duty owed on January 31.

"Although PI satisfied its duty of reasonable care on January 10, Ms. Harrill contends that a subsequent duty of reasonable care arose because PI should have known that Ruger was in Ms. Branch's mobile home on January 31. Essentially, Ms. Harrill's argument is that PI had constructive notice that Ruger returned to the property and was inside Ms. Branch's mobile home on January 31 because PI knew that Ms. Branch had a history of not complying with the Lease's prohibition against pit bulls. That constructive notice, Ms. Harrill asserts, once again gave rise to a legal duty on PI's part to exercise reasonable care to protect third persons from injury inflicted by Ruger. According to Ms. Harrill, PI breached this duty by failing to invoke the no-notice eviction provision of the Lease prior to Ruger attacking her on January 31."

"Our Supreme Court has stated, 'when a dangerous condition occurs regularly, the premises owner is on constructive notice of the condition's existence[,]' and that 'places a duty on that owner *to take reasonable steps to remedy this commonly occurring dangerous condition.*' *Blair*, 130 S.W.3d at 766 (emphasis added). The undisputed facts of this case show that PI took reasonable steps to remedy the dangerous condition. On January 10, PI ordered Ms. Branch to remove Ruger from the property, and it is undisputed that Mr. Pitts then relocated Ruger to the home of a friend. Ms. Porter testified in her deposition that, between January 10 and January 31, PI monitored the mobile home park and did not see either Mr. Pitts or Ruger return to Lot 31, nor did PI receive any reports that Ruger had been on the premises during that time period. Ms. Porter admitted that she did not inspect the inside of Ms. Branch's mobile home to see if Ruger was there, but the Lease authorized PI to inspect only the lot the mobile home sat on; it did not authorize PI to inspect the interior of the home. Based on the foregoing, we conclude that PI did not breach any duty owed to Ms. Harrill on January 31.

"Because PI submitted proof affirmatively negating the breach element, we affirm the trial court's decision granting summary judgment."

B. Property Owner's Duty of Care to Neighbor Attacked by Pot-Bellied Pig

Cook v. Fuqua, No. M2021-00107-COA-R3-CV (Tenn. Ct. App., Bennett, Jan. 27, 2022), perm. app. denied June 8, 2022.

"Gary Lynn Fuqua owns real property in LaFayette, Tennessee where he resided with his wife, Lisa Fuqua, and his adult step-son, James Allen Tipton. Mr. Tipton owned two pot-bellied pigs that Mr. Fuqua permitted him to keep in a fenced-in area on the property. On October 12, 2018, the pigs began running at large after Mr. Tipton intentionally released them from the fenced-in area. Mr. Fuqua was not on the property that day and, in fact, had not been there in approximately a month due to an order of protection being issued against him that prohibited him from coming onto the property.

"Around the time that Mr. Tipton released the pigs from the fenced-in area, Eltricia Laree Cook was visiting her father, who lived across the street from Mr. Fuqua. Ms. Cook heard a loud noise coming from her father's storm door and went to investigate the source of the noise. Upon reaching the door, she discovered that the pigs had wandered across the street and onto her father's property; she believed one of the pigs had caused the loud noise by jumping against the storm door.

"Ms. Cook herded the pigs back onto Mr. Fuqua's property and went onto his front porch to knock on the door and inform him or Mr. Tipton that the pigs were running at large. One of the pigs, Baxter, followed her up onto the porch. While Ms. Cook was knocking on the door, Baxter jumped against her back, causing her to fall off of the porch. She sustained personal injuries in the fall.

"Ms. Cook filed a complaint against both Mr. Fuqua and Mr. Tipton on September 18, 2019, alleging that she was injured as a result of their negligence in permitting the pigs to run at large. Although Mr. Fuqua did not own the pigs, Ms. Cook alleged that he was liable for her injuries because he knew prior to the incident that the pigs 'got out of the fence often' but did nothing to remedy the situation. Following discovery, Mr. Fuqua filed a motion for summary judgment arguing that Ms. Cook was a trespasser and, as such, he merely owed her a duty 'to not cause her injury intentionally, with gross negligence, or by willful and wanton conduct.' Because Ms. Cook

failed to allege that he acted intentionally, engaged in gross negligence, or willfully or wantonly caused her fall, Mr. Fuqua asserted, she failed to establish that he breached a duty owed to her.

"After hearing the matter, the trial court entered an order granting summary judgment to Mr. Fuqua. The court concluded that he was entitled to summary judgment because Ms. Cook 'was a trespasser as that term is defined by Tennessee Code Annotated § 29-34-208(a)(2); and the Complaint does not allege: that [Mr. Fuqua] was guilty of gross negligence; that he intentionally caused the fall; and/or that he willfully and/or wantonly caused the fall.' Thereafter, Ms. Cook filed a motion to alter or amend the judgment to make it a final order, which the trial court granted.

"On appeal, Ms. Cook presents one issue for our review: whether the trial court erred in granting summary judgment to Mr. Fuqua."

"Ms. Cook's claim is one of negligence. To establish prima facie proof of negligence, a plaintiff must prove five essential elements: '(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause.' *Biscan v. Brown*, 160 S.W.3d 462, 478 (Tenn. 2005). This case concerns the duty element. The existence of a duty is a question of law. *Id.* The trial court concluded that Mr. Fuqua owed Ms. Cook no duty of care 'except to refrain from willfully, with negligence so gross as to amount to willfully, intentionally, or wantonly causing [her] injury' because she was a trespasser at the time of the incident. Tenn. Code Ann. § 29-34-208(b). Therefore, in analyzing this issue, we must first consider the definition of a trespasser."

"Ms. Cook does not dispute that Mr. Fuqua did not, at any time, give her actual permission to enter onto the property. Instead, she contends that the trial court erred in finding that she was a trespasser because she had Mr. Fuqua's implied permission to come onto the property. We agree. Consent to go onto another person's property 'may be implied from custom, usage and conduct.' *State v. Walker*, C.C.A. No. 41, 1989 WL 100825, at *2 (Tenn. Crim. App. Sept. 1, 1989). For example,

> the custom in this country is for a person to enter the premises of another for a lawful purpose without first obtaining express consent. The entry may consist of using the driveway for a vehicle, walking to a door of the dwelling and ringing the doorbell; or it may consist of similar appropriate use of the premises outside of the dwelling in connection with contacting the occupant. In the absence of an indication such an entry is prohibited[,] the visitor has the occupant's implied consent and is not a trespasser.

"*Id.* Moreover, a landowner's consent or permission may be implied in the following circumstance:

> when the owner's conduct would warrant a reasonable person to believe that the owner had given consent to enter the premises, even in the absence of an invitation to enter. For instance, one who engages in a conversation with an entrant and does not ask that person to leave may not later complain about a trespass.
>
> The landowner's knowledge of the entries and of the trespassers' resulting behavior is a key factor. Actual willingness to allow entry may be inferred from inaction in the face of a prior entry, but only if the owner had actual knowledge of the trespasser's intention to enter.

"75 Am. Jur. 2d *Trespass* § 76 (2021) (footnotes omitted).

"According to Ms. Cook, she went onto the property in connection with contacting either Mr. Fuqua or Mr. Tipton about the pigs running at large. Nothing in the record indicates that Mr. Fuqua prohibited such an entry. Indeed, Mr. Fuqua testified that Ms. Cook had been on his property prior to the date of the incident, and he admitted that he did not object to her being there on that prior occasion. In light of Mr. Fuqua's inaction after the prior entry, it may be implied that Ms. Cook had his permission to come onto the property on the day of the incident. We, therefore, conclude that the trial court erred in determining that Mr. Fuqua established that Ms. Cook was a trespasser and that he merely owed her the limited duty of care set out in Tenn. Code Ann. § 29-34-208(b).

"What duty of care then, if any, did Mr. Fuqua owe to Ms. Cook? . . . Regarding domesticated animals, we have previously stated that the owner owes the following duty of care:

> The owner of a domesticated animal may be held liable for the harm the animal causes if he or she negligently failed to prevent the harm. Thus, the owner of a domesticated animal must exercise such reasonable care to prevent the animal from injuring another as an ordinarily careful and prudent person would exercise under the same circumstances. The owner cannot permit the animal to run at large and cannot knowingly or negligently permit the animal to escape and fail to make reasonable efforts to capture it.

"Stinson v. Carpenter, No. 01A01-9601-CV00036, 1997 WL 24877, at *4 (Tenn. Ct. App. Jan. 24, 1997) (citations omitted). . . ."

"Mr. Fuqua argues that he did not owe Ms. Cook a duty of reasonable care because it is undisputed that he did not own the pigs and that he had not been 'in possession' of the premises for approximately a month prior to the incident due to the order of protection. The parties have not cited to any Tennessee cases directly on-point with these facts, and this Court is unaware of any. The facts of this case, however, share some similarities with cases involving a landlord who leases property to a tenant who maintains a vicious dog on the property. Therefore, we look to those cases for guidance in determining whether the risk of harm from the pigs running at large was an unreasonable risk that gave rise to Mr. Fuqua owing a duty of reasonable care to Ms. Cook. In those cases, although the landowner/landlord does not own the animal nor does he or she have possession of the leased property, the landowner/landlord may be held liable for the acts of the animal if he or she 'had knowledge of the propensity of the [animal] to violence and that he [or she] retained sufficient control over the ... premises to afford an opportunity for the [landowner/]landlord to require the tenant to remove the [animal].' *Langford v. Darden*, No. M2004-00158-COA-R3-CV, 2005 WL 378774, at *2 (Tenn. Ct. App. Feb. 16, 2005). In other words, a duty of reasonable care arises from the landowner/landlord knowing of the unsafe condition on the premises created by the animal. *See McKenna v. Jackson*, No. 01-A-01-9510-CV00438, at *2 (Tenn. Ct. App. Mar. 29, 1996).

"Applying this principle to the facts in the present case, it is clear that issues of material fact remain in dispute. Regarding prior notice, Ms. Cook submitted the affidavit of Ms. Fuqua stating that the pigs had run at large '[o]n more than ten (10) occasions' prior to the incident at issue in this case and that the pigs 'had a bad habit of jumping up on things.' Ms. Fuqua further stated that Mr. Fuqua 'was fully aware' of both of those facts. Additionally, Mr. Fuqua admitted during his deposition that the pigs had been on the property long before the incident occurred and that he told Mr. Tipton 'he needed to get rid of them' because 'they [were] going to cause trouble.'

"Although the order of protection prohibited Mr. Fuqua from coming onto the property, he still should have retained sufficient control over it to force Mr. Tipton to remove the pigs or to keep them properly secured in the fenced-in area because the order of protection did not constitute a lease entitling Mr. Tipton to exclusive possession of the property. Mr. Fuqua still retained his legal rights over the property and could have sought removal of the pigs without stepping foot on the property. *See Langford*, 2005 WL 378774, at *2 ('It is settled in law in this jurisdiction that "[a] tenant is entitled to the exclusive possession of the leased premises against the landlord for a landlord retains no rights over leased premises, except such as are reserved and clear in express terms.'"). Based on the foregoing facts, we conclude that issues of material fact remain in dispute regarding whether Mr. Fuqua had sufficient knowledge of the pigs' harmful behaviors and whether he had sufficient control over the property allowing him an opportunity to remove or secure the pigs. As a result, we conclude that the trial court erred in granting summary judgment."

IV. Health Care Liability Act

A. Applies to All Claims Alleging Injury Related to Provision of Health Related Service

Cooper v. Mandy, 639 S.W.3d 29 (Tenn., Lee, 2022).

"In September 2014, Plaintiff Donna Cooper met with Dr. Mason Wesley Mandy at NuBody Concepts, LLC in Brentwood, Tennessee, to discuss breast reduction surgery. Dr. Mandy told Ms. Cooper he was a board-certified plastic surgeon with years of experience in performing the procedure. NuBody Concepts employee Rachelle Norris confirmed Dr. Mandy's designation as a board-certified plastic surgeon. Based on the representations by Dr. Mandy and Ms. Norris, Ms. Cooper agreed for Dr. Mandy to perform the breast reduction surgery and paid NuBody Concepts for the surgery. Dr. Mandy, however, was not board-certified as a specialist in any field.

"Dr. Mandy operated on Ms. Cooper in October 2014. According to Ms. Cooper, the surgery was 'unnecessarily painful,' was performed in a 'barbaric fashion in unsterile conditions,' and 'left her disfigured and with grotesque and painful bacterial infections.'

"In April 2018, the Coopers ('the Plaintiffs') filed suit in Williamson County Circuit Court against Defendants Dr. Mandy, NuBody Concepts, and Middle Tennessee Surgical Services, PLLC ('the Defendants'). The Plaintiffs sought to recover compensatory damages for Ms. Cooper's pain and suffering, permanent physical disfigurement, loss of enjoyment of life, and lost income, as well as for Mr. Cooper's loss of consortium. The Plaintiffs alleged that the Defendants intentionally misrepresented Dr. Mandy's qualifications and that Ms. Cooper would not have consented to the surgery if she had known Dr. Mandy was not a board-certified plastic surgeon; that the Defendants committed a medical battery because their false representations negated Ms. Cooper's consent to the surgery; and that the Defendants engaged in a civil conspiracy.

"The Defendants moved to dismiss under Tennessee Rule of Civil Procedure 12.02(6) based on the Plaintiffs' failure to comply with the pre-suit and filing requirements of the Act. [Footnote]: The Defendants claimed that the Plaintiffs failed to provide a HIPAA-compliant medical records authorization with the pre-suit notice letters; that the Plaintiffs failed to wait the required sixty days after sending the notice letters before filing suit; that the Plaintiffs' complaint failed to state compliance with the Act; and that the complaint did not include a copy of the pre-suit notice letters, certificates of mailing and affidavit, and a certificate of good faith. See Tenn. Code Ann.

§§ 29-26-121 through -122 (2012 & Supp. 2021).[End Foonote] The Plaintiffs, admitting their noncompliance with the Act, argued their claims were not for negligent care but for medical battery and intentional misrepresentation which were not covered by the Act. The Plaintiffs also asserted that even if the Act applied, strict compliance was not required because expert testimony was not needed to prove their claims.

"The trial court denied the motions, holding that the Health Care Liability Act did not apply because the Plaintiffs' claims for medical battery and intentional misrepresentation were based on false statements the Defendants made to Ms. Cooper before they established a doctor-patient relationship. Thus, the Plaintiffs' action was not related to the provision of health care services, and compliance with the Act's procedural requirements was not required. On interlocutory review, the Court of Appeals also applied a temporal analysis, concluding the Health Care Liability Act did not apply because the Defendants' misrepresentations were made as part of their business operations before any health care services were provided. *Cooper v. Mandy*, No. M2019-01748-COA-R9-CV, 2020 WL 6748795, at *1 (Tenn. Ct. App. Nov. 17, 2020), *perm. app. granted* (Tenn. Apr. 7, 2021).

"We granted the Defendants' application for permission to appeal. On interlocutory appeal, we limit our review to the issue certified by the trial court. *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314, 317 (Tenn. 2019) (citing *Wallis v. Brainerd Baptist Church*, 509 S.W.3d 886, 896 (Tenn. 2016)). Here, that issue is whether a claim for injuries arising from a surgical procedure to which the plaintiff consented is governed by the Health Care Liability Act when the claim is based on pre-surgical misrepresentations about the surgeon's credentials by the defendant health care providers."

"Casting a broad net over claims against health care providers, section 29-26-101(a)(1) of the Health Care Liability Act defined a health care liability action as 'any civil action ... alleging that a health care provider or providers have caused an injury related to the provision of ... health care services to a person, regardless of the theory of liability on which the action is based.' Tenn. Code Ann. § 29-26-101(a)(1). Also, section -101(c) made '[a]ny such civil action or claim ... subject to this part regardless of any other claims, causes of action, or theories of liability alleged in the complaint.' Tenn. Code Ann. § 29-26-101(c).

"We held in *Ellithorpe* that '[g]iving every word in this section its full effect and plain meaning,' section 29-26-101 'establishes a clear legislative intent that *all* civil actions alleging that a covered health care provider or providers have caused an injury related to the provision of ... health care services' be subject to the procedural requirements of the Act, 'regardless of any other claims, causes of action, or theories of liability alleged in the complaint.' 479 S.W.3d at 827. Neither the language of the Act nor our interpretation of section -101 has changed since we decided *Ellithorpe*."

"Applying the clear language of section 29-26-101, we hold the Plaintiffs' medical battery and intentional misrepresentation claims are included within the definition of a 'health care liability action.' The Plaintiffs' complaint alleged that the Defendants are health care providers who caused injuries to Ms. Cooper during a surgical procedure. The complaint asserted 'that *the surgical procedure* was unnecessarily painful, that it was done in a barbaric fashion in unsterile conditions and that it has left [Ms. Cooper] disfigured and with grotesque and painful bacterial infections.' (Emphasis added). The complaint also stated that Ms. Cooper 'sustained permanent physical disfigurement, pain and suffering, loss of enjoyment of life, lost income, strange bacterial infections *from the procedure*, and months of pain, not to mention the strain on her marriage.' (Emphasis

added). The complaint alleged medical battery and intentional misrepresentation, but the Act applies regardless of the theories of liability. Thus, the Plaintiffs are asserting a 'health care liability action' as defined by section 29-26-101(a)(1), and the Act applies to their claims."

"Under this expansive definition, the Plaintiffs cannot avoid the scope of the Act by alleging a health care provider committed medical battery and intentional misrepresentation when the claim relates to the health care service provided.

"Second, the Plaintiffs contend that the Act does not apply because the Defendants' misrepresentations were commercial and were made before Dr. Mandy and Ms. Cooper established a doctor-patient relationship. According to the Plaintiffs, Dr. Mandy and Ms. Norris misstated Dr. Mandy's qualifications during a 'sales meeting' to gain Ms. Cooper's agreement to the procedure before any health care services were provided. But this temporal view focuses entirely on the surgical procedure and ignores the necessary role of the doctor-patient informed consent discussion in the provision of health care services. Before surgery, Dr. Mandy had a duty to share with Ms. Cooper enough information about the procedure to enable her to give informed consent for him to proceed. *Miller ex rel. Miller v. Dacus*, 231 S.W.3d 903, 907 (Tenn. 2007) (quoting Tenn. Code Ann. § 29-26-118). This information typically includes the reason for performing the procedure, the risks and benefits of the procedure, the chances for a successful outcome, and any alternative treatments available. *Id.* (quoting *Shadrick v. Coker*, 963 S.W.2d 726, 732 (Tenn. 1998)). Without Ms. Cooper's informed consent, Dr. Mandy had no authority to perform the surgery. *See Shadrick*, 963 S.W.2d at 732 (quoting *Cardwell v. Bechtol*, 724 S.W.2d 739, 751 (Tenn. 1987)) (explaining that a procedure performed without informed consent is a battery). It was during the informed consent meeting that Dr. Mandy and Ms. Norris misrepresented Dr. Mandy's credentials. Under the Health Care Liability Act, a standard of care applies to the doctor-patient informed consent discussion. *See* Tenn. Code Ann. § 29-26-118. Thus, a plaintiff alleging an injury because a health care provider failed to provide enough information about a medical procedure must comply with the Act. *See White*, 469 S.W.3d at 526. The informed consent discussion, by its nature, has to occur before the surgical procedure, but its timing does not mean it is not a part of the provided health care service."

"Finally, the Plaintiffs contend that compliance with the Act is not necessary because their medical battery claim requires no expert testimony. Although a medical battery claim may not require expert proof, section 29-26-101(a)(1)'s definition of a 'health care liability action' contains no exemption for cases not requiring expert testimony. We cannot narrow the scope of the Act by adding exclusionary language."

"We hold that the Health Care Liability Act, section 29-26-101, broadly defines a 'health care liability action' to include claims alleging that a health care provider caused an injury related to the provision of health care services, regardless of the theory of liability. Based on the allegations in the complaint, the Plaintiffs' medical battery and intentional misrepresentation claims fall within the scope of the Act. We reverse the judgments of the Court of Appeals and the trial court, and we remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal to Donna Cooper and Michael Cooper, for which execution may issue if necessary."

B. Certificate of Good Faith

1. Basic Requirements Not Met

Estate of Blankenship v. Bradley Healthcare and Rehabilitation Center, No. E2021-00714-COA-R10-CV (Tenn. Ct. App., Bennett, Mar. 30, 2022), perm. app. denied Aug. 4, 2022.

"In July 2019, Beulah Blankenship ('Decedent') died while a resident of Bradley Healthcare and Rehabilitation Center, a nursing home owned by Bradley County, Tennessee (collectively, 'Defendants'). Decedent's son, Timothy Blankenship, acting individually and as the administrator of Decedent's estate (collectively, 'the Estate'), initiated this lawsuit on June 16, 2020, alleging that Defendants' negligence caused the wrongful death of Decedent. The Estate claimed that Decedent's death was due to Defendants' failure 'to comply with the standard of care for nursing homes' and 'to adequately staff their facility with enough personnel to provide proper care' for Decedent.

"Paragraph 11 of the complaint stated that a document attached to the complaint as Exhibit 7 satisfied the certificate of good faith requirement in Tenn. Code Ann. § 29-26-122. Exhibit 7 is a one-paragraph letter from Natalie Baker, a nurse practitioner consulted by the Estate, that provides:

> I have reviewed the medical issues regarding BEULAH BLANKENSHIP and I have determined that violations of the standards of care occurred during her residency at BRADLEY HEALTHCARE & REHABILITATION CENTER. This report is prepared for the purposes of confirming that I am competent under T.C.A. § 29-26-115 to express these opinions; and that I believe, based on the information reviewed concerning the care and treatment of BEULAH BLANKENSHIP, that there is a good faith basis to maintain an action consistent with the requirements of § 29-26-115.

"Defendants filed an answer and a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6), arguing that Exhibit 7 did not constitute a certificate of good faith because it did not include an opinion regarding whether Defendants' violation of a standard of care caused Decedent's death. The Estate filed a response contending that, under Tenn. Code Ann. § 29-26-122, it was not required to consult an expert about whether Defendants' deviation from a standard of care caused Decedent's death to certify that a good faith basis existed to maintain the lawsuit.

"While the motion to dismiss was pending, the trial court permitted Defendants to depose Ms. Baker on the limited issue of causation. Ms. Baker testified that she reviewed Decedent's medical records for the sole purpose of assessing whether there were any deviations from the nursing standard of care; she was not asked to opine as to whether those deviations caused Decedent's death. Defendants attached Ms. Baker's deposition to its response to the Estate's reply to the motion to dismiss.

"After hearing arguments on the motion, the trial court entered an order on March 10, 2021, denying the motion to dismiss based on its finding that Exhibit 7 satisfied the requirements of Tenn. Code Ann. § 29-26-122. The court then determined that, although Exhibit 7 satisfied the certificate of good faith requirement, the Estate could have a 30-day extension of time to file a certificate that 'further clarif[ied] and/or enhance[d] any points that may need clarification.' On March 7, 2021, the Estate filed an amended complaint that included an entirely new Exhibit 7 that was entitled 'Tennessee Code Annotated § 29-26-122 Good Faith Certificate.'"

"Any plaintiff filing a healthcare liability claim that requires expert testimony under Tenn. Code Ann. § 29-26-115 must file a certificate of good faith with his or her complaint; this requirement is mandatory, and a plaintiff must strictly comply with it. Tenn. Code Ann. § 29-26-122; *Myers*, 382 S.W.3d at 309-10; *see also Sirbaugh v. Vanderbilt Univ.*, 469 S.W.3d 46, 51 (Tenn. Ct. App.

2014). 'One of the purposes of the certificate of good faith is to weed out frivolous lawsuits before any party incurs substantial litigation expenses.' *Hinkle*, 2012 WL 3799215, at *8 (citing *Jenkins v. Marvel*, 683 F. Supp. 2d 626, 639 (E.D. Tenn. 2010)). In other words, it indicates 'that an expert has reviewed the claims and has certified that they are taken in good faith.' *Id.* To accomplish this purpose, Tenn. Code Ann. § 29-26-122(a)(1) provides detailed instructions about what the certificate of good faith shall state:

> (1) The plaintiff or plaintiff's counsel has consulted with one (1) or more experts who have provided a signed written statement confirming that upon information and belief they:
>
> (A) Are competent under § 29-26-115 to express an opinion or opinions in the case; and
>
> (B) Believe, based on the information available from the medical records concerning the care and treatment of the plaintiff for the incident or incidents at issue, that there is a good faith basis to maintain the action consistent with the requirements of § 29-26-115[.]"

"The phrase 'a good faith basis to maintain the action *consistent with the requirements of § 29-26-115*' is the linchpin of this issue. Tenn. Code Ann. § 29-26-122(a)(1)(B) (emphasis added). The requirements of Tenn. Code Ann. § 29-26-115 are, in pertinent part, as follows:

> (a) In a health care liability action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) *As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.*
>
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

"(Emphasis added).

"Reading the two statutes together, it is clear that § 29-26-122(a)(1)(A) refers to the locality rule for expert witnesses described in § 29-26-115(b) and that § 29-26-122(a)(1)(B) refers to the essential elements for maintaining a healthcare liability action described in § 29-26-115(a). To maintain an action under § 29-26-115(a), a plaintiff must prove the recognized standard of care, that the defendant deviated from the standard of care, and that the plaintiff's injury was caused by the defendant's deviation from the standard of care. The General Assembly stressed the essentialness of the causation element for healthcare liability actions by adopting § 29-26-115(d): 'injury alone does not cause a presumption of the defendant's negligence.' Thus, for a certificate of good faith to certify that there is 'a good faith basis to maintain the action consistent with the requirements of

§ 29-26-115,' it must indicate that the plaintiff has consulted with at least one qualified expert who reviewed the claims and believes the defendant deviated from the applicable standard of care and that the deviation proximately caused the plaintiff's injury."

"Turning to the facts of this case, we conclude that Exhibit 7 did not satisfy the filing of a certificate of good faith requirement because it does not include all of the required information. Exhibit 7, unlike the detailed affidavit in *Hinkle* [*v. Kindred Hospital*, No. M2010-02499-COA-R3-CV, 2012 WL 3799215 (Tenn. Ct. App. Aug. 31, 2012)], is a perfunctory letter containing only one paragraph that provides very little information. Ms. Baker stated that she was a qualified expert under § 115; the letter contains nothing indicating that she is qualified, however, because she makes no mention of where she is licensed, the locale where she practices, or what she practices. *See* Tenn. Code Ann. § 29-26-115(b). Furthermore, it is clear from the letter and her deposition testimony that she determined only 'that violations of the standards of care occurred during [Decedent's] residency at [Defendants' facility].' She never states that she considered whether Decedent's injury was caused by Defendants' violations of those standards of care. Exhibit 7, therefore, does not confirm that there is a good faith basis to maintain the lawsuit 'consistent with the requirements of § 29-26-115.' Tenn. Code Ann. § 29-26-122(a)(1)(B). As a result, Exhibit 7 does not satisfy the certificate of good faith filing requirement. It does not certify that a good faith basis existed to maintain the action based on all of the requirements in § 29-26-115(a), nor does it show that Ms. Baker was a qualified expert under § 29-26-115(b).

"We recognize that, when a plaintiff files the typical certificate of good faith or the form provided by the Administrative Office of the Courts, he or she simply states that a qualified expert was consulted and provided a written statement confirming there is a good faith basis to maintain the lawsuit. Our holding here does not render those types of certificates of good faith non-compliant with the statute. This case differs from cases involving those types of certificates because the Estate filed the actual written statement from the expert consulted. We believe, that Exhibit 7 does not satisfy the written statement from an expert requirement in Tenn. Code Ann. § 29-26-122(a) and, therefore, cannot serve as a compliant certificate of good faith."

"The Estate does not contend that it demonstrated extraordinary cause for the case not to be dismissed with prejudice. Instead, the Estate contends that the case should not be dismissed because it filed a new Exhibit 7 that fully complied with the certificate of good faith requirement [Footnote:] The new Exhibit 7 stated: Counsel for Plaintiff, Ronald J. Berke, of Berke, Berke & Berke, certifies that he has consulted with one or more experts, who are competent to express an opinion under Tennessee Code Annotated § 29-26-115, and this expert, or these, experts, have each provided a signed written statement confirming that, upon information and belief based upon the medical records of treatment, there is a good faith basis to maintain this cause of action consistent with the requirements of Tennessee Code Annotated § 29-26-101.There have been no prior violations of Tennessee Code Annotated § 29-26-101, et seq., including § 29-26-122. [End Footnote] when it filed the amended complaint thirty days after the hearing on the motion for summary judgment. Despite not being filed with the complaint, the Estate argues that the new Exhibit 7 satisfied the certificate of good faith filing requirement because the Estate motioned for an extension of time to file a certificate of good faith pursuant to Tenn. Code Ann. § 29-26-122(c), and the trial court granted the motion. Defendants argue that the trial court should not have granted the motion because the court lacked a basis to permit the extension."

"By adopting Tenn. Code Ann. § 29-26-122(c), the General Assembly created a get-out-of-jail-free card to allow plaintiffs, in limited circumstances, to escape the mandatory deadlines for the

certificate of good faith filing requirement. If a plaintiff fails to file a certificate of good faith with the complaint (or files one that is not fully compliant with the statutory requirements),

> [t]he court may, upon motion, grant an extension within which to file a certificate of good faith if the court determines that a health care provider who has medical records relevant to the issues in the case has failed to timely produce medical records upon timely request, or for other good cause shown.

"Tenn. Code Ann. § 29-26-122(c); *Stovall v. UHS of Lakeside, LLC*, No. W2013-01504-COA-R9-CV, 2014 WL 2155345, at *11 (Tenn. Ct. App. Apr. 22, 2014), (holding that an extension may be granted in cases where the plaintiff filed a certificate of good faith but it is not fully compliant), *overruled on other grounds by Davis ex rel. Davis v. Ibach,* 465 S.W.3d 570 (Tenn. 2015). Therefore, an extension of time may be granted only if a healthcare provider failed to timely produce relevant medical records or if the plaintiff demonstrates 'good cause.' Tenn. Code Ann. § 29-26-122(c). What is good cause? The term 'good cause' means '[a] legally sufficient reason. [It] is often the burden placed on a litigant ... to show why a request should be granted or an action excused.' *Black's Law Dictionary* (11th ed. 2019). This Court has consistently held that mistakes in calendaring, secretarial shortcomings, and attorney oversight do not constitute good cause. *See G.F. Plunk Constr. Co., Inc. v. Barrett Props. Inc.*, 640 S.W.2d 215, 218 (Tenn. 1982).

"Here, the trial court granted the extension because it found that Exhibit 7 'could have, and possibly should have, gone further and/or into more detail.' We agree with that finding, but it merely explains how Exhibit 7 failed to fully comply with the certificate of good faith filing requirement. It does not constitute a finding that the failure was justified. In fact, the record contains little to no evidence providing any justification for the Estate's failure to comply with the certificate filing requirement. The Estate contended at the summary judgment hearing that Defendants had not furnished any of Decedent's medical records. The trial court questioned the legitimacy of this argument, however, and found that Defendants provided all records to the authorized agent of the Estate per the Estate's instruction. As for 'good cause shown,' the record contains no evidence that the Estate proffered any justification to support a finding of 'good cause shown.' Therefore, we conclude that the trial court abused its discretion in granting the motion for an extension of time to file a certificate of good faith. Because the new Exhibit 7 was not properly before the court, it does not provide a means by which to demonstrate the Estate's compliance with Tenn. Code Ann. § 29-26-122.

"Based on the foregoing, we conclude that the trial court erred in not granting summary judgment to Defendants. As a result, Defendants' remaining issue is pretermitted."

2. Required from Defendant Alleging Comparative Fault Against a Non-Party

Hanson v. Levan, 647 S.W.3d 85 (Tenn. Ct. App., Swiney, 2021), perm. app. denied Jan. 13, 2022.

"In this healthcare liability action, the plaintiff sued several medical professionals and facilities. Following an amended complaint, which had removed multiple parties from the action, the remaining defendants filed their answer to the amended complaint that included allegations of comparative fault against a doctor that the plaintiff had removed as a party to the action in the amended complaint. The defendants did not file a certificate of good faith in compliance with Tennessee Code Annotated § 29-26-122, which is required when a defendant alleges comparative

fault against a 'non-party.' Following a motion by the plaintiff, the trial court entered an order striking the defendants' allegations of comparative fault. The trial court further found that the defendants had not demonstrated good cause to support an extension of time to file a certificate of good faith. Discerning no error, we affirm."

"The statute at issue that we must interpret is Tennessee Code Annotated § 29-26-122, which provides as follows in pertinent part:

> (b) Within thirty (30) days after a defendant has alleged in an answer or amended answer that a non-party is at fault for the injuries or death of the plaintiff and expert testimony is required to prove fault as required by § 29-26-115, each defendant or defendant's counsel shall file a certificate of good faith ....
>
> (c) The failure of a plaintiff to file a certificate of good faith in compliance with this section shall, upon motion, make the action subject to dismissal with prejudice. The failure of a defendant to file a certificate of good faith in compliance with this section alleging the fault of a non-party shall, upon motion, make such allegations subject to being stricken with prejudice unless the plaintiff consents to waive compliance with this section. If the allegations are stricken, no defendant, except for a defendant who complied with this section, can assert, and neither shall the judge nor jury consider, the fault, if any, of those identified by the allegations. The court may, upon motion, grant an extension within which to file a certificate of good faith if the court determines that a health care provider who has medical records relevant to the issues in the case has failed to timely produce medical records upon timely request, or for other good cause shown.

"Tenn. Code Ann. § 29-26-122 (2012).

"On appeal, Defendants argue that they were not required to file a certificate of good faith concerning Dr. Spencer Adoff because Plaintiff already had filed a certificate of good faith that included Dr. Adoff with the initial complaint and Defendants had maintained allegations of comparative fault against Dr. Adoff throughout the proceedings. According to Defendants, the allegations they had made against Dr. Adoff were 'nearly identical' to the allegations made by Plaintiff in their original complaint. Defendants therefore argue that there were 'not any new claims against a new non-party health care provider that would require the filing of an additional certificate of good faith.' We, as did the Trial Court, disagree with Defendants' argument that they were not required to file a certificate of good faith with their answer to the amended complaint when it included claims of comparative fault against a medical professional who was no longer a party to the action."

"When Dr. Adoff was removed as a party in the amended complaint, Plaintiff not only no longer had any burden of proving liability on the part of Dr. Adoff, it would be against Plaintiff's interest to do so. At the time Defendants filed their answer to the amended complaint alleging comparative fault, the sole burden of establishing any fault by Dr. Adoff, a non-party, was with Defendants. In order to strictly comply with Tennessee Code Annotated § 29-26-122, Defendants had to file a certificate of good faith following their answer to the amended complaint concerning their allegations against Dr. Adoff within thirty days. They did not do so.

"Subsection (c) provides the consequences for a defendants' failure to comply with subsection (b) and states that unless the plaintiff waives compliance, a defendant's allegations of comparative fault

are subject to being stricken with prejudice if a motion is filed. *See* Tenn. Code Ann. § 29-26-122 (2012). If such allegations are stricken, the defendant who failed to comply may not assert those allegations of fault to be considered by the court or a jury. *Id.* We recognize the harsh results stemming from section 29-26-122, but the statutory requirements for a defendant are as clear as they are for a plaintiff. Just as these healthcare liability statutes often have been a technical trap for plaintiffs, these harsh results also apply to defendants who fail to comply with the mandatory requirements of Tennessee Code Annotated § 29-26-122. In this case, we find and hold, as did the Trial Court, that Defendants did not comply with the requirements of Tennessee Code Annotated § 29-26-122 by filing a certificate of good faith to support their comparative fault allegations. Therefore, Defendants' comparative fault allegations were subject to being stricken with Plaintiff's motion to strike.

"Defendants further argue that even if they were required to file their own certificate of good faith with their answer to the amended complaint, good cause existed for an extension of time to allow them to file such certificate due to the 'reasonable confusion in the law.' Tennessee Code Annotated § 29-26-122(c) allows the trial court to grant an extension of time within which the defendant may file a certificate of good faith if, *inter alia*, good cause is shown by the defendant. However, as the Trial Court noted in its judgment, Defendants in their response in opposition to the motion to strike only generally stated the alternative request that the Trial Court should permit the requested extension of time. Defendants provided no reasoning in support of their argument that good cause existed to extend the time for which they could file a certificate of good faith. No argument was presented to the Trial Court concerning an existing 'confusion in the law' that is now being argued on appeal. Even if this specific argument had been raised before the Trial Court, we find no merit to Defendants' argument that they should be allowed an extension of time to file their certificate of good faith due to 'confusion in the law.' As previously addressed in this Opinion, the statute and resulting case law are clear that a certificate of good faith is required by the defendant when alleging the comparative fault of a medical professional who is not a party to the action if expert testimony would be required. We agree with the Trial Court that Defendants had not established that good cause existed sufficient to grant an extension of time to Defendants to file their certificate of good faith.

"Therefore, Defendants' failure to comply with Tennessee Code Annotated § 29-26-122 made their comparative fault allegations subject to being stricken with prejudice, pursuant to subsection (c). Plaintiff did not waive this statutory requirement and no good cause existed to extend Defendants' time for filing a certificate of good faith. Upon motion to strike by Plaintiff, the Trial Court ordered that Defendants' allegations in their answer of comparative fault against Dr. Spencer Adoff were to be stricken. Pursuant to Tennessee Code Annotated § 29-26-122(c), Defendants are prohibited from asserting comparative fault allegations against the non-party, Dr. Spencer Adoff. We find no error in the Trial Court's decision to strike Defendants' allegations of comparative fault due to noncompliance with Tennessee Code Annotated § 29-26-122 or its ruling that no good cause existed to allow an extension of time to comply with the statutory requirements. We, therefore, affirm the Trial Court's judgment in its entirety."

V. Legal Malpractice

Coffee County, Tennessee v. Spining, No. M2020-01438-COA-R3-CV (Tenn. Ct. App., Clement, Jan. 19, 2022), perm. app. denied May 18, 2022.

"This appeal arises from a Rule 12.02(6) dismissal of a legal malpractice action as time-barred under the one-year statute of limitations in Tennessee Code Annotated § 28-3-104(c)(1). In its September 17, 2019 Complaint, the plaintiff county alleged that its trial counsel in an underlying Public Employee Political Freedom Act ('PEPFA') action committed malpractice by failing to object to the jury verdict form in conjunction with agreeing to bifurcate the issue of damage. The defendant attorney and his law firm moved to dismiss the complaint as time-barred under § 28-3-104(c)(1), asserting that the county's claim accrued no later than July 7, 2017—the date on which the court entered the final judgment against the county in the underlying PEPFA case. The county opposed the Motion, asserting that its claim did not accrue until September 18, 2018—the date on which the Court of Appeals issued its opinion in the PEPFA case—because it was on that date the county first reasonably became aware of the alleged malpractice. The trial court granted the Motion to Dismiss on the ground the county knew it had been injured and had sufficient constructive knowledge to trigger accrual of the action more than one year prior to its commencement. This appeal followed. We affirm."

VI. Real Estate Appraiser Malpractice

First Community Mortgage, Inc. v. Appraisal Services Group, Inc., 644 S.W.3d 354 (Tenn. Ct. App., Stafford, 2021), perm. app. denied Mar. 24, 2022.

"A mortgage company appeals the dismissal of its lawsuit against an appraisal company and its employee as barred by the applicable statute of limitations. The appraisal company and its employee urge this Court to affirm the dismissal of the lawsuit and to award them attorney's fees under Tennessee Code Annotated section 20-12-119(c). We affirm the dismissal of the mortgage company's action against the appraisal company and its employee. We conclude, however, that section 20-12-119(c) does not authorize the award of attorney's fees incurred for appellate work."

"On September 12, 2019, Plaintiff/Appellant First Community Mortgage, Inc. ('Appellant') filed a complaint for damages against various defendants, including Defendant/Appellee Appraisal Services Group, Inc. ('Appraisal Services') in the Rutherford County Chancery Court. Because this case was resolved by a motion to dismiss, we take the facts from the complaint. The complaint alleged that in 2015, property owner Phil D. Finch arranged to refinance real property located in Weakley County, Tennessee. Mr. Finch contracted with Traditional Home Mortgage, Inc. ('Traditional Home Mortgage') for the refinance. Traditional Home Mortgage hired Appraisal Services to perform appraisal services related to the loan, which they completed in 2015. According to the complaint, however, Appraisal Services negligently failed to discover or disclose the existence of an encroachment issue during their appraisal, whereby improvements on the subject property extended across a property line, encroaching onto a neighboring tract of land.

"The alleged negligence was not discovered at the time, and the refinance loan was completed, secured by the underlying real property. Appellant eventually purchased the mortgage from Traditional Home Mortgage. Appellant then sold the mortgage to AmeriHome Mortgage Company, LLC ('AmeriHome Mortgage'). AmeriHome Mortgage sold the property to Federal National Mortgage Association ('FNMA'). During an audit, FNMA discovered the encroachment issue; according to the complaint, one-half of Mr. Finch's home and swimming pool were actually located on a neighboring tract of land. FNMA thereafter requested that AmeriHome repurchase the mortgage, which it did. AmeriHome next requested that Appellant repurchase the mortgage; the repurchase occurred in January 2018.

"On June 7, 2019, the underlying property was sold at foreclosure. The foreclosure sale left a deficit of over $100,000.00, borne by Appellant. According to the complaint, Appellant would not have been required to repurchase the property but for the encroachment issues; Appellant would therefore not have suffered any losses as a result of the foreclosure of the property. The complaint further alleged that Appellant's damages were the direct and proximate result of Appraisal Services' negligence in failing to discover or disclose the encroachment issues during the 2015 appraisal. Appellant therefore requested both compensatory and punitive damages, along with interest, attorney's fees, and costs."

"In support of its contention that the trial court erred in granting Appellees' motion to dismiss, Appellant essentially makes three alternative arguments: (1) that the statute of limitations relied upon by the trial court, Tennessee Code Annotated section 28-3-104(d), is inapplicable; (2) that if applicable, application of section 28-3-104(d) impairs Appellant's vested right; and (3) the trial court erred in concluding that the cause of action at issue accrued in January 2018. We will consider each argument in turn.

"The parties first disagree regarding whether the statute of limitations relied on by the trial court, Tennessee Code Annotated section 28-3-104(d), should even apply in this case. Section 28-3-104(d) provides as follows:

> Any action to recover damages against a real estate appraiser arising out of the appraiser's real estate appraisal activity shall be brought within one (1) year from a person's discovery of the act or omission giving rise to the action, but in no event shall an action to recover damages against a real estate appraiser be brought more than five (5) years after the date the appraisal was conducted.

"The trial court ruled that Appellant's cause of action accrued in January of 2018 when Appellant was forced to repurchase the loan. Applying section 28-3-104(d), the trial court ruled that Appellant was required to file its complaint within one year. Appellant's September 2019 complaint was therefore well outside the applicable statute of limitations."

"In this case, the Tennessee General Assembly expressly stated that the act, i.e., the one-year statute of limitations contained in section 28-3-104(d), would apply to 'actions accruing *and* appraisals conducted on or after' July 1, 2017. 2017 Tenn. Laws Pub. Ch. 234 (emphasis added)."

"Based on these requirements, we must conclude that the legislature intended that the newly enacted statute of limitations would apply to both actions accruing on or after July 1, 2017, and appraisals conducted on or after that date. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 117 (2012) (stating that the use of the conjunction 'and' followed by 'two elements in the construction' often 'entails an express or implied *both* before the first element'). To be sure, Appellant provides no argument, supported by legal authority or otherwise, to suggest that this interpretation is incorrect. In our view, this interpretation properly takes into account the legislature's choice to include consideration of both the accrual date and the appraisal date in determining whether the new provision applies. To hold otherwise—that the new statute of limitations applies only in the single situation wherein both the action accrued and the appraisal was conducted on or after July 1, 2017—would essentially nullify the language concerning accrual, as any cause of action based on an appraisal conducted on or after July 1, 2017 would necessarily accrue on or after July 1, 2017. Thus, an interpretation that the new statute applies both when a cause of action accrues on or after July 1, 2017, and when an appraisal is conducted on or after

July 1, 2017, best encompasses all of the language of the enabling provision and does not render the reference to accrual superfluous. *See Young v. Frist Cardiology, PLLC*, 599 S.W.3d 568, 571 (Tenn. 2020) (quoting *City of Caryville v. Campbell Cnty.*, 660 S.W.2d 510, 512 (Tenn. Ct. App. 1983)) ('We must "construe a statute so that no part will be inoperative, superfluous, void or insignificant[.]"'). Consequently, while Appellant only meets one of these requirements—that the cause of action accrued on or after July 1, 2017—the newly enacted statute of limitations contained in section 28-3-104(d) was clearly intended to apply in this situation. The trial court therefore did not err in concluding that section 28-3-104(d) was applicable to Appellant's cause of action, notwithstanding the fact that the appraisal at issue occurred in 2015."

"Appellants make one final argument: that the trial court erred in ruling that Appellant's cause of action accrued in January 2018 when it was forced to buy back the mortgage on the real property, rather than on June 7, 2019, when the foreclosure occurred. Using June 7, 2019, as the accrual date of their cause of action, Appellant contends that its September 12, 2019 initial complaint was timely. According to Appellant, it did not suffer any 'identifiable damages' until the June 7, 2019 foreclosure sale when a deficit judgment was entered against Appellant.

"As the Tennessee Supreme Court has explained,

> 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.

"*Redwing v. Cath. Bishop for Diocese of Memphis*, 363 S.W.3d 436, 459 (Tenn. 2012). . . ."

"In this case, the facts alleged in the complaint, even viewed in the light most favorable to Appellant, demonstrate that Appellant was 'forced to take some action' as a result of Appellees' alleged negligence in January 2018, when AmeriHome requested that Appellant repurchase the mortgage. At this time, the damages to Appellant were not fully realized because the property had not yet been foreclosed. But Appellant at that time suffered an actual injury as a result of Appellees' alleged negligence. The trial court did not err in concluding that Appellant's cause of action accrued in January 2018, more than one year prior to the filing of the complaint. As a result, the trial court did not err in dismissing this case on the basis of the expiration of the Tennessee Code Annotated section 28-3-104(d) statute of limitations."

"As a final matter, Appellees assert that they are entitled to attorney's fees incurred on appeal pursuant to Tennessee Code Annotated section 20-12-119(c). In particular, section 20-12-119(c)(1) provides in relevant part as follows:

> [I]n a civil proceeding, where a trial court grants a motion to dismiss pursuant to Rule 12 of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending at the time the successful motion to dismiss was granted the costs and reasonable and necessary attorney's fees incurred in the proceedings as a consequence of the dismissed claims by that party or parties. The awarded costs and fees shall be paid by the party or parties whose claim or claims were dismissed as a result of the granted motion to dismiss.

"Appellees argue on appeal that this statute provides for an award of attorney's fees incurred on appeal and that this request is properly directed to this Court."

"Construing section 20-12-119(c) in line with its stated aim to provide only 'very limited' relief to litigants does not leave litigants without the possibility of being made whole for fees incurred as a result of frivolous lawsuits. Instead, Tennessee Code Annotated section 27-1-122 has long provided for the award of attorney's fees to a party who is required to respond to a frivolous appeal. . . ."

"[W]e conclude that Tennessee law does not provide that attorney's fees for appellate work are authorized under section 20-12-119(c) in the absence of an explicit provision providing for that relief."

"As a final matter, we note that while we typically do not entertain the question of attorney's fees under section 27-1-122 without the issue being properly raised, we can consider the issue sua sponte. *See* Tenn. Code Ann. § 27-1-122 (stating that the award of attorney's fees thereunder may be made on the court's 'own motion'). *But see, e.g., Ave. Bank v. Guarantee Ins. Co.*, No. M2014-02061-COA-R3-CV, 2015 WL 5838309, at *5 (Tenn. Ct. App. Oct. 6, 2015) (noting that we sometimes decline to award attorney's fees under section 27-1-122 when the request was not designated as an issue on appeal). In this case, we have held, as a matter of first impression, that the statutory provision cited by Appellees does not authorize an award of attorney's fees incurred on appeal. As such, we exercise our discretion to consider Appellees' request under the proper statute—section 27-1-122."

"Although Appellant did not meet the express requirements of section 20-12-119(c)(5)(E) that the litigant expressly state that it is raising an issue of first impression, the question of whether the Tennessee Code Annotated section 28-3-104(d) statute of limitations enacted in 2017 was applicable to a case involving a 2015 appraisal is an issue of first impression. Thus, while Appellant may not be saved from the ambit of 20-12-119(c) for purposes of the attorney's fees Appellees incurred in the trial court, we decline to find that this appeal is frivolous for purposes of awarding damages under section 27-1-122."

VII. Premises Liability

Walker v. Rivertrail Crossing Homeowner's Association Inc., No. W2020-01201-COA-R3-CV (Tenn. Ct. App., Armstrong, Mar. 23, 2022), perm. app. denied July 13, 2022.

"In 2000, Anthony Walker and his wife, Cynthia Walker (together, 'Appellants'), purchased a home in the Rivertrail Crossing Subdivision and became members of the Rivertrail Crossing Homeowner's Association ('Rivertrail'). The Walkers' lot abutted a common area, which contained a retaining wall marking the edge of the Rivertrail property.

"On April 7, 2018, Mr. Walker complained to a member of the Rivertrail Board that a section of ground ivy, which was located in the common area near the Walkers' property line, was 'snaky' and an eyesore. The member advised Mr. Walker to submit his concerns to the Rivertrail Board in writing because changing the ground cover was a landscaping issue, which would require the Board's approval. There is no evidence that Mr. Walker submitted his concern to the Board. Furthermore, pursuant to Rivertrail's Declaration of Covenants, Conditions, and Restrictions

('CCR'), the common area was to 'remain in its natural state, except those areas which have been landscaped,' and 'clearing, digging, planting, or alteration of any kind' in the common area is prohibited absent written consent of Rivertrail, *see further discussion infra.* There is no evidence that Mr. Walker obtained such written consent.

"As set out in Appellants' complaint filed in the Shelby County Circuit Court ('trial court'), on April 21, 2018, Mr. Walker undertook to cut the ground ivy located in the common area adjacent to his lot and the railroad-crosstie, retaining wall. Appellants averred that

> [a]s [Mr. Walker] was cutting beside the railroad ties, his [riding] lawnmower fell into a trough that was covered by the ivy, which could not be seen. The lawnmower jolted over and threw [Mr. Walker] onto his driveway feet below.

"Appellants asserted that, '[a]s a result of this incident, [Mr. Walker] [suffered] a spiral fracture of his left femur and a compression fracture of a vertebrae in his back.' Based on the foregoing, the Walkers averred that Rivertrail negligently maintained the common area causing Mr. Walker's injuries. Mrs. Walker sought recovery for loss of consortium."

"On April 30, 2020, Rivertrail filed a motion for summary judgment. Rivertrail argued that: (1) it owed no duty to the Walkers because Mr. Walker was not permitted to operate a lawnmower on Rivertrail's common-area without first obtaining Rivertrail's consent; and (2) in the alternative, Rivertrail lacked actual or constructive knowledge of the area of uneven ground. The Walkers filed a response in opposition to Rivertrail's motion for summary judgment, which was heard on June 26, 2020. By order of August 10, 2020, the trial court granted Rivertrail's motion for summary judgment. . . ."

"Here, the Walkers' lawsuit sounds in premises liability. A landowner's duty 'includes the responsibility to remove or warn against latent or hidden dangerous conditions on the premises of which one was aware or should have been aware through the exercise of reasonable diligence.' *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn. 1998). Therefore, in addition to the ordinary elements of negligence, a plaintiff in a premises liability action must also prove that the dangerous condition that caused the plaintiff's injury was either 'caused or created by the [property] owner, operator, or his agent' or that 'the owner or operator had actual or constructive notice that the condition existed prior to the accident.' *Parker v. Holiday Hosp. Franchising, Inc.*, 446 S.W.3d 341, 350 (Tenn. 2014) (quotation omitted). As set out above, the trial court granted Rivertrail's motion for summary judgment on its finding that Rivertrail negated the prima facie elements of notice and duty."

"In its motion for summary judgment, Rivertrail argues that: (1) it did not create the condition complained of by Appellants; (2) it lacked actual knowledge of the defective condition; and (3) '[t]here is no evidence concerning the date of the erosion along the retaining wall from which to charge Rivertrail with constructive knowledge of the condition.'"

"Despite Appellants' assertion that there are questions regarding whether Rivertrail had actual knowledge of the uneven condition of the ground where Mr. Walker was injured, our review of the record reveals that this fact was not disputed. In number 18 of Rivertrail's Statement of Undisputed Material Facts, which accompanied its Motion for Summary Judgment, Rivertrail stated: 'Rivertrail HOA was unaware that the ground was not level in the common area alongside the retaining wall adjacent to [the Walkers'] property.' (Citations to the record omitted). Appellants' complete response to number 18 was: 'Disputed.' Rule 56.03 of the Tennessee Rules of Civil Procedure

requires that '[e]ach disputed fact ... be supported by specific citation to the record,' Tenn. R. Civ. P. 56.03, yet Appellants cited no facts in the record to support their response. A party 'may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' Tenn. R. Civ. P. 56.06."

"In other words, Appellants' bare assertion that fact 18 was 'disputed' is insufficient to create a dispute of material fact. Accordingly, Rivertrail's statement that it 'was unaware that the ground was not level in the common area' is admitted, *see White v. Bradley Cty. Gov't*, —— S.W.3d ——, No. E2020-00798-COA-R3-CV, 2021 WL 2430814, at *6 (Tenn. Ct. App. June 15, 2021), *perm. app. denied* (Tenn. Oct. 13, 2021), and Rivertrail cannot be charged with actual notice.

"Concerning whether Rivertrail may be charged with constructive knowledge of the defective condition, we first note that constructive knowledge is 'information or knowledge of a fact imputed by law to a person (although he may not actually have it) because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.' *Parker*, 446 S.W.3d at 351 (quotation omitted). In a premises liability action, '[c]onstructive notice may be established by showing that a dangerous or defective condition existed for such a length of time that a property owner, in the exercise of reasonable care, should have become aware of it.' *Id.* Rivertrail argues:

> The record contains no evidence from which to determine the length of time that the ground was uneven alongside the retaining wall. Likewise, there is no evidence suggesting that the ground was level at any time prior to April 21, 2018. Appellants did not inspect the area, and [Rivertrail's landscaping company] did not perform work in the area near the retaining wall.
> . . .
> [T]here is no evidence from which a jury could reasonably conclude the length of time that the ground was uneven.

"In response, Appellants offered the affidavit of Carman Scruggs, who has been a landscape contractor for more than 40 years. Although Mr. Scruggs opined that the erosion likely would have been apparent to any person maintaining the ivy in the common area, he did not offer any estimate concerning how long the uneven ground may have existed. Indeed, Appellants have not identified any facts in the record that would aid a jury in determining how long the ground along the retaining wall was uneven. Consequently, there is no factual basis on which to conclude that Rivertrail had sufficient opportunity to discover and correct the uneven ground. 'When there is a complete absence of proof as to when and how the dangerous condition came about, it would be improper to permit the jury to speculate on these vital elements.' *Chambliss v. Shoney's Inc.*, 742 S.W.2d 271, 273 (Tenn. Ct. App. 1987). Therefore, we conclude that Rivertrail effectively negated the element of constructive notice."

"The trial court held that Rivertrail negated the prima facie element of duty because it 'sufficiently demonstrated that Mr. Walker was operating his riding lawnmower on common area property without the consent of Rivertrail HOA at the time of injury.' 'Owners and occupiers of business premises have a duty to maintain their premises in a safe manner only in areas where customers or the public will foreseeably be present.' *Plunk v. Nat'l Health Inv'rs, Inc.*, 92 S.W.3d 409, 414 (Tenn. Ct. App. 2002) (collecting cases) (emphasis added)."

"We begin with Appellant's first argument, i.e., 'written consent deals with areas that have not been landscaped, which would not include [the common] area since it involves landscape plantings.' As set out in context above, the corresponding portion of the CCR contains two sentences: (1) 'The common areas shall remain in their natural state, except those areas which have been landscaped'; and (2) 'No clearing, digging, planting or alteration of any kind shall be done without written consent from the association.' Contrary to Appellants' reading, the second sentence is absolute—i.e., no alterations 'of any kind' shall be done without the written consent of Rivertrail. The prohibition against any kind of alteration to the common area makes no distinction between landscaped and natural portions of same. Sentence one of this provision, which Appellants read to limit the requirement of written consent to natural portions of the common area, is merely declarative, i.e., the common area will remain in its natural state unless landscaped. The CCR, however, clearly states that Rivertrail 'shall provide ... all landscaping ... for the Common Area' (emphasis added). Thus, giving full force and effect to both sentences in the disputed CCR provision and to the provision granting sole landscaping authority over the common area to Rivertrail, it is clear that the intent of the CCR is to limit alteration of the common area to changes approved by Rivertrail either on its own motion or by written consent to a homeowner. *Maples Homeowners Ass'n*, 993 S.W.2d at 39 (Covenants must be 'construe[d] in light of the context in which they appear.'); *Buettner v. Buettner*, 183 S.W.3d 354, 358 (Tenn. Ct. App. 2005) (citation omitted) ('The court must construe the various provisions of a contract together, giving effect to each provision and seeking to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the language they employed.'). Without such written consent, which Mr. Walker undisputedly did not obtain, the CCR precluded him from making any alteration to any portion of common area, whether such portion was landscaped or natural.

"In Appellants' second response, *supra*, they argue that because there is currently no 'Architectural Committee,' there is no mechanism for a homeowner to obtain the required approval. This provision of the CCR again places sole landscaping authority with the 'association,' i.e., 'The Association shall be responsible for maintaining all landscaping....' The provision also reiterates the requirement of pre-approval for any alteration to the common area by a homeowner, to-wit: 'no Owner of any Lot in the Property shall at any time disturb [the common area] without first obtaining the approval of the Architectural Committee.' While we concede that one may not obtain the consent of a committee that does not exist, the overarching purpose of the disputed CCR provisions is to ensure that no homeowner alters the common area without the consent and approval of Rivertrail. To this end, and aside from the 'Architectural Committee,' the CCR provides that a homeowner may seek approval directly from the association, i.e., 'No ... alteration of any kind shall be done without written consent from the association' (emphasis added). . . . It was, therefore, incumbent on Mr. Walker to procure written approval from Rivertrail before undertaking to alter the common area. In the absence of such approval, it was not foreseeable that Mr. Walker would be in the area where his injuries occurred. In the absence of foreseeability, Rivertrail owed no duty of care. *See Plunk*, 92 S.W.3d at 414."

VIII. Fraud and Undue Influence; Attorney Fees

Ellis v. Duggan, 644 S.W.3d 85 (Tenn. Ct. App., McGee, 2021).

"This is a case involving allegations of undue influence. The plaintiffs are the grandchildren of the decedent. The sole defendant at issue on appeal is the decedent's niece, who also held power of attorney for the decedent during the last years of her life. The transaction at issue occurred roughly

six months before the decedent died and consisted of a gift of $176,000 to the niece for the purchase of a house. The executor of the decedent's estate declined to pursue the claim for undue influence and assigned the cause of action to the decedent's four grandsons, who were the residuary beneficiaries of the estate. After a five-day bench trial, the trial court found that a confidential relationship existed between the decedent and the defendant niece and that multiple suspicious circumstances existed to support a finding of undue influence. As such, the trial court entered a judgment against the defendant niece for $176,000. However, the trial court denied the plaintiffs' request for attorney fees on the basis that they were 'not available under the current caselaw relating to undue influence.' The defendant niece appeals, challenging the finding of undue influence. The plaintiffs appeal the denial of their request for attorney fees. Having carefully reviewed the voluminous record, we affirm the finding of undue influence and the judgment against the defendant niece. We reverse the denial of the plaintiffs' request for attorney fees and remand for a reasonable award of attorney fees incurred by the plaintiffs in the trial court and on appeal."

"Finally, Plaintiffs seek an award of attorney fees incurred at trial and on appeal."

"'Tennessee has long followed the "American Rule" with regard to attorney's fees.' *Eberbach v. Eberbach*, 535 S.W.3d 467, 474 (Tenn. 2017) (citing *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000)). Pursuant to the American Rule, '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).

"An award of attorney fees was upheld under circumstances similar to those before us in *Martin v. Moore*, 109 S.W.3d 305, 307 (Tenn. Ct. App. 2003). In that case, a man who was diagnosed with dementia executed a power of attorney in favor of his wife. *Id.* She used the power to withdraw all of the money from her husband's separate account and sent most of it to her brother. *Id.* After the principal died, his daughter, who was the executrix of his estate, brought suit for breach of fiduciary duty, seeking a return of the funds. *Id.* The trial court ordered the return of the money and also ordered the wife to pay some of the daughter's attorney fees. *Id.* On appeal, this Court affirmed. At the outset, we explained that the existence of a confidential relationship, combined with a benefit to the dominant party, creates a presumption of undue influence and of the invalidity of the transaction, which can only be rebutted by clear and convincing evidence of fairness. *Id.* at 309-10. After affirming the trial court's decision to require return of the funds, we turned to the issue of attorney fees. *Id.* at 311, 313. The wife argued that there was no statutory or contractual basis for the award. *Id.* at 313. However, we found 'a basis in case law' for the award. *Id.* We explained:

> [S]everal cases of this court support the proposition that attorney fees may be awarded against a trustee who breaches her fiduciary duty. *Brandt v. Bib Enterprises*, 986 S.W.2d 586 (Tenn. Ct. App. 1998); *Marshall v. First National Bank of Lewisburg*, 622 S.W.2d 558 (Tenn. Ct. App. 1981).
>
> Although attorney fees should not be imposed where there is merely a technical fault on the part of the fiduciary, 622 S.W.2d at 560, the imposition of such fees on fiduciaries who deliberately use their position of trust to enrich themselves creates a disincentive to such behavior. The trial court's finding that Ms. Moore intentionally withdrew her husband's separate funds from his checking account for her sole use and benefit is an appropriate predicate for the trial court's award.

"*Id.*"

"Keeping these principles in mind, we conclude that there is a basis in caselaw for awarding attorney fees to the Plaintiffs in this case. Christina had exercised the power of attorney many times, giving rise to a confidential relationship. She breached her fiduciary duties to Jean and obtained a gift by undue influence. The trial court specifically found that Christina 'knowingly violated the POA to benefit herself.' *Compare Martin*, 109 S.W.3d at 313 ('The trial court's finding that Ms. Moore intentionally withdrew her husband's separate funds from his checking account for her sole use and benefit is an appropriate predicate for the trial court's award [of attorney fees].'). Christina's actions did not consist of a mere technical fault but a deliberate abuse of her position. '[T]he imposition of [attorney] fees on fiduciaries who deliberately use their position of trust to enrich themselves creates a disincentive to such behavior.'*See id.* As such, we conclude that Plaintiffs should be awarded their attorney fees at the trial level and on appeal. We remand for the trial court to determine a reasonable award."

IX. Defamation; Absolute Litigation Privilege

Vanwinkle v. Thompson, No. M2020-01291-COA-R3-CV (Tenn. Ct. App., Stafford, June 2, 2022).

"This appeal concerns one of three separate but interrelated cases involving the same two parties, Christie Lee Upchurch Vanwinkle ('Mrs. Vanwinkle') and Robert Martin Thompson ('Appellee'). These parties were married in 1995 and the first of the three cases, a divorce action, was commenced in 2015. *See generally Thompson v. Thompson*, No. M2020-01293-COA-R3-CV, 2022 WL 386159 (Tenn. Ct. App. Feb. 9, 2022). A 'Final Decree of Divorce' was filed in the Circuit Court of Putnam County (the 'trial court') on December 22, 2017, stating that Mrs. Vanwinkle and Appellee were 'granted an absolute divorce and restored to all the rights and privileges of single persons.' The decree also stated, inter alia, that issues of property division and alimony would be reserved for later determination. An order designated as a final order was entered on October 29, 2018, detailing the division of marital property and debts. *Id.* at *2. Mrs. Vanwinkle filed a motion to alter or amend the trial court's judgment or, alternatively, for a new trial, which this Court treated as a motion pursuant to Tennessee Rule of Civil Procedure 59.04. *See id.* at *2, *2 n.3. Therein, she claimed that the trial court had divided her retirement benefits in a manner that did not reflect the parties' true agreement. *Id.* at *2. The trial court denied Mrs. Vanwinkle's motion, and Mrs. Vanwinkle appealed to this Court. *Id.* at *3.

"As is relevant to the second and third cases involving these parties, Mrs. Vanwinkle married Scott Vanwinkle (together, with Mrs. Vanwinkle, 'Appellants') on October 27, 2018. On July 19, 2019, Appellee filed a separate action against Appellants in the trial court entitled 'Complaint for Declaratory Judgment and to Invalidate Bigamous Marriage.' Therein, Appellee essentially alleged that Appellants' marriage was bigamous because the divorce between Appellee and Mrs. Vanwinkle was not final. Appellee asked the trial court to declare Appellants' marriage invalid, to permit him to determine the extent of the property acquired during their marriage, and to award him an appropriate share of that property. Appellants filed a motion to dismiss Appellee's declaratory judgment action, which was eventually granted.

"In the third case, Appellants filed a complaint for defamation against Appellee in the trial court on August 15, 2019. Therein, they claimed that Appellee had falsely alleged that they had committed bigamy in his complaint for declaratory judgment. Appellants' defamation complaint further alleged, inter alia, that Appellee knew his allegation of bigamy was untrue because he himself had appeared before the trial court to secure a final divorce from Mrs. Vanwinkle. Appellants sought compensatory and punitive or exemplary damages as a result of the alleged defamation. Appellee filed a motion to dismiss the defamation complaint pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure. Therein, Appellee argued, inter alia, that the divorce was not final, and thus his bigamy allegation was true and not defamatory. Regardless, Appellee also contended that his allegations of bigamy were protected under the absolute litigation privilege—in other words, even if his statements were defamatory, he could not be sued for defamation because he made the statements in the course of a judicial proceeding and the statements were relevant to the issue in the judicial proceeding. Appellee also sought attorney's fees in his motion to dismiss."

"Following the hearing, the trial court entered an order on August 25, 2020, granting Appellee's motion to dismiss Appellants' defamation complaint. The trial court found, in part, that 'all alleged defamatory statements were expressly claimed to have been made in the course of a judicial proceeding, specifically [Appellee's] Complaint,' and 'that the alleged defamatory statements were each pertinent or relevant to the issue involved in said judicial proceeding.' Therefore, the trial court found that all of the allegedly defamatory statements were subject to the absolute litigation privilege and, as such, they could not form the basis of a defamation action. The trial court therefore dismissed the complaint for failure to state a claim upon which relief could be granted. The trial court further stated that counsel for the parties had agreed to mutually waive their claims for attorneys' fees.

"Appellants appealed. This appeal concerns only the defamation case—not the divorce or declaratory judgment actions."

"In Tennessee, the 'absolute litigation privilege' applies, such that 'statements made in the course of a judicial proceeding, if pertinent or relevant, are absolutely privileged, and this is true regardless of whether they are malicious, false, known to be false, or against a stranger to the proceeding.' [*Jones* v.] *Trice*, 360 S.W.2d [48] at 54 [(Tenn. 1962)]. Such statements, 'therefore[,] cannot be used as a basis for a libel action for damages.' *Id.* at 50; *see also id.* at 54–55 ('Our opinion is consistent with the free and unrestricted use of all reasonably pertinent and relevant information available to litigants in presenting their causes before the courts of this State.'). Thus, 'a statement by a judge, witness, counsel, or party, to be absolutely privileged, must meet two conditions, viz: (1) It must be in the course of a judicial proceeding, and (2) it must be pertinent or relevant to the issue involved in said judicial proceeding.' *Id.* at 52 (citations omitted)."

"Appellants do not appear to dispute that Appellee made his allegedly defamatory statements in the course of the declaratory judgment action, and thus in the course of a judicial proceeding. Therefore, the remaining question is whether Appellee's allegedly defamatory statements were pertinent or relevant to the issues in the declaratory judgment action. *See Trice*, 360 S.W.2d at 52. Indeed, they were, because Appellee's allegation that Appellants' marriage was bigamous formed the basis of his declaratory judgment action—the main point of which was to determine whether Appellants' marriage was, in fact, bigamous and, consequently, what relief, if any, Appellee was entitled to. Appellants argue that Appellee's allegedly defamatory statements were not relevant to the matters before the trial court—namely, the only remaining issue in the divorce action, the

division of Mrs. Vanwinkle's retirement benefits. But we are not aware of authority for the proposition that Appellee's allegation of bigamy had to be made in the course of or be pertinent or relevant to the divorce proceedings, as opposed to the declaratory judgment action, in order for the absolute litigation privilege to apply. Nor have Appellants pointed to any."

"Therefore, we conclude that Appellee is correct that the absolute litigation privilege protects the statements he made in his declaratory judgment complaint, and thus the defamation action was properly dismissed. Consequently, we need not decide whether Appellee is correct that the divorce was not final and thus his statements regarding bigamy were true."

X. Protection from Liability

Chapter 1117, Public Acts 2022, amending T.C.A. § 14-5-102 eff. June 1, 2022.

The Tennessee Recovery and Safe Harbor Act of 2020, which provides protection for claims arising from COVID-19 to certain persons, businesses, schools and other entities, has been extended to July 1, 2023.

Chapter 790, Public Acts 2022, adding T.C.A. § 28-3-117 eff. Apr. 8, 2022.

"(a) An owner, tenant, or lessee is not liable for injuries to a person that occur when the person is on the land of the owner, tenant, or lessee without paying to the owner, tenant, or lessee a valuable consideration for use of the land for the purpose of entering or exiting from or using a public greenway, unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. The limitation of liability provided by this section applies regardless of whether the person had obtained permission from the owner, tenant, or lessee to use the land for the purpose of entering or exiting from or using a public greenway.

"(b) As used in this section, 'public greenway' means an open-space area following a natural or man-made linear feature designed to be used for recreation, transportation, conservation, and to link services and facilities for which a governmental entity obtained a right-of-way easement from the property owner, tenant, or lessee."

Chapter 805, Public Acts 2022, adding T.C.A. § 29-34-213 eff. July 1, 2022.

"(a) As used in this section:

(1) 'Charitable organization' means a charitable unit of a religious or civic group that is exempt from taxation under 26 U.S.C. § 501, including those supported wholly or partially by private donations and registered with the secretary of state; and

(2) 'Services' means:

(A) Providing food;

(B) Providing housing; or

(C) Providing shelter from adverse weather.

"(b) A charitable organization providing services to the community is not liable for a loss, damages, injury, or death that results from providing services, unless the charitable organization's conduct in providing services constitutes gross negligence or willful and wanton misconduct."

XI. Settlements on Behalf of Minors

Chapter 917, Public Acts 2022, amending T.C.A. § 29-34-105 and adding § 34-1-121(c) eff. Apr. 27, 2022.

29-34-105.

"(a) (1) In any tort claim settlement involving a minor, the court shall conduct a hearing at which the minor and legal guardian are present if the tort claim settlement:
(A) Is a settlement of ten thousand dollars ($10,000) or more;
(B) Is a structured settlement; or
(C) Involves a minor who is not represented by an attorney licensed to practice in this state.
(2) Notwithstanding subdivision (a)(1), the court may, in its discretion, conduct the hearing in chambers or by remote communication and may excuse the minor from attending the hearing.

"(b) A tort claim settlement does not otherwise require court approval merely because it involves a minor.

"(c) In the order approving a tort claim settlement authorized by this section, the court has the discretion to determine whether the settlement proceeds are to be paid to the minor's legal guardian or held in trust by the court until the appropriate time."

34-1-121.

"(c) A tort claim settlement involving a minor does not require court approval except as required by § 29–34–105(a)."

WORKERS' COMPENSATION

I. Injury Arising Primarily Out of Employment; Fallen Tree Hitting Employee Exiting Non-Employer Provided Portable Restroom Does Not Qualify

Rosasco v. West Knoxville Painters, LLC, No. E2020-01656-SC-R3-WC (Tenn. W.C. Appeals Panel, Acree, Nov. 18, 2021).

"On October 31, 2019, Mr. Rosasco was painting the exterior of a house while working for Employer. A storm system in the area had produced strong winds. Mr. Rosasco described the weather as 'really, really windy,' which caused him to take a break from painting. At one point, he used a portable restroom that was located on the street. While inside the portable restroom, he heard a loud crack, rushed outside, and was struck by a dead tree that had fallen.

"Employer did not obtain the portable restroom for its employees. Employer's standard practice was for its employees to use the customer's restroom. Neither Employer nor Mr. Rosasco knew who placed the restroom in that location. He was unaware of the dead tree or the proximity of the dead tree to the portable restroom.

"Mr. Rosasco was taken to the emergency room and underwent a multi-level fusion surgery to repair fractures in his spine. The treating surgeon, Dr. William Oros, restricted him from lifting more than ten pounds, but later modified the restriction to twenty-five pounds.

"Employer denied Mr. Rosasco's workers' compensation because the injury resulted from an 'act of God' and did not arise primarily out of his employment. The Court of Workers' Compensation Claims subsequently granted Employer's motion for summary judgment after finding that Mr. Rosasco failed to 'show a causal connection between the work he performed and the resulting injury.' Mr. Rosasco has appealed."

"Mr. Rosasco argues that his injuries arose primarily out of his employment because 'the undisputedly dead tree could have been cut down by someone exercising reasonable foresight' and because the event 'was not, by definition, an act of God.'

"In contrast, Employer maintains that Mr. Rosasco's injuries did not arise primarily out of his employment because they resulted from an act of God. *See Homes v. State,* 808 S.W.2d 41, 44 (Tenn. Ct. App. 1991) ('Any misadventure or casualty is said to be caused by the act of God when it appears by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention.'). Employer also argues that Mr. Rosasco's employment did not subject him to a hazard that was 'uncommon to the general public or peculiar to the nature of the employment.'

"A workers' compensation injury is one that 'arises primarily out of and in the course and scope of employment.' Tenn. Code Ann. § 50-6-102(14). 'Arising out of' refers to 'a causal connection between the conditions under which the work is required to be performed and the resulting injury.' *Dixon v. Travelers Indem. Co.,* 336 S.W.3d 532, 537 (Tenn. 2011).

"'When an employee suffers an injury as the result of an uncontrolled force of nature or an act of God, to satisfy the "arising out of" requirement, the employee must prove that the injury was

caused by an increased risk peculiar to the nature of the employment and not a danger common to the general public at the time and place where it occurred.' *Id.* at 537; *see also Wait v. Travelers Indem. Co.,* 240 S.W.3d 220, 228 (Tenn. 2007).

"Furthermore, '[t]he mere presence of an employee at the place of injury because of his employment will not alone result in the injury being considered as arising out of the employment.' *Wilhelm v. Krogers,* 235 S.W.3d 122, 127 (Term. 2007). Similarly, 'an injury purely coincidental, or contemporaneous, or collateral, with the employment ... will not cause the injury ... to be considered arising out of the employment.' *Wait,* 240 S.W.3d at 228 (quoting *Jackson v. Clark & Fay, Inc.,* 270 S.W.2d 389 (Tenn. 1954))."

"After reviewing the foregoing principles and the evidence in the record, we conclude that the Court of Workers' Compensation Claims properly determined that Mr. Rosasco's injuries did not arise primarily out of his employment."

"Finally, Mr. Rosasco argues that his injury was the result of an unidentified property owner's failure to cut down a dead tree and was not an act of God. But as the Court of Workers' Compensation Claims observed, 'neither [Employer] nor Mr. Rosasco observed anything overtly dangerous about the location of the portable restroom,' and Mr. Rosasco's 'work as a painter placed him at no increased risk peculiar to his employment that a dead tree might fall on him.'*See Dixon*, 336 S.W.3d at 537. Instead, 'the general public at the same time and in the same place bore the same risk.' *See Jackson*, 270 S.W.2d at 390; *Hill*, 512 S.W.2d at 562. Accordingly, the Court of Workers' Compensation Claims properly granted summary judgment for Employer."

II. Selection of Physician

Williams v. People Ready, Inc., Docket No. 2021-08-0990 (Tenn. W.C. Appeals Board, Conner, June 2, 2022).

"Cornelius Williams ('Employee') worked for People Ready, Inc. ('Employer'), as a construction laborer and electrician. On June 24, 2021, Employee was working at a water facility with two other employees, including his supervisor who was preparing to cut a large metal pipe. As Employee and a co-worker were positioned near the pipe, the supervisor completed cutting the pipe and it fell toward them. Employee later testified that it 'caught us off guard,' struck his left knee, and 'pinned on us for a minute.' After the incident, Employee called the employer's office to report the accident and was directed to Concentra, a walk-in clinic, for evaluation. Employee testified he was not provided a panel of physicians but was told to go to Concentra. There, Employee was evaluated by Dr. Chauntay Bradley, who diagnosed a ligament sprain in the left knee, a knee contusion, and 'acute strain of neck muscle.' He was given a knee brace and medication. He was also released to return to 'modified work' and was referred for an MRI and physical therapy. After completing several therapy visits over the next several weeks and the MRI on August 18, Employee returned to Concentra on August 19, 2021, where he was seen by a nurse practitioner. At that visit, the provider recorded an additional diagnosis of 'rupture of anterior cruciate ligament of left knee.' Under 'Treatment Status Comment,' the provider noted 'STAT ORTHO REFERRAL.'

"According to Employee's testimony, the provider at Concentra referred him to Titan Orthopedics. He received a referral slip from staff at Concentra that had Dr. John Lochemes's name printed on it with a map to Dr. Lochemes's office and a date and time for the appointment. The referral was

made on Thursday, August 19, and the appointment was scheduled for the following Monday, August 23.

"Employee attended the appointment with Dr. Lochemes, who noted a primary complaint of left knee pain. According to Dr. Lochemes's August 23 report, Employee reported 'buckling[,] giving way and popping and catching in the left knee and swelling.' During his physical examination, Dr. Lochemes noted swelling of the medial side of the left knee. He reviewed the MRI and noted osteoarthritic changes, a 'displaced tear of the medial meniscus,' a 'complete ACL tear,' and an 'intra articular loose body within the lateral compartments superior to posterior horn of the lateral meniscus.' He acknowledged that the ACL tear and meniscal fragment were 'indeterminate in age,' but the osteoarthritic changes were 'considered chronic findings.' After reviewing treatment options, including surgery, Dr. Lochemes noted that 'the decision for surgery was made today.' With respect to the issue of causation, Dr. Lochemes stated, 'he has unstable left knee [and] a meniscal tear. It appears that clearly related to the on-the-job injury.'

"A representative of Employer's insurer, Alexandra Booher, submitted a Rule 72 Declaration for consideration at the expedited hearing. According to her Declaration, Ms. Booher did not become aware of Concentra's 'stat ortho referral' until 'sometime in the month of September.' By that time, she had already received a call from Dr. Lochemes's office requesting authorization for surgery. She advised Dr. Lochemes's office that they were not authorized to treat Employee. On September 22, 2021, a month after Employee's initial appointment with Dr. Lochemes, she offered Employee a panel of orthopedic specialists that did not include Dr. Lochemes. In her Declaration, Ms. Booher asserts she never received a copy of the referral slip evidencing a direct referral from Concentra to Dr. Lochemes until Employee's counsel provided her a copy on October 6, 2021.

"Following the expedited hearing, the trial court concluded Employee was entitled to continue treating with Dr. Lochemes as his authorized orthopedic physician. The court reasoned that, because Employer never provided Employee a panel of physicians when the accident was initially reported, Employer cannot now complain that it was not given a reasonable opportunity to provide a panel of orthopedic specialists. Employer has appealed."

"The issue in this case requires consideration of the interplay between several statutes and regulations. As noted by the trial court, Tennessee Code Annotated section 50-6-204(a)(3)(A)(ii) governs referrals to specialists, but it applies in circumstances where 'the treating physician, *selected in accordance with this subdivision (a)(3)(A)* ... [makes] referrals to a specialist physician, surgeon, or chiropractor.' Tenn. Code Ann. § 50-6-204(a)(3)(A)(ii) (emphasis added). When a panel-selected physician makes such a referral, that physician is statutorily required to 'immediately notify the employer.' *Id.* Thereafter, 'the employer shall be deemed to have accepted the referral, unless the employer, within three (3) business days, provides the employee a panel.' *Id.*

"However, there is another statute that must be considered in this case. Subsection 204(a)(3)(E) provides as follows:

> In all cases where the treating physician has referred the employee to a specialist physician, ... the specialist physician ... to which the employee has been referred, *or* selected by the employee from a panel provided by the employer, *shall* become the treating physician until treatment by the specialist physician ... concludes and the employee has been referred back to the treating physician selected by the employee from the initial panel....

"Tenn. Code Ann. § 50-6-204(a)(3)(E) (emphasis added). Thus, whether the referral is made directly by an authorized treating physician, or selected from a panel of physicians, the physician to whom the employee has been referred is designated a 'treating physician.'

"Finally, subsection 204(a)(3)(H) states, 'Any treatment recommended by a physician or chiropractor pursuant to this subdivision (a)(3) *or by referral, if applicable*, shall be presumed to be medically necessary for treatment of the injured employee.' Tenn. Code Ann. § 50-6-204(a)(3)(H) (emphasis added).

"Moreover, there are regulations pertinent to this case. For example, Tenn. Comp. R. and Regs. 0800-02-01-.06(1) states as follows:

> Following receipt of notice of a workplace injury and the employee expressing a need for medical care, an employer *shall*, as soon as practicable but no later than three (3) business days after receipt of such a request, provide the employee a panel of physicians as prescribed in [Tennessee Code Annotated] § 50-6-204.

"(Emphasis added.) *See also* Tenn. Comp. R. & Regs. 0800-02-01.06(4) (An employer's act of directing an employee to an on-site or other 'employer-sponsored medical provider' does not 'alleviate the requirement for providing an appropriate panel within the three (3) business days.').

"As noted by the trial court, we have previously concluded that 'an employer who does not timely provide a panel of physicians risks being required to pay for treatment an injured worker receives on his own.' *Ducros v. Metro Roofing and Metal Supply Co.*, No. 2017-01-0228, 2017 TN Wrk. Comp. App. Bd. LEXIS 62, at *10 (Tenn. Workers' Comp. App. Bd. Oct. 17, 2017). *See also Rhodes v. Amazon.com*, No. 2018-01-0349, 2019 TN Wrk. Comp. App. Bd. LEXIS 24 (Tenn. Workers' Comp. App. Bd. June 11, 2019) ('[t]he statutory scheme ... contemplates direct referrals to specialists and provides employers the option of accepting the referrals or, instead, providing a panel of specialists').

"In the present case, Employer, whether directly or through its authorized representative, failed to satisfy the requirements of Tennessee Code Annotated section 50-6-204(a)(3)(i) and/or Tenn. Comp. R. and Regs. 0800-02-01-.06(1) by providing an appropriate panel within three business days of Employee's expressing a need for medical care. Instead, the record supports a conclusion that, after Employee reported the work accident and requested medical care, Employer *directed* Employee to a single medical provider, Concentra. Moreover, upon making a 'stat' referral to an orthopedic specialist, Concentra, Employer's authorized provider, failed to 'immediately notify the employer' of the referral as required by Tennessee Code Annotated section 50-6-204(a)(3)(a)(ii). That led, in turn, to Employer or its insurer failing to respond within three business days of the referral as required by subsection 204(a)(3)(A)(ii). Thus, even if we were to conclude that the provisions of the ''direct referral' statute apply in this case, Employer is 'deemed to have accepted the referral' to Dr. Lochemes in accordance with the express language of that subsection.

"Regardless, we agree with the trial court that the provisions of subsection 204(a)(3)(A)(ii) were not triggered because Concentra, the provider to whom Employee was directed, was not 'selected in accordance with this subdivision (a)(3)(A).' Instead, we conclude the provisions of subsection 204(a)(3)(E) apply, meaning that Dr. Lochemes became the treating physician when the authorized treating provider, Concentra, made the referral, and Employer failed to take appropriate action within three business days. We also conclude that Dr. Lochemes's treatment recommendations, in

accordance with subsection 204(a)(3)(H), are 'presumed to be medically necessary.' Therefore, we agree with the trial court's designation of Dr. Lochemes as an authorized treating physician."

III. Attorney Fees; Deemed Reasonable if Not in Excess of Twenty Percent

Henderson v. Pee Dee Country Enterprises, Inc., No. M2021-00970-SC-R3-WC (Tenn. W.C. Appeals Panel, Davis, June 20, 2022).

"On September 18, 2019, David Joe Turner ('Employee') was killed in a motor vehicle accident while in the course and scope of his employment with Pee Dee Country Enterprises ('Employer'). Employer maintained its business in Davidson County, Tennessee, and Employee and his surviving spouse, Jamie Henderson, lived in Mississippi. After Employee's death, Employer began paying death benefits under Mississippi law.

"In December 2019, Ms. Henderson retained counsel, J. Hale Freeland and M. Reed Martz ('Freeland Martz'), who advised her to seek benefits under Tennessee law. Ms. Henderson agreed to pay counsel twenty percent of the difference between the maximum amount of death benefits payable under Mississippi law ($199,714.50) and the maximum amount of benefits payable under Tennessee law ($432,000).

"On July 16, 2020, Freeland Martz filed a petition for benefits determination on Ms. Henderson's behalf with the Court of Workers' Compensation Claims ('trial court') in Tennessee. On August 20, 2020, the trial court entered an order noting that Employer objected to paying attorneys' fees of $46,457.10. The trial court stated that 'an affidavit from Ms. Henderson's attorney needs to be filed that explains why the fee is reasonable under Tennessee Supreme Court Rule 8, Rules of Professional Conduct 1.5(a).' On September 16, 2020, the trial court entered an order noting that counsel's affidavit 'explained at length the purported reasonableness of his request under many of the applicable factors' but did not provide 'specific information about 'the time and labor required.' 'Order on Motion for Attorneys' Fees, *Henderson v. Pee Dee Country Enters., Inc.,* No. 2020-06-1013 (Ct. Workers' Comp. Cl. Sept. 16, 2020) (quoting Tenn. Sup. Ct. R. 8, RPC 1.5(a)(1)). Counsel then filed a 'fifteen-page itemization of work performed.'

"On October 14, 2020, the trial court entered an order approving the parties' settlement of the claim for the difference between the maximum amount of death benefits payable under Mississippi law and the maximum amount of death benefits payable under Tennessee law. The trial court, however, awarded Freeland Martz attorneys' fees of only $17,421.41, or seven-and-one-half percent of the additional recovery. In awarding this amount, the trial court considered the factors in Tennessee Supreme Court Rule 8, Rules of Professional Conduct 1.5(a)."

"On July 23, 2021, the Appeals Board—in a two-to-one decision—reversed the trial court's order and remanded 'for entry of an order approving the attorney's fee agreed to by the surviving spouse and her attorney.' *Henderson v. Pee Dee Country Enters., Inc.,* No. 2020-06-1013 (Tenn. Workers' Comp. App. Bd. July 23, 2021). The majority observed that 'the plain language of the initial sentence [of section 226(a)(1)] makes clear that attorney's fees are subject to the approval of the workers' compensation judge before whom the matter is pending,' but that 'the crux of the appeal hinges on the second sentence of section 226(a)(1), which mandates "the department" to deem fees for attorneys representing employees to be reasonable in certain circumstances.' *Id.* at *5. With regard to this portion of the statute, the majority reasoned as follows:

> Specifically, that sentence presents two scenarios where the discretion to refuse to approve attorney's fees is limited: (1) when an attorney's fee does not exceed 20% of the 'award to the injured worker' and (2) when an attorney's fee does not exceed 20% of the first 450 weeks under section 50-6-207(4). In both circumstances described in this sentence, the only entity vested with authority to approve attorney's fees is the Court of Workers' Compensation Claims. Moreover, there is a clear statutory link between the Court of Workers' Compensation Claims and the phrase 'the department.' First, the Court of Workers' Compensation Claims operates under the auspices of the Bureau of Workers' Compensation. *See* Tenn. Code Ann. § 50-6-237. Second, the term 'bureau' is defined to mean 'the bureau of workers' compensation *of* the department of labor and workforce development.' Tenn. Code Ann. § 50-6-102(5) (emphasis added). Finally, the word 'department' is statutorily defined to mean 'the department of labor and workforce development.' Tenn. Code Ann. § 50-6-102(10).

"Id. at *5-6 (footnotes omitted). In short, 'when considering the plain and ordinary meaning of the statutory language within the context of this section and the entire workers' compensation law, we conclude the phrase 'the department' includes judges on the Court of Workers' Compensation Claims, and this sentence limits their discretion to refuse to approve attorney's fees in either of the scenarios specified in that sentence.' *Id.* at *6."

"As noted above, this case involves Tennessee Code Annotated section 50-6-226(a)(1), which provides as follows:

> The fees of attorneys for services to employees under this chapter, shall be subject to the approval of the workers' compensation judge before which the matter is pending, as appropriate; provided, that no attorney's fees to be charged employees shall be in excess of twenty percent (20%) of the amount of the recovery or award to be paid by the party employing the attorney. The department shall deem the attorney's fee to be reasonable if the fee does not exceed twenty percent (20%) of the award to the injured worker, or, in cases governed by § 50-6-207(4), twenty percent (20%) of the first four hundred fifty (450) weeks of the award.

"The parties urge two different constructions of the applicable statute and, indeed, the trial court and the Appeals Board construed the statute in two different ways. Employer contends that because the workers' compensation *judge* must approve the attorney's fee, the first sentence of the statute is dispositive. Employer argues that the second sentence of the statute only applies when 'the department' reviews the fee. Previous counsel for Ms. Henderson, Freeland Martz, contends that the second sentence of the statute controls so that as long as the fee does not exceed twenty percent of the award to the injured worker, the fee shall be deemed reasonable. Previous counsel argues that 'the department' necessarily includes the workers' compensation courts; otherwise, the second sentence of the statute is meaningless."

"The Appeals Board found that, when considering the statutory scheme as a whole, the word 'department' must be construed to include the judges of the Court of Workers' Compensation Claims. The Appeals Board noted that if 'department' does not include judges on the Court of Workers' Compensation Claims, it is unclear to whom that term applies because there are 'no other persons or entities within the Tennessee Bureau of Workers' Compensation or the Department of Labor and Workforce Development who have the authority to review and approve attorney's fees based on an "award to the injured worker"....' Op. at *6-7.

"We agree with the analysis of the Appeals Board. Certainly, the use of two different terms, i.e., 'judge' and 'department,' creates some ambiguity, and this discrepancy in the language is ripe for review by the legislature. However, when considering the statute as a whole, it appears the continued use of the word 'department' is a vestige from the previous statutory scheme. To construe the statute in the way proffered by Employer renders the second sentence of the statute without meaning, and we must 'construe a statute so that no part will be inoperative, superfluous, void, or insignificant. We are required to give effect to every word, phrase, clause, and sentence of the act in order to achieve the Legislature's intent and [we] must construe a statute so that no section will destroy another.' *McGee*, 106 S.W.3d at 64. The statutory scheme, as a whole, contemplates that the department would include the Court of Workers' Compensation Claims.

"Although not argued by either party, it is noteworthy that subsection 226(a)(3) of the statute provides as follows:

> In accident cases that result in death of an employee, the plaintiff's attorney's fees shall not exceed reasonable payment for actual time and expenses incurred when the employer makes a voluntary settlement offer in writing to dependents or survivors eligible under § 50-6-210 within thirty (30) days of the employee's death if the employer offers to provide the dependents or survivors with all the benefits provided under this chapter. The approving authority shall review and approve the settlements on an expedited basis.

"This subsection does not apply to the present case because no such offer was made, but it reflects the legislature's intent to limit an award of attorneys' fees to reasonable payment based on actual time and expenses incurred only in specifically designated cases. In addition, subsection 226(a)(2)(C) provides that in cases that proceed to trial, 'an employee's attorney shall file an application for approval of a proposed attorney's fee. Where the award of an attorney's fee exceeds ten thousand dollars ($10,000), the court shall make specific findings as to the factors that justify the fee as provided in Tennessee Supreme Court Rule 8, RPC 1.5.' Again, the legislature has specifically articulated the circumstances under which a review of the reasonableness of time and expenses is required. In the present case, which was not tried and was not settled under the terms of subsection (a)(3), we conclude that subsection (a)(1) is properly construed to require that attorneys' fees be deemed reasonable when those fees do not exceed twenty percent of the award. We affirm the decision of the trial court awarding an attorney's fee of $46,457.10.

"As an additional argument, Employer contends that if we affirm the award of attorneys' fees, the award should not be payable in lump sum. Employer argues that there has been no 'award to the injured worker' because the payments are periodic and contingent. As set forth above, the Appeals Board considered and rejected this argument in the first appeal, and we agree with that decision. This issue was squarely addressed in *National Pizza Co. v. Young,* 879 S.W.2d 817 (Tenn. 1994) and is without merit."

IV. Appeal

Chapter 715, Public Acts 2022, amending T.C.A. § 50-6-225(a) eff. July 1, 2022.

"(1) If a party is dissatisfied or aggrieved by a workers' compensation appeals board decision to certify a compensation order of the court of workers' compensation claims as final, then the party

may appeal to the supreme court, where the cause shall be heard and determined as provided in the Tennessee Rules of Appellate Procedure.

"(2) Review of the court of workers' compensation claims' findings of fact are de novo upon the record of the court of workers' compensation claims, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise."

INSURANCE

I. Homeowners; Policy Automatically Void Due to Breach of Occupancy Clause

Clifton v. Tennessee Farmers Mutual Insurance Company, 638 S.W.3d 664 (Tenn. Ct. App., Frierson, 2021), perm. app. denied Sept. 22, 2021.

"The facts underlying this action are essentially undisputed. The plaintiff, Charles Clifton, owned improved real property located at 351 West Maple Street in Morrison, Tennessee, including a residence ('the Residence') upon which he maintained an insurance policy ('the Policy') through the defendant, Tennessee Farmers Mutual Insurance Company ('Tennessee Farmers'). The Residence was destroyed by fire on October 24, 2017. After Mr. Clifton filed a claim for the loss, Tennessee Farmers issued a denial letter based on Mr. Clifton's alleged breach of an occupancy clause ('Occupancy Clause') in the Policy."

"On June 13, 2018, Mr. Clifton filed a complaint in the Warren County Circuit Court ('trial court'), alleging that Tennessee Farmers had breached the terms of the Policy by failing to pay his claim for fire damages. Mr. Clifton sought a judgment in the amount of the limits provided in the Policy plus twenty-five percent for Tennessee Farmers' 'bad faith, costs, and interest' pursuant to Tennessee Code Annotated § 56-7-105. He averred that the policy amounts included a maximum of $85,000.00 for losses to the Residence and $42,500.00 for losses to personal property. Mr. Clifton also requested an award of punitive damages and a jury trial. Although he did not reference the Occupancy Clause in this pleading, Mr. Clifton noted in his complaint that the Policy defines 'Occupy, Occupied, or Occupancy' as 'the regular use of a premise as a dwelling place by the person or persons to whom reference is made.' Mr. Clifton stated in the complaint that he 'was the only "Occupant" of the Subject Property at the time of loss.'"

"On May 23, 2019, Tennessee Farmers filed a motion for summary judgment, arguing that the undisputed material facts demonstrated that on February 1, 2017, Mr. Clifton had committed acts that resulted in an automatic breach of the Policy and operated to make the Policy of no effect when the fire occurred in October 2017. In its memorandum in support of the summary judgment motion, Tennessee Farmers referenced a sworn statement given by Mr. Clifton on December 18, 2017, in which he purportedly stated that he had begun residing with his fiancé a year prior to the fire and that he had allowed the Glenns, who were relatives of his fiancé, to occupy the Property in February 2017 with an agreement that they would pay $300.00 in monthly rent. Tennessee Farmers attached to its memorandum a utilities invoice reflecting that the utilities at the Residence were in Bobby Glenn's name while the Glenns resided there."

"Mr. Clifton filed a response to the summary judgment motion on July 8, 2019, asserting that 'a genuine issue of material fact' existed that 'would lead a rational trier of fact to find in [his] favor' because '[a]t the time of the fire [Mr. Clifton] occupied the insured premise[s] and the policy was not void.' Mr. Clifton concomitantly filed a response to Tennessee Farmers' statement of undisputed facts and an affidavit executed by him on July 8, 2019. In the response, he added to his earlier admissions that he had begun staying with his fiancé in September or October of 2016 while he was recovering from open heart surgery. In his July 2019 affidavit, Mr. Clifton stated the following in pertinent part:

> The same day Bobby and Treva Glenn had moved out of [the Residence] I changed the locks on the doors.
>
> The weekend of October 14th I participated in a city wide yard sale, selling items from the yard of [the Residence].
>
> I stayed at [the Residence] throughout the evenings of the community yard sale.
>
> After the Glenn[s] had left, I moved boxes of personal possession[s] back into [the Residence] and began fixing the bedroom floor.
>
> I occupied [the Residence] at the time of the fire, October[ ] 24, 2017."

"The court found that no genuine issues of material fact existed and that as a matter of law, Mr. Clifton's actions had automatically voided the Policy when he violated the Occupancy Clause by vacating the Residence and allowing other individuals to reside there without obtaining Tennessee Farmers' written consent."

"Mr. Clifton acknowledges that when he vacated the Residence to reside with his fiancé and allowed the Glenns to occupy the Residence without written consent from Tennessee Farmers, the two conditions provided under the Occupancy Clause for the Policy to become 'automatically void' were met. However, Mr. Clifton avers that he would be able to prove at trial that he reoccupied the Residence prior to the fire. He thereby argues that with his reoccupation, the Policy was only void during the time that he was absent from the Residence and allowed someone else to reside there without Tennessee Farmers' consent. Mr. Clifton argues that the trial court improperly interpreted the phrase, 'automatically void,' to mean that the Policy could not be reactivated by his reoccupation of the Residence.

"In granting summary judgment in favor of Tennessee Farmers, the trial court specifically found in pertinent part:

> The Court finds there are no genuine issues of material fact. [Mr. Clifton] moved out of [the Residence]. He was living with his fiancé[ ] and had allowed relatives of his fiancé[ ] to stay at [the Residence]. Tennessee Farmers Mutual Insurance Company was not notified that [Mr. Clifton] had moved out of the residence or that others were occupying the residence. The Tennessee Farmers insurance policy was automatically void as to all insureds when the property was vacated by [Mr. Clifton]. Further, Tennessee Farmers did not give written consent of others to occupy the residence. This was an additional act which automatically voids the insurance policy.Upon careful review of the record and applicable authorities, we agree with the trial court's finding that Mr. Clifton's actions automatically voided the Policy.

"We begin our analysis with interpretation of the plain language in the Occupancy Clause, particularly the phrase at the center of this issue: 'automatically void.' *See Kafozi v. Windward Cove, LLC*, 184 S.W.3d 693, 698 (Tenn. Ct. App. 2005) ('In resolving a dispute concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contract language.'). The Occupancy Clause is set forth under a heading that states, 'ACTS WHICH AUTOMATICALLY VOID THIS POLICY' and a subheading that reads, 'Occupancy Without Written Consent.' The clause then provides:

> This policy shall be automatically void as to all insureds if:
> 1. no insureds occupy the residence premises; and
> 2. any insured allows anyone to occupy the residence premises without our written consent.

"It is undisputed that Mr. Clifton was the 'insured' under the Policy and that 'our' in 'our written consent' refers to Tennessee Farmers. We note that the coordinating conjunction, 'and,' joins two conditions for the Policy to become 'automatically void': (1) that 'no insureds occupy' the Residence and (2) that 'any insured allows anyone to occupy' the Residence without Tennessee Farmers' 'written consent.' *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'). As to the first condition that would automatically void the Policy under the Occupancy Clause, it is undisputed that Mr. Clifton did not occupy the Residence while he resided with his fiancé, beginning in September or October of 2016. Under the second condition, it is also undisputed that Mr. Clifton allowed the Glenns to occupy the Residence, beginning on February 1, 2017, and that the Glenns' occupation was without Tennessee Farmers' written consent.

"The question then narrows to the meaning of 'automatically void,' specifically whether this phrase means that the Policy became void when these two conditions were met or whether the Policy could have been reactivated by Mr. Clifton's reoccupation of the Residence. Tennessee Farmers relies on this Court's decision in a case also involving Tennessee Farmers as the defendant, *Gredig v. Tenn. Farmers Mut. Ins. Co.*, 891 S.W.2d 909 (Tenn. Ct. App. 1994). In *Gredig*, this Court determined that the insurance policy at issue was void at the time of a residential fire because the plaintiff policyholder had not been occupying the insured premises and had allowed his brother and sister-in-law to occupy the insured premises without obtaining Tennessee Farmers' written consent in violation of the following policy clause:

> This entire policy shall be void if at any time permission is given by an insured for occupancy of the residence premises by anyone other than an insured person without our written consent.

"*Gredig*, 891 S.W.2d at 913-15 (emphasis in policy). In determining that the policy had been 'rendered void,' the *Gredig* Court explained: 'If the policy is void, and we hold it is, then it is a nullity and void for all purposes. It is as if it had never been issued.' *Id.* at 915; *see also* Black's Law Dictionary 1604 (8th ed. 2004) (defining 'void' in relevant part as '[o]f no legal effect; null').

"Mr. Clifton argues that *Gredig* is distinguishable from the instant action because in *Gredig*, no question existed as to whether the insured plaintiff had reoccupied the insured premises at the time of the fire. Upon careful review, we determine this to be a distinction without a substantive difference. In this case, pursuant to the plain meaning of 'void,' the Policy became a nullity at the point that both conditions of the Occupancy Clause were met when Mr. Clifton vacated the Residence and then allowed the Glenns to occupy the Residence without Tennessee Farmers' written consent."

"Given the plain and unambiguous language of the Occupancy Clause, we determine that the trial court did not err in finding that the Policy was rendered void by Mr. Clifton's acts of vacating the Residence and subsequently allowing the Glenns to occupy the Residence without obtaining Tennessee Farmers' written consent. *See Gredig*, 891 S.W.2d at 915 ('It is not for us to re-write a contract to achieve a certain result. Our duty is to enforce the parties' agreement as we find it.')."

"For the foregoing reasons, we affirm the judgment of the trial court granting summary judgment in favor of Tennessee Farmers and dismissing Mr. Clifton's complaint."

II. Motor Vehicles

A. Bad Faith Penalty Inapplicable to Automobile Insurance Policies

Giles v. Geico General Insurance Company, 643 S.W.3d 171 (Tenn. Ct. App., McGee, 2021), perm. app. denied Feb. 10, 2022.

"This appeal involves the applicability of Tennessee Code Annotated section 56-7-105, the bad faith penalty statute, to automobile insurance policies. The trial court granted the insurance company's motion for summary judgment holding that Tennessee Code Annotated section 56-7-105 did not apply to automobile insurance policies. The insured appeals. We affirm."

"On December 13, 2012, Mrs. Shannon Giles and Mrs. Judith Sweatman were sitting in Mrs. Giles's vehicle at a red light when another vehicle struck them from behind."

"In April 2016, the case was tried before a jury. At the conclusion of the trial, the jury entered a total verdict of $300,082.16 for Mr. and Mrs. Giles. On May 11, 2016, the trial court entered its final judgment confirming the jury award. At the end of May, Geico paid the sum of $75,000, the applicable underinsured coverage limits, into the Marion County Circuit Court. In addition to the $75,000, Geico had previously paid the $10,000 in medical payments coverage to Mr. and Mrs. Giles."

"On September 6, 2016, Mr. and Mrs. Giles filed a lawsuit in the Marion County Circuit Court seeking additional damages, pursuant to Tennessee Code Annotated section 56-7-105, for a bad faith claim against Geico as the uninsured/underinsured motorist carrier in the underlying suit. Specifically, Mr. and Mrs. Giles argued that Geico intentionally and maliciously refused to fairly and reasonably pay Mrs. Giles's uninsured/underinsured motorist claim."

"On January 22, 2021, the trial court entered an order granting Geico's motion for summary judgment holding that Tennessee Code Annotated section 56-7-105 did not apply to automobile insurance policies."

"On February 11, 2021, Mr. and Mrs. Giles timely filed their appeal."

"On appeal, Mr. and Mrs. Giles present two main issues. The first issue is whether Tennessee Code Annotated section 56-7-105 applies to automobile insurance policies. Tennessee Code Annotated section 56-7-105(a), which has come to be known as the 'bad-faith penalty statute,' states that:

> (a) The insurance companies of this state, and foreign insurance companies and other persons or corporations doing an insurance or fidelity bonding business in this state, in all cases when a loss occurs and they refuse to pay the loss within sixty (60) days after a demand has been made by the holder of the policy or fidelity bond on which the loss occurred, shall be liable to pay the holder of the policy or fidelity bond, in addition to the loss and interest on the bond, a sum not exceeding twenty-five percent (25%) on the liability for the loss; provided, that it is made to appear to the court or jury trying the case that the refusal to pay the loss was not in

> good faith, and that the failure to pay inflicted additional expense, loss, or injury including attorney fees upon the holder of the policy or fidelity bond; and provided, further, that the additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury including attorney fees thus entailed.

"Tenn. Code Ann. § 56-7-105(a)."

"Considering those cases, we return to the first issue in the case at bar: whether Tennessee Code Annotated section 56-7-105 applies to automobile insurance policies. Following a jury verdict for Mr. and Mrs. Giles and against Ms. Harris, Geico paid the sum of $75,000, the applicable underinsured coverage limits, into the Marion County Circuit Court. Afterwards, Mr. and Mrs. Giles filed a lawsuit in the Marion County Circuit Court seeking additional damages, pursuant to Tennessee Code Annotated section 56-7-105, for a bad faith claim against Geico as the uninsured/underinsured motorist carrier in the underlying suit. On January 22, 2021, the trial court entered an order granting Geico's motion for summary judgment concluding that Tennessee Code Annotated section 56-7-105 did not apply to automobile insurance policies. Specifically, the trial court found that:

> Tennessee Supreme Court cases have determined the legislature intended T.C.A. § 56-7-105 (previously T.C.A. § 56-1105) to only apply to classes of written contracts which bear interest from the time those contracts become due, i.e., life insurance, fire insurance, and not automobile insurance policies which do not become 'due and payable' until judgment. *Tenn. Farmers Mutual v. Cherry*, [213 Tenn. 391] 374 S.W.2d 371 (Tenn. 1964); *Medley v. Cimmaron Ins. Co.*, 514 S.W.2d 426 (Tenn. 1974).

"Likewise, as stated by the court in *For Senior Help,* [*LLC v. Westchester Fire Ins. Co.*, 515 F. Supp. 3d 787 (M.D. Tenn. 2021)] we cannot conclude that *Gaston* [*v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815 (Tenn. 2003)] overruled *Cherry* and its progeny."

"Similarly, we conclude that *Gaston* should not be interpreted as altering the unequivocal declaration from *Cherry* that automobile insurance policies are not subject to Tennessee Code Annotated section 56-7-105. We should not assume that automobile insurance policies are subject to Tennessee Code Annotated section 56-7-105 based on the fact that the issue was not addressed in *Gaston* As stated in *Cherry*, '[t]his type of insurance contract would not bear interest prior to any judgment secured thereon and then only upon the judgment; therefore [Tennessee Code Annotated section 56-7-105] would not be applicable to such obligations.' *Cherry*, 374 S.W.2d at 372. We find the Tennessee Supreme Court's unequivocal statement in *Cherry* to be controlling. *See also Medley*, 514 S.W.2d at 428 ('It has been held in several cases in this state that a policy of automobile liability insurance is not subject to the terms and provisions of [the bad faith penalty] statute.').

"Because we are bound by the holding in *Cherry*, we find that Tennessee Code Annotated section 56-7-105 is inapplicable to the automobile insurance policy in our case. The trial court's order granting Geico's motion for summary judgment is affirmed. Furthermore, because we find that Tennessee Code Annotated section 56-7-105 does not apply to automobile insurance policies, the second issue of whether Tennessee Code Annotated section 56-7-105 applies to the facts of this case is pretermitted."

B. Uninsured Motorist Coverage; Prior Rejection of Coverage Remained Effective on Renewal

Hughes v. Liberty Mutual Fire Insurance Company, No. E2020-00225-COA-R3-CV (Tenn. Ct. App., McBrayer, Dec. 30, 2021), perm. app. denied May 20, 2022.

"On April 19, 2012, Mr. David Hughes was injured in an automobile accident. The vehicle Mr. Hughes was driving was covered by a business automobile liability policy issued by Liberty Mutual Fire Insurance Company to Health Management Associations, Inc. ('HMA'). Mr. Hughes filed a personal injury action against the other driver and notified Liberty Mutual of a potential uninsured motorist claim. *See* Tenn. Code Ann. § 56-7-1206 (2016). Liberty Mutual paid for the physical damage to the automobile. But the insurer denied that the policy included uninsured motorist coverage.

"HMA owned, leased, and managed hospitals throughout the United States. The company originally purchased the business automobile policy in 2001. The policy was renewed, with substantially the same terms and coverage, each year for the next eleven years.

"The policy provided comprehensive fleet coverage. It broadly defined 'named insured' to include both HMA and all its subsidiaries, including those companies acquired during the policy term. And any additional vehicles acquired by a named insured during the policy term were automatically covered. The exact number of motor vehicles covered during a policy period was never finalized until the end of the term. After a final fleet audit, Liberty Mutual adjusted the premium as necessary.

"As part of the yearly renewal process, HMA's insurance broker provided Liberty Mutual with the necessary information for the insurer to underwrite the account and determine the initial premium for the upcoming year. This information typically included a current fleet list as well as information on any changes in the company.

"By the first annual renewal in 2002, HMA had acquired assets, including motor vehicles, in Tennessee. Robert Farnham, on behalf of HMA, rejected uninsured motorist coverage for vehicles in use in Tennessee in a written document, signed and dated on November 12, 2002. Mr. Farnham executed a new written rejection for Tennessee vehicles each succeeding year through 2010.

"The renewal policy at issue here was effective from October 1, 2011, to October 1, 2012. With the renewal deadline approaching, Marsh USA, Inc., HMA's insurance broker, took the HMA account 'to market.' According to Sean Mitchell, a placement representative at Marsh, it is customary in the insurance industry to take large commercial accounts 'to market' every three to five years. While a broker may take this action for a variety of reasons, here the goal was financial. By soliciting premium quotes for the HMA account from a variety of insurance carriers, including Liberty Mutual, the broker hoped to obtain a better overall financial package for HMA.

"At that time, HMA operated 59 hospitals in 15 states. And the company was in negotiations with Mercy Health Partners, Inc. to purchase an additional seven hospitals and related assets in Tennessee. The anticipated purchase included 113 motor vehicles in Tennessee. The parties tentatively scheduled a closing for October 1, 2011—the same day the existing policy term ended.

"On August 18, 2011, Mr. Mitchell sent an email on behalf of HMA to multiple insurance companies, including Liberty Mutual, soliciting premium quotes for the upcoming year. As the

timing of the Mercy Health acquisition remained uncertain, Mr. Mitchell asked each carrier to quote the coverage with and without the Mercy Health assets. The email included detailed information about HMA, its subsidiaries, its current fleet, and the pending acquisition. It also specified the desired coverage. The submission did not request uninsured motorist coverage for vehicles in use in Tennessee.

"On September 30, Mr. Mitchell notified Liberty Mutual that HMA had chosen to renew its coverage for another term. The renewal policy contained identical terms and liability limits as in the previous year. The only changes were financial. The overall initial premium increased although the per vehicle rate was lower. And Liberty Mutual waived the collateral requirement.

"Also consistent with previous years, the 2011 renewal policy did not expressly include uninsured motorist coverage for vehicles in use in Tennessee. Elizabeth Orr, HMA's manager of insurance, explained at trial that the company waived uninsured motorist coverage whenever possible. Daniel Dunne, the Liberty Mutual executive assigned to the HMA account, echoed that sentiment. He had worked with HMA since 2002. In his experience, HMA had always waived uninsured motorist coverage when allowed to do so. And he did not recall anyone at HMA or Marsh seeking a change in coverage for the 2011 policy year.

"The Mercy Health acquisition closed on October 1, 2011. After the closing, the renewed policy covered 119 vehicles in Tennessee, including the vehicle driven by Mr. Hughes. HMA did not execute a new written rejection of uninsured motorist coverage for Tennessee vehicles in connection with the 2011 renewal. But Mr. Farnham had specifically rejected uninsured motorist coverage for all Tennessee vehicles in a writing dated November 15, 2010. In that written rejection, he indicated that he understood 'that the coverage selection and limit choices indicated here will apply to all future policy renewals, continuations, and changes unless I notify you otherwise in writing.'"

"The court held a bench trial to determine whether the 2011 policy included uninsured motorist coverage for vehicles in use in Tennessee. It was undisputed that HMA properly rejected uninsured motorist coverage for its Tennessee vehicles in 2010. *See id.* § 56-7-1201(a)(2) (2016). And HMA never subsequently requested such coverage. But Mr. Hughes claimed that the 2010 written rejection was no longer effective because HMA had submitted a new application in connection with the 2011 renewal. *See id.* Unsurprisingly, Liberty Mutual disagreed. The insurance company viewed the August 2011 submission as an ordinary renewal packet, not a new application."

"After a detailed analysis of the proof at trial, the trial court concluded that no new application had been submitted in connection with the 2011 renewal. The policy terms gave HMA the right to acquire new assets with the assurance that the new assets would be automatically covered. Liberty Mutual had no choice but to extend coverage to newly-acquired motor vehicles during the policy term, subject to a revised premium. The court found that the timing of the Mercy Health acquisition 'was pure coincidence' and thus had no bearing on its decision. And the court credited Mr. Mintzer's testimony that the extensive detail in the email submission was part of the marketing process, not a sign of something new.

"The court assigned no weight to the 'collective expert opinion that the August submission was an insurance application.' Viewing an application as a request for coverage, the court reasoned that a request, by definition, 'may be turned down.' Here, because Liberty Mutual had not sent the statutorily-required notice of non-renewal, the insurer had no choice but to renew coverage. *See id.*

§ 56-7-1805(a) (2016). Under these circumstances, the email submission could not be deemed an application. And the 2010 rejection remained in effect.

"In the alternative, the court ruled that, even if the August submission was a new application submitted in connection with a renewal, the statutory requirements for rejecting uninsured motorist coverage had been satisfied. The court found HMA's specific request for uninsured motorist coverage only in South Carolina and West Virginia was tantamount to a rejection of such coverage in Tennessee. The rejection was in writing, and it was signed by a Marsh representative. The court found 'overwhelming evidence' that Marsh acted as HMA's agent in submitting the August email."

"Mr. Hughes . . . argues that the trial court erred in concluding that no new application was submitted in connection with the 2011 renewal transaction. He also contends that the court erred in ruling that the August submission effectively rejected uninsured motorist coverage in Tennessee. As we find his first issue dispositive, we do not address his challenges to the trial court's alternate ruling."

"Every general automobile liability policy issued or renewed in Tennessee must include uninsured motorist coverage unless such coverage has been validly rejected by the named insured. *Id.* § 56-7-1201(a), (a)(2). The effectiveness of a named insured's waiver of uninsured motorist coverage is governed by subsection (a)(2):

> However, any named insured may reject in writing the uninsured motorist coverage completely or select lower limits of the coverage but not less than the minimum coverage limits in § 55-12-107. Any document signed by the named insured or legal representative that initially rejects the coverage or selects lower limits shall be binding upon every insured to whom the policy applies, and shall be conclusively presumed to become a part of the policy or contract when issued or delivered, regardless of whether physically attached to the policy or contract. Unless the named insured subsequently requests the coverage in writing, the rejected coverage need not be included in or supplemental to any continuation, renewal, reinstatement, or replacement of the policy, or the transfer of vehicles insured under the policy, where the named insured had rejected the coverage in connection with a policy previously issued by the same insurer; *provided, that whenever a new application is submitted in connection with any renewal, reinstatement or replacement transaction, this section shall apply in the same manner as when a new policy is being issued*.

"*Id.* § 56-7-1201(a)(2) (emphasis added).

"Without question, this was a renewal policy. And an insurer need not include uninsured motorist coverage in a renewal policy when a signed, written rejection by the named insured remains in effect. *Id.* But a prior written rejection loses its effectiveness 'whenever a new application is submitted in connection with any renewal ... transaction.' *Id.*

"Mr. Hughes maintains that the trial court failed to give the words in the statute their plain meaning. In his view, 'new application' means a recent request. *See Application*, *Black's Law Dictionary* (11th ed. 2019) (defining application as '[a] request or petition'); *New*, *Black's Law Dictionary* (11th ed. 2019) (defining 'new' as 'recently come into being'). And in the insurance industry, an 'application' is a request for a premium quote. *See Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc.*, 979 F. Supp. 2d 181, 183 (D.P.R. 2013), *aff'd as modified sub nom. Catlin at Lloyd's v. San Juan Towing & Marine*, 778 F.3d 69 (1st Cir. 2015) (defining 'application'

as 'a request from a broker to an underwriter for a coverage quote on a particular risk.'); *Smith v. N.H. Indem. Co.*, 60 So. 3d 429, 432 (Fla. Dist. Ct. App. 2011) ('An application in the context of insurance is, by definition, a request for coverage.'). Putting these definitions together, he contends that a new application is submitted in connection with a renewal transaction whenever the named insured submits 'information to request a premium quote for a new policy term.'"

"Nothing about the August 2011 submission distinguished it from the typical renewal process between these parties. HMA submitted information about changes within the company and the company fleet as part of every renewal. Liberty Mutual used this information to finalize the premium for the policy term that was ending and to determine a premium for the upcoming year.

"Still, Mr. Hughes claims that HMA submitted much more detailed information than a typical renewal and requested a coverage quote for new exposures. The trial court found that the size of the submission was due solely to the marketing decision. The evidence does not preponderate against that finding. Mr. Mitchell provided the same underwriting materials both to the incumbent carrier and other insurance carriers unfamiliar with the HMA account.

"And the timing of the Mercy Health closing 'was pure coincidence.' As Mr. Hughes conceded at trial, if the Mercy Health acquisition had closed on any other date, the newly-acquired assets would have automatically been covered by an existing policy. Coverage for new acquisitions—whether large or small—was automatic, subject to a premium adjustment.

"Mr. Hughes does not contend that HMA requested any coverage changes or new policy terms in the August submission. Since 2002, HMA's fleet coverage had remained essentially the same. The 2011 renewal policy was no different. The only changes Mr. Hughes has identified in the 2011 policy are the effective dates and the initial premium—both of which changed on a yearly basis.

"Finally, Mr. Hughes argues that the pre-renewal negotiations between the parties indicate that this was not a standard renewal. According to Mr. Hughes, the 2011 renewal was 'a complete re-application, re-evaluation, and re-negotiation of HMA's account for the 2011-12 policy year.' But we do not equate marketing tactics with a complete renegotiation of the policy terms. As noted above, nothing changed here but the price.

"In sum, HMA properly rejected uninsured motorist coverage for its motor vehicles in use in Tennessee. The company did not request uninsured motorist coverage in Tennessee for the 2011 policy term. And the August submission, while comprehensive, requested the same coverage and policy terms that HMA had enjoyed since 2002. Because HMA did not submit a new application in connection with the 2011 renewal transaction, the company's previous written rejection remained in effect for the renewal policy. The 2011 business automobile policy did not provide uninsured motorist coverage for vehicles in use in Tennessee."

C. Financial Responsibility Law; Minimum Property Damage Raised to $25,000

Chapter 860, Public Acts 2022, adding T.C.A. § 55-12-102(12)(D) eff. Apr. 14, 2022.

"['Proof of financial responsibility' means]

"(D)(i) If proof is required after December 31, 2022, proof means:

(*a*) A written proof of liability insurance coverage provided by a single limit policy with a limit of not less than sixty-five thousand dollars ($65,000) applicable to one (1) accident;

(*b*) A split-limit policy with a limit of not less than twenty-five thousand dollars ($25,000) for bodily injury to or death of one (1) person, not less than fifty thousand dollars ($50,000) for bodily injury to or death of two (2) or more persons in any one (1) accident, and not less than twenty-five thousand dollars ($25,000) for damage to property in any one (1) accident;

(*c*) A deposit of cash with the commissioner in the amount of sixty-five thousand dollars ($65,000); or

(*d*) The execution and filing of a bond with the commissioner in the amount of sixty-five thousand dollars ($65,000); and

(ii) An insured holding a policy that complies with the insurance requirements of the financial responsibility law on December 31, 2022, is not in violation of the law if the policy meets the limits specified in subdivisions (12)(D)(i)(a)–(d) as of the first renewal after December 31, 2022."

D. Written Notification Required if No Coverage for Use of Personal Vehicle

Chapter 801, Public Acts 2022, adding T.C.A. § 55-12-142 eff. Apr. 8, 2022.

"An entity that employs, or contracts with, a driver who uses the driver's personal vehicle for the delivery of the entity's goods or services, and that does not provide automobile insurance coverage to the driver, must, at the time of hire, provide written notification to the driver that:

(1) Requires the driver's signature;

(2) Informs the driver that the driver's automobile insurance may not cover commercial uses; and

(3) Recommends that the driver check with the driver's insurance provider as to whether commercial uses of the driver's personal vehicle are covered."

III. Health

A. Enhanced Coverage for Mammography Including Additional Types of Screening Technology

Chapter 1068, Public Acts 2022, amending T.C.A. § 56-7-2502 eff. May 25, 2022.

"(a) As used in this section:

(1) 'Breast tomosynthesis' means a radiologic mammography procedure that involves the acquisition of projection images over a stationary breast to produce cross-sectional digital three-dimensional images of the breast from which applicable breast cancer screening diagnoses may be determined;

(2) 'Diagnostic imaging' means an imaging examination using mammography, ultrasound imaging, or magnetic resonance imaging that is designed to evaluate:

(A) A subjective or objective abnormality detected by a physician or patient in a breast;

(B) An abnormality seen by a physician on a screening mammogram; or

(C) An abnormality previously identified by a physician as likely benign in a breast for which follow-up imaging is recommended by a physician;

(3) 'Health benefit plan':

(A) Means a hospital or medical expense policy; health, hospital, or medical service corporation contract; policy or agreement entered into by a health insurer; or health maintenance organization contract offered by an employer; and
(B) Does not include policies or certificates covering only accident, credit, dental, disability income, long-term care, hospital indemnity, medicare supplement as defined in § 1882(g)(1) of the Social Security Act (42 U.S.C. § 1395ss(g)(1)), specified disease, or vision care; other limited benefit health insurance; coverage issued as a supplement to liability insurance; workers' compensation insurance; automobile medical payment insurance; or insurance that is statutorily required to be contained in any liability insurance policy or equivalent self insurance;

(4) 'Low–dose mammography' means:
(A) An x-ray examination of the breast using equipment dedicated specifically for mammography, including an x-ray tube, filter, compression device, and screen, with an average radiation exposure delivery of less than one (1) rad per mid-breast and with two (2) views for each breast;
(B) Digital mammography; or
(C) Breast tomosynthesis; and

(5) 'Supplemental breast screening' means a medically necessary and appropriate examination of the breast, including breast magnetic resonance imaging or breast ultrasound that is:
(A) Used to screen for breast cancer when there is no abnormality seen or suspected; and
(B) Based on personal family medical history, dense breast tissue, or additional factors that may increase the individual's risk of breast cancer.

"(b) A health benefit plan that provides coverage for imaging services for screening mammography must provide coverage to a patient for low-dose mammography according to the following guidelines:
(1) A baseline mammogram for a woman thirty-five (35) to forty (40) years of age;
(2) A yearly mammogram for a woman thirty-five (35) to forty (40) years of age if the woman is at high risk based upon personal family medical history, dense breast tissue, or additional factors that may increase the individual's risk of breast cancer; and
(3) A yearly mammogram for a woman forty (40) years of age or older based on the recommendation of the woman's physician licensed under title 63, chapters 6 or 9.

"(c) A health benefit plan that provides coverage for a screening mammogram must provide coverage for diagnostic imaging and supplemental breast screening."

B. Coverage of Emergency Services

Chapter 784, Public Acts 2022, amending T.C.A. § 56-7-2355 eff. Apr. 8, 2022.

56-7-2355(a).

"(1) 'Emergency medical condition' means a medical condition that manifests itself by symptoms of sufficient severity, including severe pain, regardless of the final diagnosis of the symptoms, that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to potentially result in:
(A) Placing the person's health in serious jeopardy;
(B) Serious impairment to bodily functions; or

(C) Serious dysfunction of a bodily organ or part."

56-7-2355(b).

"(1) A health benefit plan shall not deny coverage or payment for emergency services if the symptoms presented by an enrollee of a health benefit plan and recorded by the attending provider indicate that an emergency medical condition could exist, regardless of:
(A) The final diagnosis of the symptoms;
(B) Whether prior authorization was obtained to provide those services; and
(C) Whether the provider furnishing the services has a contractual agreement with the health benefit plan for the provision of the services to the enrollee."

C. Telehealth; Coverage for Some HIPAA Compliant Audio-Only Conversations

Chapter 807, Public Acts 2022, adding T.C.A. § 56-7-1003(a)(6)(C)(ii) and -1003(k) eff. Apr. 8, 2022.

"(C) Notwithstanding subdivisions (a)(6)(A) and (B), includes Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. § 1320d et seq.) compliant audio-only conversation for the provision of:
(i) Behavioral health services when the means described in subdivision (a)(6)(A) are unavailable; and
(ii) Healthcare services when the means described in subdivision (a)(6)(A) are unavailable."

"(k) A healthcare provider, office staff, or party acting on behalf of the healthcare provider submitting for reimbursement of an audio-only encounter under subdivision (a)(6)(C)(ii) shall:
(1) Confirm and maintain documentation that the patient:
(A) Does not own the video technology necessary to complete an audio-video provider-based telemedicine encounter;
(B) Is at a location where an audio-video encounter cannot take place due to lack of service; or
(C) Has a physical disability that inhibits the use of video technology; and
(2) Notify the patient that the financial responsibility for the audio-only encounter will be consistent with the financial responsibility for other in-person or video encounters, prior to the audio-only telemedicine encounter."

IV. Medicare/Medicaid Issues

A. Payment for Future Medical Expenses Not Subject to Florida Medicaid Third-Party Liability Act

Gallardo v. Marstiller, 142 S.Ct. 1751 (U.S., Thomas, 2022).

"Petitioner Gianinna Gallardo suffered catastrophic injuries resulting in permanent disability when a truck struck her as she stepped off her Florida school bus. Florida's Medicaid agency paid $862,688.77 to cover Gallardo's initial medical expenses, and the agency continues to pay her medical expenses. Gallardo, through her parents, sued the truck's owner and driver, as well as the Lee County School Board. She sought compensation for past medical expenses, future medical

expenses, lost earnings, and other damages. That litigation resulted in a settlement for $800,000, with $35,367.52 expressly designated as compensation for past medical expenses. The settlement did not specifically allocate any amount for future medical expenses.

"The Medicaid Act requires participating States to pay for certain needy individuals' medical costs and then to make reasonable efforts to recoup those costs from liable third parties. 42 U.S.C. § 1396k(a)(1)(A). Under Florida's Medicaid Third-Party Liability Act, a beneficiary like Gallardo who 'accept[s] medical assistance' from Medicaid 'automatically assigns to the [state] agency any right' to third-party payments for medical care. Fla. Stat. § 409.910(6)(b). Applied to Gallardo's settlement, Florida's statutory framework entitled the State to $300,000—*i.e.,* 37.5% of $800,000, the percentage the statute sets as presumptively representing the portion of the tort recovery that is for 'past and future medical expenses,' absent clear and convincing rebuttal evidence. §§ 409.910(11)(f)(1), (17)(b). Gallardo challenged the presumptive allocation in an administrative proceeding. She also brought this lawsuit seeking a declaration that Florida was violating the Medicaid Act by trying to recover from portions of the settlement compensating for future medical expenses. The Eleventh Circuit concluded that the relevant Medicaid Act provisions do not prevent a State from seeking reimbursement from settlement monies allocated for future medical care. 963 F.3d 1167, 1178.

"Held: The Medicaid Act permits a State to seek reimbursement from settlement payments allocated for future medical care."

B. Coordination of Benefits; Medicare and Outpatient Dialysis Services

Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita, Inc., 142 S.Ct. 1968 (U.S., Kavanaugh, 2022).

"Petitioner Marietta Memorial Hospital Employee Health Benefit Plan is an employer-sponsored group health plan that offers all of its participants the same limited coverage for outpatient dialysis. Respondent DaVita—a major provider of dialysis services—sued the Marietta Plan, arguing that the Plan's limited coverage for outpatient dialysis violated the Medicare Secondary Payer statute. The statute makes Medicare a 'secondary' payer to an individual's existing insurance plan for certain medical services, including dialysis, when that plan already covers the same services. 42 U.S.C. §§ 1395y(b)(1)(C), (2), (4). To prevent plans from circumventing their primary-payer obligation for end-stage renal disease treatment, the statute imposes two constraints relevant here. First, a plan 'may not differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner.' § 1395y(b)(1)(C)(ii). Second, a plan 'may not take into account that an individual is entitled to or eligible for' Medicare due to end-stage renal disease. § 1395y(b)(1)(C)(i); see The District Court dismissed DaVita's claims that the Marietta Plan violated both statutory constraints. A divided panel of the U.S. Court of Appeals for the Sixth Circuit reversed. Among other things, the Court of Appeals ruled that the statute authorized disparate-impact liability and that the limited payments for dialysis treatment had a disparate impact on individuals with end-stage renal disease.

"Held: Section 1395y(b)(1)(C) does not authorize disparate-impact liability, and the Marietta Plan's coverage terms for outpatient dialysis do not violate § 1395y(b)(1)(C) because those terms apply uniformly to all covered individuals."

C. Judicial Review of DHHS Final Rule Permitted

American Hospital Association v. Becerra, 142 S.Ct. 1896 (U.S., Kavanaugh, 2022).

"The Medicare statute lays out a formula that the Department of Health and Human Services must employ annually to set reimbursement rates for certain outpatient prescription drugs provided by hospitals to Medicare patients. 42 U.S.C. § 1395*l*(t)(14)(A)(iii). That formula affords HHS two options. Option 1 applies if HHS has conducted a survey of hospitals' acquisition costs for each covered outpatient drug. Under this option, the agency may set reimbursement rates based on the hospitals' 'average acquisition cost' for each drug, and may 'vary' the reimbursement rates 'by hospital group.' § 1395*l*(t)(14)(A)(iii)(I). Absent a survey, option 2 applies, and HHS must set reimbursement rates based on 'the average price' charged by manufacturers for the drug as 'calculated and adjusted by the Secretary.' § 1395*l*(t)(14)(A)(iii)(II). Option 2 does *not* authorize HHS to vary reimbursement rates for different hospital groups. From the time these provisions took effect in 2006 until 2018, HHS did not conduct surveys of hospitals' acquisition costs, relied on option 2, set the reimbursement rates at about 106 percent, and did not vary those rates by hospital group. For 2018, HHS again did not conduct a survey. But this time it issued a final rule establishing separate reimbursement rates for hospitals that serve low-income or rural populations through the 340B program and all other hospitals. For 2019, HHS set reimbursement rates the same way.

"The American Hospital Association and other interested parties challenged the 2018 and 2019 reimbursement rates in federal court. In response, HHS first contended that various statutory provisions precluded judicial review of those rates. The agency also argued that it could vary the reimbursement rates by hospital group under its option 2 authority to 'adjust' the price-based reimbursement rates. The District Court rejected HHS's argument that the statute precluded judicial review, concluded that HHS had acted outside its statutory authority, and remanded the case to HHS to consider an appropriate remedy. The D.C. Circuit, however, reversed. The court ruled that the statute did not preclude judicial review, and upheld HHS's reduced reimbursement rates for 340B hospitals.

"Held:

"1. The statute does not preclude judicial review of HHS's reimbursement rates. Judicial review of final agency action is traditionally available unless 'a statute's language or structure' precludes it, *Mach Mining, LLC* v. *EEOC*, 575 U.S. 480, 486, 135 S.Ct. 1645, 191 L.Ed.2d 607, and this Court has long recognized a 'strong presumption' in its favor, *Weyerhaeuser Co.* v. *United States Fish and Wildlife Serv.*, 586 U.S. ——, ——, 139 S.Ct. 361, ——, 202 L.Ed.2d 269. Here, no provision in the Medicare statute precludes judicial review of the 2018 and 2019 reimbursement rates. HHS cites two nearby provisions that preclude review of the general payment methodology that HHS employs to set rates for *other* Medicare outpatient services. See §§ 1395*l*(t)(12)(A), (C). But HHS sets rates for outpatient prescription drugs using a *different* payment methodology. HHS also argues that other statutory requirements would make allowing judicial review of the 2018 and 2019 reimbursement rates impractical. Regardless, such arguments cannot override the text of the statute and the traditional presumption in favor of judicial review of administrative action."

"2. Absent a survey of hospitals' acquisition costs, HHS may not vary the reimbursement rates only for 340B hospitals; HHS's 2018 and 2019 reimbursement rates for 340B hospitals were therefore unlawful. The text and structure of the statute make this a straightforward case. Because HHS did

not conduct a survey of hospitals' acquisition costs, HHS acted unlawfully by reducing the reimbursement rates for 340B hospitals. HHS maintains that even when it does not conduct a survey, the agency still may 'adjus[t]' the average price 'as necessary.' § 1395*l*(t)(14)(A)(iii)(II). But HHS's power to increase or decrease the price is distinct from its power to set different rates for different groups of hospitals. Moreover, HHS's interpretation would make little sense given the statute's overall structure. Under HHS's interpretation, the agency would never need to conduct a survey of acquisition costs if it could proceed under option 2 and then do everything under option 2 that it could do under option 1. That not only would render irrelevant the survey prerequisite for varying reimbursement rates by hospital group, but also would render largely irrelevant the provision of the statute that precisely details the requirements for surveys of hospitals' acquisition costs. See § 1395*l*(t)(14)(D). Finally, HHS's argument that Congress could not have intended for the agency to 'overpay' 340B hospitals for prescription drugs ignores the fact that Congress, when enacting the statute, was well aware that 340B hospitals paid less for covered prescription drugs. It may be that the reimbursement payments were intended to offset the considerable costs of providing healthcare to the uninsured and underinsured in low-income and rural communities. Regardless, this Court is not the forum to resolve that policy debate."

D. Calculation of Disproportionate Patient Percentage

Becerra v. Empire Health Foundation for Valley Hospital Medical Center, 142 S.Ct. 2354 (U.S., Kagan, 2022).

"Once a person turns 65 or has received federal disability benefits for 24 months, he becomes 'entitled' to benefits under Part A of Medicare. 42 U. S. C. §§ 426(a)–(b). Part A provides coverage for, among other things, inpatient hospital treatment. See § 1395d(a). Medicare pays hospitals a fixed rate for such treatment based on the patient's diagnosis, regardless of the hospital's actual cost and subject to certain adjustments. §§ 1395ww(d)(1)–(5). One such adjustment is the 'disproportionate share hospital' (DSH) adjustment, which provides higher-than-usual rates to hospitals that serve a higher-than-usual percentage of low-income patients. To calculate the DSH adjustment, the Department of Health and Human Services (HHS) adds together two statutorily described fractions: the Medicare fraction—which represents the proportion of a hospital's Medicare patients who have low incomes—and the Medicaid fraction—which represents the proportion of a hospital's total patients who are not entitled to Medicare and have low incomes. Together those fractions produce the 'disproportionate-patient percentage,' which determines whether a hospital will receive a DSH adjustment, and how large it will be.

"Not all patients who qualify for Medicare Part A have their hospital treatment paid for by the program. Non-payment may occur, for example, if a patient's stay exceeds Medicare's 90-day cap per spell of illness, see § 1395d, or if a patient is covered by a private insurance plan, see § 1395y(b)(2)(A). Such limits on Medicare's coverage prompt the question raised here: whether patients whom Medicare insures but does not pay for on a given day are patients 'who (for such days) were entitled to [Medicare Part A] benefits' for purposes of computing a hospital's disproportionate-patient percentage. § 1395ww(d)(5)(F)(vi)(I).

"A 2004 HHS regulation says yes: If the patient meets the basic statutory criteria for Medicare (*i.e.*, is over 65 or disabled), then the patient counts in the denominator and, if poor, in the numerator of the Medicare fraction. See 69 Fed. Reg. 49098–49099. Respondent Empire Health Foundation challenged that regulation as inconsistent with the statute. The Ninth Circuit agreed. That court focused on the statute's use of two different phrases: 'entitled to [Medicare Part A] benefits' and

'eligible for [Medicaid] assistance.' The Ninth Circuit read the latter phrase to mean that a patient qualifies for Medicaid and the former phrase to mean that a patient has an absolute right to payment from Medicare. The Court granted certiorari to resolve a conflict between the Ninth Circuit and two other Circuit Courts, which had approved of HHS's regulation.

"Held: In calculating the Medicare fraction, individuals 'entitled to [Medicare Part A] benefits' are all those qualifying for the program, regardless of whether they receive Medicare payments for part or all of a hospital stay."

CIVIL PROCEDURE

I. Sovereign Immunity

A. Choice-of-Law; Federal Sovereign Immunities Act; Forum's (Not Federal) Choice-of-Law Rules Apply

Cassirer v. Thyssen-Bornemisza Collection Foundation, 142 S.Ct. 1502 (U.S., Kagan, 2022).

"The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.*, governs whether a foreign state or instrumentality is amenable to suit in an American court. The question in this case is what choice-of-law rule a court should use to determine the applicable substantive law in an FSIA suit raising non-federal claims. That issue arises in a dispute concerning the ownership of an Impressionist painting: Camille Pissarro's *Rue Saint-Honoré in the Afternoon, Effect of Rain*. Lilly Cassirer inherited the painting, which a family member had purchased from Pissarro's agent in 1900. After the Nazis came to power in Germany, Lilly surrendered *Rue Saint-Honoré* to them to obtain an exit visa. Lilly and her grandson, Claude, eventually ended up in the United States. The family's post-war search for *Rue Saint-Honoré* was unsuccessful. In the early 1990s, the painting was purchased by the Thyssen-Bornemisza Collection Foundation, an entity created and controlled by the Kingdom of Spain. Claude learned several years later that *Rue Saint-Honoré* was listed in a catalogue of the Foundation's museum.

"Claude sued the Foundation, asserting various property-law claims based on the allegation that he owned *Rue Saint-Honoré* and was entitled to its return. Because the Foundation is an 'instrumentality' of the Kingdom of Spain, the complaint invoked the FSIA to establish the court's jurisdiction. See § 1603(b). The FSIA provides foreign states and their instrumentalities with immunity from suit unless the claim falls within a specified exception. See §§ 1605–1607. The courts below held that the Nazi confiscation of *Rue Saint-Honoré* brought Claude's suit against the Foundation within the FSIA exception for expropriated property. See § 1605(a)(3). That meant the Cassirer family's suit could go forward. To determine what property law governed the dispute, the courts below had to apply a choice-of-law rule. The Cassirer plaintiffs urged the use of California's choice-of-law rule; the Foundation advocated a rule based in federal common law. The courts below picked the federal option. That option, they then held, commanded use of the property law of Spain, not California. Applying Spanish law, the courts determined that the Foundation was the rightful owner. This Court granted certiorari to resolve a conflict among the Courts of Appeals as to what choice-of-law rule a court should apply in an FSIA case raising non-federal claims.

"Held: In an FSIA suit raising non-federal claims against a foreign state or instrumentality, a court should determine the substantive law by using the same choice-of-law rule applicable in a similar suit against a private party. Here, that means applying the forum State's choice-of-law rule, not a rule deriving from federal common law.

"The FSIA provides a baseline principle of foreign sovereign immunity from civil actions unless a statutory exception applies (including the expropriation exception found to apply here). See §§ 1604–1607. Yet the FSIA was never 'intended to affect the substantive law determining the liability of a foreign state or instrumentality' deemed amenable to suit. *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). To the contrary, Section 1606 of the statute provides: 'As to any claim for relief with

respect to which a foreign state is not entitled to immunity under [the FSIA], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.' When a foreign state is not immune from suit, it is subject to the same rules of liability (the same substantive law) as a private party. See *First Nat. City Bank*, at 622, n. 11, 103 S.Ct. 2591.

"Section 1606 dictates the selection of a choice-of-law rule: It must mirror the rule that would apply in a similar suit between private parties. Only the same choice-of-law rule can guarantee use of the same substantive law—and thus guarantee the same liability. Consider two suits seeking recovery of a painting: one suit against a foreign-state-controlled museum (as here), the other against a private museum. If the choice-of-law rules in the two suits differed, so might the substantive law chosen. And if the substantive law differed, so might the suits' outcomes. Contrary to Section 1606, the two museums would not be 'liable to the same manner and to the same extent.'

"In this case, Section 1606 requires the use of California's choice-of-law rule—because that is the rule a court would use in comparable private litigation. Consider the just-hypothesized suit against a private museum, brought as this case was in California and asserting non-federal claims. If the private suit were filed in state court, California's choice-of-law rule would govern. And if the private suit were filed in federal court, the same would be true, because a federal court sitting in diversity borrows the forum State's choice-of-law rule. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). If California's choice-of-law rule applies in the private-museum suit, it must also apply in the suit here, against the Foundation. That is the only way to ensure—as Section 1606 demands—that the Foundation, although a Spanish instrumentality, will be liable in the same way as a private party.

"Even absent the clarity of Section 1606, the Court would likely reach the same result. Scant justification exists for federal common lawmaking in this context. Judicial creation of federal common law to displace state-created rules must be 'necessary to protect uniquely federal interests.' *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981). While foreign relations is an interest of that kind, here even the Federal Government disclaims any necessity for a federal choice-of-law rule in FSIA suits raising non-federal claims."

B. Standing and Sovereign Immunity Issues; Suit Against Various Tennessee Officials Regarding Prohibition Against Marriage by Officiant Ordained Online

Universal Life Church Monastery Storehouse v. Nabors, 35 F.4th 1021 (6th Cir., Bush, 2022).

"Universal Life Church Monastery ('ULC') permits anyone who feels so called to become ordained as a minister—over the Internet, free of charge, and in a matter of minutes. Should the newly minted minister wish to solemnize a marriage in Tennessee, however, she will encounter a problem. Tennessee law permits only those 'regular' ministers—ministers whose ordination occurred 'by a considered, deliberate, and responsible act'—'to solemnize the rite of matrimony.' Tenn. Code Ann. ('TCA') § 36-3-301(a)(1)–(2). And since 2019, the law has explicitly clarified that '[p]ersons receiving online ordinations may not solemnize the rite.' *Id.* § 36-3-301(a)(2).

"Asserting that those restrictions violate the federal and Tennessee constitutions, ULC and various of its members sued several Tennessee officials to pursue an injunction and declaratory judgment. Yet the officials contend that they have sovereign immunity from suit and that, in any event, plaintiffs lack standing to sue. The district court rejected those contentions by and large, entering

a preliminary injunction against several defendants. We are now asked to take up the same questions and reverse the district court. And, indeed, we hold that many of plaintiffs' claims must be dismissed for lack of standing. But we also hold that as to the remaining claims presenting a live case or controversy, the district court properly denied sovereign immunity. We will thus remand a narrow portion of plaintiffs' suit for further proceedings below."

II. Amendment of Pleadings

A. Cross-Claim Not Barred by Statute of Limitations

Roach v. Moss Motor Company, Inc., No. M2021-00511-COA-R3-CV (Tenn. Ct. App., Stafford, May 6, 2022).

"On August 26, 2018, a car driven by Defendant/Appellant Steven L. Kerr ('Kerr') collided with a car driven by Patricia Jorgenson ('Mrs. Jorgenson'). Mrs. Jorgenson died as a result of her injuries sustained in the crash. Rita Roach ('Roach') and Donna Warfield ('Mrs. Warfield') were passengers in Kerr's car. This accident resulted in three separate lawsuits in two different counties. On May 8, 2019, Brian Jorgenson, as executor of the Estate of Mrs. Jorgenson and on behalf of all wrongful death beneficiaries of Mrs. Jorgenson ('Mr. Jorgenson'), filed a complaint for wrongful death against Kerr, Moss Motor Company, Inc. ('Moss'), and James W. Mitchell d/b/a The Tire Shop ('Mitchell'), in the Circuit Court for Davidson County. On July 9, 2019, Roach filed a complaint related to injuries she sustained in the crash in the Circuit Court for Robertson County (the 'trial court'), against Kerr, Moss, and Mitchell. On August 23, 2019, Mrs. Warfield and her husband, Gary Lynn Warfield (collectively, 'the Warfields') filed a complaint in the trial court against Kerr, Moss, and Mitchell, related to the injuries Mrs. Warfield sustained in the crash.

"In due course, Kerr and Moss filed answers raising the comparative fault of Vernon A. Dotson, Jr. d/b/a D&D Tire & Repair ('Dotson'), Christopher Armstrong d/b/a D&D Tire & Repair ('Armstrong'), and Tracy Langston Ford, LLC ('Ford'). Therefore, Plaintiffs each filed amended complaints naming Dotson, Armstrong, and Ford as defendants at various times (Mr. Jorgenson was the first of the Plaintiffs to do so, in an amended complaint filed August 26, 2019). Roach and the Warfields also amended their complaints to add Mr. Jorgenson as a defendant, after Moss alleged comparative fault against Mrs. Jorgenson.

"On July 19, 2019, the Davidson County Circuit Court granted Mitchell, Moss, and Kerr's joint motion for transfer of venue to the trial court. Plaintiffs' three cases were thereafter consolidated in the trial court on December 16, 2019. According to Kerr, his liability insurance carrier retained counsel for the sole purpose of defending against the claims made against him, not for asserting possible claims he might have against other parties. On February 14, 2020, a new attorney representing Kerr as a potential cross-claimant filed a motion for leave to file an amended answer asserting a cross-claim for Kerr's injuries and property damage sustained as a result of the collision (the 'motion to amend'). Before Kerr's new attorney filed his notice of appearance, Kerr had filed six answers and one amended answer to Plaintiffs' various complaints and amended complaints. According to Kerr, only preliminary written discovery was ever completed, no depositions were taken or scheduled, and a trial date was never set.

"The motion to amend stated that it was set to be heard in the trial court on March 3, 2020. The hearing was subsequently moved to April 7, 2020. In the meantime, on March 18, 2020, Ford filed

a motion to amend its answers to allege the comparative fault of Cooper Tire and Rubber Company ('Cooper Tire'). Cooper Tire had been mentioned in Moss's answer to Mr. Jorgenson's first complaint, and Kerr had also raised allegations of comparative fault against Cooper Tire in his amended answer to Mr. Jorgenson's first complaint.

"The trial court denied Kerr's motion to amend as untimely in an order filed May 5, 2020. Therein, the trial court stated that it did not hear arguments on the motion due to COVID-19. The trial court's order stated further, inter alia:

> 6. Defendant Kerr did not include any cross-claims in his seven (7) Answers to [Plaintiffs' complaints and amended complaints], all of which were filed prior to the expiration of the one year statute of limitations. *See* Tenn. Code Ann. § 28-3-104(a)(1)(A).
>
> 7. For the foregoing reasons, the Motion is DENIED as untimely.

"On May 19, 2020, Kerr filed a motion to alter or amend the trial court's order denying his motion to amend, pursuant to Rules 59 and 60 of the Tennessee Rules of Civil Procedure. Therein, Kerr specifically requested an in-person hearing and scheduled one for June 2, 2020. On a form titled 'Motion Hearing on the Pleadings Results Form,' filed June 2, 2020, and again without a hearing, the trial court denied Kerr's motion to alter or amend but granted Ford's motion to amend its answers. The form stated that counsel for Ford was directed to prepare an order. More detailed orders granting Ford's motion to amend its answers and denying Kerr's motion to alter or amend were then filed in the trial court on July 7, 2020.

"In the order denying Kerr's motion to alter or amend, the trial court explicitly acknowledged that there was no evidence of bad faith on Kerr's part in filing his motion to amend. Nevertheless, the trial court concluded that Kerr's motion to amend was unduly delayed, finding that 'Kerr had ample opportunity since August 26, 2018[,] when his cause of action arose, and then again after he was sued in May 2019, to bring a personal injury claim against the defendants, but he deliberately chose not to do so.' The trial court further found that Kerr had 'failed to include any cross-claims in his seven answers to the underlying complaints' and he 'did not timely notify the defendants of his intent to file a cross-claim against them.' The trial court also found that Kerr's cross-claim would unduly prejudice the cross-defendants, reasoning that

> [t]he parties to this consolidated action are several months into discovery in this matter, with a mediation scheduled for July 2020. Kerr's late addition crossclaim for his own personal injuries and damages would require prior written discovery and investigative efforts to be redone and impact the collective evaluation of all the prior claims in anticipation of the mediation approaching two months from now.

"Finally, the trial court concluded that Kerr's cross-claim would be futile because it appeared to be barred by the one-year statute of limitations applicable to personal injury actions, and that Tennessee Code Annotated section 28-1-114(a) was inapplicable to save Kerr's cross-claim, 'at least as to any claims against [Ford], because Kerr's claim was barred at the time Plaintiffs interposed their claims against [Ford] in November 2019.'"

"Rule 15.01 of the Tennessee Rules of Civil Procedure states, in pertinent part:

> A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15 days after it 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.

"As our supreme court has previously explained, '[g]enerally, trial courts must give the proponent of a motion to amend a full chance to be heard on the motion and must consider the motion in light of the amendment policy embodied in Rule 15.01 of the Tennessee Rules of Civil Procedure that amendments must be freely allowed[.]' *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366, 374 (Tenn. 2007) (citation omitted). To that end, 'trial courts [are required] to be liberal in allowing pretrial motions to amend.' *Id.* at 375 (collecting cases). 'The reason is "to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties."' *Weston v. Cmty. Baptist Church of Wilson Cty.*, No. M2004-02688-COA-R3-CV, 2007 WL 394644, at *6 (Tenn. Ct. App. Feb. 5, 2007) (quoting *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001) (quoting *Karash v. Pigott*, 530 S.W.2d 775, 777 (Tenn. 1975)))."

"First, we will address whether Kerr's amended answer would be futile. *See Merriman*, 599 S.W.2d at 559. Ford argues that Kerr's amendment sought to introduce a cross-claim that was barred by the statute of limitations, and thus the amendment would be futile. To assess this issue, we must look to Tennessee Code Annotated section 28-1-114(a), which provides that '[a] counterclaim or third party complaint or cross-claim is not barred by the applicable statute of limitations or any statutory limitation of time, however characterized, if it was not barred at the time the claims asserted in the complaint were interposed.'

"Ford argues that 'the complaint' as referenced in section 28-1-114(a) must refer to the first complaint that named Ford as a defendant, which was filed on November 18, 2019—because that was the first complaint wherein claims were 'interposed' against Ford. Before that, Ford was not a party to the case, even though Kerr made comparative fault allegations against Ford in answers he filed on September 20, 2019. Thus, Ford argues, by the time it was named as a party on November 18, 2019, the one-year statute of limitations on personal injury claims had expired because the accident occurred over one year prior, on August 26, 2018. Consequently, according to Ford, Kerr's cross-claim against Ford would have been barred on November 18, 2019, 'the time the claims asserted in the complaint were interposed.' *See* Tenn. Code Ann. § 28-1-114(a). Because the cross-claim was untimely, Ford avers, it would have been futile to allow the amendment asserting it.

"Kerr, on the other hand, argues, inter alia, that there is no requirement within section 28-1-114(a) that Ford must have been an original defendant in order for section 28-1-114(a) to save his cross-claim. Instead, according to Kerr, section 28-1-114(a) only requires the original complaint to have been filed within the applicable statute of limitations.

"The issue of the meaning of 'the complaint' in section 28-1-114(a) is an issue of first impression. The statute has been cited in only nineteen cases, none of which illuminate the question here."

"On its face, section 28-1-114(a) is unclear."

"We therefore turn to the legislative history of section 28-1-114(a) to glean whether the legislature intended for 'the complaint' to refer to the original complaint in an action. Section 28-1-114 was first enacted in 1978. *See* 1978 Tenn. Pub. Acts 740. It was subsequently amended on May 20, 1983. *See* 1983 Tenn. Pub. Acts 652. We examined the Tennessee Senate's consent calendar from May 9, 1983, which includes a Summary of General Bills published by the Office of Legislative Services for members of the Tennessee General Assembly. Therein, it states, in relevant part:

> [Senate Bill 955] would amend TCA 28-1-114 to include cross-claims with counter-claims and third party complaints as a part of the set of civil actions that are: (1) not barred by any statutory limitation of time unless it was barred at the time of filing of the *original* complaint.

"Summary of General Bills, Consent Senate Calendar at 1 (May 9, 1983) (emphasis added). Thus, while the statute does not explicitly reference the 'original' complaint, this legislative record clearly indicates that the legislative intent behind section 28-1-114(a), at its inception, was to make the original complaint in a case the operative complaint for purposes of the statute. Moreover, while the statute's use of 'interposed' is somewhat confusing, this legislative history demonstrates that what the legislature meant by 'at the time the claims asserted in the complaint were interposed,' was 'at the time of filing of the original complaint.' *See* Summary of General Bills, Consent Senate Calendar."

"Because the legislative history confirms that under section 28-1-114(a), Kerr's cross-claim 'receive[s] the benefit of the [Plaintiffs'] original filing[s,]' even the latest of which was filed within the statute of limitations, his cross-claim was timely. *See Phelps*, 2017 WL 113965, at *8 (citing *Rayburn*, 1994 WL 27616, at *4 n.1). Therefore, Kerr's cross-claim is not time-barred as to any of the cross-defendants. Consequently, his amended answer would not be not futile."

"Given the complexities of this case, the multitude of parties, claims, and amendments on the whole, and the fact that the cases were not consolidated until December 2019, we cannot conclude that Kerr unduly delayed in filing the motion to amend or repeatedly and impermissibly failed to raise his cross-claim. We also conclude that the cross-defendants cannot 'legitimately claim surprise,' *Hardcastle*, 170 S.W.3d at 81, as Kerr had at least asserted general comparative fault allegations in his first answer, and proceeded to assert more specific comparative fault allegations against the cross-defendants as he became aware of their potential fault. Finally, given that discovery had not been completed, there was no trial date, and Kerr's cross-claims did not seek to introduce new issues that would fundamentally change the case, the cross-defendants would not be unduly prejudiced by Kerr's motion to amend being granted. Therefore, we hold that the trial court abused its discretion in denying Kerr's motion to amend. Upon remand, the trial court is to grant Kerr's motion to amend as to each of the cross-defendants, and Kerr shall be permitted to proceed on the merits of his cross-claim."

B. "Motion to Correct Misnomer" Unsuccessful to Amend Complaint

Bodine v. Long John Silver's LLC, No. M2021-00168-COA-R3-CV (Tenn. Ct. App., Davis, Jan. 14, 2022), perm. app. denied Apr. 13, 2022.

"Plaintiff filed her complaint in the Circuit Court for Marion County (the 'trial court') on February 24, 2020, against Long John Silver's, LLC, individually and d/b/a Long John Silver's ('Defendant'). The complaint alleged that at all relevant times, 'the defendant owned and operated on its premise[s] a restaurant known as the Long John Silver's that was open to the general public.'

Plaintiff alleged that on February 25, 2019, Defendant 'negligently permitted a hazardous concrete parking stop to exist in its parking lot in a place allowing for the passage of the Plaintiff as well as other patrons of Long John Silver's.' The complaint averred that the acts and omissions had occurred at Defendant's restaurant in Kimball, Tennessee. According to Plaintiff, she was walking in the parking lot when her feet came into contact with the concrete parking stop, causing her to fall and sustain injuries to her back, legs, and arms. As a result, Plaintiff allegedly received abrasions and contusions on her body, as well as an injury to her left hip, which required medical treatment.

"On appeal, Plaintiff acknowledges that on March 12, 2020, she received an email from counsel for Defendant 'mentioning that JAK Foods, Inc. is the franchisee and mention[ing] that they have tendered the matter to JAK.' The email, which is included in the record, is from Defendant's 'National Litigation Counsel' and is addressed to Plaintiff's counsel. The email provides that the complaint 'improperly names [Long John Silvers's, LLC] as a defendant' and that Defendant 'did not own, operate, or control the subject restaurant and did not employ any of the individuals who may have worked there.' In the email, Defendant's counsel requested that Plaintiff voluntarily dismiss the action against Defendant and stated that '[i]n an effort to allay any concern you may have over dismissal, I am willing to provide you with an affidavit which supports this information so that you will feel comfortable that you are dismissing a party which bears no responsibility for the alleged incident.' The email from Defendant's counsel further states:

> At the time of the alleged incident, the restaurant was owned, operated, and controlled by a franchisee, JAK Foods, Inc. ('JAK'), which you may contact at the following address: 2401 Broad Street, #201, Chattanooga, TN 37408. We have tendered this matter to JAK and we expect that our tender will be accepted in the near future. We will request that JAK contact you to confirm the information contained in this email.

"Plaintiff alleges she never received correspondence from JAK Foods, Inc., and Defendant was never voluntarily dismissed.

"Defendant filed an answer on April 2, 2020, denying that it was the owner/operator of the Long John Silver's location where Plaintiff was allegedly injured and arguing that Defendant owed no duty to Plaintiff. Defendant filed a motion for summary judgment on June 11, 2020, requesting that the trial court dismiss with prejudice the action against it. Defendant included a memorandum of law in support of its motion; an affidavit by a senior paralegal employed by Defendant; and a statement of undisputed facts. In its motion, Defendant argued that the restaurant at issue is owned and operated by an independent franchisee and that Long John Silver's, LLC is not the owner or operator of the restaurant. According to Defendant, no material issue of fact existed, and Defendant owed no duty of care to Plaintiff, which is an essential element of her claim."

"On July 28, 2020, the date the hearing was to occur on the pending motions, Plaintiff filed a 'Motion to Correct Misnomer.' Therein, Plaintiff argued that she had filed her complaint against two defendants, 'Long John Silver's, LLC individually and Long John Silver's, LLC d/b/a Long John Silver's.' According to Plaintiff, she intended to sue the owner/operator of the restaurant and the owner of the property, as evidenced by the substance of the Complaint. Plaintiff stated in her motion that she received a discovery response in July 2020 identifying JAK Foods, Inc. as the owner and operator of the restaurant and property. As such, Plaintiff's motion sought to correct the 'misnomer' by amending the complaint 'to substitute, JAK FOODS, INC., for Long John Silver's, LLC individually and d/b/a Long John Silver's,' and requested that 'the pleadings be amended so

that JAK FOODS, INC. replaces Long John Silver's LLC, individually and d/b/a Long John Silver's anywhere they appear.'

"Plaintiff urged that the amendment would relate back to the original filing date, pursuant to Tennessee Rule of Civil Procedure 15.03. Plaintiff argued that JAK Foods, Inc. received timely notice of the action and that it should have known that but for the mistake regarding its identity, the action would have been brought against it. Plaintiff alleged that her counsel sent notice of the claim to the physical location of the restaurant on August 26, 2019; that at least one JAK Foods, Inc. employee was aware of the fall on the day it occurred; that Long John Silver's, LLC and JAK Foods, Inc. have a franchisor/franchisee relationship; and that '[t]he two are well acquainted with one another.' Plaintiff attached to her motion an August 2019 letter that was directed to Long John Silver's in Kimball, Tennessee to the attention of Claims Management and stated as follows:

> Please be advised that this office represents Bonnie S. Bodine for personal injuries received in the captioned premises liability claim. We request that all related photographs, video tapes, incident reports, statements, or other similar documents be preserved and a copy of these items be forwarded to us at the above address.
>
> We would also appreciate your forwarding this letter to your premises liability insurance agent or adjuster along with a request that they contact our office at their earliest convenience.

"Defendant responded to Plaintiff's motion, acknowledging that the action arose out of the same conduct, transaction or occurrence as the original complaint. Defendant argued that Plaintiff should have sued the proper party within the statute of limitations period, which expired on February 25, 2020, and that failure to do so was not due to a 'mistake.' According to Defendant, a cursory internet search would have revealed that Defendant was not the owner of the restaurant or the property, and Plaintiff also could have obtained this information by going to the restaurant location to make an inquiry. Defendant argued that Plaintiff had a duty to demonstrate due diligence and that the identity of JAK Foods, Inc. was readily identifiable prior to expiration of the statute of limitations."

"Both Defendant's summary judgment motion and Plaintiff's motion to correct misnomer were heard by the trial court on December 15, 2020. During the motion hearing, the trial court stated that the situation appeared to involve due diligence and explained that Plaintiff 'could have discovered who [the proper defendant] was and got them in the suit and let them come to court and say that [Plaintiff] shouldn't have sued them yet.' The trial court then denied Plaintiff's pending motion, determining that the motion should have been a motion to amend the complaint rather than a motion to correct misnomer and that a motion to amend was not properly before it. The trial court ultimately entered an order denying Plaintiff's motion.

"The trial court also entered an order granting summary judgment in favor of Defendant, concluding that Defendant 'had no duty to protect the Plaintiff from any alleged dangerous condition on the premises.' The trial court found that the undisputed facts support that Defendant did not own or otherwise exercise control over the premises where the injury occurred, that it had no employees working on the premises, that the owner of the premises was not an agent of Defendant, and that Defendant was not involved in the day-to-day operations on the premises. The trial court therefore concluded that Defendant had negated an essential element of Plaintiff's claim."

"The only issue properly before this Court . . . is whether the trial court erred by denying Plaintiff's 'Motion to Correct Misnomer' and her request seeking additional discovery concerning whether JAK Foods, Inc. was given timely notice of the action. While Plaintiff titled her motion 'Motion to Correct Misnomer,' Plaintiff actually sought to substitute JAK Foods, Inc., an entirely different party, as defendant after the statute of limitations was expired."

"Tennessee Rule of Civil Procedure 15.01 provides in pertinent part:

> A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15 days after it 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.

"Per Rule 15.01, once a defendant answers a complaint, the complaint may be amended only by written consent of the defendant or by leave of the trial court. *See* Tenn. R. Civ. P. 15.01. Rule 15.01 'does not, however, provide that leave to amend "shall be given," only that it "shall be freely given" when justice requires it.' *Padgett v. Clarksvillle-Montgomery Cnty. School System*, No. M2017-01751-COA-R3-CV, 2018 WL, 5881766, at *4 (Tenn. Ct. App. Nov. 9, 2018) (citing *Waters v. Coker*, No. M2007-01867-COA-RM-CV, 2008 WL 4072104, at *4 (Tenn. Ct. App. Aug. 28, 2008)). Courts have identified several considerations that, alone or in combination, may result in the trial court's denial of a motion to amend the pleadings, including (1) undue delay in filing the motion requesting the amendment, (2) lack of notice to an opposing party, (3) bad faith by the moving party, (4) repeated failure to cure deficiencies with previous amendments, (5) futility of the proposed amendment, and (6) undue prejudice to an opposing party. *Hardcastle v. Harris*, 170 S.W.3d 67, 81 (Tenn. Ct. App. 2004)."

"In denying Plaintiff's motion, the trial court considered Plaintiff's delay and found an 'extreme lack of due diligence' on Plaintiff's part. The trial court further considered that Plaintiff had not performed any 'additional due diligence' while the motion was pending. Although Plaintiff argues on appeal that the trial court abused its discretion, we disagree.

"First, it is unclear from Plaintiff's 'Motion to Correct Misnomer' that she properly sought the trial court's permission to file an amended complaint against a new party, insofar as the relief sought by Plaintiff was simply 'that the pleadings be amended so that JAK FOODS, INC. replaces Long John Silver's LLC, individually and d/b/a Long John Silver's anywhere they appear.' Accordingly, we take no issue with the trial court's finding that a proper motion to amend was not before the court. Further, even to the extent Plaintiff's motion may be construed as a motion to amend, the trial court did not abuse its discretion in denying the motion because Plaintiff has never offered a sufficient reason for the delay. Plaintiff filed her complaint against Defendant on February 24, 2020. Plaintiff admits that she received an email from defense counsel on March 12, 2020, informing her that JAK Foods, Inc. was the franchisee. Thus, Plaintiff was aware of JAK Foods, Inc.'s existence as the correct party to sue from the outset of the litigation. Nonetheless, Plaintiff failed to file an amended complaint at that time in order to name the proper party. Thereafter, in April 2020, Defendant filed its answer denying that it was the owner or operator of the restaurant. After no request to amend the complaint for almost three months, Defendant then filed a motion for summary judgment in June 2020, asking the trial court to dismiss the action against it with prejudice."

"Plaintiff argues on appeal that her delay in naming the correct party was due in large part to COVID-19 restrictions and the fact that '[d]epositions were particularly difficult during the pandemic.' We are unpersuaded by this argument, however, because Plaintiff did not need to take a deposition to know that she sued the wrong entity. Plaintiff also relies on Tennessee Rule of Civil Procedure 15.03, which explains:

> An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

"Plaintiff argues on appeal that Rule 15.03 'allows for relation back in this case.' Plaintiff avers that Defendant's counsel stated that the case would be tendered to JAK Foods, Inc., and that the correct defendant therefore had notice of the suit. Relation back pursuant to Rule 15.03 is not the issue, however, because the trial court concluded that, based on the procedural posture of the case, Plaintiff had not properly sought leave to amend her Complaint to add the correct party. Stated differently, we need not reach the issue of whether an amendment would relate back because the trial court denied Plaintiff the opportunity to amend at all based upon Plaintiff's lack of due diligence. And, as addressed above, this was not an abuse of discretion under all of the circumstances."

III. Right to Intervene

A. Federal Suit Challenging North Carolina Voter ID Law; Federal Rule 24

Berger v. North Carolina State Conference of the NAACP, 142 S.Ct. 2191 (U.S., Gorsuch, 2022).

"In 2018, North Carolina amended its Constitution to provide that '[v]oters offering to vote in person shall present photographic identification.' Art. VI, § 2(4). To implement the constitutional mandate, the General Assembly approved S. B. 824. The Governor vetoed the bill, the General Assembly overrode the veto, and S. B. 824 went into effect. The state conference of the NAACP then sued the Governor and members of the State Board of Elections (collectively, Board), a state agency whose members are both appointed and removable by the Governor. The NAACP alleged that S. B. 824 offends the Federal Constitution. The Board was defended by the State's attorney general, who, like the Governor, is an independently elected official. The attorney general at the time was a former state senator who voted against an earlier voter-ID law and filed a declaration in support of a legal challenge against it. The speaker of the State House of Representatives and president pro tempore of the State Senate (hereinafter, legislative leaders) moved to intervene, arguing that, without their participation, important state interests would not be adequately represented in light of the Governor's opposition to S. B. 824, the Board's allegiance to the Governor and its tepid defense of S. B. 824 in parallel state-court proceedings, and the attorney general's opposition to earlier voter-ID efforts.

"The District Court applied a presumption that the legislative leaders' interests would be adequately represented by the Governor, Board, and the attorney general and denied their motion to intervene. Unsatisfied with the Board's defense following the denial of their motion, the legislative leaders sought to lodge an *amicus* brief and accompanying materials, but the District Court refused to consider them, struck them from the record, and granted a preliminary injunction barring enforcement of S. B. 824. The Fourth Circuit considered both District Court rulings in separate appeals before separate panels. On the preliminary injunction ruling, the panel held that the District Court had abused its discretion because the record contained insufficient evidence to show that S. B. 824 violated the Federal Constitution. On the intervention ruling, a separate panel agreed with the legislative leaders and held that the District Court had erred when denying them leave to intervene. Eventually, however, the Fourth Circuit decided to rehear the matter en banc and ruled that the legislative leaders were not entitled to intervene in the District Court proceedings. This Court agreed to hear the matter to resolve disagreements among the courts of appeals on the proper treatment of motions to intervene in cases like this one.

"Held: North Carolina's legislative leaders are entitled to intervene in this litigation."

"(a) Federal Rule of Civil Procedure 24(a)(2) provides that a 'court must permit anyone to intervene' who, (1) '[o]n timely motion,' (2) 'claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing the action may as a practical matter impair or impede the movant's ability to protect its interest,' (3) 'unless existing parties adequately represent that interest.' No one disputes the timeliness of the motion to intervene here. The Court thus addresses the Rule's two remaining requirements.

"States possess 'a legitimate interest in the continued enforce[ment] of [their] own statutes,' *Cameron* v. *EMW Women's Surgical Center, P. S. C.*, 595 U.S. ___, ___, and States may organize themselves in a variety of ways. When a State chooses to allocate authority among different officials who do not answer to one another, different interests and perspectives, all important to the administration of state government, may emerge. See, *e.g.*, *Brnovich* v. *Democratic National Committee*, 594 U.S. ___. Appropriate respect for these realities suggests that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state law. Nor are state interests the only interests at stake. Permitting the participation of lawfully authorized state agents promotes informed federal-court decisionmaking and avoids the risk of setting aside duly enacted state law based on an incomplete understanding of relevant state interests. This Court's teachings on these scores have been many, clear, and recent. See, *e.g., Virginia House of Delegates* v. *Bethune-Hill*, 587 U.S. ___; *Hollingsworth* v. *Perry,* 570 U.S. 693.

"These precedents and the principles they represent are dispositive here. North Carolina law explicitly provides that '[t]he Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, by and through counsel of their choice,' 'shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.' N. C. Gen. Stat. Ann. § 1–72.2(b). And the State has made plain that it considers the leaders of the General Assembly 'necessary parties' to suits like this one. § 120–32.6(b).

"The Board submits that North Carolina law does not afford the legislative leaders authority to represent state interests. But that argument is difficult to square with the express statutory language. Alternatively, the Board argues that the statutes authorizing the legislative leaders to participate

here violate the State Constitution by usurping power vested in the executive branch alone. That logic is hard to follow, however, given the Board's concession that the legislative leaders *may* intervene permissively under Rule 24(b), and likely as a matter of right under Rule 24(a)(2) if the attorney general ceases to defend the law.

"The NAACP offers a different reply, pointing out that Rule 24(a)(2) permits intervention only by 'new' parties. And, it submits, the legislative leaders are already effectively 'existing' parties to this suit challenging the enforcement of state law. That argument rests on a premise that is both formally and functionally mistaken. First, the NAACP has not sued the State but only certain state officers, and, so far, the legislative leaders are not among them. Functionally, however, this suit implicates North Carolina's sovereign interests regardless of the named parties. And, where a State chooses to divide its sovereign authority among different officials and authorize their participation in a suit challenging state law, a full consideration of the State's practical interests may require the involvement of different voices with different perspectives."

"(b) Concerning Rule 24(a)(2)'s third requirement, lower courts have adopted a variety of tests for evaluating whether an existing defendant already 'adequately represent[s]' the same interests a proposed intervenor seeks to vindicate. Here, both the District Court and the en banc Court of Appeals improperly applied a 'presumption' that the Board adequately represented the legislative leaders' interests and held that the leaders could not overcome this presumption. But Rule 24(a)(2)'s test in this regard presents proposed intervenors with only a minimal challenge: It promises intervention to those who bear an interest that may be practically impaired or impeded 'unless existing parties adequately represent that [same] interest.' See, *e.g., Trbovich* v. *Mine Workers,* 404 U.S. 528. Some lower courts have suggested that a presumption of adequate representation remains appropriate in certain classes of cases. But even taken on their own terms, none of these presumptions applies to cases like this one. For instance, some lower courts have adopted a presumption of adequate representation in cases where a movant's interests are identical to those of an existing party. But even the Board concedes that this presumption applies only when interests fully overlap.

"This litigation illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court. Here, the legislative leaders seek to give voice to a perspective different from the Board's. They assert an unalloyed interest in vindicating state law from constitutional challenge, without an eye to crosscutting administrative concerns—concerns that have colored the Board's defense thus far. The NAACP worries that allowing the legislative leaders to intervene could 'make trial management impossible.' While a proliferation of motions to intervene may be a cause for concern in some cases, this case is not one. Federal courts routinely handle cases involving multiple officials sometimes represented by different attorneys taking different positions. See, *e.g., Whole Woman's Health* v. *Jackson*, 595 U.S. ___. Whatever additional burdens adding the legislative leaders to this case may pose, those burdens fall well within the bounds of everyday case management."

B. Attorney General's Motion to Intervene on Appeal

Cameron v. EMW Women's Surgical Center, P.S.C., 142 S.Ct. 1002 (U.S., Alito, 2022).

"EMW Women's Surgical Center and two of its doctors filed a federal suit seeking to enjoin enforcement of Kentucky House Bill 454, legislation regulating the abortion procedure known as dilation and evacuation. Named defendants in EMW's lawsuit included two Commonwealth

officials, the attorney general and the cabinet secretary for Health and Family Services. EMW agreed to dismiss claims against the attorney general without prejudice. The stipulation of dismissal specified that the attorney general's office reserved 'all rights, claims, and defenses ... in any appeals arising out of this action' and agreed to be bound by 'any final judgment ... subject to any modification, reversal or vacation of the judgment on appeal.'. . . The secretary remained in the case and defended the challenged law. After a bench trial, the District Court held that HB 454 unconstitutionally burdens a woman's right to an abortion and issued a permanent injunction against the law's enforcement.

"The secretary filed a notice of appeal. While the appeal was pending, Kentucky elected a new attorney general, petitioner Daniel Cameron, and elected the former attorney general, Andrew Beshear, Governor. Governor Beshear appointed a new secretary for Health and Family Services who continued the defense of HB 454 on appeal. Prior to oral argument before the Sixth Circuit, Attorney General Cameron entered an appearance as counsel for the new secretary. A divided Sixth Circuit panel affirmed the District Court's judgment. The secretary then informed the attorney general's office that the secretary would not file a petition for rehearing en banc or a petition for a writ of certiorari challenging the Sixth Circuit panel's decision. Two days later, the attorney general moved to withdraw as counsel for the secretary and to intervene as a party on the Commonwealth's behalf. The secretary did not oppose that motion, but respondents did. The attorney general also filed a petition for rehearing en banc within the 14-day deadline for an existing party to seek rehearing. The Sixth Circuit denied the attorney general's motion to intervene. This Court granted certiorari limited to the question whether the Sixth Circuit should have permitted the attorney general to intervene.

"Held: The Court of Appeals erred in denying the attorney general's motion to intervene."

"(a) This Court has jurisdiction to consider whether the attorney general's motion to intervene should have been granted notwithstanding respondents' contention that the motion was jurisdictionally barred. See *Arbaugh* v. *Y & H Corp*., 546 U.S. 500, 506. Respondents concede that a court of appeals generally has jurisdiction to consider a non-party's motion to intervene in a pending appeal. But respondents assert that a narrow subset of non-parties—those bound by the district court judgment—must file a timely notice of appeal to obtain appellate review and may not circumvent applicable jurisdictional time limits by filing a motion to intervene after the deadline for filing a notice of appeal has passed. Applying this theory, respondents contend that because the attorney general could have filed a notice of appeal but failed to do so within the time allowed by law, his motion for intervention should be treated like an untimely notice of appeal over which the Sixth Circuit lacked jurisdiction."

"(1) No provision of law limits the jurisdiction of the courts of appeals to entertain a motion for intervention filed by a non-party in this way, even assuming that party can be bound by the judgment that is appealed. Unless clear from its language, a statute or rule does not impose a jurisdictional requirement. *Henderson* v. *Shinseki,* 562 U.S. 428, 439. Here, respondents cite no provision that deprives a court of appeals of jurisdiction in the way they suggest, and no such supporting language can be found in 28 U.S.C. § 2107, Federal Rules of Appellate Procedure 3 and 4, or any other provision of law."

"(2) This Court refuses to adopt what would essentially be a categorical claims-processing rule barring consideration of the attorney general's motion. When a non-party enters into an agreement to be bound by a judgment in accordance with the agreement's terms, it is hard to see why the

non-party should be precluded from seeking intervention on appeal if the agreement preserves that opportunity. Here, the attorney general reserved 'all rights, claims, and defenses ... in any appeals arising out of this action.' That easily covers the right to seek rehearing en banc and the right to file a petition for a writ of certiorari. And that agreement makes clear that the judgment to which the attorney general agreed to be bound was the judgment that emerged after all appellate review concluded."

"(b) Turning to the question whether the Court of Appeals properly denied the attorney general's motion to intervene, the Court notes that no statute or rule provides a general standard to apply in deciding whether intervention on appeal should be allowed. Guided by the 'policies underlying intervention' in the district courts, *Automobile Workers* v. *Scofield,* 382 U.S. 205, 217, n. 10, including the legal 'interest' that a party seeks to 'protect' through intervention on appeal, Fed. Rule Civ. Proc. 24(a)(2), the Court concludes that the Sixth Circuit erred in denying the attorney general's motion to intervene."

"(1) Resolution of a motion for permissive intervention is committed to the discretion of the court before which intervention is sought, see *Automobile Workers*, 382 U.S., at 217, n. 10; Fed. Rule Civ. Proc. 24(b)(1)(a). But a court fails to exercise its discretion soundly when it 'base[s] its ruling on an erroneous view of the law,' *Cooter & Gell* v. *Hartmarx Corp*., 496 U.S. 384, 405, and that is what happened here. The Sixth Circuit panel failed to account for the strength of the Kentucky attorney general's interest in taking up the defense of HB 454 when the secretary elected to acquiesce. A State 'clearly has a legitimate interest in the continued enforceability of its own statutes,' *Maine* v. *Taylor,* 477 U.S. 131, 137, and a State's opportunity to defend its laws in federal court should not be lightly cut off. The importance of ensuring that States have a fair opportunity to defend their laws in federal court has been recognized by Congress. See 28 U.S.C. § 2403(b); Fed. Rule Civ. Proc. 24(a)(1). These provisions—even if not directly applicable in this case because the secretary remained a party—reflect the weighty interest that a State has in protecting its own laws. Respect for state sovereignty must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court. See *Virginia House of Delegates* v. *Bethune-Hill*, 587 U.S. ___, ___. The unusual course that this litigation took should not obscure the important constitutional consideration at stake."

"(2) The panel also erred in its evaluation of the other factors that bear on all applications for appellate intervention. The panel's assessment of the timeliness of the attorney general's motion to intervene was mistaken. While an important consideration, timeliness depends on the circumstances, and the progression of the litigation is 'not solely dispositive.' *NAACP* v. *New York,* 413 U.S. 345, 366. Here, the most important circumstance relating to timeliness is that the attorney general sought to intervene 'as soon as it became clear' that the Commonwealth's interests 'would no longer be protected' by the parties in the case. *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 394. Because the attorney general's need to intervene did not arise until the secretary ceased defending the state law, the timeliness of his motion should be assessed in relation to that point in time. *NAACP* v. *New York,* 413 U.S. 345, distinguished."

"(3) The panel's finding that granting intervention would prejudice respondents was similarly flawed. While the attorney general's rehearing petition pressed an issue (third-party standing) not raised in the secretary's appellate briefs, allowing intervention would not have necessitated resolution of that issue. See, *e.g., McDonald*, 432 U.S., at 394. Moreover, respondents' loss of its

claimed expectations around election of a Governor with a history of declining to defend abortion restrictions is not cognizable as unfair prejudice in the sense relevant here."

IV. Motion to Dismiss; Attorney Fees

Donovan v. Hastings, S.W.3d (Tenn., Kirby, 2022).

"In 2017, Plaintiff/Appellant homeowner Mindy Donovan hired Defendant/Appellee contractor Joshua Hastings to construct an addition to and renovate parts of her Nashville home. The parties entered into a residential construction contract in which Ms. Donovan agreed to pay Mr. Hastings approximately $176,300 to complete the project.

"Ms. Donovan paid Mr. Hastings $130,000 toward the total due but was unhappy with the quality of the work. After several attempts to correct the problems, Ms. Donovan remained dissatisfied. In May 2018, she filed a complaint against Mr. Hastings in the Davidson County Chancery Court. The complaint alleged breach of contract, unjust enrichment, fraud, conversion, negligence, and violation of the Tennessee Consumer Protection Act.

"On July 18, 2018, Mr. Hastings filed his answer. He also filed a countercomplaint asserting his own breach of contract claim and seeking anticipated profits of approximately $40,000.

"On February 1, 2019, Mr. Hastings filed a motion to amend his countercomplaint. The trial court granted the motion, and on March 29, 2019, Mr. Hastings filed his amended countercomplaint. The amended countercomplaint asserted the same breach of contract claim but revised the amount of damages sought.

"In May 2019, Ms. Donovan filed a motion to dismiss Mr. Hastings's amended countercomplaint, containing his claim for breach of contract, for failure to state a claim pursuant to Tennessee Rule of Civil Procedure 12.02(6). The motion maintained that Ms. Donovan could not be held liable for breach of the contract because it lacked mutuality of consideration and thus was unenforceable.

"After a hearing, the trial court agreed with Ms. Donovan and dismissed Mr. Hastings's countercomplaint. By then all of Ms. Donovan's claims against Mr. Hastings had been dismissed, so the trial court made its order a final, appealable judgment. The order did not address Ms. Donovan's request for attorney fees and costs in connection with the dismissal of the countercomplaint.

"Once the order dismissing Mr. Hastings's countercomplaint was certified as final and the time for Mr. Hastings to appeal had elapsed, Ms. Donovan filed a motion for costs and attorney fees incurred in connection with her motion to dismiss pursuant to Tennessee Code Annotated § 20-12-119(c). In her motion, she requested the statutory maximum of $10,000. In support, Ms. Donovan submitted an itemized list of legal services with relevant time entries dating back to February 1, 2019, the date Mr. Hastings filed his motion to amend the countercomplaint. In opposition, Mr. Hastings argued that many of the expenses Ms. Donovan claimed were neither reasonable nor necessary.

"On July 29, 2019, the trial court filed an order granting Ms. Donovan's motion. The trial court excluded or reduced some of the attorney time entries and costs based on the factors articulated in

Tennessee Rule of Professional Conduct 1.5, finding that some of the time entries were duplicates for two attorneys to perform the same work or were otherwise unreasonable 'in light of the single, narrow legal issue presented and the relative dollar amount at issue.' It excluded some costs and time entries it deemed 'not related to the motion to dismiss, as they were incurred prior to the date on which the Amended Countercomplaint was filed (March 29, 2019).' In light of all of these considerations, the order granting Ms. Donovan's motion awarded attorney fees in the reduced amount of $3,600.

"Ms. Donovan appealed to the Court of Appeals. *Donovan v. Hastings*, No. M2019-01396-COA-R3-CV, 2020 WL 6390134 (Tenn. Ct. App. Oct. 30, 2020), *perm. app. granted*, (Tenn. Apr. 7, 2021). She argued that the trial court erred in reducing the fees and costs from the amount she requested. In particular, Ms. Donovan contended that the trial court erroneously excluded all requested fees and costs incurred prior to March 29, 2019 because several of the time entries before that date involved research and analysis of the breach of contract claim, were incorporated into her motion to dismiss, and thus were recoverable because they were incurred as a consequence of the dismissed breach of contract claim. *Id.* at *4. For that reason, she contended that the trial court erred in limiting her recovery to only $3,600.

"A split panel of the Court of Appeals affirmed the trial court's assessment of attorney fees and costs. All members of the panel found that the trial court did not abuse its discretion in excluding some costs and attorney time entries because they were duplicates or otherwise unreasonable. The panel split, however, on the trial court's interpretation of Tennessee Code Annotated § 20-12-119(c).

"The majority held that, because the breach of contract claim actually dismissed by the trial court was contained in the amended countercomplaint, the trial court was correct to exclude all fees and costs incurred prior to the filing of the amended countercomplaint. *Id.* at *5. Judge Neal McBrayer dissented in part; he would have held that since the original complaint included the same breach of contract claim that was ultimately dismissed, fees and costs incurred prior to the filing of the amended countercomplaint were also recoverable. *Id.* at *7 (McBrayer, J., concurring in part and dissenting in part).

"We granted Ms. Donovan's request for permission to appeal to this Court."

"The statute at issue in this appeal provides:

> (1) Notwithstanding subsection (a) or (b), in a civil proceeding, where a trial court grants a motion to dismiss pursuant to Rule 12 of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending at the time the successful motion to dismiss was granted the costs and reasonable and necessary attorney's fees *incurred in the proceedings as a consequence of the dismissed claims* by that party or parties. The awarded costs and fees shall be paid by the party or parties whose claim or claims were dismissed as a result of the granted motion to dismiss.
> (2) Costs shall include all reasonable and necessary litigation costs actually incurred due to the proceedings that resulted from the filing of the dismissed claims....

"Tenn. Code Ann. § 20-12-119(c) (Supp. 2020) (emphasis added). On appeal, both parties focus on the meaning of the phrase in subsection (c)(1), 'incurred in the proceedings as a consequence of the dismissed claims.'"

"Under the facts of this case, we do not read the word 'proceedings' in subsections (c)(1) and (c)(2) of section 20-12-119 as limiting the attorney fees or costs to only those incurred once the amended countercomplaint was filed. 'Statutes that relate to the same subject matter or have a common purpose must be read *in pari materia* so as to give the intended effect to both.' *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015). Subsection (c)(1) authorizes an award of attorney fees incurred 'as a consequence of the dismissed claims,' and subsection (c)(2) authorizes an award of costs incurred 'due to the proceedings that resulted from the filing of the dismissed claims.' Thus, the language in both relates causally to the *claim* that was dismissed. Here, the claim at issue was filed as part of Mr. Hastings's original countercomplaint and was repeated without change in the amended countercomplaint. The same breach of contract claim remained pending in the proceedings from the time the original countercomplaint was filed until the trial court granted Ms. Donovan's motion to dismiss the amended countercomplaint."

"In sum, we reverse the holding of both the trial court and the Court of Appeals that the fees and costs recoverable by Ms. Donovan pursuant to section 20-12-119(c) are limited to those incurred after Mr. Hastings's amended countercomplaint was filed on March 29, 2019. For that reason, we must vacate the trial court's award of attorney fees and remand the case to the trial court for reconsideration of the amount of the attorney fee and cost award under the correct legal parameters."

"We reverse the holding of the trial court and the Court of Appeals that attorney fees and costs awarded to Ms. Donovan pursuant to Tennessee Code Annotated § 20-12-119(c) in connection with the dismissal of Mr. Hastings's countercomplaint are limited to those incurred after the date the amended countercomplaint was filed, March 29, 2019. Consequently, we vacate the trial court's award and remand to the trial court for reconsideration of the award of reasonable attorney fees and costs. Costs on appeal are taxed to the appellee, Joshua R. Hastings, for which execution may issue if necessary."

V. Dismissal for Failure to Timely File Motion for Substitution of Plaintiff

Cunningham v. Fresenius Medical Care, Inc., No. M2021-01087-COA-R3-CV (Tenn. Ct. App., Bennett, June 22, 2022).

"While stepping off a scale at a dialysis clinic, Barbara Cunningham ('Plaintiff') tripped and fell, resulting in injuries. She filed suit against Fresenius Medical Care, Inc., asserting that it was liable for negligence and negligence per se for failing to maintain the clinic's floor in proper and safe conditions, failing to perform a routine inspection of its scale, and failing to take any precautionary measures to avoid the accident, as well as failing to post proper signage warning of the dangerous condition. She sought damages in the amount of $500,000 for her injuries, loss of consortium, and diminution in her ability to enjoy life, as well as for her past and future pain, suffering, and medical expenses.

"Dialysis Associates, LLC, ('Defendant') which operates the dialysis clinic under the assumed name of Fresenius Kidney Care Madison, answered, denying any negligence on its part and

asserting several defenses including failure to state a claim, comparative fault, lack of actual or constructive notice of the condition, and assumption of the risk. Plaintiff then filed an amended complaint, naming Dialysis Associates, LLC, as a defendant and asserting negligence as the only cause of action.

"While the lawsuit was pending, Ms. Cunningham passed away in October 2020 from causes unrelated to her fall. Plaintiff filed a suggestion of death on March 19, 2021. A case management order was entered on April 23, 2021, stating that the Plaintiff had filed the suggestion of death and 'shall have ninety days thereafter by rule to substitute the estate as the party in interest.'

"Plaintiff filed no motion to substitute within the ninety-day period, which expired on June 17. On June 30, 2021, Defendant filed a motion to dismiss, pursuant to Tenn. R. Civ. P. 25.01, on the basis that no party in interest had been substituted within the ninety-day period provided by the rule. Approximately an hour after Defendant filed the motion, Plaintiff filed a Motion to Enlarge Time and Substitute the Estate of Barbara Cunningham for the Plaintiff, Barbara Cunningham. Despite how it is styled, the motion sought only an enlargement of time; it contained no request to substitute Plaintiff's estate for Plaintiff. For grounds, the motion stated that a petition to probate the estate of the decedent was filed on May 21, 2021, and '[t]he earliest day [the heir] could have a hearing to open [the estate of the] deceased Plaintiff, Barbara Cunningham, [was] July 29, 2021.' The motion also stated that Defendant would not be prejudiced by the grant of an extension of time. The motion was supported by the affidavit of Plaintiff's counsel, who stated that he 'didn't find heirs of the deceased Plaintiff until on or about April 13, 2021'; that he 'file[d] the Petition to open the Estate [of] Barbara Cunningham on May 21, 2021'; and that '[his] office was not able to get a date for a hearing until July 29, 2021, unfortunately this date is beyond the 90 days to substitute [a] party.'

"The trial court entered an order denying the motion to enlarge the time period, on the basis that Plaintiff had failed to file a motion to substitute, despite the entry of a case management order stating that Plaintiff had ninety days from the notice of Plaintiff's death to substitute Plaintiff's estate and had failed to demonstrate that the failure was the result of excusable neglect, as required by Tenn. R. Civ. P. 6.02. Specifically, the trial court found that 'Plaintiff's Counsel has failed to establish when he learned that the Petition Hearing would be set after the ninety day deadline, and has also failed to explain why a Motion to Enlarge Time was not filed until thirteen days after the ninety day window expired.'

"Plaintiff's counsel then filed a supplemental response, to which he attached his second affidavit, stating that 'Plaintiff could not have properly substituted parties until an estate was open' and that Plaintiff's estate was opened on July 29, 2021. The court held a hearing and subsequently entered an order on August 18, 2021, granting the Defendant's motion to dismiss the complaint with prejudice pursuant to the plain language of Rule 25.01(1) and because the Plaintiff had not shown good cause to enlarge the ninety-day deadline."

"When a party to a negligence lawsuit dies, the action does not abate. Tenn. Code Ann. § 20-5-102 (providing that claims 'founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff' do not abate by the death of the party wronged, but 'may be revived,' with the right of action passing 'in like manner as the right of action described in § 20-5-106'). Tennessee Rule of Civil Procedure 25.01(1) provides the procedure for the substitution of a party upon a suggestion of death:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

"'Rule 25.01 clearly directs the dismissal of an action if no motion for substitution of parties is made within 90 days after suggestion of death upon the record.' *Douglas v. Estate of Robertson*, 876 S.W.2d 95, 97 (Tenn. 1994). However, Tenn. R. Civ. P. 6.02 vests the trial court with the discretion to enlarge many of the procedural time limitations prescribed by the Rules of Civil Procedure. Rule 6.02 states in pertinent part:

> When by statute or by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (1) with or without motion or notice[,] order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done, where the failure was the result of excusable neglect....

"This Court has held that Rule 25.01 should be construed in conjunction with Rule 6.02(2) to allow substitution of parties after the directed ninety days in instances of excusable neglect and where the opposing party has not been prejudiced by the delay:

> Since federal rule 6(b)(2) is identical to 6.02(2) Tenn. R. Civ. P., we think our Rule 25.01 should be construed to allow substitution of parties after the ninety day period has run if the failure to move within the period is the result of excusable neglect. As is generally true, the kind of excuse that will satisfy this requirement is a function of the length of time that has passed and the possible harm to the opposite party.

"*Wagner v. Frazier*, 712 S.W.2d 109, 113 (Tenn. Ct. App. 1986). Thus, '[w]here an enlargement of time is requested after the original time has elapsed, Rule 6.02(2) requires the party requesting the enlargement to show that its failure was due to excusable neglect and that the opposing party has not been prejudiced.' *Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 550 (Tenn. 2006) (citing *Douglas*, 876 S.W.2d at 97-98)."

"When Plaintiff's counsel finally moved to enlarge the time, he did not provide information explaining why he failed to file the motion to enlarge prior to the running of the ninety-day period. While silent on the reasons for failing to timely file a motion to enlarge, Plaintiff's counsel's affidavits and arguments on appeal, primarily in the reply brief, make clear that counsel believed that the estate had to be opened and a personal representative had to be appointed before a motion could be filed on the personal representative's behalf seeking substitution. For example, in the reply brief, it is argued, 'The Appellant did not have a party with standing to ... file a motion to Substitute the deceased Plaintiff Barbara Cunningham prior to the expiration of the 90 days as required by Rule 25.01.' This position is based on a mistaken view of what Rule 25.01 requires.

"Rule 25.01 requires that a motion to substitute be made by 'any party or by the successors or representatives of the deceased party.' We do not read in Rule 25.01 a requirement that an estate has to be opened in order to make the motion, and the courts have been lenient in allowing substitutions even when the wrong party is named. *See Dubis*, 540 S.W.3d at 15; *see also* Tenn. R. Civ. P. 17.01. While it may be the normal course to wait until the estate is opened before filing the motion to substitute, Plaintiff's counsel could have filed the motion and explained the state of the estate proceedings in probate court since the ninety-day deadline would pass prior to the probate court's hearing. At the very least, Plaintiff should have filed a motion to enlarge upon learning of the probate court's backlog, explaining why he believed the motion to substitute could not yet be filed and requesting an extension of time."

"In this case, we conclude that counsel's mistaken view of what Rule 25.01 requires does not constitute excusable neglect. Plaintiff's counsel's initial affidavit establishes only that Plaintiff knew that the petition to open Plaintiff's estate would not be heard until after the expiration of the ninety days. Even Plaintiff's counsel's second affidavit does not assist him; it establishes that Plaintiff's counsel knew within the ninety-day period that the probate matter would not be heard and yet still does not explain why he was dilatory in filing the motion to enlarge. His mistaken view of the law does not qualify as excusable neglect, and he has alleged no other facts that would support a finding of excusable neglect. Because excusable neglect was not demonstrated, we discern no abuse of discretion and affirm the trial court's denial of the motion to enlarge."

"We next turn to whether the court correctly dismissed the case pursuant to Rule 25.01. We review the application of the law to the facts de novo, giving no presumption of correctness to the trial court's conclusions, because it is a question of law. *Sallee v. Barrett*, 171 S.W.3d 822, 825 (Tenn. 2005). Rule 25.01 'embodies a[n] unambiguous procedural mechanism for the dismissal of civil actions *when the trial court determines that, in the absence of excusable neglect, a party has failed to file a timely motion for substitution of party* following the filing of a suggestion of death.' *Chase v. Ober Gatlinburg, Inc.*, No. E2020-00649-COA-R3-CV, 2021 WL 3702081, at *4 (Tenn. Ct. App. Aug. 20, 2021). . . ."

"In this case, Plaintiff did not file a motion to substitute within the ninety-day period and failed to establish excusable neglect that would excuse such a failure. The trial court properly dismissed the action pursuant to Rule 25.01."

VI. No Res Judicata; Settlement of Tort Case Does Not Preclude Suit by Defendants of Noncompulsory Counterclaim

Albers v. Powers, No. M2021-00577-COA-R3-CV (Tenn. Ct. App., Bennett, July 12, 2022).

"On February 22, 2021, Lori Albers and her husband, Michael Albers (collectively 'the Alberses'), filed a lawsuit against Richard Powers alleging that on February 18, 2020, Mr. Powers 'drove over the hill crest ... at a speed significantly above the posted speed limit' and 'smash[ed] the front end of his vehicle into the driver's side' of Ms. Albers's vehicle as she was initiating a turn onto Old Nashville Highway. The Alberses and Mr. Powers were residents of Rutherford County, Tennessee, and the accident occurred in Rutherford County. Ms. Albers sought compensatory and punitive damages based on theories of negligence, and Mr. Albers sought damages for loss of consortium.

"On March 5, 2021, Mr. Powers filed a Motion to Dismiss the Complaint, asserting that the trial court 'lack[ed] subject matter jurisdiction to adjudicate the controversy' because the Alberses's suit 'violate[d] the doctrine of prior suit pending' and alternatively, that the suit was 'barred by the doctrine of *res judicata.*' Mr. Powers asserted that, in September 2020, he filed a personal injury lawsuit against Lori Albers, Cheryl Albers, and David Albers regarding the same traffic accident. He further stated that he reached a settlement agreement with the Alberses, and the trial court entered an Agreed Order of Dismissal with Prejudice on February 8, 2021, approximately two weeks before the Alberses filed suit against him. Mr. Powers attached the Agreed Order of Dismissal with Prejudice to his motion, which stated, in relevant part: 'IT IS THEREFORE ORDERED AND DECREED that this cause and all claims asserted in this suit by Richard Powers against Defendants, Lori Albers, Cheryl Albers and David Albers; and the unnamed Defendant, Tennessee Farmers Mutual Insurance Company, pending in Case No. 77680 are dismissed WITH PREJUDICE.'

"The Alberses filed a Response in Opposition to the Motion to Dismiss alleging that their claims were preserved by Tenn. R. Civ. P. 13.01 and neither the prior suit pending doctrine nor res judicata barred their claims. Mr. Powers filed a Reply to which he attached, among other things, the executed 'Full, Final and Absolute Release, with Indemnity' which stated:

> WHEREAS, RICHARD POWERS on the one hand, and LORI ALBERS, CHERYL ALBERS, DAVID ALBERS, Tennessee Farmers Mutual Insurance Company and Safe Auto Insurance Company, on the other hand, desire to fully and finally settle all claims that RICHARD POWERS has or may in the future have arising from the accident which occurred on or about February 18, 2020, and that such claims shall be forever barred in their entirety, with PREJUDICE, upon completion of this settlement[.]

"On April 5, 2021, Allstate Property and Casualty Insurance Company, Mr. Powers's insurance company that provided his uninsured motorist insurance coverage policy, filed an Answer to the Alberses's complaint."

"The court concluded that, '[t]he instant case is barred by *res judicata* and is hereby dismissed with full and final prejudice.' The court declined to award attorney's fees."

"To resolve this appeal, we must determine whether the Alberses's tort claims, which could have been asserted as counterclaims in the first proceeding between Mr. Powers and Ms. Albers, are subject to the doctrine of res judicata."

"In its most simplistic application, res judicata prevents plaintiffs 'from fragmenting their accrued claims by litigating part of them to a final judgment and then filing a second suit against the same defendant on alternate claims or theories.' *Lowe v. First City Bank of Rutherford Cty.*, No. 01-A-01-9305-CV-00205, 1994 WL 570082, at *3 (Tenn. Ct. App. Oct. 19, 1994). In this case, as in *Lowe*, we must consider whether res judicata applies to a 'less straightforward' set of circumstances involving a defendant's counterclaims. *Id.* Specifically, we consider were the Alberses are precluded from recovering on claims that sound in tort that could have been asserted as counterclaims in the first suit.

"This Court confronted a somewhat similar scenario in *Lowe*; thus we will examine *Lowe* and extrapolate what we can from that precedent. In *Lowe*, First City Bank of Rutherford County ('the bank') filed suit against the Lowes seeking payment of a note that was in default. *Id.* at *1. The

Lowes eventually settled the lawsuit with the bank, and the trial court entered agreed judgment in favor of the bank. *Id.* Later, the Lowes, who had been defendants in the prior suit, filed suit against the bank, alleging, in part, that the bank wrongfully filed notices of liens lis pendens on their real property and engaged in 'outrageous conduct.' *Id.* at *2. The trial court determined that the doctrine of res judicata and collateral estoppel prevented the Lowes from asserting their claims against the bank. *Id.* On appeal, this Court considered the application of res judicata to the counterclaims that the Lowes could have asserted against the bank in the prior suit and noted that res judicata 'does not necessarily have the same broad preclusive effect with regard to counterclaims that could have been asserted in an earlier proceeding. *It applies only to compulsory counterclaims.*' *Id.* at *3 (citing *Hixson v. Hixson*, No. 03-A01-9308-CV-00289, 1994 WL 76865 (Tenn. Ct. App. Mar. 8, 1994)) (emphasis added); *see also Crain v. CRST Van Expedited, Inc.*, 360 S.W.3d 374, 379 (Tenn. Ct. App. 2011) (observing that 'if a party fails to file a counterclaim, other than those excluded by the [Tenn. R. Civ. P. 13.01] itself, in response to a pleading in accordance with Rule 13.01 and the controversy results in a final judgment, then that party would be precluded from filing suit on that claim').

"The *Lowe* court then proceeded to analyze Tenn. R. Civ. P. 13.01 to determine whether the Lowes' tort claim was a compulsory counterclaim in the prior action. Tennessee Rule of Civil Procedure 13.01 states as follows:

> A pleading shall state as a counterclaim any claim, *other than a tort claim*, which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that a claim need not be stated as a counterclaim if at the time the action was commenced the claim was the subject of another pending action. This rule shall not be construed as requiring a counterclaim to be filed in any court whose jurisdiction is limited either as to subject matter or as to monetary amount so as to be unable to entertain such counterclaim.

"(emphasis added). The *Lowe* court determined that the Lowes' claim against the bank was not a compulsory counterclaim under Tenn. R. Civ. P. 13.01 for two reasons: 1) 'it is a tort claim which is explicitly excluded from the operation of Tenn. R. Civ. P. 13.01' and 2) it did not 'arise out of the same transaction or occurrence as the bank's suit.' *Lowe*, 1994 WL 570082, at *4; *see also Old Hickory Eng'g & Mach. Co. v. Henry*, No. 01-A-019106CV00216, 1991 WL 214714, at *2 (Tenn. Ct. App. Oct. 25, 1991) ('Claims arising out of tort are not compulsory counterclaims.').

"The *Lowe* Court also cited and considered the application of Restatement (Second) of Judgments § 22 to the Lowes' claims:

> (1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).
> (2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:
>
> (a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or

> (b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

"*Lowe*, 1994 WL 570082, at *4 (quoting Restatement (Second) of Judgments § 22 (1980)). The *Lowe* court focused on section 2(b) and determined that '[p]ermitting the Lowes to pursue their claim ... will not impair the bank's ... judgment on the note.' *Id.* Therefore, because the Lowes' claims were not compulsory counterclaims in the prior action and because bringing the claims in a subsequent action did not nullify the prior judgment or impair rights established in the prior action, res judicata did not bar the Lowes' claim. *Id.* The *Lowe* court ultimately vacated the order dismissing the Lowes' claims and remanded the case. *Id.* at *5.

"Because Tenn. R. Civ. P. 13.01 is 'closely akin' to Fed. R. Civ. P. 13(a), the decisions of federal courts construing Fed. R. Civ. P. 13 can also guide us in our interpretation and application of Tenn. R. Civ. P. 13.01. *Quelette v. Whittemore*, 627 S.W.2d 681, 682 (Tenn. Ct. App. 1981). To that end, we have found *RyMed Technologies, Inc. v. ICU Medical, Inc.*, helpful in understanding whether the failure to file a permissive counterclaim in a previous action bars raising it in a later action:

> ... [T]he 'failure to interpose a counterclaim does not necessarily act as a bar to later actions.' ... There are two 'exceptions' which lead to a later action being barred by res judicata: (1) compulsory counterclaims may be barred, and (2) permissive counterclaims too may be barred when 'the relationship between the counterclaim and the plaintiff's claim is such that the successful prosecution of the second action would nullify the initial judgment or impair the rights established in the initial action.'... That is, res judicata may generally bar compulsory counterclaims, but not always permissive ones; otherwise res judicata would swallow Rule 13. But if allowing a permissive counterclaim to go forward would nullify the earlier judgment or impair rights established in the earlier action, even a permissive counterclaim can be barred.

"No. 3:10-01067, 2012 WL 4505896, at *8 (M.D. Tenn. Sept. 28, 2012) (quoting *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 492 (D.C. Cir. 2009)).

"Applying these principles to the case at hand, we first examine whether the Alberses's causes of action against Mr. Powers are compulsory counterclaims. The Alberses's claims against Mr. Powers sound in tort (e.g. causes of action based on negligence and loss of consortium); thus, pursuant to the plain language of Tenn. R. Civ. P. 13.01, the claims against Mr. Powers are not compulsory counterclaims. *Old Hickory Eng'g & Mach. Co.*, 1991 WL 214714, at *2 ('Claims arising out of tort are not compulsory counterclaims.').

"Next, we consider whether, the Alberses's tort claims, should they prevail on them, 'would nullify the initial judgment or would impair rights established in the initial action.' *Lowe*, 1994 WL 570082, at *3 (quoting Restatement (Second) of Judgments § 22). Permitting the Alberses to pursue tort claims against Mr. Powers would not nullify or impair the rights established in the initial settlement agreement. The Alberses's suit would not prevent Mr. Powers from being paid in full in accordance with the terms of the settlement agreement the parties voluntarily executed, and the Alberses's claims have no impact on the prior agreed judgment. Neither the settlement agreement nor the agreed judgment included any mention of claims the defendants might have against Mr. Powers. Thus, we conclude that res judicata does not bar the Alberses's tort claims, and we reverse the trial court's dismissal of them on that basis."

VII. No Rule 59 Relief When Lawyer Failed to See or Respond to Motion for Summary Judgment Due to Glitch in E-Mail System

Rollins v. Home Depot USA, Inc., 8 F.4th 393 (5th Cir. 2021).

"Rollins was injured while moving a bathtub for his employer, Home Depot. He then sued Home Depot in state court. The case was subsequently removed to federal court.

"Counsel for Rollins agreed to receive filings through the district court's electronic-filing system via the email address he provided, as attorneys typically do in federal courts across the country. The parties later agreed to a scheduling order requiring that all dispositive motions be filed by May 11, 2020.

"On May 7, Home Depot filed its motion for summary judgment. Rollins's counsel contends—and Home Depot does not dispute—that the notification for that filing 'was inadvertently filtered into a part of Rollins' counsel's firm email system listed as 'other,' instead of the main email box where all prior filings in the case were received.' As a result, counsel did not see the electronic notification of Home Depot's motion. Nor did counsel learn of that motion when he contacted Home Depot's counsel a few days later to discuss the possibility of a settlement.

"The scheduling order imposed a 14-day deadline to file and serve responses to any motions. After that deadline came and went without any response from Rollins, the district court reviewed the pleadings, granted Home Depot's motion for summary judgment, and entered final judgment on May 27.

"But Rollins's counsel did not know any of this until June 3. That's when counsel reached out to Home Depot's counsel again to raise the possibility of settlement. In response, Home Depot's counsel informed him that the district court had already entered final judgment.

"Rollins filed a motion under Federal Rule of Civil Procedure 59(e) to alter or amend the court's judgment against him. The district court denied the motion. Rollins now appeals."

"Rule 59(e) states, in full, that '[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.' Fed. R. Civ. P. 59(e). This is 'an extraordinary remedy that should be used sparingly.' *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). 'We review the denial of a Rule 59(e) motion only for abuse of discretion.' *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990).

"The text of Rule 59(e) does not specify the available grounds for obtaining such relief. But our court has explained that Rule 59(e) motions 'are for the narrow purpose of correcting manifest errors of law or fact or presenting newly discovered evidence'—not for raising arguments 'which could, and should, have been made before the judgment issued.' *Faciane v. Sun Life Assurance Co. of Canada*, 931 F.3d 412, 423 (5th Cir. 2019) (quotation omitted). We have further noted that Rule 59(e) allows a party to alter or amend a judgment when there has been an intervening change in the controlling law. *See Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 567–68 (5th Cir. 2003). None of those conditions are met here.

"Rollins contends that the district court abused its discretion when it denied his Rule 59(e) motion, on the ground that the only reason his counsel did not know about Home Depot's motion for summary judgment was due to a glitch in his email system.

"This argument is squarely foreclosed under our precedent. In *Trevino v. City of Fort Worth*, the plaintiffs' counsel failed to file a response to the defendant's motion to dismiss because, among other reasons, 'defective antivirus software diverted court emails to a spam folder.' 944 F.3d 567, 570 (5th Cir. 2019) (per curiam). After the district court granted the defendant's unopposed motion to dismiss, the plaintiffs sought relief under Rule 59(e). *Id.* We rejected the argument, explaining that '[f]ailure to file a response to a motion to dismiss is not a manifest error of law or fact' under Rule 59(e). *Id.* at 571. *See also Templet*, 367 F.3d at 478–79 (concluding that the district court did not err in denying Rule 59(e) relief when plaintiffs failed to file a response to defendants' motion for summary judgment).

"To be sure, we do not question the good faith of Rollins's counsel. But it is not 'manifest error to deny relief when failure to file was within [Rollins's] counsel's "reasonable control."' *Trevino*, 944 F.3d at 571. Notice of Home Depot's motion for summary judgment was sent to the email address that Rollins's counsel provided. Rule 5(b)(2)(E) provides for service 'by filing [the pleading] with the court's electronic-filing system' and explains that 'service is complete upon filing or sending.' Fed. R. Civ. P. 5(b)(2)(E). That rule was satisfied here. Rollins's counsel was plainly in the best position to ensure that his own email was working properly—certainly more so than either the district court or Home Depot. Moreover, Rollins's counsel could have checked the docket after the agreed deadline for dispositive motions had already passed. *See Trevino*, 944 F.3d at 571 (stressing that 'Plaintiffs had a duty of diligence to inquire about the status of their case.'); *Two-Way Media LLC v. AT&T, Inc.*, 782 F.3d 1311, 1317 (Fed. Cir. 2015) (no abuse of discretion where district court found it 'inexcusable for ... counsel to fail to read all of the underlying orders they received, or—at minimum—to monitor the docket for any corrections or additional rulings'); *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004) (describing counsel's argument that the electronic-filing system was to blame as 'an updated version of the classic "my dog ate my homework" line').

"In sum, the district court did not abuse its discretion in denying the Rule 59(e) motion."

VIII. Federal Rule 60 "Mistake" Includes Judge's Errors of Law; One-Year Limitations Period Applies

Kemp v. United States, 142 S.Ct. 1856 (U.S., Thomas, 2022).

"Petitioner Dexter Kemp and seven codefendants were convicted of various drug and gun crimes. The Eleventh Circuit consolidated their appeals and, in November 2013, affirmed their convictions and sentences. In April 2015, Kemp moved the District Court to vacate his sentence under 28 U.S.C. § 2255. The District Court dismissed Kemp's motion as untimely because it was not filed within one year of 'the date on which [his] judgment of conviction [became] final.' § 2255(f)(1). Kemp did not appeal. Then, in June 2018, Kemp sought to reopen his § 2255 proceedings under Federal Rule of Civil Procedure 60(b), which authorizes a court to reopen a final judgment under certain enumerated circumstances. As relevant here, a party may seek relief within one year under Rule 60(b)(1) based on 'mistake, inadvertence, surprise, or excusable neglect.' A party may also seek relief 'within a reasonable time' under Rule 60(b)(6) for 'any other reason that justifies relief,' but relief under Rule 60(b)(6) is available only when the other grounds for relief specified in Rules

60(b)(1)–(5) are inapplicable. Kemp's motion to reopen his § 2255 proceedings invoked Rule 60(b)(6), but his motion sought reopening based on a 'mistake' covered by Rule 60(b)(1). Specifically, Kemp argued that the 1-year limitations period on his § 2255 motion did not begin to run until his codefendants' rehearing petitions were denied in May 2014, making his April 2015 motion timely. The Eleventh Circuit agreed with Kemp that his § 2255 motion was timely but concluded that because Kemp alleged judicial mistake, his Rule 60(b) motion fell under Rule 60(b)(1), was subject to Rule 60(c)'s 1-year limitations period, and was therefore untimely.

"Held: The term 'mistake' in Rule 60(b)(1) includes a judge's errors of law. Because Kemp's motion alleged such a legal error, it was cognizable under Rule 60(b)(1) and untimely under Rule 60(c)'s 1-year limitations period."

"(a) As a matter of text, structure, and history, a 'mistake' under Rule 60(b)(1) includes a judge's errors of law. When the Rule was adopted in 1938 and revised in 1946, the word 'mistake' applied to any 'misconception,' 'misunderstanding,' or 'fault in opinion or judgment.' Webster's New International Dictionary 1383. Likewise, in its legal usage, 'mistake' included errors 'of law or fact.' Black's Law Dictionary 1195. Thus, regardless whether 'mistake' in Rule 60(b)(1) carries its ordinary meaning or legal meaning, it includes a judge's mistakes of law. Rule 60(b)(1)'s drafters could have used language to connote a narrower understanding of 'mistake,' yet they chose not to qualify that term. Similarly, the Rule's drafters could have excluded mistakes by judges from the Rule's reach. In fact, the Rule used to read that way. When adopted in 1938, Rule 60(b) initially referred to 'his'—*i.e.,* a party's—'mistake,' so judicial errors were not covered. The 1946 revision to the Rule deleted the word 'his,' thereby removing any limitation on whose mistakes could qualify.'

"(b) Neither the Government nor Kemp offers a reason to depart from this reading of Rule 60(b)(1)."

"(1) The Government contends that the term 'mistake' encompasses only so-called 'obvious' legal errors. This contention—also held by several Courts of Appeals—is unconvincing. None of the dictionaries from the time the Rule was adopted and revised suggests this 'obviousness' gloss. Nor does the text or history of Rule 60(b)(1) limit its reach only to flagrant cases that would have historically been corrected by courts sitting in equity. Finally, requiring courts to decide not only whether there was a mistake but also whether that mistake was sufficiently 'obvious' raises questions of administrability."

"(2) Kemp's arguments for limiting Rule 60(b)(1) to non-judicial, non-legal errors are also unconvincing. He claims that Rule 60(b)(1)'s other grounds for relief—'inadvertence,' 'surprise,' and 'excusable neglect'—involve exclusively non-legal, non-judicial errors, and thus 'mistake' should be similarly limited. But courts have found that excusable neglect may involve legal error, see, *e.g., Lenaghan* v. *Pepsico, Inc.,* 961 F.2d 1250, 1254–1255, and they have a similar history of granting relief based on 'judicial inadvertence,' *Larson* v. *Heritage Square Assocs.*, 952 F.2d 1533, 1536. Kemp argues that Rule 60's structure favors interpreting the term 'mistake' narrowly to include only non-legal errors, and the Court's contrary interpretation would create confusing overlap between Rule 60(b)(1) and relief available under other parts of Rule 60 not subject to Rule 60(c)'s 1-year limitations period. But the overlap Kemp suggests would exist even if 'mistake' reached only factual errors. Courts of Appeals have well-established tests for distinguishing between these Rules. And should such overlap ever create an irreconcilable conflict, courts may then resort to ordinary interpretive rules to determine which Rule to apply. As for Kemp's worry

that the Court's interpretation would allow parties to evade other time limits by, for example, repackaging a tardy motion under Rule 59(e), the risk Kemp identifies would exist even under his own interpretation. And, in any event, the alleged specter of litigation gamesmanship and strategic delay is overstated because a Rule 60(b)(1) motion, like all Rule 60(b) motions, must be made 'within a reasonable time.' Finally, Kemp protests that this Court's reading is inconsistent with the history of Rule 60(b). But his argument is based on the mistaken notions that Rule 60(b)(1)'s list of grounds for reopening was understood to be a 'term of art' when adopted, and that Rule 60(b)(6) alone was intended to afford relief for judicial legal errors that had previously been remedied by bills of review."

IX. 2022 Changes to Tennessee Rules of Civil Procedure

A. Electronic Filing, Signing, or Verification

Tennessee Rule of Civil Procedure 5B(2), added eff. July 1, 2022.

"(2) Any court governed by these rules shall allow documents to be signed and/or verified by attorneys with an electronic signature either in the form of s/_____ (typed out), a graphic representation of an electronic signature, and/or a digital graphic representation of the signature as signed by the person. Any court governed by these rules also shall allow electronic signatures on all discovery, declarations, subpoenas, or any other legal document in this same way. An electronic signature shall be considered the same as an original signature for all purposes."

"Advisory Commission Comment [2022]
Rule 5(B) is amended by adding a new sub-paragraph 2 to allow electronic signatures by attorneys, irrespective of the adoption of E-filing, including, but not limited to, signatures completed in DocuSign and Adobe signing programs and/or other such programs."

Tennessee Rule of Civil Procedure 11.01, amended eff. July 1, 2022.

"(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. Papers may be electronically signed in accordance with Rule 5B. 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 [2022]
Rule 11.02 is amended to provide for electronic signatures in accordance with Rule 5B."

B. Form of Issuance of Subpoena

Tennessee Rule of Civil Procedure 45.09, added eff. July 1, 2022.

"For purposes of issuance of any subpoena under Rule 45, the clerk of the court in which the action is pending may issue the subpoena in either written paper or electronic form. A signature affixed

electronically to a subpoena shall be treated as an original signature. Payment for the issuance of an electronic subpoena shall be received by the trial court clerk not later than 10 calendar days after the issuance of the electronic subpoena and shall be paid by the party requesting said electronic issuance, subject to the following exception. If the requesting party is either a party who has been allowed to proceed on a pauper's oath or an attorney for such a party, then payment of the fee shall be taxed as a court cost."

"Advisory Commission Comment [2022]
New Rule 45.09 is adopted to empower the trial court clerk to issue any Rule 45 subpoena by either written paper documents or electronic means."

C. Entry of Judgment

Tennessee Rule of Civil Procedure 58, amended eff. July 1, 2022.

"Unless otherwise expressly provided by another rule, entry of a judgment or an order of final disposition or any other order of the court is effective when a judgment or order containing one of the following is marked on the face by the clerk as filed for entry. . . ."

"Advisory Commission Comment [2022]
Rule 58 is amended to make clear that, unless otherwise expressly provided by another rule, the effective date of all court orders (not just entries of judgment or orders of final disposition) is the date of the filing of the order."

X. 2022 Changes to Tennessee Rules of Appellate Procedure

A. Form of Briefs and Other Papers

Tennessee Rule of Appellate Procedure 30(e), amended eff. July 1, 2022.

"(e) Word Limitations of Briefs and Other Papers. Except by order of the court, briefs and other specifically referenced papers shall comply with the following word limitations: (1) principal briefs and applications pursuant to Rule 11 shall be limited to 15,000 words, (2) replybriefs, answers pursuant to Rule 11, and supplemental briefs pursuant to Rule 11 shall be limited to 5,000 words, and (3) amicus briefs shall be limited to 7,500 words.

"The following sections of a brief and other referenced papers shall be excluded from these word limitations: Title/Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, Attorney Signature Block, and Certificate of Service.

"All briefs and other papers subject to word limitations under these rules must include a certificate by the attorney or unrepresented party that the brief or other paper complies with the applicable word limitation and must state the number of words in the brief or other paper. The person certifying compliance may rely on the word count of the word processing system used to prepare the brief or other paper."

"Advisory Commission Comment [2022]

This rule adopts a word limitation provision for all briefs and other referenced papers. This rule is also amended to require a certification of compliance with the word limitation provisions of this rule."

XI. 2022 Proposed Amendments to Federal Rules of Appellate and Civil Procedure

https://www.supremecourt.gov/orders/courtorders/frap22_qn12.pdf
https://www.supremecourt.gov/orders/courtorders/frcv22_b8dg.pdf

ALTERNATIVE DISPUTE RESOLUTION

I. No Appeal from Tennessee Trial Court Order Compelling Arbitration

Jones v. AutoNation, Inc., No. E2020-01231-COA-R3-CV (Tenn. Ct. App., Davis, Nov. 1, 2021).

"This case stems from the sale of a 2000 Mercury Sable ('the vehicle') purchased by Amy Jennings from John M. Lance Ford, LLC, an affiliate of AutoNation, Inc. ('AutoNation' or 'Defendant'), in 2017. Ms. Jennings signed all of the paperwork associated with the sale, including an arbitration agreement. In September of 2018, Ms. Jennings and her husband, Dorian Jones, filed suit against AutoNation in the Chancery Court for Washington County (the 'trial court') alleging multiple causes of action arising from the sale of the vehicle. Generally, Ms. Jennings and Mr. Jones alleged that AutoNation breached several warranties and fraudulently induced Ms. Jennings into the sale. Eventually, AutoNation filed a motion to compel arbitration which the trial court granted on August 10, 2020. Mr. Jones filed an appeal to this Court. Because an appeal from an order granting a motion to compel arbitration and staying litigation is nonfinal, this Court lacks subject matter jurisdiction and the appeal is dismissed.

"Ms. Jennings purchased the vehicle at issue from an AutoNation retail location in Westlake, Ohio, in 2017. Although Ms. Jennings was a resident of Johnson City, Tennessee at the time, she and Mr. Jones found the vehicle on the AutoNation website and Mr. Jones traveled to Ohio to retrieve it. Ms. Jennings alone executed a retail purchase agreement (the 'Agreement') at the Johnson City AutoNation location on October 13, 2017, and contemporaneously signed an arbitration agreement (the 'Arbitration Agreement') as part of the transaction. The arbitration agreement provides, *inter alia*, that

> neutral and binding arbitration on an individual basis only will be the sole method of resolving any claim[,] dispute or controversy (collectively, 'Claims') that either Party has arising from Purchaser/Dealership Dealings, with the sole exception that either Party may file Claims in a small claims court as an alternative to proceeding with arbitration. Claims include but are not limited to the following: (1) Claims in contract, tort, regulatory, statutory, equitable, or otherwise; (2) Claims relating [to] any representations, promises, undertakings, warranties, covenants or service; (3) Claims regarding the interpretation, scope, validity of this Agreement, or arbitrability of any issue[.]

"According to the complaint filed in the trial court on September 28, 2018, Mr. Jones and Ms. Jennings experienced difficulty with the car immediately, causing them to spend several thousand dollars on repairs. The complaint was titled 'Lawsuit to Recoup Monies Spent for the Repair of a Motor Vehicle Known or Should Have Been Known to be Defective' and purported to allege causes of action for breach of contract, negligence, negligent misrepresentation, intentional misrepresentation, fraud, fraudulent concealment, breach of the implied warranty of merchantability, and breach of express warranty. Although difficult to discern, the complaint also purported to allege violations of the Tennessee Consumer Protection Act as well as the Magnuson-Moss Warranty Act.

"Ms. Jennings and Mr. Jones proceeded to file voluminous and duplicative pleadings and discovery requests in the trial court, and AutoNation eventually filed a motion to compel arbitration and stay

the litigation on January 31, 2019. After a hearing on August 10, 2020, the trial court entered an order providing:

1. The Motion to Compel Arbitration and Stay Litigation is hereby granted and all the issues in dispute between the parties shall be heard in arbitration.
2. That this matter shall be stayed in its entirety as to all parties until the completion of the arbitration.

"From this order, Mr. Jones appeals."

"Although Mr. Jones raises a host of issues going to the substance of the Agreement and the Arbitration Agreement, there is a threshold problem we must address. Specifically, Mr. Jones has appealed an order granting a motion to compel arbitration and stay litigation, and this Court has repeatedly held that there is no right of appeal from such orders because they are nonfinal. Consequently, this appeal must be dismissed."

"With specific regard to orders granting a motion to compel arbitration and stay litigation, we very recently addressed the issue of finality. *See Regions Bank v. Crants*, No. M2020-01703-COA-R3-CV, 2021 WL 3910696 (Tenn. Ct. App. Sept. 1, 2021). In that case, Regions Bank attempted to collect on a promissory note executed by the defendant. *Id.* at *1. The defendant later filed a motion asking the trial court to stay the litigation and remit the matter for arbitration, per the terms of the note. *Id.* The trial court granted the motion but also ordered the defendant to bear the cost of the arbitration. *Id.* at *2. The defendant appealed to this Court; however, we dismissed the appeal upon concluding that '[t]here is no appeal as of right from an order compelling arbitration.'*Id.* at *4. Insofar as *Crants* squarely addresses the issue now before us, we quote liberally from that opinion:

> Under Rule 3(a), appeal as of right is only available from a final judgment. A final judgment is one that resolves all of the issues in the case, 'leaving nothing else for the trial court to do.' *State ex rel. McAllister v. Goode*, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997). Tennessee Rule of Appellate Procedure 13(b) requires this Court to 'consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review....'
>
> Here, the only issues adjudicated by the trial court in its [orders] were questions of arbitrability and the party responsible for paying the cost of arbitration. The trial court did not address, much less adjudicate, the substantive issues raised in Regions' complaint and Mr. Crants' counter-complaint. The case was not dismissed or otherwise concluded. In fact, in its November 24, 2020 order, the trial court expressly stated that, '[T]his lawsuit is stayed pending arbitration....' Therefore, there is no final order appealable under Tennessee Rule of Appellate Procedure 3(a).
>
> Pursuant to the plain terms of the Note, the substantive case is governed by the Federal Arbitration Act ('FAA'), 9 U.S.C. § 1, *et seq.* As such, we turn to address the question of whether the FAA grants Mr. Crants any right of appeal from the order requiring arbitration or from the order requiring him to pay the cost of arbitration. From his brief, Mr. Crants asserts that the appeal provision of the FAA, 9 U.S.C. § 16, 1 governs the procedural law of this appeal. We disagree. In *Morgan Keegan & Co. v. Smythe*, 401 S.W.3d 595 (Tenn. 2012), the Tennessee Supreme Court held that although the substantive provisions of the FAA may preempt the Tennessee Uniform Arbitration Act ('TUAA'), T.C.A. 29-5-301, *et seq.*, it does

not preempt the procedural provisions of the TUAA for appeals of arbitration orders entered by Tennessee state courts (Tenn. Code Ann. § 29-5-319). Rather, the Court held that, '[I]f Tennessee's appellate courts have subject matter jurisdiction to hear appeals from orders such as the trial court's ... order, the grant of jurisdiction must be found in the Tennessee Uniform Arbitration Act, not the Federal Arbitration Act.' 401 S.W.3d at 607. Accordingly, the question of whether this Court has subject-matter jurisdiction over this appeal must be determined under the TUAA and specifically Tennessee Code Annotated section 29-5-319, which provides that:

(a) An appeal may be taken from:
    (1) An order denying an application to compel arbitration made under § 29-5-303;
    (2) An order granting an application to stay arbitration made under § 29-5-303(b);
    (3) An order confirming or denying confirmation of an award;
    (4) An order modifying or correcting an award;
    (5) An order vacating an award without directing a re-hearing; and
    (6) A judgment or decree entered pursuant to this part.
(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

Here, the order appealed granted the motion to stay proceedings and to compel arbitration. Despite Mr. Crants' arguments, the fact that the trial court also ordered him to initiate arbitration and to pay the cost of arbitration does not change the trial court's substantive ruling compelling arbitration and staying the matter pending resolution of the arbitration.... In determining whether an appeal lies under TUAA § 29-5-319, we look to the substance of the trial court's orders, which was to grant the motion for stay and arbitration. The imposition of costs of arbitration to Mr. Crants is merely ancillary to the trial court's grant of the motion to compel arbitration. . . . Under Tennessee Code Annotated section 29-5-319 and the Tennessee cases interpreting the statute, it is clear that the trial court's November 24, 2020 order granting the motion to stay proceedings and compelling arbitration is not an order that is recognized under the statute as appealable on an interlocutory basis as an exception to the requirement that an order must be final to be appealable to this Court. Tenn. R. App. P. 3(a)."

"Likewise, in the present case, the contract at issue provides that any arbitration is controlled by 'the Federal Arbitration Act (9 U.S.C. & 1, et seq. hereinafter the 'FAA') and not by any state law concerning arbitration.' As explained in *Crants*, however, our Supreme Court has concluded that such language does not abrogate the procedural mandates of Tenn. R. App. P. 3. *Id.* at *3. (citing *Morgan Keegan*, 401 S.W.3d at 607); *see also SJR Ltd. P'ship v. Christie's Inc.*, No. W2013-01606-COA-R3-CV, 2014 WL 869743, at *3 (Tenn. Ct. App. Mar. 5, 2014) ('Section 29-5-319 determines the appealability of interlocutory orders involving arbitration agreements, including agreements within the [FAA].'). The finality requirement of Tenn. R. App. P. 3 therefore controls here. To that end, the order appealed from is also analogous to the one in *Crants* inasmuch as the trial court's August 10, 2020 order unequivocally provides that the case is stayed and that the parties must proceed to arbitration. As such, '[t]he case was not dismissed or otherwise concluded[,]' *id.* at *3, and the order appealed from is nonfinal. Consequently, unless 'appeal from [the] interlocutory order is provided by the rules or by statute,' this Court lacks subject matter jurisdiction. *Jones*, 783 S.W.2d at 559.

"Moreover, as explained above, Tennessee's arbitration statute does not provide for the direct appeal of an order granting a motion to compel arbitration, *T.R. Mills Contractors, Inc. v. WRH*

Enterprises, LLC, 93 S.W.3d 861, 865 (Tenn. Ct. App. 2002), and Mr. Jones has not otherwise sought interlocutory review. Accordingly, this Court lacks subject matter jurisdiction over the present appeal and it must be dismissed."

II. Airline Ramp Supervisor Falls Under FAA Exemption for Interstate Transportation Workers

Southwest Airlines Co. v. Saxon, 142 S.Ct. 1783 (U.S., Thomas, 2022).

"Respondent Latrice Saxon, a ramp supervisor for Southwest Airlines, trains and supervises teams of ramp agents who physically load and unload cargo on and off airplanes that travel across the country. Like many ramp supervisors, Saxon also frequently loads and unloads cargo alongside the ramp agents. Saxon came to believe that Southwest was failing to pay proper overtime wages to ramp supervisors, and she brought a putative class action against Southwest under the Fair Labor Standards Act of 1938. Because Saxon's employment contract required her to arbitrate wage disputes individually, Southwest sought to enforce its arbitration agreement and moved to dismiss. In response, Saxon claimed that ramp supervisors were a 'class of workers engaged in foreign or interstate commerce' and therefore exempt from the Federal Arbitration Act's coverage. 9 U.S.C. § 1. The District Court disagreed, holding that only those involved in 'actual transportation,' and not those who merely handle goods, fell within § 1's exemption. The Court of Appeals reversed. It held that '[t]he act of loading cargo onto a vehicle to be transported interstate is itself commerce, as that term was understood at the time of the [FAA's] enactment in 1925.' 993 F.3d 492, 494.

"Held: Saxon belongs to a 'class of workers engaged in foreign or interstate commerce' to which § 1's exemption applies."

"(a) This Court interprets § 1's language according to its 'ordinary, contemporary, common meaning.' *Sandifer v. United States Steel Corp.*, 571 U.S. 220, 227, 134 S.Ct. 870, 187 L.Ed.2d 729. To discern that ordinary meaning, those words 'must be read' and interpreted 'in their context.' *Parker Drilling Management Services, Ltd.* v. *Newton*, 587 U.S. ——, ——, 139 S.Ct. 1881, 1888, 204 L.Ed.2d 165."

"(1) The parties dispute how to define the relevant 'class of workers.' Saxon argues that because the air transportation industry engages in interstate commerce, airline employees, as a whole, constitute a 'class of workers' covered by § 1. By contrast, Southwest maintains that the relevant class includes only those airline employees actually engaged day-to-day in interstate commerce. This Court rejects Saxon's industrywide approach. By referring to 'workers' rather than 'employees,' the FAA directs attention to 'the *performance* of work.' *New Prime Inc.* v. *Oliveira*, 586 U.S. ——, ——, 139 S.Ct. 532, 541, 202 L.Ed.2d 536. And the word 'engaged' similarly emphasizes the actual work that class members typically carry out. Saxon is therefore a member of a 'class of workers' based on what she frequently does at Southwest—that is, physically loading and unloading cargo on and off airplanes—and not on what Southwest does generally."

"(2) The parties also dispute whether the class of airplane cargo loaders is 'engaged in foreign or interstate commerce.' It is. To be 'engaged' in 'commerce' means to be directly involved in transporting goods across state or international borders. Thus, any class of workers so engaged falls within § 1's exemption. Airplane cargo loaders are such a class.

"Context confirms this reading. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234, the Court applied two well-settled canons of statutory interpretation to hold that § 1 exempted only 'transportation workers,' rather than all employees. The Court indicated that any such exempted worker must at least play a direct and 'necessary role in the free flow of goods' across borders. *Id.,* at 121, 121 S.Ct. 1302. Cargo loaders exhibit this central feature of a transportation worker.

"A final piece of statutory context further confirms that cargo loading is part of cross-border 'commerce.' Section 1 of the FAA defines exempted 'maritime transactions' to include 'agreements relating to wharfage ... or any other matters in foreign commerce.' Thus, if an 'agreemen[t] relating to wharfage'—*i.e.,* money paid to access a cargo-loading facility—is a 'matte[r] in foreign commerce,' it stands to reason that an individual who actually loads cargo on vehicles traveling across borders is himself engaged in such commerce."

"(b) Both parties proffer arguments disagreeing with this analysis, but none is convincing."

"(1) Saxon thinks the relevant 'class of workers' should include all airline employees, not just cargo loaders. For support, she argues that 'railroad employees' and 'seamen'—two classes of workers listed immediately before § 1's catchall provision—refer generally to employees in those industries. Saxon's premise is flawed. 'Seamen' is not an industrywide category but instead a subset of workers engaged in the maritime shipping industry. For example, 'seamen' did not include all those employed by companies engaged in maritime shipping when the FAA was enacted."

"(2) Southwest's three counterarguments all fail. First, Southwest narrowly construes § 1's catchall category—'any other class of workers engaged in foreign or interstate commerce'—to include only workers who physically transport goods or people across foreign or international boundaries. Southwest relies on the definition of 'seamen' as only those 'employed on board a vessel,' *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 346, 111 S.Ct. 807, 112 L.Ed.2d 866, and argues that the catchall category should be read along the same lines to exclude airline workers, like Saxon, who do not ride aboard an airplane in interstate or foreign transit. But Southwest's acknowledgment that the statute's reference to 'railroad employees' is somewhat ambiguous in effect concedes that the three statutory categories in § 1—'seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce'—do not share the attribute that Southwest would like read into the catchall provision. Well-settled canons of statutory interpretation neither demand nor permit limiting a broadly worded catchall phrase based on an attribute that inheres in only one of the list's preceding specific terms. Second, Southwest argues that cargo loading is similar to other activities that this Court has found to lack a necessary nexus to interstate commerce in other contexts. But the cases Southwest invokes all addressed activities far more removed from interstate commerce than physically loading cargo directly on and off an airplane headed out of State. See, *e.g., Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378. Finally, Southwest argues that the FAA's 'proarbitration purposes' counsel in favor of an interpretation that errs on the side of fewer § 1 exemptions. Here, however, plain text suffices to show that airplane cargo loaders, and thus ramp supervisors who frequently load and unload cargo, are exempt from the FAA's scope under § 1."

III. FAA Preempts California Treatment of Arbitration Under Private Attorneys General Act

Viking River Cruises, Inc. v. Moriana, 142 S.Ct. 1906 (U.S., Alito, 2022).

"The question for decision is whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.* PAGA enlists employees as private attorneys general to enforce California labor law. By its terms, PAGA authorizes any 'aggrieved employee' to initiate an action against a former employer 'on behalf of himself or herself and other current or former employees' to obtain civil penalties that previously could have been recovered only by the State in an enforcement action brought by California's Labor and Workforce Development Agency (LWDA). California precedent holds that a PAGA suit is a 'representative action' in which the employee plaintiff sues as an 'agent or proxy' of the State. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 380, 173 Cal.Rptr.3d 289, 327 P.3d 129. California precedent also interprets the statute to contain what is effectively a rule of claim joinder—allowing a party to unite multiple claims against an opposing party in a single action. An employee with PAGA standing may 'seek any civil penalties the state can, including penalties for violations involving employees other than the PAGA litigant herself.' *ZB, N. A. v. Superior Court*, 8 Cal.5th 175, 185, 252 Cal.Rptr.3d 228, 448 P.3d 239.

"Respondent Angie Moriana filed a PAGA action against her former employer Viking River Cruises, alleging a California Labor Code violation. She also asserted a wide array of other violations allegedly sustained by other Viking employees. Moriana's employment contract with Viking contained a mandatory arbitration agreement. Important here, that agreement contained both a 'Class Action Waiver'—providing that the parties could not bring any dispute as a class, collective, or representative action under PAGA—and a severability clause—specifying that if the waiver was found invalid, such a dispute would presumptively be litigated in court. Under the severability clause, any 'portion' of the waiver that remained valid would be 'enforced in arbitration.' Viking moved to compel arbitration of Moriana's individual PAGA claim and to dismiss her other PAGA claims. Applying California's *Iskanian* precedent, the California courts denied that motion, holding that categorical waivers of PAGA standing are contrary to California policy and that PAGA claims cannot be split into arbitrable 'individual' claims and nonarbitrable 'representative' claims. This Court granted certiorari to decide whether the FAA preempts the California rule.

"Held: The FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."

"(a) Based on the principle that '[a]rbitration is strictly "a matter of consent,"' *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567, this Court has held that 'a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so,' *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605. Because class-action arbitration mandates procedural changes that are inconsistent with the individualized and informal mode of bilateral arbitration contemplated by the FAA, see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347, 131 S.Ct. 1740, 179 L.Ed.2d 742, class procedures cannot be imposed by state law without presenting unwilling parties with an unacceptable choice between being compelled to arbitrate using such procedures and forgoing arbitration all together.

"Viking contends that the Court's FAA precedents require enforcement of contractual provisions waiving the right to bring PAGA actions because PAGA creates a form of class or collective

proceeding. If this is correct, *Iskanian*'s prohibition on PAGA waivers presents parties with an impermissible choice: Either arbitrate disputes using a form of class procedures, or do not arbitrate at all. Moriana maintains that any conflict between *Iskanian* and the FAA is illusory because PAGA creates nothing more than a substantive cause of action.

"This Court disagrees with both characterizations of the statute. Moriana's premise that PAGA creates a unitary private cause of action is irreconcilable with the structure of the statute and the ordinary legal meaning of the word 'claim.' A PAGA action asserting multiple violations under California's Labor Code affecting a range of different employees does not constitute 'a single claim' in even the broadest possible sense. Viking's position, on the other hand, elides important structural differences between PAGA actions and class actions. A class-action plaintiff can raise a multitude of claims because he or she represents a multitude of absent individuals; a PAGA plaintiff, by contrast, represents a single principal, the LWDA, that has a multitude of claims. As a result, PAGA suits exhibit virtually none of the procedural characteristics of class actions.

"This Court's FAA precedents treat bilateral arbitration as the prototype of the individualized and informal form of arbitration protected from undue state interference by the FAA. See, *e.g., Epic Systems Corp.* v. *Lewis*, 584 U.S. ——, ——, 138 S.Ct. 1612, 200 L.Ed.2d 889. Viking posits that a proceeding is 'bilateral' only if it involves two and only two parties and 'is conducted by and on behalf of the individual named parties only.' *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S.Ct. 2541, 180 L.Ed.2d 374. Thus, *Iskanian*'s prohibition on PAGA waivers is inconsistent with the FAA because PAGA creates an intrinsically representational form of action and *Iskanian* requires parties either to arbitrate in that format or forgo arbitration altogether.

"This Court disagrees. Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals. Non-class representative actions in which a single agent litigates on behalf of a single principal necessarily deviate from the strict ideal of bilateral dispute resolution posited by Viking, but this Court has never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract or that such suits deviate from the norm of bilateral arbitration. Unlike procedures distinctive to multiparty litigation, single-principal, single-agent representative actions are 'bilateral' in two registers: They involve the rights of only the absent real party in interest and the defendant, and litigation need only be conducted by the agent-plaintiff and the defendant. Nothing in this Court's precedent suggests that in enacting the FAA, Congress intended to require States to reshape their agency law governing *who* can assert claims on behalf of *whom* to ensure that parties will never have to arbitrate disputes in a proceeding that deviates from bilateral arbitration in the strictest sense."

"(b) PAGA's built-in mechanism of claim joinder is in conflict with the FAA. *Iskanian*'s prohibition on contractual division of PAGA actions into constituent claims unduly circumscribes the freedom of parties to determine 'the issues subject to arbitration' and 'the rules by which they will arbitrate,' *Lamps Plus, Inc.* v. *Varela*, 587 U.S. ——, ——, 139 S.Ct. 1407, 1416, 203 L.Ed.2d 636, and does so in a way that violates the fundamental principle that 'arbitration is a matter of consent,' *Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758. For that reason, state law cannot condition the enforceability of an agreement to arbitrate on the availability of a procedural mechanism that would permit a party to expand the scope of the anticipated arbitration by introducing claims that the parties did not jointly agree to arbitrate. A state rule imposing an expansive rule of joinder in the arbitral context would defeat the ability of parties to control which claims are subject to arbitration by permitting parties to superadd new claims to the proceeding, regardless of whether

the agreement committed those claims to arbitration. When made compulsory by way of *Iskanian*, PAGA's joinder rule functions in exactly this way. The effect is to coerce parties into withholding PAGA claims from arbitration. *Iskanian*'s indivisibility rule effectively coerces parties to opt for a judicial forum rather than 'forgo[ing] the procedural rigor and appellate review of the courts to realize the benefits of private dispute resolution.' *Stolt-Nielsen*, 559 U.S. at 685, 130 S.Ct. 1758."

"(c) Under this Courts holding, *Iskanian*'s prohibition on wholesale waivers of PAGA claims is not preempted by the FAA. But *Iskanian*'s rule that PAGA actions cannot be divided into individual and non-individual claims is preempted, so Viking was entitled to compel arbitration of Moriana's individual claim. PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding. And under PAGA's standing requirement, a plaintiff has standing to maintain non-individual PAGA claims in an action only by virtue of also maintaining an individual claim in that action. As a result, Moriana would lack statutory standing to maintain her non-individual claims in court, and the correct course was to dismiss her remaining claims."

"Reversed and remanded."

IV. FAA Does Not Authorize Federal Courts to Create Arbitration-Specific Procedural Rule

Morgan v. Sundance, Inc., 142 S.Ct. 1708 (U.S., Kagan, 2022).

"Petitioner Robyn Morgan worked as an hourly employee at a Taco Bell franchise owned by respondent Sundance. When applying for the job, Morgan signed an agreement to arbitrate any employment dispute. Despite that agreement, Morgan filed a nationwide collective action asserting that Sundance had violated federal law regarding overtime payment. Sundance initially defended against the lawsuit as if no arbitration agreement existed, filing a motion to dismiss (which the District Court denied) and engaging in mediation (which was unsuccessful). Then—nearly eight months after Morgan filed the lawsuit—Sundance moved to stay the litigation and compel arbitration under the Federal Arbitration Act (FAA). Morgan opposed, arguing that Sundance had waived its right to arbitrate by litigating for so long.

"The courts below applied Eighth Circuit precedent, under which a party waives its right to arbitration if it knew of the right; 'acted inconsistently with that right'; and 'prejudiced the other party by its inconsistent actions.' *Erdman Co.* v. *Phoenix Land & Acquisition, LLC*, 650 F.3d 1115, 1117. The prejudice requirement is not a feature of federal waiver law generally. The Eighth Circuit adopted that requirement because of the 'federal policy favoring arbitration.' *Id.*, at 1120. Other courts have rejected such a requirement. This Court granted certiorari to resolve the split over whether federal courts may adopt an arbitration-specific waiver rule demanding a showing of prejudice.

"Held: The Eighth Circuit erred in conditioning a waiver of the right to arbitrate on a showing of prejudice. Federal courts have generally resolved cases like this one as a matter of federal law, using the terminology of waiver. The parties dispute whether that framework is correct. Assuming without deciding that it is, federal courts may not create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the FAA's 'policy favoring arbitration.' *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24. That policy 'is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding

refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.' *Granite Rock Co.* v. *Teamsters*, 561 U.S. 287, 302 (internal quotation marks omitted). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. See *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 218–221. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.

"The text of the FAA makes clear that courts are not to create arbitration-specific procedural rules like the one here. Section 6 of the FAA provides that any application under the statute—including an application to stay litigation or compel arbitration—'shall be made and heard in the manner provided by law for the making and hearing of motions' (unless the statute says otherwise). A directive to treat arbitration applications 'in the manner provided by law' for all other motions is simply a command to apply the usual federal procedural rules, including any rules relating to a motion's timeliness. Because the usual federal rule of waiver does not include a prejudice requirement, Section 6 instructs that prejudice is not a condition of finding that a party waived its right to stay litigation or compel arbitration under the FAA.

"Stripped of its prejudice requirement, the Eighth Circuit's current waiver inquiry would focus on Sundance's conduct. Did Sundance knowingly relinquish the right to arbitrate by acting inconsistently with that right? On remand, the Court of Appeals may resolve that question, or determine that a different procedural framework (such as forfeiture) is appropriate. The Court's sole holding today is that it may not make up a new procedural rule based on the FAA's 'policy favoring arbitration.'"

V. Jurisdictional Framework for Judicial Supervision of Arbitration

Badgerow v. Walters, 142 S.Ct. 1310 (U.S., Kagan, 2022).

"The Federal Arbitration Act authorizes a party to an arbitration agreement to petition a federal court for various forms of relief. But the Act's authorization of such petitions does not itself create the subject-matter jurisdiction necessary for a federal court to resolve them. Rather, the federal court must have an 'independent jurisdictional basis' to do so. *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). In *Vaden v. Discover Bank*, 556 U.S. 49, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009), this Court assessed whether there was a jurisdictional basis to decide an FAA Section 4 petition to compel arbitration by means of examining the parties' underlying dispute. The Court reasoned that specific language in Section 4 instructed a federal court to 'look through' the petition to the 'underlying substantive controversy.' *Id.,* at 62, 129 S.Ct. 1262. If the dispute underlying a Section 4 petition falls within the court's jurisdiction—for example, by presenting a federal question—then the court may rule on the petition to compel arbitration.

"In this case, the question presented is whether that same 'look-through' approach to jurisdiction applies to applications to confirm or vacate arbitral awards under Sections 9 and 10 of the FAA. Petitioner Denise Badgerow initiated an arbitration proceeding against her employer's principals (collectively, Walters), alleging that she was unlawfully terminated. After arbitrators dismissed Badgerow's claims, she filed suit in Louisiana state court to vacate the arbitral award. Walters removed the case to Federal District Court and applied to confirm the award. Badgerow then moved to remand the case to state court, arguing that the federal court lacked jurisdiction to resolve

the parties' requests—under Sections 10 and 9 of the FAA, respectively—to vacate or confirm the award. The District Court applied *Vaden*'s look-through approach, finding jurisdiction in the federal-law claims contained in Badgerow's underlying employment action. The District Court acknowledged that Sections 9 and 10 of the FAA lack the distinctive text on which *Vaden* relied, but it applied the look-through approach anyway so that 'consistent jurisdictional principles' would govern all kinds of FAA applications. The Fifth Circuit affirmed.

"Held: *Vaden*'s 'look-through' approach to determining federal jurisdiction does not apply to requests to confirm or vacate arbitral awards under Sections 9 and 10 of the FAA."

"(a) Congress has granted federal district courts jurisdiction over two main kinds of cases: suits between citizens of different States as to any matter valued at more than $75,000 (diversity cases), 28 U.S.C. § 1332(a), and suits 'arising under' federal law (federal-question cases), § 1331. Normally, a court has federal-question jurisdiction whenever federal law authorizes an action. But because this Court has held that the FAA's provisions do not themselves support federal jurisdiction, a federal court must find an independent basis for jurisdiction to resolve an arbitral dispute. In this case, neither application reveals a jurisdictional basis on its face. So to find an independent basis for jurisdiction, the District Court had to look through the Section 9 and 10 applications to the underlying substantive dispute, where a federal-law claim satisfying § 1331 indeed exists.

"In *Vaden*, this Court approved the look-through approach for a Section 4 petition by relying on that section's express language. That language provides that a party to an arbitration agreement may petition for an order to compel arbitration in a 'United States district court which, save for [the arbitration] agreement, would have jurisdiction' over 'the controversy between the parties.' 'The phrase "save for [the arbitration] agreement,"' the Court stated, 'indicates that the district court should assume the absence of the arbitration agreement and determine whether [the court] 'would have jurisdiction . . . without it' by looking through to the 'underlying substantive controversy' between the parties. 556 U.S., at 62, 129 S.Ct. 1262.

"Sections 9 and 10 of the FAA contain none of the statutory language on which *Vaden* relied. So under ordinary principles of statutory construction, the look-through method should not apply. '[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act,' this Court generally takes the choice to be deliberate. *Collins* v. *Yellen*, 594 U.S. ——, ——, 141 S.Ct. 1761, 210 L.Ed.2d 432 (2021). That holds true for jurisdictional questions, as federal 'district courts may not exercise jurisdiction absent a statutory basis.' *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005). Because a statutory basis for look-through jurisdiction is lacking in Sections 9 and 10, the Court cannot reach the same result here as in *Vaden*."

"(b) Walters presents a two-part argument to justify exercising jurisdiction here. Walters first claims that Section 4's language does not authorize look-through jurisdiction, but is only a capacious venue provision designed to give applicants a broad choice among federal courts possessing jurisdiction. Walters next construes Section 6—which requires any FAA application to 'be made and heard in the manner provided by law for the making and hearing of motions'—to provide the basis for an FAA-wide look-through rule.

"Walters's reading of Section 4 does not comport with how *Vaden* understood Section 4 or with the actual text of that provision, which never mentions venue, and refers only to jurisdiction. And

Walters's Section 6 argument fares no better. Courts do not possess jurisdiction to decide ordinary motions by virtue of the look-through method. So Congress would not have prescribed that method by telling courts, as Section 6 does, to treat FAA applications like motions."

"(c) Walters also makes several policy arguments preaching the virtues of adopting look-through as a uniform jurisdictional rule. Walters claims that a uniform rule will promote 'administrative simplicity'; that the look-through approach will be 'easier to apply' than a test grounding jurisdiction on the face of the FAA application itself; and that the look-through rule will provide federal courts with more comprehensive control over the arbitration process. . . . But '[e]ven the most formidable policy arguments cannot overcome a clear statutory directive.' *BP p.l.c.* v. *Mayor and City Council of Baltimore*, 593 U.S. ——, ——, 141 S.Ct. 1532, 209 L.Ed.2d 631 (2021). And anyway, Walters oversells the superiority of his proposal. First, uniformity in and of itself provides no real advantage here because courts can easily tell whether to apply look-through or the normal jurisdictional rules. Second, the use of those ordinary rules, in the context of arbitration applications, is hardly beyond judicial capacity. And third, there are good reasons why state, rather than federal, courts should handle applications like the ones in this case."

VI. Discovery Issues Under 28 U.S.C. § 1782(a); Foreign or International Tribunal

ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S.Ct. 2078 (U.S., Barrett, 2022).

"These consolidated cases involve arbitration proceedings abroad for which a party sought discovery in the United States pursuant to 28 U.S.C. § 1782(a)—a provision authorizing a district court to order the production of evidence 'for use in a proceeding in a foreign or international tribunal.' In the first case, Luxshare, Ltd., a Hong Kong-based company, alleges fraud in a sales transaction with ZF Automotive US, Inc., a Michigan-based automotive parts manufacturer and subsidiary of a German corporation. The sales contract signed by the parties provided that all disputes would be resolved by three arbitrators under the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), a private dispute-resolution organization based in Berlin. To prepare for a DIS arbitration against ZF, Luxshare filed an application under § 1782 in federal court, seeking information from ZF and its officers. The District Court granted the request, and ZF moved to quash, arguing that the DIS panel was not a 'foreign or international tribunal' under § 1782. The District Court denied ZF's motion. The Sixth Circuit denied a stay.

"The second case involves AB bankas SNORAS (Snoras), a failed Lithuanian bank declared insolvent and nationalized by Lithuanian authorities. The Fund for Protection of Investors' Rights in Foreign States—a Russian corporation assigned the rights of a Russian investor in Snoras—initiated a proceeding against Lithuania under a bilateral investment treaty between Lithuania and Russia, claiming that Lithuania expropriated investments. Relevant here, the treaty establishes a procedure for resolving 'any dispute between one Contracting Party and [an] investor of the other Contracting Party concerning' investments in the first Contracting Party's territory, and offers parties four options for dispute resolution. . . . The Fund chose an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law, with each party selecting one arbitrator and those two choosing a third. After initiating arbitration, the Fund filed a § 1782 application in federal court, seeking information from Simon Freakley, who was appointed as a temporary administrator of Snoras, and AlixPartners, LLP, a New York-based consulting firm where Freakley serves as CEO. AlixPartners resisted discovery, arguing that the ad hoc arbitration panel was not a 'foreign or international tribunal' under § 1782 but instead a

private adjudicative body. The District Court rejected that argument and granted the Fund's discovery request. The Second Circuit affirmed.

"Held: Only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under 28 U.S.C. § 1782, and the bodies at issue in these cases do not qualify."

"(a) Section 1782(a) provides that a district court may order discovery 'for use in a proceeding in a foreign or international tribunal.' Standing alone, the word 'tribunal' can be used either as a synonym for 'court,' in which case it carries a distinctively governmental flavor, or more broadly to refer to any adjudicatory body. While a prior version of § 1782 covered 'any judicial proceeding' in 'any court in a foreign country,' § 1782 (1958 ed.), Congress later expanded the provision to cover proceedings in a 'foreign or international tribunal.' That shift created 'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.' *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258, 124 S.Ct. 2466, 159 L.Ed.2d 355 (alterations omitted). But while a 'tribunal' thus need not be a formal 'court,' read in context—with 'tribunal' attached to the modifiers 'foreign or international'—§ 1782's phrase is best understood to refer to an adjudicative body that exercises governmental authority.

"'Foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation. This reading of 'foreign tribunal' is reinforced by the statutory defaults for discovery procedure under § 1782, which permit district courts to prescribe the practice and procedure, 'which may be in whole or part *the practice and procedure of the foreign country or the international tribunal.*' § 1782(a) (emphasis added). The statute thus presumes that a 'foreign tribunal' follows 'the practice and procedure of the foreign country.' That the default discovery procedures for a 'foreign tribunal' are governmental suggests that the body is governmental too.

"Similarly, an 'international tribunal' is best understood as one that involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes. So understood, a 'foreign tribunal' is a tribunal imbued with governmental authority by one nation, and an 'international tribunal' is a tribunal imbued with governmental authority by multiple nations."

"(b) Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the Federal Arbitration Act. From 1855 until 1964, § 1782 and its antecedents covered assistance only to foreign 'courts.' Congress established the Commission on International Rules of Judicial Procedure, see §§ 1–2, 72 Stat. 1743, and charged the Commission with improving the process of judicial assistance, specifying that the 'assistance and cooperation' was '*between the United States and foreign countries*' and that 'the rendering of assistance *to foreign courts and quasi-judicial agencies*' should be improved. *Ibid.* (emphasis added). In 1964, Congress adopted the Commission's proposed legislation, which became the modern version of § 1782. Interpreting § 1782 to reach only bodies exercising governmental authority is consistent with Congress' charge to the Commission. The animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies adjudicating purely private disputes abroad would serve that end.

"Extending § 1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because § 1782 permits much broader discovery than the FAA allows. Interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration."

"(c) The adjudicative bodies in these cases are not governmental or intergovernmental tribunals that fall within § 1782. The dispute between Luxshare and ZF involves private parties that agreed in a private contract that DIS, a private dispute-resolution organization, would arbitrate any disputes between them. No government is involved in creating the DIS panel or prescribing its procedures. Contrary to Luxshare's suggestion, a commercial arbitral panel like the DIS panel does not qualify as governmental simply because the law of the country in which it would sit (here, Germany) governs some aspects of arbitration and courts play a role in enforcing arbitration agreements.

"The ad hoc arbitration panel at issue in the Fund's dispute with Lithuania presents a harder question. A sovereign is on one side of the dispute, and the option to arbitrate is contained in an international treaty rather than a private contract. Yet neither Lithuania's presence nor the treaty's existence is dispositive, because Russia and Lithuania are free to structure investor-state dispute resolution as they see fit. What matters is whether the two nations intended to confer governmental authority on an ad hoc panel formed pursuant to the treaty. See *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 37, 134 S.Ct. 1198, 188 L.Ed.2d 220. The treaty offers a choice of four forums to resolve disputes. The inclusion of courts as one option for dispute resolution reflects Russia and Lithuania's intent to give investors the choice of bringing their disputes before a pre-existing governmental body. By contrast, the ad hoc arbitration panel is not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes. Nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. The ad hoc panel has authority because Lithuania and the Fund consented to the arbitration, not because Russia and Lithuania clothed the panel with governmental authority. Any similarities between the ad hoc arbitration panel and other adjudicatory bodies from the past are not dispositive. For purposes of § 1782, the inquiry is whether the features of the adjudicatory body and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority."

CONTRACTS

I. Contractual Waiver of *Forum Non Conveniens* Defense Enforced

Relyant Global, LLC v. Fernandez, No. E2021-00515-COA-R3-CV (Tenn. Ct. App., Davis, June 24, 2022).

"The plaintiff, Relyant Global, LLC ('Relyant'), is a company organized under the laws of this state with its principal place of business in Blount County. As a primary area of its business, Relyant provides removal and abatement services for munitions and explosives of concern ('MEC') throughout North America, the Pacific, the Middle East, Africa, and Asia. In March of 2019, Relyant hired Royden Fernandez ('Fernandez') to be a project-based unexploded ordnance ('UXO') safety officer in the U.S. territory of Guam. Fernandez signed a confidentiality, non-disclosure, and non-compete agreement (the 'Agreement') as a condition of employment. The 'Non-Competition' paragraph of the Agreement provides:

> Employee agrees that during Employee's employment by RELYANT and for a period of one (1) year thereafter, Employee will not either directly or indirectly, on Employee's own behalf or in the service or on behalf of others, engage in any business that is the same as or essentially the same as the business of RELYANT in any capacity in the Non-Competition Area.

"The Agreement defines the Non-Competition Area as 'any country where RELYANT has engaged in or specifically solicited business for the two (2) year period of time prior to the Employees termination.' Critical to this appeal, the Agreement also states:

> Governing Law; Venue: This Agreement shall be exclusively construed, governed and controlled by the laws of the State of Tennessee without regard to principles of law, including conflicts of law, of any other jurisdiction, territory, country and/or province. *Any dispute arising out of or relating to this Agreement shall exclusively be brought to any court of competent jurisdiction located within the State of Tennessee. Each party consents to personal jurisdiction thereto and waives any defenses based on personal jurisdiction, venue and inconvenient forum.* Each party hereby consents to service of process by United States certified mail, return receipt.

"(Emphases added).

"In late May 2020, Fernandez resigned and organized a one-member limited liability company under the laws of Guam, Oia'i'o Halo MEC Remediation HUI, LLC (the 'LLC'). On its website, the LLC presents itself as a provider of UXO-related services, including 'UXO/MEC Remediation Consultations,' 'UXO/MEC Construction Support/Escort,' and 'UXO/MEC Munition Response Site Clearance.' In July of 2020, Fernandez and the LLC began bidding on federal government contracts and subcontracts for UXO-related services to be performed in Guam. Fernandez and the LLC were awarded a UXO contract for work at the Naval Base Guam Telecommunications Station, a contract for which Relyant had also submitted a bid.

"On September 21, 2020, Relyant filed a complaint against Fernandez and the LLC (collectively, 'Defendants') in the Blount County Chancery Court ('the trial court'), alleging breach of the Agreement and seeking lost profits resulting from the award of the Naval Base Guam contract to

Defendants. In addition to compensatory damages, the complaint asked the trial court for injunctive relief and a declaration of the parties' rights under the Agreement. On December 14, 2020, Defendants moved the trial court to dismiss the complaint under Rule 12.02 of the Tennessee Rules of Civil Procedure, asserting lack of personal jurisdiction over Defendants, lack of jurisdiction over the subject matter, and the doctrine of *forum non conveniens.* Defendants attached to the motion a Declaration from Fernandez, which stated, in relevant part:

> 10. I do not recall signing a non-compete agreement for the Plaintiff.
> ...
> 16. Any employment related document that I signed for Plaintiff was signed while I was in the State of Utah or in Guam.
> ...
> 17. I am the President of Oia'i'o Halo MEC Remediation HUI, LLC (hereinafter the 'LLC'), which was founded as a limited liability company in Guam.
> 18. Contrary to Plaintiff's Complaint allegation, I am not the only member of the LLC. There are presently two (2) other members, both of whom also live in Guam.
> ...
> 21. I have never been to the State of Tennessee.

"Relyant responded to the motion on April 6, 2021, arguing that the trial court had subject matter jurisdiction over actions for breach of contract under Tennessee Code Annotated section 16-11-101, that Fernandez agreed to personal jurisdiction in the trial court pursuant to the Agreement, and that Fernandez expressly waived the defense of *forum non conveniens* in the Agreement. Concerning the LLC, Relyant contended that because it alleged in its complaint that Fernandez created the LLC as a vehicle to pursue unlawful competition with Relyant, the trial court should deny the motion to dismiss as to the LLC as well. In the alternative, Relyant submitted that the trial court should allow limited discovery as to the jurisdictional issues raised by Defendants.

"On May 3, 2021, the trial court filed an order granting defendants' motion to dismiss. The trial court assumed the Agreement's forum selection clause to be valid, concluded that personal jurisdiction can be waived by a forum selection clause, and determined that it had subject matter jurisdiction to hear the case. However, it dismissed the action, finding that Blount County was not a convenient forum under the *forum non conveniens* doctrine. Relyant timely appealed."

"Defendants' primary contention on appeal is that the forum selection clause should not be enforced because Tennessee would be a less convenient place for *them* to try the case than Guam. Of that, we have little doubt given their residency there. However, we are constrained to decline Defendants' invitation to consider the applicability of the *forum non conveniens* doctrine in the instant case for one simple but compelling reason: they expressly and specifically waived 'any defenses based on personal jurisdiction, venue and inconvenient forum.' Indeed, the only two circumstances expressly referenced by the trial court for deeming Tennessee a less convenient place for litigation—that obtaining testimony from material witnesses in Guam would be costly and that additional procedural steps would be required to enforce in Guam any injunctive relief ordered by a Tennessee court—were no different or less foreseeable back in March 2019 when Fernandez signed the Agreement. Put another way, Defendants voluntarily agreed to the inconvenience they now seek to avoid. They would have this Court disregard an unambiguous provision in an arm's-length Agreement and, in effect, deprive the parties of the benefit of their bargain. But '[p]arties challenging a forum selection clause cannot rely on facts and circumstances that were present or reasonably foreseen when they signed the contract.' *Sevier Cnty. Bank*, 2006 WL

2423547, at *6 (quoting *Safeco Ins. Co. of Am. v. Shaver*, No. 01A01-9301-CH-00005, 1994 WL 481402, at *4 (Tenn. Ct. App. Sept. 7, 1994)). Having discerned no basis to question the validity or enforceability of the parties' Agreement, we refuse to deviate from its express provisions and to nullify the parties' intent. *See Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.*, 566 S.W.3d 671, 688 (Tenn. 2019) ('The common thread in all Tennessee contract cases—the cardinal rule upon which all other rules hinge—is that courts must interpret contracts so as to ascertain and give effect to the intent of the contracting parties consistent with legal principles.')."

"In sum, this is not a case where the parties simply agreed to a mandatory litigation forum that was later either challenged by a defendant or sua sponte raised by the trial court as inconvenient. Here, the parties specifically bargained and contracted that dismissal would not occur on the basis of inconvenient forum. Although the enforcement of a contractual waiver of the *forum non conveniens* defense appears to be an issue of first impression in this state, we do not think that the authority inherent in our trial courts to 'control their dockets' goes as far as allowing them to, at their discretion, invalidate a voluntary contractual waiver and to apply a defense mutually surrendered by the parties. Defendants have not cited any authorities to the contrary, and the trial court should have given effect to the parties' intent as expressed in their Agreement."

II. Modification by Mutual Assent Demonstrated by Unambiguous Course of Dealing

Baker v. Eldredge, No. M2021-00072-COA-R3-CV (Tenn. Ct. App., McBrayer, July 28, 2022).

"Brett Eldredge is a country music singer, songwriter, and producer. From 2011 to 2018, Robert Baker managed his career. After the artist ended the management relationship, Mr. Baker and his limited liability company sued Brett Eldredge and related business entities for breach of contract and unjust enrichment. The complaint also included claims for statutory and common law inducement of breach of contract against Brice Eldredge, the artist's brother and business manager.

"According to the allegations in the complaint, in 2017, Brice proposed changing the compensation structure in Mr. Baker's contract. Mr. Baker rejected the proposal. But Brice told his brother that Mr. Baker had agreed. From then on, the defendants paid Mr. Baker less than the full amount owed under his contract.

"After discovery, the defendants moved for summary judgment. Among other things, they argued that Mr. Baker's contract was modified by mutual assent. Mr. Baker maintained that factual disputes precluded the grant of summary judgment."

"Moving for summary judgment, the defendants relied on the following undisputed facts. In 2013, Brett and Mr. Baker orally agreed to a new management deal. As compensation for Mr. Baker's services, Brett agreed to a 15% commission on his gross revenue from all sources other than publishing. Either party could terminate the agreement at will, subject to a 12-month sunset clause. The sunset clause obligated Brett to continue paying commissions to Mr. Baker for 12 months after termination of the agreement. From December 2013 to March 2017, Mr. Baker was paid in accordance with the 2013 agreement.

"In 2016, Brett hired Brice as his business manager. Brice 'started waiving a red flag about financial constraints heading into 2017.' He invited Mr. Baker's input on how to reduce the artist's

overall expenses. Brice and Brett also discussed renegotiating commissions for the multiple agents who worked for the artist. In 2017, Brice and Mr. Baker met twice to discuss proposed changes to Mr. Baker's compensation.

"At their February meeting, Brice told Mr. Baker that 'Brett was looking to restructure all commission buckets' to alleviate financial pressures. And he proposed changing Mr. Baker's commission from 15% of gross income to 15% of net operating income. Mr. Baker rejected the proposal. As he saw it, Brett was trying to 'fix the ... leak[ ] in net operating income all on his back.' Brice conveyed Mr. Baker's objections to Brett.

"The next month, Brice sent Mr. Baker a memo outlining a new commission structure to take effect as of January 1, 2017. The 2017 memo provided that Brett would pay Mr. Baker a 15% commission on net operating income plus a 5% commission on publishing revenue and an increased percentage of SoundExchange royalties.

"At Mr. Baker's request, the two men met again on April 20, 2017, to discuss his 'permanent commission structure.' Brice told Mr. Baker that '[the 2017 memo] was the deal based on my conversations with Brett.' Mr. Baker thanked Brice for 'asking Brett for more money.' After the meeting, Brice told Brett that Mr. Baker had agreed to the new compensation terms.

"From March 2017 to September 2018, the defendants paid Mr. Baker as detailed in the 2017 memo. The payments were deposited directly into Mr. Baker's bank account. Mr. Baker also received monthly statements explaining how the payments were calculated. Mr. Baker knew that the defendants were paying him under the new commission structure. And he accepted the modified payments for 17 months.

"Mr. Baker never protested the change to his compensation in writing. After the April meeting, he never voiced any objections to the new payment terms to Brice even though the two men spoke almost daily. Nor did he speak to Brett about the changes, other than one conversation 'tangentially related' to his compensation in August 2018.

"Brett terminated Mr. Baker's contract in September 2018. After the termination, Mr. Baker contacted Brett about the sunset clause, but did not otherwise indicate that he was being paid incorrectly. As required, Brett continued to pay Mr. Baker for 12 months after the termination date.

"Relying primarily on his own testimony, Mr. Baker argued that genuine issues of material fact precluded the grant of summary judgment in the defendants' favor. The defendants admitted that Mr. Baker never expressly accepted the deal at the April meeting. Mr. Baker went even further. He claimed that he rejected the proposed change in April and made two counterproposals. This 'put the ball in Brice's court to go talk to Brett about the changes that I wanted to see.' He left the ball in the defendants' court for the next year and a half. As Mr. Baker recounted, 'Brett and I'd had other moments where—or other issues that we had taken months or years to resolve. And the fact that this was taking time wasn't a factor for me at all.'

"Mr. Baker also stressed that his acceptance of the modified payment amounts was not intended as acceptance of the proposed modification. He explained, 'Well, I was going to accept the payments. I did accept the payments. Not in acceptance of the deal. He was paying me less than he owed me. He owed me at least that much money. And it turns out he owed me a whole lot

more.' He believed that he protested his change in pay to Brett at least once. He also told several third parties that he was being underpaid."

"The trial court ruled that the 2013 contract had been modified by mutual assent. The court reasoned that the defendants' inability to establish express assent did not preclude summary judgment. Mutual assent may be established through course of dealing. Here, the undisputed proof showed that, after the April meeting, Mr. Baker accepted the modified payments consistent with the modified contract for 17 months without protest."

"The court also dismissed Mr. Baker's remaining claims. His compensation claim was governed by a valid contract. So Mr. Baker could not recover under an unjust enrichment theory. As there had been no breach of contract, the claims for inducement of breach of contract were rendered moot."

"Assent to a contract modification may be implied from the parties' course of dealing. *Lancaster v. Ferrell Paving, Inc.*, 397 S.W.3d 606, 611-12 (Tenn. Ct. App. 2011) (citations omitted). But we will not infer mutual assent based on 'an ambiguous course of dealing between the parties from which diverse inferences might reasonably be drawn as to whether the contract remained in its original form or was changed.' *Balderacchi*, 256 S.W.2d at 391.

"The defendants bore the burden of proving that the contract was modified. *See id.* at 391-92. They came forward with evidence showing that Mr. Baker objectively manifested assent to the modification after the April meeting. Mr. Baker admitted that he knew his commission was being calculated under the new commission structure. And he accepted the modified payments for at least 17 months. During that time, he never objected to the compensation changes or insisted that the defendants comply with the terms of the 2013 contract.

"Faced with a properly supported motion for summary judgment, it was incumbent on Mr. Baker to set forth specific facts in the record 'establishing that there are indeed disputed, material facts creating a genuine issue that needs to be resolved by the trier of fact.' *Byrd*, 847 S.W.2d at 215. Mr. Baker maintains that he rejected Brice's proposal and made two counter proposals at the April meeting. The defendants dispute his claim. But this factual dispute does not preclude summary judgment. *See id.* at 214-15 (explaining that not all facts are material and not all factual disputes are genuine for purposes of Rule 56). We accept Mr. Baker's testimony as true. *See id.* at 215. Still, his subsequent conduct objectively signaled his assent to the modified compensation terms. Mr. Baker continued to manage Brett's career. Brett paid him in accordance with the 2017 compensation memo. And Mr. Baker accepted those payments without further protest. *See Staubach Retail Servs.-Se., LLC*, 160 S.W.3d at 525 (noting that one party's acceptance of payment demonstrated its acceptance of the contract terms).

"Mr. Baker insists that he never intended to accept the modified compensation terms when he accepted the payments. Yet a party's conduct may manifest assent 'even though he does not in fact assent.' Restatement (Second) of Contracts § 19 (Am. L. Inst. 1981); *see Rode Oil Co. v. Lamar Advert. Co.*, No. W2007-02017-COA-R3-CV, 2008 WL 4367300, at *9 (Tenn. Ct. App. Sept. 18, 2008) ('Unless the other party has reason to know of it, contract law does not typically credit a claim that, in spite of a party's objective manifestations of assent, it subjectively did not intend to be bound.').

"We will not imply assent when the record demonstrates that the disputed payments were accepted under protest. *See Balderacchi*, 256 S.W.2d at 391-92 ('There was no modification since the proof clearly shows that plaintiff protested and promptly notified defendant that the full salary would be claimed.'). In *Balderacchi v. Ruth*, it was undisputed that the employee 'constantly told [his manager] that he was not being paid as his contract stipulated.'*Id.* at 391. And he repeatedly insisted that his employer 'pay him the difference in the amounts.' *Id.* Similarly, in *Thompson v. Creswell Indus. Supply, Inc.*, 936 S.W.2d 955 (Tenn. Ct. App. 1996), the proof showed that the employee 'voiced numerous complaints about the changes in the commission calculations.' *Id.* at 956. And in *E & A Ne. Ltd. P'ship v. Music City Rec. Distribs., Inc.*, No. M2005-01207-COA-R3-CV, 2007 WL 858779, (Tenn. Ct. App. Mar. 21, 2007), the record contained multiple letters between the parties in which the plaintiff noted the incorrect payments and urged the defendant to remit the full amount owed. *Id.* at *1-2.

"This record shows the opposite. After the April meeting, Mr. Baker never objected to the changes in his commission structure. He never sent a letter, an email, or a text message about his concerns. Nor did he broach the subject with Brice. And he could recall only one conversation with Brett that even touched on the 2017 changes. He told Brett that Brice had changed his pay. Yet he did not insist that Brett honor the terms of the 2013 contract. And he could not specifically recall telling Brett he objected to the changes. Complaining to third parties is but a poor substitute for direct protest.

"Mr. Baker also argues that we should view the parties' course of dealing through a wider lens. Early in his career, Brett deferred payment of management commissions due to lack of sufficient funds. According to Mr. Baker, he went almost 22 months without pay before Brett fulfilled his contractual obligation. So his extended silence was reasonable under the circumstances. But these events occurred before the parties entered the 2013 contract. We do not find them relevant here."

"Based on the undisputed facts, the defendants were entitled to a judgment as a matter of law on the breach of contract claim and the claims for inducement of breach of contract. We also affirm the dismissal of Mr. Baker's unjust enrichment claim. Mr. Baker claims that the defendants were unjustly enriched when they failed to pay him the full amount of compensation he was owed for his management services. Unjust enrichment is not an available theory of recovery when a valid contract exists between the parties. *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998)."

III. Breach of Contract; New Home with Mold Issue; Statute of Limitations

Simpkins v. John Maher Builders, Inc., No. M2021-00487-COA-R3-CV (Tenn. Ct. App., Frierson, May 4, 2022).

"In this action concerning a newly-constructed home, the plaintiffs asserted, *inter alia*, claims of breach of contract, breach of warranty, fraud, intentional misrepresentation, fraudulent concealment, negligence, and unfair and deceptive business practices by the defendant construction company and its owners. The trial court granted a motion to dismiss filed by the defendants based upon expiration of the three-year statute of limitations applicable to claims of injury to real property. We determine that although the trial court properly applied the three-year statute of limitations to the plaintiffs' claims of injury to their real property, the trial court improperly determined that the doctrine of fraudulent concealment would not apply to toll the accrual of such

limitations period concerning the plaintiffs' claims for damages caused by the defendants' failure to seal the utility penetrations beneath the home, a fact which allegedly was concealed by the defendants. We also determine that the plaintiffs stated claims of breach of contract, including breach of any express or implied warranties provided by the contract, and that the trial court improperly dismissed these claims based on the incorrect statute of limitations. We therefore vacate the trial court's dismissal of the breach of contract and contractual warranty claims, as well as the claims based on the defendants' failure to seal the utility penetrations, and we remand those claims to the trial court for further proceedings consistent with this opinion. We affirm the remaining portion of the trial court's judgment in its entirety.

"The plaintiffs, David and Sally Simpkins (collectively, 'Plaintiffs'), filed a *pro se* complaint on December 30, 2020, in the Williamson County Chancery Court ('trial court') against John Maher Builders, Inc. ('JMB'); John Maher; and Tony Maher (collectively, 'Defendants'). Plaintiffs averred that on August 4, 2017, they had purchased real property with a newly constructed home in Spring Hill, Tennessee, built by Defendants. Plaintiffs asserted that this home was improperly built and contained both construction defects and substandard building materials, which caused the home to be 'infested with mold and other microbial growth.' Plaintiffs claimed that as a result of their exposure to mold and other toxins in the home, they had suffered numerous health issues, resulting in medical expenses and a loss of income.

"In their complaint, Plaintiffs averred that Defendants should be held liable for, *inter alia*, claims of breach of contract, breach of warranty, fraud, intentional misrepresentation, fraudulent concealment, negligence, and unfair and deceptive business practices. Plaintiffs sought damages in excess of ten million dollars, in addition to pre-and post-judgment interest, revocation of JMB's contractor's license, and injunctive relief preventing Defendants' involvement in the building industry, among other things. Plaintiffs attached exhibits to their complaint numbering hundreds of pages, which included home inspection and other reports as well as affidavits executed by Plaintiffs. Plaintiffs also filed a uniform civil affidavit of indigency.

"On January 27, 2021, Plaintiffs filed an 'Emergency Motion for Injunctive Relief and Permanent Monetary Injunctive Relief or Default Judgement and Memorandum,' asserting that no disputed material facts existed and requesting that the trial court grant them immediate relief. Plaintiffs included that in addition to their health problems, they were being threatened with imminent foreclosure on their mortgage loan. The trial court entered an order regarding the motion on January 29, 2021, stating in pertinent part:

> Plaintiffs' claims are governed by Tennessee law and the procedure for handling this matter is governed by the Tennessee Rules of Civil Procedure. The Plaintiffs seek immediate relief without affording the Defendants an opportunity to be heard. The Plaintiffs have tendered a proposed Order suggesting that the Court grant such relief including a judgment against the Defendants for a sum in excess of $3 million together with treble damages in excess of $9 million. The Court has no authority to grant such relief under Rule 65 of the Tennessee Rules of Civil Procedure or any other rule contained therein. Accordingly, Plaintiffs' application shall be, and is hereby, denied.

"On February 8, 2021, Defendants filed a motion to dismiss, pursuant to Tennessee Rule of Civil Procedure 12.02(6), asserting that Plaintiffs' complaint failed to state a claim upon which relief could be granted. Defendants posited that Plaintiffs' claims were barred by the applicable statute of limitations, codified at Tennessee Code Annotated § 28-3-105, which provided that '[a]ctions

for injuries to ... real property' 'shall be commenced within three (3) years from the accruing of the cause of action.' Defendants maintained that Plaintiffs' allegations of fraud and misrepresentation were also subject to a three-year statute of limitations, relying on *Med. Educ. Assistance Corp. v. State ex rel. E. Tenn. State Univ. Quillen Coll. of Med.*, 19 S.W.3d 803, 817 (Tenn. Ct. App. 1999). Defendants argued that because Plaintiffs had acknowledged in their complaint that they had become aware of the mold problems in the home in August 2017, their claims filed in December 2020 were untimely."

"The trial court conducted a hearing concerning the motion to dismiss on March 23, 2021, considering arguments from Plaintiffs and Defendants' counsel. The court subsequently entered an order on April 5, 2021, stating in pertinent part:

> The Court finds that this matter concerns the alleged damage to Plaintiffs' real property and, as such, the statute of limitations that controls is Tenn. Code Ann. § 28-3-105 which provides three (3) years for the filing of an action based upon damage to real property. The Court finds that Plaintiffs' Complaint shows that Plaintiffs were aware of the alleged damages and that the causes of action accrued in August of 2017. The Plaintiffs did not file this matter until December 30, 2020. As such, Plaintiffs failed to file their Complaint within the required three (3) year statute of limitations of Tenn. Code Ann. § 28-3-105. Thus, Defendants' Motion is well taken and it is hereby GRANTED.

"The trial court accordingly dismissed Plaintiffs' complaint with prejudice.

"Several of Plaintiffs' issues address the question of whether the trial court improvidently dismissed Plaintiffs' breach of contract claims, including claims asserting breach of any express or implied warranties contained in the parties' contract. Plaintiffs contend that they properly stated claims of breach of contract because, *inter alia*, (1) Defendants sold the home in question to Plaintiffs with knowledge that mold existed in the crawl space and (2) Defendants did not disclose the existence of mold on the residential property disclosure statement in accordance with Tennessee Code Annotated § 66-5-202 (2015) (providing that a home owner shall provide to a purchaser a 'residential property disclosure statement in the form provided in this part regarding the condition of the property, including any material defects known to the owner.'). Plaintiffs further postulate that the trial court erroneously determined that the gravamen of their claims concerned construction defects and Defendants' refusal to remedy those defects. Plaintiffs assert that the trial court should have applied the six-year statute of limitations found in Tennessee Code Annotated § 28-3-109(a)(3) (2017) to the breach of contract claims, thus rendering those claims timely. For these reasons, Plaintiffs argue that they are entitled to an immediate final or default judgment.

"The overarching issue to be addressed with regard to Plaintiffs' allegations concerning their breach of contract claims is whether the trial court properly determined that the gravamen of the claims was for injury to Plaintiffs' real property rather than breach of contract. In so ruling, the trial court relied upon this Court's opinion in *Kirby Farms*, 773 S.W.2d at 250, wherein the plaintiffs, who were purchasers of condominiums built by the developer defendants, filed a class action lawsuit concerning construction defects and asserted claims of, *inter alia*, breach of express and implied warranties based on their contracts with the developers. *See id.* at 250. The trial court in *Kirby Farms* granted summary judgment to the developers based on Tennessee Code Annotated § 28-3-105, and the plaintiffs appealed to this Court. *Id.* On appeal, this Court was asked to determine whether the six-year statute of limitations applicable to claims of breach of contract found in Tennessee Code Annotated § 28-3-109 should have been applied. *Id.*"

"In addition to alleging injury to their real property, Plaintiffs alleged that Defendants breached their contract with Plaintiffs, including any express or implied warranties contained therein, not only because of Defendants' alleged negligent construction practices but also because of Defendants' alleged acts of 'abandoning' Plaintiffs after the sale and refusing to honor Plaintiffs' warranty claims. Plaintiffs claimed that Defendants 'made promises they never intended to keep' and declined to investigate Plaintiffs' claims or make repairs pursuant to Plaintiffs' one-year home warranty.[1] Based on our review of the legal basis for Plaintiffs' claims, we conclude that Plaintiffs clearly alleged alternate claims sounding in breach of contract."

"Plaintiffs additionally assert that the trial court erred by declining to determine that the accrual of the applicable statute of limitations was tolled by reason of the doctrine of fraudulent concealment. In their complaint, Plaintiffs averred that Defendants had told them on 'the day of the Final Walkthrough' before closing, which undisputedly occurred in August 2017, that the utility penetrations in the crawl space had been sealed with foam. Plaintiffs claimed, however, that it was not until January 17, 2018, when they received the inspection report from Middle Tennessee Mold Remediation ('mold inspection'), that they learned this statement by Defendants was untrue. According to Plaintiffs, the mold inspection report revealed for the first time that Defendants had falsely represented that the utility penetrations were sealed. Plaintiffs maintained that this failure to seal the utility penetrations contributed to the moisture and mold problems in the home."

"Concerning application of the fraudulent concealment doctrine, the *Riccardi* [*v. Carl Little Constr. Co.*, No. E2020-00678-COA-R3-CV, 2021 WL 3137251 (Tenn. Ct. App. July 26, 2021)] Court determined that the homeowner had presented proof that the home was built on fill dirt that was not properly compacted and that this was a cause of the 'excessive settlement problems' with the home. *Id.* The court noted that (1) the builder testified that he was on the job site daily during the home's construction; (2) the builder knew that the fill dirt beneath the home was not properly compacted, (3) the builder admitted this fact to a third party at a later date and in the presence of the homeowner, (4) this fact would not have been readily observable or discoverable by the homeowner, and (5) the trier of fact could reasonably conclude from the evidence that the builder knew his assurances to the homeowner regarding 'natural settling' were untrue. *Id.* This Court further noted that questions concerning fraud or fraudulent concealment were fact-intensive, typically presenting issues for the trier of fact that were inappropriate for summary disposition. *Id.* at *9.

"Similarly, in this matter, Plaintiffs averred in their complaint that they were explicitly told by Tony Maher and JMB's project manager in August 2017 that the utility penetrations in the crawl space had been sealed with foam. Plaintiffs further averred that they learned on January 17, 2018, when they received the mold inspection report, that this had not been done. According to Plaintiffs, this was the first time they had knowledge of the fact that Defendants had falsely represented that the utility penetrations beneath the home were sealed. Plaintiffs also asserted that this failure to seal the utility penetrations contributed to the moisture and mold problems in the home."

"Based on the facts alleged by Plaintiffs in their complaint, we further conclude that it is not clear that Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *See Webb*, 346 S.W.3d at 426. Ergo, we determine that the trial court erred by granting Defendants' motion to dismiss with respect to Plaintiffs' claims concerning injury to their property allegedly caused by Defendants' failure to seal the utility penetrations beneath the home, which were subject to the statute of limitations contained in Tennessee Code Annotated § 28-3-105 but which were

allegedly fraudulently concealed by Defendants. We therefore vacate that portion of the trial court's judgment and remand those claims to the trial court for further disposition."

"For the foregoing reasons, we determine that although the trial court properly applied the three-year statute of limitations to Plaintiffs' claims of injury to their real property, the trial court improperly determined that the doctrine of fraudulent concealment would not apply to toll the accrual of such limitations period concerning Plaintiffs' claims for damages caused by Defendants' failure to seal the utility penetrations beneath the home, a fact which allegedly was concealed by Defendants. We also determine that Plaintiffs stated claims of breach of contract, including breach of any express or implied warranties provided by the contract, and that the trial court improperly dismissed these claims based on the incorrect statute of limitations. We therefore vacate the trial court's dismissal of the breach of contract and contractual warranty claims, as well as the claims based on Defendants' failure to seal the utility penetrations, and we remand those claims to the trial court for further proceedings consistent with this opinion. We affirm the remaining portion of the trial court's judgment in its entirety."

IV. Reformation

Hyatt v. Adenus Group, LLC, No. M2021-00645-COA-R3-CV (Tenn. Ct. App., Stafford, July 12, 2022).

"Plaintiff/Appellee Charles Hyatt ('Appellee' or 'Mr. Hyatt') was the Chief Executive Officer of Defendant/Appellant Adenus Group, LLC ('Appellant' or 'Adenus' or 'the company') from November 2007 until he was given notice in late 2018 that his employment contract would not be renewed beyond December 31, 2018. Adenus is a wastewater services company owned by four brothers ('the brothers'): Thomas Pickney ('Tom'), Charles Pickney ('Charles'), William Pickney ('Bill'), and Robert Pickney ('Robert'), who also comprise the Board of Directors of Adenus ('the board'). When Appellee was hired, the company was in financial trouble, and Appellee helped navigate the company through some of those difficulties. By all accounts, the working relationship between the brothers and Appellee was amicable, and Adenus only chose to terminate Appellee's employment because of the different 'direction that the board wanted to go.' At the time Appellee's employment was terminated, Charles was no longer a board member or owner of Adenus, but had sold his share to his three brothers. After receiving notice that his employment contract would not be renewed, Appellee attempted to exercise the sale of what he asserted was his accumulated profit share in the company.

"When he did not receive the payment he claimed he was owed for his profit share, Appellee filed a complaint against Adenus and the brothers in the Williamson County Chancery Court (the 'trial court') on August 19, 2019. He sought declaratory judgment that he was the owner of a fully vested 10% profit interest in Adenus and had the right to require Adenus to repurchase his profit interest, and that Adenus was required to comply with his repurchase demand. He also alleged counts of breach of contract, breach of fiduciary duty, unjust enrichment, conversion, fraud in the inducement, negligent misrepresentation, and tortious interference with contract. He sought damages in excess of $300,000.00, punitive damages, pre- and post-judgment interest, costs and attorney's fees, and an accounting regarding the value of the profit interest. Appellee then filed an amended complaint on July 31, 2020, pursuant to an agreed order, removing his claim for fraud in the inducement and adding a claim for reformation of the parties' agreement with respect to the profit share, and enforcement of the reformed agreement.

"A bench trial occurred in the trial court from April 12 to April 14, 2021. Appellee, Charles, Bill, and Mike Hallum, an accountant for Adenus, testified. Appellee testified that he made $115,000.00 per year at Adenus and did not receive a raise until 2017, when his salary increased to $150,000.00 per year (though his raise was not memorialized in a written agreement). Pursuant to Appellee's Employment Agreement, his initial term of employment was three years. Appellee's employment would automatically renew for a one-year term if Adenus did not notify him otherwise at least ninety days before the expiration of his Employment Agreement. Appellee's employment thus continued until he received notice on October 1, 2018 that his employment contract would not be renewed. The parties agree that the termination of Appellee's employment was a 'Termination by Expiration' under the terms of the Employment Agreement, meaning it was a 'termination of Officer as a result of the expiration of the Term of this [Employment] Agreement without extension by the Company and Officer.'

"In the 'Additional Benefits' section of Appellee's Employment Agreement, it states, in pertinent part,

> To induce the Officer to undertake the employment evidenced by this Agreement, the Company agrees to offer a Profit Sharing Award per the Company's 2008 Equity Incentive Plan ['the Plan']. The terms of the Agreement will be set forth in a separate document ['the Profit Sharing Award Agreement,' or 'the Award Agreement'], to be executed within thirty (30) days of the execution of this Agreement.

"Appellee testified that he was not involved in reviewing the Plan or the Award Agreement until after late June 2008, and he did not have prior experience with such agreements. Appellee testified that after a meeting of the board on February 15, 2008, Adenus involved a lawyer, Todd Ervin, to draft the Plan and the Award Agreement. Mr. Ervin emailed versions of the Award Agreement and the Plan to Charles and Appellee on March 26, 2008, after which, according to Appellee, Charles primarily took over the process of finalizing those agreements on behalf of Adenus."

"Appellee testified that he signed the executed version of the Award Agreement without reviewing it, thinking, based on his email communications on June 30 and July 1 and what occurred at the July 15 board meeting, that it was not different than the July 1 version. He testified that his understanding was that if his employment ended before he served sixty months, i.e., before his profit share fully vested, he would lose any and all profit share. He said that if he could have lost the profit share after sixty months—i.e., after he had fully vested—it would not be an incentive, as was its purpose. Thus, he testified that he thinks he signed the wrong document—that an incorrect, prior version was printed out and he signed the signature page. He said, 'The [signed] [A]ward [A]greement did not reflect the changes that the board approved relative to the [P]lan. And the [P]lan was the controlling factor.'"

"According to Appellee, when Tom notified him that he was not going to be retained, he asked Tom about the equity he had accumulated in the company, and Tom said, 'We'll do what's right.' Appellee sent a letter to Tom on October 1, 2018, which stated in part as follows:

> Due to the notification that the company, Adenus Group L.L.C., desires not to renew my contract on the basis of 'going in a new direction', I had notified you that I have accumulated earned undistributed profit share at the end of 2017 in the amount of $254,043.00. You provided me no direct answer as to when I was going to receive that distribution. I expect to receive that distribution within ten (10) days of receipt of this letter at the address listed below.

> In addition, I expect the 2018 profit share to be distributed prior to April 15, 2019 as my contract ends on December 31, 2018.

"After receiving no response, Appellee sent a follow up letter on October 21, 2018, stating in part that his ten percent profit interest in Adenus was 'fully vested.' The October 21 letter went on to state:

> In my letter dated October 1, 2018, I raised this issue to your attention based on our previous discussions related to the buyout or liquidation of that interest which would facilitate a complete parting of the ways between Adenus Group and me. It was my understanding from our conversations that this was your intent, so I would like to further those discussions.

"After the trial, the trial court entered a Memorandum and Order on May 14, 2021, which made the following findings, in pertinent part:

> * * *
> The proof presented at trial established by clear and convincing evidence that (1) Adenus and Mr. Hyatt negotiated an agreement that included a sale option; (2) the Board approved the version of the Plan that included the sale option; (3) the version of the Award Agreement signed by the parties omitted the sale option; (4) Mr. Hyatt's testimony as well as the minutes from the July 15, 2008 Board meeting establish that the parties intended the sale option to be a part of the agreement between the parties; and (5) as a result of the parties' mutual mistake, the sale option was omitted from the signed Award Agreement. As a result, this Court should exercise its discretion to reform the Award Agreement to include the sale option thereby requiring the Company to purchase Mr. Hyatt's profit share at its fair market value as of December 31, 2018.
>
> * * *
> The purchase price as calculated under the terms of the Plan and the Award Agreement is $298,372 plus applicable interest and other expenses."

"The trial court also awarded Appellee prejudgment interest, taking judicial notice of interest rates from December 2018 to present, and concluding 'that Mr. Hyatt should be entitled an additional judgment in the amount of $36,053 representing prejudgment interest at 5.0% simple interest from January 1, 2019 to the date of entry of this Memorandum and Order.' (Footnotes and internal citations omitted)."

"The trial court thus ultimately ordered that Appellee was 'entitled to a declaratory judgment that his vested 10% profit share in Adenus Group, LLC was not involuntarily forfeited to Adenus Group, LLC upon the expiration of his employment with Adenus Group, LLC.' Furthermore, the trial court ordered that Appellee was 'awarded a judgment against Adenus Group, LLC in the sum of $334,425 representing the fair market value of his 10% profit share interest of $298,372 together with prejudgment interest at 5.0% simple interest since January 1, 2019 in the amount of $36,053.' The trial court stated that '[s]atisfaction by Adenus Group, LLC of the foregoing judgment in the amount of $334,425 shall result in the complete redemption of Charles Hyatt's vested 10% profit share interest in Adenus Group, LLC.' The trial court dismissed Appellee's complaints against the brothers individually, stating that it appeared that Appellee had abandoned them, and '[i]n any event, the proof at trial [did] not provide any basis for the Court to ignore Adenus' business form and impose personal liability against any of the named individual defendants.'

"In addition, the trial court determined that Appellee was the successful party and contractually entitled to an award of reasonable attorney's fees, pursuant to the 'prevailing party provision [of the Award Agreement].' The court determined, based on Appellee's attorney's affidavit and attached exhibits, that Appellee was entitled to a judgment of $89,105.00 in attorney's fees and court reporter expenses of $900.00. Finally, the trial court ordered that the foregoing judgments shall accrue post-judgment interest."

"Appellant argues that the executed version of the Award Agreement is clear and unambiguous and should be enforced as written, as with the Plan. Thus, the purpose of the profit share language was only to provide employees with proceeds from a sale of the company. And employees who were terminated in the manner that Appellee was terminated forfeited their entitlement to any profit share. In the alternative, Appellant contends that the trial court erred in valuing the share of profits to which Appellee was entitled. In contrast, Appellee argues that the trial court was correct to reform the contact because the executed agreement did not reflect what the parties negotiated and the board approved concerning the profit share due to employees. Appellee further asserts that the value of his interest when he was terminated was at least $298,372.00, and he met his burden of proving fair market value."

"Generally, 'courts must interpret contracts as they are written and are not at liberty to make a new contract for parties who have spoken for themselves.' *Sikora* [*v. Vanderploeg*], 212 S.W.3d [277] at 286 [(Tenn. Ct. App. 2006)] (internal citations omitted). 'Accordingly, the courts do not concern themselves with the wisdom or folly of a contract, and will not relieve parties from contractual obligations simply because they later prove to be burdensome or unwise.' *Id.* (internal citations and footnote omitted). 'Nevertheless, the law's strong policy favoring the enforcement of contracts as written must occasionally give way. Thus, it is well settled that the courts have the power to alter the terms of a written contract where, at the time it was executed, both parties were operating under a mutual mistake of fact or law regarding a basic assumption underlying the bargain.' *Id.* (citations omitted)."

"This Court has further explained what is necessary in order to procure reformation of a contract:

> * * *
> In order to obtain reformation on the basis of mistake in expression, a party must present clear and convincing evidence that: (1) the parties reached a prior agreement regarding some aspect of the bargain; (2) they intended the prior agreement to be included in the written contract; (3) the written contract materially differs from the prior agreement; and (4) the variation between the prior agreement and the written contract is not the result of gross negligence on the part of the party seeking reformation. 7 CORBIN ON CONTRACTS § 28.45, at 283; 27 WILLISTON ON CONTRACTS §§ 70:19, at 256, 70:23, at 264–65. Reformation is not automatically barred simply because one of the parties denies that there was an antecedent agreement or claims that the mistake was not mutual.
>
> As long as the party seeking reformation establishes the elements of a mistake in expression, any discrepancy between the parties' prior agreement and their written contract is presumed to be the result of a mutual mistake .... *Alexander v. Shapard*, 146 Tenn. at 108, 111, 240 S.W. at 292–93.

"*Sikora*, 212 S.W.3d at 287–88 (footnotes omitted)."

"Here, the undisputed evidence demonstrates that Appellee emailed the July 1 version of the Award Agreement to Charles, which included the sale and repurchase options, and stated, 'Let me know if any additional changes need to be made.' There is no evidence of a reply email or other discussion after that where the sale and repurchase options were intentionally removed. Indeed, Charles could not definitely state that any other negotiations had taken place that intentionally removed the sale and repurchase options following July 1. Based on this proof, the trial court explicitly credited Appellee's testimony that there were no further discussions materially altering the agreement between the parties after this date."

"We also agree with the trial court's finding that Adenus' inability to correctly identify the operative Plan up until trial is circumstantial evidence of the fact that 'the process of executing the definitive Award Agreement was plagued with administrative chaos culminating in the parties signing an incomplete preliminary draft rather than a complete version containing all of the terms and conditions approved by the Board.'"

"Here, the evidence does not preponderate against the trial court's findings as to any of the four elements of mutual mistake justifying reformation, all of which support Appellee's assertion that the parties' contract should be reformed. Because each of the four elements support reformation in this case, we conclude that Appellee presented clear and convincing evidence to support his claim that the agreement should be reformed on the basis of a mutual mistake. Consequently, the trial court did not err in reforming the Award Agreement on the basis of mutual mistake, and thus in determining that Appellee had a right to exercise the sale option of his vested, non-forfeited profit share. The trial court likewise did not err in determining that Appellant was in breach by failing to buy Appellee's profit share, and by ordering Appellant to pay Appellee for the profit share. Given our decision regarding reformation of the Award Agreement, we need not address the trial court's alternative holding or any other portion of the trial court's order applicable in the event the Award Agreement was not reformed to include a sale option."

BUSINESS ORGANIZATIONS

I. Corporations; Redemption of Oppressed Minority Shareholder's Stock; Determination of "Fair Value"

Buckley v. Carlock, No. M2019-02294-COA-R3-CV (Tenn. Ct. App., McBrayer, Feb. 4, 2022), perm. app. denied July 13, 2022.

"TLC of Franklin, Inc., an 'ultra-high-end' car dealership in Williamson County, Tennessee, is a close corporation. At its formation, Thomas Buckley owned 25% of the company's shares, which he bought for $375,000. He also served as TLC's general manager.

"In 2014, Grover Carlock acquired 75% of TLC from other shareholders for $10,578,087.85. A few months later, Mr. Buckley reduced his stake in the company. He sold 5% of the company's shares to Luke Bryan for $700,000. This left the company with three shareholders: Mr. Carlock, Mr. Buckley, and Mr. Bryan.

"After Mr. Carlock acquired his majority stake, Mr. Buckley remained general manager. Mr. Buckley also served on the board of directors and as an officer of the company. At first, the two worked cooperatively. But, over time, the business relationship soured.

"Mr. Buckley complained that Mr. Carlock treated TLC as his own and gave no regard to the rights or interests of the other shareholders. Mr. Carlock never held shareholder or director meetings, which were required by TLC's bylaws. And he entered into various transactions on behalf of TLC that benefitted either Mr. Carlock or an entity in which he held an interest. Among those transactions was an increase in management fees paid by TLC to Carlock Management Company, Inc., a corporation wholly owned by Mr. Carlock."

"Mr. Buckley sued Mr. Carlock and Carlock Management Company (collectively, 'Defendants'), seeking to dissolve TLC. As grounds, Mr. Buckley claimed that Mr. Carlock 'employ[ed] oppressive and fraudulent acts to squeeze out [Mr. Buckley].' *See* Tenn. Code Ann. § 48-24-301(2)(B) (2019) (allowing a court to dissolve a corporation if 'those in control ... have acted ... in a manner that is illegal, oppressive, or fraudulent'). He also claimed that Mr. Carlock had wasted TLC's assets. *See id.* § 48-24-301(2)(D) (allowing a court to dissolve a corporation if '[t]he corporate assets are being misapplied or wasted'). And he accused Mr. Carlock of usurping TLC's corporate opportunities, engaging in self-dealing transactions on behalf of TLC, and breaching his fiduciary duty to TLC.

"In addition to seeking TLC's dissolution, Mr. Buckley brought causes of action for promissory fraud, conversion, and unjust enrichment. He sought damages against Defendants, as well as an injunction unwinding the self-dealing transactions. Mr. Buckley also sought attorney's fees and prejudgment interest.

"After a bench trial, the court found that Mr. Carlock's actions were 'oppressive of Mr. Buckley's rights as a minority shareholder.' But dissolution of the company would have been 'too extreme' of a remedy. At trial, Mr. Buckley abandoned dissolution as a form of relief and instead requested redemption of his shares. The court found that redemption was 'the more appropriate remedy.'

"Although Mr. Buckley had given his opinion of the fair value of his shares in TLC, the court found that opinion unreliable. And the record was otherwise insufficient for the court to determine fair value. So the court conducted another hearing at which it heard valuation expert testimony.

"Adam Lawyer testified for Mr. Buckley. Mr. Lawyer considered the three valuation methods—market, income, and asset—and selected a 'market' approach. He employed three methodologies. The first two were based on the 'current industry market indicator' or 'blue-sky' method. Mr. Lawyer described the method as using a blue-sky multiple to account for all intangible value of the dealership, including goodwill and, more importantly, franchise value.

"In the first methodology, the blue-sky multiple was multiplied by normalized earnings. To arrive at normalized earnings, revenues of TLC from 2015 and 2016 were multiplied by a 'normalization factor' to estimate expected profitability going forward under normal conditions. Mr. Lawyer used a normalization factor of 5%, which came from the 'range of normal earnings from [other] ultra-high-end franchises.' Relative to those other franchises, Mr. Lawyer expected TLC's normalized earnings to be between 4% and 6%. He 'simply selected the midpoint at 5%.'

"Mr. Lawyer then multiplied the normalized earnings by a blue-sky multiple of eight. He arrived at that figure based on his experience in ultra-high-end dealership transactions and automotive dealership publications. Based on those publications, 'premium luxury' dealerships show blue-sky multiples between about seven and nine. And, in Mr. Lawyer's experience, ultra-high-end dealerships were 'a step above that.' So, in Mr. Lawyer's opinion, a blue-sky multiple of eight 'certainly seem[ed] reasonable.' After multiplying normalized earnings by the blue-sky multiplier, Mr. Lawyer added in TLC's adjusted net assets.

"The second methodology was similar to the first. It also involved multiplying normalized earnings by a blue-sky multiple of eight and adding in adjusted net assets. But, instead of using normalized earnings, Mr. Lawyer used projected revenues from an investment presentation prepared by management.

"The third methodology was based on prior TLC stock transactions. Mr. Lawyer analyzed Mr. Carlock's purchase of 75% of TLC and Mr. Bryan's purchase of 5% of TLC. Mr. Lawyer excluded Mr. Buckley's initial purchase of 25% of TLC, reasoning that the purchase was 'an option-based purchase at a previously agreed-upon price.' So, according to Mr. Lawyer, Mr. Buckley's purchase did not reflect TLC's fair value.

"To arrive at a value of Mr. Buckley's shares, Mr. Lawyer tabulated a weighted average from each methodology. He opined that the value of Mr. Buckley's shares was $3.3 million.

"Scott Womack testified for Mr. Carlock. Mr. Womack used an income approach. In determining TLC's profitability, Mr. Womack used a normalization factor of 1.5% instead of 5%. That figure, he explained, was more in line with TLC's actual performance. It was also supported by his experience in performing valuations and other information.

"For TLC's intangible value, Mr. Womack used a blue-sky multiple of 7.5. But he admitted that Mr. Lawyer's blue-sky multiple of eight was still 'within the range of reason.' Mr. Womack did not add in TLC's assets to his calculation. In his view, to do so would have been 'double counting.' An income approach assumes that the assets contribute to earnings. That is, the value of the assets is

shown by the company's earnings. Mr. Womack ultimately valued Mr. Buckley's 20% interest in TLC at $1,092,000.

"The trial court accepted Mr. Lawyer's blue-sky approach with normalized earnings. But the court found Mr. Lawyer's normalization factor too high and Mr. Womack's too low. Both experts testified that a compilation of data from the National Auto Dealers Association was authoritative and reliable. From this compilation, the court determined that normalization factors of 2.9% and 2.8% for 2015 and 2016 revenues, respectively, were appropriate. The court also determined that Mr. Lawyer's blue-sky multiple of eight was appropriate.

"On including adjusted net assets in the valuation, the court added one-half of the adjusted net asset value. In doing so, the court arrived at a value of $1,745,489.50 for Mr. Buckley's 20% share of TLC. Because a 'punctilious method' of arriving at fair value '[wa]s not required,' the court rounded the amount to $1,745,500.

"In a later order, the trial court denied Mr. Buckley's request for prejudgment interest. But the court granted his request for attorney's fees. *See id.* § 48-24-302(d) (2019) (allowing a court to award a party 'its reasonable costs, including attorney fees, if it finds for such party' in a proceeding for judicial dissolution). The court found that Mr. Buckley was the prevailing party in one of two 'phases' of the case. He prevailed in the first phase where he proved shareholder oppression. But he did not prevail in the second phase because the court's valuation of his interest in TLC was closer to the value offered by Mr. Carlock. So the court awarded Mr. Buckley his reasonable attorney's fees only for the first phase. And it found Mr. Buckley's remaining claims moot."

"In forcing the redemption of Mr. Buckley's shares, the court essentially awarded him the same remedy that is available to a dissenting shareholder, which is 'the fair value of the shareholder's shares.' Tenn. Code Ann. § 48-23-102(a) (2019). Mr. Buckley claims that the question of fair value is a question of fact. Although true, determining a company's fair value 'is generally left to the discretion of the courts.' *Athlon Sports Commc'ns, Inc. v. Duggan*, 549 S.W.3d 107, 120 (Tenn. 2018) (citation omitted); *see Elk Yarn Mills v. 514 Shares of Common Stock of Elk Yarn Mills Inc.*, 742 S.W.2d 638, 640 (Tenn. Ct. App. 1987) (explaining that, with share valuation, 'much is left to the discretion of the evaluator')."

"Fair value is 'the shareholder's proportionate interest in the business valued as a going concern.' *Raley v. Brinkman*, 621 S.W.3d 208, 237-38 (Tenn. Ct. App. 2020). It may be proven 'by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court.' *Athlon Sports Commc'n, Inc.*, 549 S.W.3d at 126 (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. 1983)).

"Fair value 'is not the same as fair market value,' which is 'the price at which property would change hands between a willing buyer and a willing seller when neither party is under an obligation to act.' *Id.* at 119 (quoting *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 362 (Colo. 2003)). Like a dissenting shareholder—or LLC member whose interest is subject to a forced buyout—a minority shareholder forcing the redemption of his shares 'is an unwilling seller with little or no bargaining power.' *See id.* (citation omitted); *see also Raley*, 621 S.W.3d at 237. And fair value requires that a 'shareholder[ ] be fairly compensated, which may or may not equate with the market's judgment about the stock's value.' *Athlon Sports Commc'n, Inc.*, 549 S.W.3d at 119 (citation omitted). There may not even be a market, and thus no market value, where a close

corporation is at issue. *See id.*; *see also Raley*, 621 S.W.3d at 237 (reasoning that a close corporation 'is privately owned, and thus, the market is often irrelevant').

"Here, the trial court accepted a valuation methodology from Mr. Lawyer that is considered acceptable in the financial community. Authoritative automotive publications endorse the blue-sky approach. And it is used in the 'great majority' of ultra-high-end dealership transactions. The court also found the blue-sky method admissible and reliable. *See Payne v. CSX Transp., Inc.*, 467 S.W.3d 413, 454 (Tenn. 2015) (explaining that the trial court has discretion 'to function as a "gatekeeper" with regard to the admissibility of expert testimony'). Critically, the method was based on fair value, not fair market value, which Mr. Lawyer distinguished.

"Still, Mr. Buckley claims that the trial court made three errors in its valuation of his shares. He argues that the normalization factors the court used 'were arbitrary and not supported by the evidence.' He also contends that the court 'diluted the impact of the tangible assets' by only accounting for half of them. And he argues that the court 'improperly disregarded' the evidence of prior sales.

"The court derived its normalization factors from data from the National Auto Dealers Association. The compilation did not list profit margins for ultra-high-end dealerships. But the profit margins for import dealerships were 2.7% and 2.6% in 2015 and 2016, respectively. And the profit margins for luxury dealerships were 2.8% and 2.7% for those years. According to Mr. Lawyer, ultra-high-end dealerships are 'a step above that.' So, based on the data's pattern, the court extrapolated the data to arrive at normalization factors of 2.9% and 2.8%.

"Mr. Buckley faults the court for disregarding Mr. Lawyer's testimony as to the normalization factors. In Mr. Buckley's view, that testimony was the only competent evidence of normalization. We disagree. The trial court gave credit to a data compilation that both experts testified was authoritative and reliable. And 'the trier of fact is not bound to accept an expert witness's testimony as true.' *Roach v. Dixie Gas Co.*, 371 S.W.3d 127, 150 (Tenn. Ct. App. 2011). Instead, it 'may reject any expert testimony that it finds to be inconsistent with the credited evidence.' *Id.* The court did exactly that when it selected normalization factors lower than those to which Mr. Lawyer testified.

"As for the tangible assets, both experts agreed that, under the blue-sky method, adjusted net assets are appropriately added to the equation. But Mr. Womack testified that, under his income approach, adding adjusted net assets would be double counting. Despite accepting the blue-sky method, the court accounted for only half of TLC's adjusted net assets.

"Although it may have been appropriate to account for the full adjusted net asset value under the blue-sky method, valuation 'is as much art as science.' *Athlon Sports Commc'n, Inc.*, 549 S.W.3d at 123 (quoting *In re Appraisal of Dole Food Co.*, 114 A.3d 541, 553 n.7 (Del. Ch. 2014)). And a court's calculation of fair value need only be equitable. *See id.* at 125. The trial court, as factfinder, was entrusted with resolving the parties' 'legitimate but competing expert opinions.' *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 275 (Tenn. 2005). Under the abuse of discretion standard, we will not 'substitute [our] judgment for that of the trial court.' *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 105 (Tenn. 2011). Splitting the difference on the question of tangible assets was an acceptable and equitable disposition. *See Harmon*, 594 S.W.3d at 305; *Athlon Sports Commc'n, Inc.*, 549 S.W.3d at 125.

"As for the evidence of prior sales, the trial court did not find Mr. Lawyer's testimony in this regard reliable. We will not disturb the court's credibility finding on this record. *See Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). The court was entitled to disregard the evidence. *See England v. Burns Stone Co.*, 874 S.W.2d 32, 38 (Tenn. Ct. App. 1993) (explaining that 'the trier of fact may place whatever weight it chooses upon [expert] testimony').

"Ultimately, the trial court used a valuation method that is generally acceptable in the financial community to equitably calculate Mr. Buckley's interest in TLC. The court did not abuse its discretion."

"The court also did not abuse its discretion in denying prejudgment interest on the value of Mr. Buckley's shares. Whether to award prejudgment interest 'is within the sound discretion of the trial court.' *Spencer v. A-1 Crane Serv., Inc.*, 880 S.W.2d 938, 944 (Tenn. 1994)."

"Here, as the court reasoned, Mr. Buckley's claim for the redemption of his shares in TLC was for an uncertain, unliquidated amount. That alone makes the court's denial of prejudgment interest appropriate. *See Wasielewski v. K Mart Corp.*, 891 S.W.2d 916, 919 (Tenn. Ct. App. 1994) (finding no abuse of discretion in a denial of prejudgment interest 'where the plaintiff's claim was for unliquidated damages sounding in tort'). But Mr. Buckley also delayed in bringing his claim for the redemption of his shares, seeking only the dissolution of TLC until the time of trial. So the court properly found that an award of prejudgment interest would have been unfair under the circumstances."

"After denying Mr. Buckley prejudgment interest, the trial court dismissed Mr. Buckley's unjust enrichment claim as moot. The court reasoned that awarding him the fair value of his shares fully compensated him. Mr. Buckley's claim was based on property that he searched for and located for TLC to purchase. Mr. Carlock instead purchased the property for himself and leased it to TLC. He did not compensate Mr. Buckley for locating the property. So Mr. Buckley claimed that Mr. Carlock was unjustly enriched by Mr. Buckley's uncompensated efforts in locating the property.

"We agree with the trial court that awarding Mr. Buckley the fair value of his shares compensated him for Mr. Carlock's conduct with respect to the property. In his complaint, Mr. Buckley claimed that Mr. Carlock's purchase of the property for himself misappropriated a corporate opportunity of TLC. Mr. Buckley's unjust enrichment claim was an alternative theory for the same conduct.

"The trial court found that Mr. Carlock did, in fact, misappropriate a corporate opportunity by purchasing the property for himself. That misappropriation contributed to the court's finding of shareholder oppression. Mr. Buckley was compensated for the oppression by receiving the fair value of his shares. To allow Mr. Buckley to proceed on his alternative theory of unjust enrichment would give rise to a double recovery, which is not permitted. *See Shahrdar v. Global Hous., Inc.*, 983 S.W.2d 230, 238 (Tenn. Ct. App. 1998) ('[I]f the damages claimed under each theory [of recovery] overlap, the [p]laintiff is only entitled to one recovery.'); *Ford Motor Co. v. Taylor*, 446 S.W.2d 521, 530 (Tenn. Ct. App. 1969) ('[C]are should be exercised to avoid double recoveries by allowing the same damage twice under different designations.').

"We lastly address the attorney's fees awarded below and the parties' requests for attorney's fees on appeal, starting with the fees awarded to Mr. Buckley. A trial court enjoys 'considerable discretion in determining a reasonable attorney's fee.' *First Peoples Bank of Tenn. v. Hill*, 340

S.W.3d 398, 410 (Tenn. Ct. App. 2010). We will uphold the court's decision absent an abuse of discretion. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011)."

"Here, the trial court awarded Mr. Buckley his attorney's fees for the first phase of trial, but not the second, because Mr. Buckley was the prevailing party only as to the first phase. Mr. Buckley argues that he was the prevailing party as to the whole case. So he claims that he should have been awarded attorney's fees for both phases."

"The trial court's use of the term 'prevailing party' and description of Mr. Buckley as 'not the prevailing party' in connection with the second phase of trial was inartful. But we conclude that the court was not treating the case as having two 'different prevailing parties.' Instead, we read the court's analysis as taking into consideration the reasonableness of the fee requested and the results obtained. *See Hensley*, 461 U.S. at 440 (recognizing that 'where the plaintiff achieve[s] only limited success, the ... court should award only that amount of fees that is reasonable in relation to the results obtained'); Tenn. Sup. Ct. R. 8, RPC 1.5(a)(4) (providing that 'the results obtained' are relevant to 'determining the reasonableness of a fee').

"In that light, the court did not abuse its discretion in the fees awarded to Mr. Buckley. Mr. Buckley sought $3,300,000 for the value of his shares in TLC. The court awarded him $1,745,500. Although Mr. Buckley was the prevailing party, he only had limited success on the valuation question. *See Hensley*, 461 U.S. at 440; Tenn. Sup. Ct. R. 8, RPC 1.5(a)(4). Declining to award fees related to that phase of the litigation was not unreasonable."

II. Nonprofit Corporations

A. Participation in Meetings Remotely

Chapter 704, Public Acts 2022, adding T.C.A. § 48-57-109 eff. July 1, 2022.

"(a) Unless the charter or bylaws provide otherwise, and subject to guidelines and procedures as the corporation may adopt, a corporation may permit one (1) or more members or proxyholders to participate in a regular or a 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 member entitled to vote or proxyholder of a member entitled to vote;
(2) The corporation implements reasonable measures to provide members and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, 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 each vote or other action taken by a member or proxyholder that is taken by means of remote communication.

"(b) A member 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."

B. Immunity from Liability Extended to Tax-Exempt Organizations that Benefit Veterans

Chapter 696, Public Acts 2022, adding T.C.A. § 48-58-601(d)(14) eff. Mar. 18, 2022.

The statutory immunity from suit protecting the directors, trustees or members of the governing body of certain nonprofit entities has been extended to:

"(14) Nonprofit corporations, associations, and organizations that are exempt from federal income taxation under § 501(c)(19) of the Internal Revenue Code of 1986 (26 U.S.C. § 501(c)(19)), as amended [tax-exempt organizations that benefit veterans of the United States Armed Forces]."

III. Partnerships; Interpretation of Partnership Agreement

Liles v. Young, No. M2020-01702-COA-R3-CV (Tenn. Ct. App., McClarty, Jan. 13, 2022), perm. app. denied Apr. 13, 2022.

"Michael E. Young was a pharmacist in Clarksville, where he owned St. Bethlehem Drugs and IV Solutions, a closed-door pharmacy that prepares IV meds for homes and facilities. At some point, Young decided to move IV Solutions to Nashville. David L. Liles met Young's certified public accountant, Bob Yates ('CPA Yates'), when CPA Yates was looking for a person to serve as chief financial officer for Young's businesses. Young thereafter requested that Liles find a Nashville location for IV Solutions.

"Once Liles found a suitable location for IV Solutions, Young purchased the property. Because Liles had a great deal of involvement in IV Solutions, Young decided to involve Liles in the construction of the building for the business. He also offered Liles a partnership interest in return for management of the construction of the property and collection of rents from the tenants. The agreement ('Partnership Agreement') for Downside Risk Professional Properties ('DRPP') was drafted by Young's attorney and signed in 2004. The sole business of DRPP was the development and operation of commercial real estate in Davidson County."

"The agreement in this case is unambiguous. A contract is not ambiguous 'merely because the parties may differ as to interpretations of certain of its provisions.' *Cookeville Gynecology & Obstretics, P.C. v. Southeastern Data Sys., Inc.*, 884 S.W.2d 458, 462 (Tenn. Ct. App. 1994). 'Neither the parties nor the courts can create an ambiguity where none exists in a contract.' *Id.*

"The trial court determined that the Partnership Agreement, in Article III, clearly requires that Liles receive an equity stake in exchange for the contribution of services in lieu of cash. It is undisputed that Liles's 'percentage interest' or 'equity stake' in DRPP began at 1% and, over time, could be increased by his management efforts through application of a designated formula found in Article III of the Partnership Agreement. Specifically, the value of the equity interest being credited is the total dollar amount of 2% of the net rental from IV Solutions and 7% of rentals paid by all other tenants, all to be considered 'equitable contributions' by Liles. There is nothing in the Partnership Agreement that required the 5% appreciation, which caused Liles's share of profit/loss to be diluted, and indirectly caused his capital account to be diluted dollar for dollar. Liles's capital account, however, was never credited for any of the service fees earned through his management efforts expended for over a decade.

"Young and Yates appear to contend that Liles's service fees should only be used to increase Liles's profit/loss interest in DRPP to the maximum 20%. Article IV of the partnership agreement provides:

> SECTION 4.01. ALLOCATION OF PROFITS AND LOSSES. The PARTNERSHIP'S net profits and losses for each fiscal year of the PARTNERSHIP and each item of income, gain, loss, deduction, or credit entering into the computation thereof shall be allocated between the PARTNERS in accordance with their ownership interest for each year.

"A profits interest in a partnership is only an interest in the income of the partnership, not its assets. However, the clear language of the Partnership Agreement requires that Liles was to receive an increase in his equity interest (as an equity partner) based on the value of his earned service fees—not a profit/loss interest (income partner). DRPP's tax returns confirm that Liles's service fees were never reflected as an equitable contribution of capital by Liles. His ownership interest was shorted because his equity stake was not calculated on an annual basis 'after adjustment in accordance with Section 4.01 hereof.' An allocation of profit or loss was the only item ever allocated to Liles's capital account, despite the clear language in the Partnership Agreement to the contrary."

"Section 1.05(c) of the Partnership Agreement determines how Liles will be compensated for his partnership interest when DRPP is terminated. It provides:

> From the value of the property ..., any outstanding debt, accrued interest and accounts payable will be deducted with MICHAEL E. YOUNG to then pay DAVID LILES his percentage ownership interests as exists [sic] at the time, but not to exceed twenty percent of the equity, at which time DAVID LILES will sign such documents as necessary to convey his partnership interests to MICHAEL E. YOUNG so that MICHAEL E. YOUNG will own all assets of the PARTNERSHIP in fee simple absolute.

"Additionally, the Partnership Agreement notes:

> SECTION 4.03. DISTRIBUTION OF PROCEEDS UPON SALE. The net cash proceeds to the PARTNERSHIP resulting from the sale, exchange ... or other disposition of all, or any substantial part of the Property shall be distributed and applied in the following manner and order of priority:
> ...
> (d) To the PARTNERS in accordance with their respective Capital Accounts, calculated after adjustment in accordance with Section 4.01 hereof.

"Together with the directive from Article III, these provisions require that, year over year, the partners' capital accounts be adjusted in accordance with Section 4.01. As noted earlier, Section 4.01 requires that any item of income, expense, etc., be allocated between the partners according to their respective ownership interests for each year and the last sentence of Article III directs how that must be implemented: 'All amounts allocated to DAVID LILES to allow him to increase his equity stake shall be treated as income to DAVID LILES individually and be an expense of the PARTNERSHIP for tax purposes.' The Partnership Agreement specifically required an annual credit to Liles's capital account (and a corresponding expense to the partnership). Liles was not compensated (in cash) for his service fees but would be compensated by a credit to his capital account for the value of his service fees. This was never done. The service fees were not treated as

income as required by the Partnership Agreement; Liles never received a 1099 in any year between 2005 and 2017 and the value of his service fees was not reflected on his K-1 in any year.

"The record supports the determination by the trial court that Liles had achieved a 20% equity ownership stake in DRPP and that Liles is entitled to 20% of the net proceeds of the sales of the real property and remaining assets. We further agree with the trial court that the record does not support that Liles is entitled to a credit of $118,000, as the service fees appear to be reflected in his increased equity stake in DRPP."

IV. Decentralized Organizations (Sometimes Called a "DAO")

Chapter 852, Public Acts 2022, adding T.C.A. §§ 48-250-101–115 eff. Apr. 20, 2022.

"48-250-101. Chapter definitions.

"As used in this chapter:

(1) 'Decentralized organization' means a decentralized organization, organized under this chapter;

(2) 'Digital asset' means:
   (A) An electronic record in which a person has a right or interest; and
   (B) Does not include an underlying asset or liability unless the asset or liability is itself an electronic record;

(3) 'Distributed ledger technology' means a distributed ledger protocol and supporting infrastructure, including blockchain, that uses a distributed, decentralized, shared, and replicated ledger, whether it be public or private, permissioned or permissionless, and that may include the use of electronic currencies or electronic tokens as a medium of electronic exchange;

(4) 'Electronic,' relating to technology, means having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;

(5) 'Majority of the members' means the approval of more than fifty percent (50%) of participating membership interests in a vote for which a quorum of members is participating, excluding a person who dissociates from the organization as set forth in § 48–250–112;

(6) 'Membership interest' means:
   (A) A member's ownership share in a member-managed decentralized organization, which may be defined in the entity's articles of organization, smart contract, or operating agreement; or
   (B) A digital asset, if designated as a membership interest in the organization's articles of organization or operating agreement;

(7) 'Publicly available identifier' includes, but is not limited to, a URL, contract address, published whitepaper, or other similar item that is available to the public;

(8) 'Quorum' means a minimum requirement on the sum of membership interests participating in a vote for that vote to be valid;

(9) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and

(10) 'Smart contract' means an event-driven computer program, that executes on an electronic, distributed, decentralized, shared, and replicated ledger that is used to automate transactions, including, but not limited to, transactions that:

(A) Take custody over and instruct transfer of assets on that ledger;
(B) Create and distribute electronic assets;
(C) Synchronize information; or
(D) Manage identity and user access to software applications.

"48-250-102. Application of the Tennessee Revised Limited Liability Company Act.

"(a) The Tennessee Revised Limited Liability Company Act, compiled in chapter 249 of this title, applies to decentralized organizations to the extent not inconsistent with this chapter.

"(b) This chapter does not repeal or modify a statute or rule that applies to a limited liability company that is organized under the Tennessee Revised Limited Liability Company Act that does not elect to become a decentralized organization.

"48-250-103. Decentralized organization status.

"(a) A decentralized organization is a limited liability company whose articles of organization contain a statement that the company is a decentralized organization as described in subsection (c).

"(b) A limited liability company formed under the Tennessee Revised Limited Liability Company Act, compiled in chapter 249 of this title, may convert to a decentralized organization by amending its articles of organization to include the statement described in subsection (c).

"(c) A statement in substantially the following form must appear conspicuously in the articles of organization of a decentralized organization:

NOTICE OF RESTRICTIONS ON DUTIES AND TRANSFERS

The rights of members in a decentralized organization may differ materially from the rights of members in other limited liability companies. The Tennessee Decentralized Organization Supplement, underlying smart contracts, articles of organization, and operating agreement, if applicable, of a decentralized organization may define, reduce, or eliminate fiduciary duties and may restrict the withdrawal or resignation from the decentralized organization, or the transfer of ownership interests, return of capital contributions, or dissolution of the decentralized organization.

"(d) The registered name for a decentralized organization must include wording or abbreviation to denote its status as a decentralized organization, specifically 'DO', 'DAO', 'DO LLC', or 'DAO LLC'.

"(e) A statement in the articles of organization may define the decentralized organization as either a member-managed decentralized organization or a smart contract-managed decentralized organization. If the type of decentralized organization is not provided for in the articles of organization, then the limited liability company is presumed to be a member-managed decentralized organization.

"48-250-104. Formation.

"(a) A person may form a decentralized organization by having at least one (1) member sign and deliver one (1) original and one (1) exact or conformed copy of the articles of organization to the

secretary of state for filing. The person forming the decentralized organization does not need to be a member of the organization.

"(b) A decentralized organization must have and continuously maintain in this state a registered agent as provided in § 48–249–109.

"(c) A decentralized organization may form and operate for a lawful purpose, regardless of whether for profit.

"(d) A smart contract-managed decentralized organization may only form under this chapter if the underlying smart contracts are able to be amended.

"48-250-105. Articles of organization.

"(a) The articles of organization of a decentralized organization must:
(1) Include a statement that the organization is a decentralized organization, pursuant to § 48–250–103;
(2) Set forth the matters required by this chapter; and
(3) Include a publicly available identifier of a smart contract directly used to manage, facilitate, or operate the decentralized organization.

"(b) Except as otherwise provided in this chapter, the articles of organization and the smart contracts for a decentralized organization govern the following:
(1) Relations among the members and between the members and the decentralized organization;
(2) Rights and duties under this chapter of a person in that person's capacity as a member;
(3) Activities of the decentralized organization and the conduct of those activities;
(4) Means and conditions for amending the operating agreement;
(5) Rights and voting rights of members;
(6) Transferability of membership interests;
(7) Withdrawal of membership;
(8) Distributions to members prior to dissolution;
(9) Amendment of the articles of organization;
(10) Procedures for amending applicable smart contracts; and
(11) All other aspects of the decentralized organization.

"48-250-106. Amendment or restatement of articles of organization.

"Articles of organization must be amended when:
(1) There is a change in the name of the decentralized organization;
(2) There is a false or erroneous statement in the articles of organization; or
(3) The decentralized organization's smart contracts have been amended.

"48-250-107. Operating agreement.

"If the articles of organization or smart contract do not provide for a matter described in § 48–250–105, then the operation of a decentralized organization may be supplemented by an operating agreement.

“48-250-108. Management.

“Unless otherwise provided in the articles of organization or operating agreement, management of a decentralized organization is vested in:

(1) The organization's members, if member-managed; or
(2) The smart contract, if smart contract-managed.

“48-250-109. Standards of conduct for members.

“Unless otherwise provided for in the articles of organization or operating agreement, a member of a decentralized organization does not have a fiduciary duty to the organization or another member; except, that the member is subject to the implied contractual covenant of good faith and fair dealing.

“48-250-110. Membership interests for member-managed decentralized organizations—Voting.

“For purposes of §§ 48–250–112 and 48–250–113, and unless otherwise provided for in the articles of organization, smart contract, or operating agreement:

(1) Membership interests in a member-managed decentralized organization are calculated by dividing a member's contribution of digital assets to the organization divided by the total amount of digital assets contributed to the organization at the time of a vote;
(2) If members do not contribute digital assets to an organization as a prerequisite to becoming a member, each member possesses one (1) membership interest and is entitled to one (1) vote; and
(3) A quorum requires no less than a majority of membership interests entitled to vote.

“48-250-111. Right to information.

“A member does not have a right under this chapter to separately inspect or copy records of a decentralized organization, and the organization does not have an obligation to furnish information concerning the organization's activities, financial condition, or other circumstances to the extent the information is available on publicly available distributed ledger technology.

“48–250–112. Disassociation of members.

“(a) A member may only disassociate from a decentralized organization in accordance with the terms set forth in the articles of organization, the smart contracts, or, if applicable, the operating agreement.

“(b) A member of a decentralized organization is not able to have the organization dissolved for a failure to return the member's contribution to capital.

“(c) Unless the organization's articles of organization, smart contracts, or operating agreement provide otherwise, a disassociated member forfeits all membership interests in the decentralized organization, including governance or economic rights.

“48-250-113. Dissolution.

“(a) A decentralized organization is dissolved upon the occurrence of the following:

(1) The period fixed for the duration of the organization expires;
(2) By vote of the majority of the members of a member-managed decentralized organization;
(3) At the time or upon the occurrence of events specified in the underlying smart contracts, or articles of organization, or operating agreement;
(4) The decentralized organization failed to approve proposals or take actions for a period of one (1) year; or
(5) By order of the secretary of state, if the decentralized organization is deemed to no longer perform a lawful purpose.

"(b) As soon as possible following the occurrence of an event specified in subsection (a), the organization must execute a statement of intent to dissolve in the form prescribed by the secretary of state.

"48-250-114. Miscellaneous.

"(a) The articles of organization and the operating agreement of a decentralized organization are effective as statements of authority.

"(b) If the articles of organization and operating agreement conflict, then the articles of organization control.

"(c) If the articles of organization and smart contract conflict, then the smart contract controls, except for provisions that comply with §§ 48–250–104 and 48–250–105(a) and (b).

"48-250-115. Foreign decentralized organization.

"The secretary of state shall not issue a certificate of authority for a decentralized organization based outside of the United States or its territories."

GOVERNMENT

I. Election Law

A. Injunction Enjoining Enforcement of New District Boundaries and Extending Filing Deadline Vacated Due to Harm on Election Officials and Process

Moore v. Lee, 644 S.W.3d 59 (Tenn., Page, 2022).

"The Plaintiffs filed a lawsuit challenging the reapportionment plan for the districts of the Tennessee Senate that the Tennessee General Assembly enacted after the 2020 census. Specifically, the Plaintiffs alleged that the reapportionment plan violates article II, section 3 of the Tennessee Constitution because it fails to consecutively number the four Senatorial districts included in Davidson County. The Plaintiffs requested declaratory and injunctive relief. The trial court granted a temporary injunction enjoining the Defendants from enforcing or giving any effect to the boundaries of the Senatorial districts. The trial court provided the General Assembly with fifteen days to remedy the defect pursuant to Tennessee Code Annotated section 20-18-105, stating that if the defect was not remedied, the trial court would impose an interim plan for the 2022 election. Tennessee Code Annotated section 2-5-101(a)(1) sets the deadline for filing candidate nominating petitions as the first Thursday in April at noon. Thus, the trial court further extended the statutory April 7, 2022 filing deadline for Senatorial candidates until May 5, 2022. The Defendants filed an application for extraordinary appeal in the Court of Appeals pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. This Court assumed jurisdiction over the case pursuant to Tennessee Code Annotated section 16-3-201(d)(3). We conclude that the trial court erred by granting the injunction because it failed to adequately consider the harm the injunction will have on our election officials who are detrimentally impacted by the extension of the candidate filing deadline, as well as the public interest in ensuring orderly elections and avoiding voter confusion. We vacate the injunction and remand to the trial court."

B. Voting Machine Must Produce Voter-Verifiable Paper Audit Trail

Chapter 1144, Public Acts 2022, adding T.C.A. § 2-9-101(d) eff. June 3, 2022.

"(1) On and after January 1, 2024, and notwithstanding another law to the contrary, each voting machine used by a county election commission must produce a voter-verifiable paper audit trail.

"(2) A county election commission may apply to the coordinator of elections for an extension of up to two (2) years if necessary to comply with subdivision (d)(1).

"(3) As used in this subsection (d), 'voter-verifiable paper audit trail' means a paper record that is marked either manually by the voter or with the assistance of a device that includes human-readable voter selections that the voter may check for accuracy before the vote is cast."

C. Non-Qualified Voters; Lists to Federal Court Jury Coordinator

Chapter 939, Public Acts 2022, adding T.C.A. §§ 2-2-102(b) and 2-2-113 eff. Apr. 29, 2022.

2-2-102(b).

"(b) (1) An individual who is not a citizen of the United States shall not vote in a federal, state, or local election.

(2) A county, municipality, or other political subdivision of this state shall not grant voting rights to a person who is not a United States citizen for an election."

2-2-113.

"(a) Lists of registered voters may be provided to federal courts for purposes of selecting jurors on the condition that the jury coordinator provides notice pursuant to subsection (b) regarding ineligible or potentially ineligible voters.

"(b) The jury coordinator shall prepare or cause to be prepared a list of each person disqualified or potentially disqualified as a prospective juror from jury service due to being a non-United States citizen, convicted of a felony, deceased, not a resident of this state, or not a resident of the county. The list must be prepared and sent to the coordinator of elections according to the jury summons cycle used by the court clerk. This section does not prevent the list from being sent more frequently. The list may be provided by mail, facsimile transmission, or email.

"(c) The jury coordinator shall provide the coordinator of elections with the following information about each disqualified juror:

(1) The full name of the disqualified juror;
(2) Current and prior addresses, if any;
(3) Telephone number, if available;
(4) Date of birth; and
(5) The reason the prospective juror was disqualified.

"(d) After verifying that the person is a registered voter, the coordinator of elections shall forward the information to the administrator of elections in the county where the voter is registered.

"(e) The administrator of elections shall follow the procedures prescribed by § 2–2–106 or § 2–2–141, as applicable.

"(f) In addition to the list of names, if the jury coordinator has documentation showing the person's disqualification under subsection (b), the documentation may be forwarded to the coordinator of elections."

D. Residency Requirement to Qualify as Candidate for U.S. Senate or House Primary

Chapter 857, Public Acts 2022, adding T.C.A. § 2-13-209 eff. Apr. 13, 2022.

"In order to qualify as a candidate in a primary election for United States senate or for member of the United States house of representatives, a person shall meet the residency requirements for state senators and representatives contained in the Tennessee constitution."

E. Campaign Contributions; Judicial Candidates

Chapter 668, Public Acts 2022, adding T.C.A. § 2-10-313 eff. Mar. 18, 2022.

"Notwithstanding any law to the contrary, a judicial candidate may personally solicit and accept campaign contributions."

II. Judges and Chancellors

A. Judicial Qualifications

Chapter 1120, Public Acts 2022, amending T.C.A. § 17-1-106(a) eff. Oct. 1, 2022.

"(a) In addition to the qualifications provided for judges by the Constitution of Tennessee, Article VI, §§ 3 and 4, judges of the supreme court, court of appeals, court of criminal appeals, chancery courts, circuit courts, criminal courts, and courts exercising the jurisdiction imposed in one (1) or more of the chancery courts, circuit courts, or criminal courts shall be learned in the law, which must be evidenced by the judge:

(1) Being authorized to practice law in the courts of this state;
(2) Being in good standing with the board of professional responsibility; and
(3) Not having been publicly censured by the board of professional responsibility or suspended or disbarred from the practice of law within the ten (10) years preceding the judge's term of office for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; provided, that this subdivision (a)(3) does not apply to those serving in a judicial position as of the effective date of this act."

B. Board of Judicial Conduct

Chapter 976, Public Acts 2022, amending T.C.A. § 17-5-302(a) and adding §§ 17-5-302(b) and -303(h) eff. July 1, 2022.

17-5-302(a).

"(a) The board is authorized, on its own motion, or pursuant to the complaint of a person having reason to believe a judge is disabled, to investigate and take appropriate action, including recommendation of removal from office, in any case in which an active judge is suffering from a temporary or permanent disability, physical or mental, that would substantially interfere with the prompt, orderly, and efficient performance of the judge's duties. As used in this subsection (a), temporary or permanent disability includes, but is not limited to, substance abuse or dependency, the repeated and consistent inability to stay alert during court proceedings, impairment of cognitive abilities that render the judge unable to function effectively, and any other documented or diagnosed physical or mental behavioral condition adversely affecting the administration of justice."

17-5-302(b).

"(b) As part of an investigation or at another point in the disciplinary process, the board or an investigative panel of the board may refer the matter to the Tennessee lawyers assistance program. If the referral is made and the Tennessee lawyers assistance program notifies the board in writing that the judge in the matter is uncooperative or has failed to comply with the recommendations issued under the program, the board may order the judge to submit to a physical or mental evaluation by an appropriately licensed healthcare provider chosen by the board. An investigative

panel of the board may also order such a physical or mental evaluation if the action is taken by unanimous vote of the investigative panel and approved by the board chair. The expense of such evaluation must be borne by the board. Prior to a hearing under § 17–5–307, the examiner chosen by the board must disclose any report or opinion issued by the examiner to the judge, the judge's legal representative, the investigative panel, and the disciplinary counsel for the board."

17-5-303(h).

"(h) A complaint must be filed within one (1) year of the time that the party filing the complaint knew or reasonably should have known of the alleged misconduct. When the last episode of an alleged pattern of misconduct occurs within the one-year period, all prior acts or omissions related to the alleged pattern of misconduct may be considered, except a prior act or omission for which a complaint was filed and dismissed as unfounded or frivolous without a full investigation by the board."

C. Appointment of Master

Chapter 864, Public Acts 2022, amending T.C.A. § 17-2-123 eff. Apr. 14, 2022.

The circuit and chancery court judges in all Tennessee counties may now appoint a full-time master to serve as a judicial officer in the judge's absence, or to hear certain types of cases. The county legislative body must approve such appointments by a two-thirds majority.

III. Public Meetings

A. Open Meetings Act Inapplicable to Political Party and Its State Executive Committee

Newsom v. Tennessee Republican Party, 647 S.W.3d 382 (Tenn., Bivins, 2022).

"Plaintiff Robert Starbuck Newsom a/k/a Robby Starbuck sought to be a Republican candidate for Tennessee's 5th Congressional District for the United States House of Representatives. The Tennessee Republican Party and the Tennessee Republican Party State Executive Committee ('Defendants'), acting under relevant statutory authority and party rules, determined that Mr. Starbuck was not a bona fide Republican and informed the Tennessee Coordinator of Elections of the decision to exclude Mr. Starbuck from the ballot. Mr. Starbuck initially sought relief in federal court and failed to obtain injunctive relief. After voluntarily dismissing his federal action, Mr. Starbuck filed a complaint in the Davidson County Chancery Court alleging, among other things, that Defendants violated the Tennessee Open Meetings Act by determining in a non-public meeting that he was not a bona fide Republican. The chancery court granted Mr. Starbuck a temporary injunction on the basis that Defendants violated the Tennessee Open Meetings Act and ordered that Mr. Starbuck be restored to the ballot. Defendants filed an application for extraordinary appeal under Tennessee Rule of Appellate Procedure 10. This Court assumed jurisdiction over the appeal pursuant to Tennessee Code Annotated section 16-3-201(d) and Tennessee Supreme Court Rule 48 and granted the application for extraordinary appeal. We conclude that the trial court erred by granting the injunction because the Tennessee Open Meetings Act does not apply to Defendants. We vacate the injunction and remand to the trial court."

"Here, Defendants argue that the trial court erred in determining that TOMA [Tennessee Open Meetings Act] applies to the TRP SEC. We agree. Title 2 of the Tennessee Code governs the elections of this state and provides that each political party shall have both a 'state executive committee' and a 'state primary board.' Tenn. Code Ann. §§ 2-13-102, 2-13-103 (2014). Various statutory provisions in Title 2 describe the responsibilities of the state executive committees, while other statutory provisions set forth the responsibilities of the state primary boards. *Compare* Tenn. Code Ann. § 2-13-114(a) (2014) (the state executive committees for the parties are urged to jointly establish a calendar of appearances in each county enabling their gubernatorial candidates to appear together); Tenn. Code Ann. § 2-13-110 (2014) (nominating petitions shall be filed by the secretary of state with, among others, the chair of the state executive committee of the candidate's party); Tenn. Code Ann. § 2-13-204(b)(1) (2014 & Supp. 2021) (if a political party's candidate becomes unavailable and the office is to be filled by the voters of the entire state, the party's state executive committee shall determine the method of nomination). . . ."

"The plain language of the statutory scheme in Title 2 demonstrates that state executive committees and state primary boards are distinct entities with distinct responsibilities. Under Title 2, only the state primary boards, not the state executive committees, are required to comply with TOMA. *See* Tenn. Code Ann. § 2-13-108(a)(2) (2014) ('Meetings of each state primary board shall be open and subject to title 8, chapter 44.'); *see also* Tenn. Code Ann. § 2-1-113 (2014) (the meetings of boards and commissions established under Title 2 shall be open). Thus, the determinative issue is whether the TRP SEC was acting as a state primary board (subject to TOMA) or a state executive committee (not subject to TOMA) when it determined in a non-public meeting that Mr. Starbuck was not a bona fide Republican.

"Tennessee Code Annotated section 2-13-104 provides that 'a party may require by rule that candidates for its nominations be bona fide members of the party.' Under Tennessee Code Annotated section 2-5-204(b)(2), a party's *state executive committee* makes the determination of whether a candidate is a bona fide member of the party. Thus, the TRP SEC, by statute, was acting as a state executive committee, and not a state primary board, when it determined that Mr. Starbuck was not a bona fide Republican. As a result, the TRP SEC did not violate TOMA by making that determination in a non-public meeting because it was not required to comply with TOMA.

"In finding a TOMA violation, the trial court ruled that state executive committees and state primary boards are 'synonymous' under Title 2. We disagree. The statutory scheme clearly provides for and distinguishes between state executive committees and state primary boards, and it confers upon each distinct entity differing obligations and responsibilities. *See Hathaway v. First Fam. Fin. Servs., Inc.,* 1 S.W.3d 634, 640 (Tenn. 1999) ('The fact that the General Assembly did not use the same defined term demonstrates that it did not intend for that definition to apply to establish the second variable.') (citing *State v. Lewis,* 958 S.W.2d 736, 739 (Tenn. 1997)); *State v. Strode*, 232 S.W.3d 1, 11–12 (Tenn. 2007) ('This Court presumes that the General Assembly used each word in a statute deliberately, and that the use of each word conveys a specific purpose and meaning.'). The trial court correctly recognized that Tennessee Code Annotated section 2-13-102(a) provides that each party's state executive committee 'shall be' the state primary board for that party. Tenn. Code Ann. § 2-13-102(a) ('Each political party shall have a state executive committee which shall be the state primary board for the party.'). But this single statute must be read in the context of all of the statutes defining the duties of each entity. It does not render these distinct entities synonymous. It means only that the members of the state executive committee also shall serve as the members of the distinct and separate state primary board. '[S]tatutes should not be interpreted in isolation. The overall statutory framework must be considered, and "[s]tatutes that relate to the

same subject matter or have a common purpose must be read *in pari materia* so as to give the intended effect to both.'" *Coffee Cnty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 846 (Tenn. 2019) (quoting *In re Kaliyah S.*, 455 S.W.3d 533, 552 (Tenn. 2015)). When considered as a whole and read *in pari materia*, the statutory provisions in Title 2 plainly distinguish between state executive committees and state primary boards. Indeed, the trial court recognized as much when it noted that the state executive committee and the state primary board 'often function as two bodies.'

"The trial court further determined that whenever a state executive committee acts under powers granted to it under Title 2, it is acting as a state primary board because Tennessee Code Annotated section 2-13-102(b) provides that '[t]he state primary board shall perform the duties and exercise the powers required by this title for its party.' Again, we disagree and conclude that this determination results from reading the statute in isolation. Section 2-13-102(b) simply means that a party's state primary board shall perform the duties and exercise the powers required *of state primary boards.* Section 2-13-102(b) does not confer on the state primary boards any duties or powers that are instead expressly conferred by other statutes on the state executive committees.

"For the reasons stated above, we hold that the trial court erred as a matter of law in declaring that Defendants violated TOMA by deciding in a non-public meeting that Mr. Starbuck was not a bona fide Republican. As a result, we hold that the trial court erred in granting the temporary injunction. All other issues raised by the parties and the State Officials are pretermitted."

B. Participation in Meeting by Electronic Means

Chapter 856, Public Acts 2022, adding T.C.A. §§ 8-44-108(a)(1) and -108(c)(2) and renumbering accordingly eff. July 1, 2022.

8-44-108(a)(1).

"(1) 'Electronic means of communication' means communication by video conference or audio conference and may include the use of an internet-based platform, but does not include email."

8-44-108(c)(2).

"(2) If a meeting will be conducted permitting participation by members by electronic means of communication, then the governing body shall allow members of the public who are not in attendance at the physical location of the meeting to:

(A) (i) View and listen to the meeting by electronic means in real time, if the meeting is conducted using video conference; or

(ii) Listen to the meeting by electronic means in real time, if the meeting is conducted with audio only with no video; and

(B) Participate or provide comment by electronic means of communication, if participation or public comment would normally be allowed at the meeting.

"(3) A notice required by this part or other law and the agenda for the meeting must:

(A) State that the meeting will include members of the governing body who are participating by electronic means of communication;

(B) Contain information necessary for members of the public to access the meeting by electronic means to view or listen; and

(C) Contain instructions on how to provide public comment by electronic means of communication, which may include contacting the governing body or registering in advance to receive information enabling a person to provide public comment by electronic means. This subdivision (c)(3)(C) does not require a governing body to allow public comment as part of its meetings or alter its rules for public comment or public participation in a meeting.

"(4) A governing body that conducts a meeting allowing participation by electronic means of communication shall make a recording of the meeting, and post the recording or a link to the recording on its website that contains information about the governing body and its meetings. The governing body shall post the recording or link to the recording as soon as possible but no later than three (3) business days after the meeting. The governing body shall retain the recording or link for at least three (3) years after the recording was created."

C. County Governing Body

1. Notice of Special Meeting

Chapter 830, Public Acts 2022, adding T.C.A. § 5-5-105(d) eff. Apr. 19, 2022.

"(d) If notice of a special meeting under subsection (c) cannot be obtained in a manner timely enough to conduct the necessary business of the special meeting, the county legislative body shall provide notice to the public by:

(1) Posting the notice in a location where a member of the community may become aware of such notice and on a website maintained by the county if the county has a website;
(2) Including in the contents of the notice a reasonable description of the purpose of the meeting or action to be taken; and
(3) Posting the notice at a time sufficiently in advance of the special meeting in order to give citizens an opportunity to become aware of and attend the meeting, but at least five (5) days before the county legislative body convenes for the special meeting."

2. Disclosure of Conflict of Interest

Chapter 656, Public Acts 2022, adding T.C.A. § 5-5-112(b)(2) eff. Mar. 15, 2022.

"(2) If a member of a county governing body who is voting on a proposed budget, appropriation resolution, or tax rate resolution, or amendments thereto, has a conflict of interest under subsection (a) or another existing conflict of interest, then the member must declare the conflict of interest at the meeting prior to casting the member's vote."

IV. Public Records

A. Confidential Records Exceptions

1. Photo of Deceased Motor Vehicle Victim

Chapter 1064, Public Acts 2022, amending T.C.A. § 10-7-504(aa) eff. July 1, 2022.

Confidential records not subject to public inspection include:

"(1) (A) Photographic evidence of a fatal motor vehicle accident that depicts a deceased victim at the scene of the accident shall be treated as confidential and shall not be open for inspection by members of the public.

(B) Photographic evidence that depicts the remains of a deceased minor shall be treated as confidential and shall not be open for inspection by members of the public.

"(2) The estate or, in the case of a minor, the custodial parent or legal guardian of the deceased person whose photograph is made confidential pursuant to subdivision (aa)(1) may waive confidentiality and allow the deceased person's photograph to be used and obtained in the same manner as other public records."

2. Proprietary Information to Department of Environment and Conservation

Chapter 708, Public Acts 2022, adding T.C.A. § 10-7-504(a)(33) eff. Mar. 18, 2022, until July 1, 2027.

"(33)(A) All records containing proprietary information provided to the department of environment and conservation by a commercial service provider who conducts commercial operations on a park as defined in § 11–3–101 are confidential and are not to be open for inspection by members of the public. As used in this subdivision (a)(33), 'proprietary information' means commercial or financial information that is used either directly or indirectly in the business of a person or company submitting information to the department of environment and conservation and that gives the person an advantage or an opportunity to obtain an advantage over competitors who do not know of or use the information.

"(B) Subdivision (a)(33)(A) does not limit:

(i) Access to information made confidential pursuant to subdivision (a)(33)(A):

(*a*) By law enforcement agencies, courts, or other governmental agencies performing official functions; or

(*b*) When a commercial service provider expressly authorizes the release of the information; or

(ii) The release of a record made confidential pursuant to subdivision (a)(33)(A) to persons identified within the record, unless the record is subject to a legal privilege against disclosure.

"(C) Records provided to the department of environment and conservation in connection with an agreement governed by § 11–3–111 are not subject to subdivision (a)(33)(A)."

B. Identification of Person Requesting Record

Chapter 721, Public Acts 2022, amending T.C.A. § 10-7-503(a)(7)(A)(vi) eff. July 1, 2022.

"(vi) A governmental entity may require a person making a request to view or make a copy of a public record to present a government-issued photo identification, if the person possesses photo identification, that includes the person's address. If a person does not possess photo identification, then the governmental entity may require other forms of identification evidencing the person's residency in this state."

C. Award of Attorney Fees for Obtaining Documents Willfully Denied

Conley v. Knox County Sheriff, No. E2020-01713-COA-R3-CV (Tenn. Ct. App., Armstrong, Feb. 1, 2022), perm. app. denied Aug. 3, 2022.

"This is a Tennessee Public Records Act case. The trial court found that Appellant willfully denied two of Appellee's twelve public records requests, but it awarded Appellee attorney's fees and costs incurred throughout the entire litigation. We affirm the trial court's findings that Appellant willfully denied two of Appellee's public records requests. However, we conclude that the trial court abused its discretion in awarding Appellee costs and fees incurred throughout the entire litigation. Accordingly, we vacate that portion of the trial court's order and remand with instructions. The trial court's order is otherwise affirmed, and Appellee's request for appellate attorney's fees and costs is denied."

V. Administrative Procedures Act

A. Interpretation of Agency Decision Has DeNovo Review; No *Chevron* Deference to Agency's Interpretation

Chapter 883, Public Acts 2022, adding T.C.A. § 4-5-326 eff. Apr. 14, 2022.

"In interpreting a state statute or rule, a court presiding over the appeal of a judgment in a contested case shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule de novo. After applying all customary tools of interpretation, the court shall resolve any remaining ambiguity against increased agency authority."

B. Contested Case Rules Modernized

Chapter 833, Public Acts 2022, amending various parts of T.C.A. Title 4, Chapter 5 eff. July 1, 2022.

This chapter is a clean up bill that modernizes various provisions of the Administration Procedures Act regarding contested case proceedings. Of particular note is recognition of the use of electronic communications and the possibility that a witness may, under certain circumstances, testify remotely by use of contemporaneous audio-visual transmission.

VI. Public Officers; Register of Deeds' Official Seal

Chapter 691, Public Acts 2022, amending T.C.A. § 8-13-112 eff. Mar. 28, 2022.

"The county registers in the various counties may have official seals, which must contain the words, 'Register's Office of (the name of county) County.'"

VII. State of Emergency or Disaster; Public Official Not to Prohibit Worship Services

Chapter 802, Public Acts 2022, adding T.C.A. § 58-2-107(n) eff. Apr. 8, 2022.

"(n) During a state of emergency, major disaster, or natural disaster, the state, a political subdivision, or a public official shall not prohibit the operations of a church or religious organization for purposes of worship services."

VIII. Re-Employment of Retired Employees; Continuation of Retirement Benefits

A. K-12 Teachers and Bus Drivers

Chapter 821, Public Acts 2022, adding T.C.A. § 8-36-822 eff. July 1, 2022, until June 30, 2025.

"(a) Notwithstanding another law to the contrary, a retired member of the Tennessee consolidated retirement system or of a superseded system, or of a local retirement fund established pursuant to chapter 35, part 3 of this title may be reemployed in a position covered by the retirement system without the loss or suspension of the retired member's Tennessee consolidated retirement system benefits; provided, that the following conditions are met:

(1) The retired member is reemployed as a kindergarten through twelfth (K–12) grade teacher as defined in § 8–34–101, as a kindergarten through twelfth (K–12) grade substitute teacher, or as a kindergarten through twelfth (K–12) grade school bus driver;
(2) The retired member is not reemployed until the expiration of at least sixty (60) calendar days from the member's effective date of retirement;
(3) During the reemployment, the retirement benefit payable to the retired member must be reduced to seventy percent (70%) of the retirement allowance the member would have otherwise been entitled to receive;
(4) The retired member's reemployment cannot exceed one (1) year; however, the retired member may be reemployed for additional one-year periods; provided, that the conditions contained in this section are met for each period of reemployment;
(5) To fund the liability created by this section, the retired member's new employer shall pay to the Tennessee consolidated retirement system during each period of reemployment the greater of:
    (A) A payment equal to the amount the employer would have contributed to the retirement system had the retired member been a member of the retirement system during the period of reemployment; or
    (B) An amount equal to five percent (5%) of the retired member's pay rate;
(6) The retired member is not eligible to accrue additional retirement benefits as a result of the member's reemployment."

B. Emergency Medical Services Employees

Chapter 827, Public Acts 2022, adding T.C.A. § 8-36-811 eff. July 1, 2022, until June 30, 2025.

An analogous provision allows re-employment of retired but licensed emergency medical services employees.

IX. State Employee; Defense of Contracted Court Reporter by Attorney General

Chapter 853, Public Acts 2022, adding T.C.A. § 8-42-101(3)(I) eff. Apr. 20, 2022.

"(I) 'State employee' also includes, solely for purposes of this chapter and under §§ 9–8–112 and 9–8–307, a contracted court reporter when the contracted court reporter is named in a civil action for damages alleging an act or omission by the contracted court reporter in the course of performing the contracted court reporter's official duties."

X. Highways; Safe Testing

Chapter 754, Public Acts 2022, adding T.C.A. § 54-1-103 eff. July 1, 2022.

"(a) The general assembly finds that:

(1) Section 11517 of the federal Infrastructure Investment and Jobs Act (Pub. L. No. 117–58) requires the United States secretary of transportation to develop a process for third-party verification of full-scale crash testing results from crash test labs, including a method for formally verifying the testing outcomes and providing for an independent pass/fail determination; and

(2) In establishing such a process, the United States secretary of transportation shall seek to ensure the independence of crash test labs by ensuring that those labs have a clear separation between device development and testing in cases in which lab employees test devices that were developed within the parent organization of the employee.

"(b) It is the intent of the general assembly that the state department of transportation shall keep abreast of the United States secretary of transportation's implementation of these testing measures and adopt them to the greatest extent feasible under state law, with the goal being that the state department of transportation will be in compliance with the requirements of the United States department of transportation as it relates to this testing as provided in Section 11517 of the federal Infrastructure Investment and Jobs Act (Pub. L. No. 117–58)."

XI. Local Government; Restrictions on Use of Virtual Currency

Chapter 861, Public Acts 2022, adding T.C.A. §§ 9-3-601–603 eff. Apr. 14, 2022, until June 30, 2025.

§ 9-3-601.

"(a) Notwithstanding another law to the contrary, a governmental entity shall not pay, compensate, award, or remit funds in the form of, or facilitate directly or indirectly the conversion of compensation or funds to, blockchain, cryptocurrency, non-fungible tokens, or virtual currency to an individual person, corporation, or other entity without the prior written approval of the state treasurer.

"(b) A governmental entity shall not procure services for the performance of the actions prohibited by subsection (a) without the prior written approval of the state treasurer."

XII. Local Government May Regulate Entertainment Transportation

Chapter 666, Public Acts 2022, amending T.C.A. § 7-51-1007 eff. Mar. 18, 2022.

"(a) A governmental entity may regulate entry into the business of providing passenger transportation service, including, but not limited to, limousine, sedan, shuttle, entertainment transportation, and taxicab service."

"(b)(1) Entertainment transportation' means a motor vehicle that is designed or constructed to accommodate and transport a number of passengers for hire, the principal operation of which is confined to the area within the corporate limits of cities or counties and the suburban territory adjacent to the cities or counties, whether it is operated on a fixed route or schedule, and where the passengers hire the motor vehicle not only as a means of transportation but also for some entertainment or social purpose. 'Entertainment transportation' includes, but is not limited to, a wagon pulled by a tractor or other motor vehicle. 'Entertainment transportation' does not include a limousine, sedan, shuttle, or taxicab.

. . . .

"(c) If a governmental entity regulates businesses providing passenger transportation services pursuant to this section, limousines, sedans, shuttles, entertainment transportation, and taxicabs operating in the governmental entity's jurisdiction must comply with the safety rules and regulations and the liability insurance requirements contained in title 65, chapter 15."

XIII. Special Days of Observance; Ida B. Wells Day

Chapter 924, Public Acts 2022, adding T.C.A. § 15-2-145 eff. Apr. 27, 2022.

"July 16 of each year is to be observed as 'Ida B. Wells Day.' This day is not a legal holiday as defined in § 15–1–101."

XIV. State Songs

Chapter 623, Public Acts 2022, adding T.C.A. § 4-1-302(9) eff. Mar. 1, 2022.

The official state songs of Tennessee now include "I'll Leave My Heart in Tennessee" by Dailey & Vincent, written by Karen Staley, as adopted by Chapter 623 of the Public Acts of 2022.

Chapter 652, Public Acts 2022, adding T.C.A. § 4-1-302(10) eff. Mar. 15, 2022.

Another state song added is "My Tennessee Mountain Home" by Dolly Parton, as adopted by Chapter 652 of the Public Acts of 2022.

ESTATES, CONSERVATORSHIPS AND TRUSTS

I. Estates

A. No Resulting or Constructive Trust or Fraudulent Conveyance

Stamps v. Starnes, S.W.3d (Tenn. Ct. App., Clement, 2021), perm. app. denied June 8, 2022.

"James D. Stamps ('Decedent') and his widow, Virgie Katherine Stamps ('Plaintiff'), were married for thirty years, from February 14, 1986, until Decedent's death on November 19, 2016. They were residents of the state of Ohio throughout their marriage and at the time of his death; however, they lived separately during the last ten years of their marriage. Decedent lived with his daughter in Troy, Ohio, during the last six months of his life.

"Decedent had two children from a prior marriage. A daughter, Vickie Sharon Stamps Starnes ('Defendant'), and a son, Rickie Erman Stamps.

"The real property at issue, 146 acres of farmland and a house located on Phifer Mountain in Putnam County, Tennessee ('the Property'), is where Decedent grew up with his parents. On August 5, 1972, fourteen years prior to his marriage to Plaintiff, Decedent's parents conveyed a remainder interest in the Property to Decedent, subject only to a life estate for his parents. In consideration, Decedent remitted $20,000. Following this conveyance, Decedent's parents continued living on the Property until their deaths. Decedent's mother died in 1981, five years before he married Plaintiff; his father died on June 13, 1986, four months after his marriage to Plaintiff.

"Following his parents' death, Decedent and Plaintiff traveled to the Property a few times each year to maintain and enjoy it. As Plaintiff asserted in the Complaint and stated in her affidavit, both Decedent and Plaintiff contributed time, effort, and labor to maintain the Property. All maintenance expenditures and property taxes were paid with marital funds.

"In May of 2013, Decedent's son, Rickie, contacted a Cookeville, Tennessee, attorney, Margaret Noland. Rickie instructed her to prepare a warranty deed to convey the Property from Decedent to his children—Rickie Stamps and Defendant—as joint tenants with the right of survivorship. In preparation for the conveyance, Ms. Noland was advised that Mr. Stamps was a single person and that the consideration for the conveyance was ten dollars. Once the papers were prepared, Rickie Stamps accompanied his father to Ms. Noland's office on May 14, 2013, when and where Decedent executed the warranty deed, which was promptly recorded. It is undisputed that Defendant was not involved in the preparation or execution of the warranty deed at issue.

"However, Plaintiff disputes when she became aware of the 2013 warranty deed. While Plaintiff asserts that she did not know of the 2013 deed until four days after Decedent's death, November 23, 2016, Ms. Noland testified in her deposition that Plaintiff called her on October 7, 2016, to complain about the 'unmarried' language in the deed. More specifically, as Ms. Noland testified, Plaintiff complained that the deed falsely identified Decedent as a single person and alleged that the conveyance deprived her of her marital interests in the Property. Shortly thereafter, on November 19, 2016, Decedent died intestate, survived by Plaintiff and Defendant.

"Plaintiff initially stated that she filed a petition to administer her deceased husband's intestate estate in Ohio; however, she was unable to provide any details of that proceeding. Although the record contains very little information and no documentation concerning the alleged administration of Decedent's estate in Ohio, Plaintiff states that she inherited unencumbered title to all Decedent's real property in Ohio, the value of which is not in the record. Plaintiff acknowledges that she never filed a petition for a distributive share or elective share in Ohio or Tennessee, and she never filed a petition for ancillary administration of his intestate estate in Tennessee.

"Plaintiff filed a complaint initiating this civil action on September 11, 2017, followed by an Amended Complaint on December 12, 2018. In the Amended Complaint, she generally alleged that the Property was 'fraudulently transferred in contemplation of divorce and in violation of Plaintiff's marital property rights, as well as her right to an [intestate distributive] share of [her husband's] estate, and that the Decedent further made fraudulent claims within the warranty deed rendering the deed void.' Specifically, she sought to set aside the conveyance pursuant to Tennessee Code Annotated § 31-1-105 on the ground the conveyance was made fraudulently with an intent to defeat or reduce her claim as the surviving spouse for a distributive share of his net estate and to establish a constructive and/or resulting trust."

"Plaintiff challenges the summary dismissal of three claims she asserted in the trial court: (1) her claim to establish a resulting trust; (2) her claim to establish a constructive trust; and (3) her claim to set aside the warranty deed as a fraudulent conveyance under Tennessee Code Annotated § 31-1-105."

"Plaintiff contends the trial court's dismissal of her claim for a resulting trust was based on an incorrect legal conclusion that Plaintiff's claim failed because she did not make payment or incur an absolute obligation to pay as part of the original acquisition of the Property.

"The resulting trust doctrine is an equitable device 'used by courts to avoid unjust enrichment.' *Story v. Lanier*, 166 S.W.3d 167, 184 (Tenn. Ct. App. 2004) (citations omitted). 'A resulting trust is one in which the law presumes the trust to be intended by the parties from the nature and character of their transaction.' *Intersparex Leddin KG v. Al-Haddad*, 852 S.W.2d 245, 249 (Tenn. Ct. App. 1992) (citing *Burleson v. McCrary*, 753 S.W.2d 349, 352–53 (Tenn. 1988)).

"Regarding the creation and application of resulting trusts, the Tennessee Supreme Court has adopted the following:

> The imposition of a resulting trust is an equitable remedy; the doctrine of resulting trust is invoked to prevent unjust enrichment. Such a trust is implied by law from the acts and conduct of the parties and the facts and circumstances which at the time exist and surround the transaction out of which it arises. Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person becomes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another, the intention of the former to hold in trust for the latter being implied or presumed as a matter of law, although no intention to create or hold in trust has been manifested, expressly or by inference, and there ordinarily being no fraud or constructive fraud involved.

"*In re Est. of Nichols*, 856 S.W.2d 397, 401 (Tenn. 1993) (quoting 76 Am. Jur. 2d *Trusts* § 166 (1992)).

"'To establish a resulting trust upon land, it is a general principle that the trust must arise at the time of the purchase, attach to the title at that time and not arise out of any subsequent contract or transaction.' *Livesay v. Keaton*, 611 S.W.2d 581, 584 (Tenn. Ct. App. 1980) (citing *McClure v. Doak*, 65 Tenn. 364 (1873)). In recognition of Tennessee's adoption of a purchase-money resulting trust doctrine, we have stated:

> It is said that the source and underlying principle of all resulting trusts is the equitable theory of consideration. That theory is that the payment of a valuable consideration draws to it the beneficial ownership; that a trust follows or goes with the real consideration, or results to him from whom the consideration actually comes; that the owner of the money that pays for the property should be the owner of the property.

"*Id.* at 584 (quoting *Greene v. Greene*, 38 Tenn.App. 238, 272 S.W.2d 483, 487 (1954)).

"The trial court's findings regarding Plaintiff' claim for a resulting trust read in pertinent part:

> The Court finds that Plaintiff admits that she did not actually make payment as part of the original transaction of purchase, nor did she incur an absolute obligation to pay as part of the original transaction of purchase. Undisputed facts establish that Plaintiff cannot prove an essential element of her claim for resulting trust. Accordingly, Defendant is granted summary judgment on this point and Plaintiff's claims for resulting trust is [sic] DISMISSED with prejudice.

"(Citations omitted).

"As the trial court correctly found, it is undisputed that Plaintiff paid nothing toward the purchase of the Property in 1972, nor did she incur any obligation to pay as part of the original transaction of purchase. In fact, Decedent purchased the Property in 1972, fourteen years before he and Plaintiff married. Furthermore, there is no evidence in the record that Plaintiff knew Decedent in 1972 or that she had any knowledge of the Property at that time."

"Plaintiff contends the trial court erred in summarily dismissing her claim for a constructive trust; she contends its decision was erroneously based on the conclusion that Plaintiff was required to prove that Defendant engaged in fraudulent conduct. Plaintiff also argues that the trial court erroneously disregarded the conduct of Decedent and his son, Rickie Stamps.

"For her part, Defendant contends that Plaintiff, who bears the burden of proving Defendant's wrongdoing in the procurement of the Property by clear and convincing evidence, proffered no proof of fraud or other wrongful behavior by Defendant.

"A constructive trust is another equitable device used by the courts to avoid an unjust result. *Story*, 166 S.W.3d at 184 (citation omitted). If a trial court has determined that a constructive trust should be imposed, the court may remove the property from the person holding title—the trustee—and put the property in trust for the benefit of the person harmed—the beneficiary. *Findley v. Hubbard*, No. M2017-01850-COA-R3-CV, 2018 WL 3217717, at *8 (Tenn. Ct. App. July 2, 2018) (citing *Tanner v. Tanner*, 698 S.W.2d 342, 346–47 (Tenn. 1985); *Browder v. Hite*, 602 S.W.2d 489, 492–93 (Tenn. Ct. App. 1980)).

In Tennessee, there are four circumstances in which the courts have instituted a constructive trust:

> (1) where a person procures the legal title to property in violation of some duty, express or implied, to the true owner; (2) where the title to property is obtained by fraud, duress or other inequitable means; (3) where a person makes use of some relation of influence or confidence to obtain the legal title upon more advantageous terms than could otherwise have been obtained; and (4) where a person acquires property with notice that another is entitled to its benefits.

"*Myers v. Myers*, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994) (emphasis added) (citations omitted). Only the second circumstance is alleged here.

"As with a resulting trust, our courts require a higher degree of proof when a party seeks to establish a constructive trust as to real property based on parol evidence, indicating reluctance to contravene a written deed. *See Gray v. Todd*, 819 S.W.2d 104, 108 (Tenn. Ct. App. 1991) (quoting 76 Am. Jur. 2d *Trusts* § 637). '[T]he plaintiff has the burden of proving, by clear and convincing evidence, the existence of a constructive trust based on parol evidence.' *Story*, 166 S.W.3d at 185 (citing *Browder*, 602 S.W.2d at 493).

"Notably, '[a] constructive trust may only be imposed *against one* who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment or questionable means, has obtained an interest in property which he ought not in equity or in good conscience retain.' *Story*, 166 S.W.3d at 185 (emphasis added) (quoting *Intersparex Leddin KG*, 852 S.W.2d at 249). Thus, a constructive trust cannot be imposed against a party who receives property in good faith and without notice of an adverse claim. *See Cont'l Grain Co. v. First Nat. Bank of Memphis*, 162 F. Supp. 814, 833 (W.D. Tenn. 1958) (citations omitted).

"Here, the trial court expressly found that Plaintiff 'presented no proof that would permit a finder of fact to conclude that [Defendant] ... engaged in any fraudulent, wrongful or inappropriate behavior.' Following a thorough review, we also find no evidence of fraud or other wrongful behavior by Defendant. Furthermore, it is undisputed that Defendant was not aware of the deed until after it had been executed and recorded.

"For the foregoing reasons, we affirm the summary dismissal of Plaintiff's claim for a constructive trust."

"Tennessee Code Annotated § 31-1-105 provides:

> Any conveyance made fraudulently to children or others, with an intent to defeat the surviving spouse of the surviving spouse's distributive or elective share, is, at the election of the surviving spouse, includable in the Decedent's net estate under § 31-4-101(b), and voidable to the extent the other assets in the Decedent's net estate are insufficient to fund and pay the elective share amount payable to the surviving spouse under § 31-4-101(c).

"The plain language of the statute provides two forms of relief for a surviving spouse when there has been a fraudulent conveyance. Under the first form of relief, the conveyance may not be set aside. Rather, the statute provides that any such conveyance may be 'includable in the decedent's net estate under § 31-4-101(b).' Meaning, the statute provides for the value of the conveyance to be included in a decedent's net estate as calculated according to Tennessee's definition of a net estate. Under the second form of relief, a fraudulent conveyance is 'voidable to the extent the other

assets in the decedent's net estate are insufficient to fund and pay the elective share amount payable to the surviving spouse under [§] 31-4-101(c).' Notably, either form of recovery under this statute ultimately requires a calculation of the decedent's net estate."

"Here, Plaintiff does not seek an elective share; instead, she is only seeking a distributive share. A 'distributive share' is defined as '[t]he share that an heir or beneficiary receives from the legal distribution of an estate.' *Distributive Share*, Black's Law Dictionary (11th ed. 2019)."

"Under Tennessee's intestate succession statute, Plaintiff would have been entitled to either one-third or a child's share of Decedent's net estate, whichever is greater. *See* Tenn. Code Ann. § 31-2-104(a). Because Decedent was survived by only one child and his son had no issue, Plaintiff's distributive share would be one-half of Decedent's net estate. However, the amount of Plaintiff's distributive share cannot be ascertained because no one filed a petition for ancillary administration of Decedent's intestate estate in Tennessee and no one has been issued letters of administration. Stated another way, there are no present means to ascertain Decedent's net estate under § 31-4-101(b). Accordingly, even if Plaintiff could establish a fraudulent conveyance, the current posture of this case precludes calculation of Decedent's net estate. As such, Tennessee Code Annotated § 31-1-105 can afford no relief to Plaintiff."

B. Dead Man's Statute; Breach of Fiduciary Duty

Mitchell v. Johnson, 646 S.W.3d 754 (Tenn. Ct. App., Clement, 2021), perm. app. denied Mar. 23, 2022.

"Ms. McClaron and her sister, Frankie Harrington ('Ms. Harrington'), resided together for years in a home on Cheshire Road in Clarksville, Tennessee, which they owned as joint tenants with right of survivorship. The defendants to this action, husband and wife William and Rita Johnson (collectively, 'the Johnsons'), lived down the street. Barbara Johnson, the mother of defendant William Johnson, was a long-time friend of Ms. McClaron and Ms. Harrington and served as a volunteer caregiver for the sisters for a number of years before and after the Johnsons became the attorneys-in-fact for the sisters.

"Prior to when Rita Johnson became personally acquainted with Ms. McClaron, her mother-in-law, Barbara Johnson, assisted the sisters with their daily needs. After becoming acquainted with Ms. McClaron sometime in 2009 or early 2010, Rita Johnson assisted in caring for the sisters and was principally responsible for taking them to doctors, dentists, hairdressers, and other appointments. It was during this time that Rita Johnson realized, based on her day-to-day communications with Ms. McClaron, that Ms. McClaron was exhibiting signs of dementia and was incapable of managing her personal affairs.

"On October 5, 2010, Ms. McClaron executed a durable general power of attorney ('the Power of Attorney') appointing the Johnsons as her attorneys-in-fact. Shortly after being appointed attorney-in-fact, Rita Johnson took Ms. McClaron to her doctor, Dr. Paul S. Cha. During this visit, Ms. Johnson learned that Ms. McClaron had been previously diagnosed with Alzheimer's Disease and dementia.

"Within six weeks of being appointed attorney-in-fact, Rita Johnson began making material changes to substantially all of Ms. McClaron's assets, including bank accounts, insurance policies,

and annuity contracts. All of these changes significantly benefitted Rita Johnson and/or her husband, either immediately or upon Ms. McClaron's death."

"In addition to the foregoing transactions, Rita Johnson used the Power of Attorney on several occasions to transfer cash payments from Ms. McClaron's bank accounts to herself, her husband, William Johnson, and/or her children, Taylor and Mason. The total of these financial transactions was $112,000.00.

"By the time Ms. McClaron passed away, the Johnsons had consolidated her assets and arranged for themselves to have the survivorship rights or be the pay-on-death beneficiaries of bank and investment accounts in excess of $700,000. In addition, the Johnsons arranged to be joint tenants with right of survivorship with respect to her house and residential lot on Cheshire Road in Clarksville. Significantly, there is no proof in the record to suggest that Ms. McClaron had any knowledge of the foregoing transactions before or after they occurred, nor any proof that she received independent advice of counsel concerning any of the transactions.

"Ms. McClaron died intestate on December 5, 2017, leaving no surviving spouse or issue. Upon her death, her heirs at law retained attorney John L. Mitchell to file a petition to administer her estate and to recover her assets. Shortly thereafter, Mr. Mitchell ('the Administrator') was appointed the administrator of Ms. McClaron's estate.

"The Administrator commenced this action against the Johnsons, asserting, *inter alia*, that the Power of Attorney was ineffective because Ms. McClaron did not have the mental capacity to execute a power of attorney. The complaint asserted that the assets and property rights obtained by the Johnsons were the result of the Johnsons' dominion and control over Ms. McClaron and their exercise of undue influence over her. The complaint also asserted that the Johnsons, while acting in their fiduciary capacity as attorneys-in-fact for Ms. McClaron, 'individually or in combination, converted hundreds of thousands of dollars of cash, retirement accounts, investment accounts and real property belonging to Ms. McClaron to their ownership and control by exerting undue influence over her or by other means.'"

"The Johnsons then filed an answer in which they admitted using their powers of attorney to make the changes to Ms. McClaron's bank accounts, insurance policies, annuities, and real estate holdings referenced in the complaint but denied that the transactions 'were not beneficial to Ms. McClaron.' The Johnsons also contended that their actions were authorized by an understanding pursuant to which they agreed to act as caregivers and assist the sisters in their daily lives, specifically so that the sisters could remain in the house located at 204 Cheshire Road, Clarksville, Tennessee, as long as possible, including after the death of one of them in exchange for Ms. McClaron's assets at her death. The Johnsons also conceded that 'the Quitclaim Deed was not signed by Ms. McClaron in the presence of a Notary Public,' but stated 'that the Quitclaim Deed was taken by Ms. Harrington and Mrs. Johnson to the Notary Public to notarize the document.'"

"After reviewing the motion, the response, and declarations in support of the response, the trial court refused to consider the Johnsons' assertions regarding their purported agreement with Ms. McClaron. The trial court held that the assertions served to prove the existence of an agreement between Ms. McClaron and the Johnsons, which was impermissible under the Dead Man's Statute, Tennessee Code Annotated § 24-1-203. The trial court granted the Administrator's motion for partial summary judgment on the issue of liability after a hearing. The trial court's order was not based on whether or not Ms. McClaron had the capacity to create the Power of Attorney in October

of 2010. Rather, the court found that the Johnsons presented no evidence from which a reasonable trier of fact could find the presumption of undue influence had been overcome by clear and convincing evidence. The court also found that the transactions engaged in by the attorneys-in-fact were not fair to the decedent, resulted in no benefit to Ms. McClaron, and that Ms. McClaron received no independent advice regarding the transactions."

"Following its decision to grant the Administrator's motion for partial summary judgment, the trial court set the case for a bench trial to determine the remaining issues. Those issues included which assets belonging to Ms. McClaron were converted by defendants, the current state of those assets, and the relief that should be awarded to the estate. The court determined that the deed purporting to convey a one-third interest of Ms. McClaron's home and the lot on Cheshire Road to the Johnsons as joint tenants in common with rights of survivorship was null and void. The trial court found that Ms. McClaron owned the following assets at her death: (1) the First Advantage Bank checking account, totaling $356,019.32; (2) the First Advantage Bank savings account, totaling $103,042.75; (3) the Delaware Life annuity contract with a $173,270.17 value; (4) two New York Life annuity contracts, with a combined value of $88,482.93; (5) the Lincoln Financial annuity contract, with a $58,674.51 value; and (6) an SUV of an unknown model, year, and value. The Johnsons were ordered to facilitate the return of all the above-listed assets. This appeal followed."

"Tennessee Code Annotated section 24-1-203, commonly known as the Dead Man's Statute, provides:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.The purpose of the Dead Man's Statute is to protect estates from spurious claims and prevent interested parties from giving self-serving testimony regarding conversations or transactions with the deceased when the testimony involves transactions or statements that would either increase or decrease the deceased's estate. [Footnote:] If the Dead Man's Statute applies, '*neither party* shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party.' Tenn. Code Ann. § 24-1-203 (emphasis added). [End Footnote] *In re Est. of Marks*, 187 S.W.3d 21, 28 n.2 (Tenn. Ct. App. 2005). The statute is designed 'to prevent the surviving party from having the benefit of his own testimony, when, by the death of his adversary, his representative was deprived of his executor's version of the transaction or statement.' *McDonald v. Allen*, 67 Tenn. 446, 448 (1874). Nevertheless, as discussed in *Holliman v. McGrew*, '[a] witness does not become wholly incompetent to testify when the statute applies, but the statute does limit the subjects a witness can address.' 343 S.W.3d 68, 73 (Tenn. Ct. App. 2009).

"Here, the action was commenced by an administrator, and the proffered testimony relates to transactions or statements which would either increase or decrease the estate in issue. As a consequence, the Johnsons, who are interested parties to this action, are precluded from giving self-serving testimony regarding conversations or transactions with Ms. McClaron that would decrease her estate. *See In re Est. of Marks*, 187 S.W.3d at 28 n.2. More specifically, the Dead Man's Statute precludes the Johnsons from testifying 'as to any transaction with or statement by' Ms. McClaron. Tenn. Code Ann. § 24-1-203. This includes the subject of the alleged understanding between the Johnsons and Ms. McClaron wherein Ms. McClaron agreed that the Johnsons would

receive her assets at her death in consideration for the services the Johnsons agreed to provide throughout the latter years of her life.

"Therefore, we affirm the trial court's decision to exclude the Johnsons' testimony on the subject of an alleged 'understanding' or 'agreement' pursuant to which they would provide personal care and assistance to and for Ms. McClaron in consideration for receiving the assets she owned at the time of her death."

"The execution and exercise of a power of attorney establishes a fiduciary relationship between the attorney-in-fact and the grantor of the power. *Childress*, 74 S.W.3d at 328–29. On October 5, 2010, Ms. McClaron executed the durable general Power of Attorney that appointed the Johnsons as her attorneys-in-fact. The Johnsons' first exercised their powers of attorney on November 10, 2010, when Rita Johnson set up accounts for Ms. McClaron at First Federal Savings Bank. Thus, the fiduciary relationship between the Johnsons and Ms. McClaron was established on November 10, 2010. *See id.*"

"Notably, '[i]n a transaction involving a fiduciary relationship, *a presumption of invalidity attaches to the transaction once it is shown that the fiduciary benefitted from the transaction*.' *In re Est. of Smith*, No. 02A01-9503-CH-00055, 1996 WL 363591, at *2 (Tenn. Ct. App. July 2, 1996) (emphasis added)."

"As explained above, the Johnsons were obligated by their fiduciary duty to act primarily for the benefit of Ms. McClaron with regard to each transaction they engaged in on her behalf. Yet, it remains undisputed that the Johnsons benefitted from the transactions at issue while there is no evidence of a benefit to Ms. McClaron. Because the Johnsons benefitted from the transactions at issue, a presumption of invalidity attached to the transactions. To rebut the presumption, the Johnsons were required to establish the fairness of the transaction. *See Childress*, 74 S.W.3d at 328.

"'The factors which are important in determining whether a transaction is fair include: (1) whether the fiduciary made a full and frank disclosure of all relevant information within his possession; (2) whether the consideration was adequate; and (3) whether the principal had independent advice before completing the transaction.' *Sec. Fed. Sav. & Loan Ass'n of Nashville v. Riviera, Ltd.*, 856 S.W.2d 709, 714 (Tenn. Ct. App. 1992). Additionally, when analyzing the actions of a fiduciary engaging in transactions on behalf of the non-dominant party, *the Tennessee Supreme Court has required proof that the transaction was necessary to protect the interest of the non-dominant party*. *See Folts*, 132 S.W.2d at 208; *Morris v. Morris*, 195 Tenn. 133, 258 S.W.2d 732, 734 (1953).

"The Johnsons presented no evidence regarding a full and frank disclosure of any of the transactions to establish there was consideration for any of the transactions at issue or that Ms. McClaron received independent advice regarding the transactions. In fact, there was no evidence Ms. McClaron was aware of the transactions at issue.

"Further, the only evidence the Johnsons proffered to show the necessity of the transactions was an alleged understanding or agreement with Ms. McClaron. Essentially, the Johnsons asserted that they agreed to provide personal care and assistance to Ms. McClaron, for the rest of her life, in consideration for receiving, at the time of Ms. McClaron's death, all the assets she owned. However, and as explained above, the trial court properly excluded the Johnson's proffered evidence on the subject of an alleged understanding or agreement with Ms. McClaron based on the

Dead Man's Statute. Resultantly, the Johnsons presented very few facts for the court to consider in their response to the motion for partial summary judgment."

"Having considered the relevant and material facts, which are undisputed, we agree with the trial court's determination that the Johnsons presented no competent evidence to establish the necessity of the transactions at issue, that the transactions resulted in a benefit to Ms. McClaron, or that the transactions were fair to Ms. McClaron. To the contrary, the evidence in the record leads to but one conclusion, that the Johnsons were the only ones who benefitted from the transactions at issue.

"Once the Johnsons' exercised their powers of attorney, a confidential, fiduciary relationship existed between the Johnsons and Ms. McClaron at all times material to this action. *See Childress*, 74 S.W.3d at 328–29. Based on the undisputed facts in the record and the legal principles set forth above, we have determined that the Johnsons had a fiduciary duty to deal with Ms. McClaron's property in the 'utmost good faith,' *see Ralston*, 306 S.W.3d at 227, and to act primarily for the benefit of Ms. McClaron, *see McRedmond*, 46 S.W.3d at 738, but they failed to do so. The undisputed facts establish that the Johnsons benefitted from each of the transactions at issue. In contrast, Ms. McClaron did not benefit from the transactions, and the transactions were not fair to Ms. McClaron. Moreover, and significantly, the undisputed facts establish that the transactions orchestrated by the Johnsons were not necessary to protect the interest of Ms. McClaron. *See Folts*, 132 S.W.2d at 208. Accordingly, the record fully supports the trial court's determination that the Johnsons breached their fiduciary duties to Ms. McClaron as well as the trial court's grant of partial summary judgment in favor of the Administrator on the issue of liability.

"For the foregoing reasons, we affirm the trial court's decision to grant the Administrator's motion for partial summary judgment."

"To be clear, following its decision to grant the Administrator's motion for partial summary judgment, the trial court set the case for a bench trial to determine, *inter alia*: which assets belonging to Ms. McClaron were converted by defendants, the current state of those assets, and the relief that should be awarded to the Administrator. The court determined that the deed purporting to convey a one-third interest of Ms. McClaron's home on Cheshire Road to the Johnsons as joint tenants in common with rights of survivorship was null and void. The trial court also found that the following assets remained the property of Ms. McClaron, and the court ordered the Johnsons to return and/or to facilitate the return to the Administrator of all the disputed assets, including any earnings or accruals thereon: (1) the First Advantage Bank checking account, totaling $356,019.32; (2) the First Advantage Bank savings account, totaling $103,042.75; (3) the Delaware Life annuity contract with a $173,270.17 value; (4) two New York Life annuity contracts, with a combined value of $88,482.93; (5) the Lincoln Financial annuity contract, with a $58,674.51 value; and (6) an SUV of an unknown model, year, and value.

"Because we affirmed the decision to grant partial summary judgment and none of the decisions that followed the grant of summary judgment are at issue in this appeal, those rulings by the trial court are not disturbed by any ruling in this appeal."

C. Construction of Will; Unnamed Child Not Disinherited; Primary Beneficiaries Clause Controls

In re Estate of McKinney, No. M2021-00703-COA-R3-CV (Tenn. Ct. App., Bennett, June 9, 2022).

"This appeal requires us to construe a will. James McKinney ('Testator'), a resident of Williamson County, died on July 4, 2020. He left a seven-page, typed will that was formally executed on June 16, 2020, before two witnesses who also, along with Testator, signed a self-proving affidavit before a notary public. Testator had two daughters: Elizabeth McKinney and Kathleen 'Erin' McKinney. We will refer to both daughters by their given names in this opinion as they have the same last name. We mean no disrespect by doing so. The half-sisters' dispute in this will contest centers on the following two clauses:

> FAMILY
>
> 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.
>
> Elizabeth McKinney
>
> ...
>
> PRIMARY REMAINDER BENEFICIARIES
>
> I divide all of the residue and remainder of my gross estate, real and personal, wherever situated, 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 share for said issue, per stirpes. Unless otherwise indicated in my Will, the shares allocated to my children and the issue of my deceased children will be distributed to these beneficiaries, outright and free of trust. The terms 'issue,' 'child,' 'children,' include 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. These terms do include persons who are adults at the time of adoption.

"The will makes no other specific bequests but disposes of the entire estate by the above 'Primary Remainder Beneficiaries' residue clause. The will also names Testator's daughter Elizabeth as Executor.

"Elizabeth petitioned the Williamson County Chancery Court to probate the will and to be appointed Executor. Her petition identified Elizabeth and Erin as heirs at law but Elizabeth as the only beneficiary under the will due to the language of the Family clause. The clerk and master granted the petition by an Order of Probate entered on August 4, 2020, and issued Letters Testamentary.

"Erin filed a motion to alter or amend the Order of Probate, on the basis that the petition misrepresented that Elizabeth was the sole beneficiary, resulting in an order 'based on ... mistake, inadvertence, excusable neglect, or misrepresentation' that should be altered or amended, pursuant to Tenn. R. Civ. P. 60.02(2) or (3), to require 'normal inventory, interim accountings, and final accountings.' Elizabeth responded, asserting that by not naming Erin in the Family clause of the will, Testator 'purposely and effectively disinherited [Erin].'

"Erin then filed a petition to construe the will, asking the trial court to construe the will to include her as a child and beneficiary of Testator. She argued that Testator's intent is 'clear' because the Primary Remainder Beneficiaries clause 'identified all his children as remainder beneficiaries' and thus included her as one of his beneficiaries."

"The trial court ultimately determined that the 'Family' clause unambiguously reflected Testator's intent that all references to his children should be construed to mean only Elizabeth. The trial court also concluded that the residuary clause's failure to name Erin did not indicate an intent to include her. Under the trial court's construction of the will, Erin was not a beneficiary 'because Testator's intent to disinherit Petitioner is clear, unambiguous, and effective under Tennessee law.'"

"In her first issue raised, Erin presents several arguments pertaining to the trial court's consideration of evidence presented by Elizabeth. First, she argues that the trial court improperly considered the testimony of Elizabeth that Testator drafted the will without assistance using online software. She contends that testimony would have been based on statements made by Testator, in violation of the Dead Man's Statute, found at Tenn. Code Ann. § 24-1-203, which provides:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

"We find Erin's arguments unavailing. That statute does not apply to this will contest because the proceeding is not against the executor in her capacity as such and because the testimony offered would not increase or diminish the size of the decedent's estate, only the distribution of the assets of the estate. *Cantrell v. Estate of Cantrell*, 19 S.W.3d 842, 846 (Tenn. Ct. App. 1999); *In re Estate of Eden*, 99 S.W.3d at 89. Moreover, Erin failed to raise the issue in the trial court below and cannot raise it for the first time on appeal. *Barnes v. Barnes*, 193 S.W.3d 495, 501 (Tenn. 2006).

"Second, Erin contends that the trial court impermissibly considered parol evidence in construing the will. She argues that the will is not ambiguous, such that parol evidence is not admissible; however, she also argues that if the will is ambiguous, it is patently ambiguous due to the deficiency of the language of the will itself, and therefore parol evidence is inadmissible. Elizabeth also contends that the will is not ambiguous, but if it is, it suffers from a latent ambiguity.

"In *Estate of Burchfiel v. First United Methodist Church of Sevierville*, this Court recited:

> A 'patent' ambiguity ... is one which appears upon the face of the instrument, as, for example, a bequest to 'some' of the six children of the testator's brother; while a 'latent' ambiguity is one which is not discoverable from a perusal of the will but which appears upon consideration of the extrinsic circumstances, as, for example, a bequest to 'my cousin John,' it appearing that the testator has two or more cousins named John.'

"933 S.W.2d 481, 483 (Tenn. Ct. App. 1996) (quoting 80 AM. JUR. 2d § 1281 (1975)). Extrinsic evidence is admissible to explain a latent ambiguity, but not a patent one. *Id.* at 482. However, certain extrinsic evidence is always admissible, regardless of whether a will is unambiguous or patently ambiguous, as stated in *Horadam v. Stewart*:

> [T]o the extent the parol evidence rule is exclusionary, it does not prevent courts from hearing parol testimony that allows them to 'put themselves as near as possible in the situation of the makers of the wills whose language is to be interpreted[.]' *Treanor v. Treanor*, 152 S.W.2d 1038, 1041 (Tenn. Ct. App. 1941). For example, extrinsic evidence that shows 'the state of facts under which the wills were made, the situation of the properties of the testators, the

> members of their families and other relevant or cognate facts[,]' may be considered regardless of ambiguity classification. *Id.* (quoting *Cannon v. Ewin,* 18 Tenn. App. 388, 77 S.W.2d 990, 992 (Tenn. Ct. App. 1934)). Thus, [the testator's] relationship to and history with the parties, as well as any inter vivos transfers of her property, are important considerations to help us understand her intent in executing the Will.

"No. M2007-00046-COA-R3-CV, 2008 WL 4491744, at *6 (Tenn. Ct. App. Oct. 6, 2008). Accordingly, evidence that Testator had two children can be considered."

"In light of the foregoing authority, we must ascertain to whom Testator left his property to determine whether Erin was actually disinherited. The Primary Remainder Beneficiaries clause, which is the only clause that makes any dispositions in the will, disposes of the estate by dividing it 'into as many equal shares as there are living children of mine and deceased children of mine with issue then living' and directing how the shares will be given to the beneficiaries. That clause defines 'child' or 'children' to mean '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.' Earlier in the will, in the Family clause, Testator specified that 'any provision for my children includes the below-named children, as well as any child of mine hereafter born or adopted.' Then, Elizabeth's name is listed.

"The Family clause does not of itself dispose of any property, but 'it may be resorted to and found useful in resolving doubts as to the meaning of particular dispositive clauses of the will.' *McDonald*, 205 S.W. at 313. However, 'words of testamentary direction cannot be disregarded as surplusage, if any reasonable meaning can be drawn from them.' *Rinks v. Gordon*, 24 S.W.2d 896, 897 (Tenn. 1930). So, it is the words of the Primary Remainder Beneficiaries clause that may not be overlooked, as they are the only words that dispose of Testator's estate. The Primary Remainder Beneficiaries' definition of who is a child thus controls, and given the seeming inconsistency between it and the Family clause, we now parse the language to determine whether Testator intended to leave a share of his estate to Erin or not.

"The Family clause clearly indicates that Testator considered Elizabeth as his child by stating, 'Unless otherwise specifically indicated in this Will, any provision for my children includes the below-named children ... [:] Elizabeth McKinney.' While Elizabeth argues that the Family clause 'limits Testator's 'children' to Appellee Elizabeth McKinney,' we respectfully disagree with her interpretation. Testator chose to use the word 'includes' in this phrase. To 'include' something is '[t]o contain as a part of something.' *Include*, Black's Law Dictionary (11th ed. 2019)."

"Indeed, the Primary Remainder Beneficiaries clause provides such a specific indication that the word 'children' had a broader meaning. It disposes of the estate by dividing it 'into as many equal shares as there are living children of mine and deceased children of mine with issue then living' and directs how the shares will be given. It then states, 'The terms 'issue,' 'child,' 'children,' include 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.'"

"In summary, the Primary Remainder Beneficiary clause's broad language renders both Elizabeth and Erin as Testator's beneficiaries under this will, pursuant to the parent-child relationship each had with Testator. The Primary Remainder Beneficiary clause, therefore, does not affirmatively dispose of all his estate to other people, to the exclusion of Erin, as would be required in order to disinherit her. We construe the will to devise Testator's estate to both Erin and Elizabeth, equally."

"We reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion."

D. Holographic Will

1. Will Containing Only Decedent's First Name Is Valid

In re Estate of Thompson, No. M2021-00025-COA-R3-CV (Tenn. Ct. App., Clement, Oct. 25, 2021).

"The Estate of Micki D. Thompson ('the Estate') was opened on November 14, 2019, in the Chancery Court for Sumner County, Tennessee. At that time, a last will and testament, dated July 25, 2013, along with two codicils, dated July 23, 2016, and March 3, 2017, were admitted to probate. William Richard Brooks was appointed Executor.

"On July 20, 2020, Albert Read Lewin filed a petition to probate a handwritten instrument as the third codicil to the 2013 will. The Estate filed a timely objection to the handwritten instrument being admitted to probate.

"The purported third codicil, which was written in a Bible owned by Mr. Brooks, was very brief and stated in its entirety:

> July 22, 2019
>
> Owner [of the Bible]: William Richard Brooks
>
> Albert Read Lewin—shall receive $3,000 per month for life—This is appreciation for his care and complete dedication to Micki and her welfare. He gave All in making her life-

"The parties agreed and stipulated that the above writing was in Ms. Thompson's handwriting. Further, the parties agreed that Ms. Thompson was 'of sound mind and disposing memory' on the date the statement was written. The Estate, however, argued that the inscription lacked a sufficient signature; therefore, it was not a valid holographic will or codicil under Tenn. Code Ann. § 32-1-105.

"In its final order, and after acknowledging the parties' agreements and stipulations as to the evidence, the trial court made the specific finding that 'the handwriting was the handwriting of the Decedent and that she was of sound mind and disposing memory at the time the note was written.' The court also found that the handwritten instrument 'expresse[d] a testamentary intent on the part of Ms. Thompson as written on July 22, 2019.' The court then stated that '[t]he question then comes down to whether or not the Decedent intended that her name "Micki" would constitute her signature.' In its analysis of this issue, the court reasoned and held:

> T.C.A. 32-1-105 sets out the requirements for holographic wills. It states, 'No witness to a holographic will is necessary, but the *signature* (emphasis added) and all it[s] material provisions must be in the handwriting of the testator and the testator's handwriting must be proved by two (2) witnesses.' The Court notes that the Decedent referred to herself in the third person rather than in the personal pronoun. Based upon the foregoing, the Court finds that the word 'Micki' is not the signature of the Decedent and that the paper writing does not contain

the signature of the Decedent. Therefore, the Court denies the admission of the paper writing as the codicil to the Estate of MICKI D. THOMPSON.

"This appeal followed."

"The issue presented by the Estate, and agreed to by Mr. Lewin, reads: 'Does Micki Thompson's name, appearing within the body of a holographic will, constitute a signature pursuant to Tenn. Code. Ann. § 32-1-105?' We have determined that a more accurate statement of the dispositive issue is whether the testator's insertion of her first name 'Micki' within the body of the handwritten instrument satisfies the signature requirement under Tenn. Code. Ann. § 32-1-105."

"Tennessee Code Annotated § 32-1-105, which is generally referred to as the Holographic Will Statute, provides: 'No witness to a holographic will is necessary, but the signature and all its material provisions must be in the handwriting of the testator and the testator's handwriting must be proved by two (2) witnesses.' Nevertheless, '[i]t is not necessary to its validity that a testator's name appear at the end of a holographic will. It is sufficient that his name is subscribed elsewhere in the will.' *In re Jones' Estate*, 314 S.W.2d 39, 44 (Tenn. Ct. App. 1957). Moreover, and with specific reference to testamentary instruments, '*[a] signing of part of the name, if done with testamentary intent, may be sufficient*. 1 Andra J. Hedrick, Jeffrey Mobley, Jack W. Robinson, Sr., *Pritchard on the Administration of Wills and Estates* § 204 (7th ed. 2009) (emphasis added).

"However, '[i]f the instrument propounded as a holographic will is ... not subscribed by the testator, though his name is inserted in some part of it, ... the presumption is that the writer *did not* intend the paper in that imperfect state to be his will.' *Campbell v. Henley*, 110 S.W.2d 329, 330 (Tenn. 1937) (emphasis added). But this '*presumption may be rebutted by satisfactory proof that [the instrument] was intended, in the form in which it appears and as far as it goes, to be the last will and testament of the deceased.*' *Id.* (emphasis added).

"The parties agree that Tenn. Code Ann. § 32-1-105 is controlling. They also agree that Ms. Thompson was of sound mind and disposing memory at the time of the execution and that the handwriting of the inscription is that of Ms. Thompson.

"As for testamentary intent, the trial court made the specific finding that Ms. Thompson's inscription demonstrated testamentary intent. As noted above, we presume the trial court's findings of fact are correct unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). For the evidence to preponderate against this finding of fact, it must support another finding of fact with greater convincing effect. *See Walker*, 40 S.W.3d at 71. Having determined that the evidence does not support another finding of fact with greater convincing effect, we conclude that the evidence does not preponderate against the trial court's finding of testamentary intent. Accordingly, we affirm the trial court's finding that the inscription demonstrated testamentary intent.

"Although Ms. Thompson did not subscribe or insert her entire name into the handwritten instrument, she inserted her first name, 'Micki,' within the inscription. Thus, the instrument was signed by Ms. Thompson with the use of part of her name and, as the trial court found, with testamentary intent. *See* Hedrick, Mobley, Robinson, Sr., *supra*, § 204. Therefore, we conclude that these facts overcame the rebuttable presumption that Ms. Thompson did not intend for the handwritten instrument to act as her valid will and hold that Ms. Thompson intended for the July 22, 2019, handwritten instrument to act as a codicil to her will.

"For the foregoing reasons, we reverse the decision of the trial court and remand with instructions for the trial court to admit the July 22, 2019, handwritten instrument as the third codicil to Ms. Thompson's 2013 will."

2. Presumption of Suspicious Circumstances

Chapter 942, Public Acts 2022, adding T.C.A. § 32-4-105(b) eff. July 1, 2022.

"(b) Upon the contest of a holographic will, if the holographic will was written within thirty (30) days prior to a testator's death and the testator died by suicide, then there is a presumption of suspicious circumstances and the proponent of the will has the burden of presenting evidence demonstrating that the testator had the capacity to execute the will."

E. Appointment of Public Receiver

Chapter 912, Public Acts 2022, adding T.C.A. §§ 30-1-117(a)(11) and -401(c) eff. July 1, 2022.

30-1-117(a).

"[A petition for letters of administration or letters testamentary shall include:]

"(11) A statement identifying if the decedent was the owner of or had a controlling interest in any ongoing business or economic enterprise that is or may be part of the estate to be administered, and, if so, the names and addresses of all such ongoing business or economic enterprises."

30-1-401.

"(c) Upon motion of the personal representative, an interested party, or upon the court's own motion, the probate court or chancery court may appoint the public receiver to determine the need for a temporary or permanent receiver. The public receiver must submit a report of its recommendations to the court, which report must be served via United States mail to the personal representative and all known interested parties. The report is subject to the same review as a report of a special master. Upon a hearing, the court may appoint a receiver with such powers as are necessary, consistent with those extended to receivers in absentees' estates."

F. Homestead Exemption

Chapter 759, Public Acts 2022, amending T.C.A. § 30-2-209 eff. July 1, 2022.

The homestead exemption amount that a surviving spouse or minor children may claim in an estate in land has been increased from $5,000 to $35,000.

G. Small Estate Affidavit Limited Letter of Authority Act

Chapter 665, Public Acts 2022, amending T.C.A. §§ 30-4-101, -103 and -104 eff. July 1, 2022.

30-4-101.

"This chapter is known and may be cited as 'The Small Estate Affidavit Limited Letter of Authority Act."

30-4-103.

"Whenever a decedent leaves a small estate, it may be administered in the following manner:

(1) (A) After the expiration of forty-five (45) days from the date of the decedent's death, as evidenced by the death certificate, provided no petition for the appointment of a personal representative of the decedent has been filed in that period of time and the decedent's estate, one (1) or more of the decedent's competent adult heirs or next of kin, or any creditor proving that the creditor's debt on oath before the court, shall file with the clerk of the court an affidavit, along with a copy of the death certificate, which shall set forth the following:

(i) That the decedent left no will requiring administration by the court having probate jurisdiction in the county where the decedent was domiciled;

(ii) That the decedent had no interest in real property;

(iii) An itemized description and the value of all the decedent's personal property, the names and addresses of all persons known to have possession of any of the decedent's personal property, including all insurance on the decedent's life payable to the decedent's estate;

(iv) A list of unpaid debts left by the decedent and the name and address of each creditor and the amount due to that creditor; and

(v) The name, address, relationship, and age, if a minor, of each heir entitled to receive any of the decedent's personal property, all of whom the affiant must notify of the filing of the affidavit by mailing a copy to their last known address, postage prepaid;

(B) The form of the affidavit required by this section may be obtained from the clerk, if available, and must disclose that the affiant evidences by signature that, subject to the penalty for perjury:

(i) The affidavit is not false or misleading;

(ii) The affiant is not disqualified from serving because of having been sentenced to imprisonment in a penitentiary as set forth in § 40–20–115 or otherwise;

(iii) The affiant is willing to preserve all personal property of the decedent and cancel all insurance policies that are no longer applicable due to the decedent's death; and

(iv) That the affiant is mindful of all duties imposed upon the affiant by this chapter;

(C) Upon the motion of one (1) or more of the decedent's competent adult heirs or next of kin, or upon its own motion, the court may, in its discretion for good cause shown, reduce the forty-five (45) day period required by subdivision (1)(A);

(D) A competent adult who is not an heir or next of kin of the deceased, is allowed to file for a small estate limited letter of authority by the court if:

(i) All competent adult heirs or next of kin consent in writing to the filing of the affidavit; and

(ii) The person who is filing the affidavit pursuant to this chapter complies with all other provisions of this section, including the bond provisions contained in subdivision (6);

(2) The court shall receive and file the original affidavit as a part of the court's permanent records, shall assign it a number and shall index it as other estates are indexed. The clerk shall deliver one (1) certified copy of the affidavit to the affiant onto which is affixed a

clerk's stamp and seal certifying that the affidavit has been filed in the office of the probate court. Additional certified copies of the affidavit may be requested by the affiant at the time of filing the affidavit or any time prior to the affiant's discharge from liability as provided in subdivision (6). An affidavit may be amended to the extent that the aggregate amount does not exceed the statutory small estate limitation;

(3) The clerk shall charge and receive such fees for processing a small estate and additional certified copies as authorized and provided in §§ 8–21–401 and 32–1–112;

(4) The affiant shall make bond payable to the state for the benefit of those entitled with a corporate surety. The amount of the bond shall equal the value of the decedent's estate to be administered under this chapter. However, bond shall not be required of the affiant if:
   (A) The affiant or affiants are the sole heirs of the decedent; or
   (B) All adult heirs consent in writing;

(5) Formal letters testamentary or letters of administration shall not be issued nor any creditor be allowed to file a claim in a small estate proceeding;

(6) The affiant and the surety on the affiant's bond may be discharged from liability under the bond as follows:
   (A) The court may enter an order discharging the affiant and the surety on the affiant's bond after the affiant files, for a decedent dying before January 1, 2016, either the tax receipt issued pursuant to § 67–8–420 or the certificate issued pursuant to § 67–8–409(f); or
   (B) The affiant and the surety on the affiant's bond may wait until the first anniversary of the filing of the affidavit when the court shall automatically discharge them from liability. The small estate affidavit limited letter of authority shall remain open and active until the first anniversary to allow for amendments or conversions to the original affidavit limited letter of authority."

30-4-104.

"(a) Every person indebted to the decedent's estate, having possession of any personal property belonging to the estate, or acting as registrar or transfer agent of any shares of stock, bonds, notes, or other evidence of ownership, indebtedness, or right belonging to the decedent's estate must be furnished with a copy of the affidavit by the affiant, duly certified by the clerk of the court. Upon receipt of the copy of affidavit and demand of the affiant, each person furnished with a copy of the affidavit under this subsection (a) shall pay, transfer, and deliver to affiant:

(1) All indebtedness owing by the recipient; and

(2) Other property in possession of or subject to registration or transfer by the recipient.

"(b) A person making payment, transfer, or delivery of personal property belonging to a decedent's estate to the affiant pursuant to this chapter is released and discharged from all further liability to the estate and its creditors to the same extent as if the payment, transfer, or delivery were made to the duly appointed, qualified, and acting personal representative of the decedent. The person making the payment, transfer, or delivery shall not be required to see to its application or to inquire into the truth or completeness of any statement in the affidavit.

"(c) The decedent's personal property shall be distributed to the decedent's heirs as provided by law. The person to whom payment, transfer, or delivery of any personal property is made by the affiant shall be liable and remain liable, to the extent of the value of the personal property received, to unpaid creditors of the decedent, to anyone who had a prior right to the decedent's personal property, or to any personal representative of the decedent thereafter appointed. If distribution is

made prior to payment of all medical assistance owed to TennCare under § 71–5–116, both the affiant and the person to whom payment, transfer, or delivery is made by the affiant shall be liable to TennCare and remain liable, to the extent of the value of the personal property received.

"(d) If any person having possession of any of the decedent's personal property, upon receipt of a copy of the affidavit certified by the clerk, refuses to pay, transfer, or deliver the personal property to or at the direction of the affiant:

(1) The personal property may be recovered; or

(2) (A) Transfer and delivery of the personal property may be compelled in an action brought in any court of competent jurisdiction for that purpose upon proof of the facts required to be stated in the affidavit; and

(B) Costs of the proceeding must be adjudged against the person wrongfully refusing to pay, transfer, or deliver the personal property.

"(e) If during the administration of the small estate affidavit limited letter of authority, the affiant or a creditor of the decedent discovers additional assets that exceed the statutory small estate limitation, then the court may allow the small estate affidavit to be converted into probate administration by application of a verified petition pursuant to § 30–1–117 by the affiant or a creditor of the decedent to the court. The affiant is liable for the assets which may have been disposed of under the small estate affidavit limited letter of authority prior to the conversion."

II. Conservatorship

A. Chancellor's Approval of Mediated Settlement of Ward's Family Dispute Upheld

In re Conservatorship of Wilson, No. M2021-00145-COA-R3-CV (Tenn. Ct. App., Clement, Mar. 15, 2022).

"This appeal arises from a conservatorship case in which the chancery court authorized the attorneys *ad litem* for the ward of the conservatorship to enter into a compromise and settlement regarding a dispute among the ward and his four siblings over their deceased father's estate. The sole issue on appeal is whether the Chancellor abused his discretion in finding the settlement was in the ward's best interest. Finding no abuse of discretion, we affirm."

"The parties raise various issues for our consideration on appeal. We, however, have determined the dispositive issue on appeal is whether the chancellor presiding over the conservatorship of John Jr., abused its discretion by approving, pursuant to his authority under Tennessee Code Annotated § 34-1-121, a mediated settlement agreement. Scott also argues that the court erred by failing to include findings of facts and conclusions of law in the Order. For their part, the Daughters request an award of damages for defending Scott's frivolous appeal."

"Scott contends the chancellor erred by granting the Joint Motion to Approve Settlement Agreement because the Settlement Agreement was not in John Jr.'s best interest. Scott argues that the Settlement Agreement contradicts Father's intent because John Jr. will receive a lesser portion of Father's assets than the Will and Trust provided.

"The Daughters and John Jr.'s attorneys *ad litem* maintain that the Settlement Agreement is in John Jr.'s best interest because it settles all issues, claims, objections, and contests regarding Father's

estate, the district court case, and the Sixth Circuit appeal. They also contend that the Agreement reduces the uncertainty and eliminates the risk that the federal appeal would not be decided in John Jr.'s favor.

"In a conservatorship proceeding, the court has the authority to take all actions reasonably necessary to promote the ward's best interests. *In re Conservatorship of Groves*, 109 S.W.3d 317, 329 (Tenn. Ct. App. 2003). Specifically, Tennessee Code Annotated § 34-1-121, which details the court's authority in conservatorship proceedings, provides as follows:

> (b) In any action, claim, or suit in which a minor or person with a disability is a party or in any case of personal injury to a minor or person with a disability caused by the alleged wrongful act of another, the court in which the action, claim, or suit is pending, or the court supervising the fiduciary relationship if a fiduciary has been appointed, has the power to approve and confirm a compromise of the matters in controversy on behalf of the minor or person with a disability. *If the court deems the compromise to be in the best interest of the minor or person with a disability, any order or decree approving and confirming the compromise shall be binding on the minor or person with a disability.*

"(Emphasis added).

"Notably, the legislature 'has not outlined specific factors for the trial court to consider in making its best interest analysis,' but this court has explained that in conservatorship cases, the determination of the ward's best interest must turn on 'the specific facts presented in the particular case.' *In re Conservatorship of Turner*, No. M2013-01665-COA-R3-CV, 2014 WL 1901115, at *25 (Tenn. Ct. App. May 9, 2014). 'In order to determine the best interests of a disabled person, the court must consider all relevant facts.' *Crumley*, 1997 WL 691532, at *3.

"Here, the relevant facts and circumstances for the chancellor to consider were set forth in the Joint Motion to Approve Settlement Agreement as well as in Scott's Response in Opposition to Motion to Approve Settlement. The Daughters and John Jr.'s attorneys *ad litem* filed the entire Settlement Agreement with the chancellor for review. They set forth in their Joint Motion, *inter alia*, the following facts and circumstances to establish why the proposed Settlement Agreement was in John Jr.'s best interest:

1. All five of Father's children were beneficiaries of the Trust.
2. In the district court action, the Daughters contended that the testamentary provisions of the Trust were invalid.
3. All five children and, thus, all beneficiaries of the Trust were parties to the district court action.
4. Pursuant to its July 27, 2018 order, the district court ruled that the testamentary provisions of the Trust were invalid and the assets of the Trust would pass to the five children equally pursuant to the laws of intestate succession.
5. The district court's declaratory judgment that the testamentary aspects of the separate Property Trust are invalid is highly prejudicial to John Jr.'s best interests.
6. John Jr.'s attorneys ad litem appealed the district court's ruling to the United States Court of Appeals for the Sixth Circuit.
7. Scott did not appeal the district court's ruling that the testamentary provisions of the Trust were invalid and its declaration that the assets of the Trust would pass pursuant to the laws of intestate succession to the five children equally.

8. The Sixth Circuit Court of Appeals ordered the parties to participate in mediation.
9. Pursuant to its order entered on August 6, 2019, the chancery court authorized and directed John Jr.'s attorneys ad litem to, *inter alia*, negotiate and submit to the chancery court for approval proposed terms on which John Jr. may compromise and settle his appeal of the adverse district court judgment.
10. Tennessee Code Annotated § 34-1-121 affords the chancery court the discretion to approve a compromise of matters in controversy for a disabled person, such as John Jr., if it finds the compromise to be in his best interest and to make the settlement binding on the disabled person.
11. The proposed Settlement Agreement compromised and settled all claims and matters in controversy related to the interests of John Jr. and the Daughters in the Trust and Father's estate. The proposed Settlement Agreement also established terms for the distribution of the interests of John Jr. and the Daughters in the Trust.
12. The proposed Settlement Agreement provides John Jr. with certainty as to his interest in the assets of the Trust and his father's estate; it eliminates the risk that his appeal of the district court judgment will not be decided in his favor; provides that John Jr.'s share of the first proceeds from the sale of trust assets will be more than his one-fifth intestate share. Accordingly, the proposed settlement reduces John Jr.'s risk that his share will be reduced if the property sells for less than expected. It also provides that the proceeds from sale and income from the rental of those properties will be distributed to and held in an Irrevocable Trust for John Jr.'s benefit and managed by an independent trustee. Moreover, the proposed Settlement Agreement will end John Jr.'s participation in the litigation concerning the Trust as well as the attendant attorney's fees and costs of litigation.

"The facts and circumstances set forth in the Joint Motion are fully supported by the record. Moreover, they provide bona fide reasons from which the court could conclude that entering into the Settlement Agreement was in John Jr.'s best interest. Notably, if John Jr. were to pursue his appeal of the district court's declaratory judgment, and the Sixth Circuit Court of Appeals were to affirm the judgment, John Jr.'s inheritance would be significantly reduced. Specifically, he would fall from receiving the largest share of his father's estate pursuant to the Trust to receiving an equal child's share of twenty percent. Moreover, he would continue to incur legal fees and costs as the already protracted litigation ensued, with no end in sight. Accordingly, the record fully supports the trial court's determination that entering into the proposed Settlement Agreement was in the best interest of John Jr.

"With the deferential abuse of discretion standard of review in mind, this record provides no basis for us to conclude that the chancellor strayed beyond the applicable legal standards when considering the joint motion or that he failed to properly consider the factors customarily used to guide this discretionary decision. *See Lee Medical Inc.*, 312 S.W.3d at 524. In fact, the record reveals that the chancellor considered the relevant legal principles as set forth in Tennessee Code Annotated § 34-1-121. The record also provides a factual foundation that supports the chancellor's discretionary decision. Moreover, the abuse of discretion standard does not permit this court to substitute our judgment for that of the trial court. *See id.*

"Accordingly, we find no basis to conclude that the chancellor abused his discretion in authorizing the attorneys *ad litem* to enter into and execute the Settlement Agreement on behalf of John Jr."

B. Fiduciary's Accounting

Chapter 945, Public Acts 2022, amending T.C.A. § 34-1-111(d)(2) eff. Apr. 29, 2022.

"(2) The accounting must contain a statement concerning the physical or mental condition of the person with a disability, and the statement must advise the court whether the condition of the respondent continues to require the fiduciary's services, without disclosing medical information required to be kept confidential pursuant to § 34–3–105(f)."

III. Trusts

Chapter 877, Public Acts 2022, amending various parts of Title 35, Chapter 15 eff. Apr. 14, 2022.

This new law has twenty sections and makes a number of changes to the requirements for providing various types of notice concerning activities of fiduciaries. It also changes the manner to authorize trustees and others to vote stock that is a trust asset. It modifies timing and procedures for several trust actions.

TAXATION

I. Federal

A. 2022 Standard Mileage Rates

IR-2021-251, Dec. 17, 2021.

Beginning on January 1, 2022, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 58.5 cents per mile driven for business use, up 2.5 cents from the rate for 2021,
- 18 cents per mile driven for medical, or moving purposes for qualified active-duty members of the Armed Forces, up 2 cents from the rate for 2021 and
- 14 cents per mile driven in service of charitable organizations; the rate is set by statute and remains unchanged from 2021.

IR-2022-124, June 9, 2022.

For the final 6 months of 2022, the standard mileage rate for business travel will be 62.5 cents per mile, up 4 cents from the rate effective at the start of the year. The new rate for deductible medical or moving expenses (available for active-duty members of the military) will be 22 cents for the remainder of 2022, up 4 cents from the rate effective at the start of 2022. These new rates become effective July 1, 2022. The IRS provided legal guidance on the new rates in Announcement 2022-13PDF, issued today.

B. Thirty-Day Time Limit to File Petition for Review of Collection Due Process Determination Is Non-Jurisdictional and Subject to Equitable Tolling

Boechler, P.C. v. Commissioner of Internal Revenue, 142 S.Ct. 1493 (U.S., Barrett, 2022).

"In 2015, the Internal Revenue Service notified Boechler, P.C., a North Dakota law firm, of a discrepancy in its tax filings. When Boechler did not respond, the IRS assessed an 'intentional disregard' penalty and notified Boechler of its intent to levy Boechler's property to satisfy the penalty. See 26 U.S.C. §§ 6330(a), 6721(a)(2), (e)(2)(A). Boechler requested and received a 'collection due process hearing' before the IRS's Independent Office of Appeals pursuant to § 6330(b), but the Office sustained the proposed levy. Under § 6330(d)(1), Boechler had 30 days to petition the Tax Court for review. Boechler filed its petition one day late. The Tax Court dismissed the petition for lack of jurisdiction and the Eighth Circuit affirmed, agreeing that § 6330(d)(1)'s 30-day filing deadline is jurisdictional and thus cannot be equitably tolled.

"Held: Section 6330(d)(1)'s 30-day time limit to file a petition for review of a collection due process determination is a nonjurisdictional deadline subject to equitable tolling."

"(a) Not all procedural requirements are jurisdictional. Many simply instruct 'parties [to] take certain procedural steps at certain specified times' without conditioning a court's authority to hear

the case on compliance with those steps. *Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159. The distinction matters, as jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sue sponte*, and do not allow for equitable exceptions. *Id.,* at 434–435, 131 S.Ct. 1197; *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 154, 133 S.Ct. 817, 184 L.Ed.2d 627. As such, a procedural requirement is jurisdictional only if Congress 'clearly states' that it is. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515, 126 S.Ct. 1235, 163 L.Ed.2d 1097. This case therefore turns on whether Congress has clearly stated that § 6330(d)(1)'s deadline is jurisdictional.

"Section 6330(d)(1) provides that a 'person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).' Whether this provision limits the Tax Court's jurisdiction to petitions filed within the 30-day timeframe depends on the meaning of 'such matter,' the phrase marking the bounds of the Tax Court's jurisdiction. Boechler contends that it refers only to the immediately preceding phrase: a 'petition [to] the Tax Court for review of such determination,' making the filing deadline independent of the jurisdictional grant. The Commissioner, by contrast, argues that 'such matter' refers to the entire first clause of the sentence, sweeping in the deadline and granting jurisdiction only over petitions filed within that time, making the deadline jurisdictional.

"The text does not clearly mandate the jurisdictional reading. It is hard to see how it could, given that 'such matter' lacks a clear antecedent. Moreover, Boechler's interpretation has a small edge under the last-antecedent rule, which instructs that the correct antecedent is usually the closest reasonable one. There are also other plausible ways to read 'such matter.' For example, 'such matter' might refer to 'such determination' or the preceding subsection's list of '[m]atters' that may be considered during the collection due process hearing, see § 6330(c), but neither possibility ties the Tax Court's jurisdiction to the filing deadline. And it is difficult to make the case that the jurisdictional reading is clear where multiple plausible, nonjurisdictional interpretations exist. Nothing else in the provision's text or structure advances the case for jurisdictional clarity. Finally, other tax provisions enacted around the same time as § 6330(d)(1) much more clearly link their jurisdictional grants to a filing deadline—see §§ 6404(g)(1), 6015(e)(1)(A)—accentuating the lack of comparable clarity in § 6330(d)(1)."

"(b) The Commissioner's counterarguments fall short. In this context, it is not enough that his interpretation of the statute is plausible, or that some might even think it better than Boechler's. To satisfy the clear-statement rule, the Commissioner's interpretation must be clear, and it is not. A requirement 'does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions.' *Auburn,* 568 U.S., at 155, 133 S.Ct. 817. Rather than proximity, what is needed is a clear tie between the deadline and the jurisdictional grant. The Commissioner also contends that a neighboring provision, § 6330(e)(1), clarifies the jurisdictional effect of § 6330(d)(1)'s filing deadline. Section 6330(e)(1) plainly conditions the Tax Court's jurisdiction to grant an injunction to enforce the suspension of levy actions during collection due process hearings on a timely filing under § 6330(d)(1). But, if anything, § 6330(e)(1)'s clear jurisdictional statement only highlights the lack of such clarity in § 6330(d)(1). Finally, the Commissioner insists that § 6330(d)(1)'s filing deadline is jurisdictional because it was enacted at a time when Congress was aware of lower court cases that had held that an analogous tax provision, § 6213(a), is jurisdictional. Those lower court cases, however, almost all predate this Court's effort to 'bring some discipline' to the use of the term 'jurisdictional.' *Henderson*, 562 U.S., at 435, 131 S.Ct. 1197."

"(c) Nonjurisdictional limitations periods are presumptively subject to equitable tolling, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S.Ct. 453, 112 L.Ed.2d 435, and nothing rebuts the presumption here. Section 6330(d)(1) does not expressly prohibit equitable tolling, directs its 30-day time limit at the taxpayer, not the court, and appears in a section of the Tax Code that is particularly protective of taxpayers, see *Auburn*, 568 U.S., at 160, 133 S.Ct. 817.

"The Commissioner invokes *United States v. Brockamp*, 519 U.S. 347, 117 S.Ct. 849, 136 L.Ed.2d 818, which held equitable tolling inapplicable to § 6511's deadline for taxpayers to file refund claims, but that case is inapposite. *Brockamp*'s holding rested on several distinctive features of § 6511 that are absent here. Unlike § 6511's deadline, § 6330(d)(1)'s deadline is not written in 'emphatic form' or with 'detailed' and 'technical' language, nor is it reiterated multiple times. *Id.,* at 350–351, 117 S.Ct. 849. And § 6330(d)(1) admits of a single exception (as opposed to § 6511's six). See § 6330(d)(2). If anything, these differences underscore the reasons why equitable tolling applies to § 6330(d)(1). Despite the Commissioner's protestations, the Court is not convinced that allowing § 6330(d)(1) to be equitably tolled will appreciably add to the uncertainty already present in the process. Whether Boechler is entitled to equitable tolling on the facts of this case should be determined on remand."

C. Taxpayer's Wife and Lawyers Not Entitled to Notice of Third-Party Summonses for Their Bank Records Issued Solely in Aid of Collection

Polselli v. United States Department of the Treasury-Internal Revenue Service, 23 F.4th 616 (6th Cir., Moore, 2022), reh'g en banc denied Mar. 28, 2022.

"In pursuit of over $2 million of a taxpayer's unpaid liabilities, the IRS issued administrative summonses to the banks of the taxpayer's wife and lawyers, Petitioners in this case. The IRS did not notify Petitioners of the summonses, relying on relevant provisions of the Internal Revenue Code excluding summonses issued 'in aid of the collection' of tax assessments from its notice provisions. We conclude that the summonses were issued in aid of the IRS's collection efforts and that Petitioners were not entitled to notice. Because the United States waives sovereign immunity only when a taxpayer entitled to notice challenges a summons, the district court lacked subject-matter jurisdiction over Petitioners' proceedings to quash the summonses. Accordingly, we AFFIRM the judgment of the district court."

"Remo Polselli underpaid his federal taxes for over a decade. R. 6-2 (Bryant Decl. ¶ 2) (Page ID #59). For the periods in which he failed to pay the government, the IRS has made formal assessments against him. *Id.* The outstanding balance of those liabilities is over $2 million. *Id.*

"While investigating the location of assets to satisfy those liabilities, IRS Revenue Officer Michael Bryant learned that Remo used entities to shield assets from collection. *Id.* ¶ 7 (Page ID #60–61). For example, in 2018, Remo paid approximately $290,000 toward his outstanding tax liabilities from the account of 'Dolce Hotel Management LLC,' rather than from his own bank account. *Id.*

"Bryant suspected that Remo was concealing the balance of his assets elsewhere to shield them from the IRS. Bryant's investigation has revealed that Remo 'may have access to and use of' bank accounts held in the name of his wife, Hanna Karcho Polselli. *Id.* ¶ 5 (Page ID #60). Based on this information, Bryant served a summons on Wells Fargo Bank, N.A. seeking account and financial records of Hanna and Dolce Hotel Management LLC 'concerning' Remo. *Id.* ¶ 5, 7 (Page ID #60); R. 6-3 (Wells Fargo Summons at 1) (Page ID #65).

"Bryant also learned that Remo was a long-time client of the law firm Abraham & Rose, P.L.C. R. 6-2 (Bryant Decl. ¶ 8, 9) (Page ID #61). Surmising that the law firm's financial records might reveal (1) the source of Remo's funds, (2) bank accounts associated with Remo, (3) entities Remo owned or controlled, or (4) bank accounts associated with those entities, Bryant served the law firm with a summons. *Id.* ¶ 8, 16 (Page ID #61, 62). In response, Abraham & Rose sent a letter in which it asserted attorney-client privilege and represented that the firm did not retain any of the documents that the IRS requested. R. 6-6 (Letter from Abraham & Rose to IRS at 1) (Page ID #77). When Bryant contacted the firm's representative possessing the power of attorney, Sheldon Mandelbaum, Mandelbaum repeated that the firm did not possess any documents responsive to the IRS's request. R. 6-2 (Bryant Decl. ¶ 12) (Page ID #61).

"Bryant then pursued another avenue to locate the financial records. He issued identical summonses against JP Morgan Chase Bank, N.A. and Bank of America, N.A., seeking any financial records of Abraham & Rose and a related entity, Jerry R. Abraham, P.C. (the Law Firms), 'concerning' Remo. *Id.* ¶ 8; (Page ID #61); R. 6-4 (JP Morgan Chase Summons at 1) (Page ID #69); R. 6-5 (Bank of America Summons at 1) (Page ID #73).

"Bryant did not notify Hanna or the Law Firms of the bank summonses. R. 3 (Suppl. Pet. to Quash ¶ 11) (Page ID #23). Wells Fargo alerted Hanna that the IRS had summoned her records, and she petitioned to quash the summons in district court. R. 8 (Opp'n to Mot. to Dismiss at 2) (Page ID #90); R. 1 (Pet. to Quash) (Page ID #1–18). After JP Morgan Chase and Bank of America notified the Law Firms of the summonses regarding their accounts, the Law Firms also petitioned to quash, and Hanna joined. R. 3 (Suppl. Pet. to Quash) (Page ID #21–34). The Petitioners alleged that the IRS failed properly to notify them of the summonses under Internal Revenue Code (I.R.C.) § 7609(a) (26 U.S.C. § 7609(a)). *Id.* ¶ 9."

"The Government argues that sovereign immunity barred the district court from asserting jurisdiction over Petitioners' suits to quash the summonses. As a government agency, the IRS is immune from suit absent an explicit statutory waiver. *Clay v. United States*, 199 F. 3d 876, 879 (6th Cir. 1999). We must construe strictly a waiver of sovereign immunity in favor of the United States. *Gaetano*, 994 F.3d at 506. 'Any ambiguities in the statutory language are to be construed in favor of immunity, ... so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires.' *F.A.A. v. Cooper*, 566 U.S. 284, 290, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012). We are particularly careful to construe § 7609(c)(2)(D)(i) in favor of immunity because 'restrictions upon the IRS summons power should be avoided "absent unambiguous directions from Congress."' *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984) (quoting *United States v. Bisceglia*, 420 U.S. 141, 150, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975), *partially superseded by statute on other grounds*, Tax Reform Act of 1976, Pub. L. No. 94-455, § 1205, 90 Stat. 1520, 1699–1703 (1976)).

"Section 7609's notice provisions not only guide the IRS procedurally but also define the scope of the United States' sovereign immunity. Under § 7609(b)(2), 'any person who is entitled to notice of a summons ... shall have the right to begin a proceeding to quash such summons.' We have thus held that § 7609(b)(2) waives the Government's sovereign immunity for a 'narrow class of taxpayers' petitioning to quash an IRS summons seeking materials from a third-party recordkeeper. *Gaetano*, 994 F.3d at 506. Indeed, § 7609(h) explicitly grants district courts jurisdiction over any such proceeding. Consequently, federal district courts have subject-matter jurisdiction over petitions to quash summonses filed by any party that is entitled to notice under § 7609(a)(1). If one of the exceptions to the notice requirement applies, however, 'the bar of sovereign immunity remains, and

the court lacks subject-matter jurisdiction.' *Id.* at 509. To determine whether the district court had jurisdiction over the petitions at issue, we must therefore determine whether Petitioners were entitled to notice of the Government's summonses."

"'[T]he Government depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability.' *Bisceglia*, 420 U.S. at 145, 95 S.Ct. 915. Recognizing 'the possibility that some citizens may be less-than-forthcoming with their financial records,' however, Congress has conferred upon the IRS the 'broad authority to collect information related to taxpayers' potential liabilities.' *Byers*, 963 F.3d at 552. To that end, § 7602 of the Internal Revenue Code authorizes the IRS to summon the 'person liable for tax,' any officer or employee of such person, or any other person it 'may deem proper' to produce records that may be relevant to the tax inquiry. I.R.C. § 7602(a)(2). The IRS may issue such a summons

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability.

"§ 7602(a).

"The IRS may also seek information from third parties to advance its enforcement efforts. Section 7609 of the Code outlines special procedures for summonses when those third parties are recordkeepers, often banks or financial institutions maintaining records of financial transactions of interest to the IRS. In general, the IRS must give notice to 'any person ... who is identified' in such a summons within three days of issuing the summons to the third-party recordkeeper. § 7609(a)(1). The third-party recordkeeper then has at least twenty-three days to comply, and the IRS may not examine the records prior to that time. § 7609(d). These notice requirements, however, contain several exceptions. As relevant here, the IRS is not required to notify the person or entity identified in a third-party recordkeeper summons when the summons is

> issued in aid of the collection of ... (i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or (ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (I).

"§ 7609(c)(2)(D).

"We agree with the district court that the summonses at issue fall squarely within the exception listed in § 7609(c)(2)(D)(i). That section unequivocally provides that the IRS may summon the third-party recordkeeper of any person without notice to that person if (1) an assessment was made or a judgment was entered against a delinquent taxpayer and (2) the summons was issued 'in aid of the collection' of that delinquency. We hold that as long as the IRS demonstrates that these conditions are satisfied, it may issue a summons to a third-party recordkeeper without notice to the person or entity identified in the summons.

"The Government has satisfied its burden here. The parties do not dispute that the IRS issued assessments against Remo totaling over $2 million. R. 6-2 (Bryant Decl. ¶ 2) (Page ID #59). Officer Bryant avers, and the parties similarly do not dispute, that he issued the summonses to the banks solely to 'locate assets' to satisfy Remo's 'existing assessed federal tax liability, and not to determine additional federal tax liabilities.' *Id.* ¶ 3 (Page ID #59–60). Bryant issued the summonses

to Petitioners' banks to obtain information about entities or persons with ties to Remo's assets—that is, 'in aid of the collection' of 'an assessment made ... against the person with respect to whose liability the summons is issued' as authorized by § 7609(c)(2)(D)(i). We therefore conclude that the district court lacked subject-matter jurisdiction over the petitions to quash."

II. Tennessee

A. Privilege Tax

1. Occupational Tax No Longer Levied on Doctors (But Still on Lawyers)

Chapter 1083, Public Acts 2022, amending T.C.A. § 67-4-1702 eff. May 27, 2022.

"There is levied a tax on the privilege of engaging in the following vocations, professions, businesses, or occupations:

(1) Persons registered as lobbyists pursuant to § 3–6–302;
(2) Persons licensed or registered under title 48, chapter 1 [Tennessee Securities Act] as:
  (A) Agents;
  (B) Broker–dealers; and
  (C) Investment advisers; and
(3) Persons licensed as attorneys by the supreme court of Tennessee."

2. Recordation Tax on Transfers of Realty

Chapter 834, Public Acts 2022, amending T.C.A. § 67-4-409(a) eff. Apr. 19, 2022.

67-4-409(a)(1)(D).

"In the case of quitclaim deeds, the tax must be based only on the actual consideration given for that conveyance. A deed is treated as a quitclaim deed for taxation purposes under this section if the deed contains language substantially similar to the form for quitclaim deeds as provided for in § 66–5–103(2), and only conveys the grantor's interest, whatever that may be, to the grantee. A deed that contains language evidencing an intent to convey a deed in fee with general warranty substantially similar to the form provided for in § 66–5–103(1)(A) must be taxed as provided in subdivision (a)(1)."

67-4-409(a)(2).

"(2) Nothing in this subsection (a) affects the validity of the underlying transfer or conveyance."

B. Property Tax

1. Unlisted Ownership in Online Database

Chapter 996, Public Acts 2022, adding T.C.A. § 67-5-517 eff. July 1, 2023.

"(a) An assessor of property may display 'UNLISTED' for the first and last name in the ownership field of an online searchable database of property when the following conditions are met:

(1) The residential property owner files a written request with the assessor to display the ownership field for their property as 'UNLISTED'; and
(2) The written request includes sufficient information to clearly demonstrate to the assessor that the subject property is the primary residence of the residential property owner making the request pursuant to subdivision (a)(1).

"(b) This section does not prohibit an assessor from responding to an open records request regarding the subject property or from providing other information otherwise available for public inspection through an open records request."

2. Prepayment Permitted

Chapter 848, Public Acts 2022, amending T.C.A. § 67-5-1808 eff. Apr. 20, 2022.

Under prior law, county trustees are authorized to accept partial payments. This chapter authorizes prepayment as well.

3. State Tax Lien Inferior to Previously Recorded Deed

Chapter 681, Public Acts 2022, amending T.C.A. § 67-1-1403(c)(2) eff. Mar. 28, 2022.

The lien of the State of Tennessee for taxes or fees, or both, shall be superior to all liens and security interests created under Tennessee law except: "Deeds or deeds of trust that are recorded prior to the recordation of notice of the state lien."

4. Forest Land Definition Amended

Chapter 658, Public Acts 2022, amending T.C.A. § 67-5-1004(3) eff. Mar. 15, 2022.

"(3) (A) 'Forest land' means land constituting a forest unit engaged in the growing of trees under a sound program of sustained yield management that has tree growth in such quantity and quality and is so managed as to constitute a forest.
(B) To be eligible as forest land, property must meet one (1) of the following minimum size requirements by consisting of:
(i) A single tract of at least fifteen (15) acres; or
(ii) Two (2) noncontiguous tracts within the same county totaling at least fifteen (15) acres that are separated only by a road, body of water, or public or private easement and together constitute a forest unit."

5. Revocation of Tax-Exempt Status of Religious, Charitable, Scientific or Nonprofit Educational Institution

Chapter 698, Public Acts 2022, amending T.C.A. § 67-5-212(b)(5) eff. Mar. 18, 2022.

"(5) Revocation of tax-exempt status.

"(A) The state board of equalization may revoke any exemption approved under this section, either in whole or in part, if it determines the exemption was approved on the basis of fraud, misrepresentation, or erroneous information; the current owner of the property does not qualify for

exemption; or the property is not actually being used for an exempt purpose. Property is not occupied and used for an exempt purpose if the property is not currently in use, has been abandoned, is not suitable for human habitation, or is being used for a nonexempt purpose.

"(B) The board may initiate proceedings for revocation of a property's tax-exempt status on its own motion or upon the written complaint of any person. Revocation is not retroactive unless the order of revocation incorporates a finding of fraud or misrepresentation on the part of the applicant or failure of the applicant to give notice of a change in the use or ownership of the property as required by this section.

"(C) The board, the executive secretary, or the executive secretary's designee may determine that property no longer qualifies for property tax exemption or may modify the tax-exempt status of a property. The board shall revoke a property's tax-exempt status through its staff designee. Written notice of the revocation must be sent to the property owner, the county assessor of property, and the county trustee, specifying the date the property's tax-exempt status ends. Written notice includes notification by electronic means, and the record of notice may be preserved in digital or electronic format. Either the county assessor of property or the property owner may appeal the initial determination to the board and is entitled to a hearing prior to any final determination.

"(D) A revocation is final ninety (90) days after the date the written notice is sent, absent an appeal filed pursuant to § 67–5–1501(c). An appeal of a revocation of a property's tax-exempt status must be treated as an appeal for purposes of § 67–5–1512."

C. Sales and Use Tax

1. Tennessee Broadband Investment Maximization Act

Chapter 1102, Public Acts 2022, adding T.C.A. § 67-6-391 eff. May 31, 2022.

"§ 67-6-391. Tennessee broadband equipment and services moratorium.

"(a) Beginning July 1, 2022, through June 30, 2025, there is exempt from the sales and use tax imposed by this chapter purchases and leases of all equipment, machinery, software, ancillary components, appurtenances, accessories, or other infrastructure that is used in whole or in part to:

(1) Produce broadband communications services, including broadcasting, distributing, sending, receiving, storing, transmitting, retransmitting, amplifying, switching, providing connectivity for, or routing communications services; or

(2) Provide internet access.

"(b) This section does not apply to the retail sale of personal consumer electronics, including, but not limited to, smartphones, computers, and tablets, and consumer-grade modems and Wi–Fi routers.

"(c) As used in this section:

(1) 'Broadband communications services' means:

(A) Telecommunications services;

(B) Mobile telecommunications services;

(C) Video programming services; and

(D) Direct-to-home satellite television programming services;

(2) 'Equipment' includes, but is not limited to, wires, cables, fiber, conduits, antennas, poles, switches, routers, amplifiers, rectifiers, repeaters, receivers, multiplexers, duplexers, transmitters, circuit cards, insulating and protective materials and cases, power equipment, backup power equipment, diagnostic equipment, storage devices, modems, and other general central office or headend equipment, such as channel cards, frames, and cabinets, or equipment used in successor technologies, including items used to monitor, test, maintain, enable, or facilitate qualifying equipment, machinery, software, ancillary components, appurtenances, accessories, or other infrastructure that is used in whole or in part to provide broadband communications services or internet access; and

(3) 'Internet access':

(A) Means a service that enables users to connect to the internet to access content, information, or other services offered over the internet;

(B) Includes:

(i) The purchase, use, or sale of telecommunications by a provider of internet access to the extent the telecommunications are purchased, used, or sold to:

(*a*) Provide the internet access service; or

(*b*) Otherwise enable users to access content, information, or other services offered over the internet;

(ii) Services that are incidental to the provision of internet access when furnished to users as part of the internet access service, such as a home page, email and instant messaging, to include voice-and video-capable email and instant messaging, video clips, and personal electronic storage capacity; and

(iii) A homepage, email and instant messaging, to include voice- and video-capable email and instant messaging, video clips, and personal electronic storage capacity, that are provided independently or packaged with internet access; and

(C) Does not include voice, audio, or video programming, or other products and services that utilize internet protocol or a successor protocol and for which there is a charge, regardless of whether the charge is separately stated or aggregated with the charge for services for internet access.

(D) Beginning July 1, 2022, the Commissioner of Revenue shall reimburse counties and municipalities for loss of revenue resulting from the tax exemption provided for in this act. Subject to appropriations, a sum must be earmarked and allocated from the general fund for this purpose."

2. Exemption for Certain Coins, Currency and Bullion

Chapter 1092, Public Acts 2022, adding T.C.A. § 67-6-350 eff. May 27, 2022.

"There is exempt from the tax imposed by this chapter the sale of all coins, currency, and bullion that are:

(1) Manufactured in whole or in part from gold, silver, platinum, palladium, or other material;

(2) Used solely as legal tender, security, or commodity in this or another state, the United States, or a foreign nation; and

(3) Sold based primarily on their intrinsic value as precious material or collectible items rather than their representative value as a medium of exchange."

3. Tax Holiday; Gun Safes and Safety Devices

Chapter 1053, Public Acts 2022, amending T.C.A. § 67-6-393(i)(1) eff. May 25, 2022.

The sales tax holiday for gun safes and safety devices has been extended to June 30, 2023.

4. Compensation of Vendors for Collecting and Remitting

Chapter 1082, Public Acts 2022, adding T.C.A. § 67-6-521 eff. July 1, 2022.

"(a) This section applies to dealers who are required to register for and collect and remit the sales and use tax imposed on items of tangible personal property under this chapter when such items are sold during the period of time beginning July 1, 2022, and ending June 30, 2023.

"(b) For purposes of compensating a dealer in accounting for and remitting the tax imposed by this chapter, a dealer is allowed a deduction of tax due, reported, and remitted to the department of revenue as follows:

(1) The deduction must be applied only to the state portion of the sales and use tax levied under part 2 of this chapter;
(2) Two percent (2%) of the first two thousand five hundred dollars ($2,500) on each report; and
(3) One and fifteen one-hundredths percent (1.15%) of the amount over two thousand five hundred dollars ($2,500) on each report.

"(c) A deduction from tax due is not allowed if any such report or remittance of tax is delinquent.

"(d) Notwithstanding subsection (b), the deduction provided by this section is limited to a maximum of twenty-five dollars ($25.00) per report.

"(e) Notwithstanding another law to the contrary, an amount equal to the excess of the amount calculated by the formula set forth in subsection (b), over and above the twenty-five-dollar limit imposed by subsection (d), must be retained by the state and deposited in the state's general fund."

D. Motor Vehicle Registration; Tax Waived Upon Renewal for One Year

Chapter 1143, Public Acts 2022, adding T.C.A. § 55-4-142 eff. July 1, 2022.

"Notwithstanding § 55–4–111(a) or another law to the contrary, the registration fee for a Class A [$16.75] or Class B [$23.75] motor vehicle under § 55–4–111(a)(1) is waived upon the renewal of the motor vehicle's registration if the renewal occurs during the period of time beginning July 1, 2022, and ending June 30, 2023."

INTELLECTUAL PROPERTY

I. Trademark Law

A. Mark Not Abandoned; Likelihood of Confusion

Tiger Lily Ventures Ltd v. Barclays Capital Inc., 35 F.4th 1352 (Fed. Cir. 2022).

Barclays purchased a number of Lehman Brothers businesses and accompanying goodwill in 2008 as part of the bankruptcy proceedings, including trademark rights to the LEHMAN BROTHERS trademarks. Barclays was not using the marks and allowed the registration to expire.

Tiger Lily applied to register the LEHMAN BROTHERS mark in connection with whisky. Barclays opposed the whisky application and also applied to register certain marks. The Trademark Trial and Appeal Board (TTAB) refused registration by Tiger Lily, holding that (1) Barclays had not abandoned its common law mark; (2) there is a likelihood of confusion between the marks; and (3) Barclays provided sufficient evidence that it has a good faith intent to eventually begin using the mark again. The TTAB pointed to the fact that LEHMAN BROTHERS branded collectable items (including some alcohol) are still being traded by collectors.

The Federal Circuit affirmed. The Federal Circuit rejected Tiger Lily's claim to trade on the bad will of the LEHMAN BROTHERS mark, stating that "Tiger Lily's attempts to capitalize on the fame of the LEHMAN BROTHERS mark weighs in favor of finding a likelihood of confusion." Also, the court found that the mark remains famous.

B. Registration Refused to "Extra-Terrestrial Life Form" for "Merely Descriptive" Mark

In re Glascoe, No. 2022-1073, 2022 WL 1165476 (Fed. Cir. Apr. 20, 2022).

The United States Patent and Trademark Office (USPTO) refused to register Glascoe's mark SCIENTIFIC STUDY OF GOD in connection with "analyzing the process of creating a human being, the earth, the universe and its environment." The TTAB refused registration after concluding that the mark was "merely descriptive." "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963 (Fed. Cir. 2007).

Glascoe appealed pro se. Her brief begins:

> Pro Se Appellant DEIRDRE C. GLASCOE is an Extra-Terrestrial Life Form—The Alien Entity known As GOD. GOD Is A Brand Name®, as are "I AM," "YHWH," "Yahweh," "Jesus Christ™," "Allah," "the Lord GOD of Israel," "EL," "Human Beings." GOD's Kingdom is a foreign state within the meaning of the Foreign Sovereign Immunities Act.

The Federal Circuit provided a one-sentence summary denial: "Ms. Glascoe has failed to make any cogent, non-frivolous argument as to why the Board's determinations were incorrect." In briefing, Glascoe noted that the TTAB had erred by failing "to recognize GOD as a legal person." On appeal, the Federal Circuit did not address that issue.

C. First Amendment Violated by Lanham Act Provision Regarding Mark Involving Living Person

In re Elster, 26 F.4th 1328 (Fed. Cir. 2022).

Elster tried to register TRUMP TOO SMALL. The PTO had denied registration under a provision in the Lanham Act requiring it to do so when a mark "[c]onsists of or comprises a name . . . identifying a particular living individual" without the individual's "written consent."

The Federal Circuit reversed, finding that the Trademark Office violated the First Amendment when it refused to register without his permission a mark criticizing former President Donald Trump. The Court held that, as applied to the mark TRUMP TOO SMALL, "section 2(c) involves content-based discrimination that is not justified by either a compelling or substantial government interest." The opinion fails to provide any guidance as to what test the PTO should use in the future to avoid applying the statute in an unconstitutional manner as it processes thousands of routine registration decisions per year.

D. .SUCKS Will Not Be a TLD

In re Vox Populi Registry, Ltd., 25 F.4th 1348 (Fed. Cir. 2022).

A few years ago, ICANN (Internet Corporation for the Assigned Names and Numbers) opened the door to new top-level domains. Vox tried to create the ".SUCKS" domain and is the TLD's domain registry operator. Vox is attempting to register both the standard character service mark .SUCKS and also a stylized version as a trademark. The Trademark Office rejected both, finding that the marks are merely descriptive and lack distinctiveness.

The Federal Circuit has also affirmed. (Vox only appealed for the stylized form). In particular, the court found substantial evidence supporting the following: Consumers would view .SUCKS as only a non-source identifying part of a domain name, the party is using .SUCKS as a product, i.e., domain name ending in .SUCKS, and the stylized version of .SUCKS fails to create a separate commercial impression from the word itself. The court does note that the mark may become registrable if Vox is later able to show acquired distinctiveness.

E. Priority of Mark

Brittex Financial v. Dollar Financial, No. 2021-1370, 2021-1449, 2021 WL 5504880 (Fed. Cir. Nov. 24, 2021).

Dollar Financial registered trademarks for MONEY MART in connection with payday and title loan services. The company had been using the name for several years in the payday loan business, and in 2012 expanded into pawn shops and then filed for registration for that usage in 2013. The USPTO then granted the registrations associated with the new uses.

Brittex had been using its own version of the mark on its south-Texas pawn shops since the early 1990s: MONEY MART PAWN. In 2015, Brittex petitioned for cancellation of the mark based upon the likelihood of confusion between the two marks.

The dispute in the case is about priority. Dollar was the first user of the mark, albeit only in connection with payday loan and loan financing. Dollar holds an incontestable mark in that area. On the other hand, Brittex was the first to use the mark in the pawn business. The TTAB sided with Dollar, holding that pawn shop services are "covered or encompassed by loan financing," reasoning that a major aspect of the pawn business is making collateralized loans.

On appeal, the Federal Circuit rejected the TTAB's conclusions, holding that the TTAB went too far in creating new law. The court found that the registration of a mark generally covering a broad category (genus) of uses did not necessarily establish priority over a specific (species) use covered by the broad category. The TTAB provided no "sound legal basis" for a conclusion "that a registrant has priority as to a specific service it was second to offer just because it was first to offer a different specific service that is a species of a genus that covers both specific services." Further, even if a genus does provide coverage, that does not necessarily mean that the genus holder has rights to register a specific species over a competitor's prior use.

While the court also found there to be some overlap, the court found no support for complete overlap, that all pawn shop business is a form of loan financing. On remand, Dollar might still win the case based upon a separate doctrine of "natural expansion" that can also permit a priority claim for an earlier similar use.

F. No Fear of Trademark Confusion by Boy Scouts

Girl Scouts of the United States of America v. Boy Scouts of America, F.Supp.3d , No. 18-cv-10287, 2022 WL 1047583 (S.D.N.Y. Apr. 7, 2022).

A District Court in Manhattan ruled that the Boy Scouts of America's (BSA's) use of the word "Scouting" to advertise co-ed programs does not violate the Girl Scouts' trademark rights. BSA announced in 2017 that it would allow girls to join and later launched an ad campaign for co-ed scouting called "Scout Me In." It changed the name of its main scouting program to "Scouts BSA" and officially started welcoming girls in 2019. The Girl Scouts sued in 2018, alleging BSA's use of "Scouts" and "Scouting" to market to girls violates its trademarks. It said the rebrand created confusion and threatened to marginalize the group. BSA has called the lawsuit part of a Girl Scouts "ground war" to counter its entry into girls' scouting. Both organizations have lost significant membership in recent years, and BSA is trying to finalize a proposed $2.7 billion settlement of thousands of sex abuse claims in bankruptcy court.

The district court said there was no trademark confusion and that the Girl Scouts' lawsuit was not based on trademark concerns but out of "fear for their competitive position in a market with gender-neutral options for scouting."

G. The Ohio State University Registers the Trademark "THE"

Ohio State University registered THE in connection with clothing (Registration No. 6,763,118).

II. Copyright Law

A. Proposed Copyright Clause Restoration Act of 2022

Missouri Senator Josh Hawley has introduced S.4178, a modest copyright proposal that would substantially reduce copyright terms to 28 years, with a right to apply for renewal for another 28 years. Currently, if a work was created after January 1, 1978, the term of protection lasts for the life of the author plus 70 years. For anonymous works and works made for hire, the term is 95 years from the initial publication or 120 years, whichever expires first.

The proposal would apply "with respect to a copyright that, on any date on or after May 1, 2022," if the owner "has a market capitalization of more than $150 billion" and operates in the industries of "Arts, Entertainment, and Recreation" or "Motion Pictures and Videos."

Reportedly, approximately 70 companies in the United States are covered by the market cap requirement, including Disney, which Senator Hawley specifically identified as a target of the proposed legislation, calling it a "woke corporation."

B. Whose Patent or Copyright Is It Anyway?

Thaler v. Vidal, 2021-2347, 2022 WL 3130863 (Fed. Cir. Aug. 5, 2022).

An inventor must be a natural person.

Dr. Stephen Thaler developed a computer called DABUS. DABUS is an artificial intelligence device that has developed art and, per Thaler, conceived of two inventions that would otherwise meet the requirements for patentability. Thaler could have listed himself as an inventor but instead listed the inventor as DABUS. The Federal Circuit Court held "Here, there is no ambiguity: the Patent Act requires that inventors must be natural persons; that is, human beings."

The Court did not follow Thaler's argument that under 35 USC Section 103 patentability shall not depend upon "the manner in which the invention was made." The court correctly found that Section 103 does not determine inventorship. The court stated that Section 103 "provides, in relevant part, that inventions may still be nonobvious even if they are discovered during 'routine' testing or experimentation." Slip Op. at 8. The court suggested that any change could be done legislatively. Thaler will likely unsuccessfully petition the Supreme Court for *certiorari*.

In another matter, Thaler filed a complaint in the U.S. District Court in Washington, D.C. again attempting to register a copyright registration for "A Recent Entrance to Paradise," an AI-generated work that is the output of Thaler's AI system known as Creativity Machine.

Thaler is requesting that the district court issue an order that would require the United States Copyright Office (USCO) to set aside the Review Board's decision and reinstate the application for registration of the work. *Thaler v. Perlmutter*, No. 1:22-CV-01564 (D.C., case filed June 2, 2022). The Review Board of the USCO issued an opinion letter in which it affirmed the USCO's previous decisions to deny registration of the AI-generated work.

Thaler argues that the plain language of the Copyright Act allows for the protection of AI-generated works under a concept similar to protections afforded to corporations and other non-human entities (to meet the "authorship" requirement). Thaler also argues there is a lack of case law supporting the USCO's position. Thaler argues "our courts have a long history of purposive interpretation of the Act in light of technological evolution."

Thaler proposes that the Turing Test, developed by Alan Turing in 1950, should be applied by courts. More specifically to copyright law, Thaler proposes that "[t]he real question is whether a machine can make something indistinguishable from a person for purposes of copyright protection", to which the answer is argued by him to be "yes" with respect to "A Recent Entrance to Paradise." Thaler also spends time in the complaint distinguishing two Ninth Circuit cases, *Naruto v. Slater* (the monkey selfie case) and *Urantia Foundation v. Maaherra* (a case involving a book partially created by spiritual beings). Another argument put forth by Thaler is that the work may be classified under the work made for hire doctrine.

C. AIRBNB Used to Film Porn Video, Copyrighted Artwork

Bassett v. Jensen, No. 18-10576-PBS, 2020 WL 4548244 (D. Mass. Cir. Aug. 20, 2020).

Leah Bassett rented her Martha's Vineyard home to Joshua Spafford. Spafford listed his employer as "Mile High Media." Mile High then used the home to shoot several adult videos. Leah, the homeowner, did not know that they were going to use her home in this way. She was upset when she learned what they had done.

Bassett is an artist who placed several of her original pieces on the walls, which appeared in many of the video scenes. She filed copyright registration for these items and subsequently filed a copyright infringement suit in federal court in Massachusetts. *Bassett v. Jensen*, No. 18-1056-PBS, 2020 WL 4548249 (D. Mass, Aug. 6, 2020). The court found that unauthorized use of her artwork in the scenes was copyright infringement. The court then left the question of damages and whether to destroy the videos for the jury. Bassett asked for all profits from the movies. The copyright case was settled just before trial.

"Russian doll" copyright infringement is infringement of a copyright that is within another copyright, just as Russian dolls are nested inside each other. This type of copyright infringement can appear unexpectedly and can have serious consequences. Both the US Postal Service and Cadillac have been caught by this type of copyright infringement.

D. Choreographer Challenges Fortnite's Use of His Copyrighted Dance Moves

Hanagami v. Epic Games, Inc., et al., No. 2:22-cv-02063 (C.D. Cal. 2022).

Kyle Hanagami is a popular choreographer with a large YouTube presence. He won the 2020 iHeart Music Award for Favorite Music Video Choreography for BlackPink's "Kill This Love" and holds the title for YouTube's most viewed choreography video of all time. Crucially, he also holds the copyright to the dance to the Charlie Puth song "How Long."

He argues that Epic's video game *Fortnite* rips off his dance moves. The game allows players to download specialized choreography for their avatars via an in-game purchase. One of the downloadable dances is strikingly similar to the choreography for "How Long." Once purchased, players can make their avatars do a four-beat string of choreography, while Mr. Hanagami's registered dance is 96 beats long. Mr. Hanagami has sued Epic in the Central District of California for copyright infringement.

This case will set the stage for the Ninth Circuit to clarify how far video games and social media companies can go in profiting off of viral dance moves. Previous cases have been unsuccessful,

largely on the grounds that the plaintiffs lacked copyright registrations in their dances. Recently, *Fresh Prince of Bel Air* actor Alfonso Ribeiro tried to pursue Epic for the use of his famous "Carlton dance" in *Fortnite* but dropped the case because he was unable to secure a copyright registration for his dance. Because Mr. Hanagami has a registration in hand, he may be able to succeed where others have failed.

A win by Mr. Hanagami could set the stage for more creators to register their works and seek compensation for infringement, especially as viral dance crazes continue to gain popularity.

E. Jerry West's Portrayal in the Lakers' Docudrama *Winning Time* Creates a Losing Time

HBO's drama series *Winning Time: The Rise of the Lakers Dynasty*, is based on the book *Showtime: Magic, Kareem, Riley and the Los Angeles Lakers Dynasty of the 1980s* by Jeff Pearlman. Jerry West was portrayed as a temperamental dolt in the series but not so in the book. West calls his portrayal "false and defamatory" and he has publicly called for a retraction and an apology. In a letter to HBO, West's lawyer claims that Winning Time falsely and cruelly portrays West as an out-of-control, intoxicated, rage-aholic. West's lawyer claims that the producers have committed the tort of false light invasion of privacy by creating a false impression about Mr. West that is highly offensive and injurious to his reputation and have also defamed Mr. West by attributing acts of rage to him that he never committed.

One of the portrayals West claims to be defamatory was HBO's depiction of his reaction to the drafting of Magic Johnson. The series portrays West in the following scenes regarding Magic Johnson: one is West golfing with Jerry Buss, Bill Shannan and Frank Mariani while discussing Magic Johnson, and West is shown kicking his golf ball, having a profanity-laden outburst, and storming off; another shows West yelling and breaking a golf club over his knee; and in a third scene, taking place after Magic Johnson was drafted, West is portrayed throwing his MVP trophy through his office window in anger.

F. Instagram Prevails in Embedding Lawsuit

Hunley et al. v. Instagram LLC, No. 3:21-cv-03778 CRB, 2022 WL 298570 (N.D. Cal. Feb. 2, 2022).

The plaintiffs, two photojournalists, filed a class action claim against Instagram. Each had posted their original photos of the George Floyd protests on Instagram. Third party media outlets were able to display the photographs, without permission of the plaintiffs, by using an Instagram embedding tool. The plaintiffs alleged that Instagram encouraged the embedding of photos in order to drive up advertising revenue. "Instagram misled the public to believe that anyone was free to get on Instagram and embed copyrighted works from any Instagram account, like eating for free at a buffet table of photos, by virtue of simply using the Instagram embedding tool," they claimed.

In September 2021, U.S. District Judge Charles R. Breyer dismissed the case, holding that the media companies are not liable for direct copyright infringement and that Instagram is not liable for secondary copyright infringement. The Court relied on the Ninth Circuit's 2007 opinion in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). In *Perfect 10*, the court established a "server test": websites do not legally "display" a copyrighted image if it is stored on its original website and merely embedded in search results.

The photographers attempted to file an amended complaint and plead around the Court's prior ruling. In February, the Court rejected the amended complaint on the same grounds. It appears that, in the Ninth Circuit, websites are free to embed photos without liability. However, this case has been appealed.

G. Copyright Infringement and the Issue of Mistake

Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S.Ct. 941 (U.S., Breyer, 2022).

Unicolors is the owner of copyrights in various fabric designs, including a 2011 copyright registration that consisted of 31 separate designs. Unicolors sued H&M for copyright infringement when H&M stores began selling a jacket and skirt that contained artwork that Unicolors claimed to be identical to one of the designs in its 2011 registration. The jury found in Unicolors' favor and H&M moved the court for judgment as a matter of law, which the trial court denied.

On appeal, the Ninth Circuit reversed, ruling that Unicolors had made a mistake of law in connection with the registration when it registered the work as a single publication, but some of the designs were apparently not put on sale to the public all at once. The Ninth Circuit held that the registration should have been found to be invalid.

Unicolors appealed this decision to the U.S. Supreme Court, which heard the case last November. The Supreme Court found that the Ninth Circuit had erred and that its ruling should be vacated. Justice Breyer proposed a scenario where "John" sees a flash of red in a tree and says that it must be a cardinal but is wrong because, in fact, it is a scarlet tanager. He asked what kind of mistake did John make? Justice Breyer concluded that it is really a mistake of labeling, similar to the one that Unicolors made in this case, that does not even matter for purposes of determining whether Unicolors should prevail on its copyright infringement claim.

The text of 17 U.S.C. §411(a) provides that a registration should be held valid regardless of whether it has inaccurate information unless "the inaccurate information was included on the application for copyright registration with knowledge that it was inaccurate." Unicolors claimed, and the Ninth Circuit agreed, that it was not aware, when it filed a registration for the 31 separate designs, that they did not necessarily satisfy the "single unit of publication" requirement. The Supreme Court, in disagreeing with the Ninth Circuit, concluded that if Unicolors was not aware of this legal requirement, then section 411 makes clear that the registration should not be held invalid.

The Court continued by looking at similar copyright statutes that imposed a knowledge requirement both as to law and fact, unlike section 411. The Court concluded that there was nothing in the statutory language of section 411 "that Congress wanted to forgive those applicants' factual but not their (often esoteric) legal mistakes."

H. Crash and Burn?

The family of the man whose magazine article inspired the 1986 film *Top Gun* is suing Paramount Pictures over copyright infringement claims, saying they exercised their right to recover the copyright to the story in 2018 and that it took effect in 2020 under reversion. Plaintiffs allege that Paramount did not reacquire the film rights before releasing *Top Gun: Maverick*. Paramount, in a statement, vowed to fight the lawsuit. "These claims are without merit, and we will defend ourselves vigorously," the statement read.

In 1983, California magazine published an article by Ehud Yonay called "Top Guns," which told the story of Navy pilots "in a remarkably vivid and cinematic fashion," according to the lawsuit. Paramount secured the film rights to the article weeks later, and the blockbuster film *Top Gun* was released in 1986.

III. Technology Law

A. Social Media Censorship

NetChoice, LLC v. Paxton, 142 S.Ct. 1715 (U.S. 2022).

The Supreme Court issued without opinion an emergency order to reinstitute the preliminary injunction against enforcement of the social media censorship law known as HB20. The case is now back before the 5th Circuit. Texas HB20 regulates large social media platforms (at least 50 million active users in the United States in a calendar month). The law prohibits large social media platforms from censoring users based upon that user's viewpoint. "Censor" is broadly defined "to mean to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression."

NetChoice is a lobbying organization controlled by large media companies, including Google, Facebook, TikTok, Amazon and Twitter. Those companies argue that HB20 impinges upon their Constitutionally protected free speech rights. In particular, the large social media platforms argue that the First Amendment protects their rights to operate as editors making publication decisions.

B. Data Breach

In re Waste Management Data Breach Litigation, 21-cv-6147 (DLC), 2022 WL 561734 (S.D.N.Y. Feb. 4, 2022).

Waste Management detected suspicious activity on its servers in January 2021, but did not discover until May 2021 that hackers had obtained personally identifiable information (PII) for the company's 40,000 employees and tens-of-thousands of former employees. The information at issue includes name, SSN, DOB, Driver's License, et cetera. Four weeks after discovering the breach, Waste Management disclosed the breach to individuals as well as to the California Attorney General, as required by statute. WM offered to pay for one year of identity monitoring. The current/former employees filed a class action suit alleging negligence, breach of implied contract, breach of fiduciary duty, unjust enrichment, and breach of various California state laws, including the California Computer Privacy Act (CCPA). In her recent decision, S.D.N.Y. Judge Denise Cote dismissed the case for failure to state a claim upon which relief could be granted. Fed. R. Civ. Pro. R. 12(b)(6).

As to negligence, implied contract and unjust enrichment, the complaint did not allege some unreasonable action (or inaction) in breach of the duty of care or other agreement. As to implied contract, the complaint failed to plead any unreasonable action. As to fiduciary duty, the court stated that employers are not fiduciaries of their employees. As to the California Consumer Privacy Act (CCPA), the complaint failed to allege any unreasonable action, as the CCPA required that WM have in place "reasonable security procedures and practices appropriate to the nature of the

information." Cal. Civ. Code § 1798.150(a)(1). The court further found that the disclosure delay "is insufficient on its own to plausibly allege unreasonable delay."

Waste Management filed an appeal on March 25, 2022.

C. The Continuing Battle Over LinkedIn Profiles and the Applicability of the Computer Fraud and Abuse Act

HiQ Labs, Inc. v. LinkedIn Corporation, 31 F.4th 1180 (9th Cir. 2022).

The Ninth Circuit affirmed the district court's preliminary injunction against LinkedIn from taking certain technical measures to prevent hiQ, a data analytics company, from "scraping" information from publicly available profiles on LinkedIn's site. The Ninth Circuit found that hiQ was not violating the Computer Fraud and Abuse Act ("CFAA") because its activities were directed at publicly available information and, therefore, it was not accessing LinkedIn's computer systems either without authorization or in excess of such authorization as required to establish liability under the CFAA.

LinkedIn filed a petition for writ of certiorari. Another case involving the application of the CFAA was being considered during the same time period by the U.S. Supreme Court, *Van Buren v. United States*, 141 S.Ct. 1648 (2021). The Van Buren case involved a former Georgia police officer who, in exchange for money, would use the computer in his patrol car to access the law enforcement database to retrieve information about requested license plate numbers. In essence, the officer was using his valid credentials to access the police computer system but was using the system for non-law enforcement purposes. The officer was convicted of felony violation of the CFAA. The U.S. Supreme Court reversed the officer's conviction and applied a narrow reading of the CFAA. The U.S. Supreme Court reversed the finding that the officer's granted "access" to the areas of the database precluded application of the CFAA.

After *Van Buren*, the U.S. Supreme Court granted LinkedIn's petition for a writ of certiorari. The Court vacated the 2019 judgment of the Ninth Circuit and remanded the case back to the Ninth Circuit to reevaluate the issues in light of the *Van Buren* opinion. The Ninth Circuit again affirmed the preliminary injunction hiQ had obtained against LinkedIn. The Ninth Circuit's opinion found the presence of irreparable harm to hiQ if an injunction was not granted, as well as the "balance of the equities" tilting in favor of hiQ in connection with its request for injunctive relief. The Ninth Circuit found that the CFAA phrase "without authorization" is a non-technical term and should be given "its plain and ordinary meaning." The court continued by recognizing that "authorization" indicates an affirmative notion, i.e., that some steps have been taken to restrict and/or permit access to certain people. However, where sites such as LinkedIn have "free access without authorization," it was hard to find how one accessing the site has done so "without authorization." It noted that the CFAA was best "understood as an anti-intrusion statute and not as a "misappropriation statute." Furthermore, most of the early cases involving the CFAA generally applied only to computers that were not accessible to the general public, and therefore, some type of affirmative authorization was required to access them. The Ninth Circuit summarized its understanding of the CFAA by creating a three-category dichotomy: "(1) Computers for which access is open to the general public and permission is not required; (2) computers for which authorization is required and has been given; and (3) computers for which authorization is required but has not been given (or in the case of the prohibition on exceeding authorized access, has not been given for the part of the system accessed)."

IV. Trade Secret Law

A. Misappropriation

Thomas v. Hughes, 27 F.4th 363 (5th Cir. 2022).

Texas attorney Lee Ann Hughes purchased Performance Probiotics, LLC from the company founder Pearcy, who she also represented. PPI agreed to license Pearcy's proprietary formulation of probiotics at a rate of 14% of net sales with an option to purchase the rights for $100,000 at the end of five years. PPI did not pay the royalties and instead simply used the formulation without payment.

Percy won a Texas state court verdict of almost $1 million for trade secret misappropriation by PPI, but just $1 against Hughes for breach of attorney fiduciary duty. PPI filed for bankruptcy.

Percy as well as PPI's bankruptcy trustee sued Hughes personally for the money owed based upon allegations of fraudulent transfer pre-bankruptcy, fraud, and breach of fiduciary duty to the company in district court. A jury found that Hughes was liable for the original judgment and interest amounting to almost $1.5 million. In addition, the jury awarded $1.2 million in punitive ("exemplary") damages. The district court additionally ordered disgorgement of $900,000 in compensation Hughes received from PPI; an injunction against Hughes and her new companies from using the trade secret formulation until the judgment is fully satisfied; joint and several liability against Hughes personally for the prior judgment against PPI; and attorney fees of almost $400,000. This brings the total due to about $4 million.

On appeal, the Fifth Circuit has affirmed with a slight modification. Under Texas law, trade secret misappropriation requires the following three elements:

1. existence of a trade secret
2. acquisition of the trade secret through a breach of a confidential relationship or improper means; and
3. unauthorized use of the trade secret.

On appeal, Hughes argued that there was insufficient evidence to prove that Percy's formulation was a trade secret. Although Hughes made that argument in her R.50(b) motion, she did not make the argument in a pre-verdict R.50(a) motion. On appeal, the Federal Circuit refused to consider this particular challenge. "Because Hughes did not challenge the existence of a trade secret or improper use in her initial Rule 50(a) motion, those issues were not properly raised in her post-trial Rule 50(b) motion. We therefore decline to address them on appeal."

Hughes argued that the money paid fully compensated the defendant and thus no injunction was appropriate. The Federal Circuit found that, "[w]hile it is true that the jury awarded 'legally measurable damages' to Pearcy for Hughes's misappropriation of trade secrets, the history of this case makes clear that such damages, without more, are incapable of remedying 'the situation sought to be enjoined.' The Comal County jury originally awarded damages against PPI for breach of contract and misappropriation of trade secrets. But that award did not stop Hughes and companies she controlled from misappropriating Pearcy's trade secrets again. Moreover, the money damages

awarded to Pearcy compensate for *past* misappropriation, while the injunctive relief was fashioned by the district court to prevent *future* misappropriation–until the court's judgment is satisfied, neither Hughes nor her companies have any more right to use Pearcy's trade secrets than they did before. We agree with the district court that 'the evidence adduced at trial and supported by the jury's verdict shows that without injunctive relief, [Hughes] could continue harming Plaintiffs, which would … defeat the entire purpose of this long, expansive litigation.'"

B. Preliminary Injunction Upheld in Trade Secret Dispute Despite Prior Publication

Masimo Corp. v. True Wearables, Inc., No. 2021-2146, 2022 WL 205485 (Fed. Cir. Jan. 24, 2022).

Masimo Corporation and Ceracor Laboratories, Inc. (collectively, "Masimo") sued True Wearables, Inc. ("True Wearables") and Dr. Marcelo Lamego, alleging a number of causes of action, including misappropriation of trade secrets in that Dr. Lamego misappropriated Masimo's TSS algorithm used for applications such as optimizing the accuracy of oximeters, which estimate the concentration of total hemoglobin or oxygen in the blood.

Prior to founding True Wearables, Dr. Lamego worked at Ceracor and developed the TSS algorithm for calculating these coefficients, which is the alleged trade secret at issue. During an internal presentation, Dr. Lamego presented two different variations of the TSS algorithm. At some point, after leaving Masimo, Dr. Lamego founded True Wearables, where he developed the Oxxiom pulse oximeter and filed patent applications on certain aspects of its design.

The United States Patent and Trademark Office ("USPTO") issued a notice of allowance for one of the patent applications, the '158 Patent Application, on January 11, 2021. Masimo alleges that the '158 Patent Application "contains one of the variations of the TSS that Dr. Lamego developed" while at Ceracor. Masimo moved for a preliminary injunction to prevent the '158 Application from becoming public when it issues as a patent, arguing the patent would improperly expose Masimo's allegedly trade secret algorithm.

The District Court for the Central District of California evaluated the *Winter* factors to determine whether to grant the motion for preliminary injunction. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Under the *Winter* factors, a plaintiff must show that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm, (3) the balance of equities favors the plaintiff, and (4) the injunction is in the public interest." Further, "[i]n the Ninth Circuit, a court may enter a preliminary injunction 'if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.'"

The district court found that the TSS algorithm was not generally known and Masimo would likely show that Dr. Lamego misappropriated the TSS algorithm, so Masimo was likely to succeed on its trade secret claim. The court also "found that the risk of irreparable harm and the balance of the equities" favored a preliminary injunction. Further, the court determined that a preliminary injunction would be in the public interest. Therefore, the district court issued an injunction.

On appeal, True Wearables and Dr. Lamego argued that the district court erred in determining that Masimo was likely to show that the TSS algorithm was a trade secret. Under the California Uniform Trade Secrets Act ("CUTSA"), "information is eligible for trade secret protection if it (1)

'[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,' and (2) '[i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.'"

True Wearables argued the TSS algorithm is not a trade secret because an IEEE conference paper "disclosed an algorithm equivalent to the TSS and that [the paper] has been cited over 1,200 times." Further, True Wearables' expert testified that "variants of the TSS have appeared in statistics textbooks since the early 1960s" and that "an algorithm equivalent to TSS was 'widely known and widely used by the statistic community prior to … the '158 [Patent] Application.'"

The district court was not persuaded, noting that while the IEEE article was "not obscure," the publication did "not mean that the particular techniques described in them were 'generally known' to people who could obtain economic value from developing noninvasive blood content detectors." On appeal, True Wearables argued that the district court improperly deemed the publication irrelevant. However, the Federal Circuit disagreed, stating that "[t]he district court simply found that the [publication] did not conclusively show that the TSS was generally known among those who could obtain economic value from its disclosure."

Dr. Lamego's own practices and arguments to the USPTO were also contrary to his position that the TSS algorithm is not a trade secret. Masimo explained that "Dr. Lamego protected the TSS as a trade secret while working [for them], including in an email to another employee describing TSS as 'not known in the literature and … a trade secret.'" Further, "[a]fter founding True Wearables, Dr. Lamego labeled a notebook including TSS and related material as containing trade secrets." And finally, "Dr. Lamego argued to the [USPTO] that the TSS was not 'common knowledge.'"

The Federal Circuit upheld the issuance of the preliminary injunction, despite the IEEE publication, noting that "the evidence shows that TSS was known in the field of statistics, without evidence that the statistical principle had particular application to the plaintiff's field or a related field." Further, True Wearables' expert's "declaration did not tie the particular statistical information to the field of medical devices for measuring blood characteristics, or even any related field."

The Federal Circuit noted that "[u]ltimately, the class of persons who could obtain economic value from the disclosure of the TSS may well be broader than just those entities who develop noninvasive blood content detectives…. However, based on the limited record developed in this preliminary injunction proceeding, the district court was not required to conclude that the fact that the TSS was known to at least some persons within the statistics community meant that it was generally known to persons who could obtain economic value from it." Therefore, the Federal Circuit found that "[a]t a minimum, Masimo has raised a serious question as to the validity of its trade secret" and that was enough to justify the preliminary injunction.

As the case progresses, we will see whether True Wearables and Dr. Lamego are able to tie the prior publication to the applicable field. Regardless, this case is a good reminder that it is important in trade secret cases to show that prior publications can be tied to the applicable field to show the trade secrets would be generally known by those who could obtain economic value.

V. Patent Law

A. America Invents Act; Delegation of Decision for Inter Partes Review

CustomPlay, LLC v. Amazon.com, Inc., No. 2020-2209, 2022 WL 456911 (Fed. Cir. Feb. 15, 2022), petition for certiorari pending.

If certiorari is granted, this case will determine whether the Patent and Trademark Office (PTO) violated the statutory text and legislative intent of the America Invents Act (AIA) by delegating the PTO Director's responsibility to determine whether to institute inter partes review (IPR) of issued patents to the Patent Trial and Appeal Board (PTAB), which is the entity that the AIA directs to render final decisions in instituted proceedings.

A second issue is whether the PTO's administration of IPR proceedings violates a patent owner's constitutional right to due process by having the same decisionmaker, the PTAB, render both the institution decision and the final decision.

B. Administrative Procedures Act; "Submariner"

Hyatt v. USPTO, No. 2021-1708, 2021 WL 5099989 (Fed. Cir. Nov. 3. 2021), petition for certiorari pending.

Following a failed en banc petition, Hyatt filed a petition for writ of certiorari focusing on standards for dismissing Administrative Procedure Act (APA) claims. According to the USPTO, there are a couple of hundred patent applications still pending that were filed prior to the June 1995 patent term transformation (GATT). Of those, 99% list Gilbert Hyatt as an inventor. Hyatt's filings argue that the USPTO is largely to blame for the delays. In particular, Hyatt provided testimony of various former PTO officials of a no-patent-for-Hyatt policy, "a secret agency policy to block issuance of his applications as patents, regardless of the merits of his patent claims." The PTO created a Hyatt Unit of examiners who repeatedly referred to Hyatt as a "submariner" and tracked Hyatt applications using software they called the "submarine detector."

In 2018, Hyatt filed an Administrative Procedure Act (APA) suit seeking an order requiring "bona fide examination of his applications." The lawsuit sought review under both Section 706(1) and 706(2):

> The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . .

5 U.S.C. § 706.

The district court sided with the USPTO with a sua sponte summary judgment order, finding that the USPTO was already working diligently on the applications based upon its recent filing of "numerous office actions on plaintiff's applications." In the process, the district court (1) based its decision upon facts already developed in the administrative record and without following the usual summary judgment approach of drawing every reasonable inference in favor of Respondents; and (2) concluded that summary judgment was proper because Hyatt could not satisfy the extraordinary "mandamus standard" that the court concluded was required to prove a Section 706(1) or (2) case. These two rulings form the basis of Hyatt's newest petition for writ of certiorari.

C. On Sale Bar

Sunoco Partners v. U.S. Venture, 32 F.4th 1161 (Fed. Cir. 2022).

Sunoco's patents cover systems for blending butane into gasoline. In a bench trial, the judge found US Venture liable for willful infringement and awarded $2 million in reasonable royalty damages and $6 million in treble damages. Both sides appealed, with the infringer wanting to escape liability and the patentee wanting more money.

The "on sale bar" prohibits patenting an invention that was placed "on sale" prior to the application being filed. Application of the on sale bar is a question of law, as is the underlying issue of whether the experimental use exception applies. However, underlying factual conclusions made by the lower court should be given deference on appeal.

On February 7, 2000, the inventor's company (MCE) offered to sell and install a butane-blending system to Equilon. In the agreement, Equilon was not actually paying anything for the machine, but would agree to purchase substantial butane from MCE over the next 5 years. The original patent application was filed Feb 9, 2001, one year and two days later and outside the one-year grace period.

On appeal, the Federal Circuit concluded that a purchase agreement is a classic offer to sell. The offer expressly stated conveyance of "ownership and title to the Equipment." The district court found effectively that the equipment was being given away since the "the contract did not require Equilon to pay MCE anything in exchange for the system in the normal course of events." On appeal, though, the Federal Circuit held that the contract required transfer of title as part of the consideration for Equilon's agreement to purchase butane. Using its de novo power, the appellate court rejected the district court's offers interpretation and found that it constituted an offer for sale. The court cited a prior decision on point, *Netscape Commc'ns Corp. v. Konrad*, 295 F.3d 1315 (Fed. Cir. 2002) (offer to make a "remote database object . . . in exchange for four months full time employment or no more than $48,000" was a "commercial offer for sale").

Experimental use would forgive the on sale bar. The test for experimental use is whether the offer was "primarily [for] experimental purposes." The offer included a section for both "pre-installation testing" and "post-installation testing." The Federal Circuit found that those contract provisions do not necessarily indicate any intent to experiment with the system design or to ensure that the invention works and are instead testing provisions to ensure that the particular embodiment was tuned correctly. Further, the Federal Circuit found that there was no reason why the sale was needed to further any design experimentation.

D. Patent Eligibility

Spireon v. Procon Analytics, No. 2021-1954, 2022 WL 167463 (Fed. Cir. Jan. 19, 2022), cert. denied June 30, 2022.

On petition by patent holder Spireon, the Supreme Court is being asked:

1. What is the appropriate standard for determining whether a patent claim is "directed to" a patent-ineligible concept…?

2. Is patent eligibility (at each step of the Court's two-step framework) a question of law for the court based on the scope of the claims or a question of fact for the jury based on the state of the art at the time of the patent?

Spireon has millions of vehicle tracking systems in operation. Procon provides similar services as well. Spireon's U.S. Patent No. 10,089,598 is directed to a method of managing vehicle inventory at an auto dealership using a "location device" (such as a GPS receiver or other positioning system designed to be attached to the vehicle). Claim 1 includes the following steps:

1. In the Server DB: Associate the location device with the dealer's group of 'available location devices;'
2. Communicatively couple the device with a vehicle;
3. Once coupled, transmit a connection notice that includes a vehicle identifier and location device identifier;
4. In the server DB: Associate the location device with the vehicle and remove it from the list of 'available location devices;' and
5. Receive current location from the location devices.

In the case, Procon filed a declaratory judgment action. The district court dismissed the case on the pleadings, finding the claims directed to an abstract idea. The Federal Circuit then affirmed without opinion.

Off the Shelf: The patent specification indicated that "the location device may be an off-the-shelf tracking device for a vehicle, for example for use by an end-user, for user-based insurance, for fleet management, for managing driver behavior, and/or the like." The district court relied upon this statement to conclude that the location device did not include any inventive concept. In its petition, the patentee argues (Ed thinks correctly) that the "off-the-shelf" statement should be interpreted as contemplating the invented device being sold in retail stores, not that it could already be found on retail stores pre-invention.

E. Induced Infringement

Roche Diagnostics Corp. v. Meso Scale Diagnostics, LLC, 30 F.4th 1109 (Fed. Cir. 2022).

Roche obtained patents relating to immunoassays employing electrochemiluminescence ("ECL") from BioVeris Corporation. A jury found that a predecessor of BioVeris (IGEN) had exclusively licensed the patents to Meso Scale Diagnostics, and that Roche was liable to Meso for directly infringing one of the patents and for inducing infringement of two others.

The Federal Circuit affirmed the jury's decision with respect to direct infringement, but reversed the judgment of induced infringement, remanding for a new trial on damages.

Prior to acquiring the ECL patents, Roche obtained a nonexclusive license to the patented ECL technology from IGEN in the field of "human patient diagnostics." This license required Roche to note this field restriction on its product packaging. When Roche acquired BioVeris and over 100 patents, Roche announced this acquisition in a press release stating it would now "own the complete patent estate of the [ECL] technology," giving it "the opportunity to fully exploit the entire immunochemistry market" and ensuring its ability to "provide unrestricted access to all customers." Roche also sent letters to customers indicating that the field-restriction labels were

"now obsolete" and would be "removed as soon as possible," but that in the interim customers should "please ignore the restrictions." Roche subsequently began selling the products without field restrictions. Meso argued that these actions induced customers to use the patented technology outside of the licensed field of use, i.e., "human patient diagnostics."

The Federal Circuit explained that the decision to reverse the district court's judgment with respect to induced infringement rested on two independent grounds: (A) absence of intent, and (B) absence of an inducing act that could support liability during the six-year statute of limitations on collecting back-damages, as set forth in 35 U.S.C. § 286.

Regarding intent, the court found that the district court had "incorrectly applied a negligence standard rather than requiring specific intent for inducement." The Federal Circuit clarified that, while it previously applied a "knew or should have known" formulation, it has since made clear that, "to the extent our prior case law allowed the finding of induced infringement based on recklessness or negligence, such case law is inconsistent with *Global-Tech* and no longer good law.… Under the proper standard, the jury's inducement conclusion is unsupportable."

The majority went on to explain that a finding of induced infringement was fundamentally inconsistent with the district court's conclusion (made in the context of a JMOL of no willful infringement) that "at no time did Roche have a subjective intent to infringe (or induce infringement of) Meso's patent rights." In particular, the district court found that Roche had reasonably (albeit ultimately incorrectly) concluded that Meso did not have an exclusive license in the patents, and thus that Roche had no liability to Meso for patent infringement.

F. Inconvenient Forum

In re Quest Diagnostics, No. 2021-193, 2021 WL 5230757 (Fed. Cir. Nov. 11, 2021).

Ravgen sued Quest in the Western District of Texas for patent infringement. Quest has dozens of "places of business" open within the Western District (Waco and Austin areas), where Quest was selling the services. So, the venue was proper under the narrow venue statute for patent cases, Section 1400(b). Likewise, the court has personal jurisdiction over the defendant with Quest's Texas-based operations, allowing for specific jurisdiction under the minimum contacts test of *International Shoe*. Then the court looked at the question of an inconvenient forum.

The Federal Circuit again ordered Judge Albright to release this case and transfer it to a more convenient venue in the Central District of California. Quest designed and developed the tests in C.D. Cal., and it uses those same labs to actually conduct the genetic test.

Quest's primary argument for keeping the case in Waco is that there are already three other cases before Judge Albright involving the same two patents (*Ravgen, Inc. v. PerkinElmer*, *Ravgen, Inc. v. Natera*, and *Ravgen, Inc. v. LabCorp*).

The parties did not point to any non-party witnesses, but Quest did point to the long travel time from C.D.Cal., to Waco, and the Federal Circuit indicated that the district court should have placed more weight on that factor and also erred by not considering travel convenience in a more wholistic manner.

In his order, Judge Albright had noted that his familiarity with the patents at issue and his push for a quick trial weighed heavily in favor of keeping the case in Waco. However, the appellate panel found that Albright should not account for any of his familiarity learned after Quest filed its motion for transfer. In addition, the Federal Circuit restated a prior holding that "it is improper to assess the court congestion factor based on the fact that the Western District of Texas has employed an aggressive scheduling order for setting a trial date." (Quoting *In re Juniper*, 14 F.4th 1313 (Fed. Cir. 2021)).

Transfer ordered.

G. District Court Considers Acceptable Limits to Attorney Participation in Drafting of Expert Reports

Munchkin, Inc. v. Tomy International, Inc., 1-18-cv-06337, 2021 WL 3047151 (N.D. Ill. July 20, 2022).

The Court considered the permissible extent of attorney participation in the preparation of an expert report. Plaintiff moved to exclude the testimony of the defendant's technical expert for failing to prepare his own report.

In determining the admissibility of an expert opinion under Rule 702, the Court acts as a "gatekeeper" to determine whether the proffered expert testimony is reliable and relevant. In doing so, the Court asks whether: (1) the expert is "qualified by knowledge, skill, experience, training, or education;" (2) the proposed expert testimony will "assist the trier of fact in determining a relevant fact at issue in the case;" (3) the expert's testimony is "based on sufficient facts or data and reliable principles and methods;" and (4) the expert "reliably applies the principles and methods to the facts of the case." The party seeking to introduce the expert testimony bears the burden of demonstrating the expert testimony satisfies Rule 702 by a preponderance of the evidence. Here, Munchkin did not contest the expert's qualifications, and thus the Court limited its analysis to the reliability of the reports and testimony.

Rule 26(a)(2)(B) requires an expert disclosure "must be accompanied by a written report prepared and signed by the witness." While "some attorney involvement in the preparation of an expert report is permissible," the "expert must also substantially participate in the preparation of his report." An attorney "preparing the expert's opinion from whole cloth and then asking the expert to sign it if he or she wishes to adopt it conflicts with Rule 26(a)(2)(B)'s requirement that the expert 'prepare' the report."

Munchkin argues that TOMY's counsel drafted the opinion and the expert signed it.

The Court stated it could not find the expert had no substantial involvement in the report. The expert stated throughout his deposition that he dictated his opinions to counsel, counsel typed up the report, it was sent to him, and he made edits. The Court found it does not appear counsel wholly created the report based on his own opinion and asked Darley to sign off on it.

The Court did exclude Darley's report and testimony because TOMY's expert continued to argue for claim constructions that are opposite of those already adopted by the Court during claim construction.

I. Alcoholic Beverages

A. Manufacturers; Alternating Proprietorship Agreement

Chapter 689, Public Acts 2022, amending T.C.A. § 57-3-101(a) and adding § 57-3-202(m) eff. Mar. 28, 2022.

57-3-101.

"(a) 'Alternating proprietorship agreement' means an agreement between two (2) or more licensed manufacturers to share all or a portion of a bonded or general premises, or both, pursuant to § 57-3-202(m)."

57-3-202(m).

"(1) A manufacturer licensed under this section may enter into an alternating proprietorship agreement with one (1) or more manufacturers, subject to the restrictions of this subsection (m).

"(2) Parties to an alternating proprietorship agreement may alternate the use of a bonded or general premises, or both, or part of a bonded or general premises, or both, for the purpose of manufacturing alcoholic beverages, including high alcohol content beer.

"(3) A manufacturer that is a party to an alternating proprietorship agreement shall maintain a room or separate area of the general premises that is exclusively occupied by that manufacturer and is not alternated with another manufacturer. There is no size requirement for this exclusive premises.

"(4) Each manufacturer that is a party to an alternating proprietorship agreement shall individually receive approval of the agreement from the TTB and the commission prior to commencing operations at the general premises.

"(5) A manufacturer seeking approval for an alternating proprietorship agreement shall submit to the commission:

(A) A description of the areas, equipment, resources, rooms, or buildings, or combination of areas, equipment, resources, rooms, or buildings, that will alternate between manufacturers;
(B) Diagrams of the parts of the general premises that will and will not be alternated;
(C) A copy of the written alternating proprietorship agreement between manufacturers; and
(D) An acknowledgement from each manufacturer that they will maintain adequate records that track the alternating premises. Such records are subject to inspection by the commission upon request.

"(6) The commission may require additional information under this subsection (m) that is necessary for the commission to verify compliance with this chapter and other applicable laws.

"(7) Only the manufacturer participating in an alternating proprietorship agreement that is the property owner or primary lessee of the general premises may exercise retail rights and privileges

under this subsection (m). If there are two (2) or more manufacturers that are property owners or are primary lessees, only one (1) manufacturer may exercise the retail rights and privileges under this subsection (m).

"(8) The manufacturers that are parties to an alternating proprietorship agreement must not be owned by the same individual or entity or by substantially similar ownership. 'Substantially similar ownership' includes, but is not limited to:

(A) An individual who owns more than a forty percent (40%) interest in two (2) or more of the manufacturers that are parties to the alternating proprietorship agreement;

(B) An individual who owns a manufacturer that is a party to the alternating proprietorship agreement whose spouse is the owner of another manufacturer that is a party to the agreement; or

(C) A manufacturer that is a party to the alternating proprietorship agreement that is owned by a trust that is for the benefit of an owner of another manufacturer that is a party to the agreement or the owner's spouse or children."

B. Shipment; Common Carrier License and Shipment of Alcoholic Beverages or Beer

Chapter 699, Public Acts 2022, adding T.C.A. § 57-3-227 eff. Mar. 18, 2022, and amending T.C.A. § 57-3-217(g) eff. Jan. 1, 2023.

57-3-227.

"(a) Beginning January 1, 2023, there is created a common carrier license to be issued by the commission to a person, firm, or corporation that transports goods for a fee, and maintains a regularly established schedule of service within this state to transport wine from a person licensed under § 57–3–217 or § 57–3–415 directly to the citizens of the state who are twenty-one (21) years of age or older. Each applicant shall pay to the commission a one-time, nonrefundable fee in the amount of three hundred dollars ($300) when the application is submitted for review. A license under this section must not be issued until the applicant has paid to the commission the annual license fee of one thousand dollars ($1,000).

"(b) A common carrier shall only transport wine to individuals over twenty-one (21) years of age and in accordance with § 57–3–217. It is a violation for a common carrier, their employees, agents, or contractors, upon the time of final delivery to the individual, to not inspect a valid government-issued identification for proof the individual is twenty-one (21) years of age or older.

"(c) This section does not apply to common carriers regulated under 49 U.S.C. §§ 10101 et seq., or to rail trailer–on–flatcar/container–on–flatcar (TOFC/COFC) service, as defined in 49 CFR § 1090.1, or highway TOFC/COFC service provided by a rail carrier, either itself or jointly with a motor carrier, as part of continuous intermodal freight transportation, including, without limitation, any other TOFC/COFC transportation as defined under federal law.

"(d) The commission may make such investigations and inspections necessary to administer this part."

57-3-217(g).

"(g) (1) (A) It is an offense for a person to ship alcoholic beverages or beer to residents of this state without a license authorizing such activity.

(B) A violation of subdivision (g)(1)(A) is a Class E felony, punishable by a fine only.

(2) (A) All shipments of alcoholic beverages or beer made in this state must be by face-to-face delivery to individuals who provide proof satisfactory that they are over twenty-one (21) years of age and sign upon receipt.

(B) A violation of subdivision (g)(2)(A) is a Class B misdemeanor, punishable by a fine only."

C. Sports Authority; Nashville Soccer Club

Chapter 645, Public Acts 2022, amending T.C.A. § 57-4-102(35)(A)(iii) eff. Mar. 11, 2022.

"Sports authority facility" includes

"(iii) A major or minor league professional baseball (American, National, or Minor League), football (National Football League), basketball (National Basketball Association), hockey (National Hockey League), or soccer (Major League Soccer) franchise has entered into a long-term agreement to play its home games in the facility."

II. Food; Production and Sale of Homemade Food Items; Exemption from Licensure Requirements

Chapter 862, Public Acts 2022, adding T.C.A. § 53-1-118 eff. July 1, 2022.

"(a) Notwithstanding part 2 of this chapter, or another law to the contrary, except as provided in this section, the production and sale of homemade food items under this chapter are exempt from all licensing, permitting, inspecting, packaging, and labeling laws of this state, except when the department of health is investigating a reported foodborne illness.

"(b) The exemption under subsection (a) only applies if the following conditions are satisfied:

(1) Non–time/temperature control for safety food homemade food items must be sold either by:

(A) The producer to the consumer, whether in person or remotely, including, but not limited to, a sale by telephone or internet; or

(B) An agent of the producer or a third-party vendor, such as a retail shop or grocery store, to the consumer;

(2) Non–time/temperature control for safety food homemade food items must be delivered either by:

(A) The producer to the consumer; or

(B) An agent of the producer, a third-party vendor, or a third-party carrier to the consumer;

(3) The following information must be provided to the consumer, in the format required by subdivision (b)(4):

(A) The name, home address, and telephone number of the producer of the homemade food item;

(B) The common or usual name of the homemade food item;

(C) The ingredients of the homemade food item in descending order of predominance; and

(D) The following statement: 'This product was produced at a private residence that is exempt from state licensing and inspection. This product may contain allergens.'; and

(4) (A) The information required by subdivision (b)(3) must be provided:
(i) On a label affixed to the package, if the homemade food item is packaged;
(ii) On a label affixed to the container, if the homemade food item is offered for sale from a bulk container;
(iii) On a placard displayed at the point of sale, if the homemade food item is neither packaged nor offered for sale from a bulk container; or
(iv) On the webpage on which the homemade food item is offered for sale, if the homemade food item is offered only for sale on the internet; and

(B) If the homemade food item is sold by telephone or custom order, the seller need not display the information required by subdivision (b)(3), but the seller shall disclose to the consumer that the homemade food item is produced at a private residence that is exempt from state licensing and inspection, and may contain allergens. The seller shall have the information required by subdivisions (b)(3)(A)–(C) readily available and provide it to the consumer upon request.

"(c) This section does not:
(1) Impede the department of health in an investigation of a reported foodborne illness;
(2) Preclude the production or sale of food items otherwise authorized by law;
(3) Change the regulation of other goods and services where homemade food items are also produced or sold;
(4) Exempt producers or sellers of homemade food items from any applicable tax law; or
(5) Apply to sales other than intrastate sales made within this state.

"(d) This section preempts county, municipal, and other political jurisdictions from prohibiting and regulating the production and sale of homemade food items."

III. Health Care Matters

A. COVID Issues

1. Long-Term Care Facility; Patient's Right to Receive Visitation Despite COVID-19 Concern

Chapter 1123, Public Acts 2022, adding T.C.A. § 68-11-276 eff. July 1, 2022.

"(a) As used in this section:
(1) 'COVID–19' means the novel coronavirus, SARS–CoV–2, and coronavirus disease 2019, commonly referred to as COVID–19, including any variant of SARS–CoV–2 or COVID–19;
(2) 'Family member' means a spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half-brother, half-sister, adopted child, or spouse's parent;
(3) 'Long–term care facility' means a nursing home or assisted-care living facility, as defined in § 68–11–201; and
(4) 'Resident representative' means:

(A) A family member or another individual, chosen by a resident of a long-term care facility to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications; or
(B) A court-appointed guardian or conservator of a resident.

"(b) Notwithstanding another law to the contrary, during a period in which a disaster, emergency, or public health emergency for COVID–19 has been declared, a long-term care facility must allow a resident to have visitors during end-of-life situations and shall not restrict a patient from having at least one (1) resident representative present in the facility so long as the resident representative:
(1) Is not exhibiting symptoms of COVID–19 or another communicable disease;
(2) Agrees to follow all safety protocols established by the long-term care facility, which must be clearly specified in writing and be no more restrictive than protocols applicable to staff of the facility; and
(3) Would not by the representative's presence in the long-term care facility cause the facility to violate a federal or state law, rule, or guidance regulating that facility."

2. Discrimination Against Unvaccinated Transplant Patient Prohibited

Chapter 769, Public Acts 2022, adding T.C.A. § 68-31-104 eff. May 15, 2022.

"A covered entity shall not, solely on the basis of whether an individual has received or will receive a COVID–19 vaccine, do the following:
(1) Consider an individual ineligible for transplantation or receipt of an anatomical gift;
(2) Deny medical or other services related to transplantation, including:
(A) Evaluation;
(B) Surgery; and
(C) Counseling and treatment following transplantation;
(3) Refuse to refer an individual to a transplant center or specialist;
(4) Refuse to place an individual on an organ or tissue waiting list; or
(5) Place an individual at a position on an organ or tissue waiting list that is lower than the position at which the individual would have been placed if not for the individual's COVID–19 vaccine status."

3. Acquired Immunity Treated as if Vaccinated

Chapter 930, Public Acts 2022, adding T.C.A. §§ 14-1-101(1) and 14-2-105 eff. Apr. 21, 2022.

14-1-101(1).

"(1) 'Acquired immunity' means an acquired specific immune system response to the SARS–CoV–2 virus that is:
(A) Acquired naturally as a result of an individual's prior infection with SARS–CoV–2 virus; and
(B) Verified by:
(i) A letter from a licensed physician; or
(ii) Documentation of a laboratory test showing antibody, memory cell, or T cell immunity."

14-2-105.

"(a) A governmental entity, local education agency, or school shall not adopt or enforce a statute, ordinance, rule, policy, or practice arising from COVID–19 that:

(1) Fails to recognize acquired immunity as providing a level of immune protection that is at least as protective as a COVID–19 vaccine; or

(2) Treats individuals with acquired immunity differently than individuals who have received the COVID–19 vaccine.

"(b) A private business shall not adopt or enforce a rule, policy, procedure, or practice arising from COVID–19 that:

(1) Fails to recognize acquired immunity as providing a level of immune protection that is at least as protective as a COVID–19 vaccine; or

(2) Treats individuals with acquired immunity differently than individuals who have received the COVID–19 vaccine."

B. Pharmacists

1. Pharmacists May Provide Ivermectin Without a Prescription

Chapter 908, Public Acts 2022, adding T.C.A. § 63-10-224 eff. Apr. 22, 2022.

"(a) A pharmacist, in good faith, may provide ivermectin to a patient who is eighteen (18) years of age or older pursuant to a valid collaborative pharmacy practice agreement containing a non-patient-specific prescriptive order and standardized procedures developed and executed by one (1) or more authorized prescribers.

"(b) The pharmacist shall maintain the collaborative pharmacy practice agreement in accordance with § 63–10–217.

"(c) The board of pharmacy shall adopt rules to establish standard procedures for the provision of ivermectin by pharmacists, including:

(1) Providing the patient with a screening risk assessment tool;

(2) Providing the patient with a standardized factsheet that includes, but is not limited to, the indications and contraindications for use of ivermectin, the appropriate method for using ivermectin, the importance of medical follow-up, and other information deemed appropriate by the board; and

(3) Either dispensing the ivermectin or referring the patient to a pharmacy that may dispense the medication as soon as practical.

"(d) A pharmacist, pharmacist's employer, or pharmacist's agent may charge an administrative fee for services provided pursuant to this section in addition to costs associated with the dispensing of ivermectin and paid by the pharmacy benefit.

"(e) A pharmacist or prescriber acting in good faith and with reasonable care involved in the provision of ivermectin pursuant to this section is immune from disciplinary or adverse administrative actions under this title for acts or omissions during the provision of ivermectin.

"(f) A pharmacist or prescriber involved in the provision of ivermectin pursuant to this section is immune from civil liability in the absence of gross negligence or willful misconduct for actions authorized by this section."

2. Prescription Label Accessible to Blind and Visually Impaired

Chapter 1010, Public Acts 2022, adding T.C.A. § 63-10-304(k) eff. May 9, 2022.

"(k) The board of pharmacy shall promulgate rules necessary to ensure that an individual who is blind, visually impaired, or otherwise print disabled has appropriate access to prescription labels, bag tags, and medical guides."

C. Abortion-Inducing Drug Protocol

Chapter 1001, Public Acts 2022, adding T.C.A. §§ 63-6-1101 et seq. eff. Jan. 1, 2023.

"§ 63–6–1101. Short title.

"This part is known and may be cited as the 'Tennessee Abortion–Inducing Drug Risk Protocol Act.'

* * *

"§ 63–6–1103. In-person requirement.

"(a) An abortion-inducing drug may be provided only by a qualified physician following the procedures set forth in this part.

"(b) A manufacturer, supplier, pharmacy, physician, qualified physician, or other person shall not provide an abortion-inducing drug to a patient via courier, delivery, or mail service.

"§ 63–6–1104. Distribution of abortion-inducing drugs.

"(a) Because the failure and complication rates from a chemical abortion increase with advancing gestational age and because the physical symptoms of chemical abortion can be identical to the symptoms of ectopic pregnancy and abortion-inducing drugs do not treat ectopic pregnancies and are contraindicated in ectopic pregnancies, a qualified physician providing an abortion-inducing drug shall examine the patient in person and, prior to providing an abortion-inducing drug:

(1) Independently verify that a pregnancy exists;
(2) Determine the patient's blood type, and, if the patient is Rh negative, offer to administer RhoGAM at the time of the abortion;
(3) Inform the patient that the patient may see the remains of the unborn child in the process of completing the abortion; and
(4) Document, in the patient's medical chart, the gestational age and intrauterine location of the pregnancy, and whether the patient received treatment for Rh negativity, as diagnosed by the most accurate standard of medical care.

"(b) A qualified physician providing an abortion-inducing drug must be credentialed and competent to handle complication management, including emergency transfer, or must have a signed agreement with an associated physician who is credentialed to handle complications and be able

to produce the signed agreement on demand by the patient or the department. The qualified physician providing an abortion-inducing drug to a patient shall provide the patient with the name and phone number of the associated physician.

"(c) A qualified physician providing an abortion-inducing drug, or an agent of the qualified physician, shall schedule a follow-up visit for the patient at approximately seven (7) to fourteen (14) days after administration of the abortion-inducing drug to confirm that the pregnancy is completely terminated and to assess the degree of bleeding. The qualified physician shall make all reasonable efforts to ensure that the patient returns for the scheduled appointment. A brief description of the efforts made to comply with this subsection (c), including the date, time, and identification by name of the individual making the efforts, must be included in the patient's medical record.

"§ 63–6–1105. Criminal penalties.

"(a) An individual who intentionally, knowingly, or recklessly violates this part commits a Class E felony and, upon conviction, may be fined not more than fifty thousand dollars ($50,000). As used in this subsection (a), 'intentional,' 'knowing,' and 'reckless' have the same meanings as provided in § 39–11–302.

"(b) A criminal penalty shall not be assessed against a patient upon whom a chemical abortion is attempted or performed.

"§ 63–6–1106. Civil remedies and professional sanctions.

"(a) In addition to all other remedies available under the laws of this state, failure to comply with this part:

(1) Provides a basis for a civil malpractice action for actual and punitive damages;
(2) Provides a basis for professional disciplinary action under this title or title 68 for the suspension or revocation of the license of a healthcare provider or facility;
(3) Provides a basis for recovery for the patient's survivors for the wrongful death of the patient under a wrongful death action; and
(4) Provides a basis for a cause of action for injunctive relief against an individual who has provided an abortion-inducing drug in violation of this part to prevent the enjoined defendant from providing further abortion-inducing drugs in violation of this part. The action may be maintained by:
    (A) A patient to whom the abortion-inducing drug was provided;
    (B) An individual who is the spouse, parent, or guardian of, or a current or former licensed healthcare provider of, a patient to whom the abortion-inducing drug was provided; or
    (C) A prosecuting attorney with appropriate jurisdiction.

"(b) Civil liability shall not be imposed against a patient on whom a chemical abortion is attempted or performed.

"(c) When requested, the court shall allow a patient to proceed using solely the patient's initials or a pseudonym and may close any proceedings in the case and enter other protective orders to preserve the privacy of the patient on whom the chemical abortion was attempted or performed.

"(d) If judgment is rendered in favor of the plaintiff, the court shall also render judgment for reasonable attorney fees in favor of the plaintiff against the defendant.

"(e) If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court may render judgment for reasonable attorney fees in favor of the defendant against the plaintiff.

"§ 63–6–1107. Construction.

"This part does not:

(1) Create or recognize a right to abortion;
(2) Make lawful an abortion that is otherwise unlawful; or
(3) Repeal, replace, or otherwise invalidate existing federal laws, regulations, or policies.

"§ 63–6–1108. Right of intervention.

"The attorney general and reporter may bring an action to enforce compliance with this part or intervene as a matter of right in a case in which the constitutionality of this part is challenged."

D. Offer of Opioid Antagonist

Chapter 1061, Public Acts 2022, adding T.C.A. § 53-11-308(i), and -314 and amending § 53-11-401 eff. July 1, 2022.

53-1-308(i).

"(1) Notwithstanding another law, and except as otherwise provided in subdivision (i)(2), when prescribing an opioid to a patient, a healthcare prescriber shall offer a prescription for an opioid antagonist, or another drug approved by the United States food and drug administration for the complete or partial reversal of an opioid overdose event, to the patient when one (1) or more of the following conditions are present in accordance with the federal centers for disease control and prevention opioid-prescribing guidelines setting forth treatment of a known or suspected opioid overdose:

(A) The healthcare provider prescribes more than a three-day supply of an opioid medication; and
(B) (i) The healthcare provider prescribes an opioid medication concurrently with a prescription by the same provider for benzodiazepine; or
(ii) The patient presents with an increased risk for overdose, including a history of overdose, a history of substance use disorder, or being at risk for returning to a high dose of opioid medication to which the patient is no longer tolerant.

"(2) Subdivision (i)(1) does not apply to:

(A) An opioid prescription that is written as part of a patient's palliative care treatment. As used in this subdivision (i)(2)(A), 'palliative care' has the same meaning as defined in § 63–1–164; or
(B) An opioid prescription that is written by a licensed veterinarian, as defined in § 63–12–103."

53-11-314.

"This chapter [Regulations and Registration–Narcotic Drugs] does not create a private right of action."

53-11-401.

". . . [A] person who fails to comply with . . . § 53–11–308(i) is not guilty of a felony and shall be punishable only by a civil penalty assessed by the provider's licensing board and only in cases involving a pattern of willful failure to comply."

E. Foreign Medical Graduate Short-Term Visitor Training License

Chapter 970, Public Acts 2022, adding T.C.A. § 63-6-248 eff. May 3, 2022.

63-6-248.

"(a) The board of medical examiners may issue to an eligible physician or medical graduate from a foreign country or foreign territory a short-term visitor clinical training license for a period of time not to exceed ninety (90) days.

"(b) To be eligible for a short-term visitor clinical training license under this section, an applicant physician or medical graduate must provide to the board, in a manner and form prescribed by the board by rule:

(1) Proof that the applicant holds a medical degree from an institution recognized in the World Directory of Medical Schools;
(2) Proof of written acceptance to a clinical professional development or short-term clinical training program in this state;
(3) Proof that the applicant is able to lawfully enter and remain in the United States during the period of the clinical professional development or short-term clinical training program;
(4) Evidence that the host institution or the Educational Commission for Foreign Medical Graduates (ECFMG) has verified the applicant's credentials;
(5) Evidence that the applicant:
    (A) Has an unrestricted license to practice medicine in the applicant's country or territory of origin or country or territory of practice; or
    (B) Is enrolled in an accredited resident training program in the applicant's country or territory of origin;
(6) A written statement that the applicant does not have, as determined by the board:
    (A) A disqualifying criminal history; or
    (B) A history of disqualifying disciplinary action by an educational or training institution, employer, or foreign licensing authority;
(7) Proof of medical liability insurance coverage; and
(8) A written statement signed by the applicant acknowledging that a short-term visitor clinical training license cannot be used to:
    (A) Obtain or hold a position in a residency program in the United States;
    (B) Satisfy United States graduate medical education requirements; or
    (C) Remain in this state to practice medicine beyond the expiration date of the license.

"(c) A short-term visitor clinical training licensee:

(1) Shall not assume independent responsibility for patient care;

(2) May only engage in training activities under the supervision and control of a physician licensed under this chapter or chapter 9 of this title; and
(3) To the extent permitted by the board based upon the licensee's education and training, and by compliance with subdivision (c)(2), may engage in direct interaction with a patient, including, but not limited to:
(A) Taking medical history;
(B) Conducting a physical examination;
(C) Reading a radiologic study;
(D) Administering anesthesia; and
(E) Performing a surgical procedure."

An analogous provision extends the same terms to osteopaths.

F. Interstate Compacts for Occupational Therapy Licensure and Audiology and Speech-Language Pathology

Chapter 839, Public Acts 2022, adding T.C.A. §§ 63-13-501 et seq. and 63-17-301 et seq. eff. Apr. 19, 2022.

This public chapter establishes interstate licensure compacts in the areas of occupational therapy and audiology and speech-language pathology.

CONSUMER LAW

I. Unfair or Deceptive Acts

A. Automatic Online Renewal of Subscription Services

Chapter 803, Public Acts 2022, adding T.C.A. §§ 47-18-104(b)(55) and -133 eff. Jan. 1, 2023.

Businesses that allow consumers to obtain a subscription or service online must present automatic renewal terms clearly and have a straightforward online cancellation process. Failure to do so is a prohibited unfair or deceptive practice under the Consumer Protection Act.

B. Home Warranty

Chapter 843, Public Acts 2022, adding T.C.A. § 47-18-104(b)(56) eff. July 1, 2022.

"[Unfair or deceptive acts include:]
Advertising a home warranty to consumers in this state, or issuing or delivering a home warranty to consumers in this state, without explicitly stating in written detail what items will be covered and fully paid for by the home warranty."

II. Attorney General's Investigation of Alleged Violations of TCPA

In re Wall and Associates, Inc., No. M2020-01687-COA-R3-CV (Tenn. Ct. App., Armstrong, Nov. 12, 2021).

"Wall is a Virginia-based company that maintains an office in Tennessee. The company describes its business as one 'that helps people solve their tax problems by providing legal services' by acting 'as a taxpayer representative, fulfilling the role expressly granted in the Taxpayer's Bill of Rights, 26 U.S.C. § 7803.' On September 7, 2017, the AG served Wall with a Request for Information ('RFI') that contained, in relevant part, 24 requests for documents and 22 requests for written statements under oath. In accordance with the TCPA, the RFI stated that the AG had 'reason to believe' that Wall 'is engaging in, has engaged in, or ... is about to engage in' certain unlawful conduct in violation of the TCPA in connection with its advertisement and provision of tax relief services. Tenn. Code Ann. § 47-18-106(a). Wall allegedly failed to comply fully with the RFI for eight months; accordingly, on May 14, 2018, the AG issued a 10-day notice to Wall under Tennessee Code Annotated § 47-18-106(c) advising that the AG intended to 'initiate proceedings to enforce the RFI.'

"On June 1, 2018, the AG filed a Petition for an Order to Show Cause in the Davidson County Chancery Court ('trial court'), seeking an order under Tennessee Code Annotated § 47-18-106(c) compelling Wall's compliance with the RFI. The petition alleged that Wall had produced very limited information, including internal manuals, training documents, advertising information, and documents related to only thirteen selected Tennessee consumers; however, the AG alleged that Wall continued to withhold significant information, including documents related to the remaining Tennessee consumers along with certain financial information. The trial court heard the AG's petition on December 21, 2018. From the bench, the trial court found that: (1) the AG 'has the

authority to issue the request for information based on 47-18-106(a)'; and (2) 'the State has shown that it has reason to believe that there are deceptive practices in advertising.' The trial court then proceeded to discuss each of the AG's requests, and, with some minor modifications, enforced the AG's RFI. The trial court entered an order on February 14, 2019, on its rulings from the December 21, 2018 hearing."

"Following the entry of the September 25, 2019 order, Wall allegedly remained largely non-compliant with the RFI. As such, the AG moved the trial court for an order: (1) compelling compliance with the February 14, 2019 and September 25, 2019 orders; (2) imposing sanctions; and (3) assessing a civil penalty of not more than $1,000. The trial court heard the motion on May 26, 2020. By order of September 14, 2020, the trial court granted the AG's motion and ordered Wall to fully comply with the RFI within 20 days. The trial court imposed a penalty of $1,000 pursuant to Tennessee Code Annotated § 47-18-106(e) and awarded the AG its 'reasonable attorney's fees and costs.' By order of October 23, 2020, the trial court denied Wall's Tennessee Rule of Civil Procedure 59.04 motion to alter or amend its September 14, 2020 order. On November 13, 2020, the trial court heard the issue of attorney's fees and costs. By order of November 23, 2020, the trial court awarded the AG $5,000 in fees and costs. Wall appeals."

"Under the TCPA, '[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce constitute unlawful acts or practices.' Tenn. Code Ann. § 47-18-104(a). Section 47-18-106 of the TCPA grants the AG power to investigate such practices, to-wit:

> Whenever the attorney general has reason to believe that a person is engaging in, has engaged in, or, based upon information received from another law enforcement agency, is about to engage in any unlawful act or practice under this part, or has reason to believe it to be in the public interest to conduct an investigation to ascertain whether any person is engaging in, has engaged in, or is about to engage in such act or practice, the attorney general may:
>
> (1) Require the person to file a statement or report in writing, under oath or otherwise, as to all the facts and circumstances concerning the alleged violation and to furnish and make available for examination all documentary material and information relevant to the subject matter of the investigation;
>
> (2) Examine under oath any person connected to the alleged violation; and
>
> (3) Examine any merchandise or any sample of merchandise deemed relevant to the subject matter of the investigation.

"Tenn. Code Ann. § 47-18-106(a)."

"In order '[t]o prove that a request for information was validly issued, [the Attorney General] must only show that they had the requisite "reason to believe" required by T.C.A. § 47-18-106(a).' *In re Law Sols. Chicago LLC*, —— S.W.3d ——, No. M2020-00411-COA-R3-CV, 2021 WL 223817, at *7 (Tenn. Ct. App. Jan. 22, 2021), *perm. app. denied* (May 12, 2021) (quoting *Windsor Tower*, 1983 WL 953709, at *3). Here, the AG has satisfied this burden. Applying the plain language of Tennessee Code Annotated § 47-18-106(a), either the information provided to the AG by the Office of the Virginia Attorney General or the consumer complaints alone evidence a sufficient basis for the AG to have reason to believe Wall was engaging in or had engaged in unfair or deceptive acts or practices such that it was in the public interest to conduct an investigation. Therefore, we

conclude that AG was authorized to issue the RFI. We now turn to address the issue of whether the information requested under the RFI was sufficiently related to the subject matter of the AG's investigation."

"Although we will not extend the scope of this opinion to address each of the AG's requests individually, we have reviewed each against the trial court's explanations and modifications as set out in its orders. From our review, we conclude that the AG's RFI, as modified by the trial court, is sufficiently limited in scope. Specifically, the AG's requests are: (1) reasonably relevant to the subject matter of the investigation, *i.e.*, unfair and deceptive acts or practices by Wall; and (2) not too indefinite, as they provide a 'reasonably informative description' of what is required. *See Windsor Tower*, 1983 WL 953709, at *5–6. Furthermore, there is no evidence to show that compliance with the RFI would unduly burden Wall. *See id.* at *6 (quoting *United States v. Nanlo, Inc.*, 519 F.Supp. 723, 728 (D.C. Mass. 1981)) ('Where agency authority and relevancy are established, "[t]he burden of demonstrating unreasonableness rests with the party asked to produce the information."')."

"We review the trial court's decision to award sanctions under the abuse of discretion standard, which 'reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives,' and does not permit us to substitute our discretion for that of the trial court. *Lee Med.*, 312 S.W.3d at 524. Accordingly, we will not disturb a trial court's discretionary decision unless 'the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence.' *Griffith Servs. Drilling, LLC v. Arrow Gas & Oil, Inc.*, 448 S.W.3d 376, 379 (Tenn. Ct. App. 2014) (quotations omitted). Here, the trial court clearly considered and applied Tennessee Code Annotated § 47-18-106(e), and its decision on sanctions was not against the weight of the evidence. The penalties imposed on Wall were within the scope of alternatives set forth in § 47-18-106(e). Therefore, we conclude that the trial court did not abuse its discretion in sanctioning Wall for failure to comply with RFI and the trial court's orders."

III. Unsolicited Offer to Purchase Real Property; Cancellation of Acceptance

Chapter 935, Public Acts 2022, adding T.C.A. § 47-18-134 eff. July 1, 2022.

"(a) If an offeror makes an unsolicited offer to purchase real property by sending a written agreement or contract for purchase through the mail to an offeree and the offeror does not use the assistance of a broker, as defined in § 62–13–102, who is licensed in this state to make an unsolicited offer, then the offeree may cancel the agreement or contract by mailing written notice of the offeree's election to cancel to the offeror postmarked within thirty (30) days from the date of the confirmation letter described in subdivision (b)(3).

"(b) An unsolicited offer to purchase real property by sending a written agreement or contract for purchase through the mail is not deemed accepted by the offeree until:

(1) The offeree signs the agreement or contract;
(2) The offeror receives the signed agreement or contract;
(3) The offeror sends by mail a letter to the offeree that confirms receipt of the signed agreement or contract, describes the offeree's right to cancel the agreement or contract, describes the manner by which the offeree may cancel; and states the date by which the offeree must cancel; and

(4) The offeror registers the signed agreement or contract, and the confirmation letter described in subdivision (b)(3), with the register of deeds in the county in which the applicable real property is located.

"(c) Cancellation of the agreement or contract under this section is without penalty to the offeree. However, the offeree shall, within thirty (30) days following cancellation under this section, return all payments made by the offeror to the offeree.

"(d) (1) The offeree's right to cancellation under this section may not be waived unless evidenced by a sworn affidavit waiving the right to cancellation that is executed by the offeree contemporaneously with the offeree's execution of the deed and other documents of conveyance of title of the real property.

(2) An affidavit executed in the manner described in subdivision (d)(1) is conclusive evidence of an offeree's waiver of the right to cancellation under this section.

"(e) A third-party buyer who purchases the real property from the offeror prior to the expiration of the offeree's right to cancellation under this section takes title to the real property subject to the offeree's right to cancellation. If the offeree exercises the offeree's right to cancellation under this section, then the title acquired by the third-party buyer is voided and the title immediately returns to the offeree. This subsection (e) does not apply if the offeree waives the right to cancellation pursuant to subsection (d).

"(f) A violation of this section by an offeror constitutes an unfair or deceptive act prohibited under § 47–18–104, and is punishable as provided in this part."

ANTITRUST

I. Intercollegiate Athlete's Name, Image and Likeness

Chapter 845, Public Acts 2022, amending T.C.A. § 49-7-2802 and adding § 49-7-2803 eff. Apr. 20, 2022.

49-7-2802.

"(a) An intercollegiate athlete may earn compensation for the use of the intercollegiate athlete's own name, image, or likeness. Such compensation must be commensurate with the fair market value of the authorized use of the intercollegiate 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 must not be provided in exchange for athletic performance or attendance at an institution."

49-7-2802.

"(b) (1) An institution or an officer, director, or employee of the institution shall not compensate a current or prospective intercollegiate athlete for the intercollegiate athlete's name, image, or likeness.

(2) Neither a grant-in-aid for athletics awarded to an intercollegiate athlete by an institution, including the cost of attendance, nor an institution's involvement in support of name, image, or likeness activities under this part constitutes compensation to or representation of an intercollegiate athlete by the institution for purposes of this part so long as the institution does not coerce, compel, or interfere with an intercollegiate athlete's decision to earn compensation from or obtain representation in connection with a specific name, image, or likeness opportunity."

49-7-2802(h).

"(2) Parents, siblings, grandparents, spouses, and legal guardians of an intercollegiate athlete who represent the intercollegiate athlete for the purpose of securing compensation for the use of the intercollegiate athlete's name, image, or likeness are not considered to be athlete agents for purposes of this part, and are not subject to the requirements for athlete agents as prescribed by this part."

49-7-2803.

"An athletic association's governing actions, sanctions, bylaws, and rules must not interfere with an intercollegiate athlete's ability to earn compensation in accordance with this part and must not otherwise impact an intercollegiate athlete's eligibility or full participation in intercollegiate athletic events, unless the intercollegiate athlete has committed a violation of the rules of an institution or an athletic association or this act is invalidated or rendered unenforceable by operation of law."

BANKRUPTCY

I. Costs Assessed in Lawyer's Attorney Disciplinary Proceeding Not Dischargeable

Osicka v. Office of Lawyer Regulation, 25 F.4th 501 (7th Cir. 2022), cert. denied June 27, 2022.

"In an issue of first impression for our court, Tim Osicka challenges a bankruptcy court's ruling that the costs of his attorney disciplinary proceedings imposed by the Wisconsin Supreme Court were not dischargeable under a provision of the Bankruptcy Code, 11 U.S.C. § 523(a)(7). The district court upheld the ruling, and we affirm."

"In 2009 the Wisconsin Office of Lawyer Regulation commenced disciplinary proceedings against Tim Osicka. A referee ruled that Osicka engaged in 'professional misconduct' in violation of the Wisconsin Supreme Court's Rules of Professional Conduct by failing both to respond to client grievances and to cooperate with an investigation into his work for those same clients. See Wis. S.C.R. 20:8.4(f); 20:1.4(a); 22.001(9)(a); 22.03(2), (6). As for the appropriate sanction, the referee found that Osicka's offense was aggravated by this most recent misconduct following a public reprimand for similar shortcomings in 2002. On the mitigation side, the referee observed that Osicka's misconduct reflected negligence, not intentional wrongdoing. See Wis. S.C.R. 22.24(1m). Further observing that the Wisconsin Supreme Court follows a policy of 'progressive discipline,' the referee recommended temporary suspension of Osicka's license, restitution of $150 to a client, and imposition of the full cost of his disciplinary proceedings—$12,878.14. See *In re Disciplinary Proceedings Against Osicka*, 317 Wis.2d 135, 765 N.W.2d 775, 783, 787 (2009).

"Osicka appealed aspects of the recommendation to the Wisconsin Supreme Court. The Court reduced Osicka's suspension to a public reprimand, but upheld the restitution and the cost order, reducing the amount of costs to $12,500.64. See *id.* at 787–88. When Osicka failed to pay the costs by the prescribed deadline, the State Bar of Wisconsin suspended his license.

"In 2011 Osicka closed his law practice and filed for Chapter 7 bankruptcy protection. See 11 U.S.C. § 727. He listed the OLR as an unsecured creditor to which he owed $12,500 in 'fees,' and, for its part, the OLR did not challenge the requested discharge. When Osicka received a general discharge, he believed it covered his debt to the OLR. But that understanding changed when he later petitioned the Wisconsin Supreme Court for readmission to the state bar, only to learn that the OLR required payment of the disciplinary costs before recommending reinstatement. See *In re Osicka*, No. 11-15541-7, 2020 WL 2516492, at *1–*2 (Bankr. W.D. Wis. May 15, 2020).

"In 2019 Osicka reacted to these developments by moving to reopen his bankruptcy case and then filing an adversary proceeding against the OLR. The Wisconsin Supreme Court placed Osicka's reinstatement petition on hold pending the outcome of that litigation. See *id.* at *1."

"In the proceedings that followed, Osicka contended that his prior bankruptcy had discharged his disciplinary costs because the exception to dischargeability in 11 U.S.C. § 523(a)(7) did not apply. See 11 U.S.C. § 727(b). In his view, the costs—though owed to a government unit—were not a 'fine, penalty, or forfeiture' within the meaning of § 523(a)(7), and instead served only to compensate the OLR for the expense it incurred in the underlying disciplinary proceeding against him.

"The bankruptcy court disagreed and entered summary judgment for the OLR. Relying on the Supreme Court's decision in *Kelly v. Robinson*, 479 U.S. 36, 50, 52, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986), the bankruptcy court concluded that the purpose of the cost order was 'not simply compensation for pecuniary loss' because the Wisconsin Supreme Court 'intended to penalize Osicka under the context of the disciplinary proceeding.' *In re Osicka*, 2020 WL 2516492, at *4–*5.

"From there the bankruptcy court invoked our decision in *In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985), and explained that setting the penalty at the amount of costs incurred by the OLR in the disciplinary proceeding did not 'convert' those costs into a form of compensation for the OLR. In no way, the bankruptcy court reasoned, did the OLR suffer any pecuniary loss while performing its 'critical public function' of holding Wisconsin attorneys like Osicka accountable for their misconduct. *In re Osicka*, 2020 WL 2516492, at *5. To the contrary, the bankruptcy court saw the cost order as furthering the state's 'penal and rehabilitative interests' and thus as part and parcel of the other punishment, including the Wisconsin Supreme Court's public reprimand of Osicka. In the end, then, the bankruptcy court concluded that the cost order was a non-dischargeable 'penalty' under the exception Congress supplied in § 523(a)(7). *Id.* at *5–*6. So the court closed the Chapter 7 case.

"Osicka then sought review in the district court. See 28 U.S.C. § 158(a). Much like the bankruptcy court, the district court relied on *In re Zarzynski* and rejected the contention that the costs were compensatory just because they were, in Osicka's words, in the 'exact dollar amount' of the OLR's expenditures for his disciplinary proceedings. The district court added that it made little sense to think of the OLR as experiencing any 'actual pecuniary loss' within the meaning of § 523(a)(7) because in no way did Osicka's misconduct inflict financial harm on the Wisconsin Supreme Court or the OLR. The district court further emphasized that the Court imposed those costs only after the referee weighed 'culpability factors,' much like a court imposes a cost order or fine in criminal proceedings. In short, the district court concluded that Osicka's debt to the OLR was not dischargeable under § 523(a)(7).

"Osicka now appeals."

"We begin, as we must, with the language Congress used in § 523(a)(7). See *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412, 132 S.Ct. 1670, 182 L.Ed.2d 678 (2012). By its terms, the provision creates a dischargeability exception 'to the extent [the] debt [in question] is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a [particular] tax penalty.' 11 U.S.C. § 523(a)(7).

"The parties agree that Osicka owes the debt to a unit of government, the Wisconsin Office of Lawyer Regulation, so the only question is whether the cost order satisfies the other statutory criteria.

"We start with whether the cost order is a form of a 'fine, penalty, or forfeiture' within the meaning of § 523(a)(7). Congress did not define these terms. So we are left to give them their ordinary meanings, informed by the context in which they operate both within § 523(a)(7) and other provisions of the Bankruptcy Code. See *Niz-Chavez v. Garland*, —— U.S. ——, 141 S. Ct. 1474, 1480, 209 L.Ed.2d 433 (2021).

"Looking to the end of the statutory list, we have a hard time seeing the cost order as any form of 'forfeiture.' The edition of *Black's Law Dictionary* in place as of the last amendment of § 523(a)(7) in 2019 tells us that 'forfeiture' is the 'loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty,' *Forfeiture (2)*, Black's Law Dictionary (11th ed. 2019). Courts have likewise tended to construe forfeiture as entailing an offender's return of 'guilty property' to its rightful owner or custodian. *United States v. Bajakajian*, 524 U.S. 321, 330, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). Although the Wisconsin Supreme Court conditioned reinstatement of Osicka's law license on the payment of his disciplinary costs, the costs themselves were based on the OLR's expenses, not the losses Osicka caused any clients. It is difficult for us to believe that the term 'forfeiture' encompasses the cost order entered by the Wisconsin Supreme Court.

"Moving on to Congress's use of the term of 'fine' in § 523(a)(7). A fine is '[a] pecuniary criminal punishment or civil penalty payable to the public treasury.' *Fine (5)*, Black's Law Dictionary (11th ed. 2019). On this understanding of 'fine'—as a form of punishment—it is not clear what differentiation Congress intended between 'fine' and 'penalty,' as those terms appear in § 523(a)(7). See *United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020) (explaining that different language ordinarily conveys different meaning). Indeed, it is easy to see the cost order as a form of a fine payable to an arm of state government, as the Wisconsin Supreme Court imposed the order only after the OLR found that Osicka had engaged in professional misconduct. On the other hand, Osicka is right to suggest that courts historically have not treated cost orders and fines as one and the same for all purposes.

"We need not resolve the question, though, as it is plain the cost order is a 'penalty' within the meaning of § 523(a)(7). A penalty is a '[p]unishment imposed on a wrongdoer' that can take the form of a 'sum of money exacted as punishment for either a wrong to the state or a civil wrong.' *Penalty (1)*, Black's Law Dictionary (11th ed. 2019). Although there are several types of proceedings in which the Wisconsin Supreme Court may order costs, see Wis. S.C.R. 22.24(1), attorney discipline uniquely requires a 'finding of misconduct' as a precondition for doing so. Wis. S.C.R. 22.24(1m). That rule also grants referees the discretion to set the cost order after weighing culpability factors—including the nature of the misconduct, the number of charges, the attorney's disciplinary history, and the attorney's cooperation. See *id.*

"The structure of Rule 22.24(1m) unambiguously singles out attorney discipline as a penal endeavor. And that conclusion has a statutory consequence under § 523(a)(7). The Supreme Court emphasized in *Kelly* that § 523(a)(7) creates a 'broad exception' to dischargeability for all 'penal sanctions.' 479 U.S. at 51, 107 S.Ct. 353. And in Osicka's case, the referee imposed costs only after assessing various aggravating and mitigating factors:

- Osicka's failure both to respond to client grievances and to cooperate with an investigation into his work for those clients;
- Osicka's commission of four instances of similar professional misconduct seven years earlier;
- Osicka's display of a 'negative, unremorseful attitude' throughout the 2009 disciplinary proceeding; and
- On the mitigation side, 'no evidence of a dishonest or selfish motive in the misconduct.'

"*In re Disciplinary Proceedings Against Osicka*, 765 N.W.2d at 777; see also Wis. S.C.R. 22.24(1m). After doing so, the Court 'conclude[d] that Attorney Osicka should be responsible' for

paying the costs of the proceeding, less the costs of a motion made by the OLR, and entered an order to that effect. *In re Disciplinary Proceedings Against Osicka*, 765 N.W.2d at 787–88.

"Going further, we cannot conclude that the cost order amounts to 'compensation for actual pecuniary loss' under 11 U.S.C. § 523(a)(7). Osicka argues that disciplinary costs are nothing but compensatory because they 'defray' the OLR's operating expenses, and, as he pressed at oral argument, his cost order reflects the OLR's expenses 'to the penny.' We are not convinced."

"Osicka's insistence that *Kelly* applies only to criminal penalties likewise fails. What he overlooks is the Supreme Court's express extension of its holding in *Kelly* to the civil context. In *Pennsylvania Department of Public Welfare v. Davenport*, the Court understood *Kelly* to exempt from discharge 'both civil and criminal fines.' 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). And in *Cohen v. de la Cruz*, the Court upheld the nondischargeability of a fine levied by a rent-control administrator on a landlord for violating a local ordinance. 523 U.S. 213, 220–21, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). Indeed, the Court reiterated that § 523(a)(7) 'connot[es] broadly any liability arising from' penalties for misconduct. *Id.* at 220, 118 S.Ct. 1212; see also *In re Towers*, 162 F.3d 952, 954–56 (7th Cir. 1998) (applying *Kelly* to civil restitution orders)."

"Adhering to *Kelly*, we also understand § 523(a)(7) to prevent discharge of Osicka's cost order because it was a punishment and did not make the OLR whole for actual loss. In *In re Zarzynski*, we held—albeit in an abbreviated manner—that criminal prosecution expenses are 'part of the expense of governing,' and are not undertaken with the expectation of creating a debtor-creditor relationship between the party sanctioned and the state because investigation and prosecution are among the state's existing public responsibilities and are paid out of its regular expenditures. 771 F.2d at 306. Osicka faced disciplinary costs under the Wisconsin Supreme Court's policy of progressive discipline, which includes 'monetary payment' among penalties that 'may be imposed on an attorney as discipline for misconduct.' Wis. S.C.R. 21.16(1m). He attempts to challenge that policy, but his argument is unavailing because it rests on an inapposite concurring opinion, *In re Disciplinary Proceedings Against Konnor*, 279 Wis.2d 284, 694 N.W.2d 376, 386–87, 392–93 (2005) (Abrahamson, C.J., concurring), which merely considers the adoption of clearer criteria for modifying cost orders.

"Finally, every other circuit to have confronted the question presented has come to the same conclusion. See, e.g., *In re Albert-Sheridan*, 960 F.3d 1188, 1192–93 (9th Cir. 2020); *In re Feingold*, 730 F.3d 1268, 1275 (11th Cir. 2013); *Richmond v. N.H. Supreme Court. Comm. on Prof'l Conduct*, 542 F.3d 913, 920–21 (1st Cir. 2008)."

II. Disparate Trustee Fees Violate Uniformity Requirement

Siegel v. Fitzgerald, 142 S.Ct. 1770 (U.S., Sotomayor, 2022).

"Congress created the United States Trustee Program (Trustee Program) as a mechanism to transfer administrative functions previously handled by bankruptcy judges to U. S. Trustees, a component of the Department of Justice. Congress permitted the six judicial districts in North Carolina and Alabama to opt out of the Trustee Program. In these six districts, bankruptcy courts continue to appoint bankruptcy administrators under a system called the Administrator Program. The Trustee Program and the Administrator Program handle the same core administrative functions, but have different funding sources. Congress requires that the Trustee Program be funded in its entirety by

user fees paid to the United States Trustee System Fund (UST Fund), largely paid by debtors who file cases under Chapter 11 of the Bankruptcy Code. 28 U.S.C. § 589a(b)(5). Those debtors pay a fee in each quarter of the year that their case remains pending at a rate set by Congress and determined by the amount of disbursements the debtor's estate made that quarter. See § 1930(a). In contrast, the Administrator Program is funded by the Judiciary's general budget. While initially Congress did not require Administrator Program district debtors to pay user fees at all, Congress permitted the Judicial Conference of the United States to require Chapter 11 debtors in Administrator Program districts to pay fees equal to those imposed in Trustee Program districts. See § 1930(a)(7). Pursuant to a 2001 standing order of the Judicial Conference, from 2001 to 2017 all districts nationwide charged similarly situated debtors uniform fees.

"In 2017, Congress enacted a temporary increase in the fee rates applicable to large Chapter 11 cases to address a shortfall in the UST Fund. See 131 Stat. 1229 (2017 Act). The 2017 Act provided that the fee raise would become effective in the first quarter of 2018, would last only through 2022, and would be applicable to currently pending and newly filed cases. The Judicial Conference adopted the 2017 fee increase for the six Administrator Program districts, effective October 1, 2018, and applicable only to newly filed cases.

"In 2008, Circuit City Stores, Inc., filed for Chapter 11 bankruptcy in the Eastern District of Virginia, a Trustee Program district. In 2010, the Bankruptcy Court confirmed a joint-liquidation plan, overseen by a trustee (petitioner here), to collect, administer, distribute, and liquidate all of Circuit City's assets. The liquidation plan required petitioner to pay quarterly fees to the U.S. Trustee while the Chapter 11 case was pending. Circuit City's bankruptcy was still pending when Congress increased the fees for Chapter 11 debtors in Trustee Program districts through the 2017 Act. Across the first three quarters of 2018, petitioner paid $632,542 in total fees, significantly more than the $56,400 petitioner would have paid absent the fee increase in the 2017 Act. Petitioner filed for relief against the Acting U.S. Trustee for Region 4 (respondent here) contending that the fee increase was nonuniform across Trustee Program districts and Administrator Program districts, in violation of the Constitution's Bankruptcy Clause. The Bankruptcy Court agreed, and directed that for the fees due from January 1, 2018, onward, the Circuit City trustee pay the rate in effect prior to the 2017 Act. The Bankruptcy Court reserved the question whether the trustee could recover any 'overpayments' made under the 2017 Act. The Fourth Circuit reversed, holding that the fee increase did not violate the uniformity requirement of the Bankruptcy Clause because the increase applied only to debtors in Trustee Program districts in order to bolster the dwindling UST Fund, which funded the Trustee Program alone.

"Held: Congress' enactment of a significant fee increase that exempted debtors in two States violated the uniformity requirement of the Bankruptcy Clause."

"(a) The Bankruptcy Clause's uniformity requirement—which empowers Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States,' U.S. Const., Art. I, § 8, cl. 4—applies to the 2017 Act. Respondent contends that the 2017 Act was not a law 'on the subject of Bankruptcies' to which the uniformity requirement applies, but instead a law enacted pursuant to the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 18, meant to help administer substantive bankruptcy law. Nothing in the language of the Bankruptcy Clause suggests a distinction between substantive and administrative laws, however, and this Court has repeatedly emphasized that the Bankruptcy Clause's language, embracing 'laws on the subject of Bankruptcies,' is broad. This Court has never distinguished between substantive and administrative bankruptcy laws or suggested that the uniformity requirement would not apply to both. Further, the

Court has never suggested that all administrative bankruptcy laws are enacted pursuant to the Necessary and Proper Clause, nor that the Necessary and Proper Clause permits Congress to circumvent the limitations set by the Bankruptcy Clause. To the contrary, Congress cannot evade the 'affirmative limitation' of the uniformity requirement by enacting legislation pursuant to other grants of authority. See *Railway Labor Executives' Assn. v. Gibbons*, 455 U.S. 457, 468–469, 102 S.Ct. 1169, 71 L.Ed.2d 335. In any event, the 2017 fee provision fits comfortably under the scope of the Bankruptcy Clause: The provision amended a statute titled 'Bankruptcy fees,' § 1930, and the only 'subject' of the 2017 Act is bankruptcy. Moreover, the 2017 Act does affect the 'substance of debtor-creditor relations' because increasing mandatory fees paid out of the debtor's estate decreases the funds available for payment to creditors. Respondent points to purported historic analogues to argue that the uniformity requirement does not apply where Congress sets different fee structures with different funding mechanisms for debtors in different bankruptcy districts. But the fee increase at issue here is materially different from the examples cited by respondent. Unlike respondent's examples, the 2017 Act does not confer discretion on bankruptcy districts to set regional policies based on regional needs. Rather, Congress exempted debtors in only 2 States from a fee increase that applied to debtors in 48 States, without identifying any material difference between debtors across those States."

"(b) The 2017 Act violated the uniformity requirement of the Bankruptcy Clause. The Bankruptcy Clause confers broad authority on Congress with the limitation that the laws enacted be 'uniform.' The Court's three decisions addressing the uniformity requirement together stand for the proposition that the Bankruptcy Clause does not permit arbitrary geographically disparate treatment of debtors. In *Moyses* v. *Hanover Nat'l Bank*, 186 U.S. 181, 22 S.Ct. 857, 46 L.Ed. 1113, the Court rejected a challenge to the constitutionality of the Bankruptcy Act of 1898, which permitted individual debtor exemptions under different state laws, explaining that the 'general operation of the law is uniform although it may result in certain particulars differently in different States.' *Id.,* at 190, 22 S.Ct. 857. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320, the Court affirmed the constitutionality of legislation which applied only to rail carriers operating within a defined region of the country, noting the 'flexibility inherent' in the Bankruptcy Clause, *id.,* at 158, 95 S.Ct. 335, permits Congress to enact geographically limited bankruptcy laws consistent with the uniformity requirement in response to a geographically limited problem. In *Gibbons*, 455 U.S. 457, 102 S.Ct. 1169, 71 L.Ed.2d 335, the Court struck down legislation in which Congress altered the priority of claimants in a single railroad's bankruptcy proceedings, holding that '[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors.' *Id.*, at 473, 102 S.Ct. 1169.

"Here, all agree that the 2017 Act's fee increase was not geographically uniform because the fee increase applied differently to Chapter 11 debtors in different regions. That geographical disparity meant that petitioner paid over $500,000 more in fees compared to an identical debtor in North Carolina or Alabama. While respondent contends that such disparities were a permissible effort to solve the budgetary shortfall in the UST Fund, an arguably geographical problem, that shortfall stemmed not from an external and geographically isolated need, but from Congress' creation of a dual bankruptcy system which allowed certain districts to opt into a system more favorable for debtors. The Clause does not permit Congress to treat identical debtors differently based on artificial distinctions Congress itself created."

"(c) The Court remands for the Fourth Circuit to consider in the first instance the proper remedy."

III. Violation of Automatic Stay in Domestic Support Case

In re Dougherty-Kelsay, 636 B.R. 889 (6th Cir. BAP, Smith, 2022).

"This appeal arises from a Memorandum Opinion and Order Regarding Debtor's Stay Violation, Attorneys' Fees, Confirmation, and Case Disposition entered April 23, 2019 (the 'Stay Violation Order').

"Michelle Dougherty-Kelsay ('Debtor') and Michael Stephen Kelsay ('Creditor') were married in 2001 and have three children. Their divorce proceedings began in July 2007 and a decree of dissolution was entered in July 2008. Domestic support and child custody issues have continued to be litigated. In 2017, Creditor obtained primary custody of the children. In May 2017, he filed a Motion for Child Support and Motion for Contempt in the Kenton County Circuit Court ('Family Court') seeking an order 'establishing a sum of child support to be paid by Debtor to Creditor for the parties' three minor children.' A monthly support amount was determined. At issue in this appeal are expenses for medical care and extra-curricular activities, payment of past due support obligations, and the judgment for payment of the outstanding obligations and related contempt findings. Pre-petition, the Family Court established that the parties would split the cost of medical care and extra-curricular activities for the children, with Creditor paying 68% of those costs, and Debtor paying 32%. Creditor was seeking reimbursement for Debtor's share of incurred expenses when the bankruptcy petition was filed. The Family Court held a hearing, post-petition, on Creditor's request for payment, made findings on the obligation due and payment of the obligation, and found Debtor in contempt of a prior order. Debtor filed a motion with the Bankruptcy Court requesting sanctions for violation of the automatic stay for the post-petition hearing and Creditor's collection efforts made pursuant to orders issued by the Family Court. In the Stay Violation Order, the Bankruptcy Court found that some actions violated the automatic stay and awarded attorneys' fees as actual damages and punitive damages. For the reasons set forth below, the Bankruptcy Court's Stay Violation Order is AFFIRMED."

"On appeal, Debtor challenges the determination that the Family Court hearing and judgment were actions to establish a domestic support obligation, and therefore excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(2). Debtor also challenges the finding that the medical expenses Creditor attempted to collect arose post-petition. For the violations of the stay found by the Bankruptcy Court, Debtor challenges the calculation and amount of the attorneys' fees and damages awarded under § 362(k)(1)."

"In this appeal, the Panel reviews *de novo* the Bankruptcy Court's legal conclusions that Creditor violated the automatic stay, with Debtor bearing the burden of proof. The Panel reviews the Bankruptcy Court's awards of attorneys' fees as actual damages and punitive damages on account of such violations for an abuse of discretion.

"When Debtor filed her bankruptcy petition on January 25, 2018, Creditor's Contempt Motion No. 2 was pending with the Family Court, with a hearing scheduled for February 19, 2018. Contempt Motion No. 2 was filed in October, after Debtor failed to respond to or pay invoices forwarded by Creditor as required by the Family Court's September 2017 oral ruling. Notwithstanding this known obligation, Debtor's bankruptcy petition did not list Creditor or his attorney. Once Debtor amended her schedules, Debtor's attorney notified the Family Court the next day. The Family Court decided to move forward with the hearing. *Dominic's Restaurant of Dayton,*

Inc. v. Mantia, 683 F.3d 757, 760 (6th Cir. 2012) (The court 'in which the judicial proceeding is pending ... has jurisdiction to decide whether the proceeding is subject to the stay.').

"To determine whether Debtor met her burden of proving that Creditor violated the automatic stay, we must determine if Creditor's actions would have been stayed under § 362(a) absent an exception, and whether an exception under § 362(b), or other applicable law, applies. *Wohleber v. Skurko* (*In re Wohleber*), 596 B.R. 554, 567 (B.A.P. 6th Cir. 2019). With regard to the February 19, 2018 hearing, when the Family Court established the amount of the obligations due to Creditor, ordered payment of the obligation through wage garnishment, and Creditor's subsequent payment by way of the Intercepts, we find that the Family Court's actions would not have been stayed under § 362 because exceptions under § 362(b) are applicable to each action. Therefore, Debtor cannot meet her burden that these actions constitute a violation of the stay."

"The February 19, 2018, hearing addressed the Pre-Petition Child Support Order, Contempt Motion No. 1, Contempt Motion No. 2, and visitation arrangements. The Family Court ruled that the stay was not applicable to the hearing because the motions involved domestic support obligations. Although that ruling is not binding on this panel, reviewing the pleadings, issues addressed, and the findings of the Family Court, we find that the February 19, 2018 hearing was conducted for the purpose of establishing and modifying a domestic support obligation and was excepted from the automatic stay. 11 U.S.C. § 362(b)(2)(A)(ii). At the hearing, the Family Court established $1,270.66 as the amount owed by Debtor to Creditor. The amount consists of the $692.80 Debtor was invoiced and did not object to after the September hearing, and Debtor's share of the subsequent medical, dental, pharmaceutical, and extracurricular expenses of the parties' children under the formula provided in the Pre-Petition Child Support Order, calculated at $577.66. Establishing $1,270.66 as an additional domestic support obligation due to Creditor is an exception to the stay under 11 U.S.C. § 362(b)(2)(A)(ii). Therefore, we find that the judgment entered by the Family Court in the amount of $1,270.66 was the establishment of a domestic support obligation and was not a violation of the stay.

"The Family Court ordered the additional domestic support obligation to be paid in $50 installments, and required Debtor to deliver the first installment, the $50 Payment, directly to the visitation supervisor on her next visit with the children. The remaining installments were to be paid by increasing the child support garnishment order on Debtor by $50 per month. Debtor appeals the Bankruptcy Court's finding that only the $50 Payment portion of the Family Court's order was a violation of the automatic stay. Pursuant to 11 U.S.C. § 362(b)(2)(C), the withholding of income that is property of the estate or the debtor, for payment of a domestic support obligation under a judicial or administrative order is not stayed by the filing of a bankruptcy petition. Accordingly, we find that the Family Court judgment directing the additional domestic support obligation to be paid through garnishment of Debtor's wages, effected by amending the garnishment order in place, was not a violation of the stay. The $50 Payment, however, will be addressed below.

"The final exception to the stay applicable in this matter is 11 U.S.C. § 362(b)(2)(F), which allows the interception of a tax refund to collect support obligations despite the filing of a bankruptcy petition. In 2018, Debtor's state tax refund of $274.00 and federal income tax refund of $4,306.00 were intercepted and transferred to DCS to be applied to her $4,417.00 child support arrears. The funds were paid to Creditor. The Intercepts themselves are excluded from the stay under 11 U.S.C. § 362(b)(2)(F). There is no reason to allow the Intercepts but prohibit the distribution of those funds to Creditor. Therefore, we find that neither the interception of the funds, nor the payment to and retention of the funds by Creditor were a violation of the stay.

"At the February 19, 2018 hearing, the Family Court denied Contempt Motion No. 1, but granted Contempt Motion No. 2, holding the determination of sanctions in abeyance. Although Contempt Motion No. 2 sought relief for Debtor's failure to comply with the Family Court's order related to domestic support obligations, its purpose was not to establish or modify such an order. Rather, the purpose was to compel Debtor to pay pre-petition arrearages under threat of sanction for civil contempt. Accordingly, we find that Debtor has met her burden to establish that the Family Court Judgment finding her in civil contempt violated the stay and is void. In addition, the filing of Contempt Motion No. 3, after Debtor filed her bankruptcy petition, violated the stay as a forbidden commencement of a judicial proceeding to enforce a pre-petition obligation. 11 U.S.C. § 362(a).

"The initial inquiry regarding the direct $50 Payment for the domestic support obligation and the $112 Medical Expense, is whether they were obligations subject to the stay. *Wohleber*, 596 B.R. at 567. The parties do not dispute that the expenses included in the $1,270.66 domestic support obligation were incurred pre-petition. There is a dispute, however, about whether the Medical Expense is a prepetition or post-petition obligation. The Medical Expense resulted from a pre-petition hospital visit, but because of the 30/30 rule, Creditor asserts that the Medical Expense did not become a claim until an invoice was submitted to Debtor, which occurred post-petition. This argument is contrary to the plain meaning of 'claim' as found in the Bankruptcy Code. Under the Code, a claim is a right to payment, whether matured, unmatured, or disputed. 11 U.S.C. § 101(5). It arises regardless of enforcement efforts. *See Stewart Foods, Inc. v. Broecker* (*In re Stewart Foods, Inc.*), 64 F.3d 141, 146 (4th Cir. 1995) ('[T]hat the payments became due after the bankruptcy filing does not alter the conclusion that the payments are pre-petition obligations.'). The Medical Expense arose from a pre-petition injury and hospital visit. The fact that Creditor sent the invoice to collect the obligation from Debtor after the petition date did not transform it into a post-petition obligation. There is no exception to the stay under 11 U.S.C. § 362(b), or other applicable law, that applies to collection of the first $50 Payment or the Medical Expense, however.

"Unlike the remaining $50 installment payments that were ordered to be made pursuant to an amended garnishment order, the initial $50 Payment ordered by the Family Court was to be paid by Debtor directly to Creditor. To except collection of the payment from the stay, it would need to be paid from property that is not property of the estate. *See* 11 U.S.C. § 362(b)(2)(B). Because the judgment did not limit collection of the $50 Payment from funds that were not property of the estate, that portion of the judgment violated the stay and is void. Similarly, Creditor's attempts to collect the $50 and the Medical Expense were not limited to funds that were not property of the estate. Therefore, his attempts to collect both debts violated the stay.

"When there has been a willful violation of the stay, § 362(k) provides that the injured party can recover actual damages, including costs and attorneys' fees, and where appropriate, punitive damages. 11 U.S.C. § 362(k)(1). Creditor sent multiple messages to Debtor in an effort to collect the $50 Payment and the Medical Expense after Debtor advised him, albeit belatedly, about her bankruptcy case. He also filed Contempt Motion No. 3 to compel Debtor to pay the obligations. The Bankruptcy Court found that his actions constitute a willful violation of the stay under 11 U.S.C. § 362(k)(1), and we perceive no basis to disturb that finding. We now consider whether the Bankruptcy Court abused its discretion in awarding damages for Creditor's violations of the stay."

"In determining that $4,313.75 for attorneys' fees was reasonable, the Bankruptcy Court considered the nature and extent of litigation, the total fees accrued, and the parties' stipulations about the attempts to settle the matter. Finally, punitive damages of $1,000 were awarded by the Bankruptcy Court based on Creditor's repeated post-petition collection attempts, seeking contempt, and ceasing

the collection efforts only after the Stay Violation Motion was filed. We note that the Bankruptcy Court's damages calculation did not consider the collection of the Medical Expense as a violation of the stay. This Panel's disagreement with the Bankruptcy Court regarding the prepetition nature of the Medical Expense (and its conclusion that Creditor violated the stay by attempting to collect it) does not impact the propriety of the Bankruptcy Court's damages determination because the collection efforts for the Medical Expense were consistent with Creditor's attempts to collect the $50 Payment. These actions were part of the same conduct that formed the basis for the Bankruptcy Court's imposition of the $1,000 in punitive damages. Based on the facts considered by the Bankruptcy Court and its application of the law for the award of damages and attorneys' fees, we find that that the court did not abuse its discretion in allowing fees and damages as set forth herein. *See M.J. Waterman & Assocs*., 227 F.3d at 608."

IV. Sanctions Imposed Against Attorney Who Filed Bankruptcy Petitions for Deceased Debtor

Johnston v. Hildebrand, 40 F.4th 740 (6th Cir., Donald, 2022).

"Attorney E. Covington Johnston filed bare-bones Chapter 13 bankruptcy petitions on behalf of Gayle Bagsby in 2016 and 2018 at the request of Gayle Bagsby's daughter, Elizabeth Pace Bagsby. There was only one glaring issue with this arrangement—one cannot file for bankruptcy on behalf of a deceased person and Gayle Bagsby died on February 28, 2006. Elizabeth Bagsby was Administratix of her mother's probate estate. After the dismissal of the 2018 petition, Elizabeth Bagsby, proceeding pro se, filed three more Chapter 13 petitions on Gayle Bagsby's behalf.

"In March 2019, the Chapter 13 Trustee filed a motion to dismiss and a motion for sanctions against Elizabeth Bagsby after she filed yet another Chapter 13 petition, pro se. As a result, the bankruptcy court ordered Mr. Johnston to appear and show cause as to why he should not be subject to sanctions for filing the two Chapter 13 petitions on behalf of Gayle Bagsby, a deceased person, back in 2016 and 2018. After the show cause hearing, the bankruptcy court reopened the first two cases filed in Gayle Bagsby's name and issued sanctions sua sponte against Mr. Johnston and Elizabeth Bagsby. In particular, the bankruptcy court determined that 1) Mr. Johnston failed to conduct any inquiries or legal research, 2) there was no basis in existing law to support a reasonable possibility of success, and 3) the cases were filed for the express purpose of delaying foreclosure actions. Therefore, the bankruptcy court concluded Mr. Johnston violated Rule 9011 of the Federal Rules of Bankruptcy Procedure and issued sanctions. Mr. Johnston appealed to the Bankruptcy Appellate Panel of the Sixth Circuit ('BAP'), which affirmed after finding that the district court did not abuse its discretion. *See In re Bagsby*, Nos. 19-8017/8018/8019, 2020 WL 2025906 (B.A.P. 6th Cir. Apr. 27, 2020). For the reasons set forth below, we AFFIRM the bankruptcy court's order imposing sanctions against Mr. Johnston."

"Mr. Johnston (represented by counsel) and Elizabeth Bagsby (appearing pro se) both testified at the bankruptcy court's May 15, 2019, evidentiary hearing. Elizabeth Bagsby explained that she filed the first petition in 2016 'on behalf of [her] deceased mother' because the home in which she was living with her spouse was still held in Gayle Bagsby's name—Gayle Bagsby died intestate, and the home was not listed as part of the probate estate. Elizabeth Bagsby also explained that she filed for bankruptcy relief on behalf of Gayle Bagsby's probate estate because the mortgage lender was attempting to foreclose. She contacted Mr. Johnston, who recommended filing for Chapter 13 bankruptcy. She stated that Mr. Johnston filed the 2016 petition in Gayle Bagsby's name because the mortgage loan was still in Gayle Bagsby's name—Gayle Bagsby 'was the debtor and

[Elizabeth Bagsby] had been declared administratix.' The 2016 petition was dismissed soon thereafter.

"In December 2018, after receiving another notice of foreclosure from the mortgage lender, Elizabeth Bagsby worked with Mr. Johnston to file a second Chapter 13 petition in Gayle Bagsby's name. Elizabeth Bagsby testified that the 2018 petition was withdrawn because she 'had submitted yet another application for a loan modification and [she] had also begun ... applying for another mortgage with another company.' When asked if she was 'aware that ... deceased persons were not eligible to file bankruptcy,' Elizabeth Bagsby responded that she did not understand this and that she could not recall anyone telling her this information. Elizabeth Bagsby filed a 'third bankruptcy to stop the foreclosure' in 2018, and a fourth in 2019.

"Mr. Johnston has been practicing law for approximately forty years and has been a bankruptcy lawyer for most of his career. Mr. Johnston explained that the two skeletal petitions he filed in Gayle Bagsby's name were the only times he had ever filed a bankruptcy case for a deceased person. Further, he explained that he learned that a deceased person—or their estate—could not file for bankruptcy only after speaking with the UST in relation to the 2018 Chapter 13 petition filed in Gayle Bagsby's name. Mr. Johnston explained that his conversation with UST led him to voluntarily dismiss the 2018 Chapter 13 petition. Mr. Johnston added that he 'didn't want to mislead anybody.' At no point between filing the 2016 and 2018 petitions did Mr. Johnston research whether a decedent's estate could file for bankruptcy.

"Mr. Johnston testified further that he was trying to file the bankruptcy petitions for the probate estate, so he had Elizabeth Bagsby sign the bankruptcy petitions as 'administratix of the estate.' Then, when asked why he used the signature of Gayle Bagsby, without any indication that it was used in a representative capacity, or any additional clarifying information, Mr. Johnston testified that his law firm's software prevented him from uploading Elizabeth Bagsby's wet signature indicating that she signed the petition in a representative capacity for Gayle Bagsby.

"Mr. Johnston testified that he filed the skeletal petitions in both 2016 and 2018 because both filings were made on the eve of foreclosure. After Elizabeth failed to provide the information or documents needed to prepare the schedules in either case, he never filed the required schedules or Bankruptcy Rule 2016 fee disclosures. When asked why he never disclosed the $1500 in fees he received for filing the 2016 petition, and the $690 he received for filing the 2018 petition, Mr. Johnston testified that he usually filed the Rule 2016(b) fee disclosures with the schedules. After Elizabeth Bagsby 'never brought in any information,' he never filed the schedules or the fee disclosures.

"The day after the hearing, the bankruptcy court reopened the 2016 and 2018 two bankruptcy cases Mr. Johnston filed at Elizabeth Bagsby's request.

"After considering Mr. Johnston's testimony, the court found that his conduct in the 2016 and 2018 petitions warranted sanctions. The court noted Mr. Johnston's claims that 1) he was not aware that a probate estate was ineligible to file for bankruptcy, and 2) he believed he was filing on behalf of a probate estate. The court then noted that Mr. Johnston's lack of research raised serious questions regarding his 'motivations and competence.' The bankruptcy court found that Mr. Johnston signed the 2016 petition as Gayle Bagsby's attorney, not as the estate's attorney. More specifically, the court noted:

> Nowhere in any of the filings [of the 2016 case] is there any indication that Gayle [Bagsby] was deceased at the time of filing, that a probate estate even existed, or that the case was filed on behalf of her probate estate. Nowhere is there any indication that someone else besides Gayle [Bagsby] authorized the petition or signed it.

"Further, the court noted that Mr. Johnston's testimony regarding his use of the software to upload the required signatures was undermined by 'his actions in that the plan filed in the second case contain[ed] his wet signature as [Gayle Bagsby]'s attorney.'"

"Based on its findings, the court concluded that Mr. Johnston failed to follow multiple rules and regulations. The court found that Mr. Johnston violated Bankruptcy Rule 9011 by signing and filing the accompanying statement of Gayle Bagsby's social security number. The court also found that Mr. Johnston failed to make the required disclosures of the fees he received for filing the two Chapter 13 petitions, in violation of § 329 and Bankruptcy Rule 2016(b). Third, the court found that Mr. Johnston violated ethics regulations and local bankruptcy rules pertaining to competence and candor. As a result, the court concluded that Mr. Johnston's actions in filing the 2016 and 2018 petitions on behalf of an ineligible debtor were unreasonable under the circumstances. Finally, because Mr. Johnston's actions were unreasonable under the circumstances, the court imposed sanctions sua sponte, including (1) a 90-day suspension from filing new bankruptcy petitions, (2) completing ten hours of continuing legal education courses in ethics, and (3) self-reporting to the Tennessee Board of Professional Responsibility."

"The bankruptcy court sanctioned Mr. Johnston for violating Bankruptcy Rule 9011. Rule 9011 provides, in relevant part:

> (a) Signature. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. ...
> (b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery[.]...
>
> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> > (1) *How Initiated*.
> >
> > > (A) *By Motion*.... The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion ... the challenged [filing] ... is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b)....

> (B) *On Court's Initiative*. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

"Fed. R. Bankr. P. 9011.

"Also, relevant here is 11 U.S.C. § 109(e), which provides, in relevant part: '[o]nly an individual with regular income that owes, ..., or an individual with regular income and such individual's spouse,' that owe 'noncontingent, liquidated, unsecured debts' below a certain statutory amount may be a debtor under chapter 13 of this title.' 11 U.S.C. § 109(e)."

"In support of his argument that the bankruptcy court abused its discretion by imposing sanctions under Bankruptcy Rule 9011, Mr. Johnston urges this Court to adopt the Second Circuit's heightened standard for issuing sua sponte sanctions under Federal Rule of Civil Procedure 11. Under the Second Circuit's subjective approach, a court may not impose Rule 11 sanctions against a party or attorney unless there is evidence of bad faith or actions 'akin to contempt of court.' *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1329 (2d Cir. 1995). In *Wesely v. Churchill Development Corp.*, we followed the Second Circuit's approach and held that the district court in that case abused its discretion by issuing *Rule 11* sanctions without finding that the attorney's actions were subjectively contemptuous. No. 95-4024, 99 F.3d 1141, *3 (6th Cir. Oct. 24, 1996) (unpublished table decision). Mr. Johnston argues that we should expand on *Wesely*—an unpublished table decision—and apply to sanctions imposed under Bankruptcy Rule 9011 a standard akin to a contempt-of-court standard. We disagree.

"To start, binding Sixth Circuit precedent instructs courts to apply an objective standard when evaluating the imposition of sanctions sua sponte pursuant to Bankruptcy Rule 9011. *See In re Wingerter*, 594 F.3d at 939; *see also In re Fordu*, 201 F.3d 693, 711 (6th Cir. 1999) (affirming the bankruptcy court's denial of sanctions where the bankruptcy court concluded the conduct at issue 'was reasonable under the circumstances'). The bankruptcy court in *Wingerter* imposed sanctions sua sponte against a creditor for filing a proof of claim without having conducted a reasonable pre-filing inquiry into the validity and factual basis of its claim in violation of Bankruptcy Rule 9011(b). *In re Wingerter*, 594 F.3d at 939. The creditor's appeal eventually reached this court, where we explained:

> The test for imposing sanctions [under Rule 9011(b)] is whether the individual's conduct was reasonable under the circumstances.' *Corzin v. Fordu (In re Fordu),* 201 F.3d 693, 711 (6th Cir. 1999). 'In applying this test, the bankruptcy court is not to use the benefit of hindsight but should test the signer's conduct by inquiring what was reasonable to believe at the time the [filing] was submitted.' *Mapother & Mapother, P.S.C. v. Cooper (In re Downs),* 103 F.3d 472, 481 (6th Cir.1996) (alterations, citation, and internal quotation marks omitted).

"*Id.* (alterations in original); *see also In re Jones*, 546 B.R. at 34 (reviewing sanctions issued sua sponte against an attorney under Bankruptcy Rule 9011 and stating: 'the bankruptcy court must evaluate the attorney's conduct based on what was reasonable to believe at the time the [petition] was submitted').

"In relying on the Rule-11-specific holding in *Wesely*, Mr. Johnston also ignores a critical difference between the safe harbor provisions in Rule 11 and Rule 9011. Even assuming that the

safe harbor provision in § 9011(c)(1)(A) applies to § 9011(c)(1)(B), the safe harbor provision has an exception for when 'the conduct alleged is the filing of a petition.' Fed. R. Bankr. P. 9011(c)(1)(A). This is because filing 'a [bankruptcy] petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition.' Fed. R. Bankr. P. 9011 advisory committee's note to 1997 amendment. In other words, even if Mr. Johnston was arguing that he took corrective action by withdrawing or moving to dismiss the 2016 and 2018 petitions, his argument still fails because such an argument is expressly precluded under Rule 9011(c)(1)(A).

"Accordingly, in assessing whether to impose sanctions sua sponte against Mr. Johnston, the bankruptcy court was not required to find that he acted in bad faith, in a manner 'akin to contempt of court,' or with a certain *mens rea*. As the BAP correctly noted, this court's precedents establish that the bankruptcy court had to determine 'whether [Mr. Johnston]'s conduct was reasonable at the time he filed the documents at issue.' *In re Bagsby*, 2020 WL 2025906 at *6. The bankruptcy court quoted Bankruptcy Rule 9011(b) regarding an attorney's representations to the court in signing and filing a petition or other papers. In the order, the bankruptcy court correctly and necessarily underscored that a deceased person or their estate is ineligible to file for bankruptcy. The court discussed Mr. Johnston's representations in submitting the 2016 and 2018 bankruptcy petitions and concluded that his conduct, as an attorney, was unreasonable under the circumstances. Therefore, the bankruptcy court did not impose sanctions sua sponte based on an erroneous view or improper application of the law."

"Mr. Johnston next argues that the bankruptcy court abused its discretion because '[t]he evidence simply does not support [its] finding[s][.]'"

"Here, the bankruptcy court made several findings of fact regarding Mr. Johnston's conduct, as outlined above. The Order then explained how his conduct violated Bankruptcy Rule 9011:

> Given that (1) Mr. Johnston made no inquiries and conducted no research before filing either bankruptcy case in Gayle [Bagsby]'s name, (2) there was no basis in existing law to support a reasonable possibility that a Chapter 13 case would be successful, and (3) the cases were filed for the express purpose of delaying foreclosure actions, Mr. Johnson's conduct was not reasonable under the circumstances.

"Mr. Johnston does not dispute any specific findings of fact in the order or connect those findings to the conclusions drawn by the bankruptcy court. Instead, Mr. Johnston merely argues, vaguely, that the bankruptcy court's 'findings do not comport with the evidence presented[,]' and that the evidence does not support a finding that his conduct was 'an abuse of the bankruptcy system.' Appellant Br. at 31, 42. His vague, generalized argument is misplaced. The bankruptcy court expressly stated that Mr. Johnston's 'violations, particularly [those] of Rule 9011, amount[ ] to abuse of the bankruptcy system and subject him to sanctions in accordance with those findings.' The court clearly determined that Mr. Johnston violated Bankruptcy Rule 9011 and, therefore, was being sanctioned for those violations. The bankruptcy court was not required to find that Mr. Johnston's actions were an abuse of the bankruptcy system, and the court did not state that the sanctions were based on a such a finding."

"Based on the foregoing, we hold that the bankruptcy court did not make factually erroneous conclusions or abuse its discretion in determining that Mr. Johnston's actions, in filing for

bankruptcy on behalf of a deceased person, were unreasonable under the circumstances, violated Rule 9011, and 'were therefore sanctionable.' *See In re Wingerter*, 594 F.3d at 941."

V. 2022 Proposed Amendments to Federal Rules of Bankruptcy Procedure
https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments

I. Abortion

A. No Right to Abortion in U.S. Constitution; *Roe v. Wade* Overturned

Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2228 (U.S., Alito, 2022).

"Mississippi's Gestational Age Act provides that '[e]xcept in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.' Miss. Code Ann. § 41–41–191. Respondents—Jackson Women's Health Organization, an abortion clinic, and one of its doctors—challenged the Act in Federal District Court, alleging that it violated this Court's precedents establishing a constitutional right to abortion, in particular *Roe* v. *Wade*, 410 U.S. 113, and *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that Mississippi's 15-week restriction on abortion violates this Court's cases forbidding States to ban abortion pre-viability. The Fifth Circuit affirmed. Before this Court, petitioners defend the Act on the grounds that *Roe* and *Casey* were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

"Held: The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives."

"(a) The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion. *Casey*'s controlling opinion skipped over that question and reaffirmed *Roe* solely on the basis of *stare decisis*. A proper application of *stare decisis*, however, requires an assessment of the strength of the grounds on which *Roe* was based. The Court therefore turns to the question that the *Casey* plurality did not consider."

"(1) First, the Court reviews the standard that the Court's cases have used to determine whether the Fourteenth Amendment's reference to 'liberty' protects a particular right. The Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right. *Roe* held that the abortion right is part of a right to privacy that springs from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. See 410 U.S., at 152–153. The *Casey* Court grounded its decision solely on the theory that the right to obtain an abortion is part of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause. Others have suggested that support can be found in the Fourteenth Amendment's Equal Protection Clause, but that theory is squarely foreclosed by the Court's precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications. See *Geduldig* v. *Aiello*, 417 U.S. 484, 496, n. 20; *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 273–274. Rather, regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures."

"(2) Next, the Court examines whether the right to obtain an abortion is rooted in the Nation's history and tradition and whether it is an essential component of 'ordered liberty.' The Court finds

that the right to abortion is not deeply rooted in the Nation's history and tradition. The underlying theory on which *Casey* rested—that the Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for 'liberty'—has long been controversial. The Court's decisions have held that the Due Process Clause protects two categories of substantive rights—those rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the question is whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to this Nation's 'scheme of ordered liberty.' *Timbs* v. *Indiana*, 586 U.S. —, — (internal quotation marks omitted). The term 'liberty' alone provides little guidance. Thus, historical inquiries are essential whenever the Court is asked to recognize a new component of the 'liberty' interest protected by the Due Process Clause. In interpreting what is meant by 'liberty,' the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about the liberty that Americans should enjoy. For this reason, the Court has been 'reluctant' to recognize rights that are not mentioned in the Constitution. *Collins* v. *Harker Heights*, 503 U.S. 115, 125.

"Guided by the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion. Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe*, no federal or state court had recognized such a right. Nor had any scholarly treatise. Indeed, abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day *Roe* was decided. *Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis.

"Respondents' argument that this history does not matter flies in the face of the standard the Court has applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the Fourteenth Amendment. The Solicitor General repeats *Roe*'s claim that it is 'doubtful . . . abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus,' 410 U.S., at 136, but the great common-law authorities—Bracton, Coke, Hale, and Blackstone—all wrote that a post-quickening abortion was a crime. Moreover, many authorities asserted that even a pre-quickening abortion was 'unlawful' and that, as a result, an abortionist was guilty of murder if the woman died from the attempt. The Solicitor General suggests that history supports an abortion right because of the common law's failure to criminalize abortion before quickening, but the insistence on quickening was not universal, see *Mills* v. *Commonwealth*, 13 Pa. 631, 633; *State* v. *Slagle*, 83 N.C. 630, 632, and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.

"Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, 410 U.S., at 154, and *Casey* described it as the freedom to make 'intimate and personal choices' that are 'central to personal dignity and autonomy,' 505 U.S., at 851. Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and

Casey each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed 'potential life.' *Roe*, 410 U.S., at 150; *Casey*, 505 U.S., at 852. But the people of the various States may evaluate those interests differently. The Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."

"(3) Finally, the Court considers whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents. The Court concludes the right to obtain an abortion cannot be justified as a component of such a right. Attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. *Casey*, 505 U.S., at 851. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion is different because it destroys what *Roe* termed 'potential life' and what the law challenged in this case calls an 'unborn human being.' None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. Accordingly, those cases do not support the right to obtain an abortion, and the Court's conclusion that the Constitution does not confer such a right does not undermine them in any way."

"(b) The doctrine of *stare decisis* does not counsel continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role and protects the interests of those who have taken action in reliance on a past decision. It 'reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.' *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446, 455. It 'contributes to the actual and perceived integrity of the judicial process.' *Payne* v. *Tennessee*, 501 U.S. 808, 827. And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But *stare decisis* is not an inexorable command, *Pearson* v. *Callahan*, 555 U.S. 223, 233, and 'is at its weakest when [the Court] interpret[s] the Constitution,' *Agostini* v. *Felton*, 521 U.S. 203, 235. Some of the Court's most important constitutional decisions have overruled prior precedents. See, *e.g.,Brown* v. *Board of Education*, 347 U.S. 483, 491 (overruling the infamous decision in *Plessy* v. *Ferguson*, 163 U.S. 537, and its progeny).

"The Court's cases have identified factors that should be considered in deciding when a precedent should be overruled. *Janus* v. *State, County, and Municipal Employees*, 585 U.S. —, — . Five factors discussed below weigh strongly in favor of overruling *Roe* and *Casey*."

"(1) *The nature of the Court's error*. Like the infamous decision in *Plessy* v. *Ferguson*, *Roe* was also egregiously wrong and on a collision course with the Constitution from the day it was decided. *Casey* perpetuated its errors, calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State's interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who disagreed with *Roe*."

"(2) *The quality of the reasoning*. Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation. See 410 U.S., at 163–164. *Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Then, after surveying history,

the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee, and did not explain why the sources on which it relied shed light on the meaning of the Constitution. As to precedent, citing a broad array of cases, the Court found support for a constitutional 'right of personal privacy.' *Id.,* at 152. But *Roe* conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See *Whalen* v. *Roe*, 429 U.S. 589, 599–600. None of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed 'potential life.' When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were 'consistent with,' among other things, 'the relative weights of the respective interests involved' and 'the demands of the profound problems of the present day.' *Roe*, 410 U.S.*,* at 165. These are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. An even more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. See *id*., at 163. The arbitrary viability line, which *Casey* termed *Roe*'s central rule, has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. The most obvious problem with any such argument is that viability has changed over time and is heavily dependent on factors—such as medical advances and the availability of quality medical care—that have nothing to do with the characteristics of a fetus.

"When *Casey* revisited *Roe* almost 20 years later, it reaffirmed *Roe'*s central holding*,* but pointedly refrained from endorsing most of its reasoning. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the Fourteenth Amendment's Due Process Clause. 505 U.S., at 846. The controlling opinion criticized and rejected *Roe*'s trimester scheme, 505 U.S., at 872, and substituted a new and obscure 'undue burden' test. *Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new test with no firm grounding in constitutional text, history, or precedent."

"(3) *Workability*. Deciding whether a precedent should be overruled depends in part on whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner. *Casey*'s 'undue burden' test has scored poorly on the workability scale. The *Casey* plurality tried to put meaning into the 'undue burden' test by setting out three subsidiary rules, but these rules created their own problems. And the difficulty of applying *Casey*'s new rules surfaced in that very case. Compare 505 U.S., at 881–887, with *id.,* at 920–922 (Stevens, J., concurring in part and dissenting in part). The experience of the Courts of Appeals provides further evidence that *Casey*'s 'line between' permissible and unconstitutional restrictions 'has proved to be impossible to draw with precision.' *Janus*, 585 U.S., at —. *Casey* has generated a long list of Circuit conflicts. Continued adherence to *Casey*'s unworkable 'undue burden' test would undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.' *Payne*, 501 U.S., at 827."

"(4) *Effect on other areas of law*. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions. See *Ramos* v. *Louisiana*, 590 U.S. —, — (Kavanaugh, J., concurring in part)."

"(5) *Reliance interests.* Overruling *Roe* and *Casey* will not upend concrete reliance interests like those that develop in 'cases involving property and contract rights.' *Payne*, 501 U.S., at 828. In *Casey*, the controlling opinion conceded that traditional reliance interests were not implicated because getting an abortion is generally 'unplanned activity,' and 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.' 505 U.S., at 856. Instead, the opinion perceived a more intangible form of reliance, namely, that 'people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail' and that '[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.' *Ibid.* The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women as well as the status of the fetus. The *Casey* plurality's speculative attempt to weigh the relative importance of the interests of the fetus and the mother represent a departure from the 'original constitutional proposition' that 'courts do not substitute their social and economic beliefs for the judgment of legislative bodies.' *Ferguson* v. *Skrupa*, 372 U.S. 726, 729–730.

"The Solicitor General suggests that overruling *Roe* and *Casey* would threaten the protection of other rights under the Due Process Clause. The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."

"(c) *Casey* identified another concern, namely, the danger that the public will perceive a decision overruling a controversial 'watershed' decision, such as *Roe*, as influenced by political considerations or public opinion. 505 U.S., at 866–867. But the Court cannot allow its decisions to be affected by such extraneous concerns. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* would still be the law. The Court's job is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly."

"(d) Under the Court's precedents, rational-basis review is the appropriate standard to apply when state abortion regulations undergo constitutional challenge. Given that procuring an abortion is not a fundamental constitutional right, it follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.' *Ferguson*, 372 U.S., at 729–730. That applies even when the laws at issue concern matters of great social significance and moral substance. A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.' *Heller* v. *Doe*, 509 U.S. 312, 319. It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.,* at 320.

"Mississippi's Gestational Age Act is supported by the Mississippi Legislature's specific findings, which include the State's asserted interest in 'protecting the life of the unborn.' § 2(b)(i). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail."

"(e) Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. The

Court overrules those decisions and returns that authority to the people and their elected representatives."

B. Texas Heartbeat Act

Whole Woman's Health v. Reeve, 142 S.Ct. 522 (U.S., Gorsuch, 2021).

"The Court granted certiorari before judgment in this case to determine whether the petitioners may pursue a pre-enforcement challenge to Texas Senate Bill 8—the Texas Heartbeat Act—a Texas statute enacted in 2021 that prohibits physicians from performing or inducing an abortion if the physician detected a fetal heartbeat. S. B. 8 does not allow state officials to bring criminal prosecutions or civil actions to enforce the law but instead directs enforcement through 'private civil actions' culminating in injunctions and statutory damages awards against those who perform or assist with prohibited abortions. Tex. Health & Safety Code Ann. §§ 171.204(a), 171.207(a), 171.208(a)(2), (3). Tracking language from *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, S. B. 8 permits abortion providers to defeat any suit against them by showing, among other things, that holding them liable would place an 'undue burden' on women seeking abortions. §§ 171.209(a)–(b).

"The petitioners are abortion providers who sought pre-enforcement review of S. B. 8 in federal court based on the allegation that S. B. 8 violates the Federal Constitution. The petitioners sought an injunction barring the following defendants from taking any action to enforce the statute: a state-court judge, Austin Jackson; a state-court clerk, Penny Clarkston; Texas attorney general, Ken Paxton; executive director of the Texas Medical Board, Stephen Carlton; executive director of the Texas Board of Nursing, Katherine Thomas; executive director of the Texas Board of Pharmacy, Allison Benz; executive commissioner of the Texas Health and Human Services Commission, Cecile Young; and a single private party, Mark Lee Dickson. The public-official defendants moved to dismiss the complaint citing, among other things, the doctrine of sovereign immunity. Mr. Dickson also moved to dismiss, claiming that the petitioners lacked standing to sue him. The District Court denied these motions. The public-official defendants filed an interlocutory appeal with the Fifth Circuit under the collateral order doctrine, which allows immediate appellate review of an order denying sovereign immunity. The Fifth Circuit decided to entertain a second interlocutory appeal filed by Mr. Dickson given the overlap in issues between his appeal and the appeal filed by the public-official defendants. The Fifth Circuit denied the petitioners' request for an injunction barring the law's enforcement pending resolution of the merits of the defendants' appeals, and instead issued an order staying proceedings in the District Court until that time. The petitioners then filed a request for injunctive relief with the Court, seeking emergency resolution of their application ahead of S. B. 8's approaching effective date. In the abbreviated time available for review, the Court concluded that the petitioners' filings failed to identify a basis in existing law that could justify disturbing the Fifth Circuit's decision to deny injunctive relief. *Whole Woman's Health* v. *Jackson*, 594 U.S. —, —. The petitioners then filed another emergency request asking the Court to grant certiorari before judgment to resolve the defendants' appeals in the first instance, which the Court granted.

"Held: The order of the District Court is affirmed in part and reversed in part, and the case is remanded."

II. Article VI, Supremacy Clause; Washington Workers' Compensation Law Struck Down

United States v. Washington, 142 S.Ct. 1976 (U.S., Breyer, 2022).

"In 2018, Washington enacted a workers' compensation law that applied only to certain workers at a federal facility in the State who were 'engaged in the performance of work, either directly or indirectly, for the United States.' Wash. Rev. Code § 51.32.187(1)(b). The facility, known as the Hanford site, was once used by the Federal Government to develop and produce nuclear weapons, and is now undergoing a complex decontamination process. Most workers involved in this cleanup process are federal contract workers—people employed by private companies under contract with the Federal Government. A smaller number of workers involved in the cleanup include State employees, private employees, and federal employees who work directly for the Federal Government. As compared to Washington's general workers' compensation scheme, the law makes it easier for federal contract workers at Hanford to establish their entitlement to workers' compensation, thus increasing workers' compensation costs for the Federal Government.

"The United States brought suit against Washington, arguing that Washington's law violates the Supremacy Clause by discriminating against the Federal Government. The District Court concluded that the law was constitutional because it fell within the scope of a federal waiver of immunity contained in 40 U.S.C. § 3172. The Ninth Circuit affirmed.

"Held: Washington's law facially discriminates against the Federal Government and its contractors. Because § 3172 does not clearly and unambiguously waive the Federal Government's immunity from discriminatory state laws, Washington's law is unconstitutional under the Supremacy Clause."

"(a) This case is not moot. After the Court granted certiorari, Washington enacted a new statute which changed the scope of the original law such that the workers' compensation scheme no longer applied exclusively to Hanford site workers who work for the United States. But a case is not moot unless it is impossible for the Court to grant any effectual relief. *Mission Product Holdings, Inc.* v. *Tempnology, LLC*, 587 U.S. —_, —. The United States asserts that a ruling in its favor will allow it to recoup or to avoid paying millions of dollars in workers' compensation claims. Washington disagrees, arguing that the new statute applies retroactively and is broad enough to encompass any claim filed under the earlier law. But it is not the Court's practice to interpret statutes in the first instance, *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201, nor does the Court know how Washington's state courts will interpret the new law. It is thus not impossible for the United States to recover money if the Court rules in its favor, and the case is not moot."

"(b) Since *McCulloch* v. *Maryland*, 4 Wheat. 316, this Court has interpreted the Supremacy Clause as prohibiting States from interfering with or controlling the operations of the Federal Government. This constitutional doctrine—often called the intergovernmental immunity doctrine—has evolved to bar state laws that either regulate the United States directly or discriminate against the Federal Government or its contractors. A state law discriminates against the Federal Government or its contractors if it 'single[s them] out' for less favorable 'treatment,' *Washington* v. *United States*, 460 U.S. 536, 546, or if it regulates them unfavorably on some basis related to their governmental 'status,' *North Dakota* v. *United States*, 495 U.S. 423, 438 (plurality opinion).

"Washington's law violates these principles by singling out the Federal Government for unfavorable treatment. The law explicitly treats federal workers differently than state or private workers, and imposes costs upon the Federal Government that state and private entities do not bear. The law thus violates the Supremacy Clause unless Congress has consented to such regulation through waiver."

"(c) Congress waives the Federal Government's immunity 'only when and to the extent there is a clear congressional mandate.' *Hancock* v. *Train*, 426 U.S. 167, 179. Washington argues that Congress has waived federal immunity from state workers' compensation laws on federal lands and projects through § 3172(a). Section 3172(a) says that '[t]he state authority charged with enforcing and requiring compliance with the state workers' compensation laws ... may apply [those] laws to all land and premises in the State which the Federal Government owns,' as well as 'to all projects, buildings, constructions, improvements, and property in the State and belonging to the Government, in the same way and to the same extent as if the premises were under the exclusive jurisdiction of the State.' Washington reads the statute's language broadly to effectuate a complete waiver of intergovernmental immunity as to all workers' compensation laws on federal lands and projects, including workers' compensation laws that discriminate against the Federal Government. But one can reasonably read the statute as containing a narrower waiver of immunity, namely, as only authorizing a State to extend its generally applicable state workers' compensation laws to federal lands and projects within the State. Section 3172's waiver thus does not 'clear[ly] and unambiguous[ly]' authorize a State to enact a discriminatory law that facially singles out the Federal Government for unfavorable treatment. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180."

"(d) Washington's arguments to the contrary are unconvincing. Washington emphasizes that the waiver statute allows a State to apply its workers' compensation laws to federal premises 'as if the premises were under the exclusive jurisdiction of the State.' § 3172(a). But those words follow the phrase 'in the same way and to the same extent' and, read together, the language could plausibly be interpreted to allow only the extension of generally applicable workers' compensation laws to federal premises. The statute thus does not clearly and unambiguously permit the discrimination contained in Washington's 'federal workers only' law. Washington next points to other congressional waivers of intergovernmental immunity that explicitly maintain the constitutional prohibition on discriminatory state laws. But the fact that Congress more explicitly preserved the immunity in other contexts does not mean that Congress clearly waived it in § 3172(a). Finally, Washington relies on *Goodyear Atomic*, but that decision said nothing about laws—such as the one here—that explicitly discriminate against the Federal Government. If anything, statements from *Goodyear Atomic* tend to support, not undermine, the Court's decision today."

III. First Amendment

A. Free Speech Clause

1. No Violation When Community College Board Censured a Board Member

Houston Community College System v. Wilson, 142 S.Ct. 1253 (U.S., Gorsuch, 2022).

"In 2013, David Wilson was elected to the Board of Trustees of the Houston Community College System (HCC), a public entity that operates various community colleges. Mr. Wilson often disagreed with the Board about the best interests of HCC, and he brought multiple lawsuits challenging the Board's actions. By 2016, these escalating disagreements led the Board to reprimand Mr. Wilson publicly. Mr. Wilson continued to charge the Board—in media outlets as well as in state-court actions—with violating its ethical rules and bylaws. At a 2018 meeting, the Board adopted another public resolution, this one 'censuring' Mr. Wilson and stating that Mr. Wilson's conduct was 'not consistent with the best interests of the College' and 'not only

inappropriate, but reprehensible.'. . . The Board imposed penalties in addition to the verbal censure, among them deeming Mr. Wilson ineligible for Board officer positions during 2018. Mr. Wilson amended the pleadings in one of his pending state-court lawsuits to add claims against HCC and the trustees under 42 U.S.C. § 1983, asserting that the Board's censure violated the First Amendment. The case was removed to federal court, and the District Court granted HCC's motion to dismiss the complaint, concluding that Mr. Wilson lacked standing under Article III. On appeal, a panel of the Fifth Circuit reversed, holding that Mr. Wilson had standing and that his complaint stated a viable First Amendment claim. 955 F.3d 490, 496–497 (5th Cir. 2020). The Fifth Circuit concluded that a verbal 'reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983.' *Id*., at 498. HCC sought review in this Court of the Fifth Circuit's judgment that Mr. Wilson may pursue a First Amendment claim based on a purely verbal censure.

"Held: Mr. Wilson does not possess an actionable First Amendment claim arising from the Board's purely verbal censure."

"(a) The First Amendment prohibits laws 'abridging the freedom of speech.' When faced with a dispute about the Constitution's meaning or application, '[l]ong settled and established practice is a consideration of great weight.' *The Pocket Veto Case*, 279 U.S. 655, 689, 49 S.Ct. 463, 73 L.Ed. 894 (1929). That principle poses a problem for Mr. Wilson because elected bodies in this country have long exercised the power to censure their members. As early as colonial times, the power of assemblies to censure their members was assumed. And, as many examples show, Congress has censured Members not only for objectionable speech directed at fellow Members but also for comments to the media, public remarks disclosing confidential information, and conduct or speech thought damaging to the Nation. Censures have also proven common at the state and local level. In fact, no one before the Court has cited any evidence suggesting that a purely verbal censure analogous to Mr. Wilson's has ever been widely considered offensive to the First Amendment. Instead, when it comes to disagreements of this sort, longstanding practice suggests an understanding of the First Amendment that permits '[f]ree speech on both sides and for every faction on any side.' *Thomas v. Collins*, 323 U.S. 516, 547, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (Jackson, J., concurring)."

"(b) What history suggests, the Court's contemporary doctrine confirms. A plaintiff like Mr. Wilson pursuing a First Amendment retaliation claim must show that the government took an 'adverse action' in response to his speech that 'would not have been taken absent the retaliatory motive.' *Nieves* v. *Bartlett*, 587 U.S. ——, ——, 139 S.Ct. 1715, 204 L.Ed.2d 1 (2019). To distinguish material from immaterial adverse actions, lower courts have taken various approaches. But any fair assessment of the materiality of the Board's conduct in this case must account for at least two things. First, Mr. Wilson was an elected official. Elected representatives are expected to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes. Second, the only adverse action at issue before the Court is itself a form of speech from Mr. Wilson's colleagues that concerns the conduct of public office. The First Amendment surely promises an elected representative like Mr. Wilson the right to speak freely on questions of government policy, but it cannot be used as a weapon to silence other representatives seeking to do the same. The censure at issue before us was a form of speech by elected representatives concerning the public conduct of another elected representative. Everyone involved was an equal member of the same deliberative body. The censure did not prevent Mr. Wilson from doing his job, it did not deny him any privilege of office, and Mr. Wilson does not allege it was defamatory. Given the features of Mr. Wilson's

case, the Board's censure does not qualify as a materially adverse action capable of deterring Mr. Wilson from exercising his own right to speak."

"(c) Mr. Wilson's countervailing account of the Court's precedent and history rests on a strained analogy between censure and exclusion from office. While Congress possesses no power to exclude duly elected representatives who satisfy the prerequisites for office prescribed in Article I of the Constitution, the power to exclude and the power to issue other, lesser forms of discipline 'are not fungible' under the Constitution. *Powell v. McCormack*, 395 U.S. 486, 512, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). The differences between censure and exclusion from office undermine Mr. Wilson's attempt to rely on either *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), or the historical example he cites involving John Wilkes, both of which involved exclusion from office. Neither history nor this Court's precedents support finding a viable First Amendment claim here."

2. City Ordinance Against New Off-Premises Digital Billboards Is Content Neutral

City of Austin, Texas v. Reagan National Advertising of Austin, LLC, 142 S.Ct. 1464 (U.S., Sotomayor, 2022).

"Like a great many jurisdictions around the country, the City of Austin, Texas (City), specially regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. See City Code § 25–10–102(1). These are known as off-premises signs. The City's sign code at the time of this dispute prohibited construction of new off-premises signs. *Ibid*. Grandfathered off-premises signs could remain in their existing locations as 'nonconforming signs,' but could not be altered in ways that increased their nonconformity. §§ 25–10–3(10), 25–10–152(A)–(B). On-premises signs were not similarly restricted. § 25–10–102(6).

"Respondents, Reagan National Advertising of Austin, LLC, and Lamar Advantage Outdoor Company, L. P., own billboards in Austin. When Reagan sought permits to digitize some of its billboards, the City denied its applications. Reagan filed suit in state court, alleging that the City's prohibition against digitizing off-premises signs, but not on-premises signs, violated the First Amendment's Free Speech Clause. The City removed the case to federal court, and Lamar intervened. The District Court held that the challenged sign code provisions were content neutral under *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S.Ct. 2218, 192 L.Ed.2d 236, reviewed the City's on-/off-premises distinction under intermediate scrutiny, and found that the distinction satisfied that standard. The Court of Appeals reversed. It found the on-/off-premises distinction to be facially content based because a government official had to read a sign's message to determine whether the sign was off-premises. The court then reviewed the City's on-/off-premises distinction under strict scrutiny, and it held that the City failed to satisfy that onerous standard.

"Held: The City's on-/off-premises distinction is facially content neutral under the First Amendment."

"(a) *Reed* held that a regulation of speech is content based under the First Amendment if it 'target[s] speech based on its communicative content,' *i.e.,* if it 'applies to particular speech because of the topic discussed or the idea or message expressed.' 576 U.S. at 163, 135 S.Ct. 2218. The Court of Appeals' interpretation of *Reed*—to mean that a regulation cannot be content neutral if its

application requires reading the sign at issue—is too extreme an interpretation of this Court's precedent."

"(1) In *Reed*, the town of Gilbert, Arizona, adopted a comprehensive sign code that applied distinct size, placement, and time restrictions to 23 different categories of signs, giving more favorable treatment to some categories (such as ideological signs or political signs) and less favorable treatment to others (such as temporary directional signs relating to religious events, educational events, or other similar events). The Court rejected the contention that the restrictions were content neutral because they did not discriminate on the basis of particular viewpoints, reasoning that 'a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.' 576 U.S. at 169, 135 S.Ct. 2218. Unlike the sign code in *Reed*, the City's sign ordinances here do not single out any topic or subject matter for differential treatment. A sign's message matters only to the extent that it informs the sign's relative location. Thus, the City's on-/off-premises distinction is more like ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny. Cf. *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 101 L.Ed.2d 420."

"(2) This Court's precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral. Most relevant here, the First Amendment allows for regulations of solicitation, and speech must be read or heard to determine whether it entails solicitation. See *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298. Moreover, the Court has previously understood distinctions between on-premises and off-premises signs to be content neutral. See *Suffolk Outdoor Advertising Co. v. Hulse*, 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101 (order dismissing appeal); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772. Underlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, content-based regulations are those that discriminate based on 'the topic discussed or the idea or message expressed.' *Reed*, 576 U.S. at 171, 135 S.Ct. 2218."

"(3) Reagan's counterargument relies primarily on a sentence in *Reed* recognizing that '[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.' 576 U.S. at 163, 135 S.Ct. 2218. Reagan contends that the City's sign code defines off-premises signs on the basis of function or purpose and is therefore content based and subject to strict scrutiny. This stretches *Reed*'s 'function or purpose' language too far. *Reed* held that subtler forms of content discrimination cannot escape classification as content based simply because they swap an obvious subject-matter distinction for a function or purpose proxy. That does not mean that any classification that considers function or purpose is *always* content based. Reagan's reading of *Reed* would contravene numerous precedents and cast doubt on the Nation's history of regulating off-premises signs."

"(b) This Court's determination that the City's on-/off-premises distinction is facially content neutral does not end the First Amendment inquiry. Evidence that an impermissible purpose or justification underpins a facially content-neutral restriction may mean that the restriction is nevertheless content based. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be 'narrowly tailored to serve a significant governmental interest.' *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661. Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters."

3. Boston's Refusal to Allow Christian Group to Fly Flag Violated First Amendment

Shurtleff v. City of Boston, Massachusetts, 142 S.Ct. 1583 (U.S., Breyer, 2022).

"Just outside the entrance to Boston City Hall, on City Hall Plaza, stand three flagpoles. Boston flies the American flag from the first pole and the flag of the Commonwealth of Massachusetts from the second. Boston usually flies the city's own flag from the third pole. But Boston has, for years, allowed groups to hold ceremonies on the plaza during which participants may hoist a flag of their choosing on the third pole in place of the city's flag. Between 2005 and 2017, Boston approved the raising of about 50 unique flags for 284 such ceremonies. Most of these flags were other countries', but some were associated with groups or causes, such as the Pride Flag, a banner honoring emergency medical service workers, and others. In 2017, Harold Shurtleff, the director of an organization called Camp Constitution, asked to hold an event on the plaza to celebrate the civic and social contributions of the Christian community; as part of that ceremony, he wished to raise what he described as the 'Christian flag.' The commissioner of Boston's Property Management Department worried that flying a religious flag at City Hall could violate the Establishment Clause and found no past instance of the city's having raised such a flag. He therefore told Shurtleff that the group could hold an event on the plaza but could not raise their flag during it. Shurtleff and Camp Constitution (petitioners) sued, claiming that Boston's refusal to let them raise their flag violated, among other things, the First Amendment's Free Speech Clause. The District Court held that flying private groups' flags from City Hall's third flagpole amounted to government speech, so Boston could refuse petitioners' request without running afoul of the First Amendment. The First Circuit affirmed. This Court granted certiorari to decide whether the flags Boston allows others to fly express government speech, and whether Boston could, consistent with the Free Speech Clause, deny petitioners' flag-raising request.

"Held:

"1. Boston's flag-raising program does not express government speech."

"(a) The Free Speech Clause does not prevent the government from declining to express a view. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–469, 129 S.Ct. 1125, 172 L.Ed.2d 853. The government must be able to decide what to say and what not to say when it states an opinion, speaks for the community, formulates policies, or implements programs. The boundary between government speech and private expression can blur when, as here, the government invites the people to participate in a program. In those situations, the Court conducts a holistic inquiry to determine whether the government intends to speak for itself or, rather, to regulate private expression. The Court's cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. See *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–213, 135 S.Ct. 2239, 192 L.Ed.2d 274. Considering these indicia in *Summum*, the Court held that the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. See 555 U.S. at 470–473, 129 S.Ct. 1125. In *Walker*, the Court found that license plate designs proposed by private groups also amounted to government speech because, among other reasons, the State that issued the plates 'maintain[ed] direct control over the messages conveyed' by 'actively' reviewing designs and rejecting over a dozen proposals. 576 U.S. at 213, 135 S.Ct. 2239. On the other hand, in *Matal* v. *Tam*, the Court concluded that trademarking words or symbols generated by private registrants did

not amount to government speech because the Patent and Trademark Office did not exercise sufficient control over the nature and content of those marks to convey a governmental message. 582 U.S. ——, ——, 137 S.Ct. 1744, ——, 198 L.Ed.2d 366."

"(b) Applying this government-speech analysis here, the Court finds that some evidence favors Boston, and other evidence favors Shurtleff. The history of flag flying, particularly at the seat of government, supports Boston. Flags evolved as a way to symbolize communities and governments. Not just the content of a flag, but also its presence and position have long conveyed important messages about government. Flying a flag other than a government's own can also convey a governmental message. For example, another country's flag outside Blair House, across the street from the White House, signals that a foreign leader is visiting. Consistent with this history, flags on Boston's City Hall Plaza usually convey the city's messages. Boston's flag symbolizes the city and, when flying at halfstaff, conveys a community message of sympathy or somber remembrance. The question remains whether, on the 20 or so times a year when Boston allowed private groups to raise their own flags, those flags, too, expressed the city's message. The circumstantial evidence of the public's perception does not resolve the issue. The most salient feature of this case is that Boston neither actively controlled these flag raisings nor shaped the messages the flags sent. To be sure, Boston maintained control over an event's date and time to avoid conflicts, and it maintained control over the plaza's physical premises, presumably to avoid chaos. But the key issue is whether Boston shaped or controlled the flags' content and meaning; such evidence would tend to show that Boston intended to convey the flags' messages as its own. And on that issue, Boston's record is thin. Boston says that all (or at least most) of the 50 unique flags it approved reflect particular city-endorsed values or causes. That may well be true of flying other nations' flags, or the Pride Flag raised annually to commemorate Boston Pride Week, but the connection to other flag-raising ceremonies, such as one held by a community bank, is more difficult to discern. Further, Boston told the public that it sought 'to accommodate all applicants' who wished to hold events at Boston's 'public forums,' including on City Hall Plaza. . . . The city's application form asked only for contact information and a brief description of the event, with proposed dates and times. The city employee who handled applications testified that he did not request to see flags before the events. Indeed, the city's practice was to approve flag raisings without exception—that is, until petitioners' request. At the time, Boston had no written policies or clear internal guidance about what flags groups could fly and what those flags would communicate. Boston's control is therefore not comparable to the degree of government involvement in the selection of park monuments in *Summum*, see 555 U.S. at 472–473, 129 S.Ct. 1125, or license plate designs in *Walker*, see 576 U.S. at 213, 135 S.Ct. 2239. Boston's come-one-come-all practice—except, that is, for petitioners' flag—is much closer to the Patent and Trademark Office's policy of registering all manner of trademarks in *Matal*, see 582 U.S., at ——, ——, 137 S.Ct., at ——. All told, Boston's lack of meaningful involvement in the selection of flags or the crafting of their messages leads the Court to classify the third-party flag raisings as private, not government, speech."

"2. Because the flag-raising program did not express government speech, Boston's refusal to let petitioners fly their flag violated the Free Speech Clause of the First Amendment. When the government does not speak for itself, it may not exclude private speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.' *Good News Club v. Milford Central School*, 533 U.S. 98, 112, 121 S.Ct. 2093, 150 L.Ed.2d 151. Boston concedes that it denied petitioners' request out of Establishment Clause concerns, solely because the proposed flag 'promot[ed] a specific religion.'. . . In light of the Court's government-speech holding, Boston's refusal to allow petitioners to raise their flag because of its religious viewpoint violated the Free Speech Clause."

4. Loan Repayment Limitations on Candidate's Loan to Campaign in Bipartisan Campaign Finance Reform Act Burden Free Speech

Federal Election Commission v. Cruz, 142 S.Ct. 1638 (U.S., Roberts, 2022).

"During his 2018 Senate reelection campaign and consistent with federal law, see 11 C.F.R. § 110.10; 52 U.S.C. § 30101(9)(A)(i), appellee Ted Cruz loaned $260,000 to his campaign committee, Ted Cruz for Senate (Committee). To repay these and other campaign debts, campaigns may continue to receive contributions after election day. See 11 C.F.R. § 110.1(b)(3)(i). Section 304 of the Bipartisan Campaign Reform Act of 2002 (BCRA) restricts the use of post-election contributions by limiting the amount that a candidate may be repaid from such funds to $250,000. 52 U.S.C. § 30116(j). Relevant here, the Federal Election Commission (FEC) has promulgated regulations establishing three rules to implement that limitation: First, a campaign may repay up to $250,000 in candidate loans using contributions made 'at any time.' 11 C.F.R. § 116.12(a). Second, to the extent the loans exceed $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs 'within 20 days of the election.' § 116.11(c)(1). Third, when the 20-day post-election deadline expires, the campaign must treat any portion above $250,000 as a contribution to the campaign, precluding later repayment. § 116.11(c)(2).

"The Committee began repaying Cruz's loans after the 20-day post-election window for repaying amounts over $250,000 had closed. It accordingly repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid. Cruz and the Committee filed this action in Federal District Court, alleging that Section 304 of BCRA violates the First Amendment and raising challenges to the FEC's implementing regulation, § 116.11. The District Court granted Cruz and his Committee summary judgment on their constitutional claim, holding that the loan-repayment limitation burdens political speech without sufficient justification, and dismissed as moot their challenges to the regulation.

"Held:

"1. Appellees have standing to challenge the threatened enforcement of Section 304."

"(a) The Government recognizes that the Committee's present inability to repay the final $10,000 of Cruz's loans constitutes an injury in fact both to Cruz and his Committee. It maintains, however, that appellees lack Article III standing because these injuries are not traceable to the threatened enforcement of Section 304, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. First, the Government argues that appellees knowingly triggered the application of the loan-repayment limitation and thus their injuries are traceable to themselves, not the Government. This Court has never recognized an exception to Article III standing's traceability requirement for injuries that a party purposely incurs. Moreover, this Court has made clear that an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred. See *Evers v. Dwyer*, 358 U.S. 202, 204, 79 S.Ct. 178, 3 L.Ed.2d 222 (*per curiam*). Cases cited by the Government—*Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 185 L.Ed.2d 264, and *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (*per curiam*)—do not alter that conclusion. In contrast to those cases, here the appellees' injuries are directly inflicted by the FEC's threatened enforcement of the provisions they now challenge. That appellees chose to subject themselves to those provisions does not change the fact that they *are*

subject to them, and will face genuine legal penalties if they do not comply. Finally, the Government's observation that it should not be blamed for appellees' injuries because the Committee had a legally available alternative—*i.e.,* repaying Cruz's loans in full with pre-election funds, within 20 days of the election—misses the point. Demanding that the Committee do so would require it to forgo the exercise of the First Amendment right the Court must assume it has when assessing standing—the right to repay its campaign debts in full, at any time."

"(b) The Government next argues that although appellees would have standing to challenge the FEC's implementing regulation, § 116.11, they do not have standing to challenge Section 304 itself. The Government contends that the Committee used pre-election funds to repay the first $250,000, and thus Section 304's cap on using post-election funds to repay a candidate's loan does not prohibit repayment of the final $10,000 here. Instead, it is the agency's regulation—with its 20-day limit—that prevents repayment. Appellees insist that they used post-election funds—in the form of overlimit contributions to the 2018 campaign that were 'redesignated' as contributions to the 2024 campaign—to repay Cruz's loans. Ordinarily, it would not matter whether a plaintiff was challenging the statute's enforcement or instead the enforcement of a regulation. Here, however, the parties assume that the distinction makes a difference because the subject-matter jurisdiction of the three-judge District Court is limited to actions challenging the enforcement of the statute. See BCRA § 304(a). Even under the Government's account, the present inability of the Committee to repay and Cruz to recover the final $10,000 is traceable to the operation of Section 304 itself. An agency's regulation cannot 'operate independently of' the statute that authorized it. *California v. Texas*, 593 U.S. ——— , ——— , 141 S.Ct. 2104, 210 L.Ed.2d 230. Here, the FEC's 20-day rule was expressly promulgated to implement Section 304. Thus, if Section 304 is invalid and unenforceable, the agency's 20-day rule is as well, and the remedy appellees sought in the District Court would redress appellees' harm by preventing enforcement of the agency's 20-day rule. See *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. In challenging the FEC's threatened enforcement of the loan-repayment limitation, through its implementing regulation, appellees may raise constitutional claims against Section 304, the statutory provision that, through the agency's regulation, is being enforced. Cf. *Collins v. Yellen*, 594 U.S. ——— , ——— , 141 S.Ct. 1761, 210 L.Ed.2d 432. And because they are challenging 'the constitutionality of [a] provision of [BCRA],' § 403(a), jurisdiction was proper in the three-judge District Court."

"2. Section 304 of BCRA burdens core political speech without proper justification."

"(a) The loan-repayment limitation abridges First Amendment rights by burdening candidates who wish to make expenditures on behalf of their own candidacy through personal loans. Restricting the sources of funds that campaigns may use to repay candidate loans increases the risk that such loans will not be repaid in full, which, in turn, deters candidates from loaning money to their campaigns. This burden is no small matter. Debt is a ubiquitous tool for financing electoral campaigns, especially for new candidates and challengers. By inhibiting a candidate from using this critical source of campaign funding, Section 304 raises a barrier to entry—thus abridging political speech."

"(b) The Government has not demonstrated that the loan-repayment limitation furthers a permissible goal. Any law that burdens First Amendment freedoms, even slightly, must be justified by a permissible interest."

"(i) The only permissible ground for restricting political speech recognized by this Court is the prevention of '*quid pro quo*' corruption or its appearance. See *McCutcheon v. Federal Election*

Comm'n, 572 U.S. 185, 207, 134 S.Ct. 1434, 188 L.Ed.2d 468. Here, the Government argues that the contributions at issue raise a heightened risk of corruption because they are used to repay a candidate's personal loans. But given that these contributions are already capped at $2,900 per election in order to prevent corruption or its appearance, the approach of adding an additional layer of regulation is a significant indicator that the regulation may not be necessary for the interest it seeks to protect. See *id.* at 221, 134 S.Ct. 1434. Because the Government is defending a restriction on speech, it must do more than 'simply posit the existence of the disease sought to be cured'; it must instead point to 'record evidence or legislative findings' demonstrating the need to address a special problem. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795. '[M]ere conjecture' is '[in]adequate to carry a First Amendment burden.' *McCutcheon*, 572 U.S. at 210, 134 S.Ct. 1434. Yet the Government is unable to identify a single case of *quid pro quo* corruption in this context, even though most States do not impose a limit on the use of post-election contributions to repay candidate loans."

"(ii) In the absence of direct evidence, the Government turns to a scholarly article, a poll, and statements by Members of Congress to show that the contributions used to repay candidate loans carry a heightened risk of at least the appearance of corruption. All of this evidence, however, concerns the sort of 'corruption,' loosely conceived, that this Court has repeatedly explained is not legitimately regulated under the First Amendment. Nor is it equivalent to 'legislative findings' that demonstrate the need to address a special problem."

"(iii) As a fallback argument, the Government analogizes post-election contributions used to repay a candidate's loans to gifts because they enrich the candidate as opposed to the campaign's treasury. But this analogy is meaningful only if the baseline is that the campaign will default. The record suggests, however, that winning candidates are commonly repaid in full. For these candidates, post-election contributions bear little resemblance to a gift; they instead restore the candidate to the status quo ante. As for losing candidates, the Government does not provide any anticorruption rationale to explain why contributions to those candidates should be restricted. Finally, the Government argues for deference to Congress's 'legislative judgment' that Section 304 furthers an anticorruption goal. Given scant evidence of corruption, deference to Congress would be especially inappropriate where, as here, the legislative act may have been an effort to 'insulate[ ] legislators from effective electoral challenge.' *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 404, 120 S.Ct. 897, 145 L.Ed.2d 886 (BREYER, J., concurring). In the end, it remains the role of this Court to decide whether a particular legislative choice is constitutional. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 109 S.Ct. 2829, 106 L.Ed.2d 93."

B. Free Exercise

1. Coach's Personal Prayer Midfield After Football Games Permissible

Kennedy v. Bremerton School District, 142 S.Ct. 2407 (U.S., Gorsuch, 2022).

"Petitioner Joseph Kennedy lost his job as a high school football coach in the Bremerton School District after he knelt at midfield after games to offer a quiet personal prayer. Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, and the Ninth Circuit affirmed. After the parties engaged in discovery, they filed cross-motions for summary judgment. The District Court found that the 'sole reason' for the District's decision to suspend Mr. Kennedy was its perceived 'risk of

constitutional liability' under the Establishment Clause for his 'religious conduct' after three games in October 2015. 443 F.Supp.3d 1223, 1231. The District Court granted summary judgment to the District and the Ninth Circuit affirmed. The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. 4 F.4th 910, 911. Several dissenters argued that the panel applied a flawed understanding of the Establishment Clause reflected in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, and that this Court has abandoned *Lemon*'s 'ahistorical, atextual' approach to discerning Establishment Clause violations. 4 F.4th at 911, and n. 3.

"Held: The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression."

"(a) Mr. Kennedy contends that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. Where the Free Exercise Clause protects religious exercises, the Free Speech Clause provides overlapping protection for expressive religious activities. See, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 269, n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440. A plaintiff must demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries his or her burden, the defendant must show that its actions were nonetheless justified and appropriately tailored."

"(1) Mr. Kennedy discharged his burden under the Free Exercise Clause. The Court's precedents permit a plaintiff to demonstrate a free exercise violation multiple ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.' *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879–881, 110 S.Ct. 1595, 108 L.Ed.2d 876. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny, under which the government must demonstrate its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. See, *e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472.

"Here, no one questions that Mr. Kennedy seeks to engage in a sincerely motivated religious exercise involving giving 'thanks through prayer' briefly 'on the playing field' at the conclusion of each game he coaches. . . . The contested exercise here does not involve leading prayers with the team; the District disciplined Mr. Kennedy *only* for his decision to persist in praying quietly without his students after three games in October 2015. In forbidding Mr. Kennedy's brief prayer, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character. Prohibiting a religious practice was thus the District's unquestioned 'object.' The District explained that it could not allow an on-duty employee to engage in *religious* conduct even though it allowed other on-duty employees to engage in personal secular conduct. The District's performance evaluation after the 2015 football season also advised against rehiring Mr. Kennedy on the ground that he failed to supervise student-athletes after games, but any sort of postgame supervisory requirement was not applied in an evenhanded way. . . . The District thus conceded that its policies were neither neutral nor generally applicable.

"(2) Mr. Kennedy also discharged his burden under the Free Speech Clause. The First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731.

But teachers and coaches are also government employees paid in part to speak on the government's behalf and to convey its intended messages. To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689, and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. When an employee 'speaks as a citizen addressing a matter of public concern,' the Court's cases indicate that the First Amendment may be implicated and courts should proceed to a second step. *Id.*, at 423, 126 S.Ct. 1951. At this step, courts should engage in 'a delicate balancing of the competing interests surrounding the speech and its consequences.' *Ibid*. At the first step of the *Pickering–Garcetti* inquiry, the parties' disagreement centers on one question: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

"When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech 'ordinarily within the scope' of his duties as a coach. *Lane v. Franks*, 573 U.S. 228, 240, 134 S.Ct. 2369, 189 L.Ed.2d 312. He did not speak pursuant to government policy and was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not 'ow[e their] existence' to Mr. Kennedy's responsibilities as a public employee. *Garcetti*, 547 U.S. at 421, 126 S.Ct. 1951. The timing and circumstances of Mr. Kennedy's prayers—during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities—confirms that Mr. Kennedy did not offer his prayers while acting within the scope of his duties as a coach. It is not dispositive that Coach Kennedy served as a role model and remained on duty after games. To hold otherwise is to posit an 'excessively broad job descriptio[n]' by treating everything teachers and coaches say in the workplace as government speech subject to government control. *Garcetti*, 547 U.S. at 424, 126 S.Ct. 1951. That Mr. Kennedy used available time to pray does not transform his speech into government speech. Acknowledging that Mr. Kennedy's prayers represented his own private speech means he has carried his threshold burden. Under the *Pickering–Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern. See *Lane*, 573 U.S. at 242, 134 S.Ct. 2369."

"(3) Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least 'strict scrutiny,' showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. See *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. A similar standard generally obtains under the Free Speech Clause. See *Reed v. Town of Gilbert*, 576 U.S. 155, 171, 135 S.Ct. 2218, 192 L.Ed.2d 236. The District asks the Court to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively, intermediate scrutiny. The Court concludes, however, that the District cannot sustain its burden under any standard."

"i. The District, like the Ninth Circuit below, insists Mr. Kennedy's rights to religious exercise and free speech must yield to the District's interest in avoiding an Establishment Clause violation under *Lemon* and its progeny. The *Lemon* approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. *Lemon*, 403 U.S., at 612–613, 91 S.Ct. 2105. In time, that approach also came to involve estimations about whether a 'reasonable observer' would

consider the government's challenged action an 'endorsement' of religion. See, *e.g.*, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593, 109 S.Ct. 3086, 106 L.Ed.2d 472. But—given the apparent 'shortcomings' associated with *Lemon's* 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion* v. *American Humanist Assn.*, 588 U.S. ——, —— (plurality opinion).

"In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.' *Town of Greece v. Galloway*, 572 U.S. 565, 576, 134 S.Ct. 1811, 188 L.Ed.2d 835. A natural reading of the First Amendment suggests that the Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13, 15, 67 S.Ct. 504, 91 L.Ed. 711. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.' *Town of Greece*, at 575, 134 S.Ct. 1811. The District and the Ninth Circuit erred by failing to heed this guidance."

"ii. The District next attempts to justify its suppression of Mr. Kennedy's religious activity by arguing that doing otherwise would coerce students to pray. The Ninth Circuit did not adopt this theory in proceedings below and evidence of coercion in this record is absent. The District suggests that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. A rule that the only acceptable government role models for students are those who eschew any visible religious expression would undermine a long constitutional tradition in which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.' *Lee v. Weisman*, 505 U.S. 577, 590, 112 S.Ct. 2649, 120 L.Ed.2d 467. No historically sound understanding of the Establishment Clause begins to 'mak[e] it necessary for government to be hostile to religion' in this way. *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954."

"iii. There is no conflict between the constitutional commands of the First Amendment in this case. There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 308, 83 S.Ct. 1560, 10 L.Ed.2d 844 (Goldberg, J., concurring). A government entity's concerns about phantom constitutional violations do not justify actual violations of an individual's First Amendment rights."

"(c) Respect for religious expressions is indispensable to life in a free and diverse Republic. Here, a government entity sought to punish an individual for engaging in a personal religious observance, based on a mistaken view that it has a duty to suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his religious exercise and free speech claims."

2. Texas' Restriction on Audible Prayer and Laying on of Hands in Execution Chamber

Ramirez v. Collier, 142 S.Ct. 1264 (U.S., Roberts, 2022).

"A Texas jury sentenced John Ramirez to death after he brutally murdered Pablo Castro in 2004. On February 5, 2021, after years of direct and collateral proceedings concerning Ramirez's conviction, sentence, and aspects of his execution, Texas informed Ramirez that his execution date

would be September 8, 2021. Ramirez then filed a prison grievance requesting that the State allow his long-time pastor to be present in the execution chamber, which Texas initially denied. Texas later changed course and amended its execution protocol to allow a prisoner's spiritual advisor to enter the execution chamber. On June 11, 2021, Ramirez filed another prison grievance asking that his pastor be permitted to 'lay hands' on him and 'pray over' him during his execution, acts Ramirez's grievance explains are part of his faith. Texas denied Ramirez's request on July 2, 2021, stating that spiritual advisors are not allowed to touch an inmate in the execution chamber. Texas pointed to no provision of its execution protocol requiring this result, and the State had a history of allowing prison chaplains to engage in such activities during executions. Ramirez appealed within the prison system by filing a Step 2 grievance on July 8, 2021. With less than a month until his execution date, and no ruling on his Step 2 grievance, Ramirez filed suit in Federal District Court on August 10, 2021. Ramirez alleged that the refusal of prison officials to allow his pastor to lay hands on him in the execution chamber violated his rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) and the First Amendment. Ramirez sought preliminary and permanent injunctive relief barring state officials from executing him unless they granted the requested religious accommodation. On August 16, 2021, Ramirez's attorney inquired whether Ramirez's pastor would be allowed to pray audibly with him during the execution. After prison officials said no, Ramirez filed an amended complaint seeking an injunction that would allow his pastor to lay hands on him and pray with him during the execution. Ramirez also sought a stay of execution while the District Court considered his claims. The District Court denied the request, as did the Fifth Circuit. This Court then stayed Ramirez's execution, granted certiorari, and heard argument on an expedited basis.

"Held: Ramirez is likely to succeed on his RLUIPA claims because Texas's restrictions on religious touch and audible prayer in the execution chamber burden religious exercise and are not the least restrictive means of furthering the State's compelling interests."

"(a) The question before the Court is whether Ramirez's execution without the requested participation of his pastor should be halted pending full consideration of his claims on a complete record. To obtain the relief Ramirez seeks—relief that the parties agree is properly characterized as a preliminary injunction—Ramirez 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.' *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20. The Court rejects the prison officials' threshold contention that Ramirez cannot succeed on his claims because he failed to exhaust all available remedies before filing suit as mandated by the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a). In the context of Texas's grievance system, the Court finds Ramirez properly exhausted administrative remedies. Ramirez tried (unsuccessfully) to resolve the issue informally with a prison chaplain. He then filed a Step 1 grievance requesting that his pastor be allowed to '"lay hands on me" & pray over me while I am being executed.' Prison officials denied that grievance, and Ramirez timely appealed. His Step 2 grievance reiterated the same requests. Ramirez's grievances thus 'clearly stated' that he wished to have his pastor touch him and pray with him during his execution.

"Respondents' various arguments to the contrary lack merit. Respondents maintain that Ramirez failed to exhaust Texas's grievance process because he filed suit six days before prison officials ruled on his Step 2 grievance, but any defect was arguably cured by Ramirez's filing of an amended complaint the same day the State denied his Step 2 grievance, and the Court need not definitively resolve the issue as respondents failed to raise it below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718,

n. 7. While respondents correctly note that Ramirez's grievance did not explicitly request 'audible' prayer in the execution chamber, the most natural understanding of Ramirez's request to permit his pastor to 'pray over' him during the execution is one that conveys a request for 'audible' prayer. Finally, the Court rejects respondents' argument that Ramirez should have filed his grievance earlier. Ramirez filed the grievance that sparked this litigation just three days after he learned of the prohibition on religious touch, and the Court finds his grievance timely."

"(b) Turning to the merits of Ramirez's RLUIPA claims, RLUIPA provides that '[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution' unless the government demonstrates that the burden imposed on that person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc–1(a). A plaintiff bears the initial burden of proving that a prison policy 'implicates his religious exercise.' *Holt* v. *Hobbs*, 574 U.S. 352, 360. A prisoner's requested religious accommodation 'must be sincerely based on a religious belief and not some other motivation.' *Id*., at 360–361. The burden on the prisoner's religious exercise must also be 'substantial[ ].' *Id*., at 361."

"(1) Ramirez is likely to succeed in proving that his religious requests are 'sincerely based on a religious belief.' *Id.*, at 360–361. Both the laying on of hands and prayer are traditional forms of religious exercise, and Ramirez's pastor confirmed that prayer accompanied by touch is a significant part of their shared faith tradition. Neither the District Court nor the Court of Appeals doubted that Ramirez had a sincere religious basis for his requests. Texas's argument to the contrary—which stems from a complaint Ramirez filed in 2020 in which he sought his pastor's presence and prayer in the chamber, but disclaimed any need for touch—does not outweigh ample evidence of the sincerity of Ramirez's beliefs. Respondents do not dispute that any burden their policy imposes on Ramirez's religious exercise is substantial."

"(2) Given the current record, the State has not shown that it is likely to carry the burden of demonstrating that its refusal to accommodate Ramirez's religious exercise is the least restrictive means of furthering the government's compelling interests."

"(i) Despite a historical tradition of clerical prayer at the time of a prisoner's execution that stretches back well before the founding and continues today, prison officials insist that a categorical ban on audible prayer is the least restrictive means of furthering two compelling governmental interests. First, they assert that absolute silence is necessary to monitor the inmate's condition during the delicate process of lethal injection without the potential interference of audible prayer. Respondents fail to show that a categorical ban on audible prayer is the least restrictive means of furthering this compelling interest, and they do not explain why other jurisdictions can accommodate audible prayer but Texas cannot feasibly do so. Texas asks the Court to defer to its execution chamber policy determinations, but RLUIPA requires more when a policy imposes a substantial burden on sincere religious exercise. Further, no basis for deference exists given the State's history of allowing prison chaplains to audibly pray with the condemned during executions.

"Second, prison officials say that if they allow spiritual advisors to pray aloud during executions, the opportunity 'could be exploited to make a statement to the witnesses or officials, rather than the inmate.' Texas has a compelling interest in preventing disruptions of any sort and maintaining solemnity and decorum in the execution chamber. But the record here provides no indication that Ramirez's pastor would cause the sorts of disruptions that respondents fear. Conjecture alone fails to satisfy the sort of case-by-case analysis that RLUIPA requires. See *Holt*, 574 U.S., at 363. Further, prison officials have less restrictive ways to handle any concerns."

"(ii) Ramirez is also likely to prevail on his claim that Texas's categorical ban on religious touch in the execution chamber is inconsistent with his rights under RLUIPA. Respondents point to three compelling governmental interests it says the ban on touch furthers: security in the execution chamber, preventing unnecessary suffering of the prisoner, and avoiding further emotional trauma to the victim's family members. But respondents fail to show that a categorical ban on touch is the least restrictive means of accomplishing any of these commendable goals. Indeed, Texas does nothing to rebut obvious alternatives, and its suggestion that Ramirez must identify other less restrictive means that would accomplish the government's interests gets RLUIPA's burden shifting backward. Texas may eventually face more problematic requests than those made by Ramirez here, but RLUIPA requires that courts consider only 'the particular claimant whose sincere exercise of religion is being substantially burdened.' *Holt*, 574 U.S., at 363."

"(c) Having found that Ramirez is likely to prevail on the merits of his RLUIPA claims, the Court concludes other factors justify preliminary relief. See *Winter*, 555 U.S., at 20. Ramirez is likely to suffer irreparable harm absent injunctive relief because he will be unable to engage in protected religious exercise in the final moments of his life. This is a spiritual harm that compensation paid to his estate would not remedy. Additionally, the balance of equities and public interest tilt in Ramirez's favor. RLUIPA recognizes that prisoners like Ramirez have a strong interest in avoiding substantial burdens on their religious exercise. At the same time, '[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence.'*Hill* v. *McDonough*, 547 U.S. 573, 584. Because it is possible to accommodate Ramirez's sincere religious beliefs without delaying or impeding his execution, the Court concludes the balance of equities and the public interest favor his tailored request for injunctive relief. The record does not support respondents' assertion that Ramirez has engaged in litigation misconduct that should preclude equitable relief here."

"(d) Timely resolution of RLUIPA claims in the prisoner context could be facilitated if States were to adopt policies anticipating likely issues and streamlined procedures for resolving requests. It should be the rare RLUIPA capital case that requires last-minute resort to the federal courts. The proper remedy in such a case is an injunction ordering the accommodation, not a stay of the execution. This approach balances the State's interest in carrying out capital sentences without delay and the prisoner's interest in religious exercise. Texas must decide on remand here where its interest lies, as further proceedings defending its policies may delay carrying out Ramirez's sentence. If Texas reschedules Ramirez's execution and declines to permit audible prayer or religious touch, the District Court should enter appropriate preliminary relief."

3. Maine's "Nonsectarian' Tuition Assistance Program Unconstitutional

Carson v. Makin, 142 S.Ct. 1987 (U.S., Roberts, 2022).

"Maine has enacted a program of tuition assistance for parents who live in school districts that neither operate a secondary school of their own nor contract with a particular school in another district. Under that program, parents designate the secondary school they would like their child to attend, and the school district transmits payments to that school to help defray the costs of tuition. Participating private schools must meet certain requirements to be eligible to receive tuition payments, including either accreditation from the New England Association of Schools and Colleges (NEASC) or approval from the Maine Department of Education. But they may otherwise differ from Maine public schools in various ways. Since 1981, however, Maine has limited tuition assistance payments to 'nonsectarian' schools.

"Petitioners sought tuition assistance to send their children to Bangor Christian Schools (BCS) and Temple Academy. Although both BCS and Temple Academy are accredited by NEASC, the schools do not qualify as 'nonsectarian' and are thus ineligible to receive tuition payments under Maine's tuition assistance program. Petitioners sued the commissioner of the Maine Department of Education, alleging that the 'nonsectarian' requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The District Court rejected petitioners' constitutional claims and granted judgment to the commissioner. The First Circuit affirmed.

"Held: Maine's 'nonsectarian' requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause."

"(a) The Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.' *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450. The Court recently applied this principle in the context of two state efforts to withhold otherwise available public benefits from religious organizations. In *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. — , the Court considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces, but denied such grants to any applicant that was owned or controlled by a church, sect, or other religious entity. The Court held that the Free Exercise Clause did not permit Missouri to 'expressly discriminate[ ] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.' 582 U.S., at — . And in *Espinoza* v. *Montana Department of Revenue*, 591 U.S. — , the Court held that a provision of the Montana Constitution barring government aid to any school 'controlled in whole or in part by any church, sect, or denomination' violated the Free Exercise Clause by prohibiting families from using otherwise available scholarship funds at religious schools. 591 U.S., at — . 'A State need not subsidize private education,' the Court concluded, '[b]ut once a State decides to do so, it cannot disqualify some private schools solely because they are religious.' *Id.,* at —"

"(b) The principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case. Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, the religious schools in this case are disqualified from this generally available benefit 'solely because of their religious character.' 582 U.S., at — . Likewise, in *Espinoza*, as here, the Court considered a state benefit program that provided public funds to support tuition payments at private schools and specifically carved out private religious schools from those eligible to receive such funds. Both that program and this one disqualify certain private schools from public funding 'solely because they are religious.' 591 U.S., at — . A law that operates in that manner must be subjected to 'the strictest scrutiny.' *Id.*, at — .

"Maine's program cannot survive strict scrutiny. A neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652–653. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires. But a State's antiestablishment interest does not justify enactments that exclude some members of

the community from an otherwise generally available public benefit because of their religious exercise."

"(c) The First Circuit's attempts to recharacterize the nature of Maine's tuition assistance program do not suffice to distinguish this case from *Trinity Lutheran* or *Espinoza*."

"(1) The First Circuit held that the 'nonsectarian' requirement was constitutional because the benefit was properly viewed not as tuition payments to be used at approved private schools but instead as funding for the 'rough equivalent of the public school education that Maine may permissibly require to be secular.' 979 F.3d 21, 44. But the statute does not say anything like that. The benefit provided by statute is tuition at a public or private school, selected by the parent, with no suggestion that the 'private school' must somehow provide a 'public' education. Moreover, the differences between private schools eligible to receive tuition assistance under Maine's program and a Maine public school are numerous and important. To start with, private schools do not have to accept all students, while public schools generally do. In addition, the free public education that Maine insists it is providing through the tuition assistance program is often not free, as some participating private schools charge several times the maximum benefit that Maine is willing to provide. And the curriculum taught at participating private schools need not even resemble that taught in the Maine public schools.

"The key manner in which participating private schools *are* required to resemble Maine public schools, however, is that they must be secular. Maine may provide a strictly secular education in its public schools. But BCS and Temple Academy—like numerous other recipients of Maine tuition assistance payments—are not public schools. Maine has chosen to offer tuition assistance that parents may direct to the public or private schools of *their* choice. Maine's administration of that benefit is subject to the free exercise principles governing any public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise."

"(2) The Court of Appeals also attempted to distinguish this case from *Trinity Lutheran* and *Espinoza* on the ground that the funding restrictions in those cases were 'solely status-based religious discrimination,' while the challenged provision here 'imposes a use-based restriction.' 979 F.3d, at 35, 37–38. *Trinity Lutheran* and *Espinoza* held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why. '[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.' *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 591 U.S. — , — . In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

"*Locke* v. *Davey*, 540 U.S. 712, does not assist Maine here. The scholarship funds at issue in *Locke* were intended to be used 'to prepare for the ministry.' *Trinity Lutheran*, 582 U.S., at —. *Locke*'s reasoning expressly turned on what it identified as the 'historic and substantial state interest' against using 'taxpayer funds to support church leaders.' 540 U.S., at 722, 725. But 'it is clear that there is no 'historic and substantial' tradition against aiding [private religious] schools' that is 'comparable.' *Espinoza*, 591 U.S., at — . *Locke* cannot be read to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."

IV. Second Amendment; New York Concealed Carry Law Struck Down

New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S.Ct. 2111 (U.S., Thomas, 2022).

"The State of New York makes it a crime to possess a firearm without a license, whether inside or outside the home. An individual who wants to carry a firearm outside his home may obtain an unrestricted license to 'have and carry' a concealed 'pistol or revolver' if he can prove that 'proper cause exists' for doing so. N. Y. Penal Law Ann. § 400.00(2)(f). An applicant satisfies the 'proper cause' requirement only if he can 'demonstrate a special need for self-protection distinguishable from that of the general community.' *E.g.*, *In re Klenosky*, 75 App. Div. 2d 793, 428 N.Y.S.2d 256, 257.

"Petitioners Brandon Koch and Robert Nash are adult, law-abiding New York residents who both applied for unrestricted licenses to carry a handgun in public based on their generalized interest in self-defense. The State denied both of their applications for unrestricted licenses, allegedly because Koch and Nash failed to satisfy the 'proper cause' requirement. Petitioners then sued respondents—state officials who oversee the processing of licensing applications—for declaratory and injunctive relief, alleging that respondents violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications for failure to demonstrate a unique need for self-defense. The District Court dismissed petitioners' complaint and the Court of Appeals affirmed. Both courts relied on the Second Circuit's prior decision in *Kachalsky* v. *County of Westchester*, 701 F.3d 81, which had sustained New York's proper-cause standard, holding that the requirement was 'substantially related to the achievement of an important governmental interest.' *Id*., at 96.

"Held: New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense."

"(a) In *District of Columbia* v. *Heller*, 554 U.S. 570, and *McDonald* v. *Chicago*, 561 U.S. 742, the Court held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. Under *Heller*, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, and to justify a firearm regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation."

"(1) Since *Heller* and *McDonald*, the Courts of Appeals have developed a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. The Court rejects that two-part approach as having one step too many. Step one is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history. But *Heller* and *McDonald* do not support a second step that applies means-end scrutiny in the Second Amendment context. *Heller*'s methodology centered on constitutional text and history. It did not invoke any means-end test such as strict or intermediate scrutiny, and it expressly rejected any interest-balancing inquiry akin to intermediate scrutiny."

"(2) Historical analysis can sometimes be difficult and nuanced, but reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,'

especially given their 'lack [of] expertise' in the field. *McDonald*, 561 U.S., at 790–791 (plurality opinion). Federal courts tasked with making difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures. While judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment 'is the very product of an interest balancing by the people,' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense. *Heller*, 554 U.S., at 635."

"(3) The test that the Court set forth in *Heller* and applies today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. Of course, the regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868. But the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated, even though its meaning is fixed according to the understandings of those who ratified it. See, *e.g.*, *United States* v. *Jones*, 565 U.S. 400, 404–405. Indeed, the Court recognized in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.' 554 U.S., at 582.

"To determine whether a firearm regulation is consistent with the Second Amendment, *Heller* and *McDonald* point toward at least two relevant metrics: first, whether modern and historical regulations impose a comparable burden on the right of armed self-defense, and second, whether that regulatory burden is comparably justified. Because 'individual self-defense is 'the *central component*' of the Second Amendment right,' these two metrics are '*central*' considerations when engaging in an analogical inquiry. *McDonald*, 561 U.S., at 767 (quoting *Heller*, 554 U.S., at 599).

"To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to 'longstanding' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings' to determine whether modern regulations are constitutionally permissible. *Id.,* at 626. That said, respondents' attempt to characterize New York's proper-cause requirement as a 'sensitive-place' law lacks merit because there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."

"(b) Having made the constitutional standard endorsed in *Heller* more explicit, the Court applies that standard to New York's proper-cause requirement."

"(1) It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of 'the people' whom the Second Amendment protects. See *Heller*, 554 U.S., at 580. And no party disputes that handguns are weapons 'in common use' today for self-defense. See *id*., at 627. The Court has little difficulty concluding also that the plain text of the Second Amendment protects Koch's and Nash's proposed course of conduct—carrying handguns publicly for self-defense. Nothing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of 'bear' naturally encompasses public carry. Moreover, the Second Amendment guarantees an 'individual right to possess and carry weapons in case of confrontation,' *id*., at 592, and confrontation can surely take place outside the home."

"(2) The burden then falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. To do so, respondents appeal to a variety of historical sources from the late 1200s to the early 1900s. But when it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.' *Heller*, 554 U.S., at 634–635. The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either time may not illuminate the scope of the right. With these principles in mind, the Court concludes that respondents have failed to meet their burden to identify an American tradition justifying New York's proper-cause requirement."

"(i) Respondents' substantial reliance on English history and custom before the founding makes some sense given *Heller*'s statement that the Second Amendment 'codified a right "inherited from our English ancestors."' 554 U.S., at 599. But the Court finds that history ambiguous at best and sees little reason to think that the Framers would have thought it applicable in the New World. The Court cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection."

"(ii) Respondents next direct the Court to the history of the Colonies and early Republic, but they identify only three restrictions on public carry from that time. While the Court doubts that just three colonial regulations could suffice to show a tradition of public-carry regulation, even looking at these laws on their own terms, the Court is not convinced that they regulated public carry akin to the New York law at issue. The statutes essentially prohibited bearing arms in a way that spread 'fear' or 'terror' among the people, including by carrying of 'dangerous and unusual weapons.' See 554 U.S., at 627. Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are today 'the quintessential self-defense weapon.' *Id*., at 629. Thus, these colonial laws provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today."

"(iii) Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory prohibitions, and 'surety' statutes. None of these restrictions imposed a substantial burden on public carry analogous to that imposed by New York's restrictive licensing regime.

"Common-Law Offenses. As during the colonial and founding periods, the common-law offenses of 'affray' or going armed 'to the terror of the people' continued to impose some limits on firearm carry in the antebellum period. But there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry.

"Statutory Prohibitions. In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. But the antebellum state-court decisions upholding them evince a consensus view that States could not altogether prohibit the public carry of arms protected by the Second Amendment or state analogues.

"Surety Statutes. In the mid-19th century, many jurisdictions began adopting laws that required certain individuals to post bond before carrying weapons in public. Contrary to respondents' position, these surety statutes in no way represented direct precursors to New York's proper-cause requirement. While New York presumes that individuals have no public carry right without a

showing of heightened need, the surety statutes presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of 'reasonable cause to fear an injury, or breach of the peace.' Mass. Rev. Stat., ch. 134, § 16 (1836). Thus, unlike New York's regime, a showing of special need was required only *after* an individual was reasonably accused of intending to injure another or breach the peace. And, even then, proving special need simply avoided a fee.

"In sum, the historical evidence from antebellum America does demonstrate that the manner of public carry was subject to reasonable regulation, but none of these limitations on the right to bear arms operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose."

"(iv) Evidence from around the adoption of the Fourteenth Amendment also does not support respondents' position. The 'discussion of the [right to keep and bear arms] in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves,' *Heller*, 554 U.S., at 614, generally demonstrates that during Reconstruction the right to keep and bear arms had limits that were consistent with a right of the public to peaceably carry handguns for self-defense. The Court acknowledges two Texas cases—*English* v. *State*, 35 Tex. 473 and *State* v. *Duke*, 42 Tex. 455—that approved a statutory 'reasonable grounds' standard for public carry analogous to New York's proper-cause requirement. But these decisions were outliers and therefore provide little insight into how postbellum courts viewed the right to carry protected arms in public. See *Heller*, 554 U.S., at 632."

"(v) Finally, respondents point to the slight uptick in gun regulation during the late-19th century. As the Court suggested in *Heller*, however, late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence. In addition, the vast majority of the statutes that respondents invoke come from the Western Territories. The bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry. See *Heller*, 554 U.S., at 614. Moreover, these territorial laws were rarely subject to judicial scrutiny, and absent any evidence explaining why these unprecedented prohibitions on all public carry were understood to comport with the Second Amendment, they do little to inform 'the origins and continuing significance of the Amendment.' *Ibid.*; see also The Federalist No. 37, p. 229. Finally, these territorial restrictions deserve little weight because they were, consistent with the transitory nature of territorial government, short lived. Some were held unconstitutional shortly after passage, and others did not survive a Territory's admission to the Union as a State."

"(vi) After reviewing the Anglo-American history of public carry, the Court concludes that respondents have not met their burden to identify an American tradition justifying New York's proper-cause requirement. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor have they generally required law-abiding, responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' to carry arms in public. *Klenosky*, 75 App. Div. 2d, at 793, 428 N. Y. S. 2d, at 257."

"(c) The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' *McDonald*, 561 U.S., at 780 (plurality opinion). The exercise of other constitutional rights does not require individuals to demonstrate to government officers some special need. The Second Amendment

right to carry arms in public for self-defense is no different. New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms in public."

V. No Cause of Action Under *Bivens* for Excessive Force or Retaliation Claims

Egbert v. Boule, 142 S.Ct. 1793 (U.S., Thomas, 2022).

"Respondent Robert Boule owns a bed-and-breakfast—the Smuggler's Inn—in Blaine, Washington. The inn abuts the international border between Canada and the United States. Boule at times helped federal agents identify and apprehend persons engaged in unlawful cross-border activity on or near his property. But Boule also would provide transportation and lodging to illegal border crossers. Often, Boule would agree to help illegal border crossers enter or exit the United States, only to later call federal agents to report the unlawful activity.

"In 2014, Boule informed petitioner Erik Egbert, a U.S. Border Patrol agent, that a Turkish national, arriving in Seattle by way of New York, had scheduled transportation to Smuggler's Inn. When Agent Egbert observed one of Boule's vehicles returning to the inn, he suspected that the Turkish national was a passenger and followed the vehicle to the inn. On Boule's account, Boule asked Egbert to leave, but Egbert refused, became violent, and threw Boule first against the vehicle and then to the ground. Egbert then checked the immigration paperwork for Boule's guest and left after finding everything in order. The Turkish guest unlawfully entered Canada later that evening.

"Boule filed a grievance with Agent Egbert's supervisors and an administrative claim with Border Patrol pursuant to the Federal Tort Claims Act (FTCA). Egbert allegedly retaliated against Boule by reporting Boule's 'SMUGLER' license plate to the Washington Department of Licensing for referencing illegal activity, and by contacting the Internal Revenue Service and prompting an audit of Boule's tax returns. Boule's FTCA claim was ultimately denied, and Border Patrol took no action against Egbert for his use of force or alleged acts of retaliation. Boule then sued Egbert in Federal District Court, alleging a Fourth Amendment violation for excessive use of force and a First Amendment violation for unlawful retaliation. Invoking *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, Boule asked the District Court to recognize a damages action for each alleged constitutional violation. The District Court declined to extend *Bivens* as requested, but the Court of Appeals reversed.

"Held: *Bivens* does not extend to create causes of action for Boule's Fourth Amendment excessive-force claim and First Amendment retaliation claim."

"(a) In *Bivens*, the Court held that it had authority to create a damages action against federal agents for violating the plaintiff's Fourth Amendment rights. Over the next decade, the Court also fashioned new causes of action under the Fifth Amendment, see *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846, and the Eighth Amendment, see *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15. Since then, however, the Court has come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power,' *Hernández v. Mesa*, 589 U.S. ——, ——, 140 S.Ct. 735, 741, 206 L.Ed.2d 29, and has declined 11 times to imply a similar cause of action for other alleged constitutional violations, see, *e.g., Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586; *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648. Rather than dispense with *Bivens*, the Court

now emphasizes that recognizing a *Bivens* cause of action is 'a disfavored judicial activity.' *Ziglar v. Abbasi*, 582 U.S. ——, ——, 137 S.Ct. 1843, 198 L.Ed.2d 290.

"The analysis of a proposed *Bivens* claim proceeds in two steps: A court asks first whether the case presents 'a new *Bivens* context'—*i.e.,* is it 'meaningfully different from the three cases in which the Court has implied a damages action,' *Ziglar*, 582 U.S., at ——, 137 S.Ct., at 1855, and, second, even if so, do 'special factors' indicate that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.' *Id.,* at ——, 137 S.Ct., at 1857–1858. This two-step inquiry often resolves to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy. Further, under the Court's precedents, a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.' *Ziglar*, 582 U.S., at ——, 137 S.Ct., at 1858."

"(b) The Court of Appeals conceded that Boule's Fourth Amendment claim presented a new *Bivens* context, but its conclusion that there was no reason to hesitate before recognizing a cause of action against Agent Egbert was incorrect for two independent reasons."

"(1) First, the 'risk of undermining border security provides reason to hesitate before extending *Bivens* into this field.' *Hernández*, 589 U.S., at ——, 140 S.Ct., at 747. In *Hernández*, the Court declined to create a damages remedy for an excessive-force claim against a Border Patrol agent because 'regulating the conduct of agents at the border unquestionably has national security implications.' *Id.*, at ——, 140 S.Ct., at 747. That reasoning applies with full force here. The Court of Appeals disagreed because it viewed Boule's Fourth Amendment claim as akin to a 'conventional' excessive-force claim, as in *Bivens*, and less like the cross-border shooting in *Hernández*. But that does not bear on the relevant point: Permitting suit against a Border Patrol agent presents national security concerns that foreclose *Bivens* relief. Further, the Court of Appeals' analysis betrays the pitfalls of applying the special-factors analysis at too granular a level. A court should not inquire whether *Bivens* relief is appropriate in light of the balance of circumstances in the 'particular case.' *United States v. Stanley*, 483 U.S. 669, 683, 107 S.Ct. 3054, 97 L.Ed.2d 550. Rather, it should ask '[m]ore broadly' whether there is any reason to think that 'judicial intrusion' into a given field might be 'harmful' or 'inappropriate,' *id.,* at 681, 107 S.Ct. 3054. The proper inquiry here is whether a court is competent to authorize a damages action not just against Agent Egbert, but against Border Patrol agents generally. The answer is no."

"(2) Second, Congress has provided alternative remedies for aggrieved parties in Boule's position that independently foreclose a *Bivens* action here. By regulation, Border Patrol must investigate '[a]lleged violations' and accept grievances from '[a]ny persons.' 8 C.F.R. §§ 287.10(a)–(b). Boule claims that this regulatory grievance procedure was inadequate, but this Court has never held that a *Bivens* alternative must afford rights such as judicial review of an adverse determination. *Bivens* 'is concerned solely with deterring the unconstitutional acts of individual officers.' *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 71, 122 S.Ct. 515, 151 L.Ed.2d 456. And, regardless, the question whether a given remedy is adequate is a legislative determination. As in *Hernández*, this Court has no warrant to doubt that the consideration of Boule's grievance secured adequate deterrence and afforded Boule an alternative remedy. See 589 U.S., at ——."

"(c) There is no *Bivens* cause of action for Boule's First Amendment retaliation claim. That claim presents a new *Bivens* context, and there are many reasons to think that Congress is better suited to authorize a damages remedy. Extending *Bivens* to alleged First Amendment violations would

pose an acute 'risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.' *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523. In light of these costs, 'Congress is in a better position to decide whether or not the public interest would be served' by imposing a damages action. *Bush*, 462 U.S. at 389, 103 S.Ct. 2404. The Court of Appeals' reasons for extending *Bivens* in this context—that retaliation claims are 'well-established' and that Boule alleges that Agent Egbert 'was not carrying out official duties' when the retaliation occurred—lack merit. Also lacking merit is Boule's claim that this Court identified a *Bivens* cause of action under allegedly similar circumstances in *Passman*. Even assuming factual parallels, *Passman* carries little weight because it predates the Court's current approach to implied causes of action. A plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens, Passman,* or *Carlson*—the three cases in which the Court has implied a damages action—unless the plaintiff also satisfies the prevailing 'analytic framework' prescribed by the last four decades of intervening case law. *Ziglar*, 582 U.S., at ——."

VI. Fifth Amendment Double Jeopardy Clause Not Violated by Successive Prosecutions Arising from Single Act

Denezpi v. United States, 142 S.Ct. 1838 (U.S., Barrett, 2022).

"An officer with the federal Bureau of Indian Affairs filed a criminal complaint against Merle Denezpi, a member of the Navajo Nation, charging Denezpi with three crimes alleged to have occurred at a house located within the Ute Mountain Ute Reservation: assault and battery, in violation of 6 Ute Mountain Ute Code § 2; terroristic threats, in violation of 25 C.F.R. § 11.402; and false imprisonment, in violation of 25 C.F.R. § 11.404. The complaint was filed in a C.F.R. court, a court which administers justice for Indian tribes in certain parts of Indian country 'where tribal courts have not been established.' § 11.102. Denezpi pleaded guilty to the assault and battery charge and was sentenced to time served—140 days' imprisonment. Six months later, a federal grand jury in the District of Colorado indicted Denezpi on one count of aggravated sexual abuse in Indian country, an offense covered by the federal Major Crimes Act. Denezpi moved to dismiss the indictment, arguing that the Double Jeopardy Clause barred the consecutive prosecution. The District Court denied Denezpi's motion. Denezpi was convicted and sentenced to 360 months' imprisonment. The Tenth Circuit affirmed.

"Held: The Double Jeopardy Clause does not bar successive prosecutions of distinct offenses arising from a single act, even if a single sovereign prosecutes them."

"(a) The Double Jeopardy Clause of the Fifth Amendment provides: 'No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.' By its terms, the Clause does not prohibit twice placing a person in jeopardy 'for the same *conduct* or *actions*,' *Gamble* v. *United States*, 587 U.S. —, —, but focuses on whether successive prosecutions are for the same 'offence.' In 1791, 'offence' meant the violation of a law. See *ibid.* Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign. See *id*., at —. The two offenses can therefore be separately prosecuted without offending the Double Jeopardy Clause—even if they have identical elements and could not be separately prosecuted if enacted by a single sovereign. See *id.*, at —, n. 1, —. This dual-sovereignty principle applies where 'two entities derive their power to punish from wholly independent sources.' *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 68, 136 S.Ct. 1863, 195 L.Ed.2d 179.

"Denezpi's single act transgressed two laws: the Ute Mountain Ute Code's assault and battery ordinance and the United States Code's proscription of aggravated sexual abuse in Indian country. The Ute Mountain Ute Tribe exercised its 'unique' sovereign authority in adopting the tribal ordinance. See *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303. Likewise, Congress exercised the United States' sovereign power in enacting the federal criminal statute. See *United States v. Lanza*, 260 U.S. 377, 382, 43 S.Ct. 141, 67 L.Ed. 314. The two laws—defined by separate sovereigns—proscribe separate offenses, so Denezpi's second prosecution did not place him in jeopardy again 'for the same offence.'"

" (b) Denezpi argues that the dual-sovereignty doctrine applies only when offenses are enacted *and* enforced by separate sovereigns. He insists that his second prosecution violated double jeopardy, then, because prosecutors in C.F.R. courts exercise federal authority, which means that he was prosecuted twice by the United States. The Court need not decide whether prosecutors in C.F.R. courts exercise tribal or federal authority because the Double Jeopardy Clause does not prohibit successive prosecutions by the same sovereign; rather, it prohibits successive prosecutions 'for the same offence.' Thus, even if Denezpi is right that the Federal Government prosecuted his tribal offense, the Clause did not bar the Federal Government from prosecuting him under the Major Crimes Act too. The Double Jeopardy Clause does not ask who puts a person in jeopardy. It zeroes in on what the person is put in jeopardy for: the 'offence.' The Court has seen no evidence that 'offence' was originally understood to encompass both the violation of the law and the identity of the prosecutor.

"Denezpi stitches together loose language from the Court's precedent to support his position that the identity of the prosecuting sovereign matters under the dual-sovereignty doctrine. No precedent cited by Denezpi involves or even mentions the unusual situation of a single sovereign successively prosecuting its own law and that of a different sovereign. In any event, imprecise statements cannot overcome the holdings of the Court's cases, not to mention the text of the Clause. Those authorities make clear that enactment is what counts in determining whether the dual-sovereignty doctrine applies. Denezpi's reliance on *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684, is misplaced. At most, *Bartkus* acknowledged that successive federal prosecutions for the same conduct would raise a double jeopardy question, but *Bartkus* did not begin to analyze, much less answer, that question.

"Denezpi's remaining arguments are unavailing. Denezpi first points to the Government's exclusion of Major Crimes Act felonies from the federal regulatory offenses enforceable in C.F.R. court in order to avoid double jeopardy concerns. He asserts that this 'limitation borders on a concession that the Double Jeopardy Clause bars [his] second prosecution.'. . . Not so. Federal regulatory crimes are defined by the Federal Government, so successive prosecutions for a federal regulatory crime and a federal statutory crime present a different double jeopardy question from the one here.

"Next, Denezpi argues that permitting successive prosecutions like his 'does not further the purposes underlying the dual-sovereignty doctrine,' namely, advancing sovereigns' independent interests. *Id.*, at 28–29. Purposes aside, the doctrine 'follows from' the Clause's text, which controls. *Gamble*, 587 U.S., at —. In any event, the Tribe's sovereign interest *is* furthered when its assault and battery ordinance—duly enacted by its governing body as an expression of the Tribe's condemnation of that crime—is enforced, regardless of who enforces it.

"Finally, Denezpi asserts that the Court's conclusion might lead sovereigns to assume more broadly the authority to enforce other sovereigns' criminal laws in order to get two bites at the apple. If a

constitutional barrier to such cross-enforcement exists, it does not derive from the Double Jeopardy Clause."

VII. No Constitutional Requirement for SSI Benefits to Extend to Puerto Rican Residents

United States v. Vaello Madero, 142 S.Ct. 1539 (U.S., Kavanaugh, 2022).

"The Territory Clause of the United States Constitution—which states that Congress may 'make all needful Rules and Regulations respecting the Territory ... belonging to the United States,' Art. IV, § 3, cl. 2—affords Congress broad authority to legislate with respect to the U.S. Territories. In exercising that authority, Congress has long maintained different federal tax and benefits programs for residents of the Territories than for residents of the 50 States. For example, residents of Puerto Rico are typically exempt from most federal income, gift, estate, and excise taxes. See 48 U.S.C. § 734; see, *e.g.,* 26 U.S.C. §§ 933, 2209, 4081–4084. But just as not every federal tax extends to residents of Puerto Rico, so too not every federal benefits program extends to residents of Puerto Rico. One such benefits program is Supplemental Security Income (SSI), which by statute applies only to residents of the 50 States and the District of Columbia. 42 U.S.C. § 1382c(a)(1)(B)(i). The question presented is whether the equal-protection component of the Fifth Amendment's Due Process Clause requires Congress to make Supplemental Security Income benefits available to residents of Puerto Rico to the same extent that Congress makes those benefits available to residents of the States.

"Here, respondent Jose Luis Vaello Madero received SSI benefits while he was a resident of New York. He then moved to Puerto Rico, where he was no longer eligible to receive those benefits. Unaware of Vaello Madero's new residence, the Government continued to pay him SSI benefits. The Government eventually sued Vaello Madero to recover those errant payments, which totaled more than $28,000. In response, Vaello Madero invoked the Constitution, arguing that Congress's exclusion of residents of Puerto Rico from the SSI program violated the equal-protection component of the Fifth Amendment's Due Process Clause. The District Court and the Court of Appeals agreed.

"Held: The Constitution does not require Congress to extend SSI benefits to residents of Puerto Rico. In *Califano v. Torres*, 435 U.S. 1, 98 S.Ct. 906, 55 L.Ed.2d 65, and *Harris v. Rosario*, 446 U.S. 651, 100 S.Ct. 1929, 64 L.Ed.2d 587, the Court applied the deferential rational-basis test to uphold Congress's decision not to extend certain federal benefits to Puerto Rico, noting that because Congress chose to treat residents of Puerto Rico differently from residents of the States for purposes of tax laws, it could do the same for benefits programs. Those two precedents dictate the result here. Congress's decision to exempt Puerto Rico's residents from most federal income, gift, estate, and excise taxes supplies a rational basis for likewise distinguishing residents of Puerto Rico from residents of the States for purposes of the SSI benefits program. Vaello Madero's contrary position would usher in potentially far-reaching consequences, with serious implications for the Puerto Rican people and the Puerto Rican economy. The Constitution does not require that extreme outcome."

VIII. Voting Rights Act

Wisconsin Legislature v. Wisconsin Elections Commission, 142 S.Ct. 1245 (U.S., Per Curiam, 2022).

"Individual voters petitioned to Wisconsin Supreme Court for leave to commence original action for declaration that existing maps for state legislative districts were unconstitutional and for mandatory injunction as remedy. The Wisconsin Supreme Court granted the petition and permitted the legislature, the Governor, and several other parties to intervene. The Wisconsin Supreme Court, Rebecca Grassl Bradley, J., 399 Wis.2d 623, 967 N.W.2d 469, set out the basic process and criteria that it would use to guide its decision, and later invited parties to submit proposed maps. The Wisconsin Supreme Court, Brian Hagedorn, J., 2022 WL 621082, accepted Governor's proposed maps. Certiorari was granted on request by legislature and voters for emergency stay or certiorari review."

"The Supreme Court held that:

[1] assuming that Governor was the mapmaker who was required to satisfy narrow tailoring element of strict scrutiny for equal protection violation, Governor failed to show strong basis in evidence for concluding that Voting Rights Act (VRA) required the addition of seventh majority-Black district for General Assembly;
[2] assuming that Wisconsin Supreme Court was the mapmaker that was required to show narrow tailoring, it did not show strong basis in evidence for concluding that VRA required the addition of seventh majority-Black district; and
[3] Wisconsin Supreme Court improperly reduced, to single factor, the three [*Thornburg* v.] *Gingles*[, 478 U.S. 30, 46-51 (1986)] preconditions for a VRA vote-dilution claim.

"Reversed and remanded."

IX. Indian Law

A. Indian Country; States Have Concurrent Jurisdiction Over Crimes by Non-Indians Against Indians

Oklahoma v. Castro-Huerta, 142 S.Ct. 2486 (U.S., Kavanaugh, 2022).

"In 2015, respondent Victor Manuel Castro-Huerta was charged by the State of Oklahoma for child neglect. Castro-Huerta was convicted in state court and sentenced to 35 years of imprisonment. While Castro-Huerta's state-court appeal was pending, this Court decided *McGirt* v. *Oklahoma*, 591 U.S. — . There, the Court held that the Creek Nation's reservation in eastern Oklahoma had never been properly disestablished and therefore remained 'Indian country.' *Id.,* at —. In light of *McGirt*, the eastern part of Oklahoma, including Tulsa, is recognized as Indian country. Following this development, Castro-Huerta argued that the Federal Government had exclusive jurisdiction to prosecute him (a non-Indian) for a crime committed against his stepdaughter (a Cherokee Indian) in Tulsa (Indian country), and that the State therefore lacked jurisdiction to prosecute him. The Oklahoma Court of Criminal Appeals agreed and vacated his conviction. This Court granted certiorari to determine the extent of a State's jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

"Held: The Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."

"(a) The jurisdictional dispute in this case arises because Oklahoma's territory includes Indian country. In the early Republic, the Federal Government sometimes treated Indian country as separate from state territory. See *Worcester* v. *Georgia,* 6 Pet. 515. But that view has long since been abandoned. *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 72. And the Court has specifically held that States have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. *United States* v. *McBratney,* 104 U.S. 621; see also *Draper* v. *United States,* 164 U.S. 240, 244–247. Accordingly, States have jurisdiction to prosecute crimes committed in Indian country unless preempted."

"(b) Under Court precedent, a State's jurisdiction in Indian country may be preempted by federal law under ordinary principles of federal preemption, or when the exercise of state jurisdiction would unlawfully infringe on tribal self-government. Neither serves to preempt state jurisdiction in this case."

"(1) Castro-Huerta points to two federal laws—the General Crimes Act and Public Law 280—that, in his view, preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian country. Neither statute, however, preempts the State's jurisdiction."

"(i) The General Crimes Act does not preempt state authority to prosecute Castro-Huerta's crime. It provides that 'the general laws of the United States as to the punishment of offenses committed ... within the sole and exclusive jurisdiction of the United States ... shall extend to the Indian country.' 18 U.S.C. § 1152. By its terms, the Act simply 'extend[s]' the federal laws that apply on federal enclaves to Indian country. The Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes, that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country.

"Castro-Huerta claims that the General Crimes Act does indeed make Indian country the jurisdictional equivalent of a federal enclave. Castro-Huerta is wrong as a matter of text and precedent.

"Pointing to the history of territorial separation and Congress's reenactment of the General Crimes Act after this Court suggested in dicta in *Williams* v. *United States,* 327 U.S. 711, 714, that States lack jurisdiction over crimes committed by non-Indians against Indians in Indian country, Castro-Huerta argues that Congress *implicitly intended* for the Act to provide the Federal Government with exclusive jurisdiction over crimes committed by non-Indians against Indians in Indian country. But the text of the Act says no such thing; the idea of territorial separation has long since been abandoned; and the reenactment canon cannot be invoked to override clear statutory language of the kind present in the General Crimes Act. Castro-Huerta notes that the Court has repeated the *Williams* dicta on subsequent occasions, but even repeated dicta does not constitute precedent and does not alter the plain text of the General Crimes Act."

"(ii) Castro-Huerta's attempt to invoke Public Law 280, 67 Stat. 588, is also unpersuasive. That law affirmatively grants certain States (and allows other States to acquire) broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian country. 18 U.S.C. § 1162; 25 U.S.C. § 1321. Castro-Huerta contends that the law's enactment in 1953 would have been pointless surplusage if States already had concurrent jurisdiction over crimes committed by

non-Indians against Indians in Indian country. But Public Law 280 contains no language preempting state jurisdiction. And Public Law 280 encompasses far more than just non-Indian on Indian crimes. Thus, resolution of the narrow jurisdictional issue here does not negate the significance of Public Law 280."

"(2) The test articulated in *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country. There, the Court held that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government. *Id.,* at 142–143. Under *Bracker*'s balancing test, the Court considers tribal interests, federal interests, and state interest. *Id.,* at 145. Here, the exercise of state jurisdiction would not infringe on tribal self-government. And because a State's jurisdiction is concurrent with federal jurisdiction, a state prosecution would not preclude an earlier or later federal prosecution. Finally, the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, including an interest in protecting both Indian and non-Indian crime victims.

"(c) This Court has long held that Indian country is part of a State, not separate from it. Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted by federal law or by principles of tribal self-government. The default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted. And that jurisdiction has not been preempted here."

B. Bingo

Ysleta Del Sur Pueblo v. Texas, 142 S.Ct. 1929 (U.S., Gorsuch, 2022).

"This case represents the latest conflict between Texas gaming officials and the Ysleta del Sur Pueblo Indian Tribe. In 1968, Congress recognized the Ysleta del Sur Pueblo as an Indian tribe and assigned its trust responsibilities for the Tribe to Texas. 82 Stat. 93. In 1983, Texas renounced its trust responsibilities as inconsistent with the State's Constitution. The State also expressed opposition to any new federal trust legislation that did not permit the State to apply its own gaming laws on tribal lands. Congress restored the Tribe's federal trust status in 1987 when it adopted the Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act. 101 Stat. 666. The Restoration Act also 'prohibited' as a matter of federal law '[a]ll gaming activities which are prohibited by the laws of the State of Texas.' *Id.*, at 668. Shortly thereafter, Congress adopted its own comprehensive Indian gaming legislation: the Indian Gaming Regulatory Act (IGRA). IGRA established rules for separate classes of games. As relevant here, IGRA permitted Tribes to offer so-called class II games—like bingo—in States that 'permi[t] such gaming for any purpose by any person, organization or entity.' 25 U.S.C. § 2710(b)(1)(A). IGRA allowed Tribes to offer class III games—like blackjack and baccarat—but only pursuant to negotiated tribal/state compacts. § 2703(8).

"Pursuant to IGRA, the Tribe sought to negotiate a compact with Texas to offer class III games. Texas refused, arguing that the Restoration Act displaced IGRA and required the Tribe to follow all of the State's gaming laws on tribal lands. In subsequent federal litigation, the District Court held that Texas violated IGRA by failing to negotiate in good faith. The Fifth Circuit reversed, holding that the Restoration Act's directions superseded IGRA's and guaranteed that the entirety of 'Texas' gaming laws and regulations' would 'operate as surrogate federal law on the Tribe's reservation.'

36 F.3d 1325, 1326, 1334 (*Ysleta I*). In 2016, the Tribe began to offer bingo, including 'electronic bingo' machines, on the view that IGRA treats bingo as a class II game for which no state permission is required so long as the State permits the game to be played on some terms by some persons. The State then sought to shut down all of the Tribe's bingo operations. Bound by *Ysleta I,* the District Court sided with Texas and enjoined the Tribe's bingo operations, but the court stayed the injunction pending appeal. The Fifth Circuit reaffirmed *Ysleta I* and held that the Tribe's bingo operations were impermissible because they did not conform to Texas's bingo regulations.

"Held: The Restoration Act bans as a matter of federal law on tribal lands only those gaming activities also banned in Texas."

"(a) Section 107 of the Restoration Act directly addresses gaming on the lands of the Ysleta del Sur Pueblo. It provides in subsection (a) that 'gaming activities which are prohibited by [Texas law] are hereby prohibited on the reservation and on lands of the tribe.' Subsection (b) insists that the statute does not grant Texas 'civil or criminal regulatory jurisdiction' with respect to matters covered by § 107. The State reads the Act as effectively subjecting the Tribe to the entire body of Texas gaming laws and regulations. The Tribe, however, understands the Act to bar it from offering only those gaming activities the State fully prohibits, and that if Texas merely regulates bingo, the Tribe may also offer that game subject only to federal-law, not state-law, limitations.

"The language of § 107—particularly its dichotomy between prohibition and regulation—presents Texas with a problem. Texas concedes that its laws do not 'forbid,' 'prevent,' 'effectively stop,' or 'make impossible' bingo operations in the State. Webster's Third International Dictionary 1813 (defining 'prohibit'). Instead, the State admits that it allows the game 'according to rule[s]' that 'fix the time,' place, and manner in which it may be conducted. *Id.*, at 1913 (defining 'regulate'). From this alone, Texas's bingo laws appear to fall on the regulatory rather than prohibitory side of the line. In response, Texas describes its laws as 'prohibiting' bingo *unless* the State's regulations are followed and insists that it is merely seeking to do what subsection (a) allows.

"Texas's understanding of the word 'prohibit' would risk turning the Restoration Act's terms into an indeterminate mess. In Texas's view, laws regulating gaming activities *become* laws prohibiting gaming activities—an interpretation that violates the rule against 'ascribing to one word a meaning so broad' that it assumes the same meaning as another statutory term. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1. Indeterminacy aside, the State's interpretation would leave subsection (b)—denying the State regulatory jurisdiction—with no work to perform. As a result, Texas's interpretation also defies another canon of statutory construction—the rule that courts must normally seek to construe Congress's work 'so that effect is given to all provisions.' *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (internal quotation marks omitted). Seeking to give subsection (b) real work to perform, Texas submits that the provision serves to deny its state courts and gaming commission 'jurisdiction' to punish violations of subsection (a) by sending such disputes to federal court instead. But that interpretation only serves to render subsection (c), which grants federal courts 'exclusive' jurisdiction over subsection (a) violations, a nullity. A full look at the statute's structure suggests a set of simple and coherent commands; Texas's competing interpretation renders individual statutory terms duplicative and leaves whole provisions without work to perform."

"(b) Important contextual clues resolve any remaining questions. Congress passed the Restoration Act six months after this Court handed down its decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244. There, the Court interpreted Public Law

280—a statute Congress had adopted in 1953 to allow a handful of States to enforce some of their criminal laws on certain tribal lands—to mean that only 'prohibitory' state gaming laws could be applied on the Indian lands in question, not state 'regulatory' gaming laws. The *Cabazon* Court held that California's bingo laws—materially identical to Texas's laws here—fell on the regulatory side of the ledger. This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents. *Ryan v. Valencia Gonzales*, 568 U.S. 57, 66, 133 S.Ct. 696, 184 L.Ed.2d 528. At the time Congress adopted the Restoration Act, *Cabazon* was not only *a* relevant precedent; it was *the* precedent. In *Cabazon*'s immediate aftermath, Congress also adopted other laws governing tribal gaming that appeared to reference and employ in different ways *Cabazon*'s distinction between prohibition and regulation. See, *e.g.*, Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, § 9, 101 Stat. 709–710.

"None of this is to say that the Tribe may offer gaming on whatever terms it wishes. The Restoration Act provides that a gaming activity prohibited by Texas law is also prohibited on tribal land as a matter of federal law. Other gaming activities are subject to tribal regulation and must conform to the terms and conditions set forth in federal law, including IGRA to the extent applicable."

"(c) The State's remaining arguments are unavailing."

"(1) Texas asks the Court to focus on subsection (a) of the Restoration Act, which ends with the statement that '[t]he provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T. C.–02–86.' 101 Stat. 668–669. In that referenced resolution, the Tribe announced its opposition to Texas's legislative efforts to have its gaming laws apply on tribal lands. At the same time, the Tribe also announced its own intention to prohibit gaming on its reservation and authorized the acceptance of federal legislation prohibiting gaming on tribal lands. Texas claims that the reference to the tribal resolution suggests the Restoration Act should be read 'broadly' to allow Texas to apply its gaming regulations on tribal lands. As an initial matter, subsection (a) does not purport to incorporate that resolution into federal law—something Congress knows how to do when it wishes, see *e.g.*, 25 U.S.C. § 5396(b). In addition, Texas's 'broad' reading suffers from the same interpretative challenges already mentioned and defies Congress's apparent adoption of *Cabazon*'s prohibitory/regulatory distinction. Finally, on this Court's interpretation of the Restoration Act, Congress *did* legislate 'in accordance with' the Tribe's resolution by expressly granting the Tribe federal recognition and choosing not to apply Texas gaming regulations as surrogate federal law on tribal land."

"(2) Texas appeals to public policy and argues that attempts to distinguish between prohibition and regulation are sure to prove 'unworkable.' It is not, however, this Court's place to question whether Congress adopted the wisest or most workable policy. That the Restoration Act's prohibitory/regulatory distinction can and will generate borderline cases hardly makes it unique among federal statutes. And courts have applied the same prohibitory/regulatory framework for decades under Public Law 280. Moreover, Texas's alternative interpretation poses its own 'workability' challenges, as federal courts would be charged with enforcing the minutiae of state gaming regulations governing the conduct of permissible games."

X. Tennessee Constitution; Article I, §19; Autopsy Photos Posted Online

Andreacchio v. Hamilton, No. M2021-01021-COA-R3-CV (Tenn. Ct. App., Swiney, July 13, 2022).

"In February 2014, Plaintiffs' son, Christian Andreacchio, died in Meridian, Mississippi. The Meridian Police Department ruled his death a suicide. However, Plaintiffs contend that their son was murdered. Plaintiffs contend further that the Meridian Police Department conducted an incompetent investigation. Plaintiffs have, among other things, participated in an audio podcast called 'Culpable' and appeared on the television show 'Crime Watch Daily with Chris Hansen.' In contrast, Defendant has spoken out in support of the Meridian Police Department's conclusion that Christian Andreacchio's death was a suicide. Defendant created a Facebook page called 'Unjustifiable' to counter Plaintiffs' assertions. In this context, Defendant allegedly shared Christian Andreacchio's autopsy photographs as well as some of Christian's text messages. Both the autopsy photographs and text messages were public records released by the Mississippi Attorney General's Office.

"In February 2020, Plaintiffs sued Defendant in the Trial Court. In their first count, Plaintiffs alleged intentional and/or reckless infliction of emotional distress, stating: 'Mr. Hamilton and the John Doe Defendants' decision to publish Christian's autopsy photographs and/or private text messages 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 Plaintiffs.' Plaintiffs also alleged negligent infliction of emotional distress if the Trial Court found that the defendants had acted neither intentionally nor recklessly; publicity given to private facts; and negligent entrustment/failure to supervise/*respondeat superior.* Defendant filed an answer in opposition. Discovery ensued. In February 2021, Defendant filed a motion for summary judgment accompanied by a statement of undisputed material facts."

"In August 2021, the Trial Court entered an order granting Defendant's motion for summary judgment."

"Although not stated exactly as such, Plaintiffs raise the following issue on appeal: whether the Trial Court erred in holding that the First Amendment, the Tennessee Constitution, and/or the Public Records Doctrine insulate Defendant for liability from intentional or, alternatively, negligent infliction of emotional distress for distribution of Christian Andreacchio's autopsy photographs."

"This appeal involves a claim of intentional or, alternatively, negligent 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) (citations omitted). 'The elements of a claim for negligent infliction of emotional distress include the elements of a general negligence claim, which are duty, breach of duty, injury or loss, causation in fact, and proximate causation.' *Id.* at 206 (citation and footnote omitted).

"This appeal implicates constitutional protection of speech, as well. The First Amendment of the United States Constitution states: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' Article I, Section 19 of the Tennessee Constitution contains its own provision regarding free speech, stating:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases."

"Defendant . . . cites among other cases *Fann v. City of Fairview*, 905 S.W.2d 167 (Tenn. Ct. App. 1994), in which this Court dismissed a claim for invasion of privacy regarding a newspaper's publication of confidential information related to a political candidate's expunged criminal record. *Id.* at 172. This Court stated: 'We hold that *The Review Appeal*'s receipt of the information, including the expunged material, was not unlawful.... We further hold that the newspaper articles clearly concerned 'a matter of public significance' as the truthful information concerned a candidate for public office.' *Id.* This Court continued: 'We reiterate that Fann's allegations as to Franklin Publishing merely concern the newspaper's receipt of this information. Moreover, the record fails to suggest that the newspaper, on its own initiative, wrongfully discovered the information. As such, we do not find the mere lawful receipt and subsequent publication of truthful information regarding a candidate for public office, absent more, to go beyond the limits of decency....' *Id.*"

"As Plaintiffs themselves acknowledged, the investigation into Christian Andreacchio's death is a matter of public concern. Indeed, whether the official investigation into Christian Andreacchio's death was mishandled, as Plaintiffs have argued, is a matter of public significance. Plaintiffs have publicly expressed their views on the matter, as is their right. Defendant has publicly expressed a contrary view, as is his right. This is the sort of 'free communication of thoughts and opinions' protected by Article 1, Section 19 of the Tennessee Constitution. It was within this context that Defendant is alleged to have distributed Christian Andreacchio's autopsy photographs online. There is no hint in the record that Defendant obtained these photographs by unlawful means. On the contrary, they were public records obtained through the Mississippi Attorney General's Office. Further, there is no suggestion that the photographs were altered or manipulated in any way. Defendant thus is alleged to have disseminated truthful information—public records from a sister state, no less—concerning a matter of public significance. Without more, this activity cannot be deemed 'outrageous' in the legal sense. Rather, it is free expression. Additionally, Plaintiffs' attempt to equate Defendant's actions with intimidation or harassment is without merit as no intimidation or harassment of Plaintiffs by Defendant has been alleged or shown here.

"Plaintiffs' revulsion at, and opposition to, the online distribution of photographs of their deceased son's body is, of course, completely understandable. Respectfully, however, that is not dispositive of the constitutional issues at stake. Under *Fann*, and, more crucially, the First Amendment and Article 1, Section 19 of the Tennessee Constitution, Defendant cannot be held liable for sharing truthful information, here public records, concerning the investigation into Christian Andreacchio's death, a matter of public significance. That the truthful information concerning this matter of public significance is of a deeply sensitive nature neither makes the information any less truthful nor makes the matter any less publicly significant. In this case, Defendant has filed a properly supported motion for summary judgment. He has successfully established a defense to the claims against him, which Plaintiffs have failed to overcome. We hold, as a matter of law, that Plaintiffs cannot prevail on their claims. We affirm the Trial Court in its grant of summary judgment to Defendant."

PROPERTY

I. Zoning; Restrictions on Home-Based Businesses; Mootness

Shaw v. Metropolitan Government of Nashville and Davidson County, S.W.3d (Tenn., Kirby, 2022).

"Plaintiff/Appellant Elijah 'Lij' Shaw is a professional record producer who has lived in East Nashville for a number of years. He renovated the detached garage at his home to create a recording studio called The Toy Box Studio. For several years, Mr. Shaw operated The Toy Box Studio out of his home.

"Plaintiff/Appellant Patricia Raynor also lives in Nashville, in the Donelson area, and is a licensed cosmetologist. She operated a single-chair beauty salon in the garage of her home.

"The municipal code for Defendant/Appellee Metropolitan Government of Nashville and Davidson County ('Metro') allows residents to operate businesses out of their homes, subject to regulation. At the time this lawsuit was filed, Metro's ordinances regulating home businesses provided that '[n]o clients or patrons may be served on the property' where the business is operated. Metropolitan Government of Nashville & Davidson County, Tenn., Code § 17.16.250(D)(1) (2017) (repealed 2020). In the course of these proceedings, this provision has generally been referred to as the 'Client Prohibition.' Metro's municipal code contained a few exemptions from the Client Prohibition for uses such as day cares, short-term rentals, and 'historic home events.'

"In 2013, Metro received an anonymous complaint that Ms. Raynor had violated the Client Prohibition. In 2015, Metro received an anonymous complaint that Mr. Shaw had violated the Client Prohibition. Metro sent abatement notices to both Ms. Raynor and Mr. Shaw, requiring both to cease and desist. Both complied.

"In an effort to remedy the problem, both Mr. Shaw and Ms. Raynor apparently tried to get their properties re-zoned to allow client visits. Neither succeeded.

On December 5, 2017, Mr. Shaw and Ms. Raynor ('Homeowners') filed this lawsuit against Metro in the Chancery Court of Davidson County. The complaint challenged 'a single sentence within the Zoning Code,' specifically, the Client Prohibition. The complaint asserted as-applied substantive due process claims as well as equal protection claims under the Tennessee Constitution. The complaint reiterated, 'The *only* restriction of which [Homeowners] here complain is the Client Prohibition, Metro. Code § 17.16.250(D)(1).' The Homeowners' complaint sought declaratory and injunctive relief.

"Metro filed its answer, and discovery ensued. The Homeowners and Metro then filed cross-motions for summary judgment.

"After extensive briefing, the trial court granted summary judgment in favor of Metro. In a detailed order, the trial court applied the rational basis test to the Homeowners' claims and held that Metro had 'proffered real, rational and appropriately-related reasons for the Client Prohibition' code provision and for the exemptions for certain types of home businesses. The Homeowners appealed to the Court of Appeals.

"While the Homeowners' appeal was pending, the Metro Council repealed the Client Prohibition provision that was the subject of the Homeowners' complaint. *Shaw v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2019-01926-COA-R3-CV, 2021 WL 515887, at *1 (Tenn. Ct. App. Feb. 11, 2021), *perm. app. granted*, (Tenn. July 12, 2021). Metro replaced the Client Prohibition with a new ordinance that allowed home businesses such as the Homeowners' businesses up to three customer visits per hour and six visits per day ('Six-Client Ordinance'). *See* Metro. Code § 17.16.250(D)(3) (2020) (amended 2022). The Six-Client Ordinance contained a sunset provision stating that it 'shall expire and be null and void on January 7, 2023 unless extended by resolution of the metropolitan council.' *Id.* § 17.16.250(D)(9).

"The Metro Council's actions prompted Metro to argue to the Court of Appeals that the Homeowners' case had been rendered moot. The Homeowners asked the Court of Appeals to apply the 'voluntary cessation' exception to the mootness doctrine. The Homeowners contended that, because Metro had voluntarily chosen to cease engaging in the challenged conduct, Metro would be free to resume that same conduct once the court dismissed the Homeowners' lawsuit. For this reason, they argued, the case should not be declared moot. *Shaw*, 2021 WL 515887, at *2.

"The Court of Appeals considered the Homeowners' contention but ultimately held in favor of Metro. Affording Metro 'the long-standing rebuttable presumption that government officials will discharge their duties in good faith and in accordance with the law,' the appellate court held that the Homeowners' claims were moot. *Id.* at *6–7 (quoting *Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty.*, 301 S.W.3d 196, 206 (Tenn. 2009)).

"The Homeowners were then granted permission to appeal to this Court. At oral argument in January 2022, the Homeowners emphasized the sunset provision in the Six-Client Ordinance to argue that the Court should apply the voluntary cessation exception to the mootness doctrine and reverse the Court of Appeals' dismissal of their claims. This Court then took the appeal under advisement.

"But wait, there's more. In February 2022, after oral argument to this Court, Metro further amended the code. The amendment removed the sunset provision and extended the Six-Client Ordinance 'indefinitely.'

"The Homeowners brought Metro's further amendment of the ordinance to the attention of the Court in a motion to consider post-judgment facts. In that context, post-oral argument, both parties addressed the effect of the amendment on their positions. We address all of their arguments below."

"Much of the Court of Appeals' analysis centered on voluntary cessation in light of Metro's repeal of the Client Prohibition, the effect of Metro's enactment of the Six-Client Ordinance and its related sunset provision, whether it was clear that the prior Client Prohibition could not 'reasonably be expected to recur,' and whether Metro's repeal of the Client Prohibition should be afforded a presumption of good faith. *See Shaw*, 2021 WL 515887, at *5–6. The intermediate appellate court applied the standard adopted by the United States Court of Appeals for the Sixth Circuit for voluntary cessation by a governmental entity: 'Where the government voluntarily ceases its actions by enacting new legislation or repealing the challenged legislation, that change will presumptively moot the case unless there are clear contraindications that the change is not genuine.' *Id.* at *7 (quoting *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019)). Using that framing, it declined to apply the exception for voluntary cessation, concluded the case was moot, and remanded the case to the trial court for dismissal. *Id.* at *7–8.

"On appeal to this Court, much of the briefing and argument likewise focused on the repeal of the Client Prohibition, the effect of the Six-Client Ordinance and the sunset provision, and whether this Court should apply the *Speech First* presumption of good faith to Metro's repeal and replacement of the Client Prohibition. The Homeowners argued that, in light of the sunset provision, Metro's repeal of the Client Prohibition should be considered only a temporary pause. Even under the *Speech First* standard, they said, it was not clear that Metro would not resume enforcement of the original Client Prohibition against the Homeowners once it allowed the Six-Client Ordinance to sunset.

"However, at oral argument, Metro clarified that the sunset provision applied only to the Six-Client Ordinance and not to the repeal of the Client Prohibition. Thus, if the Metro Council took no further action and allowed the Six-Client Ordinance to sunset, the repeal of the Client Prohibition would remain in place. In that circumstance, the Metro Code would simply not address whether home businesses such as the Homeowners' could have client visits.

"The Homeowners contended at oral argument that, despite Metro's clarification of the effect of the sunset provision, their claims are not moot because the Six-Client Ordinance still unfairly limits their home businesses while other home businesses such as home day care businesses remain exempt. They cited language in a United States Supreme Court decision, *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, to the effect that the Homeowners' claims are not mooted by enactment of a replacement ordinance if the new ordinance 'disadvantages them in the same fundamental way.' 508 U.S. 656, 662, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993). Metro continued to emphasize the argument it made in its briefs, that the case is moot because the singular provision that was the subject of the Homeowners' complaint, the Client Prohibition, was repealed for good.

"As noted above, after oral argument, Metro further amended the Six-Client Ordinance by removing the sunset provision and extending the new ordinance 'indefinitely.' In the context of their motion to consider post-judgment facts, the Homeowners conceded that, by removing the sunset provision and extending the Six-Client Ordinance indefinitely, Metro had adopted '[a] permanent policy change by a government entity that is not likely to be abandoned once the immediate threat of litigation is passed.' *Norma Faye*, 301 S.W.3d at 207. They insisted, however, that the case had not been mooted by this turn of events, explaining that while the Six-Client Ordinance disadvantages the Homeowners *less* than the Client Prohibition did, it nevertheless continues to disadvantage them in the same way. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. at 662, 113 S.Ct. 2297.

"In response, Metro noted that the recent amendment removed the concern underlying the voluntary cessation exception, namely, that a dismissal for mootness could allow Metro to temporarily cease its wrongful conduct to avoid judicial review and then resume the same conduct after dismissal. *See Norma Faye*, 301 S.W.3d at 205. In reply to the Homeowners' contention that they remain disadvantaged by the Six-Client Ordinance, only to a lesser degree, Metro reiterated that Homeowners' complaint never challenged the Six-Client Ordinance; it *only* challenged the now-repealed Client Prohibition. While the Homeowners are free to file a *new* lawsuit challenging the Six-Client Ordinance, Metro maintained, they cannot do so in this lawsuit, which is now moot.

"We consider first the most recent argument put forth by the Homeowners—that the new Six-Client Ordinance continues to disadvantage them in the same way, though to a lesser degree—because this argument goes to whether there remains any actual controversy between the parties and

whether the case can still serve as a means of providing practical judicial relief to the Homeowners. *Norma Faye*, 301 S.W.3d at 204."

"In a recent decision, the United States Supreme Court applied and summarized this same approach [as in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)]:

> Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.

"*N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, —— U.S. ——, 140 S. Ct. 1525, 1526, 206 L.Ed.2d 798 (2020) (per curiam) (citations omitted) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482–83, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990)). In *New York State Rifle*, the Court granted certiorari to review a New York City rule that prevented the petitioners from transporting firearms to a second home or to a shooting range outside the city. *Id.* After the Court granted certiorari, the city amended the rule to allow the petitioners to transport firearms to a second home or a shooting range outside the city, the relief sought in their complaint. *Id.* The petitioners argued that the new rule still infringed on their rights in a variety of ways. *Id.*

"The majority in *New York State Rifle* vacated the ruling of the intermediate appellate court and remanded the case to the district court with directions to permit the petitioners to amend their pleadings and add a claim for damages under the prior rule. *Id.* at 1526–27. Three justices dissented, arguing that the majority's decision to vacate and remand was inappropriate because even if the petitioners' remaining interest in the outcome of the lawsuit was small, it was sufficient to defeat a finding of mootness. *Id.* at 1528 (Alito, J., dissenting). The dissent did not disagree with the principle cited by the majority, only the result under the particular facts of that case.

"State and federal courts have employed this same approach in a variety of cases, with outcomes dependent primarily on the particular facts in a given case. *See, e.g.*, *Chrysafis v. Marks*, 15 F.4th 208, 215 (2d Cir. 2021) (remanding where the court 'cannot be certain how the new [law] will be implemented in practice'); *Foremost Signature Ins., MI v. Silverboys*, *LLC*, 793 F. App'x 962, 965 (11th Cir. 2019) (dismissing instead of granting leave to amend where the parties 'had ample opportunity before the district court to fully develop the record'); *Hill v. Snyder*, 821 F.3d 763, 770–71 (6th Cir. 2016) (remanding where the district court 'has not yet had an opportunity to consider the legislative changes'); *Am. Ins. Ass'n v. State Indus. Comm'n*, 745 P.2d 737, 740 (Okla. 1987) (granting leave to amend in light of new legislation); *Knowles v. State Bd. of Educ.*, 219 Kan. 271, 547 P.2d 699, 705 (1976) (same); *In re Riverwoods Park Dist.*, 247 Ill.App.3d 702, 187 Ill.Dec. 256, 617 N.E.2d 464, 473 (1993) (remanding since 'the new law was not in effect at the time the petition was filed,' raising factual questions 'which this court cannot resolve on the basis of the record on appeal').

"We agree with this approach. The baseline, as observed in *Norma Faye*, is that a case is considered moot 'if it no longer serves as a means to provide some sort of judicial relief to the prevailing party.' 301 S.W.3d at 204 (citing *Knott v. Stewart Cnty.*, 185 Tenn. 623, 207 S.W.2d 337, 338–39 (1948); *Bell v. Todd*, 206 S.W.3d 86, 96 (Tenn. Ct. App. 2005); *Massengill v. Massengill*, 36

Tenn.App. 385, 255 S.W.2d 1018, 1019 (1952)). Where a lawsuit challenges a statute or ordinance and seeks only prospective relief, and the statute or ordinance is simply repealed, the case will ordinarily be dismissed as moot because it is no longer possible for the court to grant any effectual relief. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am.*, 508 U.S. at 669–70, 113 S.Ct. 2297 (O'Connor, J., dissenting).

"The analysis changes, however, if the challenged law is amended or is repealed and replaced with a new law. *Id.* at 670, 113 S.Ct. 2297. On one end of the continuum, a defendant cannot moot a case by altering the challenged law in an insignificant way. *Id.* On the other end of the continuum, if the challenged law is changed so as to clearly cure the alleged defect or in such a way that it no longer applies to the plaintiff, plainly there remains no 'live controversy' for the court to decide. *Id.* 'Such cases functionally are indistinguishable from those involving outright repeal' and should be deemed moot. *Id.*

"Inhabiting the gray area in the middle is the situation where, while an appeal is pending, the challenged law is replaced by a new law that does not clearly or completely remedy the defect asserted by the plaintiff but 'is more narrowly drawn.' *Id.* at 671, 113 S.Ct. 2297. In such circumstances, it may ultimately turn out that the new law retains the same 'legal defect' as the old law. *Id.* But it may also turn out that the challenged law was altered in a way that presents 'a substantially different controversy' from the one originally decided by the trial court. *Id.* When the appellate court 'cannot be sure how the statutory changes will affect the plaintiff's claims,' it should consider vacating the lower court's decision and remanding to the trial court with instructions to permit the plaintiff to amend, including amendment to challenge the new law. *Id.* at 673, 675, 113 S.Ct. 2297. The determination of whether a case should be remanded with leave to amend, rather than dismissed as moot, turns on the facts and circumstances of each case. *Cf. Norma Faye*, 301 S.W.3d at 204 (noting that mootness depends on the facts and circumstances of each case).

"In the case at bar, the Homeowners assert that Metro's new Six-Client Ordinance is only an insignificant change from the prior Client Prohibition. They contend 'Metro has not ceased discriminating against' them, compared to home-based businesses that were exempt from the Client Prohibition and remain exempt from the Six-Client Ordinance. The gravamen of their equal protection claim, the Homeowners argue, is that their home-based businesses are disadvantaged as to the number of client visits in comparison to home-based businesses that are allowed twelve clients per day. They contend they seek declaratory and injunctive relief under the Tennessee Constitution to the extent Metro prohibits them from serving up to twelve clients per day at their home businesses.

"In response, Metro points out that the Homeowners' complaint sought *only* to challenge the now-repealed Client Prohibition. Metro emphasizes, '[T]he facts alleged in the Complaint and the Trial Court's ruling addressed and analyzed only the legality of a complete ban on clients.' There is no longer a sunset provision attached to the Six-Client Ordinance, and removal of the sunset provision also removed any likelihood that the Client Prohibition will be resurrected. In this circumstance, Metro posits, the Homeowners' case is simply moot.

"As to the Homeowners' contention that the Six-Client Ordinance is only an 'insignificant' change, we cannot go that far. On the other hand, we cannot agree with Metro's position that we should consider *only* whether the case can serve as a means of providing judicial relief under the *original* ordinance and blind ourselves to any claims the Homeowners may have under the new ordinance. *Norma Faye*, 301 S.W.3d at 204. This case falls into the gray area described by the dissent in

Northeastern Florida, where the challenged ordinance has been replaced by a new ordinance that, while not completely remedying the alleged problem with the original ordinance, is 'more narrowly drawn.' 508 U.S. at 671, 113 S.Ct. 2297 (O'Connor, J., dissenting).

"Without question, the original relief sought by the Homeowners, declaratory and injunctive relief as to the Client Prohibition, is no longer appropriate. However, because Metro repealed and replaced the Client Prohibition after the trial court proceedings were completed, the record contains no information on whether or how the new Six-Client Ordinance will affect the Homeowners, or whether they 'may have some residual claim under the new framework that was understandably not asserted previously.' *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526 (quoting *Lewis*, 494 U.S. at 482, 110 S.Ct. 1249). It may turn out that the Six-Client Ordinance has the same alleged legal flaw as the Client Prohibition, that it altered the law in a way that presents significantly different issues, or that it simply has no adverse effect on the Homeowners. At this juncture, the record on appeal does not contain all of the information needed to determine whether the case can still be a means of 'provid[ing] some sort of judicial relief' to the Homeowners. *Norma Faye*, 301 S.W.3d at 204 (citing *Knott*, 207 S.W.2d at 338–39; *Bell*, 206 S.W.3d at 96; *Massengill*, 255 S.W.2d at 1019).

"Mindful of the Homeowners' right to judicial review of their claims, but also mindful of our obligation to be careful stewards of our judicial power, the prudent course is for us to vacate the judgments of the lower courts and remand the case to the trial court, to permit the parties to amend their pleadings, and for any further proceedings consistent with this Opinion, in the sound discretion of the trial court."

"We hold that, on this record, we cannot determine whether the Homeowners suffer ongoing harm from the new ordinance, how the changes to the Metro ordinance will affect their claims, and whether they still have some residual claim under the new ordinance. Consequently, we vacate the judgments of the Court of Appeals and the trial court below and remand the case to the trial court for further proceedings consistent with this Opinion. Costs on appeal are taxed one half to the Plaintiffs, Elijah Shaw and Patricia Raynor, and one half to the Defendant, Metropolitan Government of Nashville and Davidson County, for which execution may issue if necessary."

II. Restrictive Covenants

A. Modular Home Permitted; It's Not a Trailer

McKeehan v. Price, 646 S.W.3d 486 (Tenn. Ct. App., Swiney, 2022).

"In May 2020, Price bought Lot 25 in Fort Loudon Estates in Loudon County. She soon thereafter obtained a permit to place a 'double-wide' mobile home on her lot. In July 2020, McKeehan, a long-time resident of Fort Loudon Estates, filed her Petition for Enforcement of Covenants and Restrictions and for Temporary Restraining Order and Permanent Injunction against Price in the Trial Court. Fort Loudon Estates' covenants and restrictions were recorded in 1959. In her petition, McKeehan relied on Item Four of the covenants and restrictions for Fort Loudon Estates, which provides: '4. Temporary Structures: No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuilding shall be used on any lot at any time as a residence either temporarily or permanently.'

"Acting on McKeehan's petition, the Trial Court entered a temporary restraining order against Price, enjoining her 'from placing a mobile home, trailer, or other temporary structure on Lot 25 located in Fort Loudon Estates #1 pending further hearing of this cause.' Price then filed an answer, stating in part: 'The Defendant requests this petition ... be dismissed as evidence has been provided to the Court, and the Plaintiff's attorney, that a doublewide, nor any type of mobile home, will not be being placed on said property by the Defendant nor any other person acting on the Defendant's behalf.' In October 2020, Price filed a motion objecting to injunctive relief and seeking to dissolve the restraining order. In her motion, Price stated that she had originally bought a double-wide mobile home but had since cancelled that purchase. Price opted for a modular home instead, which was 'constructed, approved and regulated under the *Tennessee Modular Building Act of 1985*, TCA § 68-126-301, et seq.' Price asserted that her new modular home was distinct from a mobile home and passed muster under the restrictive covenants. The Trial Court subsequently entered an order finding that the temporary injunction should issue and remain in force through a final hearing on McKeehan's petition. McKeehan was to post an injunction bond of $5,000.

"In January 2021, a trial on the merits was held before the Trial Court. James Anthony (Tony) Buhl ('Buhl'), a salesperson for Oakwood Homes—a branch under Clayton Homes—testified first. Buhl sold Price a double-wide mobile home, but Price received a full refund on it when she opted for a modular home instead. Price had not yet paid for the modular home. If Buhl completed the sale, he would earn a commission of around 20% of the profit. Appalachia Homes, another subset of Clayton Homes, manufactured the home. The home would be delivered first to Buhl at his facility. The home then would be transported to Price's lot in two pieces using a tractor and an escort. Asked if a chassis were involved, Buhl stated it was a 'wood frame.' The two separate pieces of the home would be assembled on-site. Buhl testified that if Price had kept the double-wide mobile home, it too would have been transported in two sections. Asked if the frame would be removed from the modular home, Buhl stated: 'We do two types of modular homes, yes. We can do an off-frame mod or an on-frame mod by the stipulations set in 2006. They have both. They're both modular homes.' Price's home was an 'on-frame mod.' Buhl stated that the modular home's dimensions were different from those of the double-wide mobile home: 'One is 32 wide compared to 28 wide. And one is 76 and one is 68 foot.' Buhl testified there were mobile homes with the same exterior façade as the modular home. Price's home had already been built; such homes are built to order."

"[At the conclusion of Plaintiff's proof] Price moved for dismissal. The Trial Court found in favor of Price on all issues. In February 2021, the Trial Court entered its Order and Decree. The Trial Court stated:

> This matter was heard on the merits before the Honorable Frank [V.] Williams, III, Chancellor, via Zoom hearing on January 14, 2021, whereupon the Court was provided various exhibits introduced by the parties, heard the testimony of the Petitioner, Cathy McKeehan, and the witness, Tony Buhl, as a representative of Oakwood Homes, considered the arguments of counsel, the applicable statutory and case law and the record as a whole. The Petitioner presented the testimony of Ms. McKeehan, Mr. Buhl and the submission of various documents in evidence and then rested. Thereupon, the Respondent, through counsel, moved for a dismissal of the case, which the Court granted, finding that the applicable Covenants and Restrictions for Fort Loudon Estates subdivision of record in Book 66, Page 235 of the Register of Deeds Office for Loudon County, Tennessee — particularly the provisions against 'Temporary Structures' — do not prohibit the Respondent from erecting on her lot in the subdivision as a residence her modular home as identified in the documents submitted by Respondent and as testified to by the witness, Tony Buhl. A ...

ORDERED, ADJUDGED AND DECREED as follows:

1. The Complaint of the Petitioner, Cathy McKeehan, is hereby *dismissed*. . . ."

"Although not stated exactly as such, McKeehan raises the following issues on appeal: 1) whether the Trial Court erred in interpreting the Fort Loudon Estates covenants and restrictions as not prohibiting the modular home Price wants to put on her lot and 2) if the Trial Court erred as to the first issue, whether the Trial Court should be directed to enjoin Price from placing the modular structure or any other temporary residential structure on her lot and to set aside the $5,000 injunction bond awarded to Price."

"In *Williams v. Fox*, the Tennessee Supreme Court reversed the Court of Appeals and the trial court's holding that language in a subdivision's restrictive covenants against temporary buildings like trailers and mobile homes applied to modular homes, stating: 'We reverse, holding that 'modular homes' are distinct types of structures from 'mobile homes' and 'trailers' and because the restrictive covenant did not expressly prohibit 'modular homes,' the courts cannot expand the plain wording of the covenant to include the defendant's modular home.' 219 S.W.3d 319, 321 (Tenn. 2007)."

"A 'modular building unit' is defined by statute as follows:

> 'Modular building unit' means a structural unit, or preassembled component unit, including the necessary electrical, plumbing, heating, ventilating and other service systems, manufactured off-site and transported to the point of use for installation or erection, with or without other specified components, as a finished building. 'Modular building unit' does not apply to temporary structures used exclusively for construction purposes, nonresidential farm buildings, or ready-removables that are not modular structures[.]

"Tenn. Code Ann. § 68-126-303(8) (2013)."

"To recap, the restriction at issue, Item Four of the Fort Loudon Estates covenants and restrictions, provides: '4. Temporary Structures: No structure of a temporary character, trailer, basement, tent, shack, garage, barn or other outbuilding shall be used on any lot at any time as a residence either temporarily or permanently.' In her brief, McKeehan states that '[t]he covenant's language shows an express intent to prohibit "temporary structures," including "trailers."' McKeehan points out that Price's modular home has many of the same features of a mobile home or trailer, which she contends would plainly be barred by the restriction. McKeehan argues further that Fort Loudon Estates' covenants and restrictions did not need to specifically include the term 'modular home' as the term was not defined for another 26 years after the subdivision's covenants and restrictions were recorded. We agree with McKeehan that the precise term for a structure need not necessarily be spelled out to fall under a restriction against temporary structures. The term 'modular home' may not have occurred to the drafters of the covenants and restrictions in 1959. Nevertheless, while we are to give effect to restrictive covenants, we are not to expand them. The dispositive issue is whether Price's modular home is, in fact, a temporary structure prohibited by the restrictions of Fort Loudon Estates. The Trial Court found it is not.

"With respect to whether Price's modular home is a temporary structure, the Trial Court had the benefit of Buhl's testimony, among other evidence. Buhl testified, to wit: that while he personally could not state whether it complies with the Tennessee Modular Building Act of 1985, Price's home

is a 'regulated and constructed' modular home rather than a mobile home; that a modular home is designed to be permanently affixed to a foundation; and that a modular home is not designed to be easily transportable to different sites like a single-wide trailer or mobile home. Buhl acknowledged that Price's home could be moved after it is put into place, although not easily. However, Buhl also testified that, in principle, any house in the subdivision could be moved. In addition, the Trial Court had the benefit of documentary evidence, including the Compliance Certificate and Building Plans, the Data Plate, and the Spec Sheet. As explained by the Tennessee Supreme Court in *Williams* and, in keeping with the Tennessee Modular Building Act, Tenn. Code Ann. §§ 68-126-301, *et seq.*, a modular home is not the equivalent of a mobile home or trailer; it is of a more permanent nature. We are not at liberty to ignore this distinction.[2]

"The evidence at trial, summarized above, reflects that Price's home is a modular home. It was designed and intended to be permanent. It is not easily movable once affixed. While manufactured off-site, the record reflects nonetheless that Price's modular home is meant to be rooted in one place indefinitely, as would be true for any other home built in the subdivision. It would become, as our Supreme Court in *Williams* described, 'part of the property as a permanent improvement to the real estate similar to a "site-built" home.' 219 S.W.3d at 323. Meanwhile, the record is bereft of evidence that Price's modular home was designed or intended to be a temporary structure. There is nothing in the record to indicate that Price's modular home is designed or intended for transient occupancy or ready transportability, characteristics mentioned in *Napier* as associated with mobile homes and/or camper trailers. The fact that Price's home may superficially resemble a mobile home in some ways does not make it one, nor does it make it a temporary structure. If Fort Loudon Estates homeowners wished to prohibit modular homes in their subdivision, they could have amended their covenants and restrictions to do so. However, they did not. The evidence does not preponderate against the Trial Court's finding that Price's modular home is not a temporary structure. We hold, as did the Trial Court, that the Fort Loudon Estates covenants and restrictions do not prohibit Price's modular home. McKeehan's second issue is pretermitted. We affirm the judgment of the Trial Court."

B. Short-Term Vacation Rental Prohibited

Pandharipande v. FSD Corporation, No. M2020-01174-COA-R3-CV (Tenn. Ct. App., Clement, Apr. 29, 2022).

"This is a dispute between a property owner and his homeowners' association concerning the scope and applicability of restrictive covenants. Two restrictive covenants are at issue. One is a covenant contained in the neighborhood's 1984 Declaration of Covenants, Conditions, and Restrictions that limited usage of the homes to residential use as 'a residence by a single family.' The other is a covenant contained in a 2018 Amendment that relaxed the 1984 residential use restriction by authorizing short-term rentals of no less than 30 consecutive days, subject to specific criteria. The plaintiff, who purchased a home in the development in 2015 and has been leasing it on a short-term vacation rental basis to third parties as a business venture, seeks a declaratory judgment that he may lease his home for rentals as short as two days. For its part, the homeowners' association seeks to enforce the restrictive covenants in the 1984 Declaration as well as the 2018 Amendment. The trial court granted summary judgment in favor of the homeowners' association on both issues. In doing so, the court held that restrictions in the 1984 Declaration prohibited non-residential renting. The court also held that Plaintiff's current use of his property is subject to the 2018 Amendment, which authorized short-term leasing subject to stipulations including that '[t]the length of the lease must be for a minimum of 30 consecutive days.' The plaintiff appeals. We affirm."

"In November 2015, Dr. Pratik Pandharipande ('Plaintiff') purchased an improved lot with a cabin/house thereon within Four Seasons ('the Property'). He acquired the Property by warranty deed subject to the covenants, conditions, and restrictions set forth in the 1984 Declaration.

"It is undisputed that Plaintiff purchased the Property with the intent of leasing it for short-term vacation rentals to third parties as a business venture and that he has utilized the Property in such a fashion since its purchase. Shortly after acquiring the Property and acting in furtherance of his business plan, Plaintiff retained a property management company, Center Hill Chalets, to market the Property for short-term vacation rentals. Since its inception, Center Hill Chalets has advertised the Property on as many as 25 different vacation rental websites for lease on a short-term basis, requiring a minimum two-night stay and a maximum 28-night stay for each rental.

"In 2018, the 1984 Declaration was amended by a majority vote of the stockholders (the '2018 Amendment') to authorize short-term rentals of no less than 30 days subject to specific criteria. The 2018 Amendment provided, in pertinent part:

> Leasing homes owned by FSDC shareholders shall be allowed with the following stipulations:
> i. The length of the lease must be for a minimum of 30 consecutive days.

"A few months after the 2018 Amendment was duly recorded, counsel for FSD notified Plaintiff that the means by which he was renting his property was in violation of Four Seasons' restrictive covenants. Plaintiff responded by filing a Verified Complaint against FSD, seeking a declaratory judgment pursuant to Tennessee Code Annotated §§ 29-14-101 to -113 and injunctive relief. He contended, *inter alia*, that the 2018 Amendment could not apply to him because he acquired the Property in 2015, approximately three years before the 2018 Amendment went into effect. FSD responded by filing an Answer and Counterclaim, seeking to enforce the restrictive covenants. In doing so, FSD rejected Plaintiff's claim that the 2018 Amendment could not apply and asserted that, even if the 2018 Amendment was not applicable, the 1984 Declaration prohibited Plaintiff from leasing the Property as a short-term vacation rental.

"On October 28, 2019, Plaintiff moved for summary judgment. In doing so, Plaintiff contended that the 1984 Declaration did not prohibit short-term vacation rentals. He also contended that the 2018 Amendment could not be applied retroactively. Alternatively, Plaintiff argued that if the 2018 Amendment did apply, he was entitled to summary judgment based on a grandfathering provision contained in the 2018 Amendment.

"Following a hearing on the motion for summary judgment, the trial court denied Plaintiff's motion. Shortly thereafter, FSD filed its own motion for summary judgment, which the trial court granted. In making its determination, the trial court found:

> [T]he plain language contained in FSD's 1984 [Amendments] ... prohibited [Plaintiff] from using his property for short term renting or leasing. This Court is required to read the restrictive covenant as a contract. This Court finds that as a matter of law, *Shields Mountain Property Owners Ass'n v. Teffeteller*, No. E2005-00871-COA-R3-CV, 2006 WL 408050 (Tenn. Ct. App. Feb. 22, 2006), a Tennessee Court of Appeals case which discusses language identical to this matter, demonstrates that the plain language contained in FSD's 1984 [Amendments] prohibited [Plaintiff] from short term leasing his property.
> ...

> Second, this Court finds that [Plaintiff] is in violation of the 2018 Amendment by short term renting/leasing his property for less than thirty (30) days at one time. The plain language of the 2018 Amendment bars [Plaintiff] from leasing his property for less than thirty (30) days.
> ...
> Therefore, the 2018 Amendment to the Declaration of Covenants, Conditions and Restrictions bars [Plaintiff] from short term leasing his property for less than thirty (30) days.

"This appeal followed."

"On March 29, 1984, FSD duly recorded the 1984 Declaration of Covenants, Conditions, and Restrictions with the Register of Deeds for Dekalb County, Tennessee, in Deed Book A6, Page 893. In pertinent part, the 1984 Declaration states:

> [The Properties] subjected to this Declaration shall be held, sold, and conveyed subject to the following easements, restrictions, covenants, and conditions. Such easements, restrictions, covenants and conditions are for the purpose of protecting the value and desirability of the Properties and shall run with all real property subjected to this Declaration. They shall be binding on the Corporation and all other parties having any right, title, or interest in the described Properties or any part thereof, their heirs, successors, and assigns....

"Further, Article XIII, Section 1 of the 1984 Declaration states that the Declaration would automatically extend for successive ten-year periods unless the majority of the FSD owners signed an instrument terminating the Declaration. There have been no filings to terminate the 1984 Declaration. Thus, at the time Plaintiff purchased the Property in 2015, the 1984 Declaration was in effect and subject to any amendments approved by a majority of the stockholders.

"Significantly, the 1984 Declaration included mandatory provisions requiring that all lots within the Four Seasons neighborhood be devoted exclusively to residential use. Article 1, Section 7 defined 'Lot' as follows: ' 'Lot' or 'Lots' shall mean a portion or portions of the Properties made subject to the terms and conditions of this Declaration and intended for any type of independent ownership for construction and *use as a residence by a single family.*' (Emphasis added). Further, Article XII, Section 1(a), titled 'Use Restrictions,' stated:

> Except as otherwise provided in this Declaration, *each Lot shall be used for residential and no other purposes.* There shall not be constructed or maintained upon any Lot [any] duplex or multi-unit structure. Except as otherwise provided in [this] Declaration, the Common Area shall be used for recreational, [illegible], and other purposes directly related to the single-family use [of] the Lots authorized hereunder.

"(Emphasis added).

"Subsection (j) of Article XII also prohibited any 'nonresidential use' of the lots. In pertinent part it stated:

> [*N*]*o* gainful profession, occupation, trade or *other nonresidential use shall be conducted in any Lot or upon the Common Area of any portion thereof*, provided that this restriction shall not prohibit consultations, conferences, or the transaction of business by telephone or other electronic devices

"(Emphasis added).

"As previously discussed, the 1984 Declaration was in effect when Plaintiff purchased the Property in July 2015. Accordingly, the question is whether the 1984 Declaration prohibits Plaintiff's short-term renting of the Property."

"For its part, FSD contends that, though the 1984 Declaration expressly states that the use of the lots within Four Seasons shall be solely for residential purposes, Plaintiff has never used his property as a residence for himself or his family, only as a business. More specifically, FSD contends that Plaintiff's use of the Property as a short-term vacation rental is in violation of the residential-use-only restriction. In making this argument, FSD principally relies on this court's decision in *Shields Mountain Property Owners Ass'n, Inc. v. Teffeteller*, No. E2005-00871-COA-R3-CV, 2006 WL 408050 (Tenn. Ct. App. Feb. 22, 2006). In *Teffeteller*, we considered whether a restrictive covenant stating that '[a]ll lots shall be used for *residential purposes exclusively*' prohibited a landowner from renting his property on a short-term basis. *Id.* at *1 (emphasis added). Following a thorough analysis, we determined that such language prohibited short-term vacation rentals because, while 'the length of the stay by itself is not dispositive of whether a use is residential,' the landowner's renters were 'using the property for "the most temporary convenience of shelter in the course of a brief stay in the area."' *Id.* at *4 (quoting *Parks*, 567 S.W.2d at 469). Further, we concluded that 'while [renters] may well eat, sleep, relax, and bathe while there, they do not reside there. Instead ... renters use the property in the same way that people use a motel.' *Id.*

"Almost identically, the 1984 Declaration at issue here restricts Plaintiff's use of the Property, his lot and cabin, to residential uses. This is evident from the provision that states: 'each Lot shall be used for residential and no other purposes.' In our view, the phrase 'no other purposes' is no different from 'exclusively,' as both clearly indicate an intent to prohibit any non-residential use. As the trial court correctly found, while the 1984 Declaration does not expressly prohibit short-term rentals, it expressly prohibits any short-term rental that is not *residential* in nature. *See Teffeteller*, 2006 WL 408050, at *4. Thus, the relevant inquiry is whether Plaintiff's renters are using the Property on a short-term residential basis or as a short-term vacation rental. *See id.*

"Like *Teffeteller*, and as the trial court noted, the nature of Plaintiff's use of the Property is not residential. Though Plaintiff argues that this case is distinguishable from *Teffeteller* because renters are not using the Property 'like a motel,' there is no meaningful difference between how renters in *Teffeteller* used that property and how Plaintiff's renters use his property. The undisputed facts establish that immediately after purchasing his lot in 2015, Plaintiff engaged Center Hill Chalets, a property management company that leases the Property as a short-term vacation rental for those visiting the area. It is also undisputed that Center Hill Chalets advertises Plaintiff's lot on as many as 25 different short-term vacation rental websites, requiring a minimum of a two-night stay and a maximum of 28 nights. To facilitate each rental, the management company provides key code access to short-term renters to access Plaintiff's cabin as well as laundry and cleaning services. It also provides concierge services for the renters. After each rental, the management company resets the cabin in preparation for the next renter. When considered in concert, these facts clearly show that Plaintiff's renters are using the Property for 'the most temporary convenience of shelter in the course of a brief stay in the area.' *Id.* at *4 (quoting *Parks*, 567 S.W.2d at 469). Thus, based on the undisputed facts, we find no meaningful difference between Plaintiff's renters and those in *Teffeteller*."

"For the reasons stated above, the trial court correctly found that the 1984 Declaration precludes Plaintiff from leasing the Property as a non-residential vacation rental and, based on the material facts, which are undisputed, FSD was entitled to summary judgment as a matter of law based on the restrictive covenants in the 1984 Declaration."

"In pertinent part, the 2018 Amendment states:

> Leasing homes owned by FSDC shareholders shall be allowed with the following stipulations:
>
> i. The length of the lease must be for a minimum of 30 consecutive days.
> * * *
> ix. Any owner engaged in leasing or subleasing activities as of the date of this amendment shall be allowed to continue leasing or subleasing activities until the expiration of the term of said lease or said lot is sold or conveyed to a third party. No lease or sublease term extensions are permitted. In order to ascertain the expiration date of current leases, any owner who is leasing as of the date of this Third Amendment shall provide a copy of the lease to the FSDC Board's secretary within two weeks of the date this Third Amendment is filed with the DeKalb County Register of Deeds' office.
>
> x. Owners shall remain responsible for all activities of their lessees.

"(Emphasis added).

"Acting on FSD's motion for summary judgment, the trial court determined that 'the 2018 Amendment to the Declaration of Covenants, Conditions and Restrictions bars [Plaintiff] from short term leasing his property for less than thirty (30) days' and that Plaintiff was in violation of the 2018 Amendment 'by short term renting/leasing his property for less than thirty days at a time.'

"Plaintiff challenges this ruling on three principal fronts. First, he contends the 1984 Declaration and the 2018 Amendment are unenforceable because the time-limited covenants in the 1967 and 1974 covenants had expired. Second, he contends the 2018 Amendment is unenforceable because Tennessee courts abhor the retroactive application of substantive restrictions on real property. Finally, he contends he is exempt from the thirty-day minimum leasing restriction based on a grandfathering provision in subsection (ix.) of the 2018 Amendment."

"Plaintiff contends that our Supreme Court's recent decision in *Phillips v. Hatfield*, 624 S.W.3d 464 (Tenn. 2021) 'breathed new life into the issue of time-limited covenants, such as the 1967 and 1974 covenants at issue here.' We find Plaintiff's reliance on *Phillips* in the context of this issue misplaced because the material facts in this case are readily distinguishable from those in *Phillips*."

"FSD contends the 2018 Amendment is valid and enforceable for three reasons, two of which we address below. First, FSD relies on the undisputed fact that Plaintiff had notice when he purchased his lot that the Property was subject to restrictive covenants that could be amended by a majority vote of the stockholders. Second, Plaintiff is bound by the contractual provisions in the 1984 Declaration, which includes collective decision making by the stockholders of FSD, also known as community association governance. *See Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 476 (Tenn. 2012)."

"Plaintiff purchased the Property subject to, and with notice of, the 1984 Declaration, which provided a mechanism by which FSD's stockholders could enact amendments. The 1984 Declaration specifically provides that any such amendment will be binding on the existing stockholders and their lots. The 2018 Amendment was approved by a majority of the stockholders, and it was duly recorded with the Register of Deeds shortly thereafter. Accordingly, the Property, as well as Plaintiff's use of the Property, is subject to the 2018 Amendment."

"Lastly, we acknowledge Plaintiff's alternative argument that he is exempt from the new restriction that 'the length of the lease must be for a minimum of 30 consecutive days,' based on a grandfathering provision in subsection (ix.) in the 2018 Amendment and the undisputed fact that Plaintiff has not sold the Property. The provision Plaintiff relies on reads in pertinent part:

> xi. Any owner engaged in leasing or subleasing activities as of the date of this amendment shall be allowed to continue leasing or subleasing activities until the expiration of the term of said lease or said lot is sold or conveyed to a third party. No lease or sublease term extensions are permitted. In order to ascertain the expiration date of current leases, any owner who is leasing as of the date of this Third Amendment shall provide a copy of the lease to the FSDC Board's secretary within two weeks of the date this Third Amendment is filed with the DeKalb County Register of Deeds' office."

"Having construed the meaning of subsection (ix.), we agree with FSD's conclusion that subsection (ix.) has two triggering events. First, the expiration of the lease, 'said lease,' in effect when the 2018 Amendment went into effect on July 24, 2018. Second, when the current owner of a lot sells or conveys his or her lot to another. Thus, the occurrence of either of these triggering events extinguishes the lot owner's authority to lease his or her property except as provided under the 2018 Amendment, including the provision that the length of future lease 'must be for a minimum of 30 consecutive days.'

"Because it is undisputed that Plaintiff rented his property for periods of no more than 28 days, Plaintiff's last lease would have expired, at the latest, within 28 days of the 2018 Amendment going into effect. Moreover, Plaintiff's reliance on the fact that he has not sold the Property is unavailing. Accordingly, Plaintiff is bound by the provision in the 2018 Amendment requiring that 'the length of the lease must be for a minimum of 30 consecutive days.'

"For the foregoing reasons, we affirm the trial court's determination that 'the 2018 Amendment to the Declaration of Covenants, Conditions and Restrictions bars [Plaintiff] from short term leasing his property for less than thirty (30) days.'"

III. Action to Quiet Title

Garabrant v. Chambers, No. E2021-00128-COA-R3-CV (Tenn. Ct. App., Frierson, Feb. 1, 2022).

"The plaintiff, Adam Garabrant, filed a complaint in the Scott County Chancery Court ('trial court') on March 27, 2019, seeking a declaratory judgment concerning the ownership of a parcel of unimproved real property located in Scott County, Tennessee ('the disputed property'). Mr. Garabrant named Jeffery and Jennifer Chambers as defendants. In his complaint, Mr. Garabrant stated that he was the title owner of a parcel of real property, consisting of approximately

twenty-one acres, which he purchased via a quitclaim deed in 2006. Mr. Garabrant also averred that he had a survey completed of the property in 2017 and that he recorded the survey in 2018.

"Mr. Garabrant claimed that in 2016, he discovered that timber had been cut from his property without his permission. According to Mr. Garabrant, McCreary County Hardwoods, Inc. ('MCH') owned a parcel of adjoining property, which it had quitclaimed to Charles Stephens on October 3, 2016. Mr. Garabrant subsequently filed suit in the Scott County Circuit Court ('circuit court') against MCH and Mr. Stephens, claiming that those parties had trespassed and cut trees on Mr. Garabrant's property. According to Mr. Garabrant's instant complaint, Mr. Stephens did not answer the complaint filed in circuit court, resulting in a default judgment being entered against him on March 13, 2018.

"Mr. Garabrant further alleged in his complaint that following entry of the default judgment in circuit court, Mr. Stephens executed a warranty deed conveying title to his property to the Chamberses, who subsequently obtained and recorded a survey of the property. Mr. Garabrant stated that on January 30, 2019, he received a letter from the Scott County Assessor of Property, indicating that Mr. Garabrant's survey and the survey recorded by the Chamberses created a conflict in real property ownership relevant to Mr. Garabrant's parcel. Mr. Garabrant thus sought a declaratory judgment establishing his ownership of the disputed property, based upon his deed or, alternatively, the doctrine of adverse possession predicated on payment of taxes. Mr. Garabrant attached copies of the various deeds and survey maps to his complaint."

"[After a trial] the trial court entered a judgment on January 12, 2021, dismissing Mr. Garabrant's complaint. Mr. Garabrant timely appealed."

"Mr. Garabrant's first three issues focus on his overarching assertion that the trial court erred by permitting Defendants to challenge or collaterally attack the Clerk and Master's deed issued to Mr. Garabrant's predecessor in title following a 1981 tax sale. Mr. Garabrant points out, pursuant to Tennessee Code Annotated § 67-5-2504 (2018), that a 'tax deed of conveyance' provides 'an assurance of perfect title to the purchaser of such land,' which 'shall [not] be invalidated in any court' except in limited circumstances. As Mr. Garabrant further posits, our Supreme Court has held that 'every reasonable presumption should be indulged in to uphold such a conveyance.' *Sheafer v. Mitchell*, 109 Tenn. 181, 71 S.W. 86, 94 (Tenn. 1902).

"As the trial court noted in its December 14, 2020 order, however, Defendants have not sought to invalidate Mr. Garabrant's predecessor's tax deed or the tax sale. Rather, Mr. Garabrant has invoked Tennessee Code Annotated § 67-5-2504 as a means of affording him perfect title to the disputed property. However, as the trial court concluded, the inquiry is not whether Mr. Garabrant owns a parcel of real property, as conveyed by his deed and the tax deed from which it was derived, because he clearly does. Rather, the question that the trial court was tasked with answering was whether Mr. Garabrant's property is located on or near the disputed property, which the Chamberses also claim to own.

"Mr. Garabrant contends that his deed and the 1983 Clerk and Master's deed following the tax sale provide that he owns the real property depicted by Tax Map 11, Parcel 14. The proof presented at trial demonstrated that the 1983 Clerk and Master's deed to Charles Neal and R.G. Cravens referenced a 1981 sale of the property for unpaid taxes wherein the G.W. King Estate was the defendant. As for the description of the property being conveyed, the 1983 Clerk and Master's deed

simply references, 'Map 11 Parcel 1400.' Notably, the 1981 order of sale from the Scott County Chancery Court, also naming the G.W. King Estate as the defendant, describes the property as:

> Bounded on the North by land of Reed, Bounded on the South by land of Trammell, Bounded on the East by land of Trammell, Bounded on the West by land of King.

"Beneath the property description, the order contains a handwritten note, stating, 'Map 011, Parcel 1400.'"

"Mr. Garabrant testified that when he purchased his property in 2006, he did not have a survey performed. Mr. Garabrant articulated that he had visited the property approximately two times per year on average since then and had enjoyed camping and riding all-terrain vehicles thereon. He further related that he had placed no signs, boundary markers, fences, or structures on the property. According to Mr. Garabrant, once he discovered someone cutting trees on the disputed property, he hired James Phillips with Innovative Reclamation Technologies & Engineering Co., Inc. ('IRTEC') to conduct a survey.

"Mr. Phillips testified at trial, explaining that he was asked to establish the eastern boundary of Mr. Garabrant's property. According to Mr. Phillips, he visited the property on one occasion. He also reviewed the deeds in Mr. Garabrant's chain of title back to the 1983 Clerk and Master's deed; a prior survey of an adjoining parcel commissioned by TKY Acquisitions, LLC, in 2009 and performed by IRTEC; and the tax map. Mr. Phillips explained that inasmuch as the 1983 Clerk and Master's deed described the property by referencing the tax map and parcel number, he viewed the tax map as a good source of information for locating the property.

"Mr. Phillips acknowledged that he did not personally walk all of the property lines before completing his survey; rather, he concentrated on the area he was requested to determine, specifically locating the northeast corner. Mr. Phillips further testified that although he initially believed that Mr. Garabrant's property was part of the property belonging to the G.W. King Estate, he now opined that Mr. Garabrant's property derived from William King's property. However, he acknowledged that he had never found a deed to William King.

"Mr. Phillips testified additionally that the property of G.W. King appeared to exist south of Capuchin Road, which would place it approximately 8,200 feet from the disputed property. He also related, however, that he believed that G.W. King or his estate had been assessed for property in a different location than that of the tract that G.W. King or his estate owned. Although Mr. Phillips explained that he had not 'gone behind' the Clerk and Master's deed and did not consider the order of sale to be relevant, he acknowledged that the description of the property in the order of sale was different than that contained in the subsequent deeds. Mr. Phillips was unable to reconcile the varying deed descriptions of Mr. Garabrant's predecessors in title. Mr. Phillips also agreed that the location of Parcel 14 of Tax Map 11 had changed somewhat from the original 1970s tax map depiction to the present version."

"Surveyor Jim Reed testified on behalf of Defendants, stating that he had been asked to perform a survey for MCH before learning that surveyor Jonathan Boyatt had been retained to complete a survey for the Chamberses. Mr. Reed testified that he had reviewed all of the deeds in the chain of title for the Chamberses' property back to the original land grants. Inasmuch as the area had been the subject of a dispute between Tennessee and Kentucky concerning the proper placement of the state line sometime in the 1800s, Mr. Reed included that he had researched records in both

Tennessee and Kentucky. Mr. Reed also related that he had reviewed the deeds in Mr. Garabrant's chain of title, aerial photographs of the area, other surveys, and tax maps.

"Respecting tax maps, Mr. Reed elaborated:

> All tax maps are wrong to some degree. Maybe a foot, maybe ten feet, maybe 8,000 feet. They're not intended to represent the actual lands. They're just a guidance for the tax assessor to send out tax cards on. So we rely on them to get a general location and to hopefully get the correct owners. But many times you find out that they're very much flawed. So they're not reliable for surveys.

"Mr. Reed further testified that the respective tax maps had changed in recent years, such that Parcel 14 on Tax Map 11 was not in the same location as it once was."

"The Chamberses' surveyor, Mr. Boyatt, testified at trial and presented his survey performed of the Chamberses' property. Mr. Boyatt stated that when gathering information for his survey, he travelled to the property fifteen to twenty times, spanning a six-week period, and walked the entire boundary of the Chamberses' property as well as the property claimed by Mr. Garabrant. Mr. Boyatt reported that he had reviewed the deeds in the Chamberses' chain of title back to the original land grant as well as the previous surveys performed for TKY Acquisitions, Inc., and Mr. Webb.

"Mr. Boyatt explained that although the Chamberses' deed description omitted some information, he was able to utilize earlier deeds in the chain that had complete descriptions to provide missing information. Mr. Boyatt opined that the area depicted on Tax Map 11 as Parcel 14 was actually a part of the Chamberses' property. Moreover, Mr. Boyatt did not agree with Mr. Phillips's survey because Mr. Boyatt found clear markers on the ground for the lines he established while the line claimed by Mr. Garabrant on Mr. Phillips's survey maintained no markers on the ground. Mr. Boyatt agreed with Mr. Reed's opinion that Mr. Garabrant's property was actually located some 8,000 feet away.

"The trial court credited the weight of Mr. Boyatt's testimony and his survey, finding that the Chamberses owned title to the disputed property. Based upon our thorough review, we conclude that the evidence does not preponderate against that finding. The trial court's ruling neither invalidates the 1983 Clerk and Master's deed nor any subsequent deed in Mr. Garabrant's chain of title; rather, the court's ruling simply decrees that Mr. Garabrant's property is not in the same location as the disputed property. In other words, Mr. Garabrant still owns title to his real property, but the location of his tract is not where he believed it to exist."

"The trial court determined the process of Mr. Boyatt's survey to be more credible, noting that it was corroborated by the testimony of Mr. Reed. Both of these expert witnesses researched the Chamberses' chain of title back to the land grant from the State of Kentucky. Mr. Boyatt accomplished multiple visits to the property, walking the lines of the Chamberses' tracts, as well as the tract claimed by Mr. Garabrant, and searching for monuments and other line indicia noted in the deeds. Mr. Boyatt testified that he found such indicia consistent with the lines he drew but not along the lines claimed by Mr. Garabrant. Moreover, Mr. Boyatt's survey was consistent with the deeds in the Chamberses' chain of title and with previous surveys performed in the area.

"In contrast, Mr. Phillips testified that he saw no need to look beyond the 1983 Clerk and Master's deed in analyzing Mr. Garabrant's chain of title. Moreover, Mr. Phillips did not walk the perimeter

of the property lines when completing his survey, focusing his attention solely on one boundary and placing emphasis on the tax map location. As such, we conclude that the trial court properly credited Mr. Boyatt's testimony and survey in determining that the Chamberses owned the disputed property."

"Mr. Garabrant alternatively relies upon Tennessee Code Annotated § 28-2-109 (2017) as providing him ownership of the disputed property. This statute states:

> Any person holding any real estate or land of any kind, or any legal or equitable interest therein, who has paid, or who and those through whom such person claims have paid, the state and county taxes on the same for more than twenty (20) years continuously prior to the date when any question arises in any of the courts of this state concerning the same, and who has had or who and those through whom such person claims have had, such person's deed, conveyance, grant or other assurance of title recorded in the register's office of the county in which the land lies, for such period of more than twenty (20) years, shall be presumed prima facie to be the legal owner of such land.

"According to Mr. Garabrant, because he and his predecessors in title have paid taxes on Parcel 14 from Tax Map 11 for more than twenty years and have had deeds to the same parcel recorded in the register's office for more than twenty years, he must be presumed to be the owner of the disputed property.

"The trial court determined that although Mr. Garabrant and his predecessors had paid taxes on Parcel 14 from Tax Map 11 for more than twenty years, the location of his property was in dispute. The court further found that Defendants and their predecessors had also paid taxes on their parcels, which they believed to contain the disputed property, for more than twenty years. The trial court specifically determined that the 'actual land that Plaintiff has paid taxes on is in a different location.' The evidence supports these findings.

"The trial court accordingly concluded that the presumption of ownership provided in Tennessee Code Annotated § 28-2-109 had been rebutted. Based on our thorough review of the evidence, we agree."

IV. Partition; Uniform Partition of Heirs Property Act

Chapter 1109, Public Acts 2022, adding T.C.A. §§ 29-27-301–313 eff. July 1, 2022.

"29-27-301. Short title.

"This part is known and may be cited as the 'Uniform Partition of Heirs Property Act.'

"29-27-302. Part definitions.

"As used in this part:

(1) 'Ascendant' means an individual who precedes another individual in lineage, in the direct line of ascent from the other individual;

(2) ‘Collateral’ means an individual who is related to another individual under the law of intestate succession of this state but who is not the other individual's ascendant or descendant;
(3) ‘Descendant’ means an individual who follows another individual in lineage, in the direct line of descent from the other individual;
(4) ‘Determination of value’ means a court order determining the fair market value of heirs property under § 29–27–306 or § 29–27–310 or adopting the valuation of the property agreed to by all cotenants;
(5) ‘Heirs property’ means real property held in tenancy in common that satisfies all of the following requirements as of the filing of a partition action:
(A) There is no agreement in a record binding all the cotenants that governs the partition of the property;
(B) One (1) or more of the cotenants acquired title from a relative, whether living or deceased; and
(C) Any of the following applies:
(i) Twenty percent (20%) or more of the interests are held by cotenants who are relatives;
(ii) Twenty percent (20%) or more of the interests are held by an individual who acquired title from a relative, whether living or deceased; or
(iii) Twenty percent (20%) or more of the cotenants are relatives;
(6) ‘Partition by sale’ means a court-ordered sale of the entire heirs property, whether by auction, sealed bids, or open-market sale conducted under § 29–27–310;
(7) ‘Partition in kind’ means the division of heirs property into physically distinct and separately titled parcels;
(8) ‘Record’ means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and
(9) ‘Relative’ means an ascendant, descendant, or collateral or an individual otherwise related to another individual by blood, marriage, adoption, or law of this state other than this part.”

* * *

“29-27-306. Determination of value.

“(a) Except as otherwise provided in subsections (b) and (c), if the court determines that the property that is the subject of a partition action is heirs property, then the court may consider the county's tax appraised value. If an objection to the tax appraisal is filed by a party within thirty (30) days of receipt of the appraisal, then the court shall determine the fair market value of the property by ordering an appraisal pursuant to subsection (d).

“(b) If all cotenants have agreed to the value of the property or to another method of valuation, then the court shall adopt that value or the value produced by the agreed method of valuation.

“(c) If the court determines that the evidentiary value of an independent appraisal is outweighed by the cost of the appraisal, then the court, after an evidentiary hearing, shall determine the fair market value of the property and send notice to the parties of the value.

“(d) If the court orders an appraisal, then the court shall appoint a disinterested real estate appraiser licensed in this state to determine the fair market value of the property, assuming sole ownership of the fee simple estate. On completion of the appraisal, the appraiser shall file a sworn or verified appraisal with the court.

"(e) If an appraisal is conducted pursuant to subsection (d), then the plaintiff shall send notice to each party with a known address no later than ten (10) days after the appraisal is filed, stating:

(1) The appraised fair market value of the property;
(2) That the appraisal is available at the clerk's office; and
(3) That a party may file with the court an objection to the appraisal no later than thirty (30) days after the notice is sent, stating the grounds for the objection.

"(f) If an appraisal is filed with the court pursuant to subsection (d), then upon motion of a party, the court shall conduct a hearing to determine the fair market value of the property no sooner than thirty (30) days after a copy of the notice of the appraisal is sent to each party under subsection (e), regardless if an objection to the appraisal is filed under subdivision (e)(3). In addition to the court-ordered appraisal, the court may consider other evidence of value offered by a party.

"(g) After a hearing under subsection (f), but before considering the merits of the partition action, the court shall determine the fair market value of the property and send notice to the parties of the value.

"29-27-307. Cotenant buyout.

"(a) If any cotenant requested partition by sale, then the plaintiff shall send notice to the parties after the determination of value under § 29–27–306 that any cotenant, except a cotenant that requested partition by sale, may buy all the interests of the cotenants that requested partition by sale.

"(b) No later than forty-five (45) days, or a time period as set in the court's discretion, after the notice is sent under subsection (a), any cotenant, except a cotenant that requested partition by sale, may file notice with the court and serve notice to all parties that the cotenant elects to buy all the interests of the cotenants that requested partition by sale.

"(c) The purchase price for each of the interests of a cotenant that requested partition by sale is the value of the entire parcel determined under § 29–27–306 multiplied by the cotenant's fractional ownership of the entire parcel.

"(d) After expiration of the period in subsection (b), a party may move the court to set a hearing to determine the allocation of the interests, subject to the following rules:

(1) If only one (1) cotenant elects to buy all the interests of the cotenants that requested partition by sale, then the court shall notify all the parties of that fact at the hearing;
(2) If more than one (1) cotenant elects to buy all the interests of the cotenants that requested partition by sale, then the court shall allocate the right to buy those interests among the electing cotenants based on each electing cotenant's existing fractional ownership of the entire parcel divided by the total existing fractional ownership of all cotenants electing to buy and send notice to all the parties of that fact and of the price to be paid by each electing cotenant; and
(3) If no cotenant elects to buy all the interests of the cotenants that requested partition by sale, then, at the hearing, the court shall order the plaintiff to send notice to all the parties of that fact and resolve the partition action under § 29–27–308(a) and (b)."

* * *

"(f) At a hearing no later than twenty (20) days after the notice is given pursuant to subdivision (e)(3), or a time period as set in the court's discretion, any cotenant that paid may elect to purchase

all of the remaining interest by paying the entire price to the court. At the hearing, the following rules apply:

(1) If only one (1) cotenant pays the entire price for the remaining interest, then the court shall issue an order reallocating the remaining interest to that cotenant. The court shall issue an order reallocating the interests of all of the cotenants and disburse the amounts held by the court to the persons entitled to the amounts;

(2) If no cotenant pays the entire price for the remaining interest, then the court shall resolve the partition action under § 29–27–308(a) and (b), as if the interests of the cotenants that requested partition by sale were not purchased; and

(3) If more than one (1) cotenant pays the entire price for the remaining interest, then the court shall reapportion the remaining interest among those paying cotenants, based on each paying cotenant's original fractional ownership of the entire parcel divided by the total original fractional ownership of all cotenants that paid the entire price for the remaining interest. The court shall issue an order reallocating all of the cotenants' interests, disburse the amounts held by the court to the persons entitled to the amounts, and refund any excess payment held by the court.

"(g) No later than forty-five (45) days, or a time period as set in the court's discretion, after the notice is sent to the parties pursuant to subsection (a), any cotenant entitled to buy an interest under this section may move the court to set a hearing to authorize the sale as part of the pending action of the interests of cotenants named as defendants and served with the complaint but that did not appear in the action.

"(h) If the court receives a timely motion under subsection (g), then the court, after a hearing, may deny the motion or authorize the requested additional sale on terms as the court determines are fair and reasonable, subject to the following limitations:

(1) A sale authorized under this subsection (h) may occur only after the purchase prices for all interests subject to sale under subsections (a)–(f) have been paid to the court and those interests have been reallocated among the cotenants as provided in subsections (a)–(f); and

(2) The purchase price for the interest of a nonappearing cotenant is based on the court's determination of value under § 29–27–306.

"29-27-308. Partition alternatives.

"(a) If all the interests of all cotenants that requested partition by sale are not purchased by other cotenants pursuant to § 29–27–307, or if after conclusion of the buyout under § 29–27–307, a cotenant remains that has requested partition in kind, then upon motion and hearing, the court may order partition in kind unless the court, after consideration of the factors listed in § 29–27–309, finds that partition in kind will result in great prejudice to the cotenants as a group. In considering whether to order partition in kind, the court shall approve a request by two (2) or more parties to have their individual interests aggregated.

"(b) If, at the hearing, the court does not order partition in kind under subsection (a), then the court shall order partition by sale pursuant to § 29–27–310 or, if no cotenant requested partition by sale, the court shall dismiss the action.

"(c) If, at the hearing, the court orders partition in kind pursuant to subsection (a), then the court may require that one (1) or more cotenants pay one (1) or more other cotenants amounts so that the

payments, taken together with the value of the in-kind distributions to the cotenants, will make the partition in kind just and proportionate in value to the fractional interests held.

(d) If the court orders partition in kind, then the court may allocate to the cotenants that are unknown, unbeatable, or the subject of a default judgment, if their interests were not bought out pursuant to § 29–27–307, a part of the property representing the combined interests of these cotenants, as determined by the court, and this part of the property must remain undivided. . . ."

V. Landlord and Tenant; Writ of Possession; Bond Upon Appeal by Tenant

Chapter 817, Public Acts 2022, amending T.C.A. § 29-18-130(b)(2) eff. Apr. 8, 2022.

"(2) (A) If the defendant prays an appeal, then the defendant must execute bond, or post either a cash deposit or irrevocable letter of credit from a regulated financial institution, or provide two (2) good personal sureties with good and sufficient security in the amount of one (1) year's rent of the premises, conditioned to pay all costs and damages accruing from the failure of the appeal, including rent and interest on the judgment as provided for in this section, and to abide by and perform whatever judgment may be rendered by the appellate court in the final hearing of the cause.

(B) The plaintiff is not required to post a bond to obtain possession if the defendant appeals without complying with this subdivision (b)(2). The plaintiff is entitled to interest on the judgment, which accrues from the date of the judgment if the defendant's appeal fails."

VI. Time Share; Mutual Rights of Cancellation; Notice by E-Mail

Chapter 835, Public Acts 2022, amending T.C.A. § 66-32-114(c) eff. Jan. 1, 2023.

"(c) If either party elects to cancel a contract pursuant to subsection (a) or (b), then that party may do so by:

(1) Hand delivering notice of cancellation to the other party within the designated period for voiding the contract;

(2) Mailing notice of cancellation by prepaid United States mail, postmarked anytime within the designated period for voiding the contract, to the other party or to the other party's agent for service of process; or

(3) Sending notice of cancellation via electronic mail, time stamped within the designated period for voiding the contract to the other party.

"(d) The purchaser and the developer shall not waive the rescission rights set forth in subsections (a) and (b)."

VII. Planning Commissions; No Unconstitutional Takings Permitted

Chapter 1128, Public Acts 2022, adding T.C.A. §§ 13-3-403(d) and 13-4-303(d) eff. July 1, 2022.

13-3-403(d).

"(d) (1) In exercising the powers granted to it by § 13–3–402, a regional planning commission shall not require an owner of private property to dedicate real property to the public, or pay money to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an essential nexus between the dedication or payment and a legitimate local governmental interest and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of the property. An owner of private property required to make a dedication or pay money in violation of this subdivision (d)(1) may seek relief through a common law writ of certiorari in chancery court.

(2) Regulations adopted by regional planning commissions pursuant to this section must include the provisions in subdivision (d)(1).

(3) This subsection (d) does not apply to an assessment, fee, or charge that is imposed on a broad class of property owners by a local governmental entity."

13-4-303(d).

"(d) (1) In exercising the powers granted to it by § 13–4–302, the planning commission shall not require an owner of private property to dedicate real property to the public, or pay money to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an essential nexus between the dedication or payment and a legitimate local governmental interest and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of the property. An owner of private property required to make a dedication or pay money in violation of this subdivision (d)(1) may seek relief through a common law writ of certiorari in chancery court.

(2) Regulations adopted by planning commissions pursuant to this section must include the provisions in subdivision (d)(1).

(3) This subsection (d) does not apply to an assessment, fee, or charge that is imposed on a broad class of property owners by a local governmental entity."

ENVIRONMENTAL LAW

I. Equitable Apportionment of Water

State of Mississippi v. Tennessee, 142 S.Ct. 31 (U.S., Roberts, 2021).

"Mississippi brought an original action against Tennessee for damages and other relief related to the pumping of groundwater by the City of Memphis from the Middle Claiborne Aquifer, a valuable water resource that lies beneath eight States. Mississippi argues that Tennessee's pumping—using wells Mississippi concedes are located entirely in Tennessee—siphons water away from Mississippi and amounts to a tortious taking of groundwater owned by Mississippi. Mississippi expressly disclaims any equitable apportionment remedy, arguing that the 'fundamental premise of this Court's equitable apportionment jurisprudence—that each of the opposing States has an equality of right to use the waters at issue—does not apply to this dispute.' Complaint ¶49. The Special Master appointed by the Court to assess Mississippi's claims determined that the aquifer is an interstate water resource and that equitable apportionment is the exclusive judicial remedy. Because Mississippi's complaint did not seek equitable apportionment, the Special Master recommended that the Court dismiss the complaint but grant Mississippi leave to amend. Mississippi challenges the recommendation to dismiss; Tennessee objects to the recommendation to grant Mississippi leave to file an amended complaint.

"Held: The waters of the Middle Claiborne Aquifer are subject to the judicial remedy of equitable apportionment; Mississippi's complaint is dismissed without leave to amend."

"(a) The doctrine of equitable apportionment aims to produce a fair allocation of a shared water resource between two or more States, see *Colorado* v. *New Mexico*, 459 U.S. 176, 183, 103 S.Ct. 539, 74 L.Ed.2d 348, based on the principle that States have an equal right to reasonable use of shared water resources. *Florida* v. *Georgia*, 592 U.S. ——, ——, 41 S.Ct. 1175, 209 L.Ed.2d 301. The Court has applied the doctrine to interstate rivers and streams, see *South Carolina* v. *North Carolina*, 558 U.S. 256, 130 S.Ct. 854, 175 L.Ed.2d 713, to disputes over interstate river basins, see *Florida* v. *Georgia*, 585 U.S. ——, ——, 138 S.Ct. 2502, 201 L.Ed.2d 871, and in situations where the pumping of groundwater has affected the flow of interstate surface waters, see *Nebraska* v. *Wyoming*, 515 U.S. 1, 14, 115 S.Ct. 1933, 132 L.Ed.2d 1. The Court has also applied the doctrine to anadromous fish that migrate between the Pacific Ocean and spawning grounds in the Columbia-Snake River system, 'travel[ing] through several States during their lifetime.' *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017, 1018–1019, 1024, 103 S.Ct. 2817, 77 L.Ed.2d 387.

"The Court has not before addressed whether equitable apportionment applies to interstate aquifers. Equitable apportionment of the Middle Claiborne Aquifer is 'sufficiently similar' to past applications of the doctrine to warrant the same treatment, for several reasons. *Id.*, at 1024, 103 S.Ct. 2817. First, the Court has applied equitable apportionment when transboundary water resources were at issue. Here the Middle Claiborne Aquifer's 'multistate character' seems beyond dispute. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 953, 102 S.Ct. 3456, 73 L.Ed.2d 1254. Second, the Middle Claiborne Aquifer contains water that flows naturally between the States, and the Court's equitable apportionment cases have all concerned such water, *Kansas* v. *Colorado*, 206 U.S. 46, 98, 27 S.Ct. 655, 51 L.Ed. 956, or fish that live in it, *Idaho ex rel. Evans*, 462 U.S., at 1024, 103 S.Ct. 2817. While Mississippi contends the natural transboundary flow of the Middle Claiborne Aquifer is slower than some streams and rivers, the Court has applied equitable

apportionment even to streams that run dry from time to time. See *Kansas*, 206 U.S., at 115, 27 S.Ct. 655. The speed of the flow does not place the aquifer beyond equitable apportionment. Finally, actions taken in Tennessee to pump water from the aquifer clearly have effects on the portion of the aquifer that underlies Mississippi. Tennessee's pumping has contributed to a cone of depression that extends miles into northern Mississippi, and Mississippi itself contends that this cone of depression has reduced groundwater storage and pressure in northern Mississippi. Such interstate effects are a hallmark of the Court's equitable apportionment cases, see, *e.g., Florida*, 592 U.S., at ——, 141 S.Ct., ——. For all these reasons, the Court holds that the judicial remedy of equitable apportionment applies to the waters of the Middle Claiborne Aquifer."

"(b) The Court rejects Mississippi's contention that it has a sovereign ownership right to all water beneath its surface that precludes application of equitable apportionment. The Court has 'consistently denied' the proposition that a State may exercise exclusive ownership or control of interstate 'waters flowing within her boundaries.' *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102, 58 S.Ct. 803, 82 L.Ed. 1202. Although the Court's past equitable apportionment cases have generally concerned streams and rivers, no basis exists for a different result in the context of the Middle Claiborne Aquifer. To the contrary, Mississippi's ownership approach would allow an upstream State to completely cut off flow to a downstream one, a result contrary to the Court's equitable apportionment jurisprudence. The Court's decision in *Tarrant Regional Water Dist.* v. *Herrmann*, 569 U.S. 614, 133 S.Ct. 2120, 186 L.Ed.2d 153, does not support Mississippi's position. *Tarrant* concerned whether one State could cross another's boundaries to access a shared water resource under the terms of an interstate compact. The Court did not consider equitable apportionment, because the affected States had negotiated a compact that determined their respective rights to the resource. To the extent *Tarrant* stands for the broader proposition that one State may not physically enter another to take water in the absence of an express agreement, that principle is not implicated here. The parties have stipulated all of Tennessee's wells are drilled straight down and do not cross the Mississippi-Tennessee border. While the origin of an interstate water resource may be relevant to the terms of an equitable apportionment, that feature alone cannot place the resource outside the doctrine itself. Because the waters contained in the Middle Claiborne Aquifer are subject to equitable apportionment, the Court overrules Mississippi's exceptions and adopts the Special Master's recommendation to dismiss the bill of complaint."

"(c) Mississippi has neither sought leave to amend its complaint nor tendered a proposed complaint seeking equitable apportionment. The Court does not address whether Mississippi should be granted such leave and sustains Tennessee's objection to the Special Master's recommendation to grant Mississippi leave to amend."

"Exceptions overruled in part and sustained in part, and case dismissed."

II. Clean Air Act; Clean Power Plan's Emissions Cap Exceeds EPA's Authority

West Virginia v. Environmental Protection Agency, 142 S.Ct. 2587 (U.S., Roberts, 2022).

"In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. For authority, the Agency cited Section 111 of the Clean Air Act, which, although known as the *New* Source Performance Standards program, also authorizes regulation of certain pollutants from

existing sources under Section 111(d). 42 U.S.C. § 7411(d). Prior to the Clean Power Plan, EPA had used Section 111(d) only a handful of times since its enactment in 1970. Under that provision, although the States set the actual enforceable rules governing existing sources (such as power plants), EPA determines the emissions limit with which they will have to comply. The Agency derives that limit by determining the 'best system of emission reduction ... that has been adequately demonstrated,' or the BSER, for the kind of existing source at issue. § 7411(a)(1). The limit then reflects the amount of pollution reduction 'achievable through the application of' that system. *Ibid.*

"In the Clean Power Plan, EPA determined that the BSER for existing coal and natural gas plants included three types of measures, which the Agency called 'building blocks.' 80 Fed. Reg. 64667. The first building block was 'heat rate improvements' at coal-fired plants—essentially practices such plants could undertake to burn coal more cleanly. *Id.,* at 64727. This sort of source-specific, efficiency-improving measure was similar in kind to those that EPA had previously identified as the BSER in other Section 111 rules.

"Building blocks two and three were quite different, as both involved what EPA called 'generation shifting' at the grid level—*i.e.,* a shift in electricity production from higher-emitting to lower-emitting producers. Building block two was a shift in generation from existing coal-fired power plants, which would make less power, to natural-gas-fired plants, which would make more. *Ibid.* This would reduce carbon dioxide emissions because natural gas plants produce less carbon dioxide per unit of electricity generated than coal plants. Building block three worked like building block two, except that the shift was from both coal and gas plants to renewables, mostly wind and solar. *Id.,* at 64729, 64748. The Agency explained that, to implement the needed shift in generation to cleaner sources, an operator could reduce the regulated plant's own production of electricity, build or invest in a new or existing natural gas plant, wind farm, or solar installation, or purchase emission allowances or credits as part of a cap-and-trade regime. *Id.,* at 64731–64732. Taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. *Id.,* at 64731.

"Having decided that the BSER was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining 'the degree of emission limitation achievable through the application' of that system. § 7411(a)(1). The Agency recognized that, in translating the BSER into an operational emissions limit, it could choose whether to require anything from a little generation shifting to a great deal. It settled on what it regarded as a 'reasonable' amount of shift, which it based on modeling how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. *Id.,* at 64797–64811. The Agency ultimately projected, for instance, that it would be feasible to have coal provide 27% of national electricity generation by 2030, down from 38% in 2014. From these projected changes, EPA determined the applicable emissions performance rates, which were so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of generation shifting. The Government projected that the rule would impose billions in compliance costs, raise retail electricity prices, require the retirement of dozens of coal plants, and eliminate tens of thousands of jobs.

"This Court stayed the Clean Power Plan in 2016, preventing the rule from taking effect. It was later repealed after a change in Presidential administrations. Specifically, in 2019, EPA found that the Clean Power Plan had exceeded the Agency's statutory authority under Section 111(d), which it interpreted to 'limit[ ] the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation.' 84 Fed. Reg. 32524. EPA explained that the Clean Power Plan,

rather than setting the standard 'based on the application of equipment and practices at the level of an individual facility,' had instead based it on 'a shift in the energy generation mix at the grid level,' *id.,* at 32523. The Agency determined that the interpretive question raised by the Clean Power Plan fell under the major questions doctrine. Under that doctrine, it determined, a clear statement is necessary for a court to conclude that Congress intended to delegate authority 'of this breadth to regulate a fundamental sector of the economy.' *Id.,* at 32529. It found none. The Agency replaced the Clean Power Plan by promulgating a different Section 111(d) regulation, known as the Affordable Clean Energy (ACE) rule. *Id*., at 32532. In that rule, EPA determined that the BSER would be akin to building block one of the Clean Power Plan: a combination of equipment upgrades and operating practices that would improve facilities' heat rates. *Id.,* at 32522, 32537.

"A number of States and private parties filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan and its enactment of the replacement ACE rule. The Court of Appeals consolidated the cases and held that EPA's 'repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act'—namely, that generation shifting cannot be a 'system of emission reduction' under Section 111. 985 F.3d 914, 995. The court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. It also vacated and remanded the ACE rule for the same reason. The court's decision was followed by another change in Presidential administrations, and EPA moved the court to partially stay its mandate as to the Clean Power Plan while the Agency considered whether to promulgate a new Section 111(d) rule. No party opposed the motion, and the Court of Appeals agreed to stay its vacatur of the Agency's repeal of the Clean Power Plan.

"Held:

"1. This case remains justiciable notwithstanding the Government's contention that no petitioner has Article III standing, given EPA's stated intention not to enforce the Clean Power Plan and to instead engage in new rulemaking. In considering standing to appeal, the question is whether the appellant has experienced an injury 'fairly traceable to the judgment below.' *Food Marketing Institute* v. *Argus Leader Media*, 588 U.S. —, If so, and a 'favorable ruling' from the appellate court 'would redress [that] injury,' then the appellant has a cognizable Article III stake. *Ibid.* Here, the judgment below vacated the ACE rule and its embedded repeal of the Clean Power Plan, and accordingly purports to bring the Clean Power Plan back into legal effect. There is little question that the petitioner States are injured, since the rule requires them to more stringently regulate power plant emissions within their borders. The Government counters that EPA's current posture has mooted the prior dispute. The distinction between mootness and standing matters, however, because the Government bears the burden to establish that a once-live case has become moot. The Government's argument in this case boils down to its representation that EPA does not intend to enforce the Clean Power Plan prior to promulgating a new Section 111(d) rule. But 'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1,* 551 U.S. 701, 719. Here, the Government 'nowhere suggests that if this litigation is resolved in its favor it will not' reimpose emissions limits predicated on generation shifting. *Ibid*."

"2. Congress did not grant EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan."

"(a) In devising emissions limits for power plants, EPA 'determines' the BSER that—taking into account cost, health, and other factors—it finds 'has been adequately demonstrated,' and then quantifies 'the degree of emission limitation achievable' if that best system were applied to the covered source. § 7411(a)(1). The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% to 27% coal by 2030, can be the BSER within the meaning of Section 111.

"Precedent teaches that there are 'extraordinary cases' in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority. *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 159–160. See, *e.g., Alabama Assn. of Realtors* v. *Department of Health and Human Servs.,* 594 U.S. ___, ___; *Utility Air Regulatory Group* v. *EPA,* 573 U.S. 302, 324; *Gonzales* v. *Oregon*, 546 U.S. 243, 267; *National Federation of Independent Business* v. *OSHA*, 595 U.S. ___, ___. Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to 'clear congressional authorization' for the authority it claims. *Utility Air*, 573 U.S., at 324."

"(b) This is a major questions case. EPA claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler. That discovery allowed it to adopt a regulatory program that Congress had conspicuously declined to enact itself. Given these circumstances, there is every reason to 'hesitate before concluding that Congress' meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S., at 160.

"Prior to 2015, EPA had always set Section 111 emissions limits based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, see, *e.g.*, 41 Fed. Reg. 48706—never by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources.' 80 Fed. Reg. 64726. The Government quibbles with this history, pointing to the 2005 Mercury Rule as one Section 111 rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616. But in that regulation, EPA set the emissions limit—the 'cap'—based on the use of 'technologies [that could be] installed and operational on a nationwide basis' in the relevant timeframe. *Id.,* at 28620–28621. By contrast, and by design, there are no particular controls a coal plant operator can install and operate to attain the emissions limits established by the Clean Power Plan. Indeed, the Agency nodded to the novelty of its approach when it explained that it was pursuing a 'broader, forward-thinking approach to the design' of Section 111 regulations that would 'improve the *overall power system*,' rather than the emissions performance of individual sources, by forcing a shift throughout the power grid from one type of energy source to another. 80 Fed. Reg. 64703 (emphasis added). This view of EPA's authority was not only unprecedented; it also effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation' into an entirely different kind. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.,* 512 U.S. 218, 231.

"The Government attempts to downplay matters, noting that the Agency must limit the magnitude of generation shift it demands to a level that will not be 'exorbitantly costly' or 'threaten the reliability of the grid.'. . . This argument does not limit the breadth of EPA's claimed authority so much as reveal it: On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in the basic regulation

of how Americans get their energy. There is little reason to think Congress did so. EPA has admitted that issues of electricity transmission, distribution, and storage are not within its traditional expertise. And this Court doubts that 'Congress ... intended to delegate ... decision[s] of such economic and political significance,' *i.e.,* how much coal-based generation there should be over the coming decades, to any administrative agency. *Brown & Williamson*, 529 U.S., at 160. Nor can the Court ignore that the regulatory writ EPA newly uncovered in Section 111(d) conveniently enabled it to enact a program, namely, cap-and-trade for carbon, that Congress had already considered and rejected numerous times. The importance of the policy issue and ongoing debate over its merits 'makes the oblique form of the claimed delegation all the more suspect.' *Gonzales*, 546 U.S., at 267–268."

"(c) Given that precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach, the Government must point to 'clear congressional authorization' to regulate in that manner. *Utility Air*, 573 U.S., at 324. The Government can offer only EPA's authority to establish emissions caps at a level reflecting 'the application of the best system of emission reduction ... adequately demonstrated.' § 7411(a)(1). The word 'system' shorn of all context, however, is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required. The Government points to other provisions of the Clean Air Act—specifically the Acid Rain and National Ambient Air Quality Standards (NAAQS) programs—that use the word 'system' or 'similar words' to describe sector-wide mechanisms for reducing pollution. But just because a cap-and-trade 'system' can be used to reduce emissions does not mean that it is the kind of 'system of emission reduction' referred to in Section 111.

"Finally, the Court has no occasion to decide whether the statutory phrase 'system of emission reduction' refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. It is pertinent to the Court's analysis that EPA has acted consistent with such a limitation for four decades. But the only question before the Court is more narrow: whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no."

CIVIL RIGHTS

I. Immigration Law

A. Migrant Protection Plan; Biden Administration's Termination of Trump Administration's "Remain in Mexico" Policy

Biden v. Texas, 142 S.Ct. 2528 (U.S., Roberts, 2022).

"In January 2019, the Department of Homeland Security began to implement the Migrant Protection Protocols (MPP). Under MPP, certain non-Mexican nationals arriving by land from Mexico were returned to Mexico to await the results of their removal proceedings under section 1229a of the Immigration and Nationality Act (INA). MPP was implemented pursuant to a provision of the INA that applies to aliens 'arriving on land ... from a foreign territory contiguous to the United States' and provides that the Secretary of Homeland Security 'may return the alien to that territory pending a proceeding under section 1229a.' 8 U.S.C. § 1225(b)(2)(C). Following a change in Presidential administrations, the Biden administration announced that it would suspend the program, and on June 1, 2021, the Secretary of Homeland Security issued a memorandum officially terminating it.

"The States of Texas and Missouri (respondents) brought suit in the Northern District of Texas against the Secretary and others, asserting that the June 1 Memorandum violated the INA and the Administrative Procedure Act (APA). The District Court entered judgment for respondents. The court first concluded that terminating MPP would violate the INA, reasoning that section 1225 of the INA 'provides the government two options' with respect to illegal entrants: mandatory detention pursuant to section 1225(b)(2)(A) or contiguous-territory return pursuant to section 1225(b)(2)(C). 554 F.Supp.3d 818, 852. Because the Government was unable to meet its mandatory detention obligations under section 1225(b)(2)(A) due to resource constraints, the court reasoned, terminating MPP would necessarily lead to the systemic violation of section 1225 as illegal entrants were released into the United States. Second, the District Court concluded that the June 1 Memorandum was arbitrary and capricious in violation of the APA. The District Court vacated the June 1 Memorandum and remanded to DHS. It also imposed a nationwide injunction ordering the Government to 'enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under [section 1225] without releasing any aliens *because of* a lack of detention resources.' *Id.*, at 857 (emphasis in original).

"While the Government's appeal was pending, the Secretary released the October 29 Memoranda, which again announced the termination of MPP and explained anew his reasons for doing so. The Government then moved to vacate the injunction on the ground that the October 29 Memoranda had superseded the June 1 Memorandum. But the Court of Appeals denied the motion and instead affirmed the District Court's judgment in full. With respect to the INA question, the Court of Appeals agreed with the District Court's analysis that terminating the program would violate the INA, concluding that the return policy was mandatory so long as illegal entrants were being released into the United States. The Court of Appeals also held that '[t]he October 29 Memoranda did not constitute a new and separately reviewable "final agency action."' 20 F.4th 928, 951.

"Held: The Government's rescission of MPP did not violate section 1225 of the INA, and the October 29 Memoranda constituted final agency action."

"(a) Beginning with jurisdiction, the injunction that the District Court entered in this case violated 8 U.S.C. § 1252(f)(1). See *Garland* v. *Aleman Gonzalez*, 596 U.S. ___, ___. But section 1252(f)(1) does not deprive *this* Court of jurisdiction to reach the merits of an appeal even where a lower court enters a form of relief barred by that provision. Section 1252(f)(1) withdraws a district court's 'jurisdiction or authority' to grant a particular form of relief. It does not deprive lower courts of all subject matter jurisdiction over claims brought under sections 1221 through 1232 of the INA.

"The text of the provision makes that clear. Section 1252(f)(1) deprives courts of the power to issue a specific category of remedies: those that 'enjoin or restrain the operation of' the relevant sections of the statute. And Congress included that language in a provision whose title—'Limit on injunctive relief'—makes clear the narrowness of its scope. Moreover, the provision contains a parenthetical that explicitly preserves this Court's power to enter injunctive relief. If section 1252(f)(1) deprived lower courts of subject matter jurisdiction to adjudicate any non-individual claims under sections 1221 through 1232, no such claims could ever arrive at this Court, rendering the specific carveout for Supreme Court injunctive relief nugatory.

"Statutory structure likewise confirms this conclusion. Elsewhere in section 1252, where Congress intended to deny subject matter jurisdiction over a particular class of claims, it did so unambiguously. See, *e.g.,* § 1252(a)(2) (entitled 'Matters not subject to judicial review'). Finally, this Court previously encountered a virtually identical situation in *Nielsen* v. *Preap*, 586 U.S. ___, and proceeded to reach the merits of the suit notwithstanding the District Court's apparent violation of section 1252(f)(1)."

"(b) Turning to the merits, section 1225(b)(2)(C) provides: 'In the case of an alien ... who is arriving on land ... from a foreign territory contiguous to the United States, the [Secretary] may return the alien to that territory pending a proceeding under section 1229a.' Section 1225(b)(2)(C) plainly confers a *discretionary* authority to return aliens to Mexico. This Court has 'repeatedly observed' that 'the word 'may' *clearly* connotes discretion.' *Opati* v. *Republic of Sudan*, 590 U.S. ___, ___.

"Respondents and the Court of Appeals concede that point, but urge an inference from the statutory structure: because section 1225(b)(2)(A) makes detention mandatory, they argue, the otherwise-discretionary return authority in section 1225(b)(2)(C) becomes mandatory when the Secretary violates that mandate. The problem is that the statute does not say anything like that. The statute says 'may.' If Congress had intended section 1225(b)(2)(C) to operate as a mandatory cure of any noncompliance with the Government's detention obligations, it would not have conveyed that intention through an unspoken inference in conflict with the unambiguous, express term 'may.' The contiguous-territory return authority in section 1225(b)(2)(C) is discretionary—and remains discretionary notwithstanding any violation of section 1225(b)(2)(A).

"The historical context in which section 1225(b)(2)(C) was adopted confirms the plain import of its text. Section 1225(b)(2)(C) was added to the statute more than 90 years after the 'shall be detained' language that appears in section 1225(b)(2)(A). And the provision was enacted in response to a BIA decision that had questioned the legality of the contiguous-territory return practice. Moreover, since its enactment, every Presidential administration has interpreted section 1225(b)(2)(C) as purely discretionary, notwithstanding the consistent shortfall of funds to comply with section 1225(b)(2)(A).

"The foreign affairs consequences of mandating the exercise of contiguous-territory return likewise confirm that the Court of Appeals erred. Interpreting section 1225(b)(2)(C) as a mandate imposes a significant burden upon the Executive's ability to conduct diplomatic relations with Mexico, one that Congress likely did not intend section 1225(b)(2)(C) to impose. And finally, the availability of parole as an alternative means of processing applicants for admission, see 8 U.S.C. § 1182(d)(5)(A), additionally makes clear that the Court of Appeals erred in holding that the INA required the Government to continue implementing MPP."

"(c) The Court of Appeals also erred in holding that '[t]he October 29 Memoranda did not constitute a new and separately reviewable "final agency action."' 20 F.4th, at 951. Once the District Court vacated the June 1 Memorandum and remanded to DHS for further consideration, DHS had two options: elaborate on its original reasons for taking action or "'deal with the problem afresh" by taking *new* agency action.' *Department of Homeland Security* v. *Regents of Univ. of Cal.*, 591 U.S. —, —. The Secretary selected the second option from *Regents*: He accepted the District Court's vacatur and dealt with the problem afresh. The October 29 Memoranda were therefore final agency action for the same reasons that the June 1 Memorandum was final agency action: Both 'mark[ed] the "consummation" of the agency's decisionmaking process' and resulted in 'rights and obligations [being] determined.' *Bennett* v. *Spear*, 520 U.S. 154, 178.

"The various rationales offered by respondents and the Court of Appeals in support of the contrary conclusion lack merit. First, the Court of Appeals erred to the extent it understood itself to be reviewing an abstract decision apart from the specific agency actions contained in the June 1 Memorandum and October 29 Memoranda. Second, and relatedly, the October 29 Memoranda were not a mere *post hoc* rationalization of the June 1 Memorandum. The prohibition on *post hoc* rationalization applies only when the agency proceeds by the first option from *Regents*. Here, the Secretary chose the second option from *Regents* and 'issue[d] a new rescission bolstered by new reasons absent from the [June 1] Memorandum.' 591 U.S., at —. Having returned to the drawing table, the Secretary was not subject to the charge of *post hoc* rationalization.

"Third, respondents invoke *Department of Commerce* v. *New York*, 588 U.S. —. But nothing in this record suggests a 'significant mismatch between the decision the Secretary made and the rationale he provided.' *Id.*, at —. Relatedly, the Court of Appeals charged that the Secretary failed to proceed with a sufficiently open mind. But this Court has previously rejected criticisms of agency closemindedness based on an identity between proposed and final agency action. See *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U.S. —, —. Finally, the Court of Appeals erred to the extent it viewed the Government's decision to appeal the District Court's injunction as relevant to the question of the October 29 Memoranda's status as final agency action. Nothing prevents an agency from undertaking new agency action while simultaneously appealing an adverse judgment against its original action."

B. Federal Courts Lack Jurisdiction to Review Facts Found by the Executive Branch as Part of Discretionary Relief Proceedings

Patel v. Garland, 142 S.Ct. 1614 (U.S., Barrett, 2022).

"In 2007, Pankajkumar Patel, who had entered the United States illegally with his wife Jyotsnaben in the 1990s, applied to United States Citizenship and Immigration Services (USCIS) for discretionary adjustment of status under 8 U.S.C. § 1255, which would have made Patel and his wife lawful permanent residents. Because USCIS was aware that Patel had previously checked a

box on a Georgia driver's license application falsely stating that he was a United States citizen, it denied Patel's application for failure to satisfy the threshold requirement that the noncitizen be statutorily admissible for permanent residence. § 1255(i)(2)(A); see also § 1182(a)(6)(C)(ii)(I) (rendering inadmissible a noncitizen 'who falsely represents ... himself or herself to be a citizen of the United States for any purpose or benefit under' state or federal law).

"Years later, the Government initiated removal proceedings against Patel and his wife due to their illegal entry. Patel sought relief from removal by renewing his adjustment of status request. Patel argued before an Immigration Judge that he had mistakenly checked the 'citizen' box on the state application and thus lacked the subjective intent necessary to violate the federal statute. The Immigration Judge disagreed, denied Patel's application for adjustment of status, and ordered that Patel and his wife be removed from the country. The Board of Immigration Appeals dismissed Patel's appeal.

"Patel petitioned the Eleventh Circuit for review, where a panel of that court held that it lacked jurisdiction to consider his claim. Federal law prohibits judicial review of 'any judgment regarding the granting of relief' under § 1255. § 1252(a)(2)(B)(i). But see § 1252(a)(2)(D) (exception where the judgment concerns 'constitutional claims' or 'questions of law'). The panel reasoned that the factual determinations of which Patel sought review—whether he had testified credibly and whether he had subjectively intended to misrepresent himself as a citizen—each qualified as an unreviewable judgment. On rehearing, the en banc court agreed with the panel. This Court granted certiorari to resolve a Circuit conflict as to the scope of § 1252(a)(2)(B)(i).

"Held: Federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under § 1255 and the other provisions enumerated in § 1252(a)(2)(B)(i)."

"(a) This case largely turns on the scope of the word 'judgment' as used in § 1252(a)(2)(B)(i). In support of the judgment below, Court-appointed *amicus* defines it as any authoritative decision—encompassing any and all decisions relating to the granting or denying of discretionary relief. By contrast, the Government argues that it refers exclusively to a decision requiring the use of discretion, which the factual findings in this case are not. Patel agrees that 'judgment' implies an exercise of discretion but interprets the qualifying phrase 'regarding the granting of relief' as focusing the jurisdictional bar on only the Immigration Judge's ultimate decision whether to grant relief. Everything else, he says, is reviewable."

"(1) Only *amicus*' definition fits the text and context of § 1252(a)(2)(B)(i). '[T]he word 'any' has an expansive meaning.' *Babb* v. *Wilkie*, 589 U.S. ——, ——, n. 2, 140 S.Ct. 1168, 1173 n. 2, 206 L.Ed.2d 432 (some internal quotation marks omitted). As applied here, 'any' means a judgment 'of whatever kind' under § 1255 and the other enumerated provisions. *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132. The word 'regarding' has a similarly 'broadening effect.' *Lamar, Archer & Cofrin, LLP* v. *Appling*, 584 U. S. ——, ——, 138 S.Ct. 1752, 1760, 201 L.Ed.2d 102. Thus, § 1252(a)(2)(B)(i) encompasses not just 'the granting of relief' but also any judgment *relating to* the granting of relief. *Amicus*' reading is reinforced by Congress' later addition of § 1252(a)(2)(D), which preserves review of legal and constitutional questions but makes no mention of preserving review of questions of fact. Moreover, this Court has already relied on subparagraph (D) to all but settle that judicial review of factfinding is unavailable. See *Guerrero-Lasprilla* v. *Barr*, 589 U.S. ——, 140 S.Ct. 1062, 206 L.Ed.2d 271; *Nasrallah* v. *Barr,* 590 U. S. ——, 140 S.Ct. 1683, 207 L.Ed.2d 111 (2020)."

"(2) The Government's and Patel's interpretations read like elaborate efforts to avoid the text's most natural meaning. The Government cites dictionary definitions such as 'the mental or intellectual process of forming an opinion or evaluation by discerning and comparing' as indicating that 'judgment' refers exclusively to a discretionary decision, which it describes as one that is 'subjective or evaluative.'. . . The factual findings in this case, it says, do not fit that description. The Government is wrong about both text and context. A 'judgment' does not necessarily involve discretion, nor does context indicate that only discretionary judgments are covered by § 1252(a)(2)(B)(i). Rather than delineating a special category of discretionary determinations, the cited definitions—none of which expressly references discretion—simply describe the decisionmaking process, which might involve a matter that the Government treats as 'subjective' or one that it deems 'objective.' Using the word 'judgment' to describe the fact determinations at issue in this case is perfectly natural. See, *e.g., Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 327, 135 S.Ct. 831, 190 L.Ed.2d 719. To succeed, the Government must show that in context, the *kind* of judgment to which § 1252(a)(2)(B)(i) refers is discretionary. But the text of that provision applies to '*any* judgment.' Had Congress intended to limit the jurisdictional bar to 'discretionary judgments,' it could easily have used that language, as it did elsewhere in the immigration code. The Government's reliance on *Kucana v. Holder*, 558 U.S. 233, 130 S.Ct. 827, 175 L.Ed.2d 694, is inapposite. That case said or implied nothing about review of nondiscretionary decisions."

"(3) Neither does Patel's interpretation square with the text or context of § 1252(a)(2)(B)(i). He claims that the phrase 'any judgment *regarding the granting of relief*' refers only to the ultimate grant or denial of relief, leaving *all* eligibility determinations reviewable. Patel's interpretation reads 'regarding' out of the statute entirely. Patel also fails to explain why subparagraph (B)'s bar should be read differently from subparagraph (C)'s prohibition on reviewing final orders of removal for certain criminal offenses. Given the similarities of those two provisions—each precludes judicial review in the same way and bears the same relationship to subparagraph (D)—there is no reason to think that subparagraph (B) would allow a court to review the factual underpinnings of a decision when subparagraph (C) prohibits just that."

"(b) Patel and the Government object that this Court's interpretation would arbitrarily prohibit review of some factual determinations made in the discretionary-relief context that would be reviewable if made elsewhere in removal proceedings. But the distinction simply reflects Congress' choice to provide reduced procedural protection for discretionary relief. And while this Court does not decide what effect, if any, its decision has on review of discretionary-relief determinations made outside of removal proceedings, the Court rejects Patel's and the Government's contention that the risk of foreclosing such review should change its interpretation here. As the Court has emphasized many times before, policy concerns cannot trump the best interpretation of the statutory text."

"(c) As a last resort, Patel and the Government argue that the statute is ambiguous enough to trigger the presumption that Congress did not intend to foreclose judicial review. Here, however, the text and context of § 1252(a)(2)(B)(i) clearly indicate that judicial review of fact determinations is precluded in the discretionary-relief context, and the Court has no reason to resort to the presumption of reviewability."

C. Bond Eligibility for Noncitizens Previously Removed; Applicability of § 1231

A. Limits on Requirement for Bond Hearing

Johnson v. Arteaga-Martinez, 142 S.Ct. 1827 (U.S., Sotomayor, 2022).

"Respondent Antonio Arteaga-Martinez is a citizen of Mexico who was removed in July 2012 and reentered the United States in September 2012. U.S. Immigration and Customs Enforcement (ICE) issued a warrant for Arteaga-Martinez's arrest in 2018. ICE reinstated Arteaga-Martinez's earlier removal order and detained him pursuant to its authority under the Immigration and Nationality Act. See 8 U.S.C. § 1231(a). Arteaga-Martinez applied for withholding of removal under § 1231(b)(3), as well as relief under regulations implementing the Convention Against Torture, based on his fear that he would be persecuted or tortured if he returned to Mexico. An asylum officer determined he had established a reasonable fear of persecution or torture, and the Department of Homeland Security referred him for withholding-only proceedings before an immigration judge.

"After being detained for four months, Arteaga-Martinez filed a petition for a writ of habeas corpus in District Court challenging, on both statutory and constitutional grounds, his continued detention without a bond hearing. The Government conceded that Arteaga-Martinez would be entitled to a bond hearing after six months of detention based on circuit precedent holding that a noncitizen facing prolonged detention under § 1231(a)(6) is entitled by statute to a bond hearing before an immigration judge and must be released unless the Government establishes, by clear and convincing evidence, that the noncitizen poses a risk of flight or a danger to the community. The District Court granted relief on Arteaga-Martinez's statutory claim and ordered the Government to provide Arteaga-Martinez a bond hearing. The Third Circuit summarily affirmed. At the bond hearing, the Immigration Judge considered Arteaga-Martinez's flight risk and dangerousness and ultimately authorized his release pending resolution of his application for withholding of removal.

"Held: Section 1231(a)(6) does not require the Government to provide noncitizens detained for six months with bond hearings in which the Government bears the burden of proving, by clear and convincing evidence, that a noncitizen poses a flight risk or a danger to the community."

"(a) Section 1231(a)(6) cannot be read to require the hearing procedures imposed below. After the entry of a final order of removal against a noncitizen, the Government generally must secure the noncitizen's removal during a 90-day removal period, during which the Government 'shall' detain the noncitizen. 8 U.S.C. §§ 1231(a)(1), (2). Beyond the removal period, § 1231(a)(6) defines four categories of noncitizens who 'may be detained ... and, if released, shall be subject to [certain] terms of supervision.' There is no plausible construction of the text of § 1231(a)(6) that requires the Government to provide bond hearings with the procedures mandated by the Third Circuit. The statute says nothing about bond hearings before immigration judges or burdens of proof, nor does it provide any other indication that such procedures are required. Faithfully applying precedent, the Court cannot discern the bond hearing procedures required below from § 1231(a)(6)'s text."

"(b) Arteaga-Martinez argues that § 1231(a)(6)'s references to flight risk, dangerousness, and terms of supervision, support the relief ordered below. Similarly, respondents in the companion case, see *Garland* v. *Gonzalez*, 594 U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2022 WL 2111346, analogize the text of § 1231(a)(6) to that of 8 U.S.C. § 1226(a), noting that noncitizens detained under § 1226(a) have long received bond hearings at the outset of detention. Assuming without deciding that an express statutory reference to 'bond' (as in § 1226(a)) might be read to require an initial bond hearing, § 1231(a)(6) contains no such reference, and § 1231(a)(6)'s oblique reference to terms of supervision does not suffice. The parties agree that the Government possesses discretion

to provide bond hearings under § 1231(a)(6) or otherwise, but this Court cannot say the statute requires them.

"Finally, Arteaga-Martinez argues that *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653, which identified ambiguity in § 1231(a)(6)'s permissive language, supports a view that § 1231(a)(6) implicitly incorporates the specific bond hearing requirements and procedures imposed by the Court of Appeals. In *Zadvydas*, this Court construed § 1231(a)(6) 'in light of the Constitution's demands' and determined that § 1231(a)(6) 'does not permit indefinite detention' but instead 'limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States.' 533 U.S. at 689, 121 S.Ct. 2491. The bond hearing requirements articulated by the Third Circuit, however, reach substantially beyond the limitation on detention authority *Zadvydas* recognized. *Zadvydas* does not require, and *Jennings* v. *Rodriguez*, 583 U.S. ——, does not permit, the Third Circuit's application of the canon of constitutional avoidance."

"(c) Constitutional challenges to prolonged detention under § 1231(a)(6) were not addressed below, in part because those courts read § 1231(a)(6) to require a bond hearing. Arteaga-Martinez's alternative theory that he is presumptively entitled to release under *Zadvydas* also was not addressed below. The Court leaves these arguments for the lower courts to consider in the first instance. See *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020."

"Reversed and remanded."

2. No Class-Wide Injunctive Relief

Garland v. Gonzalez, 142 S.Ct. 2057 (U.S., Alito, 2022).

"Respondents are aliens who were detained by the Federal Government pursuant to 8 U.S.C. § 1231(a)(6) of the Immigration and Nationality Act (INA). Respondents Esteban Aleman Gonzalez and Jose Eduardo Gutierrez Sanchez—the named plaintiffs in the case that bears Aleman Gonzalez's name—are natives and citizens of Mexico who were detained under § 1231(a)(6) after reentering the United States illegally. They filed a putative class action in the United States District Court for the Northern District of California, alleging that aliens detained under § 1231(a)(6) are entitled to bond hearings after six months' detention. The District Court certified a class of similarly situated plaintiffs and 'enjoined [the Government] from detaining [respondents] and the class members pursuant to section 1231(a)(6) for more than 180 days without providing each a bond hearing.' *Gonzalez v. Sessions*, 325 F.R.D. 616, 629. A divided panel of the Ninth Circuit affirmed. *Aleman Gonzalez v. Barr*, 955 F.3d 762, 766. Respondent Edwin Flores Tejada—the named plaintiff in the case that bears his name—is a native and citizen of El Salvador. He likewise reentered the country illegally and was detained under § 1231(a)(6). He filed suit in the Western District of Washington, alleging that § 1231(a)(6) entitled him to a bond hearing. The District Court certified a class, granted partial summary judgment against the Government, and entered class-wide injunctive relief. A divided panel of the Ninth Circuit affirmed. *Flores Tejada v. Godfrey*, 954 F.3d 1245, 1247. This Court granted certiorari and instructed the parties to brief the threshold question whether the District Courts had jurisdiction to entertain respondents' requests for class-wide injunctive relief under the INA.

"Held: Section 1252(f)(1) of the INA deprived the District Courts of jurisdiction to entertain respondents' requests for class-wide injunctive relief."

"(a) Section 1252(f)(1) generally strips lower courts of 'jurisdiction or authority' to 'enjoin or restrain the operation of' certain provisions of the INA. The ordinary meaning of the terms 'enjoin' and 'restrain' bars the class-wide relief awarded by the two District Courts here. When a court 'enjoins' conduct, it issues an 'injunction,' which is a judicial order that 'tells someone what to do or not to do.' *Nken v. Holder*, 556 U.S. 418, 428, 129 S.Ct. 1749, 173 L.Ed.2d 550. The Court has suggested that 'restrain' sometimes has a 'broad meaning' that refers to judicial orders that 'inhibit' particular actions, and at other times it has a 'narrower meaning' that includes 'orders that stop (or perhaps compel)' such acts. *Direct Marketing Assn. v. Brohl*, 575 U.S. 1, 12–13, 135 S.Ct. 1124, 191 L.Ed.2d 97. In § 1252(f)(1), the object of the verbs 'enjoin or restrain' is the 'operation of' certain provisions of the INA—provisions that charge the Federal Government with the implementation and enforcement of the immigration laws governing the inspection, apprehension, examination, and removal of aliens. See §§ 1221–1232. Putting these terms together, § 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the referenced INA statutory provisions.

"Section 1252(f)(1) includes one exception to this general prohibition: The lower courts retain the authority to 'enjoin or restrain the operation of' the relevant statutory provisions 'with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.' In *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481–482, 119 S.Ct. 936, 142 L.Ed.2d 940, the Court stated that § 1252(f)(1) 'prohibits federal courts from granting classwide injunctive relief' but 'does not extend to individual cases.' Here, both District Courts entered injunctions requiring the Government to provide bond hearings, not only for respondents, but also for all other class members. Those orders 'enjoin or restrain the operation' of § 1231(a)(6) because they require officials to take actions that (in the Government's view) are not required by § 1231(a)(6) and to refrain from actions that (again in the Government's view) are allowed by § 1231(a)(6). Those injunctions thus interfere with the Government's efforts to operate § 1231(a)(6), and the injunctions do not fall within the exception for individualized relief because the injunctions were entered on behalf of entire classes of aliens."

"(b) Respondents' two counter-arguments fail. First, respondents contend that 'the operation' of the covered immigration provisions means the operation of those provisions 'as *properly* interpreted' and that what § 1252(f)(1) bars are class-wide injunctions that prohibit the Government from doing what the statute allows or commands. (emphasis added). . . . The ordinary meaning of the language of § 1252(f)(1) weighs against respondents' interpretation. It is very common to refer to the 'unlawful' or 'improper' operation of something, and it is not apparent why the same cannot be said of a statute. The statutory context provides additional reasons to reject respondents' reading.

"Respondents next argue that § 1252(f)(1) allows class-wide relief so long as all the class members are '*individuals* who already face enforcement action.' Brief for Respondents 55 (emphasis added). But § 1252(f)(1) refers to 'an individual,' not 'individuals,' and the Court has repeatedly stated that it bars class-wide injunctive relief. See, *e.g., American-Arab Anti-Discrimination Comm.*, 525 U.S. at 481, 119 S.Ct. 936. Respondents argue that the absence of any express reference to class actions in § 1252(f)(1)—unlike the express reference in § 1252(e)(1)—suggests that no preclusion of class-wide relief was intended The Court is reluctant to give much weight to this negative inference; it is possible that § 1252(f)(1) simply uses different language to bar class-wide injunctive relief. But a literal reading of the provision could also rule out efforts to obtain any injunctive relief that applies to multiple named plaintiffs. The Court has no occasion to adopt such an interpretation

here. It is sufficient to hold that the class-wide injunctive relief awarded in these cases was unlawful."

II. 42 U.S.C. § 1983

A. Qualified Immunity Granted to Officer Where No Violation of Clearly Established Right Against Excessive Force

Rivas-Villegas v. Cortesluna, 142 S.Ct. 4 (U.S., Per Curiam, 2021).

"Suspect filed § 1983 action asserting claims of excessive force and failure to intervene against city police officers, and asserted claim against city, relating to police response to 911 emergency call reporting a serious alleged incident of domestic violence possibly involving a chainsaw. The United States District Court for the Northern District of California, Jacqueline Scott Corley, United States Magistrate Judge, 2018 WL 6727824, granted summary judgment to defendants. Suspect appealed. The United States Court of Appeals for the Ninth Circuit, Graber, Circuit Judge, 979 F.3d 645, affirmed in part, reversed in part, and remanded, determining that one of the officers was not entitled to qualified immunity.

"Upon granting certiorari, the Supreme Court held that officer's conduct in placing his knee on suspect's back for no more than eight seconds, and only on the side of his back near the knife that officers were in the process of retrieving, did not violate a clearly established right against excessive force.

"Certiorari granted; reversed."

City of Tahlequah, Oklahoma v. Bond,142 S.Ct. 9 (U.S., Per Curiam, 2021).

"Special administrator of estate of suspect, who was fatally shot by police officers, brought § 1983 action against officers and city, alleging that the officers violated suspect's Fourth Amendment right to be free from excessive force. The United States District Court for the Eastern District of Oklahoma, Ronald A. White, Chief Judge, 2019 WL 4674316, granted officers' motion for summary judgment. Special administrator appealed. The United States Court of Appeals for the Tenth Circuit, McHugh, Circuit Judge, 981 F.3d 808, reversed. Petition for writ of certiorari was filed.

"Upon granting certiorari, the Supreme Court held that police officers, who shot and killed suspect after suspect raised hammer behind his head and took stance as if he was about to throw the hammer or charge at the officers, did not violate any clearly established law, and, thus, doctrine of qualified immunity shielded officers from liability. Certiorari granted; judgment of the Court of Appeals reversed."

B. Qualified Immunity Granted to Officers Investigating Knock-Off of Police Department Facebook Page

Novak v. City of Parma, Ohio, 33 F.4th 296 (6th Cir., Thapar, 2022).

"Anthony Novak thought it would be funny to create a Facebook page that looked like the Parma Police Department's. The Department was not amused. In fact, officers arrested Novak and prosecutors charged him with a state crime. Novak was acquitted at trial, and he now argues his constitutional rights were violated in the ordeal. But because the officers reasonably believed they were acting within the law, Novak can't recover."

"According to Anthony Novak, he created 'The City of Parma Police Department' Facebook account—a knockoff of the Department's real page—to exercise his 'fundamental American right' of '[m]ocking our government officials.' R. 6, Pg. ID 1238. And mock them he did. In less than a day, he published half-a-dozen posts 'advertising' the Department's efforts, including free abortions in a police van and a 'Pedophile Reform event' featuring a 'No means no' learning station. The page spread around Facebook. Some readers praised its comedy. Others criticized the page or called out that it was fake. (He deleted their comments.) And still others (nearly a dozen, in total) felt it necessary to call the police station. A few asked if the page was real. The rest expressed confusion or alerted the police to the fake page.

"Once the Department heard about the page, it sprang into action. First, officers verified that the official page hadn't been hacked. Then, they posted a notice on the Department's actual page, confirming that it was the official account and warning that the fake page was 'being investigated.' R. 123-9, Pg. ID 24596. Novak then copied that post onto his knockoff page—allegedly '[t]o deepen his satire.' R. 6, Pg. ID 1259.

"Then-Lieutenant Kevin Riley tasked Detective Thomas Connor with figuring out who ran the knockoff page. Connor sent a letter to Facebook, asking the company to preserve all records related to the account and take down the page. Riley issued a press release and appeared on the nightly news, announcing an investigation and warning the public about the fake page. Novak—worried he'd get in trouble for the page—took it down.

"Yet the officers continued their investigation. Connor eventually got a search warrant for Facebook, and he discovered that Novak was the page's author. Unsure what sort of case they had, Riley and Connor sought advice from Parma's Law Director, Timothy Dobeck. Dobeck concluded they had probable cause and could seek two more warrants: an arrest warrant from Magistrate Judge Edward Fink and a search warrant from Judge Deanna O'Donnell. The grounds? An Ohio law that makes it illegal to use a computer to disrupt or impair police functions. Ohio Rev. Code § 2909.04(B). Both judges found there was probable cause and issued the warrants.

"With warrants in hand, the officers arrested Novak, searched his apartment, and seized his phone and laptop. He spent four days in jail before he made bond. Then prosecutors presented the case to a grand jury, which indicted him for disrupting police functions. But a jury later acquitted him. And after his acquittal, Novak brought dozens of claims against Riley, Connor, and the City of Parma. In a prior appeal, we granted qualified immunity to the officers on some claims. *Novak v. City of Parma*, 932 F.3d 421 (6th Cir. 2019). Now, Novak appeals the district court's grant of summary judgment to the defendants on the remaining claims."

"Novak brings several section 1983 claims against Lieutenant Riley and Detective Connor. He alleges First Amendment retaliation, Fourth Amendment violations, and First Amendment prior restraint. We address each in turn."

"Novak's first set of claims alleges that the police officers retaliated against him in violation of the First Amendment. For their part, the officers contend they are entitled to qualified immunity.

"Qualified immunity protects state officers against section 1983 claims unless (1) 'they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time' of the offense. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018) (cleaned up). And the burden lies with the plaintiff to show each prong. *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8, 211 L.Ed.2d 164 (2021) (per curiam); *Cunningham v. Shelby County*, 994 F.3d 761, 764–65 (6th Cir. 2021).

"To meet his burden, Novak argues that Riley and Connor violated his clearly established right to be free from retaliatory arrest. He suggests the arrest was retaliatory because the officers based it on his Facebook page—which he argues is parody protected under the First Amendment. But there's no recognized right to be free from a retaliatory arrest that is supported by probable cause. *See Reichle v. Howards*, 566 U.S. 658, 663, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). So to prevail on his claim, Novak must show it was clearly established that the officers lacked probable cause to arrest him. Because he hasn't done so, the officers are entitled to qualified immunity."

"Whether these actions—deleting comments that made clear the page was fake and reposting the Department's warning message—are protected speech is a difficult question. After all, impersonating the police is not protected speech. *See United States v. Alvarez*, 567 U.S. 709, 721, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012); *see also id.* at 735, 132 S.Ct. 2537 (Breyer, J., concurring); *id.* at 748, 132 S.Ct. 2537 (Alito, J., dissenting); *United States v. Chappell*, 691 F.3d 388, 393–94 (4th Cir. 2012). And for good reason—one can easily imagine the mayhem that a scam IRS or State Department website could cause.

"But while probable cause here may be difficult, qualified immunity is not. That's because qualified immunity protects officers who 'reasonably pick[ ] one side or the other' in a debate where judges could 'reasonably disagree.' *Citizens in Charge, Inc. v. Husted*, 810 F.3d 437, 443 (6th Cir. 2016). That's just what the officers did—they reasonably found probable cause in an unsettled case judges can debate. Indeed, Novak has not identified a case that clearly establishes deleting comments or copying the official warning is protected speech. So even with *Leonard*'s protected-speech rule on the books, the officers could reasonably believe that some of Novak's Facebook activity was not parody, not protected, and fair grounds for probable cause.

"What's more, the officers had good reason to believe they had probable cause. Both the City's Law Director and the judges who issued the warrants agreed with them. Reassurance from no fewer than three other officials further supports finding that the officers 'reasonably,' even if 'mistakenly,' concluded that probable cause existed. *Wesby*, 138 S. Ct. at 591 (cleaned up). That's enough to shield Riley and Connor from liability.

"Thus, the officers are entitled to qualified immunity on Novak's retaliation claims."

"The same analysis guides our consideration of Novak's Fourth Amendment claims.

" Novak argues that the officers lacked probable cause for his arrest, the search of his apartment, and the seizure of his phone and laptop. Yet our precedent offers a 'complete defense' against these claims when officers relied on a magistrate judge's warrant. *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010) (arrest); *see Tlapanco v. Elges*, 969 F.3d 638, 649 (6th Cir. 2020) (search and

seizure). And here, the officers obtained warrants from Magistrate Judge Fink and Judge O'Donnell before committing these alleged violations.

"But this defense has two exceptions. The first covers cases when an officer provides false information to obtain a warrant. *Sykes*, 625 F.3d at 305. To establish this defense, Novak must show that (1) the officers knowingly or recklessly made false statements or significant omissions; and (2) those 'statements or omissions were material, or necessary, to the finding of probable cause.' *Id.* (cleaned up). [They did not]."

"Novak also alleges malicious prosecution under section 1983. To prevail, Novak must first show that the officers participated in or influenced the decision to criminally prosecute him. *Id.* at 308. And because we construe participation in light of traditional 'tort causation principles,' the officers must have done more than passively cooperate. *Id.* at 308 n.5. Instead, Novak must show that the officers aided in the decision to prosecute. *Id.*

"They did not."

"Little did Anthony Novak know when he launched 'The City of Parma Police Department' page that he'd wind up a defendant in court. So too for the officers who arrested him. At the end of the day, neither got all they wanted—Novak won't be punished for his alleged crime, and the defendants are entitled to summary judgment on Novak's civil claims.

"But granting the officers qualified immunity does not mean their actions were justified or should be condoned. Indeed, it is cases like these when government officials have a particular obligation to act *reasonably*. Was Novak's Facebook page worth a criminal prosecution, two appeals, and countless hours of Novak's and the government's time? We have our doubts. And from the beginning, any one of the officials involved could have allowed 'the entire story to turn out differently,' simply by saying 'No.' Bari Weiss, *Some Thoughts About Courage*, Common Sense (Oct. 19, 2021). Unfortunately, no one did.

"Because the law compels it, we affirm."

C. City Manager's Facebook Actions Blocking Plaintiff and Deleting Comments Are Not State Action

Lindke v. Freed, 37 F.4th 1199 (6th Cir., Thapar, 2022), reh'g en banc denied Aug. 5, 2022.

"James Freed prized his roles as father, husband, and city manager of Port Huron, Michigan. So his Facebook page listed all three. The question here is whether involving his job makes Freed's Facebook activity state action. In Freed's case, it does not."

"Like many Americans, James Freed joined Facebook to connect with friends and family. He created a Facebook profile—a private account limited to his 'friends'—and used it for years. But eventually, he grew too popular for Facebook's 5,000-friend limit on profiles. So Freed converted his profile to a 'page,' which has unlimited 'followers' instead of friends. His page was public, and anyone could 'follow' it; for the page category, Freed chose 'public figure.'

"In 2014, Freed was appointed city manager for Port Huron, Michigan. So he updated his Facebook page to reflect his new title. In the 'About' section, he most recently described himself as 'Daddy

to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.' R. 1-1, Pg. ID 17. Freed listed the Port Huron website as his page's website, the City's general email for 'City Administration and Staff' (CommunityComments@PortHuron.org) as his page's contact information, and the City Hall address as his page's address.

"Freed was an active Facebook user whose page featured a medley of posts. He shared photos of his daughter's birthday, his visits to local community events, and his family's weekend picnics. He also posted about some of the administrative directives he issued as city manager. And when the Covid-19 pandemic hit in spring 2020, he posted about that too, sharing the policies he initiated for Port Huron and news articles on public-health measures and statistics.

"Freed's Covid-19 posts caught the attention of one disconcerted citizen, Kevin Lindke. Lindke didn't approve of how Freed was handling the pandemic. He saw Freed's posts about new policies and responded with criticism in the comments section. Freed didn't appreciate the comments, so he deleted them. And Freed eventually 'blocked' Lindke from the page, which kept Lindke from commenting on Freed's page and its posts.

"Upset that he could no longer use Facebook to engage with the city manager, Lindke sued Freed in federal court under 42 U.S.C § 1983. He argued that Freed violated his First Amendment rights by deleting his comments and blocking him from the page. The district court granted summary judgment to Freed, and Lindke appeals."

"Section 1983 provides a cause of action when federal rights are violated by someone acting 'under color of any statute, ordinance, regulation, custom, or usage, of any State.' 42 U.S.C. § 1983. Courts have interpreted this language to mean that a defendant must be acting in a state capacity to be liable under the statute. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). This is known as the 'state action' requirement, and it turns on whether a defendant's actions are 'fairly attributable to the State.' *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

"How do we know if Freed was engaged in state action? One might think it's easy—Freed is a state official, after all. So we might assume everything he does is state action. But the analysis isn't that simple. When a state official acts 'in the ambit of [his] personal, private pursuits,' section 1983 doesn't apply. *Stengel v. Belcher*, 522 F.2d 438, 441 (6th Cir. 1975). In this way, the doctrine draws a line between actions taken in an official capacity and those taken in a personal one. But the caselaw is murky as to when a state official acts personally and when he acts officially. That imprecision is made even more difficult here, since we must apply the doctrine in a novel setting: the ever-changing world of social media.

"To clear the state-action waters, we analyze the current state of the doctrine and realign how state officials' actions fit into the current framework. We then explain when state officials' social-media activity constitutes state action. And lastly, we conclude Freed maintained his Facebook page in his personal capacity."

"The Supreme Court has identified three tests for assessing state action: (1) the public-function test, (2) the state-compulsion test, and (3) the nexus test. *Lugar*, 457 U.S. at 939, 102 S.Ct. 2744; *see Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003) (en banc) (adopting the same). But each of these tests is framed to discern whether a *private party's* action is attributable to the state—they don't make clear the distinction between *public officials'* governmental and personal activities.

"So in practice, our court has applied a different test when asking whether a public official was acting in his state capacity—which we'll call the 'state-official test.' *See, e.g.*, *Dean v. Byerley*, 354 F.3d 540, 552–53 (6th Cir. 2004); *Waters v. City of Morristown*, 242 F.3d 353, 359–60 (6th Cir. 2001). This test asks whether the official is 'performing an actual or apparent duty of his office,' or if he could not have behaved as he did 'without the authority of his office.' *Waters*, 242 F.3d at 359. It stems from our recognition that public officials aren't just public officials—they're individual citizens, too. And it tracks the Supreme Court's guidance as to public officials and state action. *See West*, 487 U.S. at 50, 108 S.Ct. 2250 ('[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law.'). These questions make sense in our context—they speak to whether Freed ran his Facebook page in his official or his personal capacity.

"Though we haven't explained before how the state-official test fits within the Supreme Court's framework, it is simply a version of the Supreme Court's nexus test. Under the nexus test, the ultimate question is whether a defendant's action 'may be fairly treated as that of the State itself.' *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). To answer that question, we analyze whether his action is 'entwined with governmental policies' or subject to the government's 'management or control.' *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966)).

"The state-official test mirrors these questions. Whether an official acts pursuant to his governmental duties or cloaked in the authority of his office is just another way of asking whether his actions are controlled by the government or entwined with its policies. *Compare Waters*, 242 F.3d at 359–60 (applying the state-official test to a city alderman's actions), *with Chapman*, 319 F.3d at 834–35 (applying the nexus test to an off-duty sheriff's deputy's actions). In short, the state-official test is how we apply the nexus test when the alleged state actor is a public official."

"Thus, we turn to social media. When analyzing social-media activity, we look to a page or account as a whole, not each individual post. That's because to answer our cornerstone question—whether the official's act is 'fairly attributable' to the state—we need more background than a single post can provide. Looking too narrowly at isolated action without reference to the context of the entire page risks losing the forest for the trees.

"When does a public official run his Facebook page as an official? *See Waters*, 242 F.3d at 359. And when is a page a personal pursuit beyond section 1983's ambit? *See Stengel*, 522 F.2d at 441. Despite the new context, the answers to these questions remain rooted in the principles of our state-official test. So just like anything else a public official does, social-media activity may be state action when it (1) is part of an officeholder's 'actual or apparent dut[ies],' or (2) couldn't happen in the same way 'without the authority of [the] office.' *Waters*, 242 F.3d at 359. Consider some examples.

"Perhaps the most straightforward instance of an actual duty is when the text of state law requires an officeholder to maintain a social-media account. That is, a page can constitute state action if the law itself provides for it. So if Cincinnati decided that its residents would benefit from a public-safety Facebook page run by the police chief, it could pass a law directing the chief to operate such a page. Maintaining that page would then be one of the police chief's actual duties—and thus, state action. *See id.* This fact pattern fits neatly within the text of section 1983;

the public official operates the social-media page 'under color of [a state] statute, ordinance, [or] regulation.' 42 U.S.C. § 1983.

"The use of state resources may also indicate that running a social-media account is an official's 'actual or apparent duty.' *Waters*, 242 F.3d at 359. Take an example involving state funds. A city councilwoman is given a budget for community outreach efforts. She spends some of that budget to pay for her account on a paid social-media platform, or for paid features (like ads) on a free platform. Here, her use of state funds to pay for the account suggests that operating the account is within her job duties—and thus, state action.

"State action may also arise from the use of state authority. For instance, some social-media accounts belong to an office, rather than an individual officeholder. When that's true, the account is 'fairly attributable' to the state because it's state property. *Lugar*, 457 U.S. at 937, 102 S.Ct. 2744. After all, the public official can operate the account only because of his state authority.

"For an example, imagine there's an official Facebook account for the Governor of Kentucky titled @KentuckyGovernor. The current governor, John Doe, now operates the @KentuckyGovernor page. But a few years ago, his predecessor, Jane Smith, used that handle. That's because it belongs to the governor's office, not the individual officeholder. When the office switched occupants, the @KentuckyGovernor page switched hands. Since an individual is entrusted with that page only while he's governor, it's available only under the authority of the office. And operating the page counts as state action.

"By contrast, a Facebook page called @JohnDoe belongs to Doe-the-citizen—not Doe-the-governor. That page will belong to Doe even after he leaves office—it's his, not the governorship's. While the office's account is always state action, the officeholder's may not be.

"A page may also draw on an officeholder's authority over government staff. Indeed, a tech-savvy governor might hire a social-media team to manage her online presence. And when those employees are on the state's payroll, using them to manage a page can transform it into state action. After all, that governor could only hire those employees on the government's dime, and direct them to operate her Facebook page, because she holds the authority of her office. And what's more, directing her employees to operate the page makes it one of the employees' job responsibilities—which further supports finding state action.

"In all these instances, a public official operates a social-media account either (1) pursuant to his actual or apparent duties or (2) using his state authority. *Waters*, 242 F.3d at 359. It's only then that his social-media activity is 'fairly attributable' to the state. *Lugar*, 457 U.S. at 937, 102 S.Ct. 2744. Otherwise, it's personal and free from scrutiny under section 1983."

"So how does this play out here? Under these criteria, Freed's Facebook activity was not state action. The page neither derives from the duties of his office nor depends on his state authority. In short, Freed operated his Facebook page in his personal capacity, not his official capacity. Walking through the examples above shows why.

"First, no state law, ordinance, or regulation compelled Freed to operate his Facebook page. In other words, it wasn't designated by law as one of the actual or apparent duties of his office. Nor do government funds show Freed operated the page in his official capacity. Facebook is a free social-networking site; Freed pays no fees to maintain his page. And there's no evidence he ever

ran ads or any other paid content through Facebook, let alone using government funds. Thus, there's nothing to suggest operating the page was Freed's official responsibility."

"That's why we part ways with other circuits' approach to state action in this novel circumstance. Instead of examining a page's appearance or purpose, we focus on the actor's official duties and use of government resources or state employees. As explained above, these anchors are rooted in our circuit's precedent on state action. And they offer predictable application for state officials and district courts alike, bringing the clarity of bright lines to a real-world context that's often blurry.

"But our state-action anchors are missing here. Freed did not operate his page to fulfill any actual or apparent duty of his office. And he didn't use his governmental authority to maintain it. Thus, he was acting in his personal capacity—and there was no state action."

"James Freed didn't transform his personal Facebook page into official action by posting about his job. Instead, his page remains personal—and can't give rise to section 1983 liability. We affirm."

D. Non-Disparagement Clause in Outgoing Director of School's Severance Agreement Unconstitutional and Unenforceable

Frogge v. Joseph, No. M2020-01422-COA-R3-CV (Tenn. Ct. App., McGee, June 20, 2022).

"Three members of a school board filed this lawsuit after the school board passed a resolution approving a severance agreement with the director of schools that contained a non-disparagement clause preventing the individual school board members from expressing even truthful criticism of the director of schools. The plaintiff board members named as defendants the school board and the director of schools. They sought a declaratory judgment that the non-disparagement clause violated their free speech rights under the First and Fourteenth Amendments to the United States Constitution and Article I Section 19 of the Tennessee Constitution, was unconstitutionally overbroad, and was unenforceable as against the public policy of the State of Tennessee. They also sought a permanent injunction preventing enforcement of the non-disparagement clause and an award of their attorney fees and costs pursuant to 42 U.S.C. § 1988(b). The plaintiffs moved for summary judgment on numerous alternative grounds. The defendants filed motions to dismiss for failure to state a claim, lack of standing, and lack of ripeness. After a hearing, the trial court entered an order denying the defendants' motions to dismiss and granting the plaintiffs' motion for summary judgment. The trial court found that the non-disparagement clause was unenforceable and unconstitutional on several grounds. It permanently enjoined enforcement of the clause and awarded the plaintiffs their attorney fees. The defendants appeal, arguing that the case should have been dismissed for lack of standing and ripeness. We affirm and remand for further proceedings."

E. *Miranda* Violation Not a Basis for § 1983 Claim

Vega v. Tekoh, 142 S.Ct. 2095 (U.S., Alito, 2022).

"The case arose out of the interrogation of respondent, Terence Tekoh, by petitioner, Los Angeles County Sheriff's Deputy Carlos Vega. Deputy Vega questioned Tekoh at the medical center where Tekoh worked regarding the reported sexual assault of a patient. Vega did not inform Tekoh of his rights under *Miranda* v. *Arizona*, 384 U.S. 436. Tekoh eventually provided a written statement apologizing for inappropriately touching the patient's genitals. Tekoh was prosecuted for unlawful sexual penetration. His written statement was admitted against him at trial. After the jury returned

a verdict of not guilty, Tekoh sued Vega under 42 U.S.C. § 1983, seeking damages for alleged violations of his constitutional rights. The Ninth Circuit held that the use of an un-*Mirandized* statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim against the officer who obtained the statement.

"Held: A violation of the *Miranda* rules does not provide a basis for a § 1983 claim."

"(a) Section 1983 provides a cause of action against any person acting under color of state law who 'subjects' a person 'to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.' Tekoh argues that a violation of *Miranda* constitutes a violation of the Fifth Amendment right against compelled self-incrimination. That is wrong."

"(1) In *Miranda*, the Court concluded that additional procedural protections were necessary to prevent the violation of the Fifth Amendment right against self-incrimination when suspects who are in custody are interrogated by the police. *Miranda* imposed a set of prophylactic rules requiring that custodial interrogation be preceded by now-familiar warnings and disallowing the use of statements obtained in violation of these new rules by the prosecution in its case-in-chief. 384 U.S., at 444, 479. *Miranda* did not hold that a violation of the rules it established necessarily constitute a Fifth Amendment violation. That makes sense, as an un-*Mirandized* suspect in custody may make self-incriminating statements without any hint of compulsion. The *Miranda* Court stated that the Constitution did not itself require 'adherence to any particular solution for the inherent compulsions of the interrogation process' and that its decision 'in no way create[d] a constitutional straitjacket.' *Id*., at 467. Since *Miranda*, the Court has repeatedly described *Miranda* rules as 'prophylactic.'"

"(2) After *Miranda*, the Court engaged in the process of charting the dimensions of these new prophylactic rules, and, in doing so, weighed the benefits and costs of any clarification of the prophylactic rules' scope. See *Maryland* v. *Shatzer*, 559 U.S. 98, 106. Some post-*Miranda* decisions found that the balance of interests justified restrictions that would not have been possible if *Miranda* described the Fifth Amendment right as opposed to a set of rules designed to protect that right. For example, in *Harris* v. *New York*, 401 U.S. 222, 224–226, the Court held that a statement obtained in violation of *Miranda* could be used to impeach the testimony of a defendant, even though an involuntary statement obtained in violation of the Fifth Amendment could not have been employed in this way. In *Michigan* v. *Tucker*, 417 U.S. 443, 450–452, n. 26, the Court held that the 'fruits' of an un-*Mirandized* statement can be admitted. In doing so, the Court distinguished police conduct that 'abridge[s] [a person's] constitutional privilege against compulsory self-incrimination' from conduct that 'depart[s] only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.' 417 U.S., at 445–446. Similarly, in *Oregon* v. *Elstad*, 470 U.S. 298, the Court, following the reasoning in *Tucker*, refused to exclude a signed confession and emphasized that an officer's error 'in administering the prophylactic *Miranda* procedures ... should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.' *Id*., at 309.

"While many of the Court's decisions imposed limits on *Miranda*'s prophylactic rules, other decisions found that the balance of interests called for expansion. For example, in *Doyle* v. *Ohio*, 426 U.S. 610, the Court held that silence following a *Miranda* warning cannot be used to impeach. The Court acknowledged that *Miranda* warnings are 'prophylactic,' 426 U.S., at 617, but it found that allowing the use of post-warning silence would undermine the warnings' implicit promise that silence would not be used to convict. *Id.,* at 618. Likewise, in *Withrow* v. *Williams*, 507 U.S. 680,

the Court rejected an attempt to restrict *Miranda*'s application in collateral proceedings based on the reasoning in *Stone* v. *Powell*, 428 U.S. 465 (1976). Once again acknowledging that *Miranda* adopted prophylactic rules, the Court balanced the competing interests and found that the costs of adopting a *Stone*-like rule outweighed any benefits. In sum, the Court's post-*Miranda* cases acknowledge the prophylactic nature of the *Miranda* rules and engage in cost-benefit analysis to define their scope."

"(3) The Court's decision in *Dickerson* v. *United States*, 530 U.S. 428, did not upset the firmly established prior understanding of *Miranda* as a prophylactic decision. *Dickerson* involved a federal statute, 18 U.S. C. § 3501, that effectively overruled *Miranda* by making the admissibility of a statement given during custodial interrogation turn solely on whether it was made voluntarily. 530 U.S., at 431–432. The Court held that Congress could not abrogate *Miranda* by statute because *Miranda* was a 'constitutional decision' that adopted a 'constitutional rule,' 530 U.S., at 438–439, and the Court noted that these rules could not have been made applicable to the States if they did not have that status, see *ibid*. At the same time, the Court made it clear that it was not equating a violation of the *Miranda* rules with an outright Fifth Amendment violation. Instead, the *Dickerson* Court described the *Miranda* rules as 'constitutionally based' with 'constitutional underpinnings,' 530 U.S., at 440, and n. 5. Those formulations obviously avoided saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right. *Miranda* was a 'constitutional decision' and it adopted a 'constitutional rule' in the sense that the decision was based on the Court's judgment about what is required to safeguard that constitutional right. And when the Court adopts a constitutional prophylactic rule of this nature, *Dickerson* concluded, the rule has the status of a 'La[w] of the United States' that is binding on the States under the Supremacy Clause (as *Miranda* implicitly held, since three of the four decisions it reversed came from state court, 384 U.S., at 491–494, 497–499), and the rule cannot be altered by ordinary legislation. *Dickerson* thus asserted a bold and controversial claim—that this Court has the authority to create constitutionally based prophylactic rules that bind both federal and state courts—but *Dickerson* cannot be understood any other way consistent with the Court's prior decisions. Subsequent cases confirm that *Dickerson* did not upend the Court's understanding of the *Miranda* rules as prophylactic. In sum, a violation of *Miranda* does not necessarily constitute a violation of the Constitution, and therefore such a violation does not constitute 'the deprivation of [a] right ... secured by the Constitution' for purposes of § 1983."

"(b) A § 1983 claim may also be based on 'the deprivation of any rights ... secured by the ... *laws*.' But the argument that *Miranda* rules constitute federal 'law' that can provide the ground for a § 1983 claim cannot succeed unless Tekoh can persuade the Court that this 'law' should be expanded to include the right to sue for damages under § 1983. 'A judicially crafted' prophylactic rule should apply 'only where its benefits outweigh its costs,' *Shatzer*, 559 U.S., at 106. Here, while the benefits of permitting the assertion of *Miranda* claims under § 1983 would be slight, the costs would be substantial. For example, allowing a claim like Tekoh's would disserve 'judicial economy,' *Parklane Hosiery Co*. v. *Shore*, 439 U.S. 322, 326, by requiring a federal judge or jury to adjudicate a factual question (whether Tekoh was in custody when questioned) that had already been decided by a state court. Allowing § 1983 suits based on *Miranda* claims could also present many procedural issues. *Miranda* and its progeny provide sufficient protection for the Fifth Amendment right against compelled self-incrimination."

F. Favorable Termination of Criminal Prosecution for Fourth Amendment Claim Requires Lack of Conviction, Not Affirmative Indication of Innocence

Thompson v. Clark, 142 S.Ct. 1332 (U.S., Kavanaugh, 2022).

"In January 2014, petitioner Larry Thompson was living with his fiancée (now wife) and their newborn baby in an apartment in Brooklyn, New York. Thompson's sister-in-law, who apparently suffered from a mental illness, called 911 to report that Thompson was sexually abusing the baby. When Emergency Medical Technicians arrived, Thompson denied that anyone had called 911. When the EMTs returned with four police officers, Thompson told them that they could not enter without a warrant. The police nonetheless entered and handcuffed Thompson. EMTs took the baby to the hospital where medical professionals examined her and found no signs of abuse. Meanwhile, Thompson was arrested and charged with obstructing governmental administration and resisting arrest. He was detained for two days before being released. The charges against Thompson were dismissed before trial without any explanation by the prosecutor or judge. After the dismissal, Thompson filed suit under 42 U.S.C. § 1983, alleging several constitutional violations, including a Fourth Amendment claim for malicious prosecution. To maintain that Fourth Amendment claim under § 1983, a plaintiff such as Thompson must demonstrate, among other things, that he obtained a favorable termination of the underlying criminal prosecution. To meet that requirement, Second Circuit precedent required Thompson to show that his criminal prosecution ended not merely without a conviction, but also with some affirmative indication of his innocence. See *Lanning v. Glens Falls*, 908 F.3d 19, 22. The District Court, bound by *Lanning*, held that Thompson's criminal case had not ended in a way that affirmatively indicated his innocence because Thompson could not offer any substantial evidence to explain why his case was dismissed. The Second Circuit affirmed the dismissal of Thompson's claim. This Court granted certiorari to resolve a split among the Courts of Appeals over how to apply the favorable termination requirement of the Fourth Amendment claim under § 1983 for malicious prosecution.

"Held: To demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under § 1983 for malicious prosecution, a plaintiff need not show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that his prosecution ended without a conviction. Thompson has satisfied that requirement here."

"(a) To determine the elements of a constitutional claim under § 1983, this Court's practice is to first look to the elements of the most analogous tort as of 1871 when § 1983 was enacted, so long as doing so is consistent with 'the values and purposes of the constitutional right at issue.' *Manuel* v. *Joliet*, 580 U.S. 357, 370, 137 S.Ct. 911, 197 L.Ed.2d 312. Here, as most of the Courts of Appeals to consider the question have determined, the most analogous tort to this Fourth Amendment claim is malicious prosecution."

"(b) In accord with the elements of the malicious prosecution tort, a Fourth Amendment claim under § 1983 for malicious prosecution requires the plaintiff to show a favorable termination of the underlying criminal case against him. The parties to this case, as well as the lower courts, disagree about what a favorable termination entails, *i.e.,* is it sufficient to show that Thompson's prosecution ended without a conviction or must he also show that his prosecution ended with some affirmative indication of innocence? To resolve that disagreement, the Court looks to American malicious prosecution tort law as of 1871. At that time, most American courts agreed that the favorable termination element of a malicious prosecution claim was satisfied so long as the prosecution ended without a conviction. A plaintiff could maintain a malicious prosecution claim when, for example, the prosecutor abandoned the criminal case or the court dismissed the case without providing a reason.

"The American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence, and this Court similarly construes Thompson's Fourth Amendment claim under § 1983 for malicious prosecution. Doing so is consistent with 'the values and purposes' of the Fourth Amendment. *Manuel*, 580 U.S., at 370, 137 S.Ct. 911. Questions concerning whether a criminal defendant was wrongly charged, or whether an individual may seek redress for a wrongful prosecution, cannot reasonably depend on whether the prosecutor or court happened to explain why charges were dismissed. And requiring a plaintiff to show that his prosecution ended with an affirmative indication of innocence is not necessary to protect officers from unwarranted civil suits, as officers are still protected by the requirement that the plaintiff show the absence of probable cause and by qualified immunity."

III. Individuals with Disabilities in Education Act; No Insurance Coverage for Attorney Fee Award Against Lawyers

Wesco Insurance Company v. Roderick Linton Belfance, LLP, 39 F.4th 326 (6th Cir., Murphy, 2022), reh'g en banc denied July 28, 2022.

"If a court compels a lawyer to pay a defendant's attorney's fees because the lawyer filed a frivolous complaint or litigated a case for an improper purpose, would the average attorney describe this fees award as a 'sanction'? This case raises that interpretive question. And we have a large body of legal sources to help answer it: the thousands of judicial decisions available on Westlaw or Lexis. They reveal that the legal community routinely describes an attorney's fees award as a 'sanction' when a court grants it because of abusive litigation tactics.

"This fact dooms the request for insurance coverage by the two lawyers who filed this appeal. These lawyers had brought claims against schools under the Individuals with Disabilities Education Act (IDEA). After the claims failed, the schools sought their attorney's fees from the lawyers under the IDEA's fee-shifting provision. The lawyers asked their insurer, Wesco Insurance Company, to pay the fees. Wesco refused on the ground that the requested attorney's fees fell within the insurance policy's exclusion for 'sanctions.' Because the IDEA makes attorney misconduct a prerequisite to a fees award against a party's lawyer, we agree that this policy exclusion applied. We thus affirm the summary-judgment ruling for Wesco."

IV. Emotional Distress Damages Not Recoverable in Private Actions to Enforce Anti-Discrimination Provisions of Rehabilitation Act of 1973 or Affordable Care Act

Cummings v. Premier Rehab Keller, P.L.L.C., 142 S.Ct. 1562 (U.S., Roberts, 2022).

"Jane Cummings, who is deaf and legally blind, sought physical therapy services from Premier Rehab Keller and asked Premier Rehab to provide an American Sign Language interpreter at her sessions. Premier Rehab declined to do so, telling Cummings that the therapist could communicate with her through other means. Cummings later filed a lawsuit seeking damages and other relief against Premier Rehab, alleging that its failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of the Rehabilitation Act of 1973 and the Affordable Care Act. Premier Rehab is subject to these statutes, which apply to entities that receive federal financial assistance, because it receives reimbursement through Medicare and Medicaid for the provision of some of its services. The District Court determined that the only compensable

injuries allegedly caused by Premier Rehab were emotional in nature. It held that damages for emotional harm are not recoverable in private actions brought to enforce either statute. The District Court thus dismissed the complaint, and the Fifth Circuit affirmed.

"Held: Emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act."

"(a) Congress has broad power under the Spending Clause of the Constitution to 'fix the terms on which it shall disburse federal money.' *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694. Pursuant to that authority, Congress has enacted statutes prohibiting recipients of federal financial assistance from discriminating on the basis of certain protected characteristics. This Court has held that such statutes may be enforced through implied rights of action. *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S.Ct. 2097, 153 L.Ed.2d 230. Although it is 'beyond dispute that private individuals may sue' to enforce the antidiscrimination statutes at issue here, 'it is less clear what remedies are available in such a suit.' *Ibid.*

"The Court's cases have clarified that whether a particular remedy is recoverable must be informed by the way Spending Clause 'statutes operate': by 'conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.' *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277. Because Spending Clause legislation operates based on consent, the 'legitimacy of Congress' power' to enact such laws rests not on its sovereign authority, but on 'whether the [recipient] voluntarily and knowingly accepts the terms of th[at] "contract."' *Barnes*, 536 U.S. at 186, 122 S.Ct. 2097 (quoting *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531). The Court has regularly applied this contract-law analogy to define the scope of conduct for which funding recipients may be held liable, with an eye toward ensuring that recipients had notice of their obligations. 'The same analogy,' *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097, similarly limits 'the scope of available remedies.' *Gebser*, 524 U.S. at 287, 118 S.Ct. 1989. Thus, a particular remedy is available in a private Spending Clause action 'only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.' *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097."

"(b) To decide whether emotional distress damages are available under the Spending Clause statutes in this case, the Court therefore asks whether a prospective funding recipient deciding whether to accept federal funds would have had 'clear notice' regarding that liability. *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526. Because the statutes at issue are silent as to available remedies, it is not obvious how to decide that question. Confronted with the same dynamic in *Barnes*, which involved the question whether punitive damages are available under the same statutes, the Court followed the contract analogy and concluded that a federal funding recipient may be considered 'on notice that it is subject ... to those remedies traditionally available in suits for breach of contract.' 536 U.S. at 187, 122 S.Ct. 2097. Given that punitive damages 'are generally not available for breach of contract,' the Court concluded that funding recipients 'have not, merely by accepting funds, implicitly consented to liability for punitive damages.' *Id.*, at 187–188, 122 S.Ct. 2097.

"Crucial here, the Court in *Barnes* considered punitive damages generally unavailable for breach of contract despite the fact that such damages are hardly unheard of in contract cases: Treatises cited in *Barnes* described punitive damages as recoverable in contract where 'the conduct constituting the breach is also a tort for which punitive damages are recoverable.' Restatement

(Second) of Contracts § 355, p. 154. That recognized exception to the general rule, however, was not enough to give funding recipients the requisite notice that they could face such damages. Under *Barnes*, the Court thus presumes that recipients are aware that they may face the *usual* contract remedies in private suits brought to enforce their Spending Clause 'contract' with the Federal Government."

"(c) The above framework produces a straightforward analysis in this case. Hornbook law states that emotional distress is generally not compensable in contract. Under *Barnes*, the Court cannot treat federal funding recipients as having consented to be subject to damages for emotional distress, and such damages are accordingly not recoverable.

"Cummings argues for a different result, maintaining that traditional contract remedies here *do* include damages for emotional distress, because there is an exception—put forth in some contract treatises—under which such damages may be awarded where a contractual breach is particularly likely to result in emotional disturbance. See, *e.g.,* Restatement (Second) of Contracts § 353. That special rule is met here, Cummings contends, because discrimination is very likely to engender mental anguish. This approach would treat funding recipients as on notice that they will face not only the general rules, but also 'more fine-grained,' exceptional rules that 'govern[ ] in the specific context' at hand. . . . That is inconsistent with both *Barnes* and the Court's larger Spending Clause jurisprudence. *Barnes* necessarily concluded that the existence of an on-point exception to the general rule against punitive damages was insufficient to put funding recipients on notice of their exposure to that particular remedy. No adequate explanation has been offered for why the Court—bound by *Barnes*—should reach a different result here. The approach offered by Cummings pushes the notion of offer and acceptance, central to the Court's Spending Clause cases, past its breaking point. It is one thing to say that funding recipients will know the basic, general rules. It is quite another to assume that they will know the contours of every contract doctrine, no matter how idiosyncratic or exceptional. Cummings would essentially incorporate the law of contract remedies wholesale, but *Barnes* constrains courts to imply only those remedies 'that [are] normally available for contract actions.' *Id.*, at 188, 122 S.Ct. 2097. In urging the Court to disregard that restriction, Cummings would have the Court treat statutory silence as a license to freely supply remedies the Court cannot be sure Congress would have chosen. Such an approach 'risks arrogating legislative power,' *Hernández* v. *Mesa*, 589 U. S. ——, ——, and is particularly untenable in a context requiring 'clear notice regarding the liability at issue,' *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455.

"Even if it were appropriate to treat funding recipients as aware that they may be subject to 'rare' contract-law rules that are 'satisfied only in particular settings,' . . . funding recipients would still lack the requisite notice that emotional distress damages are available under the statutes at issue. That is because the Restatement's formulation—that such damages are available where 'the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result,' § 353—does not reflect the consensus rule among American jurisdictions. There is in fact no majority rule on what circumstances, if any, may trigger the exceptional allowance of such damages. For instance, many states reject the broad and generally phrased Restatement exception because they award emotional distress damages only in a narrow and idiosyncratic group of cases in which the breaching conduct would also have been a tort. These cases unsurprisingly mix contract, quasi-contract, and tort principles together, suggesting that they do not establish or evince a rule of *contract* law.

"Emotional distress damages are not 'traditionally available in suits for breach of contract.' *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097. There is correspondingly no ground, under the Court's cases, to conclude that federal funding recipients have 'clear notice,' *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455, that they would face such a remedy in private actions brought to enforce the statutes here."

EMPLOYMENT LAW

I. Prohibition Against Employment of Undocumented Noncitizen; E-Verify Program

Chapter 832, Public Acts 2022, amending T.C.A. §§ 50-1-103, -703, -713, and -802 and adding § 4-21-409 eff. Apr. 19, 2022.

50-1-103.

"(b) A person shall not knowingly employ, rehire, recruit, or refer for a fee for employment an illegal alien."

50-1-703.

"(b) Notwithstanding subdivision (a)(1)(B), private employers with thirty-five (35) or more full-time equivalent employees, on or after January 1, 2023, shall comply with the requirements in subdivision (a)(1)(B)(ii); provided, that those employers are only required to use the E–Verify program to verify the work authorization status of employees hired on or after January 1, 2023."

50-1-713.

"An employer is not in violation of this part:
(1) During a time period in which the E–Verify program is suspended or not operational; or
(2) If the employer acts upon false results generated by the E–Verify program concerning an employee's work authorization status."

50-1-802.

"An employee has no civil cause of action alleging wrongful or retaliatory discharge against the employee's employer if:
(1) The employee is not authorized to work in the United States under federal immigration laws; and
(2) The employer was not aware that the employee was not authorized to work in the United States under federal immigration laws."

4-21-409.

"If an employer discovers that an employee is not authorized to work in the United States under federal immigration laws through results produced by the E–Verify program, as defined in § 50–1–702, and discharges the employee based on those positive results, then the employee does not have a cause of action for discrimination based on national origin for the discharge under this part."

II. Wages; Minimum Wage, Not Subminimum Wage

Chapter 870, Public Acts 2022, adding T.C.A. § 50-2-114 eff. July 1, 2022.

"(a) An employer shall pay an employee no less than the federal minimum wage under 29 U.S.C. § 206, regardless of the subminimum wage authorized pursuant to 29 U.S.C. § 214(c).

"(b) As used in this section:
(1) 'Employee' means a person born or naturalized in the United States and subject to the jurisdiction thereof, or a person legally present in this country, either of whom is employed by an employer; and
(2) 'Employer' includes an individual, partnership, association, corporation, business trust, legal representative, or organized group of persons, not involved in interstate commerce, acting directly or indirectly in the interest of an employer in relation to an employee."

III. Work Conditions; Hairstyles; CROWN Act

Chapter 1078, Public Acts 2022, adding T.C.A. § 50-1-313 eff. July 1, 2022.

"(a) As used in this section:
(1) 'Commissioner' means the commissioner of labor and workforce development or the commissioner's designee;
(2) 'Employee' means an individual who performs services for an employer for valuable consideration, and does not include a self-employed independent contractor; and
(3) 'Employer' means an individual or entity that employs one (1) or more employees and includes this state and political subdivisions of this state.

"(b) An employer shall not adopt a policy that does not permit an employee to wear the employee's hair in braids, Iocs, twists, or another manner that is part of the cultural identification of the employee's ethnic group or that is a physical characteristic of the employee's ethnic group.

"(c) (1) A policy in violation of subsection (b) is deemed discriminatory and void as against the public policy of this state. A violation of this section does not form the basis for a violation of another provision of law.
(2) This section does not create a private cause of action.

"(d) An employee may file a complaint for a violation of this section with the commissioner. The commissioner shall provide a warning to an employer in violation of this section.

"(e) This section does not apply to:
(1) A public safety employee if it would prevent the employee from performing essential functions of the employee's job requirements during the course of employment; or
(2) A policy that an employer must adopt to adhere to common industry safety standards, to maintain reasonable safety measures, or to comply with federal or state laws, rules, or regulations relative to health or safety."

IV. Employment Issues for Military

A. USERRA; Sovereign Immunity Waived by State in Suit by Veteran

Torres v. Texas Department of Public Safety, 142 S.Ct. 2455 (U.S., Breyer, 2022).

"Article I of the Constitution grants Congress the power '[t]o raise and support Armies' and '[t]o provide and maintain a Navy.' § 8, cls. 1, 12–13. Pursuant to that authority, Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which gives returning servicemembers the right to reclaim their prior jobs with state employers and authorizes suit if those employers refuse to accommodate veterans' service-related disabilities. See 38 U.S.C. § 4301 *et seq.* Petitioner Le Roy Torres enlisted in the Army Reserves in 1989. In 2007, he was called to active duty and deployed to Iraq. While serving, Torres was exposed to toxic burn pits, a method of garbage disposal that sets open fire to all manner of trash, human waste, and military equipment. Torres received an honorable discharge. But he returned home with constrictive bronchitis, a respiratory condition that narrowed his airways and made breathing difficult. These ailments, Torres says, left him unable to work his old job as a state trooper. Torres asked his former employer, respondent Texas Department of Public Safety (Texas), to accommodate his condition by reemploying him in a different role. Texas refused. So Torres sued Texas in state court to enforce his rights under USERRA. § 4313(a)(3). Texas tried to dismiss the suit by invoking sovereign immunity. The trial court denied the State's motion. An intermediate appellate court reversed, reasoning that, under this Court's case law, Congress could not authorize private suits against nonconsenting States pursuant to its Article I powers except under the Bankruptcy Clause, citing *Central Va. Community College* v. *Katz*, 546 U.S. 356. The Supreme Court of Texas denied discretionary review. After the decision below, this Court issued *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. — . *PennEast* held that the States waived their sovereign immunity as to the federal eminent domain power pursuant to the 'plan of the Convention.' The Court then granted Torres' petition for certiorari to determine whether, in light of that intervening ruling, USERRA's damages remedy against state employers is constitutional.

"Held: By ratifying the Constitution, the States agreed their sovereignty would yield to the national power to raise and support the Armed Forces. Congress may exercise this power to authorize private damages suits against nonconsenting States, as in USERRA."

"The Court therefore holds that, in joining together to form a Union, the States agreed to sacrifice their sovereign immunity for the good of the common defense."

B. Veterans' Day as a Holiday

Chapter 854, Public Acts 2022, adding T.C.A. § 15-1-105 eff. Apr. 20, 2022.

"(a) As used in this section:

(1) 'Employee' means a natural person who performs services for an employer for valuable consideration, and does not include a self-employed independent contractor;

(2) 'Employer' means a person or entity that employs one (1) or more employees, and includes the state and its political subdivisions; and

(3) 'Veteran' means a former member of the armed forces of the United States, or a former or current member of a reserve or Tennessee national guard unit who was called into active military service of the United States, as defined in § 58–1–102.

"(b) An employer shall allow the employer's veteran employees to have the entirety of November 11, Veterans' Day, as a non-paid holiday if:

(1) The veteran employee provides the employer with at least one-month's written notice of the veteran employee's intent to have the entirety of that day as a non-paid holiday;

(2) The veteran employee provides the employer with proof of veteran status, which may include, but is not limited to, a DD Form 214 or other comparable certificate of discharge from the armed forces; and
(3) The veteran employee's absence, either alone or in combination with other veteran employee's absences, on that day will not impact public health or safety, or cause the employer significant economic or operational disruption as determined by the employer in the employer's sole discretion.

"(c) This section does not prohibit an employer from allowing the employer's veteran employees to have the entirety of Veterans Day as a paid holiday."

V. Teachers

A. Continuing Contract Law; No Private Right-of-Action for Non-Tenured School Teacher Under First to the Top Act

McAllister v. Lawrence County School System Board of Education, No. M2021-00082-COA-R3-CV (Tenn. Ct. App., McClarty, Mar. 15, 2022), perm. app. denied July 13, 2022.

"Lacy McAllister ('Teacher') was employed by the Lawrence County School System ('BOE' or 'Defendants') as a non-tenured Response to Intervention ('RTI') Coordinator. In contrast to a regular teaching position, an RTI Coordinator tests students, compiles and analyzes test data, leads meetings and gives presentations to teachers regarding intervention materials and methods, communicates with students, parents, teachers and staff, implements the county's RTI program at the school and targets intervention of students through classroom instruction. During the 2016-2017 school year, Teacher, the first person to serve as the RTI Coordinator at Summertown High, was evaluated on two occasions using the General Educator Evaluation rubric utilized for classroom teachers. Principal Brent Long conducted a pre-conference and a post-conference on each occasion. Teacher received scores of 4 or 'above expectations.' During the 2017-18 school year, Teacher anticipated being observed and evaluated in the same fashion. BOE asserts that for the 2017-2018 school year, however, the Summertown High officials decided that the School Services Personnel evaluation rubric would be utilized for Teacher's evaluation.

"Unaware of the change in evaluation methods, by October 2017, Teacher became concerned that she had not been observed. Principal Long departed the school in December without evaluating Teacher as he had done the previous year. After Patty Franks was hired as the new principal, from January to May 2018, Teacher was not observed in the manner utilized previously. In a later deposition, Principal Franks related as follows:

> I explained to her that with ... the school support service rubric [not the classroom teacher rubric], that her job, as a whole, is observed all the time. So her interaction with teachers, her interactions with parents at meetings, the way that she uses the data. She's responsible for gathering the data, somehow she uses the data. All of that is part of her job, and so that's part of that rubric.

"On May 22, 2018, Teacher was notified that she would be dismissed and her employment terminated 'at the close of the present school year-May 30, 2018.' Principal Franks noted problems with Teacher's professionalism and preparation. Director of Schools Johnny McDaniel later

testified that he relied on the principal's recommendation that Teacher be dismissed. He acknowledged never reviewing the evaluation results or any documents reflecting alleged observations of Teacher.

"Teacher later received emails providing the results of two purported observations of her. According to Teacher, Principal Franks claimed to have conducted an in-classroom observation of her on May 31, 2018, at 7:15 p.m. Ms. Franks completed the form nine minutes later at 7:24 p.m. Teacher observes that the school year had already ended by that date and no one was present in the school at that time of night. Teacher therefore claims that Ms. Franks never conducted any in-classroom observation of her.

"A second form was prepared by former Principal Long. It related that Mr. Long conducted the observation on December 13, 2017, but did not create the form until June 4, 2018, six months after the date of the alleged observation and two weeks after Teacher's contract was not renewed. Teacher asserts that administrators directed Mr. Long to 'go back and complete' an evaluation form for an observation that did not take place.

"Teacher initially filed a grievance asserting the inaccuracy of the data (based on her allegation of falsified observation results) and the failure to follow the evaluation process (by failing to observe her); however, it was not processed because she was no longer an employee. Teacher then filed a complaint on April 26, 2019, seeking, on its face, declaratory relief for breach of contract on the basis that BOE dismissed her 'without a valid notice of nonrenewal under the Continuing Contract Law ['CCL'].' She alleged: 'Because McAllister was not properly evaluated, Director McDaniel's purported nonrenewal of McAllister did not comply with the requirements of ... § 49-1-302(d)(2)(A), ... and therefore was invalid under the Continuing Contract Law ... § 49-5-409.' Teacher argued that BOE 'failed to adhere to Tennessee law and to state and local board policies' when she was denied the right to pursue a grievance and when her evaluations did not inform the decision to terminate her. Teacher specifically claims that she was asserting an implied right of action based on Tennessee Code Annotated section 49-1-302(d)(2)(A), a part of the 'First to the Top Act' ('FTTTA'). It provides: '[annual] evaluations shall be a factor in employment decisions, including ... promotion, retention, termination, compensation and the attainment of tenure status.' The FTTTA also mandated a local level evaluation grievance procedure for public school teachers to provide a means for a teacher to challenge 'the accuracy of the data used in the evaluation and the adherence to the evaluation policies adopted.' Teacher argues that the legislature declared that evaluations 'shall be a factor' in employment decisions, including dismissals.

"BOE responded to Teacher's complaint by denying that it had failed to conduct observations of Teacher or that the evaluations were falsified or improper. BOE filed a summary judgment motion asserting the following arguments: (1) section 49-5-409 does not provide a private right of action for a non-tenured teacher subject to a nonrenewal decision; and (2) Teacher had no right to judicial review regarding her nonrenewal because she was a probationary employee.

"The trial court held as follows:

> 1. This court acknowledges that Tennessee Supreme Court Rule 4 generally provides that unpublished opinions are persuasive authority, and the court specifically finds *Mosby v. Fayette Cnty. Bd. of Educ.*, No. W2019-01851-COA-R3-CV, 2020 WL 4354905 (Tenn. Ct. App. July 29, 2020) to be persuasive and controlling authority for this case.

> 2. Plaintiff has no private right of action under any of the theories alleged in her complaint, and therefore, Defendants' Motion for Summary Judgment is GRANTED based on the arguments presented in its memorandum of Law....
>
> 3. While Plaintiff disputed [certain] facts ... in Defendants' Statement of Undisputed Material Facts, the dispute identified by Plaintiff does not create a factual dispute such that Defendants' Motion should be denied."

"In *Mosby,* which also involved a non-tenured teacher who sued to challenge her dismissal at the end of the school year, we noted: 'Section 49-5-409 does not offer a prolonged list of protections for non-tenured teachers who wish to challenge a decision to non-renew their employment. Instead "[the timing requirement] is the central and nearly the *sole* protection offered to non-tenured teachers."' *Mosby*, 2020 WL 4354905, at *5 (quoting *Dallas,* 603 S.W.3d at 51) (emphasis in original). Ms. Mosby asserted a claim pursuant to Tennessee Code Annotated section 49-5-409 after the director of schools acknowledged that he did not consider her evaluations when he decided to dismiss her. This court concluded that the statute 'does not provide a private right of action.'

"Teacher argues that *Mosby* has no application to this claim and that Ms. Mosby's assertion of a direct action under the CCL was different than the legal claim here. She contends that Ms. Mosby did not rely on the requirements of the FTTTA as a basis for a breach of contract claim. Ms. Mosby specifically stated that she was not asserting 'an implied right of action based on Tenn. Code Ann. § 49-1-302(d)(2)(A).' Thus, this court expressly pretermitted the question of whether Ms. Mosby could assert a cause of action for a violation of the requirements in Tennessee Code Annotated section 49-1-302(d)(2)(A)."

"In *Mosby*, the plaintiff filed suit arguing that the defendants improperly failed to consider the required evaluations under the FTTTA in deciding to non-renew her employment and improperly delegated the responsibility to make the non-renewal decision. *Mosby*, 2020 WL 4354905, at *2. The court directly addressed the issue of whether a non-renewal decision could be challenged based on a failure to comply with the evaluations. A panel of this court expressly found as follows:

> [N]o language in section 49-5-409 ... directs a court to include section 49-1-302(d)(2)(A) in a claim under the Continuing Contract Law. *See* Tenn. Code Ann. § 49-5-409. Allowing such a claim would fly in the face of the directive that courts shall not 'create a [private] right under the guise of liberal interpretation of [a] statute.' *See Brown*, 328 S.W.3d at 855 (quoting *Premium Fin. Corp.*, 978 S.W.2d at 93). Instead of wielding the broad-sweeping effect that Plaintiff asserts, the Continuing Contract Law centers on the timeliness of notice given to a teacher. *See Dallas [v. Shelby Cnty. BOE,* 603 S.W.3d 32, 35 (Tenn. Ct. App. 2019)]....

"*Id.* at *5."

"A long line of precedent establishes that the CCL's sole protection for non-tenured teachers in a challenge to a non-renewal decision is the timeliness of the notice of non-renewal. As noted by Defendants, the legislature has not provided the relief sought by Teacher.

"Teacher also claims that her non-renewal was unlawful for failure to comply with the observation and grievance procedure requirements in the FTTTA. She argues that the evaluation grievance procedure operates as an additional basis for a non-tenured teacher to challenge an employment action. However, the FTTTA provides: 'This grievance procedure must provide a means ... to

challenge only the accuracy of the data used in the evaluation and the adherence to the evaluation policies adopted pursuant to this subdivision (d)(2).' *See Trout v. Knox Cnty. BOE*, 163 F. Supp. 3d 492, 496-97 (E.D. Tenn. 2016). In *Trout*, the court held that the purpose of a grievance procedure is to 'efficiently and fairly resolve grievances regarding procedural errors in the evaluation process, not to address disputes regarding employment actions taken based on the results of an evaluation.' As noted by BOE, the limited relief afforded by the grievance procedure to review procedural errors does not amount to a 'claim' Teacher can assert distinct from the holding in *Mosby.* The trial court properly found *Mosby* to be controlling."

"No proof of legislative intent to imply a private right of action in the FTTTA for non-tenured teachers who have been non-renewed has been demonstrated. The trial court properly ruled that Teacher had no private right of action under the theories she raised in her complaint."

B. Dismissal Due to Lack of Funding

Chapter 678, Public Acts 2022, adding T.C.A. § 49-5-409(b)(2) eff. Mar. 28, 2022.

"(2) If a teacher's dismissal or failure of reelection is due only to a loss of funding for the position, then the local board of education or director of schools, as appropriate, shall state in the notice required under this section that the only reason for dismissing the teacher or not reelecting the teacher's contract for the next succeeding school year is a loss of funding for the position."

VI. Cause of Action for Unlawful Discharge of Employee Who is Public Servant

Chapter 1142, Public Acts 2022, adding T.C.A. § 50-1-314 eff. July 1, 2022.

"(a) A public servant who was terminated by the public servant's employer or agent of the employer in violation of § 39–16–506 may bring a cause of action against the employer for unlawful discharge and any other damages to which the employee may be entitled, subject to the limitations set out in § 4–21–313, and:

(1) Treble the amount of damages resulting from or incident to the unlawful discharge; and
(2) Reasonable attorney fees and costs.

"(b) If a public servant files a cause of action under this section for any improper purpose, such as to harass or to cause needless increase in costs to an employer, the court, upon motion or upon its own initiative, shall impose upon the public servant an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred, including reasonable attorney's fees.

"(c) In any cause of action for discharge brought pursuant to this section, the plaintiff shall have the burden of establishing a prima facie case of unlawful discharge. If the plaintiff satisfies this burden, the burden shall then be on the defendant to produce evidence that one (1) or more legitimate, nondiscriminatory reasons existed for the plaintiff's discharge. The burden on the defendant is one of production and not persuasion. If the defendant produces such evidence, the presumption of discrimination raised by the plaintiff's prima facie case is rebutted, and the burden shifts to the plaintiff to demonstrate that the reason given by the defendant was not the true reason for the plaintiff's discharge and that the stated reason was a pretext for unlawful discharge. The foregoing allocations of burdens of proof shall apply at all stages of the proceedings, including motions for

summary judgment. The plaintiff at all times retains the burden of persuading the trier of fact that the plaintiff has been the victim of unlawful discharge.

"(d) This section abrogates and supersedes the common law with respect to any claim that could have been brought under this section."

VII. COVID Issues

A. Vaccination Requirement for Health Care Workers at Facilities that Participate in Medicare and Medicaid Programs Upheld

Biden v. Missouri, 142 S.Ct. 647 (U.S., Per Curiam, 2022).

"In first action, several States brought action against President and other federal defendants, challenging Centers for Medicare and Medicaid Services' (CMS) interim final rule imposing COVID-19 vaccination mandate applicable to staff of healthcare facilities participating in Medicare and Medicaid. The United States District Court for the Eastern District of Missouri, Matthew T. Schelp, J., 2021 WL 5564501, granted States' motion for preliminary injunction, and denied, 2021 WL 5631736, defendants' motion for stay pending appeal. In second action, several States brought action against the Secretary of Health and Human Services and other federal defendants challenging same CMS interim final rule. The United States District Court for the Western District of Louisiana, Terry A. Doughty, J., 2021 WL 5609846, granted nationwide preliminary injunction, and denied defendants' motion for stay pending appeal. The United States Court of Appeals for the Fifth Circuit, 20 F.4th 260, granted in part and denied in part defendants' motion for stay pending appeal. In both cases, the federal government filed applications to stay preliminary injunctions."

"The Supreme Court held that:

[1] Secretary of Health and Human Services did not exceed his statutory authority in issuing rule;
[2] rule was not arbitrary and capricious;
[3] Secretary had requisite good cause to forgo notice-and-comment procedures;
[4] Secretary was not required to consult with appropriate State agencies on participation conditions before issuing rule; and
[5] rule did not violate statutory directive that federal officials may not exercise any supervision or control over manner in which medical services are provided or over selection or tenure of any officer or employee of any participating facility.

"Applications granted."

B. OSHA's Vaccine-or-Test Mandate for Employers with More than 100 Employees Put on Hold

National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 142 S.Ct. 661 (U.S., Per Curiam, 2022).

"States, businesses, trade groups, nonprofit organizations, and others filed separate petitions for review of emergency temporary standard (ETS) issued by Secretary of Labor, acting through Occupational Safety and Health Administration (OHSA), mandating that employers with more than

100 employees require the employees to undergo COVID-19 vaccination or take weekly COVID-19 tests at their own expense and wear a mask in workplace. The United States Court of Appeals for the Fifth Circuit, Engelhardt, Circuit Judge, 17 F.4th 604, stayed enforcement pending judicial review of petitioners' motions for permanent injunction. Government notified judicial panel on multidistrict litigation of petitions across multiple circuits, invoking lottery procedure to consolidate all petitions in single circuit, and panel designated the United States Court of Appeals for the Sixth Circuit to review the petitions. The United States Court of Appeals for the Sixth Circuit, Stranch, Circuit Judge, 2021 WL 5989357, granted federal government's motion to dissolve the stay, and denied rehearing en banc, 20 F.4th 264. States and a business organization applied for stay pending judicial review."

"The Supreme Court held that:

> [1] petitioners were likely to succeed on claim that ETS exceeded Secretary's statutory authority, and
> [2] equities did not justify withholding interim relief through a stay.

"Applications granted; rule stayed."

C. Exemption from Employer's Requirement for Proof of Vaccination

Chapter 644, Public Acts 2022, adding T.C.A. § 14-6-105 eff. Mar. 11, 2022, until July 1, 2023.

"(a) As used in this section:
- (1) 'Employer' means an entity that:(A) Employs one (1) or more persons within this state; and(B) Is not subject to the prohibition against compelling proof of vaccination in § 14–2–102(a); and
- (2) 'Staff member':
  - (A) Means a person required by an employer to provide proof of vaccination or receive the COVID–19 vaccine; and
  - (B) Includes:
    - (i) A person who is employed by an employer, as of the effective date of this act, and is required by the employer to provide proof of vaccination or receive the COVID–19 vaccine; and
    - (ii) A person required by the employer to provide proof of vaccination or receive the COVID–19 vaccine:
      - (*a*) Who is:
        (*1*) Licensed, registered, certified, or permitted under title 63 or title 68 to administer health care in the ordinary course of business or practice of a profession; or
        (*2*) A student pursuing a course of study for the purpose of becoming licensed, registered, certified, or permitted under title 63 or title 68 to administer health care in the ordinary course of business or practice of a profession; and
      - (*b*) Who, as of the effective date of this act, has been granted permission by a facility licensed under title 33 or title 68 to be present in the facility to care for or attend to patients or for clinical education.

"(b) An employer that requires a staff member to provide proof of vaccination or receive the COVID–19 vaccine shall grant the staff member an exemption to the requirement if:

(1) The staff member's request for a medical exemption is supported by a statement signed and dated by a physician licensed under title 63, chapter 6 or 9 that the staff member has a condition recognized under generally accepted medical standards as a basis for the medical exemption and provided by the physician pursuant to Section 2 of this act; or

(2) The staff member attests in writing, including by electronic means, that the staff member has a sincerely held religious belief that prevents the staff member from complying with the requirement in accordance with guidance from the federal centers for medicare and medicaid services.

"(c) An employer described in subsection (b) shall not:

(1) Take longer than ten (10) business days to grant or deny the staff member's request for an exemption;

(2) Deny a request for an exemption without providing a written statement explaining why the request was denied;

(3) Discharge, threaten to discharge, or reduce the compensation, benefits, or hours of a staff member because the staff member has requested and been granted an exemption; or

(4) For an exemption based on a religious belief pursuant to subdivision (b)(2), require the staff member to provide further proof beyond the staff member's initial statement that the staff member has a sincerely held religious belief that prevents compliance and should be granted an exemption.

"(d) (1) This section does not:

(A) Impose a duty or liability on an employer for acts or omissions prior to the effective date of this act;

(B) Except as otherwise provided in subdivision (d)(2), require an employer to change a determination made prior to the effective date of this act; or

(C) Require an employer to take or refrain from an action contrary to enforceable requirements imposed by the federal centers for medicare and medicaid services.

(2) Notwithstanding subdivision (d)(1)(B), a staff member who was terminated for not complying with a COVID–19 vaccine mandate and that termination would have been covered by this section may reapply for employment and shall not be denied employment solely because the staff member sought an exemption prior to the effective date of this act.

"(e) A violation of this section is punishable by a civil penalty of ten thousand dollars ($10,000).

"(f) (1) The attorney general and reporter shall establish a process by which violations of this section may be reported.

(2) The attorney general and reporter may bring an action against an employer that violates this section to enjoin further violations and to recover a civil penalty of ten thousand dollars ($10,000) per violation.

(3) A civil penalty collected pursuant to this section must be paid into the general fund of this state.

(4) The prevailing party in an action brought under subdivision (f)(2) is entitled to reasonable attorney's fees, court costs, and expenses, but court costs must not be taxed against the attorney general and reporter or this state in actions commenced under this section.

(5) Jurisdiction for an action brought pursuant to this section is in the chancery or circuit court of Williamson County or the chancery court in the county where the employer is located.

"(g) Notwithstanding § 14–6–102, an employer is not exempt from this section.

"(h) Notwithstanding this section, a person is not prohibited from requiring another person to provide proof of vaccination as a condition to entering that person's personal residence for purposes of providing products or services."

I. Breach of Fiduciary Duty of Prudence

Hughes v. Northwestern University, 142 S.W.3d 737 (U.S., Sotomayor, 2022).

"Respondents administer retirement plans on behalf of current and former Northwestern University employees, including petitioners here. The plans are defined-contribution plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), under which each participant chooses an individual investment mix from a menu of options selected by the plan administrators. Petitioners sued respondents claiming that respondents violated ERISA's duty of prudence required of all plan fiduciaries by: (1) failing to monitor and control recordkeeping fees, resulting in unreasonably high costs to plan participants; (2) offering mutual funds and annuities in the form of 'retail' share classes that carried higher fees than those charged by otherwise identical share classes of the same investments; and (3) offering options that were likely to confuse investors. The District Court granted respondents' motion to dismiss, and the Seventh Circuit affirmed, concluding that petitioners' allegations fail as a matter of law.

"Held: The Seventh Circuit erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents. Determining whether petitioners state plausible claims against plan fiduciaries for violations of ERISA's duty of prudence requires a context-specific inquiry of the fiduciaries' continuing duty to monitor investments and to remove imprudent ones as articulated in *Tibble* v. *Edison Int'l*, 575 U.S. 523. *Tibble* concerned allegations that plan fiduciaries had offered 'higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available.' *Id.,* at 525–526. The *Tibble* Court concluded that the plaintiffs had identified a potential violation with respect to certain funds because 'a fiduciary is required to conduct a regular review of its investment.' *Id*., at 528. *Tibble*'s discussion of the continuing duty to monitor plan investments applies here. Petitioners allege that respondents' failure to monitor investments prudently—by retaining recordkeepers that charged excessive fees, offering options likely to confuse investors, and neglecting to provide cheaper and otherwise-identical alternative investments—resulted in respondents failing to remove imprudent investments from the menu of investment offerings. In rejecting petitioners' allegations, the Seventh Circuit did not apply *Tibble*'s guidance but instead erroneously focused on another component of the duty of prudence: a fiduciary's obligation to assemble a diverse menu of options. But respondents' provision of an adequate array of investment choices, including the lower cost investments plaintiffs wanted, does not excuse their allegedly imprudent decisions. Even in a defined-contribution plan where participants choose their investments, *Tibble* instructs that plan fiduciaries must conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options. See *id.*, at 529–530. If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty. The Seventh Circuit's exclusive focus on investor choice elided this aspect of the duty of prudence. The court maintained the same mistaken focus in rejecting petitioners' claims with respect to recordkeeping fees on the grounds that plan participants could have chosen investment options with lower expenses. The Court vacates the judgment below so that the Seventh Circuit may reevaluate the allegations as a whole, considering whether petitioners have plausibly alleged a violation of the duty of prudence as articulated in *Tibble* under applicable pleading standards. The content of the duty of prudence turns on 'the circumstances . . .

prevailing' at the time the fiduciary acts, 29 U.S.C. § 1104(a)(1)(B), so the appropriate inquiry will be context specific. *Fifth Third Bancorp* v. *Dudenhoeffer*, 573 U.S. 409, 425."

ETHICS AND PROFESSIONALISM

I. The Client-Lawyer Relationship (Rules 1.1 - 1.16)

A. Competence, Rule 1.1

In re Anderson, Board Release of Information.

Kristie Nicole Anderson of Jacksboro was suspended for 1 year, with 30 days to be served on active suspension and the remainder on probation, and ordered to engage the services of a practice monitor, based on a conditional guilty plea.

"The Board received complaints from 5 clients regarding the failure of Ms. Anderson to file appropriate pleadings, submit timely orders, respond to discovery and reasonably communicate regarding the status of the representation."

Ms. Anderson violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), 3.4 (fairness to opposing party and counsel), and 8.4(a) (misconduct).

In re Eidson, Board Release of Information.

Gerald Todd Eidson of Rogersville was publicly censured.

"Mr. Eidson was appointed to represent a client in a dependency and neglect matter in juvenile court on June 7, 2021, and the adjudicatory hearing was set for June 29, 2021. Mr. Eidson failed to speak with the client until the day before the hearing, despite the client leaving multiple messages to speak with him. Mr. Eidson failed to seek a continuance until he was in court on June 29, and he withdrew his request for a continuance upon the objection by other parties. The client suffered potential harm."

Mr. Eidson violated RPCs 1.3 (diligence) and 1.1 (competence).

In re Freeman, Board Release of Information.

Michael Lloyd Freeman of Nashville was suspended for 3 years, with 3 months to be served on active suspension and the remainder on probation, and ordered to pay restitution of $750, obtain an evaluation from TLAP, 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."

Mr. Freeman violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), and 3.2 (expediting litigation).

North Carolina State Bar 2021 Formal Ethics Opinion 2, A Lawyer's Professional Responsibility in Identifying and Avoiding Counterfeit Checks (July 16, 2021).

"Inquiry #1:

"Client contacted Lawyer seeking to collect debt from a third party. Client's communication with Lawyer was unsolicited – Lawyer does not advertise for his practice, and Lawyer had not previously solicited Client's business. Client provided Lawyer with documentation supporting Client's claim. Lawyer made preliminary investigation and verified the existence and address of third party. Lawyer contracted with Client to file a lawsuit against third party for the amount owed to Client. A few days after Lawyer sent third party a letter introducing himself as Client's representative, third party contacted Lawyer stating that he wished to pay the amount owed to Client without the need for litigation, and that third party would be back in touch to make payment arrangements. Without further communication with third party, Lawyer subsequently received a cashier's check from third party drawn on an out-of-country bank. The cashier's check was dated prior to third party's earlier conversation with Lawyer, and third party did not mention the cashier's check to Lawyer. Third party's note also stated that he would pay the remainder of debt owed to Client within weeks. Lawyer did no further investigation of third party and did not investigate the authenticity of the foreign bank cashier's check.

"Did Lawyer violate the Rules of Professional Conduct by not investigating the authenticity of the foreign bank cashier's check?

"Opinion #1:

"Yes. Lawyer violated his duties of competency and diligence in representing Client because the scenario described above raises a number of red flags that should alert a lawyer practicing today to the potential for fraud in both the representation and the receipt and disbursement of funds. Rules 1.1 and 1.3.

"A lawyer's duty of competency requires the lawyer to have the necessary 'legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.' Comment 8 to Rule 1.1 further states,

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

"The fraud accomplished through the counterfeit check scam described in the present inquiry is, unfortunately, not a new problem for the legal community. State and federal agencies have alerted the public to the existence and persistence of these counterfeit check scams for some time. *See, e.g.*, *Counterfeit Check Scams*, North Carolina Department of Justice, https://ncdoj.gov/protecting-consumers/sweepstakes-and-prizes/counterfeit-check-scams/; *How to Spot, Avoid and Report Fake Check Scams*, Federal Trade Commission, https://www.consumer.ftc.gov/articles/how-spot-avoid-and-report-fake-check-scams. Similarly, state and national bar associations, lawyer regulatory bodies, and malpractice carriers have reported on and alerted lawyers to the reality that such scams often target members of the legal profession. *See, e.g.*, *Six Indicted in $32M Internet Collection Scam That Snagged 80 Lawyers*, ABA Journal (Nov. 22, 2010), https://www.abajournal.com/news/article/six_indicted_in_32m_internet_collection_scam_that_snagged_80_lawyers/; *Counterfeit Check Scams Continue to Target Law Firms*, California Bar Journal (January 2012), http://www.calbarjournal.com/January2012/TopHeadlines/TH6.aspx; New York City Bar Formal Ethics Opinion 2015-3, *Lawyers Who Fall Victim to Internet Scams* (April 22, 2015),

https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2015-3-lawyers-who-fall-victim-to-internet-scams; Laura Loyek, *Counterfeit Check Scams are Still Snaring Lawyers*, Lawyers Mutual North Carolina (March 22, 2019), https://www.lawyersmutualnc.com/risk-management-resources/articles/ counterfeit-check-scams-are-still-snaring-lawyers; Joanna Herzik, *Scams Continue to Target Texas Attorneys*, Texas Bar Blog (July 14, 2020), https://blog.texasbar.com/2020/07/articles/law-firms-and-legal-departments/scams-continue-to-target-texas-attorneys/; *E-Mail Scams and Lawyer Trust Accounts*, Illinois Attorney Registration and Disciplinary Commission, https://www.iardc.org/ information/alert.html. The North Carolina State Bar has also published a number of warnings to the legal profession in North Carolina about these scams. *See, e.g.*, *New Variation of Fake Check Scam Targets Law Practices, North Carolina State Bar* (December 6, 2010), /news-publications/ news-notices/2010/12/fake-check-scam/; Bruno Demoli, *Bruno's Top Tips: Protect Yourself from Financial Con-Artists*, North Carolina State Bar Journal (Fall 2011 pp. 34 & 37); *Alert: Beware of Scams that Target NC Law Practices*, North Carolina State Bar (January 8, 2016), /news-publications/news-notices/2016/01/scams-targeting-nc-law-practices/. These publications describe the scenarios associated with the scams and identify the relevant warning signs to assist lawyers in detecting and avoiding such scams.

"Lawyer's mistaken reliance on the counterfeit check is unexcused. Given the breadth of notice provided to the legal profession on this common scam, Lawyer should have realized that the circumstances surrounding this purported representation required additional investigation. As noted above, Lawyer has a duty to represent his clients with competency and diligence. Rules 1.1 and 1.3. Lawyer's duty of competency includes the need to 'keep abreast of changes in the law and its practice[.]' Rule 1.1. For at least ten years, lawyers have been warned about being targets of scams such as the one at issue in this inquiry. Lawyer should have been alerted to the suspicious nature of this transaction based upon the circumstances in this scenario, including the unsolicited request for the representation; the willingness of the purported defendant to quickly resolve the dispute without much effort from Lawyer; the cashier's check drawn on an out-of-country bank; and the cashier check being dated prior to Lawyer's conversation with the purported defendant. Although one of these circumstances standing alone may not give cause for suspicion, the totality of the circumstances should have alerted Lawyer to the suspicious nature of the representation and the transaction. Lawyer's failure to recognize the scam given the vast notice and information directed to lawyers on the topic demonstrated his lack of competency in violation of Rule 1.1. Furthermore, given the suspicious nature of the representation and transaction, Lawyer should have diligently investigated the legitimacy of the cashier's check. Lawyer could have accomplished this by contacting the bank that issued the cashier's check to confirm authenticity, or Lawyer could have informed Client of his concerns and waited to see that the cashier's check was in fact honored and accepted by the issuing bank.

"Inquiry #2:

"Lawyer deposited the cashier's check into his firm's trust account. Lawyer notified Client of Lawyer's receipt of payment from third party. Client directed Lawyer to promptly deduct 20% of the cashier's check for Lawyer's fee and to disburse the rest of the money via two disbursements: one to an account in another state and the remainder to an account in a different country. The day after Lawyer deposited the cashier's check into his trust account, Lawyer called his bank and was informed that the funds from the cashier's check were available. Without clarifying what available means, Lawyer then proceeded to make the disbursements from his trust account per Client's direction.

"Subsequently, the foreign bank upon which third party's cashier's check was drawn became suspicious and determined that the cashier's check was counterfeit. Lawyer was unable to recall and recover the trust account disbursements made to Client's accounts. Lawyer then replenished the disbursed funds, including his fee, to his trust account using funds from his operating account. Lawyer reported the incident to the State Bar's Trust Account Compliance Counsel, expressing remorse and stating that his reliance on the counterfeit cashier's check was an unintentional mistake.

"Did Lawyer violate the Rules of Professional Conduct by depositing the check into his trust account and making the disbursements as directed by Client from the trust account?

"Opinion #2:

"Yes. By disbursing funds from Lawyer's trust account on Client's behalf when Lawyer did not actually have funds belonging to Client in Lawyer's trust account, Lawyer disbursed entrusted funds belonging to other clients in violation of Rules 1.15-2(a), (k), and (n). Safeguarding entrusted client funds is one of the most important professional responsibilities that a lawyer possesses. The Rules of Professional Conduct require lawyers to deposit and hold entrusted client funds in the lawyer's general or dedicated trust account, and to only disburse those funds for the client's benefit upon the client's directive. Rules 1.15-2(a), (b), and (n). Rule 1.15-2(k) specifically prohibits a lawyer from using 'any entrusted property to obtain credit or other personal benefit for . . . any person other than the legal or beneficial owner of that property.'

"Although Lawyer believed he was disbursing Client's funds from his trust account after depositing the purportedly valid cashier's check, Lawyer actually disbursed funds belonging to his other clients because the cashier's check was counterfeit and resulted in no actual deposit of funds belonging to Client into Lawyer's trust account. Lawyer's disbursement of other clients' funds to Client and to himself occurred without his other clients' permission. By disbursing his other clients' funds from his trust account without their permission and for the benefit of someone other than the client, Lawyer misappropriated entrusted client funds in violation of Rules 1.15-2(a), (k), and (n).

"RPC 191 [Disbursements Upon Deposit Of Funds Provisionally Credited To Trust Account, Adopted: October 20, 1995] references N.C. Gen. Stat. § 45A-4 (Good Funds Settlement Act) and rules that a lawyer may make disbursements from his or her trust account in reliance upon the deposit of funds provisionally credited to the account if the funds are deposited in the form of cash, wired funds, cashier's check, or by specified instruments which, although they are not irrevocably credited to the account upon deposit, are generally regarded as reliable. However, a lawyer should never disburse against any provisionally credited funds unless he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. RPC 191. When reasonably identifiable suspicious circumstances are present surrounding the receipt and disbursement of funds, a lawyer should not disburse on provisional credit – even if statutorily authorized to do so – until the lawyer satisfies him or herself that the instrument is authentic and the transaction is legitimate. Lawyer's failure to do so in this situation not only unnecessarily put other clients' funds at risk but resulted in actual harm to his clients through the misappropriation of his clients' funds.

"Inquiry #3:

"Does Lawyer have a duty to replace the funds that were improperly disbursed as a result of the counterfeit check scam?

"Opinion #3:

"Yes. Under these circumstances, Lawyer failed to follow the Rules of Professional Conduct with regards to competency, diligence, and safekeeping of funds. *See* Opinion #1. Because Lawyer's failure to follow the Rules of Professional Conduct is a proximate cause of the loss of entrusted client funds, Lawyer is professionally obligated to replace the misappropriated funds. *See* 2015 FEO 6.

"Inquiry #4:

"Does Lawyer have a duty to report to the State Bar's Trust Account Compliance Counsel the misappropriation of funds from Lawyer's trust account resulting from the deposit and disbursement of the fraudulent cashier's check?

"Opinion #4:

"Yes. Rule 1.15-2(p) states that, '[a] lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel.' Even if Lawyer promptly replenished the funds disbursed after learning the cashier's check was counterfeit, a misappropriation of funds belonging to other clients occurred that requires reporting to the State Bar under Rule 1.15-2(p)."

B. Scope of Representation and Allocation of Authority Between Client and Lawyer, Rule 1.2

In re Mangrum, Board Release of Information.

Jason Scott Mangrum of Brentwood was publicly censured.

"In the representation of clients in a civil proceeding, Mr. Mangrum failed to obtain consent from his clients to the voluntary dismissal of their lawsuit. Following the dismissal of the lawsuit, Mr. Mangrum made misrepresentations to his clients, falsely claiming that depositions were in the process of being scheduled. Mr. Mangrum delayed in taking proper action for his clients throughout the representation."

Mr. Mangrum, violated RPCs 1.2(a) (scope of representation), 1.3 (diligence), 1.4 (communication), and 8.4(c) (misconduct), and is hereby Publicly Censured for these violations.

C. Diligence, Rule 1.3

In re Duke, Board Release of Information.

Charles Martin Duke of Nashville was suspended for 3 years, with one year to be served on active suspension, and required to engage a practice monitor, based on a conditional guilty plea.

"On February 1, 2018, a Petition for Discipline was filed against Mr. Duke. Mr. Duke was retained by his client to prosecute a personal injury action. Mr. Duke failed to file an action within the statute of limitations and falsified a tolling agreement in an effort to mislead his client."

Mr. Duke violated RPCs 1.1 (competence), 1.3 (diligence), 1.4(a) (communication), 3.1 (meritorious claims and contentions), 3.3(a)(1) (candor toward the tribunal), 3.4(b) (fairness to opposing counsel and others), 4.1(a) (truthfulness in statements to others), and 8.4(a), (b), (c), and (d) (misconduct).

In re Evans, Board Release of Information.

Jake Preston Evans of Charlotte, North Carolina, was suspended for 16 months retroactive to March 9, 2020, and ordered to contact TLAP and pay restitution to clients, based on a conditional guilty plea.

"Mr. Evans was retained in two separate patent and trademark matters and was not diligent in making timely filings for patents and copyright matters resulting in the applications being denied. Mr. Evans failed to perfect appeals of those denials, failed to reasonably communicate with his clients, and failed to respond to Board inquiries."

Mr. Evans violated RPCs 1.3 (diligence), 1.4 (communication), and 8.1 (bar admissions and disciplinary matters).

In re Fielden, Board Release of Information.

Daniel Clyde Fielden, II, of Knoxville was publicly censured.

"Mr. Fielden represented a client in a divorce action and failed to represent his client in a diligent manner, failed to expedite her hearing, failed to properly respond to the client's termination of representation, and failed to communicate with his client."

Mr. Fielden violated RPCs 1.3 (diligence), 1.4 (communication), 1.16 (declining or terminating representation), 3.2 (expediting litigation) and 8.4(d) (misconduct).

In re Freeman, Board Release of Information.

Michael Lloyd Freeman of Nashville was publicly censured, based on a conditional guilty plea.

"Mr. Freeman failed to reasonably respond to his client's request for information about the status of his criminal case and failed to diligently represent his client over a period of approximately two years.

Mr. Freeman violated RPCs 1.3 (diligence) and 1.4 (communication).

In re Hall, Board Release of Information.

Andrew Nathan Hall of Wartburg was permanently disbarred and ordered to pay restitution to two clients.

"The Board filed a Petition for Discipline and a Supplemental Petition for Discipline against Mr. Hall, and the disciplinary matter was tried to a Hearing Panel on June 24, 2021.

"In the first complaint, the Panel found Mr. Hall failed to represent his client in a diligent manner; failed to set her case for hearing and expedite her litigation; failed to comply with an order of

summary suspension entered November 6, 2018 by the Tennessee Supreme Court; failed to inform his client of his suspension from the practice of law and withdraw from her representation; failed to inform his client of his health issues and misled her to believe another attorney had agreed to represent her; failed to reasonably communicate with his client, and failed to respond to the request of Board for information related to the disciplinary complaint.

"In the second complaint, the Panel found Mr. Hall failed to represent his clients in a diligent manner; repeatedly misled them to believe their petition for bankruptcy had been filed and was proceeding; accepted a fee but failed to provide the professional services for which he had been retained; charged and collected an unreasonable fee; failed to comply with the summary suspension Order entered by the Tennessee Supreme Court; failed to comply with the Order of Temporary Suspension entered September 4, 2020, by the Tennessee Supreme Court; failed to inform his clients of his suspension from the practice of law and withdraw from their representation; failed to reasonably communicate with them and failed to respond to the request of the Board for information related to the disciplinary complaint."

Mr. Hall violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16 (declining or terminating representation), 3.2 (expediting litigation), 3.4(fairness to opposing party and counsel), 8.1 (bar admissions and disciplinary matters), and 8.4 (misconduct).

In re Harding, Board Release of Information.

John T. Harding of Hendersonville was suspended for 1 year with 30 days to be served on active suspension and the remainder served on probation, based on a conditional guilty plea.

"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 Morris, Board Release of Information.

Jack Colin Morris of Jackson was publicly censured.

"Mr. Morris represented a client in a detainer action. Mr. Morris did not appear at the hearing and the case was dismissed. Mr. Morris made a timely and good faith effort to rectify the consequences of his misconduct."

Mr. Morris violated RPCs 1.3 (diligence) and 8.4(a) and (d) (misconduct).

In re Perez, Board Release of Information.

Philip Joseph Perez of Nashville was permanently disbarred.

"The Hearing Panel determined Mr. Perez received retainer fees but failed to provide services; failed to file complaints; misled clients to believe their complaints had been filed; failed to appear for scheduled hearings and motions; failed to return unearned retainer fees; failed to notify clients

of his suspension from the practice of law, and that the actions of Mr. Perez were done knowingly and warranted permanent disbarment."

Mr. Perez violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.6 (confidentiality of information), 1.15 (safekeeping of property and funds), 1.16 (declining or terminating representation), 3.2 (expediting litigation), 3.4 (fairness to opposing party and counsel), 8.1 (bar admission and disciplinary matters), and 8.4 (misconduct).

In re Pulley, Board Release of Information.

Karl Emmanuel Pulley of Nashville was suspended for 1 year, with 30 days to be served on active suspension and the remainder on probation, conditioned on appointment of a practice monitor.

"A Petition and Supplemental Petition for Discipline containing four complaints was filed by the Board. Mr. Pulley executed a conditional guilty plea acknowledging 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)."

In re Rabideau, Board Release of Information.

Andre Chase Rabideau of Smyrna was publicly censured, conditioned on his refunding $750 in attorney fees to his former client.

"Mr. Rabideau agreed to represent a client in pursuing civil claims arising out of a fire that occurred at the client's leased dwelling. Mr. Rabideau failed to take any action to pursue his client's claims and did not maintain good communication with his client after undertaking the representation. When Mr. Rabideau's client inquired about the status of the representation, Mr. Rabideau falsely implied that a lawsuit had been filed. Mr. Rabideau also failed to return the client's file materials."

Mr. Rabideau violated RPCs 1.3 (diligent representation), 1.4(a) (communication), and 1.16(d) (declining or terminating representation).

In re Richardson, Board Release of Information.

Keisha Moses Richardson of Memphis was suspended for 2 years retroactive to the date of her temporary suspension, January 26, 2018, and indefinitely until she complies with the Court's Order entered on November 17, 2017, and ordered to pay restitution to 3 former clients.

"The Board filed a Petition for Discipline, Supplemental Petition for Discipline and Second Supplemental Petition for Discipline against Ms. Richardson. She filed an answer to the Petition for Discipline, and default judgments were entered against her on the Supplemental Petition for Discipline and Second Supplemental Petition for Discipline.

"The Petitions for Discipline included 7 complaints of misconduct. A Hearing Panel found that she violated the Rules of Professional Conduct in 6 of the complaints. Ms. Richardson charged an

unreasonable fee, failed to expedite litigation, stopped communicating with her clients, violated a court order concerning custody of her child, engaged in the unauthorized practice of law while administratively suspended and failed to respond to disciplinary counsel."

Ms. Richardson violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16(d) (declining or terminating representation), 3.2 (expediting litigation), 3.4(c) (failure to obey obligation under rules of tribunal), 5.5 (unauthorized practice of law), 8.1(b) (disciplinary matters), and 8.4 (misconduct).

In re Warner, Board Release of Information.

Inez Beatrice Warner of Cordova was publicly censured, conditioned upon the payment of restitution to 3 clients of $8,775.00.

"Ms. Warner represented 4 clients who filed complaints regarding her lack of diligence, lack of communication with them, failure to properly account of settlement proceeds, and unclear fee practices, including fee arrangements incompatible with Ms. Warner's stated fee agreements. The Hearing Panel found in three of the four complaints of Ms. Warner's conduct, by failing to stay in contact with clients and failing to satisfy medical liens, she violated RPC 1.3 (Diligence), the Hearing Panel found in all complaints that Ms. Warner's conduct, by failing to communicate with the clients and failing to provide notice of her office relocation, violated RPC 1.4 (communication), the Hearing Panel found in three of the four complaints that Ms. Warner's conduct, by charging unreasonable fees and charging a nonrefundable fee without a written agreement, violated RPC 1.5 (fees), the Hearing Panel found in one complaint that Ms. Warner's conduct, by failing to maintain adequate records concerning fund distribution, violated RPC 1.15 (safekeeping of property and funds), and that Ms. Warner's conduct, pursuant to violations of RPC 1.3, 1.4, 1.5 and 1.15, violated RPC 8.4 (misconduct)."

In re Wesson, Board Release of Information.

John Scott Wesson of Chattanooga was publicly censured.

"Mr. Wesson failed to appear at a deposition, failed to file a response to opposing counsel's motion for summary judgment, and failed to appear at several court hearings. Mr. Wesson failed to maintain good communication with his client during the representation. Moreover, Mr. Wesson was named as a party in a show cause proceeding, and the court found him in civil contempt."

Mr. Wesson violated RPCs 1.3 (diligence), 1.4 (communication), and 8.4(g) (misconduct).

D. Communication, Rule 1.4

In re Campbell-Brown, Board Release of Information.

Melanie A. Campbell-Brown of Oklahoma City was suspended for 1 year, with 60 days to be served on active suspension and the remainder to be served on probation, based on a conditional guilty plea.

"A Petition containing one complaint was filed against Ms. Campbell-Brown on November 12, 2020. Ms. Campbell-Brown entered a conditional guilty plea admitting she accepted a fee to represent her client in a quiet title action; failed to file the Complaint; failed to provide legal

services in a diligent manner and expedite her client's litigation; failed to reasonably communicate with her client regarding the status of the case; and mislead her client regarding the filing of the complaint."

Ms. Campbell-Brown violated RPCs 1.3 (diligence), 1.4 (communication), and 8.4(a), (c), and (d) (misconduct).

In re Carpenter, Board Release of Information.

Charles Alphonso Carpenter of Maryville was permanently disbarred. Mr. Carpenter consented to disbarment because he could not successfully defend the charges against him.

"In the pending Petition for Discipline, Mr. Carpenter failed to communicate with his clients, failed to file proper pleadings relative to the immigration matters, failed to correct errors in documents submitted and failed to inform his clients of his errors. In another matter, Mr. Carpenter signed the name of his client to an emergency Juvenile Petition as an affiant and then notarized, with his own notary seal, the signature. In pending disciplinary investigations, Mr. Carpenter represented eight clients in immigration matters and failed to communicate with his clients, failed to file proper pleadings in the immigration matters, failed to correct improperly filed immigration pleadings, failed to inform clients of his errors, and received fees but performed no work. Mr. Carpenter also failed to respond to Disciplinary counsel requests for information during the investigatory process."

Mr. Carpenter violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 8.1(b) (disciplinary matters), and 8.4(a), (c) and (d) (misconduct).

In re Dolan, Board Release of Information.

John Louis Dolan, Jr., of Memphis was suspended for 1 year, with 30 days to be served on active suspension and the remainder to be served on probation under the supervision of a practice monitor, based on a conditional guilty plea.

"In the first of two complaints, Mr. Dolan failed to reasonably respond to his client's request for information about the status of his criminal case and failed to diligently represent his client over a period of approximately two years. In the second matter, Mr. Dolan failed to properly communicate with his client and failed to submit various pleadings."

Mr. Dolan violated RPCs 1.3 (diligence), 1.4 (communication), 3.4 (rules of the tribunal), and 8.4(a) (misconduct).

In re Poole, Board Release of Information.

John Ryan Poole of Hermitage was suspended for 6 years, with the first 4 years to be served on active suspension and the remaining 2 years served on probation conditioned on the appointment of a practice monitor, based on a conditional guilty plea.

"A Petition, Supplemental, Second Supplemental, and Third Supplemental Petitions for Discipline containing 7 complaints were filed by the Board alleging Mr. Poole failed to reasonably communicate with his clients regarding the status of their case, failed to act in a diligent manner, and expedite the clients' litigation, failed to comply with court orders, failed to protect client funds,

failed to provide proper notice following temporary suspension, and failed to reply with lawful demands for information from disciplinary counsel."

Mr. Poole violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping client property), 1.16 (declining and terminating representation), 3.2 (expediting litigation), 3.4 (fairness to opposing party and counsel), 8.1 (bar admission and disciplinary matters), and 8.4(a) (misconduct).

In re Schaeffer, Board Release of Information.

James Foster Schaeffer, Jr., of Memphis was suspended for 1 year, with 30 days to be served on active suspension, and the remainder to be served on probation subject to his making restitution to his former client, based on a conditional guilty plea.

"A Petition and Supplemental Petition for Discipline containing two complaints were filed by the Board. In the first complaint, Mr. Schaeffer was retained to represent his client in an uncontested divorce. After preparing the Marital Dissolution Agreement, his client's spouse would not sign it and the divorce became contested. Mr. Schaeffer did not adequately communicate with his client, and the case was ultimately dismissed for failure to prosecute. In the second complaint, Mr. Schaeffer represented his client in a criminal case. Mr. Schaeffer was not diligent in providing his client a copy of the state's discovery."

Mr. Schaeffer violated RPCs 1.3 (diligence), 1.4 (communication), 8.1 (disciplinary matters), and 8.4(a) and (d) (misconduct).

In re Taylor, Board Release of Information.

Christopher Lynn Taylor of Memphis was publicly censured, based on a conditional guilty plea.

"Mr. Taylor failed to respond to a motion for summary judgment and failed to timely inform his client of the pending motion and his failure to respond."

Mr. Taylor violated RPCs 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), and 8.4(d) (conduct that is prejudicial to the administration of justice).

ABA Formal Opinion 500, Language Access in the Client-Lawyer Relationship (Oct. 6, 2021).

"Communication between a lawyer and a client is necessary for the client to participate effectively in the representation and is a fundamental component of nearly every client-lawyer relationship. When a client's ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or owing to a client's non-cognitive physical condition, such as a hearing, speech, or vision disability, the duties of communication under Model Rule 1.4 and competence under Model Rule 1.1 are undiminished. In that situation, a lawyer may be obligated to take measures appropriate to the client's circumstances to ensure that those duties are capably discharged. When reasonably necessary, a lawyer should arrange for communications to take place through an impartial interpreter or translator capable of comprehending and accurately explaining the legal concepts involved, and who will assent to and abide by the lawyer's duty of confidentiality. The lawyer also should use other assistive or language-translation technologies, when necessary. In addition, particularly when there are language considerations affecting the reciprocal exchange of information, a lawyer must

ensure that the client understands the legal significance of translated or interpreted communications and that the lawyer understands the client's communications, bearing in mind potential differences in cultural and social assumptions that might impact meaning."

E. Fees, Rule 1.5

Harris v. McMichael, No. E2020-00817-COA-R3-CV, 2021 WL 5274050 (Tenn. Ct. App., Armstrong, Nov. 12, 2021).

"Appellees, Gary and Lisa McMichael, reside in Tennessee. The instant lawsuit stems from representation provided to the McMichaels by Appellant W. Douglas Harris, a Florida attorney. In connection with a commercial real estate development in Florida, the McMichaels signed guarantees on certain loans for the Florida development, and then allegedly defaulted on those loans. This precipitated a lawsuit against the McMichaels by the bank and their former partners in the venture ('the Florida Litigation'). At the outset of the Florida Litigation, the McMichaels were represented by attorney Gregory D. Smith. Unfortunately, Mr. Smith fell ill prior to resolution of the Florida Litigation, and the McMichaels engaged Mr. Harris as their attorney.

"Giving rise to the instant appeal, on October 30, 2014, Mr. Harris filed a complaint against the McMichaels in the Knox County Circuit Court ('trial court'), alleging a claim for breach of contract, quantum meruit, and bad check. In the complaint, Mr. Harris averred, *inter alia*, that: (1) he and Mr. McMichael entered into an attorney-client agreement on June 2, 2014, which provided for a $30,000 retainer and hourly fees charged at $350 per hour for attorney time and $100 per hour for legal assistant time; (2) the amount owed on the June 2 agreement had been paid in full; (3) the parties entered into an amended attorney-client representation agreement on August 25, 2015, which provided for the same hourly fees as the prior agreement and for a $30,000 retainer which was 'deemed earned upon payment and non-refundable'; (4) Mr. Harris performed legal services pursuant to the amended agreement and incurred hourly fees equal to or in excess of the $30,000 retainer; (5) on August 15, 2015, Mr. McMichael tendered a check to Mr. Harris for $15,000 which was not honored when Mr. Harris presented it to the issuing bank; (6) the amended agreement provided for a lien on Mr. McMichael's real, personal, and intangible property for any unpaid balance; and (7) Mr. McMichael failed to pay the $30,000 owed.

"On December 8, 2014, the McMichaels filed an answer and counter-complaint, in which they averred that: (1) they had paid Mr. Harris $41,775; (2) the fees Mr. Harris sought were not justified; (3) they did not issue any bad checks; (4) Mr. Harris 'failed to properly document that he has earned the sums paid to him or that the amounts charged are ethical or reasonable'; (5) Mr. Harris 'used his position of trust, and advantage as an attorney, to breach his original agreement with the [McMichaels] and improperly and unethically demand two later fee agreements, which included additional 'non-refundable' fees, and an hourly rate increase of $100.00 and 'liens' on assets'; and (6) Mr. Harris threatened to disclose the McMichaels' confidential information if he was not paid. The McMichaels requested that Mr. Harris be disgorged of the $41,775 they had paid.

"The trial court heard the case on September 17, 2018. The evidence presented at the hearing showed that the parties entered into an 'Attorney-Client Representation Agreement' ('the First Agreement'), with Mr. McMichael as the client. The First Agreement states that Mr. Harris, will represent him 'in regard to Charter Bank's Motion for Summary Judgment Case # 2010 CA 2267....' It further states, '[T]his agreement will allow Attorney to make a limited appearance just for the pending Motion for Summary Judgment scheduled for March 6, 2014,' and 'the Attorney

may provide additional legal services to the Client on which the Attorney and client may subsequently agree.' With respect to fees, the First Agreement provided: 'The current standard hourly rate for attorneys is $250.00 and $100.00 for legal assistants. Time billed shall be in increments of one quarter of an hour.' The First Agreement also required a $5,000 retainer, 'deemed earned upon payment and non-refundable.'

"Pursuant to the First Agreement, on March 6, 2014, Mr. Harris appeared at the summary judgment hearing in the Florida Litigation. At the hearing, the judge recused himself, and the hearing was continued. On March 12, 2014, Mr. Harris sent Mr. McMichael an email that stated:

> Please find attached my legal invoice. There is no money due. I did not charge you for any of my expenses in traveling back to Okaloosa County or for drafting the motion to disqualify Judge Brown. Thank you for the opportunity to be of assistance to you in this matter. Good luck in the future.

"The email included a block bill (which Mr. Harris calls a 'skinny bill'), showing '20 hours @$250.00 = $5000.00' for 'reviewing the Motion for summary judgment filed by Charter Bank, researching available defenses, writing a memorandum in opposition to MSJ[,] [t]raveling from Palm Beach County to Okaloosa County and attending the SJ hearing and preparing a motion for disqualification of Judge Brown.' It also stated, 'Under the terms of our agreement this will comp[l]ete our agreement.' The statement did not provide quarter-hour itemization of Mr. Harris' work as contemplated in the agreements. . . ."

"It is undisputed that the McMichaels paid Mr. Harris a total of $41,500 and that Mr. Harris demanded an additional $30,000 under the Third Agreement. Prior to the hearing in the instant case, Mr. Harris tendered a statement alleging that the McMichaels owed a balance of $40,027.50, comprised of 50.2 hours of work by Mr. Harris and 33.3 hours of work by a paralegal from August 7, 2014, though October 24, 2014.

"By order of June 21, 2019, the trial court held that Mr. Harris did not prove his bad-check claim. The trial court further held that Mr. Harris 'procured agreements subsequent to the initial agreement through coercion,' which rendered the subsequent agreements void. Finally, the trial court held that the doctrine of quantum meruit was inapplicable because the parties had express contracts. The trial court disgorged Mr. Harris of all fees and removed the liens on the McMichaels' property. In a subsequent order of January 7, 2020, the trial court granted the McMichaels discretionary costs of $1,537.60 for court reporter fees and $3,720 for expert witness fees.

"On July 19, 2019, Mr. Harris filed a Motion to Alter or Amend the Judgment, wherein he asserted, *inter alia*, that the trial court 'contradicted itself by finding that the fee agreements were voidable, and yet [q]uantum [m]eruit is not available in this case because there were fee agreements.' In an amended order filed on January 3, 2020, the trial court held, 'This court is of the opinion that [the McMichaels] were coerced as a result of the unethical conduct of [Mr. Harris][,] but, because there was consideration for the services to be rendered, the agreements are not void.' On January 7, 2020, the trial court entered an order on Mr. Harris' motion to alter or amend, wherein it found that

> [w]hen considering all the evidence and weighing it accordingly, the court is of the opinion that [Mr. Harris] has failed to present any new evidence or law that the court should consider amending its ruling. However, the court is of the opinion that [Mr. Harris] did attend some hearings, was somewhat prepared for some of them, did correspond with opposing counsel and

> the [McMichaels], and should be compensated for some of his time. As the court stated, it is impossible for the court to make a clear determination as to the amount that the [Mr. Harris] should receive. As a result, the court is of the opinion that [Mr. Harris] should receive the initial five thousand ($5,000.00) retainer for his services and that [his] Motion to Alter or Amend should be Denied in all other respects."

"Mr. Harris asserts that the trial court erred in finding that he breached his fiduciary duty to the McMichaels 'by not compiling his billing records contemporaneously.' Specifically, he argues:

> The trial court erred in finding that it was necessary for [Mr. Harris] [to] compile his billing contemporaneously. Florida law does not so require. Florida law allows reconstruction of the time billed through notes taken contemporaneously, which is what [Mr. Harris] did.

"Mr. Harris' argument mischaracterizes the trial court's findings and ignores the fact that Mr. Harris did not comply with the requirements outlined in the fee agreements. The trial court's amended order notes that,

> [a]lthough Florida imposes no absolute requirement of contemporaneous records, Mr. Harris' fee agreement states that the [McMichaels] would receive a billing statement setting forth time expended in quarter hour increments. This did not happen.

"Furthermore, the trial court held that Mr. Harris breached the duty to 'be competent, prompt, and diligent ... [and to] maintain communication with a client concerning the representation.' R. Regulating Fla. Bar, Preamble. The Florida Bar recommends that:

> Billing should be done promptly after the work for which the bill is sent is completed, and should be detailed. The client is entitled to know what items are covered by the bill and to have current billing so that the cost of the litigation can be overseen as it progresses.
>
> * * *
>
> When billing a client, the lawyer should detail the legal services performed in the matter and the expenses incurred for each legal service. The 'narrative' statements assist the client in understanding the reason for the amount of the bill.

"The Fla. Bar, *Florida Civil Practice Before Trial*, ch.3 (13th ed. 2020), *available at* Westlaw CIVPRAC FL-CLE 1-1.

"Contrary to Mr. Harris' assertion, the trial court did not hold that Mr. Harris breached his fiduciary duty due to his failure to abide by any Florida rule that required contemporaneous billing; rather, the court held 'that [Mr. Harris'] failure to comply with the provisions of his fee agreement was a breach of his duty under the rules of professional conduct.' (Emphasis added). We agree. All three fee agreements provide, 'Time billed shall be in increments of one quarter of an hour.' The Florida Supreme Court has stated that 'although there is no fixed construction of the word 'shall,' it is normally meant to be mandatory in nature.' *Allstate Ins. Co. v. Orthopedic Specialists*, 212 So. 3d 973, 978 (Fla. 2017) (quoting *S.R. v. State*, 346 So.2d 1018, 1019 (Fla. 1977)) (brackets omitted). Nothing in the parties' agreements indicates that this Court should construe the word 'shall' contrary to its normal usage. In his brief, Mr. Harris argues that he 'did provide billing in quarter hour increments.[,] [a]lthough such billing was not contemporaneous[.]' It is true that, in addition to several 'skinny bills,' the record contains three detailed billing statements that bill in

quarter-hour increments: the first covers the period of February 26, 2014 through March 6, 2014; the second covers the period of March 7, 2014 through May 27, 2014; and the third covers the period of June 4, 2014 through August 7, 2014. At the September 2018 hearing, Mr. Harris testified that he: (1) prepared these statements just prior to the hearing; (2) had not submitted them when he sent the 'skinny bills' to the McMichaels; and (3) submitted the detailed bills to the McMichaels shortly before the hearing. This belated and ad hoc compliance with the billing provisions of the parties' agreements simply does not reflect the promptness, diligence or appropriate communication required of a Florida attorney, or any other attorney. We conclude that the trial court did not err in holding that Mr. Harris' failure to comply with the terms of his fee agreement constitute a breach of the fiduciary duty he owed to the McMichaels."

"Mr. Harris asserts that the trial court abused its discretion by ordering disgorgement of attorney fees. In its Amended Order, the trial court ordered that Mr. Harris 'is disgorged of all fee charges' to the McMichaels. The trial court reconsidered this remedy in its Order on Motion to Alter or Amend, filed January 7, 2020, wherein it held that although 'the fee agreements are vague and ambiguous as to the work to be performed by the attorney for the fees charged and that [Mr. Harris] failed to meet his obligations as an attorney,' he was entitled to some of his fees because he 'did attend some hearings, was somewhat prepared for some of them, did correspond with opposing counsel and the [McMichaels], and should be compensated for some of his time.' However, the trial court gave 'very little weight' to Mr. Harris' testimony with respect to 'whether the amounts [he] charged accurately reflect the work performed, [and] .... [t]here is no way for the court to make such a finding based on the weight of the evidence.' Therefore, the trial allowed Mr. Harris to retain five thousand dollars but disgorged him of all other payments received from the McMichaels.

"Disgorgement is an equitable remedy. *See King Mountain Condo. Ass'n v. Gundlach*, 425 So. 2d 569, 572 (Fla. Dist. Ct. App. 1982). As such, our review is limited to whether the trial court abused its discretion in granting or denying disgorgement. *See Morrow*, 165 S.W.3d at 258."

"The trial court also based its disgorgement decision on the following factual findings:

> [Mr. Harris] failed to follow the most basic of terms of his own agreement by failing to keep a record of his time and provide that record to his clients to account for the time he spent in his representation of them as was set out in the retainer agreement that he authored. He did not explain what he meant in the Agreement by 'limited appearance.' His fee agreements are vague according to the testimony of his own witness, the [McMicheals'] expert witness ..., and in the opinion of this Court, thus creating confusion between himself and his clients. He further failed to put his clients' needs before his own by demanding additional payments close to deadlines or due dates or close to the time of a court appearance. Additionally, he took advantage of his clients' situation by changing the fee agreement, demanding more money, and never justifying the work he had performed even though he promised that he would supply [the] documents [that] he [had] produced and a 'plan of attack.' [Mr. Harris] was in a superior position which put his clients in an extremely difficult position considering all the surrounding circumstances....
>
> [Mr. Harris] waited for deadlines to be close, at which time he demanded additional funds and promised, but never fully delivered, the representation that he convinced [the McMichaels] that [he] could perform. This created a situation for [the McMichaels] that put them in an unmanageable position after already having been put in a problematic position by [their previous counsel].

"The trial court found credible the McMichaels' testimony that they were pressured into signing the second and third agreements due to Mr. Harris' unwillingness to speak to them about their case until they signed. Accordingly, the court held that the McMichaels 'were coerced as a result of the unethical conduct of [Mr. Harris].' The trial court further concluded that Mr. Harris did not comply with the duties imposed by the Rules of Professional Conduct to represent clients with the 'thoroughness and preparation reasonably necessary for the representation' and to 'make reasonable efforts to ensure that the client ... possesses information reasonably adequate to make an informed decision.' *See* R. Regulating Fla. Bar, Rule 4-1.1 and Preamble, Comments. Based on the available evidence, we conclude that the trial court's findings are supported by the evidence and are not otherwise contrary to logic or reasoning. *See Eldridge*, 42 S.W.3d at 85.

"Under Florida law, when a fiduciary commits a breach of his or her duty, 'the beneficiary can obtain redress either at law or in equity for the harm done[,] [or].... is entitled to obtain the benefits derived by the fiduciary through the breach of duty,' *i.e.*, disgorgement. *King Mountain Condo. Ass'n*, 425 So. 2d at 571 (citing Restatement of Restitution § 138 cmt a (Am. Law Inst. 1937); Restatement (Second) of Torts § 874 cmt b (Am. Law Inst. 1979)). Although the trial court recognized that Mr. Harris completed some work on behalf of the McMichaels, it ultimately concluded that

> there was no competent evidence of what [Mr. Harris] did in this case based on all of the circumstances surrounding this matter: specifically, that [Mr. Harris] failed or refused to comply with his own contract and supply a breakdown of his 'skinny bill' until some 4 years after suit was brought in this matter.

"The trial court's equitable solution was to allow Mr. Harris $5,000, the amount contemplated in the First Agreement, and to disgorge him of the remainder of the fees paid him. Under the specific facts of this case, the trial court's decision constitutes an acceptable resolution, *see Lee Med., Inc.*, 312 S.W.3d at 524; as such, we conclude that the trial court did not abuse its discretion or otherwise err in allowing Mr. Harris to retain only $5,000.00."

In re Estate of Bonifield, No. W2020-01593-COA-R3-CV, 2022 WL 668426 (Tenn. Ct. App., Armstrong, Mar. 7, 2022), perm. app. denied July 13, 2022.

"On November 11, 2013, Patsy Glover Bonifield ('Decedent') hired Appellant David W. Camp to represent her in a divorce action against her husband, Glenn R. Bonifield ('Husband'). Decedent filed for divorce on November 25, 2013. In April 2016, while the divorce action was pending, agents with the drug task force raided Husband's pharmacy. As a result of the raid, on May 4, 2016, the State of Tennessee (the 'State') seized several of Decedent and Husband's marital assets, including: (1) a coin collection; (2) silver bars; (3) $13,280.74 in currency; and (4) the full value of Husband's VOYA retirement account. Thereafter, Decedent allegedly asked Appellant to represent her in challenging the State's seizure of these marital assets.

"On May 6, 2016, Appellant wrote a letter to Decedent concerning his representation of her in the seizure matter. In the letter, Appellant outlined a proposed contingency fee agreement whereby he would be compensated '33-1/3% of any and all amounts' Decedent recovered from the State. On May 13, 2016, Appellant filed a challenge to the seizure on Decedent's behalf. During this time, Appellant continued to represent Decedent in the divorce action but charged her an hourly rate for those services.

"On December 5, 2016, Decedent and Husband settled their divorce action. Husband agreed to transfer his full interest in the seized assets, i.e., the coin collection, silver bars, bank accounts (including money seized), and the VOYA retirement account, to Decedent. This settlement was outlined in the couple's Marital Dissolution Agreement ('MDA') that was filed on January 19, 2017. On February 6, 2017, the final decree of divorce was entered.

"Despite being awarded all of the seized marital assets in the divorce, these assets were still in the State's possession at the time of the entry of the final decree of divorce. Accordingly, Appellant continued to represent Decedent in the seizure matter. On January 11, 2018, Decedent signed a formal settlement agreement with the State, and on January 30, 2018 an Order of Compromise and Settlement was entered. Under the terms of the settlement, Decedent was awarded all of the silver bars and the remaining funds from the VOYA account after the State received $156,836.77. Decedent agreed to withdraw her claim to the remaining seized assets. After settling with the State, Appellant continued to work with VOYA to release the retirement funds to Decedent in accordance with the MDA.

"On March 7, 2018, Decedent died. Despite Decedent's settlement of the seizure challenge, on March 21, 2018, Forrest Bonifield, Decedent's son, executed an agreement with Appellant for his representation of the Estate of Patsy Bonifield (the 'Estate' or 'Appellee') against the State. This agreement provided that Appellant would receive '1/3%' of the assets recovered from the seizure.

"On March 22, 2018, Mr. Bonifield filed a petition to be appointed the personal representative of the Estate in the Chancery Court for Crockett County ('trial court'). On March 30, 2018, Husband and Mr. Bonifield (as alternate payee and the alleged administrator of the Estate) executed the qualified domestic relations order ('QDRO') required to transfer the VOYA funds to the Estate. On April 3, 2018, the trial court entered an order appointing Mr. Bonifield as the personal representative for the Estate. On June 16, 2018, Mr. Bonifield died.

"On July 12, 2018, Appellant filed a Verified Claim Against Estate ('Claim 1') seeking compensation for his 'representation for recovery of proceeds from VOYA Retirement involving State of Tennessee seizure claim.' The date listed for Claim 1 was March 21, 2018, the date Mr. Bonifield executed his agreement with Appellant on behalf of the Estate. The total amount owed for Claim 1 was listed as 'Pending,' but indicated that it should be '1/3 of all proceeds recovered on behalf of Estate.' On July 30, 2018, the trial court entered an order appointing one of Decedent's daughters, Patricia Walls, as the successor personal representative of the Estate. On August 2, 2018, Appellant filed a second Verified Claim Against Estate ('Claim 2') seeking payment of $3,847.51 for 'Attorney Fees.' Attached to Claim 2 was a July 22, 2018 invoice addressed to Decedent for $3,847.51 in legal services. On August 15, 2018, Ms. Walls filed an objection to both claims.

"During this time, Appellant continued to pursue the release of the VOYA retirement funds. On September 24, 2018, Appellant submitted a letter to VOYA threatening legal action if full disbursement was not provided. On October 8, 2018, pursuant to the MDA, VOYA released $360,018.87 to the Estate. Thereafter, under the settlement agreement, $156,836.77 was paid to the State. At that time, the State released the silver bars to the Estate.

"The subject of this appeal concerns Appellant's compensation for his representation in the seizure challenge, i.e., Claim 1. On November 18, 2019, the trial court entered an order finding, in pertinent part, that: (1) Decedent never executed a contingency fee agreement with Appellant for his representation in the seizure matter; (2) Claim 1 failed to satisfy the Rules of Professional Conduct,

but assuming, *arguendo*, that the defects were cured, the amount requested in Claim 1 was unreasonable; (3) the agreement between Appellant and Mr. Bonifield was not a valid contingency fee agreement; and (4) at the time he entered into the agreement with Appellant, Mr. Bonifield did not have authority to bind the Estate. Therefore, the trial court found that Appellant was not entitled to 1/3 of the proceeds recovered from the seizure. However, the trial court acknowledged that Appellant 'expended time on obtaining the VOYA retirement funds and should receive a reasonable fee' for such services. Accordingly, the trial court awarded Appellant a judgment of $3,847.51 against the Estate.

"On December 13, 2019, Appellant filed a Motion to Alter or Amend, and the Estate responded on March 5, 2020. On October 19, 2020, the trial court entered an order denying the motion. Appellant appeals."

"Appellant filed two claims against the Estate. *See generally* Tenn. Code Ann. § 30-2-307. As discussed, *supra*, Claim 1, the focus of this appeal, alleged that the Estate owed Appellant '1/3 of all proceeds recovered on behalf of [the] Estate' from the seizure challenge. Appellant alleges that the contractual basis for Claim 1 is his March 21, 2018 agreement with Mr. Bonifield, and the parties focus their appellate arguments on whether such agreement is a valid contingency fee contract and whether Mr. Bonifield had authority to bind the Estate to such contract. Based on the record, we conclude that the agreement *Mr. Bonifield* executed with Appellant provides no basis for Appellant to receive compensation for his representation in the seizure matter. Turning to the record, and as discussed *supra*, on January 30, 2018, an Order of Compromise and Settlement between Decedent and the State was entered. Under the terms of the settlement, the State agreed to release to Decedent the silver bars and the majority of the VOYA funds, and Decedent agreed to withdraw her claim to the other seized assets. This settlement marked the end of Decedent's seizure challenge and the end of Appellant's representation of her in that matter. Thus, when Mr. Bonifield executed the March 21, 2018 agreement with Appellant, there were no remaining claims for the Estate—and Appellant on the Estate's behalf—to pursue against the State. As such, Appellant's agreement with Mr. Bonifield concerning the seizure challenge is of no consequence.

"In determining what compensation, if any, Appellant is owed for his representation in the seizure challenge, we now focus on whether Appellant and *Decedent* entered into a valid contingency fee agreement concerning the seizure matter. 'In asserting a claim against an estate for services rendered the decedent, the cause of action necessarily is based upon either contract or quasi contract.' *Cobble v. McCamey*, 790 S.W.2d 279, 281 (Tenn. Ct. App. 1989) (internal citations omitted). Appellant alleges that his May 6, 2016 letter to Decedent evidences his contingency fee agreement, i.e., contract for legal services, with her. *See Williams v. Comer*, No. 01A01-9701-CH-00008, 1997 WL 803586, at *4 (Tenn. Ct. App. Dec. 30, 1997) (citing *Alexander v. Inman*, 903 S.W.2d 686, 694 (Tenn. App. 1995)) ('In construing a contract between an attorney and a client, the general rules of contract law apply.'). 'Generally, a contingency fee agreement is understood to be "an agreement for legal services under which the amount or payment of the fee depends, in whole or in part, on the outcome of the proceedings for which the services were rendered."' *Williams*, 1997 WL 803586, at *4 (quoting *Alexander*, 903 S.W.2d at 696). Contingency fee agreements are often an alternative to the traditional hourly billing and 'enable clients who are unable to pay a reasonable fixed fee to obtain competent representation.' *Alexander*, 903 S.W.2d at 696 (internal citations omitted). The Rules of Professional Conduct specifically allow for contingency fee agreements but expressly require that such agreements '*shall* be in writing [and] signed by the *client*....' Tenn. Sup. Ct. R. 8, RPC 1.5(c) (emphases added).

"In the May 6, 2016 letter, Appellant proposed that compensation for his services in the seizure challenge would 'be a contingent fee of 33-1/3% of any and all amounts recovered by [Decedent]' from the State. This is the same amount Appellant alleges the Estate owes him under Claim 1, i.e., '1/3 of all proceeds recovered....' Under Decedent's settlement with the State, she was to receive $203,182.10 of the VOYA retirement funds and all of the silver bars. Thus, Appellant seeks a judgment against the Estate in the amount of $67,727.37 plus 1/3 of the value of the silver bars. In its order, the trial court denied Appellant's request for such judgment, finding, in pertinent part, that Appellant presented no proof that Decedent ever signed a contingency fee agreement with him. The record supports the trial court's finding. The May 6, 2016 letter bears Appellant's signature only. On review, there is no document signed by Decedent that could form the basis of a contingency fee agreement between Appellant and Decedent. *See* Tenn. Sup. Ct. R. 8, RPC 1.5(c). As such, we affirm the trial court's finding that Appellant and Decedent never entered into a contingency fee agreement. Because Appellant and Decedent never entered into such agreement, there is no basis for Appellant to recover a 1/3 contingency fee from the Estate under Claim 1. Therefore, we affirm the trial court's denial of Claim 1.

"Despite Appellant's failure to provide proof of an enforceable contract for his legal services in the seizure matter, the trial court recognized that Appellant should receive a reasonable fee for such services. Accordingly, the trial court allowed Claim 2 and entered a judgment for $3,847.51 against the Estate. This was not error. Indeed, '[p]ersons who provide valuable services to another without an agreement regarding compensation are entitled to recover the reasonable value of their services (1) when the circumstances indicate that the parties to the transaction should have understood that the person providing the services expected to be compensated and (2) when it would be unjust to permit the recipient of the services to benefit from them without payment.' *In re Estate of Marks*, 187 S.W.3d 21, 29 (Tenn. Ct. App. 2005) (citing *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 197-98 (Tenn. 2001); *Castelli v. Lien*, 910 S.W.2d 420, 427 (Tenn. Ct. App. 1995). Such principle applies to claims against a decedent's estate. *Id.*; *see also Cobble*, 790 S.W.2d at 282. . . . Although Ms. Walls initially filed an objection to Claim 2, in its appellate brief, the Estate explains that it has paid Claim 2 in full and asks this Court to affirm the trial court's order. Thus, the Estate does not appear to dispute that Appellant provided a service to Decedent and should be awarded $3,847.51 for the same.

"On appeal, Appellant argues that the $3,847.51 award is insufficient for his services rendered in the seizure challenge, and that the limited fee unjustly enriches the Estate. As the creditor seeking to recover payment for his services, Appellant had the burden of proving the reasonable value of his services. *See In re Estate of Marks*, 187 S.W.3d at 32 (citing *CPB Management, Inc. v. Everly*, 939 S.W.2d 78, 81 (Tenn. Ct. App. 1996); *Bokor v. Holder*, 722 S.W.2d 676, 680-81 (Tenn. Ct. App. 1986)). Many practitioners prove the reasonable value of their attorney's fees by presenting an affidavit to the court that details the number of hours and the work performed in a given case. *Wright v. Wright*, No. M2007-00378-COA-R3-CV, 2007 WL 4340871, at *5 (Tenn. Ct. App. Dec. 12, 2007) (quoting *Hosier v. Crye-Leike Commercial, Inc.*, No. M2000-01182-COA-R3-CV, 2001 WL 799740, at *6 (Tenn. Ct. App. July 17, 2001)). It appears from the record that Appellant failed to present to the trial court *any* proof of the reasonable value of his representation in the seizure challenge. Instead, Appellant relied solely on his argument that the parties entered into a contingency fee agreement, and that he was entitled to 1/3 of all proceeds Decedent recovered from the State under such agreement. At oral argument before this Court, the panel attempted to glean from Appellant how much time he devoted to the seizure challenge, but Appellant stated that he did not keep contemporaneous billing and maintained his argument that he had a contingency fee agreement with Decedent. In the absence of contemporary billing records or other evidence,

Appellant has failed to provide any proof of the reasonable value of his services rendered during the seizure challenge. *See In re Estate of Marks*, 187 S.W.3d at 32.

"In determining the reasonable value of Appellant's services, it appears the trial court turned to the only proof in the record of Appellant's legal fees, i.e., the invoice for $3,847.51 that was attached to Claim 2. The invoice is for legal services rendered from May 2017 through July 2018 and shows that Appellant billed 13.2 hours during this time period. The invoice also shows expenses (filing fees and postage) of $383.49 and appears to carry forward balances owed for previous invoices totaling $2,643.55. Although Claim 2 and the attached invoice may relate to Appellant's representation as Decedent's divorce attorney, *it is the only proof of Appellant's legal fees that he presented to the trial court.* Accordingly, the record demonstrates that Appellant is entitled to no more than $3,847.51 for his services. Although Appellant argues that this amount is insufficient for the work performed, Appellant was provided the opportunity to prove the value of his services in the seizure challenge and, for the reasons outlined above, he failed to do so. *See Bokor*, 722 S.W.2d at 681 ('There is no proof in this record as to the value of Bokor's services. Bokor has had his day in court with the opportunity to prove the value of his services. Through no fault except his own, he failed to do so.'). As such, we conclude that the trial court did not err when it found that $3,847.51 represented the reasonable value of Appellant's services, and we affirm the award of same."

In re Friauf, Board Release of Information.

James William Friauf of Knoxville was publicly censured, based on a conditional guilty plea.

"Mr. Friauf was retained to prosecute an employment action, and a written fee agreement was executed by his client providing Mr. Friauf with a forty percent (40%) contingency fee upon any recovery through settlement or trial, or the fees awarded by the Court through statutory fee shifting, whichever is higher. The fee agreement also allowed Mr. Friauf to charge an undisclosed hourly rate if he chose to withdraw from the representation. During an unsuccessful mediation, Mr. Friauf used the fee agreement to pressure his client to settle his action. Thereafter, Mr. Friauf, without providing any written bill detailing his services, demanded payment of $63,261.46 in attorney fees at an hourly rate not previously agreed to and misrepresented to his client that Ethics counsel at the Board of Professional Responsibility had ratified Mr. Friauf's demand for fees and expenses."

Mr. Friauf violated RPCs 1.2 (scope of representation), 1.5 (fees), 1.8 (conflict of interests), 7.1 (information about legal services) and 8.4(a) (misconduct).

In re Hatmaker, Board Release of Information.

Michael Glen Hatmaker of Jacksboro was permanently disbarred, based on a conditional guilty plea.

"The Board of Professional Responsibility filed a Petition for Discipline against Mr. Hatmaker containing 2 complaints of misconduct. In the first complaint, Mr. Hatmaker was retained to represent his client in a criminal matter and received a $7,500.00 fee. After being suspended from the practice of law, Mr. Hatmaker failed to refund the unearned balance of the retainer to his client and failed to comply with the terms and conditions of the Order of Enforcement entered by the Supreme Court. In the second complaint, Mr. Hatmaker set aside a default judgment without the knowledge or authorization of his client and took no action thereafter to prosecute his client's action

or reasonably communicate with his client about the status of her case. In addition, Mr. Hatmaker failed to respond to the Board about either disciplinary complaint."

Mr. Hatmaker violated RPCs 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.16 (termination of representation), 3.2 (expediting litigation), 8.1(b) (disciplinary matters) and 8.4(d) and (g) (prejudice to the administration of justice).

New Hampshire Bar Association Ethics Committee Opinion No. 2021-22/02, Crowdfunding Legal Fees (June 7, 2022).

"This Opinion discusses the ethical concerns presented by donation-based crowdfunding, which appears to be growing in popularity as a means of financing legal representation for those who might not otherwise be able to afford it.

"Through Internet-based crowdfunding, typically small amounts of money are raised from a large number of people. Funds may be raised for virtually any legal purpose, using one of the many platforms designed for that purpose. Crowdfunding platforms offer five basic types of incentives that projects seeking funding may offer funders: debt, equity, royalty, and donation (with or without 'rewards').

"In the emerging scenario we consider here, legal services are funded though donation-based crowdfunding ('DBC'). Contributions are solicited to fund a specific individual's specific legal matter. Donors acquire neither any control over the matter nor any direct financial interest in its outcome. Solicitation of donations may take various forms and typically involves processing donations through one of the many Internet platforms designed for that purpose. If contributors are offered 'rewards,' the rewards are limited in type and value as discussed below.

"The DBC model is distinct from equity-based crowdfunding and other forms of alternative litigation finance. Those funding sources raise some of the same ethical concerns as DBC; note the Committee's prior guidance concerning non-recourse litigation funding. New Hampshire Ethics Committee Advisory Opinion #2004-05/01 *Non-Recourse Lawsuit Financing.*

"DBC presents a variety of ethical concerns, concerns that increase as the attorney's involvement in the fundraising increases.

"*Engagement Letters*. The Committee strongly encourages the use of written engagement letters in matters involving DBC. *Cf.* NHRPC Rule 1.5(b) (written agreement preferable but not required). The engagement letter should be clear regarding the terms under which the funds will be drawn down. NHRPC Rule 1.5(b). It should also be clear how lawyer and client will proceed not just if donations exceed costs (whether due to natural conclusion, settlement, or the client's decision not to pursue the matter) but also if costs exceed donations, or because for whatever reason the attorney-client relationship terminates. Subject to NHRPC Rule 1.6, plans for these contingencies ought to be disclosed to donors if necessary to make the pitch truthful. NHRPC Rules 1.1, 1.3, 2.1., 4.1 and 7.1.

"*Duties Where Receiving Funds From Other Than the Client.* Compensation may be accepted from a source other than the client only when the following conditions set forth in NHRPC 1.8(f) are satisfied: '(1) the client gives informed consent; (2) there is no interference with the lawyer's

independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.' NHRPC 1.8(f).

"*Potential Business Transaction*. A lawyer should always be alert to the possibility that their contemplated conduct might constitute a 'business transaction' with a client, triggering the disclosure and documentation requirements set forth in NHRPC Rule 1.8(a). Where a lawyer entangles themself deeply with a client's DBC fundraising, at some point it becomes reasonable to assume that those disclosure and documentation requirements must be satisfied.

"We do not believe, however, that the mere fact that a lawyer expects to receive fees and costs from an arrangement a client enters into with a third party, alone, even if the resulting financing were a condition of, and built into, the lawyer's fee agreement with the client as a means to pay for the representation, would give rise to a 'business transaction' between lawyer and client. To the extent our prior guidance suggested as much, we now believe that language to have been overbroad. We previously reasoned, in the context of non-recourse financing:

> to the extent that a lawyer knows or has reason to know he/she will obtain some form of benefit, such as payment of fees and costs, through the client's participation in non-recourse lawsuit financing, such an arrangement could well constitute a 'business transaction' between the lawyer and client.

"NH Opinion 2004-05/1. In a footnote we added:

> This would be especially true if participation in non-recourse lawsuit financing was a condition of and built into the lawyer's fee agreement as a means to pay for the litigation.

"*Id.* n. 5. We believe that opinion's determination that the disclosure and documentation requirements of Rule 1.8(a) might be implicated was based on the attorney's intensive involvement in a commercial transaction, rather than by the attorney's mere receipt of funds arising from an arrangement between client and a third party. Thus, we overstated the likelihood that non-recourse lawsuit financing, and by implication, DBC, would *per se* give rise to a 'business transaction' as contemplated by NHRPC Rule 1.8(a). To that extent, we modify the language of the prior opinion.

"*Understand How the Platform Works.* Even if the lawyer does not intend to be involved with the client's use of a crowdfunding platform, the lawyer cannot adequately meet their obligations to counsel the client, discussed below, unless the lawyer understands the basic functionality of the platform, including how it treats funds raised on behalf of the client. A lawyer who intends to be directly involved with use of a platform must bear in mind their obligation to understand the risks and advantages associated with technology they use in their practice. NHRPC Rule 1.1.

"*Legal Duties.* Lawyers must take reasonable steps to identify their legal obligations and to avoid entangling themselves in illegal conduct. NHRPC Rules 8.4(b) and (c). For example, in addition to potential fraud and money-laundering, a lawyer may also have an obligation to identify the source of overseas funding. Bear in mind the scope of an attorney's duties and the limits of the safe harbor set forth in NHRPC Rule 1.2(d) and (e).

"*Duty to Consult with Client Generally.* Nothing in the manner funds are raised excuses any of an attorney's obligations to their client. This includes, for example, the duty to consult with the client and abide by their decisions. NHRPC 1.2 and 1.4.

"*Duty to Counsel Client re: Privilege.* In particular, an attorney must consider and counsel the client about the risks of disclosing information. As a practical matter, the success of a crowdfunding appeal often turns on how compelling the client's story is. A crowdfunding website post seeking donations, like any other public social media, can provide an adversary with valuable information. Communications with funders may later be deemed to be unprivileged, an issue which has arisen in third-party funded matters in other jurisdictions. Bear in mind the treacherous doctrine of subject matter waiver under which an entire topic can be rendered non-privileged. If confidentiality may already have been compromised, consider what damage control can be implemented.

"*Duty to Counsel Client re: Relevant Considerations*: Even if the lawyer plans to have no involvement in a client's fundraising, the lawyer has a duty to discuss with their client the potential impacts of the fundraising on the contemplated litigation, including available alternatives, the pros and cons of such financing, the ramifications on a potential recovery and any other material considerations. NHRPC Rule 1.3. *See* New Hampshire Ethics Committee Advisory Opinion #2004-05/01. The lawyer's duty to counsel the client extends to potential legal consequences of soliciting donations which the client might not otherwise anticipate. NHRPC Rules 1.1, 1.4(b) and 2.1. Where a lawyer is more deeply involved with the client's engagement with the DBC platform, the lawyer may have a duty to familiarize themself with the platform's terms of service and to advise the client about potentially significant terms, *e.g.*, waiving jury trial rights or agreeing to binding arbitration.

"*Tax Issues*: The IRS may deem funds raised through DBC to be income taxable to the client.

"The lawyer should advise their client to seek appropriate guidance. The risk of a client neglecting this issue may be heightened due to some crowdfunding platforms reportedly structuring disbursements to avoid triggering the platforms' IRS reporting obligations.

"*Disclosure Duties.* Communications between the attorney and potential donors must be truthful and must not raise 'an unjustified expectation about results the lawyer can achieve.' *See* NHRPC Rules 4.1 (truthfulness in statements to others) and 7.1 (communications concerning a lawyer's services). Donors should be informed where their funds will be nonrefundable, how any unearned donated funds will be distributed at the conclusion to the matter, that donors will not receive confidential information about the client's matter, and that donors will not have any opportunity to exert control over the lawyer's work. Depending on the circumstances, the attorney may be obligated to make such disclosures, *see* NHRPC Rules 4.1 and 7.1, or may be obligated to advise the client to make the disclosures. *See* NHRPC Rules 1.1, 1.3 and 2.1.

"*The Ethics of Attorney Advertising May Apply*: Some online DBC platforms collect payment processing fees and receive a percentage of the funds raised if a campaign is successful. A lawyer compensating a third party to raise funds for a specific case would be wise to assume that the lawyer is engaged in advertising. In addition to the usual ethical concerns raised by attorney advertising, *see* in particular NHRPC Rules 7.1 and 7.2 and the comments thereto, and usual practices (such as disclosing the name, office address and jurisdictions of admission of at least one involved attorney) consider that any compensation the platform receives (or retains) must not exceed the 'reasonable costs' permitted under Rule 7.2(b)(1). Consider any relevant disclaimers, *e.g.*, that a donation neither establishes an attorney-client relationship, nor entitles a donor to an equity interest or to any control over the matter.

"*Beware of 'Perks' and 'Rewards.'* With respect to 'perks' and 'rewards' for donors, the coin of the crowdfunding realm, lawyers must tread cautiously. For example, there is no clear ethical bar to a lawyer committing to providing periodic updates to donors concerning the matter, provided communications are client-approved, and contain no confidential information. The thoughtful lawyer may be cautious however, about the risk of suggesting that donors will have any influence over the lawyer's prosecution of the matter.

"*Disbursement of Funds.* The functionality of the platform utilized will determine how raised funds may be disbursed and how unutilized funds may be returned to donors or otherwise disposed of. For example, funds may be received by the client and disbursed to the attorney as billed, held by the crowdfunding platform and disbursed to the lawyer upon invoice, or deposited in the attorney's client trust account as raised, to be drawn down as earned by the attorney.

"*Fees and Expenses Must be 'Reasonable' and 'Earned.'* Whether paid upon invoice or drawn down from the attorney's trust account, fees must be both 'reasonable' and 'earned,' even if the retainer sets forth a flat-fee agreement. NHRPC Rules 1.5(a) and 1.15. Any such funds not reasonably earned by the conclusion of the matter remain the property of the client, unless otherwise set forth in the client engagement letter, if not also the solicitation to donors. While we see no obstacle to excess funds being donated to a non-profit or allocated to fund similar litigation involving another client, it would be unethical for an attorney to personally retain a windfall that is not both 'reasonable' and 'earned' in a non-contingent matter. NHRPC Rule 1.5(a).

"*Funds Raised by a Lawyer for Legal Costs Cannot be used for the Client's Assistance*: A lawyer who becomes so materially involved in the fund-raising process as to be raising funds on behalf of the client must bear in mind the prohibition on providing financial assistance set forth in Rule 1.8(e). Note that New Hampshire chose not to adopt the ABA's Model Rule 1.8(e)(3) permitting lawyers to offer such assistance to indigent clients.

"*Donations Exceeding Reasonable Costs*: The solicitation of donations in excess of reasonably anticipated costs could raise various ethical concerns. *See, e.g.,* NHRPC Rules 4.1 (Truthfulness in Statement to Others), 8.4(c) (which prohibits a lawyer from engaging in dishonest or deceitful conduct) and 1.5(a) (which prohibits a lawyer from seeking an unreasonable fee). Ethics authorities in other jurisdictions [Footnote] have identified the risk that a lawyer might be perceived as seeking an unreasonable fee due to the potential to raise funds in excess of the costs of the representation and a perception that the client might exercise less rigorous oversight over the lawyer's billings than if the funds were the client's own. The lawyer should ensure that a plan is in place to terminate fundraising when sufficient funds have been raised.

[Footnote: *See, e.g.,* 'Ethical Considerations of Crowdfunding,' DC Bar - Ethics Opinion 375 (November 2018); Philadelphia Bar Association Professional Guidance Committee Opinion 2015-6 (2015); and Palmer, Mark, 'Is Crowdfunding Legal Services Ethically Permissible?' Web blog post, *2Civility*, Illinois Supreme Court Commission on Professionalism; January 21, 2019 (updated August 16, 2020).

F. Confidentiality of Information, Rule 1.6

New York State Bar Association Committee on Professional Ethics Opinion 1240, Duty to Protect Client Information Stored on a Lawyer's Smartphone (Apr. 8, 2022.)

"When the inquiring lawyer downloads or accesses an app on his smartphone, the lawyer is sometimes asked whether the lawyer gives consent for that app to access the lawyer's 'contacts' on the smartphone. The lawyer's contacts include clients in criminal representations.

"May a lawyer consent for an app to access contacts on the lawyer's smartphone that include the lawyer's current, former or prospective clients?

"Rule 1.6(c) of the New York Rules of Professional Conduct (the 'Rules') requires a lawyer to 'make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to' the confidential information of current, former and prospective clients. Rule 1.6(a), in turn, provides that confidential information 'consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.'

"Rule 1.6(c) has been interpreted to require a lawyer to take reasonable care to protect clients' confidential information when carrying electronic devices containing such information across the border (*see* N.Y. City 2017-5 (2017)), when using an online storage provider to store clients' confidential information (*see* N.Y. State 842 (2010)), and when sending emails containing confidential information (*see* N.Y. State 709 (1998))."

"Contacts stored on a smartphone typically include one or more email addresses, work or residence addresses, and phone numbers (collectively sometimes called 'directory information'), but contacts often also include additional non-directory information (such as birth date or the lawyer's relationship to the contact). Social media apps may seek access to this information to solicit more users to the platform or to establish links between users and enhance the user experience. Apps which sell products or services may seek such access to promote additional sales. Apps that espouse political or social beliefs may seek such access to disseminate their views. These are but three examples of how an attorney's contacts might be exploited by an app, but there are more, and likely many more to come.

"Insofar as clients' names constitute confidential information, a lawyer must make reasonable efforts to prevent the unauthorized access of others to those names, whether stored as a paper copy in a filing cabinet, on a smartphone, or in any other electronic or paper form. To that end, before an attorney grants access to the attorney's contacts, the attorney must determine whether any contact – even one – is confidential within the meaning of Rule 1.6(a). A contact could be confidential because it reflects the existence of a client-attorney relationship which the client requested not be disclosed or which, based upon particular facts and circumstances, would be likely to be embarrassing or detrimental to the client if disclosed. N.Y. State 1088 (2016).

"Some relevant factors a lawyer should consider in determining whether any contacts are confidential are: (i) whether the contact information identifies the smartphone owner as an attorney, or more specifically identifies the attorney's area of practice (such as criminal law, bankruptcy law, debt collection law, or family law); (ii) whether people included in the contacts are identified as clients, as friends, as something else, or as nothing at all; and (iii) whether the contact information also includes email addresses, residence addresses, telephone numbers, names of family members or business associates, financial data, or other personal or non-public information that is not generally known.

"If a lawyer determines that the contacts stored on his smartphone include the confidential information of any current or former client, the lawyer must not consent to give access to his contacts to an app, unless the attorney, after reasonable due diligence, including a review of the app's policies and stated practices to protect user information and user privacy, concludes that such confidential contact information will be handled in such a manner and for such limited purposes that it will not, absent the client's consent, be disclosed to additional third party persons, systems or entities. *See* N.Y. State 820 (2008).

"If 'contacts' on a lawyer's smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client's consent."

G. Conflict of Interest: Current Clients, Rule 1.7

State v. Nale, No. E2021-00276-CCA-R9-CD, 2022 WL 844587 (Tenn. Crim. App., Montgomery, Mar. 22, 2022).

"The Defendant is alleged to have offered a bribe to a part-time Bledsoe County General Sessions Court judge, who reported the Defendant's alleged conduct to the Tennessee Bureau of Investigation. The general sessions judge also maintains a private criminal defense practice in the Twelfth Judicial District. The general sessions judge is a member of the board of directors of a local bank, as is an assistant district attorney general. The district attorney general has outstanding secured loans with the bank. Because the general sessions judge was the target of the Defendant's alleged bribery, he is a State's witness in the present case.

"The Defendant filed a Motion to Disqualify the Twelfth Judicial District Attorney's Office, in which she alleged that both an actual conflict of interests and the appearance of impropriety existed. As relevant to this appeal, the motion alleged facts regarding (1) the State's appearance, through the district attorney general, in criminal matters heard by the general sessions judge; (2) the general sessions judge's private practice, in which he litigated criminal cases against the State, through the district attorney general, and (3) the district attorney general's indebtedness to the bank at which the general sessions judge sat on the board of directors."

"In a written order, the trial court found that the judge who was the alleged target of a bribe was a part-time general sessions judge, that the general sessions judge had been the target of the alleged bribe by the Defendant, and that the general sessions judge was an essential witness for the State in the present case. The court found, 'The Twelfth Judicial District Attorney General and his staff prosecuting cases in [the judge's] court creates an appearance [the judge] would have an improper influence over the Twelfth Judicial District Attorney General's and his staff's decisions with regards to the prosecution of the defendant in this matter.' Therefore, the court concluded, the district attorney general's office staff 'shall be disqualified.' The court also consolidated the present case with the other pending bribery case.

"In a later-filed document titled Stipulation of Facts, which was signed by the trial court, the parties set forth their stipulated facts, which included statements that the general sessions judge and an assistant district attorney general sat on the board of directors of a bank from which the district attorney general had borrowed money secured by three deeds of trust. The trial court stated in the

stipulations document that these facts related to the bank 'do not create a conflict or an appearance of a conflict for the Twelfth Judicial District Attorney General and his staff and are not relevant to this matter.' The court stated that its ruling had relied upon the district attorney general's office's appearing in court before the general sessions judge.

"The State filed an application with this court for an interlocutory appeal by permission pursuant to Tennessee Rule of Appellate Procedure 9, which we granted. After receiving the parties' briefs and oral arguments, the case is now before us for review.

"We preface our discussion by noting that the State contends that the trial court erred in disqualifying the district attorney general's office on the basis of the district attorney general's appearance in other cases in the general sessions judge's court. The Defendant counters that the trial court abused its discretion by not finding that an appearance of impropriety based upon the relationships of the general sessions judge and a member of the district attorney general's staff with the bank at which the district attorney general has outstanding loans. The State responds in its reply brief that the Defendant's argument regarding the trial court's failure to rely on the banking relationship as an additional basis for disqualification is beyond the scope of this court's grant of an interlocutory appeal. Thus, we must begin our analysis with consideration of the scope of the appeal."

"A party moving to disqualify an attorney in a criminal case must establish a conflict of interests by a preponderance of the evidence. *State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003). A trial court's decision to disqualify an attorney for a conflict of interests and to impute an attorney's conflict of interests upon the attorney's firm is reviewed for an abuse of discretion. *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *see State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000). A court abuses its discretion by 'apply[ing] an incorrect legal standard, or reach[ing] a decision which is against logic or reasoning that caused an injustice to the party complaining.' *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999); *see Clinard*, 46 S.W.3d at 182.

"When deciding whether a district attorney general or his office must be disqualified from prosecuting a case, a trial court must consider whether an actual conflict of interests or the appearance of impropriety exists. *State v. Coulter*, 67 S.W.3d 3, 29 (Tenn. Crim. App. 2001); *see State v. Culbreath*, 30 S.W.3d 309, 312-13 (Tenn. 2000). If the court determines that disqualification is required on either basis, the court must consider whether the entire district attorney general's office should be disqualified. *Coulter*, 67 S.W.3d at 29. A conflict of interests 'includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of "compromising interests and loyalties."' *Culbreath*, 30 S.W.3d at 312 (citing Tenn. R. Sup. Ct. 8, EC 5–1) (replaced)."

"In the present case, the trial court disqualified the district attorney general's office based upon an appearance of impropriety, not based upon a finding of an actual conflict of interests, and the parties' appellate arguments have focused on the appearance of impropriety, rather than on the existence of an actual conflict of interests. Further, the State conceded at oral argument that if disqualification of the district attorney general himself was appropriate, the record had not been developed to establish how the remaining staff of the district attorney general's office might proceed with appropriate screening measures. We will limit our consideration to whether the trial court erred in determining that an appearance of impropriety exists.

"The State is represented by the district attorney general, who 'is not an advocate for the victim of a crime or the witnesses for the State but is instead the representative of the sovereign state of Tennessee charged with "safeguarding and advocating the rights of the people."' *State v. Johnson*, 538 S.W.3d 32, 51 (Tenn. Crim. App. 2017) (quoting *Quillen v. Crockett*, 928 S.W.2d 47, 51 (Tenn. Crim. App. 1995)). The district attorney general and his staff 'are expected to be impartial in the sense that they must seek the truth and not merely obtain convictions.' *Culbreath*, 30 S.W.3d at 314; *see State v. White*, 114 S.W.3d 469, 477 (Tenn. 2003). In other words, the district attorney general's duty is to seek justice. *Johnson*, 538 S.W.3d at 51; *see Berger v. United States* 295 U.S. 629, 633 (1935) (stating that a prosecutor's interest is not to win a case, but to do justice).

"The trial court found that the district attorney general's office appeared in court before the general sessions judge, which created an appearance of impropriety in the present case because the general sessions judge was a witness to the alleged bribery. The court did not elaborate further on the rationale for its conclusion.

"The statements and arguments of counsel at the hearing reflect that the venue of the present case is a small community in which attorneys in private practice, judges, and prosecutors know one another and are involved with each other in multiple capacities, both related and unrelated to the law. This court knows that the United States Census Bureau reported in 2020 that the population of Bledsoe County, Tennessee was 14,913. *See* Tenn. R. Evid. 201 (judicial notice); U.S. Census Bureau (2020) (retrieved from www.census.gov/quickfacts/bledsoecountytennessee). No evidence was offered to suggest that the district attorney general and his staff were biased in the present case toward the general sessions judge by virtue of their appearance in court before the general sessions judge in other cases or that they would take actions contrary to their duties as prosecutors to seek justice. Likewise, no evidence suggested that these facts influenced the district attorney general and his staff to prosecute the Defendant unfairly or differently than a defendant in a case in which the general sessions judge was not a witness. In the context of a small community in which legal professionals serve in multiple, interconnected roles, a reasonable layperson with knowledge of the facts of this case would not conclude that an appearance of impropriety existed. The defense's arguments at the hearing and on appeal suggest nothing more than a mere possibility of such, which is insufficient to warrant the drastic remedy of disqualification of a district attorney general's office. *See Clinard*, 46 S.W.3d at 187 (stating that 'disqualification of one's counsel is a drastic remedy and is ordinarily unjustifiable based solely upon an appearance of impropriety'). We conclude, therefore, that the trial court abused its discretion in ordering disqualification on this basis. *Cf. State v. Derek T. Grooms*, No. W2019-01324-CCA-R10-CD, 2020 WL 9171956 (Tenn. Crim. App. Nov. 25, 2020) (holding that no actual conflict or appearance of impropriety existed to require disqualification of the district attorney general's office in a case against a defendant who was a victim of a crime being prosecuted in another case by the district attorney general).

"We turn to the Defendant's contention that the trial court abused its discretion in not basing its disqualification order on the banking relationship of the district attorney, a member of his staff, and the general sessions judge. Again, no evidence was offered at the hearing, although the statements of counsel and the stipulations of fact again demonstrate the reality of a small community in which legal professionals are engaged in other business activity. No evidence was offered to suggest that the board of directors had any decision-making authority or influence over the bank's lending decisions as regards the district attorney general's loans. No evidence suggests that the district attorney general or his staff would prosecute the Defendant in a way that was inconsistent with the special duties conferred upon a prosecutor merely because the district attorney general had outstanding indebtedness to a bank whose board of directors included a member of the district

attorney's staff and the general sessions judge, who was the State's witness. In the context of this community and these facts, a reasonable layperson with knowledge of the facts of this case would not conclude that an appearance of impropriety existed. The trial court did not abuse its discretion in denying the motion to disqualify the district attorney general's office based upon the banking relationship."

"D. Kelly Thomas, Jr., J., concurring in part and dissenting in part."

"In my opinion, the majority's analysis comes perilously close to requiring evidence of actual impropriety rather than just an appearance of impropriety. Any lay person could reasonably think that the District Attorney General's office would approach this prosecution differently, possibly looking like an 'insider-deal' to those unfamiliar with the legal system or like the Defendant would not receive the proverbial 'fair shake.' More than just a mere possibility of impropriety exits under these circumstances. Furthermore, these concerns would apply universally to the entire office, touching the office as a whole. In short, it would appear that the District Attorney General's Office could not exercise its independent professional judgment free of 'compromising influences and loyalties.' Based upon these considerations, I would affirm the order of the trial court disqualifying the Twelfth Judicial District Attorney General's Office. See *Culbreath*, 30 S.W.3d at 316 (the Tennessee Supreme Court holding that the Shelby County District Attorney General's Office was disqualified from prosecuting defendants based upon a conflict of interest created by the use of a private attorney hired as a special prosecutor for the county, who had received substantial compensation from special interest groups)."

In re Dancison, Board Release of Information.

Thomas Joseph Dancison, Jr., of Lawrenceburg was publicly censured.

"Mr. Dancison represented a client in a domestic matter. During the representation, Mr. Dancison created a conflict of interest by engaging in sexualized conversation and conduct. Mr. Dancison pled guilty to simple assault pursuant to Tenn. Code Ann. § 39-13-101(a)(3) for intentional or knowing physical contact with a client that a reasonable person would consider 'extremely offensive or provocative.'"

Mr. Dancison violated RPCs 1.7 (conflict of interest: current client) and 8.4 (misconduct).

In re Meeks, Board Release of Information.

Travis Nathaniel Meeks of Clarksville was publicly censured.

"Mr. Meeks agreed to the joint representation of two clients in pursuing a detainer action. While this representation was ongoing, Mr. Meeks agreed to represent one of the two clients in a second matter in which the other client's interests were materially adverse. Mr. Meeks did not obtain an informed conflict waiver from either client, and also failed to maintain reasonable communication with one of the two clients."

Mr. Meeks violated RPCs 1.4 (communication), 1.7 (conflict of interest: current client), and 1.8 (conflict of interest: current clients: specific rules).

In re Petty, Board Release of Information.

Brian Jackson Petty of Selmer was publicly censured.

"Mr. Petty was appointed to represent an indigent client in a dependent and neglect matter in Juvenile Court. Mr. Petty created a conflict of interest by sending text messages that were sexual in nature to his client. There was a significant risk that Mr. Petty's personal interests materially limited his representation of his client."

Mr. Petty violated RPC 1.7(a)(2) (concurrent conflict of interest).

H. Safekeeping Property and Funds, Rule 1.15

In re Anderson, Board Release of Information.

Melissa June Anderson of Nashville was publicly censured.

"Ms. Anderson failed to create and maintain appropriate trust account bookkeeping protocols for her law office, breaching her managerial obligation to ensure that her office acted in compliance with the Tennessee Rules of Professional Conduct. As a result of Ms. Anderson's conduct, a check drawn on the firm's trust account was returned for insufficient funds."

Ms. Anderson violated RPCs 1.15 (safekeeping property and funds) and 5.1 (responsibilities of managerial and supervisory lawyers).

In re Clayton, Board Release of Information.

Terry Renease Clayton of Nashville was publicly censured with the condition that he attend the next Trust Account Workshop by the Board of Professional Responsibility in September 2021.

"Mr. Clayton represented a client in the recovery of back child support. In August 2020, Mr. Clayton received the funds and timely issued a check to his client. After issuing another check in the case, Mr. Clayton issued a check to himself for fees, which resulted in an overdraft of the account. The check was returned by the bank.

"Mr. Clayton then discovered that he had accidentally overpaid his client due to his mathematical error. Mr. Clayton asked his client to return the overpaid funds, which she did. After the error, Mr. Clayton delayed in removing his earned fee from trust, doing so in multiple payments over three months. Mr. Clayton did not have a client ledger on this matter. Mr. Clayton's conduct resulted in the commingling of his funds with client funds for three months."

Mr. Clayton violated RPC 1.15 (safekeeping property and funds).

In re Erwin, Board Release of Information.

Jacob Edward Erwin of Maryville was publicly censured.

"Mr. Erwin utilized trust account funds for fulfillment of a personal financial obligation. While no clients or third parties were harmed, Mr. Erwin's conduct constitutes a breach of his fiduciary obligation regarding client funds and property."

Mr. Erwin violated RPC 1.15 (safekeeping property and funds).

In re Lopez, Board Release of Information.

Ivan Omar Lopez of Hermitage was publicly censured with the condition that he attend the Board's next Trust Account Workshop in September 2021.

"In the representation of two clients, Mr. Lopez withheld funds for anticipated medical bills. The medical provider went out of business temporarily. Mr. Lopez maintained the funds in trust. Several months after the settlement of the client's case, the medical provider sought payment for the medical bills in amounts in excess of the funds Mr. Lopez had retained.

"In October 2020, Mr. Lopez decided to remit payment to the medical provider in full, to timely resolve any potential dispute. Mr. Lopez intended to remove the funds he held in trust, and also pay an additional $1,850 from his own funds to issue full payment to the provider. On October 2, 2020, Mr. Lopez incorrectly removed the full amount of funds from his trust account, $1,850 of which should have been paid from his operating account. Mr. Lopez did not discover the error until April 2021. Mr. Lopez then made a second error in depositing too much into trust to remedy the error, resulting in commingling of $3,149 of his funds with his client funds for two weeks.

"Mr. Lopez's conduct was negligent, not intentional, and did not result in harm to his clients or to the medical provider at issue, but there was potential harm to other clients whose funds were removed for six months."

Mr. Lopez violated RPC 1.15 (safekeeping property and funds).

In re Patterson, Board Release of Information,

Kevin Glenn Patterson of Germantown was publicly censured, based on a conditional guilty plea.

"Mr. Patterson failed to retain client funds in his IOLTA account after the client failed to cash a check for one year and would not respond to various attempts to reach her. More than four years later, the client negotiated the check and the bank honored it, which caused Mr. Patterson's client trust account to overdraft when an unrelated client deposited a check written from his client trust account. Mr. Patterson immediately paid funds to correct the overdraft and cooperated with the Board making full disclosure of the cause of the overdraft after researching his bank accounts."

Mr. Patterson violated RPC 1.15 (safekeeping property and funds).

In re Springer, Board Release of Information.

Paul James Springer of Memphis was permanently disbarred and ordered him to pay restitution of $6,247.34, to his client and close his 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).

In re Tennyson, Board Release of Information.

John Terence Tennyson of Mount Juliet was permanently disbarred and ordered him to pay restitution to his client of $10,000.

"After a hearing upon the disciplinary petition, a Hearing Panel determined Mr. Tennyson knowingly and wrongfully retained funds belonging to his client in the amount of $10,000 for his own financial benefit, knowingly refused to refund that amount to his client despite a written fee agreement requiring that the funds be immediately refunded, and knowingly deceived his client as to the process whereby she could receive payment of the misappropriated funds, thereby causing harm to his client."

Mr. Tennyson violated RPCs 1.5 (fees), 1.15 (safekeeping property and funds), 1.16 (declining or terminating representation), and 8.4 (misconduct).

In re Vaughan, Board Release of Information.

Effective April 22, 2022, Kyle Douglas Vaughan of Kingsport was permanently disbarred. Mr. Vaughan consented to disbarment because he could not successfully defend the charges against him.

"In the pending Petition for Discipline, the Supplemental Petition for Discipline, the Second Supplemental, Third Supplemental, and Fourth Supplemental Petitions for Discipline, Mr. Vaughan failed to communicate with his clients, failed to act diligently, failed to comply with court orders, failed to comply with the requirements of a suspended attorney, failed to comply with requirements upon discharge, failed to protect client's funds, and failed to respond to disciplinary complaints."

Mr. Vaughan violated RPCs 1.1 (competency), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property and funds), 1.16(d) (declining or terminating representation), 3.1 (meritorious claims and contentions), 3.2 (expediting litigation), 3.3(a) (candor towards the tribunal), 3.4(c) (fairness to the opposing party and counsel), 8.1(b) (bar admission and disciplinary matters), and 8.4(c) and (g) (misconduct).

I. Terminating Representation, Rule 1.16

Board of Professional Responsibility of Supreme Court of Tennessee v. Prewitt, 647 S.W.3d 357 (Tenn., Lee, 2022).

"In 2012, Candes Vonniest Prewitt was licensed to practice law in Tennessee. In December of that year, she and Demetrius Tucker began an on-and-off romantic relationship that lasted for several years. In July 2014, while Mr. Tucker was working as a security guard for a Nashville night club, a disgruntled patron shot him. Mr. Tucker was seriously injured and incurred over $500,000 in medical expenses. A co-worker, Dionage Harris, was also injured in the incident. Both men retained Ms. Prewitt to represent them in a personal injury lawsuit. Ms. Prewitt agreed to handle the lawsuit under a contingency fee agreement of one-third of any damages recovered.

"In July 2015, Ms. Prewitt filed a complaint on behalf of Mr. Tucker and Mr. Harris against their employer, Robert Higgins d/b/a WKND Lounge, and the premises owner, Dialysis Clinic, Inc. ('the defendants'), in the Davidson County Circuit Court. The suit alleged that the defendant employer was negligent by failing to report to law enforcement that the man who shot Mr. Tucker had been ejected from the club earlier in the evening and had threatened to return and kill everyone.

"After the lawsuit was filed, Ms. Prewitt and Mr. Tucker continued their on-and-off romantic relationship. Ms. Prewitt did not advise Mr. Tucker of a potential conflict of interest based on their personal relationship and did not have him sign a written conflict waiver.

"By February 15, 2018, Ms. Prewitt was required to file plaintiffs' expert disclosures under Tennessee Rule of Civil Procedure 26.02(4). This filing deadline was set five months earlier during an August 31, 2017 discovery conference. Ms. Prewitt filed the disclosures on February 15. The defendants then moved to exclude two of the plaintiffs' expert witnesses—a security expert designated to testify on the liability issue and a chiropractor designated to testify about Mr. Harris's injuries. In April 2018, the circuit court granted the motion, excluding the two expert witnesses after finding that the expert disclosures provided by Ms. Prewitt were deficient under Rule 26.02(4). The disclosures failed to include the substance of the facts and opinions to which the witnesses were expected to testify and a summary of the grounds for each opinion; failed to list the witnesses' qualifications, publications for the previous ten years, and cases in which they had testified as an expert in the previous four years; and failed to disclose the compensation to be paid to the witnesses for their work on the case. Ms. Prewitt did not inform her clients of the circuit court's ruling excluding their expert witnesses.

"In late April 2018, the defendants moved for summary judgment, arguing that they did not owe a duty of care to the plaintiffs because the shooting was not foreseeable. Ms. Prewitt told neither Mr. Tucker nor Mr. Harris that summary judgment motions had been filed, and she did not prepare any response to the motions. Instead, in May 2018, she moved to withdraw from the case and postpone the summary judgment hearing. By this time, Ms. Prewitt was expecting a child with Mr. Tucker, and their romantic relationship had ended. As grounds for her motion to withdraw, Ms. Prewitt stated that 'the communication between counsel and [the p]laintiffs ha[d] broken down.' She mentioned neither her pregnancy nor her personal relationship with Mr. Tucker. Ms. Prewitt represented to the circuit court that her clients' interests would not be materially adversely affected by her withdrawal. Ms. Prewitt did not include her clients on the certificate of service for the motion to withdraw and did not send them copies of the motion. Ms. Prewitt claimed she told them both by telephone that she intended to withdraw from the case. On July 3, 2018, the circuit court entered an order allowing Ms. Prewitt to withdraw. The circuit court gave Mr. Tucker and Mr. Harris thirty days to obtain new counsel and continued the summary judgment hearing to August 10, 2018.

"After Ms. Prewitt told Mr. Tucker she would no longer represent him, he consulted another attorney about taking over the case. The attorney asked Mr. Tucker to get him the case file and information about any lien Ms. Prewitt intended to assert for her work on the case. When Ms. Prewitt submitted a four-page document itemizing her work at $500 per hour, billed in quarter-hour increments and totaling $121,750, the attorney declined to represent Mr. Tucker. After some discussion with Mr. Tucker in an exchange of text messages, Ms. Prewitt agreed to release the lien in exchange for half of Mr. Tucker's recovery in the lawsuit. But when Ms. Prewitt turned over the case file to Mr. Tucker, she gave him an unconditional release of the lien. The attorney then agreed to take the case.

"When Mr. Tucker's attorney reviewed the case file, he found that it was missing transcripts of the three depositions that had been taken, as well as a video recording of Mr. Tucker's shooting. The attorney also learned that no depositions of medical or security experts had been taken, that the circuit court had excluded two expert witnesses, and that summary judgment motions were pending and set for hearing in less than thirty days. The attorney obtained a continuance of the hearing and filed a response to the summary judgment motions.

"In October 2018, the circuit court heard the defendants' motions for summary judgment. In January 2019, the circuit court granted the motions for summary judgment. The basis for the circuit court's ruling was the plaintiffs' failure to establish that the defendants owed a duty of care based on a foreseeable risk of harm of criminal acts. The circuit court noted that the plaintiffs had not provided evidence of any criminal activity in the immediate vicinity of the night club."

"In January 2019, Mr. Tucker submitted a disciplinary complaint to the Board against Ms. Prewitt. In November 2019, the Board filed a petition for discipline against Ms. Prewitt, alleging that in her representation of Mr. Tucker she violated Rules of Professional Conduct 1.1 (Competence), 1.3 (Diligence), 1.7 (Conflict of Interest: Current Clients), 1.16 (Declining or Terminating Representation), and 8.4 (Misconduct). Ms. Prewitt denied any misconduct. After a July 15, 2020 evidentiary hearing, the hearing panel issued a written decision on August 14, 2020, finding that Ms. Prewitt had violated Rules 1.1, 1.3, 1.7, 1.16, and 8.4(a). The hearing panel imposed a thirty-day active suspension, and as conditions for reinstatement, Ms. Prewitt had to complete ten extra hours of ethics continuing legal education and engage a practice monitor for six months."

"The hearing panel found that Ms. Prewitt violated Rule 1.1 by failing to make proper expert disclosures, leading to the exclusion of two of the plaintiffs' expert witnesses, and by failing to advise Mr. Tucker to file a claim for workers' compensation rather than a personal injury lawsuit. The hearing panel concluded that these failures showed a lack of legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation of Mr. Tucker."

"The expert disclosures Ms. Prewitt provided did not meet the requirements of Rule 26.02(4)(A)(i). Her one-paragraph disclosure of the liability expert stated that he 'specialize[d] in all aspects of the provision of security services, as well as safety.' It also stated that grounds for his 'future opinion' would 'include, but ... not be limited to, the review of security policies and procedures, discovery responses, and all other materials produced by Defendants related to the subject shooting incident.' The liability expert was expected to 'opine on the subject of liability, particularly duty, breach and causation.' This disclosure did not state the substance of the expert's opinions or the grounds for those opinions. It also failed to list the expert's qualifications, previous cases in which he had testified, and his compensation for testifying in Mr. Tucker's case. The disclosures regarding Mr. Harris's chiropractor were similarly deficient."

"Ms. Prewitt also contends the Board did not show that Mr. Tucker's case was prejudiced by the exclusion of the only expert witness designated to establish liability. She claims the hearing panel's finding was arbitrary, capricious, and unsupported by the record because the Board did not offer evidence that Mr. Tucker's case would have survived summary judgment had the liability expert not been excluded. We disagree. First, it cannot reasonably be argued that excluding the only expert witness on liability did not cause harm or potential harm to Mr. Tucker. Second, even if there was no prejudice to Mr. Tucker, Ms. Prewitt was not relieved of her ethical responsibilities under the Rules of Professional Conduct. *See, e.g.*, *In re Groom*, 350 Or. 113, 249 P.3d 976, 983 (2011)

('[T]he fact that a lawyer's failure to communicate does not prejudice the client does not relieve the lawyer of the ethical duty [under Rule of Professional Conduct 1.4] to communicate.').

"Ms. Prewitt also contends the hearing panel should not have relied solely on the circuit court's ruling excluding the expert witnesses because that ruling was never subject to appellate review. This argument also misses the mark. The expert disclosures were facially deficient because of noncompliance with Rule 26.02(4)(A)(i). Ms. Prewitt did not provide the information required, and her statements to the hearing panel and her filings in Mr. Tucker's personal injury lawsuit show a fundamental misunderstanding of the requirements for disclosing expert witnesses in litigation. She asserts that the Board did not prove she violated the standard of care for a reasonable attorney in her expert disclosures. But this is a disciplinary case, not a legal malpractice action requiring expert proof on the standard of care. Here, Rule 26.02(4)(A)(i) establishes what was required."

"The hearing panel determined that Ms. Prewitt violated Rule 1.7 because her personal relationship with Mr. Tucker significantly limited her ability to advise and represent him objectively and conflicts in their personal relationship interfered with their attorney-client relationship. The hearing panel concluded Ms. Prewitt should have disclosed to Mr. Tucker that their personal relationship could interfere with her representation in the lawsuit, and she should have obtained his informed written consent to waive the potential conflict. The hearing panel also found that Ms. Prewitt violated Rule 1.7 because she put her own interests ahead of Mr. Tucker's by asserting a lien for her fees after she withdrew and by advising him to file a personal injury lawsuit instead of a workers' compensation claim."

"Although the rule does not define 'personal interest,' Ms. Prewitt argues, based on Comment 10 to the rule, that 'personal interest' refers to a pecuniary interest. While it is true that Comment 10 appears under the heading 'Personal Interest Conflicts,' Comments 12 and 12a, which appear in the comments under the heading 'Sexual Relations Between Lawyer and Client,' identify another potential source of a personal interest conflict.

"Comment 12 emphasizes the fiduciary relationship between lawyer and client 'in which the lawyer occupies the highest position of trust and confidence.' Tenn. Sup. Ct. R. 8, RPC 1.7 cmt. 12. It explains that given this fiduciary duty, 'combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest' and about 'impairment of the judgment of both lawyer and client.' *Id.* Comment 12 specifically states that '[t]hese concerns may be particularly acute when a lawyer has a sexual relationship with a client,' which 'may create a conflict of interest under [Rule 1.7(a)(2)] or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.' *Id.*

"Comment 12a expands on this: '[T]he client's dependence on the lawyer's knowledge of the law is likely to make the relationship between the lawyer and client unequal.' Tenn. Sup. Ct. R. 8, RPC 1.7 cmt. 12a. This inequality may be exacerbated by a sexual relationship, which 'can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage.' *Id.* Also, there is 'a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment.' *Id.* Finally, '[t]he client's own emotional involvement may make it impossible for the client to give informed consent to these risks.' *Id.*

"The concerns expressed in Comments 12 and 12a are reflected in Mr. Tucker's testimony before the hearing panel. When asked how he came to be represented by Ms. Prewitt in the personal injury

lawsuit, Mr. Tucker explained that Ms. Prewitt was angry that he consulted other attorneys and did not come to her first since she was his girlfriend at the time. Mr. Tucker also said he 'kind of felt like [he] was pressured into' asking Ms. Prewitt to represent him because she was 'trying to make [him] feel bad because [he] didn't want to use her.' Mr. Tucker stated that because Ms. Prewitt was new to the practice of law, he 'didn't really think she knew what she was doing' and 'really didn't want to go with her,' but he agreed to let Ms. Prewitt handle the case because he 'felt bad' and told himself 'she had [his] best interest at hand.' Ms. Prewitt, on the other hand, testified that Mr. Tucker 'begged' her to represent him in the personal injury case because he could not find another lawyer to take the case and the statute of limitations deadline was approaching. The hearing panel did not make a specific finding of fact or credibility on this conflicting testimony but implicitly resolved the conflicts against Ms. Prewitt by its finding that she violated Rule 1.7."

"Ms. Prewitt also claims there was no concurrent conflict of interest when she first agreed to represent Mr. Tucker in his lawsuit, but only a 'potential' conflict. Thus, she argues, there was no 'significant risk' of a conflicting 'personal interest' that would 'materially limit[ ]' her responsibilities in the case. Tenn. Sup. Ct. R. 8, RPC 1.7(a)(2). But Ms. Prewitt admitted to the hearing panel that there were times during her three-year relationship with Mr. Tucker that they did not talk—sometimes for weeks—because she did not want to talk to him. She characterized it as 'nothing that serious' and maintained that the relationship 'didn't become volatile until it ended.' Ms. Prewitt stated that for 'the most part,' they did not go long stretches without talking while she was representing Mr. Tucker in the lawsuit."

"There is ample evidence in the record of the on-and-off nature of Ms. Prewitt's relationship with Mr. Tucker both before and during the representation and of the disputes they had about the representation from the beginning. Thus, the evidence supports the hearing panel's finding that Ms. Prewitt had a concurrent conflict of interest that required disclosure to Mr. Tucker and his informed consent regardless of Ms. Prewitt's subjective belief that there was no conflict. *See Beecher*, 224 P.3d at 450 (stating that the lawyer's subjective belief there was no conflict was unreasonable); *Robinson*, 209 A.3d at 575 (holding that the lawyer violated Vermont Rule of Professional Conduct 1.7 even though he did not think his sexual relationship with his client presented a conflict of interest). The hearing panel's finding of a concurrent conflict of interest based on Ms. Prewitt's personal relationship with Mr. Tucker was not arbitrary or capricious and is supported by substantial and material evidence.

"Ms. Prewitt claims she did not comply with Rule 1.7(b) because she did not believe there was a conflict. But when asked at the disciplinary hearing whether she would 'agree that an attorney and a client having a sexual relationship could cause some personal conflicts that could affect representation,' Ms. Prewitt answered, 'That's what the rules say, that that's not permitted.' Ms. Prewitt admitted she knew that a sexual relationship could cause conflicts in her representation of Mr. Tucker. Thus, she had an obligation under Rule 1.7(b) to explain that to Mr. Tucker and obtain in writing his informed consent to the representation. *See Robinson*, 209 A.3d at 575. The hearing panel's finding that her failure to do so violated Rule 1.7(b) was not arbitrary or capricious and is supported by substantial and material evidence.

"Ms. Prewitt next asserts that she did not have to obtain a written waiver of the concurrent conflict of interest from Mr. Tucker because he was 'just as aware of the status of his relationship with Ms. Prewitt as she was.' But this is not the standard. Under Rule 1.7(b), Ms. Prewitt could represent Mr. Tucker when there was a concurrent conflict of interest if she 'reasonably believe[d] that [she would] be able to provide competent and diligent representation' and Mr. Tucker gave 'informed

consent, confirmed in writing.' For Mr. Tucker to give informed consent, Ms. Prewitt had to advise him of the 'relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects' on his interests. Tenn. Sup. Ct. R. 8, RPC 1.7(b)(1), (4), cmt. 18; *see also Vogel*, 482 S.W.3d at 533 (holding that a lawyer violated Rule 1.7 by failing to explain to his client 'the potential impact a sexual relationship between them could have on the attorney-client relationship' and failing to obtain her 'informed consent to such a relationship'). . . . Additionally, the testimony of both Mr. Tucker and Ms. Prewitt shows that their personal relationship was an issue throughout the representation. Mr. Tucker's knowledge of their personal relationship does not mean he knew about the potential harm that it could have on the attorney-client relationship, and thus the reason for Rule 1.7(b)'s informed consent requirement.

"The hearing panel also found that Ms. Prewitt violated Rule 1.7 by asserting a lien on the case, which put her own interests above Mr. Tucker's. Ms. Prewitt argues the Board did not show that she could not assert an attorney lien after withdrawal or that she asserted unreasonable time or billable amounts. The Board agrees that an attorney is allowed to assert a reasonable lien for work performed before the attorney withdraws from the case. But the Board presented evidence that the $121,750 lien Ms. Prewitt asserted was unreasonable; the lien hindered Mr. Tucker's ability to retain another attorney; and although she later reconsidered, Ms. Prewitt agreed to release the lien only after Mr. Tucker promised her half of his recovery in the personal injury lawsuit. Ms. Prewitt's actions regarding the lien establish that she put her financial interests ahead of Mr. Tucker's interests. *See, e.g.*, *Deseret First Fed. Credit Union v. Parkin*, 339 P.3d 471, 476 (Utah Ct. App. 2014). . . ."

"The hearing panel determined that Ms. Prewitt violated Rule 1.16 when she withdrew from Mr. Tucker's case because her withdrawal could not be accomplished without a material adverse effect on the client's interest. This finding was based on Ms. Prewitt's delay in seeking to withdraw; the fact that summary judgment motions were pending and Ms. Prewitt did not inform future counsel about them; and her assertion of a substantial lien that could deter another lawyer from taking the case. The hearing panel also noted that Ms. Prewitt did not provide Mr. Tucker with a copy of the motion to withdraw, that she failed to inform him of the possible impact her withdrawal would have on the case, and that the timing of her withdrawal failed to give Mr. Tucker adequate time to hire other counsel.

"Ms. Prewitt argues the hearing panel erred in concluding that her withdrawal from the case could not be accomplished without material adverse effect on the client, and thus was a violation of Rule 1.16. *See* Tenn. Sup. Ct. R. 8, RPC 1.16(b)(1). She points out that she withdrew for 'good cause' which is allowed under Rule 1.16(b)(7). Tenn. Sup. Ct. R. 8, RPC 1.16(b)(7). Even so, Rule 1.16 imposes additional requirements on a lawyer who withdraws from a case. The lawyer must, 'to the extent reasonably practicable, take steps to protect the client's interests.' Tenn. Sup. Ct. R. 8, RPC 1.16(d). This may include '(1) giving reasonable notice to the client; (2) allowing time for the employment of other counsel; (3) cooperating with any successor counsel engaged by the client; (4) promptly surrendering papers and property to which the client is entitled....' *Id.* After withdrawal, 'a lawyer must take all reasonable steps to mitigate the consequences to the client.' Tenn. Sup. Ct. R. 8, RPC 1.16 cmt. 9.

"Even if Ms. Prewitt had good cause under Rule 1.16(b)(7) to withdraw, she violated Rule 1.16(d) when she did not give reasonable notice to her client. The timing of her motion to withdraw—after summary judgment motions had been pending for a month and were set for hearing—did not allow adequate time for the employment of new counsel. The Board presented evidence that the lien Ms.

Prewitt placed on the case was unreasonable, which further hindered Mr. Tucker's ability to retain new counsel. Additionally, Ms. Prewitt failed to cooperate with Mr. Tucker's subsequent attorney when she did not tell him about the pending summary judgment motions. Ms. Prewitt's conduct did not show any effort to mitigate the consequences of her withdrawal.

"The hearing panel's finding that Ms. Prewitt violated Rule 1.16 was not arbitrary or capricious and is supported by substantial and material evidence."

Finley v. Wettermark Keith, LLC, No. E2020- 01081- COA-R3-CV, 2021 WL 3465865 (Tenn. Ct. App., Frierson, Aug. 6, 2021).

"On October 29, 2019, Jonathan Finley, proceeding self-represented, filed a complaint against Wettermark Keith, LLC ('Wettermark'), in the Hamilton County Circuit Court ('trial court'), alleging that he had hired Wettermark on August 24, 2018, to represent him with regard to 'an accident where the plaintiff sustained 2nd degree burns to the arm cause[d] by an air bag.' Mr. Finley asserted that Wettermark had failed to file suit against General Motors Company ('General Motors') within the applicable statute of limitations such that his claim was now time-barred. Mr. Finley accordingly claimed that Wettermark should be held liable for failing to provide competent representation."

"On December 10, 2019, Wettermark filed a motion to dismiss Mr. Finley's complaint, pursuant to Tennessee Rule of Civil Procedure 12.02(6), asserting that Mr. Finley had failed to state a claim upon which relief could be granted. Wettermark acknowledged that Mr. Finley had sought legal representation from Wettermark in August 2018 and averred that in February 2019, Mr. Finley had agreed to settle his personal injury claim related to an automobile accident for $1,800.00. According to Wettermark, Mr. Finley then refused to sign the release it had sent to him. Wettermark stated that it had subsequently terminated its representation of Mr. Finley in March 2019 following Mr. Finley's failure to execute the release required for him to receive his settlement proceeds. Mr. Finley filed a response in opposition to the motion to dismiss.

"On January 27, 2020, Mr. Finley filed a motion seeking to amend his complaint to add a claim for damages in the amount of eight million dollars. Wettermark subsequently filed an answer, admitting that Mr. Finley had hired Wettermark in August 2018 with regard to a recent automobile accident. Wettermark further admitted that Mr. Finley and Wettermark had entered into a contingency-fee contract for legal services. Wettermark denied that Mr. Finley's potential claims were related to a faulty airbag or that its representation of Mr. Finley concerned such a claim. Wettermark therefore admitted that it had never filed suit on Mr. Finley's behalf against General Motors, stating that the parties' contract did not concern a products liability action. Wettermark also averred that the parties' relationship was dissolved on March 22, 2019. Wettermark further pled various affirmative defenses, including unclean hands and lack of contract formation.

"On April 13, 2020, Mr. Finley filed a motion for summary judgment. Wettermark likewise filed a motion for summary judgment on the following day. Wettermark attached an affidavit from attorney Steven Nicewonder, who stated that he was the intake manager for Wettermark and that Mr. Finley had signed a standard, motor-vehicle-accident contract. Mr. Nicewonder stated that Wettermark did not maintain any 'Takata Airbag' cases.

"Wettermark also filed a copy of the parties' contract, which reflects that Wettermark had agreed to handle all claims against 'all responsible parties' arising out of an accident that occurred on or

about August 24, 2018, on behalf of Mr. Finley, for a contingency fee. In addition, Wettermark attached a copy of a letter that one of its employees sent to Mr. Finley on March 25, 2019, stating that Wettermark was declining further representation of him but encouraging him to seek the advice of another attorney concerning his case before expiration of the applicable time limitation.

"Wettermark further attached the affidavit of William Hassinger, who stated that he was the Wettermark attorney assigned to handle Mr. Finley's automobile accident claim. According to Mr. Hassinger, Mr. Finley's only damages consisted of one visit to Physicians Care at an expense of $95.00. Mr. Hassinger stated that he had procured a settlement offer from Progressive Insurance in the amount of $1,800.00 and that Mr. Finley had authorized acceptance of this offer. Notwithstanding, when Mr. Hassinger sent Mr. Finley the requisite release, Mr. Finley returned it with 'significant alterations.' Mr. Hassinger further stated that he advised Mr. Finley via telephone that he could no longer represent him on March 22, 2019, and sent a letter confirming termination of the representation on March 25, 2019. Mr. Hassinger indicated that Mr. Finley had no further contact with him."

"The trial court entered an order concerning the countervailing motions for summary judgment on August 11, 2020. The court noted that Mr. Finley had not disputed Wettermark's assertion of fact, supported by Mr. Hassinger's affidavit, that Wettermark had terminated its representation of Mr. Finley in March 2019 while warning him of 'strict time limits that could bar his claim if not timely filed.' The court thus determined that any duty owed by Wettermark to Mr. Finley ceased as of March 22 or 25, 2019, when the representation was undisputedly terminated. The court further found that after that date, Mr. Finley still had over five months within which to hire new counsel or take other action to protect his interests before the statute of limitations would have run on his personal injury claims. The court accordingly determined that any damages Mr. Finley suffered were due to his own failure to act. The court therefore granted summary judgment in favor of Wettermark and denied Mr. Finley's summary judgment motion."

"Mr. Finley's legal malpractice claim fails because Wettermark has negated the first element of a legal malpractice claim—Wettermark has shown that it no longer owed a duty to Mr. Finley, having terminated its representation of him in March 2019. Again, this is a fact that Mr. Finley has not disputed. Moreover, because no continuing duty was owed to Mr. Finley, there could likewise be no breach of that duty.

"In addition, Mr. Finley would be required to demonstrate a causal connection between Wettermark's alleged negligence and his injury. *See Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 407 (Tenn. 1991). Wettermark has similarly negated this element by demonstrating that it had terminated its representation of Mr. Finley over five months prior to expiration of the one-year statute of limitations applicable to his claim, *see* Tennessee Code Annotated § 28-3-104 (2017), and Wettermark further demonstrated that its employee had advised Mr. Finley by letter to seek other counsel and to be mindful of the time limitation applicable to his claim. As such, Wettermark did not cause Mr. Finley to suffer the loss of a viable claim or any damages. *See Jones v. Allman*, 588 S.W.3d 649, 658-59 (Tenn. Ct. App. 2019), *perm. app. denied* (Tenn. Sept. 19, 2019). . . ."

"Instead, Mr. Finley's failure to seek other counsel or otherwise pursue his claim within the applicable time limitation was the cause of his damages. Mr. Finley's inaction following the termination of Wettermark's representation is the sole cause of any damages he may have experienced because his accident claim became time-barred. For all of the above reasons, we

conclude that Mr. Finley has failed to 'demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find' in his favor. *See Rye*, 477 S.W.3d at 265. The trial court properly granted summary judgment in Wettermark's favor."

In re Humphrey, Board Release of Information.

Darryl Wayne Humphrey of Cordova was publicly censured.

"After a disciplinary suspension from the practice of law, Mr. Humphrey filed motions to withdraw in his pending cases in which he falsely stated the reasons for his suspension. Further, Mr. Humphrey failed to set the motions to withdraw for hearing and failed to accurately inform his clients of the reasons for his suspension."

Mr. Humphrey violated RPCs 1.3 (diligence), 1.4 (communication), 1.16 (declining or terminating representation), 3.3 (candor towards tribunal), and 8.4 (misconduct).

In re Mangrum, Board Release of Information.

Jason Scott Mangrum of Brentwood was publicly censured.

"Mr. Mangrum agreed to represent a client in pursuing two collection matters and failed to take proper action and expedite litigation in both cases, failed to respond to inquiries from his client, failed to keep his client updated on the status of her cases and failed to respond or communicate to inquiries and directives from the client. After the client terminated representation, Mr. Mangrum failed to turn over the client file to successor counsel for over one month."

Mr. Mangrum violated RPCs 1.3 (diligence), 1.4 (communication), 1.16 (declining or terminating representation), and 3.2 (expediting litigation).

In re Taylor, Board Release of Information.

Christopher Lynn Taylor of Memphis was publicly censured.

"Mr. Taylor represented a client in a matter in federal court against the client's former employer. While summary judgment was pending, the client filed a *pro se* motion to 'disqualify' Mr. Taylor because the client wanted to terminate the relationship with Mr. Taylor. Mr. Taylor then sent a closing letter and provided the client a copy of her file. Mr. Taylor did not, however, move to withdraw from the pending court matter. Mr. Taylor then failed to inform his client of the decision on summary judgment, and he failed to represent her on a motion for costs filed by the defendant, including at several court hearings on the motion for costs."

Mr. Taylor violated RPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.16 (termination of representation), 3.2 (expediting litigation), 3.4(c) (fairness to opposing party and court), and 8.4(d) (prejudice to the administration of justice).

II. Advocate (Rules 3.1 - 3.4)

A. Meritorious Claims and Contentions, Rule 3.1

Board of Professional Responsibility of the Supreme Court of Tennessee v. Walker, 638 S.W.3d 127 (Tenn., Lee, 2021).

"In August 2018 and February 2019, the Board of Professional Responsibility filed petitions for discipline against Nashville attorney Charles Edward Walker. The petitions were based on complaints of misconduct submitted by two Davidson County chancellors and two lawyers. The complaints mainly arose out of Mr. Walker's conduct involving a chancery court tax sale redemption proceeding, a chancery court injunction, and a pro hac vice application."

"Next, Mr. Walker contends that he did not violate Rules 3.1, 3.3, and 3.4 in his representation of REO Holdings, LLC in a chancery court proceeding involving the redemption of real property. The property at issue was owned by Mildred Huff. In 1992, she executed a note and a deed of trust to Capitol Builders, Inc. to secure a debt. Ms. Huff failed to pay her Metropolitan Government of Nashville and Davidson County property taxes. In June 2014, by order of the Davidson County Chancery Court, the Clerk and Master sold Ms. Huff's property at a delinquent tax sale. John R. Sherrod, III was the successful bidder. In August 2014, the chancery court confirmed the sale.

"In May 2015, REO Holdings LLC, through its attorney and owner Mr. Walker, filed notice and tendered funds to the chancery court to redeem the Huff property under Tenn. Code Ann. § 67-5-2701. To show REO Holdings' statutorily required interest in the property, Mr. Walker submitted an Assignment of Deed of Trust, signed by Merdan Ibrahim and recorded on May 6, 2015, in the Davidson County Register of Deeds office. The Assignment, prepared by Mr. Walker, stated that Mr. Ibrahim was the lawful holder of the note signed by Ms. Huff to Capitol Builders in 1992; that Mr. Ibrahim had bought the note from Capitol Builders; and that Mr. Ibrahim was assigning his interest in the note and deed of trust to REO Holdings, LLC. Mr. Walker also filed an Appointment of Substitute Trustee, dated and recorded on May 6, 2015, which stated that Mr. Ibrahim, as an 'authorized member' of REO Holdings, appointed Mr. Walker as substitute trustee of the deed of trust. Based on this showing of REO Holdings' interest in the property, the chancery court approved the property redemption by REO Holdings.

"The property redemption began to unravel in September 2015 when Mr. Ibrahim was deposed in a case unrelated to the Huff property redemption against several defendants, including Mr. Ibrahim, REO Holdings, and Mr. Walker. Among other things, Mr. Ibrahim testified that he had done remodeling work for Mr. Walker; that he was neither a member nor a manager of REO Holdings; that he had never heard of Capitol Builders; that he knew nothing about the Assignment of Deed of Trust and Appointment of Substitute Trustee relating to the Huff property—only that he had signed the documents at the request of someone at Mr. Walker's law office; and that he received no payment for assigning his interest.

"Mr. Sherrod moved the chancery court to strike REO Holdings' redemption of the property. Mr. Sherrod asserted that Mr. Ibrahim had never owned the lien he purportedly assigned to REO Holdings. Thus, REO Holdings had no right to redeem the tax sale property, and its attempted redemption was based on fraudulent documents.

"After the deposition but before Mr. Sherrod moved to strike the redemption, Mr. Walker prepared and recorded another Assignment of Deed of Trust. In this document, Jill Ann Landman Carmack, as successor in interest to Capitol Builders, assigned to Mr. Ibrahim all of Capitol Builders' interest in a note and deed of trust from Ms. Huff. The stated purpose of the Assignment was 'to confirm and replace a prior lost and mislaid assignment of Deed of Trust dated March 16, 2011, from

Capitol Builders, Inc., to Merdan Ibrahim. Mr. Walker had Ms. Carmack execute the Assignment and also sign an affidavit stating that she was the sole heir of the now-deceased owner of Capitol Builders.

"At the chancery court hearing on Mr. Sherrod's motion to strike, he argued that Capitol Builders never assigned the note and deed of trust to Mr. Ibrahim in 2011 and so, the purported assignment from Mr. Ibrahim to REO Holdings in 2015 was not valid. Thus, REO Holdings had no interest in the property and no right of redemption. Mr. Sherrod relied on the testimony of Mr. Ibrahim that he had never heard of Capitol Builders, was not a member of REO Holdings, and knew nothing about the 2015 assignment to REO Holdings other than he had signed it at Mr. Walker's office. To this Mr. Walker responded: 'And Your Honor, I would submit to the court I have the documents from Capitol Builders confirming—they're embossed and confirming that the note was transferred to Mr. Ibrahim.' Later he added: 'And we would be glad to submit this document for inspection by the court.'

"The chancellor granted the motion to strike, concluding that Mr. Ibrahim never held a valid interest in the real property, so his purported assignment to REO Holdings was not valid based on Mr. Walker's deceitful actions:

> Charles Walker, his firm, Walker Law Offices and those associated with him, have been preparing legal documents for recordation in the office of the Davidson County Register of Deeds that are misleading and deceitful in order to redeem title to real property in the Chancery Courts. Mr. Walker and his staff drafted documents which represent that Mr. Ibrahim was the holder of a Deed of Trust and Note from Capitol Builders, Inc., but Mr. Ibrahim denied under oath any knowledge of his membership in REO, denied his purchasing or owning the Deed of Trust or a Note for $5,321, denied knowing of his conveyance of the Deed of Trust to REO and denied any knowledge of Capitol Builders, Inc. No proof was tendered that Mr. Ibrahim ever held a valid interest in the real property or that the subsequent conveyance to REO was valid. Mr. Walker and his employees at the Walker Law Firm engaged in conduct intended to deceive this Court with respect to a material issue in the redemption process. In so doing, Mr. Walker and his associates at the Walker Law Firm violated the Code of Professional Responsibility, Rule 3.3[,] *Candor Toward the Tribunal*, Rule 4.1[,] *Truthfulness in Statements to Others*, Rule 5.1, *Responsibility of Partners, Managers and Supervisory Lawyers*, and Rule 8.4[,] *Misconduct.*

"During Mr. Walker's disciplinary hearing, he maintained that he had the original assignment of the note from Capitol Builders to Mr. Ibrahim but had lost it. When the issue came up in litigation, Mr. Walker contacted Ms. Carmack 'and got another one.' Mr. Walker admitted that on the day of the chancery court hearing on Mr. Sherrod's motion to strike, he knew he did not have the original 2011 assignment from Capitol Builders to Mr. Ibrahim, but only the substitute Assignment of Deed of Trust signed by Ms. Carmack, which 'replaces the original note in the eyes of the law.'

"Neither the Board nor Mr. Walker called Mr. Ibrahim to testify as a witness. An attorney who was present at Mr. Ibrahim's deposition testified that Mr. Ibrahim stated under oath that he had never heard of Capitol Builders, that he did not read the Assignment of Deed of Trust and the Appointment of Substitute Trustee, that he was not a member of REO Holdings, and that he signed the documents when asked by someone in Mr. Walker's office."

"[T]he hearing panel concluded that Mr. Walker violated Rule 3.1 (Meritorious Claims and Contentions) and Rule 3.3 (Candor Toward the Tribunal) when he failed to correct the statement he made during the chancery court hearing that he had the 'embossed' document (meaning the original assignment) when he later discovered he did not have it. Mr. Walker also violated Rule 3.4 (Fairness to Opposing Party and Counsel) and Rule 4.1 when he failed to provide the original assignment to the opposing party at the beginning of the litigation or disclose to them that he did not have the document. Because Mr. Walker violated Rules 3.1, 3.3, 3.4, and 4.1, the hearing panel decided he should be suspended from the practice of law for three years.

"Mr. Walker contends that the trial court erred by affirming the hearing panel's decision finding he had violated Rules 3.1, 3.3, and 3.4 during his representation of REO Holdings in the tax sale redemption matter. He argues that he should not be 'responsible for failing [to] disclose (to a third party) the loss of the original when ... [the assignment of the deed of trust from Mr. Ibrahim and the affidavit from Ms. Carmack] replace the original note and assignment by operation of law.' Mr. Walker contends that he did not need to produce the 'lost' 2011 assignment from Capitol Builders to Mr. Ibrahim because the 2015 substitute assignment from Ms. Carmack as the sole heir of the owner of Capitol Builders replaced the original note and assignment 'by operation of law.'

"Mr. Walker's argument misses the mark. He was not disciplined because the substitute assignment from Ms. Carmack was not valid. Instead, the hearing panel found he should be suspended because he represented to the chancery court and opposing counsel that he had the original 2011 assignment from Capitol Builders to Mr. Ibrahim when he did not. Not only did Mr. Walker not have the original document at the hearing, he also never corrected his inaccurate statement to the chancery court. The existence of the original assignment in 2011 of Capitol Builders' lien to Mr. Ibrahim was critical to REO Holdings' ability to redeem the Huff property and prevail on the motion to strike. If Capitol Builders had never assigned the deed of trust to Mr. Ibrahim, then he had no interest to assign to REO Holdings in 2015. Yet the original assignment from Capitol Builders was never produced, and Mr. Ibrahim testified he had never heard of Capitol Builders and knew nothing about the 2015 assignment other than he had signed it at the request of someone at Mr. Walker's office.

"Thus, material and substantial evidence supports the hearing panel's decision that Mr. Walker was not candid with the chancery court when he failed to correct his statement suggesting he had the original 'embossed' assignment when he knew he did not have the document (Rule 3.3(a)); that without the original assignment from Capitol Builders to Mr. Ibrahim, Mr. Walker could not have made reasonable inquiry about whether the redemption proceeding had a factual or lawful basis (Rule 3.1); and that Mr. Walker acted unfairly to the opposing party and counsel by concealing that he did not have the original assignment during litigation and otherwise obstructing their access to the document (Rule 3.4(a)). None of the hearing panel's findings were arbitrary or an abuse of discretion."

"Besides finding Mr. Walker should be suspended for his lack of candor and fairness in the REO Holdings tax sale matter, the hearing panel also found he should be suspended for his misconduct relating to a temporary injunction and a pro hac vice application.

"Mr. Walker's misconduct involving the temporary injunction arose after the Davidson County Chancery Court issued an order prohibiting Mr. Walker, his business partner in REO Holdings, and their employees and agents from recording documents with any Register of Deeds in Tennessee without first notifying the court and opposing counsel and providing the court with copies of the documents. This injunction was issued after the chancery court was 'presented clear, unrebutted

proof of [ten] forgeries of notary signatures and seals in [five] property transactions' involving Mr. Walker. The chancery court also found that Mr. Walker 'posed a substantial risk to the public welfare with respect to registration of forged real estate documents in the public record.'

"After the injunction was issued, Mr. Walker established a Trust that named himself as the Settlor and Jamaal L. Boykin as the Trustee. Later, the Trustee on behalf of the Trust bought property in Antioch, Tennessee, and recorded a deed conveying the property to the Trust. When the Trust sold the property, the Trustee was directed by Mr. Walker to apply the proceeds to Mr. Walker's personal bankruptcy legal fees. Mr. Walker did not notify the court or opposing counsel about the recording of the deed. In July 2016, the chancery court found Mr. Walker in criminal contempt of court for violating the temporary injunction barring the recordation of documents. The chancery court found, beyond a reasonable doubt, that Mr. Walker used the Trust to evade the court's temporary injunction, 'willfully and for a bad purpose.' The court sentenced Mr. Walker to two days in jail and ordered him to pay a $50 fine. The Court of Appeals affirmed the chancery court's ruling, and this Court denied permission to appeal. *Fam. Tr. Servs., LLC v. REO Holdings, LLC*, No. M2016-02524-COA-R3-CV, 2018 WL 2203216 (Tenn. Ct. App. May 14, 2018), *perm. app. denied* (Tenn. Sept. 13, 2018).

"Based on these facts, the panel found that Mr. Walker had violated Rule 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation) and 8.4(d) (Conduct Prejudicial to the Administration of Justice) by creating the Trust to avoid the chancery court's injunction and should be suspended from the practice of law for three years. Mr. Walker did not appeal to this Court the finding of misconduct or the discipline.

"The hearing panel also found that Mr. Walker should be disciplined based on his failure to make certain disclosures in his August 2017 pro hac vice application filed in the United States District Court for the Western District of Texas at Austin. The application asked whether he had 'been subject to grievance proceedings or involuntary removal proceedings while a member of the bar' and whether he had 'been charged, arrested, or convicted of a criminal offense.' In answering these questions, Mr. Walker failed to disclose his prior disciplinary history, his pending disciplinary complaints, and that he had been found guilty of criminal contempt of court for disobeying an order of the Davidson County Chancery Court in August 2016.

"When the Board notified Mr. Walker about the omission in his pro hac vice application, Mr. Walker did not correct the omissions, but claimed that the complaints pending against him were not 'grievance proceedings.' He then offered to clarify this portion of the application by contacting the federal court clerk's office. But when he communicated with the clerk's office, he asked if he needed to report any disciplinary complaints filed by indigent defendants he had been appointed to represent. The clerk's office responded that he only needed 'to include any cases that had actual findings of wrong doing/etc.' Mr. Walker admitted to the hearing panel that he should have disclosed a 2008 informal admonition but claimed he had forgotten about it.

"Based on this evidence, the hearing panel found that Mr. Walker's failure to disclose in his pro hac vice application that he had previously been disciplined by the Board, had pending disciplinary complaints, and had been found guilty of criminal contempt was an 'intentional misrepresentation by omission.' The hearing panel concluded that Mr. Walker had violated Rule 3.3 (Candor Toward the Tribunal) and that he should be suspended from the practice of law for two years, to be served concurrently with his other suspensions. Mr. Walker did not appeal to this Court this finding of misconduct or the recommended suspension."

B. Candor Toward the Tribunal, Rule 3.3

In re Gardiner, Board Release of Information.

Grace Ingrid Gardner of Knoxville was suspended for 3 years, with 4 months to be served on active suspension and the remainder on probation.

"A Hearing Panel found that during representation of clients in Bankruptcy Court, Ms. Gardiner failed to comply with Rules of the Bankruptcy Court, including the following: 1) obtaining original 'wet' signatures of clients on petitions and schedules; 2) permitting her name to be signed to a retainer agreement before she met the client; 3) presenting an agreed order continuing a hearing bearing the signature of the Chapter 13 Trustee who had not agreed to the continuance; 4) failing to take reasonable measures to ensure that her assistant complied with the Rules of the Bankruptcy Court; and 5) presenting to the Court a document bearing the forged signature of her client."

Ms. Gardiner violated RPCs 1.1 (competence), 1.3 (diligence), 3.3 (candor toward the tribunal), 5.3 (responsibilities regarding nonlawyer assistants) and 8.4 (misconduct).

In re Henderson, Board Release of Information.

Flordia M. Henderson was publicly censured.

"Ms. Henderson agreed to represent a client in a small estate matter. Ms. Henderson's client made statements while testifying in open court about the decedent's marital status that were untrue. Ms. Henderson failed to take proper remedial action prior to the conclusion of the proceeding and did not subsequently address the issue directly with her client. Ms. Henderson instead filed a subsequent petition on behalf of the decedent's estate alleging that the client had made knowingly false statements in her testimony."

Ms. Henderson violated RPCs 1.4 (communication), 1.6 (confidentiality of information), 1.8 (conflict of interest), 1.9 (duties to former clients) and 3.3 (candor toward the tribunal).

In re Teets, Board Release of Information.

Kevin William Teets, Jr., of Nashville was suspended for 1 year.

"A Petition for Discipline, consisting of one disciplinary complaint, was filed against Mr. Teets on February 15, 2019. The disciplinary complaint was tried before a Hearing Panel which found Mr. Teets, knowing the bonding company had refused to remain on his client's criminal bond after the conviction, intentionally misled the Trial Court to believe the bonding company had agreed to remain on the bond."

Mr. Teets violated RPCs 3.3(a) (candor toward the tribunal) and 8.4(a), (c) and (d) (misconduct).

C. Fairness to Opposing Party and Counsel, Rule 3.4

In re Lee, Board Release of Information.

Alan C. Lee of Leland, North Carolina, was suspended for 3 years, based on a conditional guilty plea.

"Mr. Lee knowingly failed to timely comply with an injunction issued by the U.S. District Court and misrepresented to the court that he was unaware of the court's order."

Mr. Lee violated RPCs 3.3 (candor toward the tribunal), 3.4 (disobeying an obligation under the rules of a tribunal), and 8.4(a), (b), and (c) (misconduct).

III. Transactions With Persons Other Than Clients; Communication With a Person Represented by Counsel (Rule 4.2)

In re Jackson, Board Release of Information.

Thomas Francis Jackson, III, of Memphis was suspended for 1 year.

"A Petition and Supplemental Petition for Discipline containing 3 complaints were filed by the Board against Mr. Jackson. After a hearing on the disciplinary complaints, a Hearing Panel found Mr. Jackson knowingly and repeatedly communicated with the opposing parties through their agents about the substance of the litigation without the consent of the attorneys representing the defendants and continued to do so after being instructed to communicate only with opposing counsel. The Hearing Panel further found Mr. Jackson, after being suspended from the practice of law, advertised his professional services on the internet, met with a potential client about representation, sought to collect fees for professional services for which he had not been retained and failed to disclose his suspension."

Mr. Jackson violated RPCs 4.2(a) (communicating with a person represented by counsel) and 5.5(a) (unauthorized practice of law).

IV. Law Firms, Legal Departments, and Legal Service Organizations (Rules 5.1 - 5.5)

A. Responsibilities of Partners, Managers, and Supervisory Lawyers, Rule 5.1

In re Stein, Board Release of Information.

Brett B. Stein of Memphis was publicly censured.

"Mr. Stein was hired to file a petition for habeas corpus relief in federal court in Mississippi, in a court in which he is not admitted to practice law. Mr. Stein failed to adequately supervise a junior attorney's preparation of the habeas corpus petition and an accompanying motion for *pro hac vice* admission. Mr. Stein failed to discover that the motion for *pro hac vice* was denied the day after it was filed for failure to comply with court requirements, and Mr. Stein failed to inform the client of the status of the matter. The client suffered potential harm."

Mr. Stein violated RPCs 1.3 (diligence), 1.4 (communication), and 5.1 (responsibilities of supervisory lawyers).

B. Responsibilities Regarding Nonlawyer Assistants, Rule 5.3

In re Agee, Board Release of Information.

Charles Maurice Agee, Jr., of Dyersburg was publicly censured.

"In the representation of a criminal defendant, Mr. Agee requested that his legal assistant communicate with the prosecutor to seek a continuance of the client's upcoming preliminary hearing because of a conflicting obligation in a court in another county. Mr. Agee did not personally speak or communicate directly with the prosecutor. The legal assistant communicated directly with the prosecutor and advised Mr. Agee that the prosecutor had agreed to the continuance. Mr. Agee appeared in Court on the morning of the preliminary hearing and advised the Court that he had spoken directly with the prosecutor by email and she had agreed to the continuance. Mr. Agee's statement omitted the fact that his communications with the prosecutor were entirely conducted through his legal assistant. The prosecutor was not in the courtroom when the statement was made. The prosecutor later confirmed to the Presiding Judge that she had not agreed to continue the preliminary hearing."

Ms. Agee violated RPCs 3.3(a)(1) (candor towards the tribunal), 5.3 (responsibilities regarding nonlawyer assistance), and 8.4(c) (misconduct).

In re Dancy, Board Release of Information.

Andrew Jackson Dancy, III, of Brentwood was publicly censured, conditioned upon payment of restitution to his client of $2,400.00.

"A Pennsylvania resident hired Mr. Dancy's firm to work out a loan modification in the pending foreclosure of her home. Mr. Dancy is not licensed in Pennsylvania but associated with at least two attorneys in Pennsylvania on foreclosure matters. Mr. Dancy failed to supervise his non-attorney staff to ensure that the associated Pennsylvania attorney was notified and retained to assist in the representation in violation of RPC 5.3 (responsibilities regarding nonlawyer assistants). Mr. Dancy also failed to deposit client funds into his IOLTA account as provided in his fee agreement in violation of RPC 1.15 (safekeeping property and funds)."

In re Darnell, Board Release of Information.

Stanley Douglas Darnell of Clarksville was publicly censured.

"During his representation of a client, Mr. Darnell failed to provide sufficient oversight of his legal assistant, who prepared a forged final decree and letter without Mr. Darnell's knowledge. Further, Mr. Darnell did not have protocols in place sufficient to reveal that the client's divorce petition had not been filed. In addition, Mr. Darnell received a flat fee for the representation and failed to place the unearned funds in his trust account at the beginning of the representation."

Mr. Darnell violated RPCs 1.3 (diligence), 1.15 (safekeeping property and funds), and 5.3 (responsibilities regarding nonlawyer assistance).

C. Professional Independence of a Lawyer, Rule 5.4

ABA Formal Opinion 499, Passive Investment in Alternative Business Structures (Sept. 8, 2021).

A lawyer may passively invest in a law firm that includes nonlawyer owners ("Alternative Business Structures" or "ABS") operating in a jurisdiction that permits ABS entities, even if the lawyer is admitted to practice law in a jurisdiction that does not authorize nonlawyer ownership of law firms. To avoid transgressing Model Rule 5.4 or other Model Rules and to avoid imputation of conflicts under Model Rule 1.10, a passively investing lawyer must not practice law through the ABS or be held out as a lawyer associated with the ABS and cannot have access to information protected by Model Rule 1.6 without the ABS client's informed consent or compliance with an applicable exception to Rule 1.6 adopted by the ABS jurisdiction. The fact that a conflict might arise in the future between the investing lawyer's practice and the ABS's work for its clients does not mean that the lawyer cannot make a passive investment in the ABS. If, however, at the time of the investment the lawyer's investment would create a personal interest conflict under Model Rule 1.7(a)(2), the lawyer must refrain from the investment or appropriately address the conflict under Model Rule 1.7(b).

D. Unauthorized Practice of Law, Rule 5.5

In re Graham, Board Release of Information.

Mark Steven Graham of Knoxville was publicly censured.

"Mr. Graham filed a trademark application when he was suspended from the practice of law in Tennessee and not licensed to practice law in any other state. His application was on behalf of a client, and it identified Mr. Graham as attorney of record."

Mr. Graham violated RPCs 5.5 (unauthorized practice of law) and 8.4(g) (knowingly fail to comply with a court order).

In re Hunt, Board Release of Information.

Brian Jamie Hunt of Clinton was publicly censured.

"Mr. Hunt took military inactive status on June 28, 2012, and returned to private practice after ending his military service. Mr. Hunt failed to apply for reinstatement as required by Tenn. Sup. Ct. R. 9 and failed to pay attorney registration fees when he returned to private practice. Mr. Hunt engaged in the private practice of law while his license status was military inactive."

Mr. Hunt violated RPC 5.5 (unauthorized practice).

In re Mance, Board Release of Information.

Corletra Faye Mance of Nashville was publicly censured.

"Ms. Mance's law license was administratively suspended on August 17, 2021, and she practiced law while it was suspended until September 14, 2021. In mitigation, Ms. Mance did not receive a copy of the order suspending her law license, but she had received prior notice of a deficiency with her continuing legal education requirement."

Ms. Mance violated RPC 5.5 (unauthorized practice of law).

In re O'Reilly, Board Release of Information.

Wendell J. O'Reilly of Franklin was permanently disbarred and ordered him to pay restitution to his clients.

"The Board filed a Petition for Discipline containing 2 complaints and a Supplemental Petition for Discipline containing 1 complaint against Mr. O'Reilly. The disciplinary complaints were tried before a Hearing Panel who determined Mr. O'Reilly, while suspended from the practice of law, knowingly engaged in the unauthorized practice of law; failed to adequately communicate with his clients; knowingly misled courts, clients and third parties; knowingly charged excessive fees; failed to safeguard client funds; knowingly failed to comply with final court orders; engaged in conduct prejudicial to the administration of justice and failed to respond to the Board about a disciplinary matter."

Mr. O'Reilly violated RPCs 1.4 (communication), 1.5 (fees), 1.15 (safekeeping of property), 3.3 (candor toward the tribunal), 4.1 (truthfulness in statements to others), 5.5 (unauthorized practice of law), 8.1(disciplinary matters) and 8.4(a), (c), (d), and (g) (misconduct).

In re Rickman, Board Release of Information.

Brian Chadwick Rickman of Memphis was suspended for 1 year.

"An Amended Petition for Discipline was filed against Mr. Rickman, alleging unethical conduct during the litigation of a contentious child custody matter. After a hearing on the disciplinary complaints, a Hearing Panel found Mr. Rickman intentionally and knowingly engaged in abusive and obstreperous conduct intended to disrupt the proceedings of the tribunal and continued this unethical behavior despite multiple warnings from the court. The Hearing Panel further found Mr. Rickman made statements in open court and in pleadings that were knowingly false or made with reckless disregard as to the truth of the statements, impugning the integrity and reputation of the presiding judge."

Mr. Rickman violated RPCs 3.5(e) (impartiality and decorum of the tribunal), 8.2(a)(1) (judicial and legal officials), and 8.4(a) and (d) (misconduct).

V. Information About Legal Services; Solicitation of Potential Clients (Rule 7.3)

ABA Formal Opinion 501, Solicitation (Apr. 13, 2022).

ABA Model Rule of Professional Conduct 7.3(a), amended in 2018, contains a narrowed definition of what constitutes a "solicitation." Rule 7.3(b) delineates the type of solicitation that is expressly prohibited. Rules 8.4(a) and 5.3 extend a lawyer's responsibility for solicitation prohibitions not only to actions carried out by the lawyer directly but also to the acts of persons employed by, retained by, or associated with the lawyer under certain circumstances.

Rule 5.3(b) requires lawyer supervisors to make reasonable efforts to ensure that all persons employed, retained, or associated with the lawyer are trained to comply with the Rules of

Professional Conduct, including Rule 7.3(b)'s prohibition. Partners and lawyers possessing comparable managerial authority in a law firm must make reasonable efforts to ensure that the firm has training that reasonably assures that nonlawyer employees' conduct is compatible with the professional obligations of lawyers. Under Rule 5.3(c), a lawyer will be responsible for the conduct of another if the lawyer orders or with specific knowledge of the conduct ratifies it, or if the lawyer is a manager or supervisor and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 8.4(a) makes it professional misconduct for a lawyer to "knowingly assist or induce another," to violate the Rules or knowingly do so through the acts of another. Failing to train a person employed, retained, or associated with the lawyer on Rule 7.3's restrictions may violate Rules 5.3(a), 5.3(b), and 8.4(a).

Many legal consumers obtain information about lawyers from acquaintances and other professionals. The Model Rules of Professional Conduct are rules of reason. Recommendations or referrals by third parties who are not employed, retained, or similarly associated with the lawyer and whose communications are not directed to make specific statements to particular potential clients on behalf of a lawyer do not generally constitute "solicitation" under Rule 7.3.

VI. Maintaining the Integrity of the Profession (Rules 8.1 - 8.4)

A. Bar Admission and Disciplinary Matters, Rule 8.1

In re Duffer, Board Release of Information.

Travis Randall Duffer of Springfield was publicly censured with the condition that he refund $900 to his former client within 90 days.

"Mr. Duffer left the employment of a law firm in December 2020 and took some clients with him. For three clients, Mr. Duffer thereafter failed to respond to requests for information from them, and he failed to complete the matters for which he was hired. The three clients at issue hired new counsel to complete their matters. For one client, Mr. Duffer's former law firm transferred $900 of client funds to Mr. Duffer for the completion of the client's case. Mr. Duffer did not complete the representation. In response to an inquiry in the disciplinary investigation, Mr. Duffer falsely stated that the representations in the three client matters had been 'completed.'"

Mr. Duffer violated RPCs 1.3 (diligence), 1.4 (communication), 1.16 (termination of representation), 8.1 (disciplinary matters), and 8.4(d) (prejudice to the administration of justice).

B. Misconduct: Criminal Act, Rule 8.4(b)

In re Troutman, Board Release of Information.

Jody Rodenborn Troutman of LaFollette was suspended for 4 years, with 1 year to be served on active suspension and the remainder to be served on probation, conditioned upon compliance with any monitoring agreement recommended by TLAP, based on a conditional guilty plea.

Ms. Troutman was convicted of criminal misdemeanors for theft of property and driving under the influence 1st and 2nd and appeared in open court while under the influence.

Ms. Troutman violated RPCs 1.3 (diligence) and 8.4(b) and (d) (misconduct).

In re Vaughan, Board Release of Information.

Effective April 21, 2021, Kyle Douglas Vaughan of Kingsport was permanently disbarred and ordered to pay restitution to his former law partners in the amount of $223,452.20.

"Mr. Vaughan was convicted in the Criminal Court of Washington County, Tennessee, in the matter of *State of Tennessee v. Kyle D. Vaughan*, Case No. 46339, of theft of property from his law firm partners, a Class B Felony, in violation of Tenn. Code Ann. § 39-14-103."

Mr. Vaughan violated RPCs 8.4(a), (b), (c), and (d) (misconduct).

C. Misconduct: Dishonest Conduct, Rule 8.4(c)

Harris v. Board of Professional Responsibility of the Supreme Court of Tennessee, 645 S.W.3d 125 (Tenn., Kirby, 2022).

"The respondent attorney in this case, Appellant Tyree B. Harris, IV, has been licensed to practice law in Tennessee since 1970. Pursuant to Tennessee Supreme Court Rule 9, § 33.1(d), he appeals the discipline imposed by a hearing panel of the Tennessee Board of Professional Responsibility ('BPR' or 'Board'). The discipline at issue arises out of testimony Mr. Harris gave during child support proceedings. The child support testimony related to a client fee that had been the subject of a prior dispute between Mr. Harris and his former law firm."

"In 2010, Mr. Harris was a partner in the three-member Nashville law firm of Willis & Knight, PLC. In May of that year, the firm received a client fee payment of $336,857.57. The client disputed a portion of the fee, so the firm kept the entire fee payment in its escrow account pending resolution of the dispute.

"Ordinarily, the firm placed such fees in an operating account used to pay the firm's rent and other overhead costs. After covering those expenses, the firm would allocate any remaining funds to the designated capital accounts of individual partners, including Mr. Harris. Each of the three individual partners could then make cash withdrawals to pay personal expenses, thereby reducing his or her individual capital account balance. Among Mr. Harris's personal expenses was a child support obligation. He authorized the firm to send periodic checks directly to the child's mother and charge those amounts against his capital account balance.

"By January 2011, the law firm resolved the fee dispute with its client and was ready to distribute the funds from the escrow account. Meanwhile, relations between the partners had become strained, in part because Mr. Harris believed he was bearing a disproportionate share of the firm's costs. The events that followed were a departure from the firm's usual practice regarding client fees, and Mr. Harris and another lawyer in his firm told somewhat differing versions of what happened.

"As outlined above, the firm's usual practice was to first deposit funds in the operating account, pay firm expenses, and then allocate any remaining funds to partners' individual capital accounts.

According to Mr. Harris, he and two other members of the firm decided by a 2-1 vote to bypass the operating account entirely and distribute the partners' shares of the fee from the escrow account directly to each individual partner. Pursuant to this plan, on January 31, 2011, Mr. Harris directed the firm's bookkeeper to prepare three checks from the escrow account, one for each partner in the amount of his or her share of the fee. Mr. Harris's check was for $225,000. Once he received the check from the firm's bookkeeper, he deposited it into a separate personal savings account.

"The law firm sued Mr. Harris in the Chancery Court for Davidson County. The complaint asserted, among other things, that Mr. Harris converted some or all of the $225,000. In the litigation, Mr. Harris testified about the purported 2-1 vote to bypass the firm's operating account and distribute the client fee directly to the partners. One of the firm's partners disputed Mr. Harris's testimony and maintained there was never a vote to bypass the firm's operating account.

"The chancery court tried the case in 2015 and found that Mr. Harris's testimony about the purported vote was not credible. It held him liable to the law firm for conversion, intentional misrepresentation, misrepresentation by concealment, fraud, and breach of fiduciary duty. The court awarded the firm compensatory and punitive damages along with costs and fees. *See Knight v. Harris*, No. M2016-00909-COA-R3-CV, 2018 WL 372211, at *3 (Tenn. Ct. App. Jan. 11, 2018), *perm. app. denied*, (Tenn. May 17, 2018).

"On appeal, the Court of Appeals mostly affirmed the chancery court's findings. However, it reversed the chancery court's award of punitive damages on the basis that the record lacked clear and convincing evidence that Mr. Harris had fraudulent intent when he converted his share of the disputed client fee. *Id.* at *10–11."

"Meanwhile, in September 2010, while the disputed client fee was still being held in the law firm's escrow account, Mr. Harris petitioned the Juvenile Court of Davidson County to reduce his child support obligation. In the petition, Mr. Harris claimed his income had decreased. The petition was pending in January 2011, when Mr. Harris received his $225,000 share of the disputed law firm fee and deposited it into his personal account.

"The juvenile court scheduled its hearing on the child support modification petition for April 1, 2011. About a week before the hearing, and a day before Mr. Harris's scheduled deposition, the juvenile court conducted a telephonic hearing to address discovery obligations. The court ordered Mr. Harris to produce his tax returns and the law firm's profit-loss statements dating back to 2007.

"At Mr. Harris's deposition, counsel for the child's mother asked Mr. Harris about his income, his capital account, and checks from his law firm. As detailed below, Mr. Harris's responses did not disclose the fact that he had received and deposited into his personal savings account a $225,000 check from the firm's escrow account."

"In sum, in response to questions about his income, his capital account, checks he had received from the firm, and the firm's collections, Mr. Harris did not disclose the $225,000 check from the law firm he had deposited into his personal savings account. Based on Mr. Harris's testimony, the juvenile court found that Mr. Harris's income was reduced and cut his required monthly child support payment roughly in half, by over $1,000 per month.

"Later, the child's mother apparently became aware of the law firm dispute and filed a motion to reinstate the prior amount of child support. Her counsel contended that Mr. Harris's prior testimony

to the juvenile court was untruthful because he had received the $225,000 check from his law firm by the time of his juvenile court testimony but did not disclose it. In January 2012, the juvenile court held a hearing on the motion but deferred ruling on it until resolution of the law firm dispute about the $225,000 check.

"Several months later, but long before resolution of the law firm dispute, the child's mother died in a car accident. The maternal grandmother assumed custody of Mr. Harris's child. The record does not include any ruling by the juvenile court on the mother's motion to reinstate Mr. Harris's prior child support obligation.

"The law firm dispute concluded years after the child's mother died."

"On May 8, 2017, the BPR filed a petition for discipline against Mr. Harris. The petition alleged he violated Tennessee Supreme Court Rule 8, RPC 8.4 by 1) converting funds from his law firm and concealing that conversion from his partner; and 2) giving false testimony in connection with his child support modification proceedings. On February 6, 2019, a hearing panel designated by the BPR held an evidentiary hearing on the petition. Mr. Harris appeared as the sole witness.

"As to the allegation that Mr. Harris violated RPC 8.4 by converting funds from his law firm and concealing the conversion from his law partner, the Board presented no direct evidence. Relying instead on the doctrine of non-mutual collateral estoppel, the Board contended that the Court of Appeals decision, which affirmed the chancery court's conclusion that Mr. Harris had converted the law firm's funds, was sufficient basis for the panel to find a violation of RPC 8.4.

"The hearing panel rejected this argument. It held that, although the Court of Appeals decision established Mr. Harris's conversion of funds, the fact of conversion alone did not demonstrate the sort of 'dishonesty, fraud, deceit, or misrepresentation' necessary to establish a violation of RPC 8.4. As a result, the hearing panel concluded that the Board did not prove the first alleged violation. The Board did not appeal the hearing panel's determination on this allegation, and it is not at issue in this appeal.

"The allegation that Mr. Harris violated RPC 8.4 by giving false testimony in the child support modification proceedings is a different story. The Board submitted into evidence transcripts of the testimony Mr. Harris gave in his deposition and at the juvenile court hearing. The Board emphasized: 1) the questions Mr. Harris was asked; 2) the undisputed fact that, at the time of his testimony, Mr. Harris had deposited a $225,000 check from his law firm into a personal savings account; and 3) Mr. Harris's failure to disclose the existence of the check in either his deposition testimony or his juvenile court testimony. Noting that Mr. Harris was asked direct questions about his income and his draws from the law firm, the Board argued his testimony amounted to aggravated perjury, which it defined as 'testimony of a material matter with the intent to deceive while under oath in a formal proceeding.' In addition, the Board pointed out, Mr. Harris refused to acknowledge his wrongdoing. The Board maintained that Mr. Harris's conduct seriously adversely reflected on his fitness to practice law, and it asked the hearing panel to disbar him.

"In his testimony before the hearing panel, Mr. Harris insisted that, in context, the answers he gave during his deposition and juvenile court testimony were truthful and responsive to the specific questions asked. He said he did not view the $225,000 check as a 'draw,' *i.e.*, income, because he was holding the funds in a separate bank account until he learned how much of the fee he owed the law firm for expenses.

"Mr. Harris also maintained that he intended to testify about the check in the juvenile court proceeding and in fact tried to do so. In support of this claim, Mr. Harris's attorney read into the record the transcript of the exchange in juvenile court in which she sought to introduce into evidence a spreadsheet reflecting the law firm's capital accounts. In the transcript, the attorney asked Mr. Harris about figures on the spreadsheet that were 'in dispute,' and Mr. Harris said the spreadsheet had 'a figure' that was 'under discussion.' Alluding to this transcribed testimony, Mr. Harris explained to the hearing panel that the $225,000 check was 'the dispute' in the capital accounts on the spreadsheet he was referencing. He claimed he was 'about to share' and 'was going to tell' the juvenile court judge about the $225,000 disputed check when the mother's attorney objected to the spreadsheet. Mr. Harris said: 'I was about to testify about it. And it wasn't us who brought – said, 'Well, wait a minute. That's not relevant.' We brought it up. It was [mother's] attorney who objected to it. And I was instructed not to answer it, and so I didn't.' Mr. Harris insisted he did not intentionally withhold information about the $225,000 check from either mother's counsel or the juvenile court. He denied the allegation outright, saying 'the suggestion that I was trying to hide anything is absolutely without any basis in fact.'

"The hearing panel rejected Mr. Harris's argument, concluding instead that he had engaged in 'intentional omissions designed to conceal relevant information fairly called for in the questions.' Explaining its reasoning, the hearing panel first observed that, once Mr. Harris deposited the $225,000 check into his bank account, 'he exercised control over those funds ... and had the power to spend or save as he chose.' The panel then spelled out how Mr. Harris's answers to questions during his deposition were misleading:

> In his deposition, Mr. Harris was asked about his capital account for 2007, which led to a discussion of the capital account as a source for a 'draw.' When asked if a 'draw' meant 'you get to get money out of the law firm,' Mr. Harris agreed: 'Yes.' He then testified that, 'I have not drawn anything from the firm with the single exception of my child support. I have not drawn a penny from [his law firm] in the last five months' – later corrected to four months. Those adjacent answers, read together, would suggest to an objective observer that Mr. Harris had no opportunity 'to get money out of the law firm' in the prior four months, that is, since November 25, 2010. His testimony was that, during that period, 'I have not drawn a penny from [the law firm].'

"The hearing panel was unmoved by Mr. Harris's explanation that the $225,000 was not a 'draw' because he was holding it subject to resolution of the law firm dispute about expenses. It characterized his answer as a 'type of hair-splitting which falls well short of 'the truth, the whole truth, and nothing but the truth' required of witnesses under oath.'"

"Thus, the hearing panel concluded that Mr. Harris's testimony in the child support proceeding violated RPC 8.4(c)."

"As a threshold question, Mr. Harris takes issue with the standard of proof. He contends that the petition for discipline accused him of a criminal act, namely perjury, and that disciplinary counsel at his hearing 'inflated these charges to criminal aggravated perjury.' Mr. Harris concedes that the hearing panel declined to determine whether Mr. Harris's testimony constituted perjury. However, he suggests that it effectively found him guilty of the crime of perjury, so it should be held to the 'beyond a reasonable doubt' standard of proof used in criminal trials.

"This argument is without merit. As this Court has repeatedly held, attorney disciplinary proceedings are not criminal proceedings. *See, e.g.*, *In re Sitton*, 618 S.W.3d 288, 295 (Tenn. 2021) ('Attorney disciplinary proceedings are not criminal proceedings....'). . . . Rather, the burden is on the Board to establish rule violations by a preponderance of the evidence. Tenn. Sup. Ct. R. 9, § 15.2(h). The hearing panel's decision in this case need not be supported by proof beyond a reasonable doubt."

"Mr. Harris's primary argument to this Court is that his testimony was truthful in the context of the specific questions he was asked."

"In this appeal, Mr. Harris insists his testimony was truthful and he had no intent to deceive. He maintains that his interpretation of the word 'draw' was accurate given the firm's typical practices. He reiterates that he was going to disclose his receipt of the $225,000 check, but the juvenile court's ruling against his lawyer's line of questioning prevented him from doing so."

"RPC 8.4(c) states that it is 'professional misconduct' for a lawyer to 'engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.' In this case, our review of whether Mr. Harris violated this rule is based on largely undisputed facts. First, it is undisputed that Mr. Harris received and personally deposited the $225,000 check before he gave his testimony in the juvenile court proceeding. As the hearing panel pointed out, once Mr. Harris received this check, he exercised total control over the funds and could save or spend them as he wished.

"Second, because Mr. Harris's testimony is transcribed, there is no dispute about the questions posed to him and what Mr. Harris said and, perhaps more importantly, did not say in response. We know that when Mr. Harris was asked in his deposition about his 'draw,' counsel for the mother defined 'draw' as 'you get to get money out of the law firm.' Despite the breadth attributed to the term, Mr. Harris claimed he had 'not drawn anything from the firm with the single exception of my child support. I have not drawn a penny from [his law firm] in the last five months'—later corrected to four months. The hearing panel rightly concluded that any objective observer would have understood Mr. Harris's answer to mean that he had not received any money from his law firm in the previous four months, which was contrary to the actual facts.

"Likewise, in the juvenile court hearing, when asked about any 'draw' he had taken, Mr. Harris said his draw was limited to the child support checks sent to his child's mother. The hearing panel rightly rejected Mr. Harris's assertion that he did not have to disclose the $225,000 because he felt it was technically not a 'draw.' Neither opposing counsel nor the juvenile court judge could have guessed Mr. Harris's Byzantine rationale—'hair-splitting' as the hearing panel aptly put it—for not telling them about the $225,000 in response to repeated inquiries about money he had received from his law firm. The hearing panel accurately described Mr. Harris's testimony as appearing to have been 'carefully crafted to aim for literal truth in only the narrowest sense, while omitting key information highly relevant to the issues.'

"Importantly, this misleading testimony was given by an experienced and accomplished lawyer, someone who should have been well-acquainted with a lawyer's 'special obligations to demonstrate respect for the law and legal institutions.' Tenn. Sup. Ct. R. 8, RPC 8.4, cmt. [9]. As noted by the trial judge, even if Mr. Harris genuinely viewed the $225,000 as a 'distribution' and not a 'draw,' he still had a duty to disclose it. The trial judge put it succinctly: '[A]n experienced and accomplished lawyer should know better than to omit information highly relevant to the issues before a court.'"

"Consequently, lawyers have a duty to do more than simply refrain from committing perjury. *See, e.g.*, *In re Lamont*, 561 N.W.2d 650, 654 (N.D. 1997) ('While our perjury and false statement statutes set out the standards which apply generally to all witnesses in judicial proceedings, attorneys are officers of the court and must be held to a higher standard.' (citations omitted)). A lawyer's general duty of candor to the courts includes not only the duty to refrain from knowing misrepresentations but also a positive duty to disclose to the court all material facts. *See Dunlap v. Bd. of Pro. Resp.*, 595 S.W.3d 593, 613 (Tenn. 2020) (attorney's failure to disclose material information to the court violated duty of candor under RPC 3.3 and was a misrepresentation under RPC 8.4). . . ."

"By this measure, Mr. Harris's testimony in the juvenile court proceedings fell well short of our ethical standards for lawyers. The Supreme Court of New Mexico put it well:

> A lawyer who makes false statements, tells half-truths, and otherwise attempts to mislead harms the legal system and the legal profession. The essential aim of our legal system is to seek truth in the pursuit of justice; for a lawyer, all other duties and responsibilities are secondary. Thus, a lawyer who subordinates truth to obtaining a successful outcome for a client or to avoiding personal responsibility undermines the rule of law and erodes public trust and confidence in the legal system. We must demand better from each other.

"*In re Dixon*, 435 P.3d 80, 88 (N.M. 2019) (citation omitted).

"We do demand better. We find substantial and material evidence in this record to support the decisions of the hearing panel and the trial court that Mr. Harris's testimony in the juvenile court proceedings violated RPC 8.4(c), so we affirm those decisions."

D. Misconduct: Prejudicial to the Administration of Justice, Rule 8.4(d)

The Florida Bar v. James, 329 So. 3d 108 (Fla. 2021).

"We have for review a referee's report recommending that Respondent, Derek Vashon James, be found guilty of professional misconduct in violation of the Rules Regulating the Florida Bar (Bar Rules), and that he be suspended from the practice of law for thirty days as a sanction for his misconduct. The Florida Bar (Bar) filed a notice of intent to seek review of the referee's report, challenging the referee's recommendation that James be found not guilty of violating Bar Rule 4-8.4(d), as well as the referee's recommended sanction. We have jurisdiction. *See* art. V, § 15, Fla. Const. For the reasons discussed below, we approve the referee's findings of fact and recommendations as to guilt, except for the recommendation that James be found not guilty of violating Bar Rule 4-8.4(d), which we disapprove, and find James guilty of violating the rule. We also disapprove the referee's recommended discipline, and instead, we suspend James from the practice of law for ninety-one days."

"On January 28, 2020, the Bar filed a complaint against James, alleging that he engaged in misconduct by coaching a witness during a deposition in a contested worker's compensation matter and making misrepresentations regarding his misconduct."

"James represented the employer in a worker's compensation case. On July 31, 2018, Renee Gray, the adjuster who worked for the employer, was deposed via telephone. Gray, James, and the

claimant's counsel, Toni Villaverde, attended the deposition via telephone, from different locations. Because the deposition was not conducted by video, the court reporter refused to swear Gray in as a witness, making her testimony unsworn. While the deposition was in progress and Villaverde was questioning Gray, James sent text messages to Gray regarding her testimony. The texts included coaching and specific directions on how to respond to Villaverde's questions.

"The following messages were exchanged between Gray and James during Villaverde's questioning of Gray:

10:19 a.m. (James): You don't
10:20 a.m. (James): As to settlement checks expiration
10:20 a.m. (James): You remember the deposition but not discussing checks
10:20 a.m. (James): yes
10:21 a.m. (James): Just review notes from 02/20/2018 forward
10:23 a.m. (James): Be careful just say
10:23 a.m. (James): You may not see today
10:25 a.m. (James): Take a break in 15 minutes?
10:25 a.m. (Gray): Up to you.

"Villaverde could hear typing sounds and asked Gray and James if they were engaging in texting during the deposition. James denied texting Gray and stated he was only receiving a text from his daughter. Villaverde asked James to stop texting and put his phone away, and James agreed. James misrepresented to Villaverde that he had concluded the text messaging when in fact he had not. After a break, and after Villaverde resumed questioning Gray, James inadvertently sent the following text messages intended for Gray to Villaverde:

11:53 a.m. (James): Just say it anyway
11:53 a.m. (James): Just say 03/28
11:54 a.m. (James): In addition to the 03/28/2018 email containing the signed release I show ...
11:55 a.m. (James): Don't give an absolute answer
11:55 a.m. (James): All I can see at this time but I cannot rule out existence
11:55 a.m. (James): It's a trap
11:56 a.m. (James): Then say that is my best answer at this time.

"Once Villaverde noticed the texts, she stopped the deposition. She later filed a motion for production and in-camera inspection of all the texts sent during the deposition. After the Judge of Compensation Claims granted the motion, James produced two pages of text messages but never produced any texts involving his daughter, despite being ordered to do so by the judge, and despite his assurances to Villaverde during the deposition that the typing sounds she heard involved a text received from his daughter. The judge found that the text messages were sent during the deposition, not during a break in the questioning, and that they were not protected by attorney-client privilege, contrary to James's claims. The parties conducted a second deposition of the witness on February 19, 2019.

"During the disciplinary proceedings, James testified that he was unable to retrieve the texts from his daughter due to his own technological limitations. He explained that worker's compensation proceedings are informal, and he felt compelled to aid his witness during the deposition because Villaverde was constantly talking over Gray's answers or interrupting with speaking objections, and

he felt Gray was being mistreated. The referee found that James's texts to Gray while she was being questioned, telling her what to say, how to answer, to avoid providing certain information, to remember a deposition but not discuss certain checks, and to not give an absolute answer were dishonest.

"Furthermore, the record shows that after the deposition ended, and in the days following the deposition, James tried to convince Villaverde that he sent the texts to Gray during the break, not during the questioning. During a hearing on Villaverde's motion for production and in-camera inspection, James failed to be transparent and forthright with the judge regarding his texts to Gray. He made it appear that he only texted his wife and daughter during the deposition and that he sent the text messages to Gray during the break in the deposition.

"The referee recommends that James be found guilty of violating Bar Rules: 3-4.3 (Misconduct and Minor Misconduct) and 4-3.4(a) ('A lawyer must not ... unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document....'). However, the referee recommends that James be found not guilty of violating rule 4-8.4(d) ('A lawyer shall not ... engage in conduct in connection with the practice of law that is prejudicial to the administration of justice....') as well as others."

"The Bar challenges the referee's recommendation of no guilt as to Bar Rule 4-8.4(d), contending that the referee's own findings, as well as the record, support a contrary conclusion. The Court must consider whether the referee's recommendation that James be found not guilty of violating Bar Rule 4-8.4(d) is supported."

"Bar Rule 4-8.4(d) states, 'A lawyer shall not ... engage in conduct in connection with the practice of law that is prejudicial to the administration of justice....' R. Regulating Fla. Bar 4-8.4(d). This Court has determined that dishonesty in connection with the practice of law is prejudicial to the administration of justice. *See Fla. Bar v. Feinberg*, 760 So. 2d 933, 938 (Fla. 2000). Here, the referee specifically found that James's response that he was just responding to his daughter when in fact texts were being sent to Gray was misleading and a matter contrary to honesty. He also found that James misrepresented to Villaverde that he had concluded the text messaging when in fact he had not. The referee further found that James's texts to Gray while she was being questioned, telling her what to say, how to answer, to avoid providing certain information, to remember a deposition but not discuss certain checks, and to not give an absolute answer were dishonest. James's dishonesty is clear from the record, and we find him guilty of violating Bar Rule 4-8.4(d)."

VII. Licensure

A. Transfer of Law License to Disability Inactive Status

Matilda Ann Batson, Acworth, Georgia
Jay Nelson Chamness, Franklin
Charles David Deas, Maryville
Karen Tucker Fleet, Bolivar
John William Gautier, Franklin
William N. Griffin, Memphis
William Robert Heck, Hixson

Lawrence McLean House, Knoxville
Michael Brandon Meador, Hopkinsville, Kentucky
Ruth Raber Murphy, Old Hickory
Charles Michael Purcell, Jackson
Keri Elizabeth Rule, Knoxville
Johnny Leon Woodruff, Apison

B. Suspension for Failure to Respond to a Complaint of Misconduct

A. Sais Phillips Finney, Memphis
David Dwayne Harris, Nashville
Angela Joy Hopson, Jackson
Stephanie Branam Johnson, Sparta
Janet Monique Okoye, Birmingham, Alabama

C. Suspension for Failure to Comply With TLAP Contract

Mark Steven Graham, Knoxville
Alex Fletcher Thompson, Goodlettsville

D. Suspension for Posting a Threat of Substantial Harm to the Public

Jason R. McLellan, Kingsport
Melvin Jacob Werner, Knoxville

E. Suspension for Violation of Disciplinary Probation

In re Harris, Board Release of Information.

David Dwayne Harris Nashville was suspended for 2 years, less 75 days he had already been suspended.

"On May 1, 2020, Mr. Harris was suspended from the practice of law for 2 years with 60 days active suspension and the remainder to be probated contingent upon Mr. Harris meeting certain conditions, including a restitution requirement within the first year of his suspension. Mr. Harris failed to pay restitution as ordered, and on June 28, 2021, the Board of Professional Responsibility filed a Petition to Revoke Probation. A Hearing Panel revoked Mr. Harris's probation and imposed a two (2) year suspension as originally ordered with credit of 75 days previously served."

F. Summary Suspension for Conviction of Serious Crime

In re Adams, Board Release of Information.

Glenda Ann Adams of Memphis was suspended until further orders of the Supreme Court.

"Ms. Adams pled guilty and was convicted in state court of bribery of a public servant and official misconduct. Ms. Adams also pled guilty and was convicted in federal court of conspiracy to violate the travel act."

The matter has been referred to the Board to institute formal proceedings to determine the extent of the final discipline to be imposed upon Ms. Adams.

In re Neglia, Board Release of Information.

Aaron Anthony Neglia of Memphis was suspended until further orders of the Supreme Court.

"Mr. Neglia pled guilty and was convicted in state court of bribery of a public servant and in federal court to conspiracy to violate the travel act."

The matter has been referred to the Board to institute formal proceedings to determine the extent of the final discipline to be imposed upon Mr. Neglia.

In re Reguli, Board Release of Information.

Connie Lynn Reguli of Brentwood was suspended until further orders of the Supreme Court.

"Ms. Reguli was found guilty in the Circuit Criminal Court for Williamson County in State of Tennessee v. Connie Reguli, Docket No. W-CR190482, of Facilitation of Felony – Custodial Interference; Accessory After the Fact – Aiding; and Accessory After the Fact – Harboring."

The matter has been referred to the Board to institute formal proceedings to determine the extent of the final discipline to be imposed upon Ms. Reguli.

In re Tansil, Board Release of Information.

Thomas A. Tansil, Jr., of Greenfield was suspended until further orders of the Supreme Court, based on his plea of nolo contendere to 3 felonies involving theft of property, tampering with government records, and computer offenses.

The matter has been referred to the Board to institute formal proceedings to determine the extent of the final discipline to be imposed upon Mr. Tansil.

G. Permanent Disbarment

Charles Alphonso Carpenter, Maryville
Andrew Nathan Hall, Wartburg
Michael Glen Hatmaker, Jacksboro
Wendell J. O'Reilly, Franklin
Philip Joseph Perez, Nashville
Richard Louis Reynolds, Diamondhead, Mississippi
Paul James Springer, Memphis
John Terence Tennyson, Mount Juliet
Kyle Douglas Vaughan, Kingsport

H. Reinstatement

John Stephen Anderson, Rogersville
Kristie Nicole Anderson, Jacksboro

Whitney Suzanne Bailey, Kingsport
John Louis Dolan, Jr., Memphis
Michael Lloyd Freeman, Nashville
Grace Ingrid Gardiner, Knoxville
Mark Steven Graham, Knoxville
Darryl Wayne Humphrey, Cordova
Anthony Bernard Norris, Collierville
Albert Fitzpatrick Officer, III, Rickman
Sherry Marie Percival, Jackson
Karl Emmanuel Pulley, Nashville

I. Reciprocal Discipline

In re Harrison, Board Release of Information.

Sir Ashley James Harrison of Huntersville, North Carolina, was suspended for 5 years retroactive to December 8, 2015, based on a 5-year suspension received in North Carolina in 2015 for widespread neglect of client matters, failure to communicate with clients and neglecting to complete matters he was retained for.

In re Reynolds, Board Release of Information.

Richard Louis Reynolds of Diamondhead, Mississippi, was disbarred, following his disbarment in Mississippi. His disbarment in Mississippi followed a guilty plea and conviction in federal court in Texas to the felony of misprision of a felony. He has also been disbarred in Louisiana on the same grounds.

J. Costs and Fees of Disciplinary Prosecution

In re Justice, 628 S.W.3d 279 (Tenn., Clark, 2021).

"An attorney who had been disbarred was assessed costs associated with his disbarment proceedings pursuant to pre-2014 Tennessee Supreme Court Rule 9, section 24.3. The attorney timely filed a petition seeking relief from costs, and a panel of the Board of Professional Responsibility conducted a hearing on the petition. The panel reduced the costs for 11.2 hours of disciplinary counsel time and otherwise denied the petition. The attorney has appealed to this Court, as permitted by pre-2014 Rule 9, section 24.3. Having carefully and thoroughly considered the record and each of the issues raised, we affirm the panel's decision."

K. Amendments to Supreme Court Rules

1. Lawyer Advertising

In re Petition for the Adoption of Revisions to Tenn. Sup. Ct. R. 8, RPCs 7.1, 7.2, 7.3, 7.4, 7.5, and 7.6 (eff. Sept. 1, 2021).

The Rules governing lawyer advertising in Tennessee were revised substantially, largely to confirm to the 2018 revisions to the ABA Model Rules of Professional Conduct. The amended rules:

- Consolidate much of the content of the former rules into Rule 7.1, the core advertising rule that bans false or misleading communications or ads, and Rule 7.3, which continues to concern solicitation.
- Repeal former Rules 7.2, 7.4, and 7.5, but much of their specific content is carried forward in the Comments to Rule 7.1.
- Reduce some of the requirements on written solicitations.
- Permit in-personal solicitation direct at "a person who routinely uses for business purposes the type of legal services offered by the lawyer."
- Allow a lawyer to compensate their employees to recommend the lawyer.
- Continue the requirement that ads be retained by a lawyer for two years.

2. Intermediary Organizations

In re Rule 8, RPC 7.6 and Rule 44, Rules of the Tennessee Supreme Court. (Orders entered Dec. 15, 2021, and eff. Jan. 1, 2022; and entered May 12, 2022, and eff. on entry).

Tenn. Sup. Ct. R. 8, RPC 5.4(a)(6) was amended as follows:

(6) a lawyer may pay to a ~~registered~~ non-profit intermediary organization a referral fee calculated by reference to a reasonable percentage of the fee paid to the lawyer by the client referred to the lawyer by the <u>non-profit</u> intermediary organization.

Tenn. Sup. Ct. R. 8, RPC 7.6(b)(5) was amended as follows:

RULE 7.6: INTERMEDIARY ORGANIZATIONS

(a) An intermediary organization is a lawyer-advertising cooperative, lawyer referral service, <u>lawyer matching service, online marketing platform,</u> prepaid legal insurance provider, <u>or other similar organization that engages in referring consumers of legal services to lawyers or facilitating the creation of lawyer-client relationships between consumers of legal services and lawyers willing to provide assistance</u> for which the organization does not bear ultimate responsibility. ~~, or a similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers for the performance of fee-generating legal services or the payment for or provision of legal services to the organization's customers, members, or beneficiaries in matters.~~ A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule.

~~(b) A lawyer shall not seek or accept a referral of a client, or compensation for representing a client, from an intermediary organization if the lawyer knows or reasonably should know that:~~

~~(1) the organization:~~

~~(i) is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; or~~

~~(ii) is engaged in the unauthorized practice of law; or~~

~~(iii) engages in marketing activities that are false or misleading or are otherwise prohibited by the Board of Professional Responsibility; or~~

~~(iv) has not registered with the Board of Professional Responsibility and complied with all requirements imposed by the Board; or~~

~~(2) the lawyer will be unable to represent the client in compliance with these Rules.~~

(b) Before and while participating in an intermediary organization, a lawyer shall be licensed and in good standing to practice law in Tennessee and shall make reasonable efforts to ensure that the intermediary organization's conduct complies with the professional obligations of the lawyer, including the following conditions:

(1) The intermediary organization does not direct or regulate the lawyer's professional judgment in rendering legal services to the client;
(2) The intermediary organization, including its agents and employees, does not engage in improper solicitation prohibited by RPC 7.3;
(3) The intermediary organization makes the criteria for inclusion available to prospective clients, including any payment made or arranged by the lawyer(s) participating in the service and any fee charged to the client for use of the service at the outset of the client's interaction with the intermediary organization;
(4) The function of the referral arrangement between lawyer and intermediary organization is fully disclosed to the client at the outset of the client's interaction with the lawyer;
(5) The intermediary organization does not require the lawyer to pay more than a reasonable sum representing a proportional share of the organization's administrative and advertising costs, or, in the case of a non-profit intermediary organization, a referral fee calculated by reference to a reasonable percentage of the fee paid to the lawyer by the client referred to the lawyer by the non-profit intermediary organization;
(6) The intermediary organization is not owned, controlled, or directed by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; and

(c) If a lawyer discovers the intermediary organization's noncompliance with the lawyer's professional obligations or any of the conditions in paragraph (b), the lawyer shall either withdraw from participation or seek to correct the noncompliance. If the intermediary organization fails to correct the noncompliance, the lawyer must withdraw from participation.

3. Appeals of Disciplinary Matters

In re Amendment to Tenn. Sup. Ct. R. 9, Section 33.1(d) (eff. Mar. 24, 2022).

Tenn. Sup. Ct. R. 9, Section 33.1(d) was amended as follows:

(d) Either party dissatisfied with the decree of the circuit or chancery court may prosecute an appeal directly to the Court, ~~where the~~ The appeal cause shall be ~~heard~~ determined upon the transcript of the record from the circuit or chancery court, which shall include the transcript of evidence before the hearing panel, ~~.~~ and upon the parties' briefs but without oral argument, unless the Court orders otherwise.…

4. Disciplinary Authority Over Attorneys Not Licensed in Tennessee.

In re Amendment to Tenn. Sup. Ct. R. 9, Section 8.1 (eff. July 28, 2022).

The Court amended Rule 9 to ensure consistency with its Rule 8 by explicitly stating that any attorney not admitted in Tennessee who practices law, renders legal services, or offers to so do in Tennessee is subject to the Court's disciplinary jurisdiction, as well as the jurisdiction of the Board of Professional Responsibility, its panels, its hearing panels, and its district committees, and the Circuit and Chancery Courts of Tennessee.

VIII. Judicial Ethics

A. Recusal

Tarver v. Tarver, No. W2022-00343-COA-T10B-CV, 2022 WL 1115016 (Tenn. Ct. App., Frierson, Apr. 14, 2022), perm. app. denied May 9, 2022.

"Petitioner and Sallie Lunn Tarver ('Respondent') were divorced in 2017. In May 2021, Petitioner filed a petition to modify the final decree. In November 2021, Respondent filed a petition to enforce the final decree. In December 2021, Petitioner filed a petition for injunctive relief, and Respondent filed a motion to add a party. These petitions and motion remain pending in the Circuit Court for Shelby County ('trial court'). In January 2022, Petitioner filed in the trial court a motion for recusal and transfer. Following a hearing, the trial court entered an order on February 25, 2022, denying the motion for recusal for failure to comply with Tennessee Supreme Court Rule 10B.

"Petitioner then filed an amended motion for recusal attempting to cure the fatal deficiencies in his first motion. The trial court held a hearing and entered its order on March 25, 2022, denying the amended motion for recusal and finding in pertinent part:

> 14[.] The Movant, John Kirk Tarver, filed his Motion alleging that on January 13, 2022 the law firms of Moskovitz, McGhee, Brown, Cohen & Moore, Black McLaren Jones Ryland & Griffee and Butler Sevier Hinsley & Reid co-hosted a fundraising event supporting the re-election of Judge Bob Weiss[.]
> 15[.] Wife was previously represented by John Ryland and is currently represented by Gail Sevier, both of whom are partners in two of the hosting firms.
> 16. In the case at bar, the law firm of Butler Sevier Hinsley & Reid were co-hosts of a campaign event hosted in the lobby of the building at 530 Oak Court Drive, Memphis, TN 38117 where all three firms are located.
> 17[.] That the Committee was only in contact with one representative from each firm, Lara Butler, Mike McLaren and Charles McGhee[.]
> 18. The firms were supportive of the event by securing permission to utilize the open lobby in their building.
> 19[.] Mike McLaren also secured a donation of refreshments but the Committee provided the food, staffing and promotion of the event.
> 20[.] The lawyers in all three firms actively practice in the Shelby County Circuit Courts and include a total of thirty-seven (37) lawyers.
> 21[.] In compliance with Tennessee Supreme Court Rule 10 RJC 4.1(a)(8), the Court is unaware of what financial contributions, if any, were made by the individual firms or any particular lawyer.
> 22. No attorney in Butler Sevier Hinsley & Reid or the other co-hosting firms is a member of the Committee to Re-Elect Judge Robert 'Bob' Weiss nor does anyone in any of the firms hold a leadership position in the campaign.

"Petitioner filed his petition for recusal appeal in this Court on March 18, 2022."

"We begin our analysis by addressing Petitioner's first motion for recusal. Petitioner's first motion was deficient because it failed to comply with Rule 10B, § 1.01. . . ."

"Petitioner's first motion failed to comply with Rule 10B because it was not supported by an affidavit or a declaration under penalty of perjury and because it failed to affirmatively state that it was not being presented for any improper purpose. As such, Petitioner's claim for recusal contained in the first motion has been waived. *See, e.g., Moncier v. Wheeler*, No. E2020-00943-COA-T10B-CV, 2020 WL 4343336, at *5 (Tenn. Ct. App. July 28, 2020). . . ."

"Petitioner amended his motion for recusal to add supporting affidavits and the required statement that the motion was not being presented for an improper purpose. Respondent filed a response to the amended motion for recusal and argued that because Petitioner raised no grounds not raised in his first motion, the issue was barred by *res judicata.*

"With regard to Respondent's argument that Petitioner's amended motion is barred by *res judicata*, we note that the trial court denied Petitioner's first motion for recusal primarily due to Petitioner's failure to comply with Rule 10B. The trial court alternatively stated that it would deny the motion based 'upon a lack of bias, prejudice or favor for [or] against any party or attorney involved in this matter....' Given the trial court's primary holding with regard to Petitioner's first motion, and in the interest of promoting confidence in the judiciary, we choose to address the grounds raised in Petitioner's amended motion. However, we remind litigants that strict compliance with Rule 10B in the first instance is required and that we may not choose to proceed with review in similar situations in the future. *See Neamtu*, 2019 WL 2849432, at *2. . . ."

"In his amended motion, Petitioner sought recusal based upon the facts that the trial court judge is currently seeking re-election and that Respondent's attorney is a member of a law firm that, along with two other law firms, recently hosted a campaign fundraising event for the trial court judge. Petitioner also points out that Respondent's former attorney is a member of one of the other two host law firms. The amended motion states that Petitioner does not allege 'any actual bias' on the part of the trial court judge but asserts that 'there is certainly an appearance of bias, regardless of whether or not any actual bias exists.' In his affidavit in support of the motion, Petitioner asserts: 'While I did not attend the judicial fundraiser, I assume that the Judge publicly thanked the members of my wife's law firm for their assistance and support in his re-election campaign.' Petitioner asserts: 'To me, the above gives an appearance of bias, regardless of whether or not any actual bias may exist.'

"In *Collier v. Griffith*, No. 01-A-019109CV00339, 1992 WL 44893, at *6 (Tenn. Ct. App. March 11, 1992), this Court discussed the reality of judicial elections, stating:

> Political fund raising will be an unfortunate necessity as long as judges are required to seek or retain their offices through contested elections. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1335 (Fla. 1990); *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. Ct. App. 1983).
> * * *
> As long as judges must be elected, members of the bar will play active roles in their campaigns and will be a principal source of campaign contributions. While all parties must be aware of the ethical implications and possible appearance of this activity, the fact that a judge has received contributions from an attorney for one of the parties is not grounds for automatic

> disqualification. The same may be said for attorneys who simply endorse a judicial candidate or who are listed on a judge's campaign committee. *Nathanson v. Korvick*, 577 So.2d 943, 944 (Fla. 1991); *In re Petition to Recall Dunleavy*, 769 P.2d 1271, 1275 (Nev. 1988); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 842-45 (Tex. Ct. App. 1987); Jeffery M. Shaman, Steven Lubet & James J. Alfini, *Judicial Conduct and Ethics* § 11.16, at 353-54 (1990).
>
> However, recusal may be required if an attorney for one of the parties is more actively involved in a judge's campaign. Several courts have found that grounds for disqualification exist when an attorney for one of the parties has a leadership role in a judge's currently active campaign committee. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d at 1338 n.5; *Barber v. MacKenzie*, 562 So.2d 755, 757-58 (Fla. Dist. Ct. App. 1990); *Caleffe v. Vitale*, 488 So.2d 627, 629 (Fla. Dist. Ct. App. 1986); *see also Gluth Bros. Constr. Co. v. Union Nat'l Bank*, 548 N.E.2d 1364, 1368 (Ill. App. Ct. 1989). The judicial ethics advisory committees in New York, South Carolina, and Washington have reached the same conclusion when the parties, with full knowledge of the facts, have not consented to the judge's continued participation in the case. American Judicature Society, *The Digest of Judicial Ethics Advisory Opinions* 412, 487, 555 (D.L. Solomon, ed. 1991), citing N.Y. Advisory Opinion No. 89-107 (Sept. 12, 1989); S.C. Advisory Opinion No. 5-1982 (1982); Washington Advisory Opinion No. 88-7 (Mar. 16, 1988).

"The Code of Judicial Conduct contained in Tennessee Supreme Court Rule 10 provides, in pertinent part:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
> * * *
> (4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has made contributions or given such support to the judge's campaign that the judge's impartiality might reasonably be questioned.

"Tenn. S. Ct. R. 10, RJC 2.11. Comment 7 to Rule 2.11 clarifies that contributions to a judge's campaign or support given to the judge's election by either a party or a party's attorney, however, does not in and of itself require recusal. Comment 7 states: 'Absent other facts, campaign contributions within the limits of the 'Campaign Contributions Limits Act of 1995,' Tennessee Code Annotated Title 2, Chapter 10, Part 3, or similar law should not result in disqualification.' Tenn. S. Ct. R. 10, RJC 2.11, cmt. 7. Comment 7 further explains:

> [C]ampaign contributions or support a judicial candidate receives may give rise to disqualification if the judge's impartiality might reasonably be questioned. In determining whether a judge's impartiality might reasonably be questioned for this reason, a judge should consider the following factors among others:
> (1) The level of support or contributions given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's campaign and to the total amount spent by all candidates for that judgeship;
> (2) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
> (3) The timing of the support or contributions in relation to the case for which disqualification is sought; and

> (4) If the supporter or contributor is not a litigant, the relationship, if any, between the supporter or contributor and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate or opponent, and (iv) the total support received by the judicial candidate or opponent and the total support received by all candidates for that judgeship.

"Tenn. S. Ct. R. 10, RJC 2.11, cmt. 7.

"As this Court has previously explained concerning RJC 2.11, Comment 7:

> [T]he fact that an attorney has contributed to a judge's campaign, has endorsed a judge's candidacy, or has been listed on a judge's campaign committee will not require automatic disqualification of the judge. However, recusal may be required if an attorney is more actively involved in the judge's campaign or serves in a leadership role.

"*In re Gabriel V.*, No. M2014-01298-COA-T10B-CV, 2014 WL 3808916, at *3 (Tenn. Ct. App. July 31, 2014).

"In the instant action, the trial court found in its March 25, 2022 order denying recusal that the campaign event at issue was held in the lobby of the building where the three host law firms had their offices and not in any of the firms' individual offices. The trial court further found that that the three host law firms included a total of thirty-seven lawyers but that the judge's campaign committee worked with only three specific attorneys from those firms, none of whom had represented Respondent. Additionally, the judge's campaign 'Committee provided the food, staffing and promotion of the event,' not Respondent's current or former attorney. The March 25, 2022 order stated that the judge was 'unaware of what financial contributions, if any, were made by the individual firms or any particular lawyer' and that '[n]o attorney in Butler Sevier Hinsley & Reid or the other co-hosting firms is a member of the Committee to Re-Elect Judge Robert 'Bob' Weiss nor does anyone in any of the firms hold a leadership position in the campaign.'

"Although the fact that Respondent's current and former attorneys are members of law firms that hosted a fund-raising event does constitute support of a judge's campaign, this fact alone is insufficient to require recusal. Petitioner does not allege that either Respondent's current attorney or her former attorney had a direct role in the fund-raising event at issue. Nor does Petitioner allege that Respondent's current or former attorney is actively involved in the trial court judge's campaign. Furthermore, there is no allegation that Respondent's current or former attorney serves in a leadership role in the trial court judge's campaign. Petitioner does not allege that Respondent's current or former attorney attended the event in question, and assuming, *arguendo*, that this were true, it would only constitute support of a judge's campaign, which pursuant to Rule 2.11 and Comment 7, absent other facts would not require recusal. Tenn. S. Ct. R. 10, RJC 2.11, cmt. 7. Petitioner failed to show any support that would rise to the level wherein the judge's impartiality might reasonably be questioned."

In re Haven-Lee S., No. W2022-00124-COA-T10B-CV, 2022 WL 468124 (Tenn. Ct. App., Bennett, Feb. 16, 2022).

"This is an appeal from a juvenile court magistrate's denial of a motion for recusal. The underlying case is a dependency and neglect proceeding filed by Tiare and William Lee Mark S., the maternal grandparents of Haven-Lee S. and Conner A. Brittany A. ('Mother') is the mother of both children, and Brian A. is Conner's biological father and the step-father of Haven-Lee. A preliminary hearing

was held on August 4, 2021, at which Mother and maternal grandparents testified. Following the hearing, the magistrate determined, in her oral ruling, that the children should be placed in the temporary custody of the maternal grandparents. The magistrate further stated that Mother's testimony regarding an episode of alleged domestic violence between Mother and Brian A. was not credible.

"On October 15, 2021, Mother and Brian A. filed a motion for recusal of the juvenile court magistrate, alleging that the magistrate's credibility determination has affected her 'ability to fairly and impartially hear this matter and has created a bias towards [Mother].' Mother also alleged that she was unable to adequately present her proof in the time allotted by the magistrate. In support of the motion, Mother and Brian A. filed an affidavit as required by Tenn. Sup. Ct. R. 10B.

"On January 14, 2022, the juvenile court magistrate entered an order denying the motion for recusal. On February 3, 2022, Mother and Brian A. filed an Accelerated Interlocutory Appeal Petition for Recusal to this Court, alleging that the magistrate's order denying their motion was in error."

"Appeals from orders denying motions to recuse are governed by Tenn. Sup. Ct. R. 10B ('Rule 10B'). Under Rule 10B, § 2.01, an accelerated interlocutory appeal is only available where a 'trial court judge' denies a motion for recusal made under Rule 10B, § 1. Rule 10B, § 1.01 specifies that it applies only to the recusal of 'a judge of a court of record.' Juvenile courts are courts of record, and the judges of those courts are covered by Rule 10B, §§ 1 and 2. However, this case was heard before a juvenile court magistrate, rather than by a trial court judge or a judge acting as a court of record. The recusal of a juvenile court magistrate is governed by Rule 10B, § 4. *See* Tenn. Sup. Ct. R. 10B, cmt. § 1 ('Other judicial officers who serve in a juvenile court, such as a magistrate or referee, are covered by section 4 of this rule.'). Therefore, the procedures outlined in Rule 10B, § 4 provide the procedural framework for the appeals process in this case.

"Under Rule 10B, § 4, there is no right to an accelerated interlocutory appeal from a magistrate's decision denying recusal. Rather, judicial review of the denial of a motion to recuse under § 4 'depends on the forum in which the motion is made and is governed by the law applicable to that forum.' The explanatory comments to § 4 of Rule 10B provide the following additional explanation:

> [R]ulings of some judicial officers (e.g., a magistrate, referee or master) can be subject to the approval or review of a judge of a court of record. These examples are provided to illustrate that, in the various proceedings covered by this section, review of a judge's or other judicial officer's denial of a motion for disqualification should be sought in accordance with the appeal procedure generally available for review of the judge's or judicial officer's other rulings.

"The appeal procedure for a juvenile court magistrate's ruling is set forth in Tenn. Code Ann. § 37-1-107(d), which provides that '[a]ny party may, within ten (10) days after entry of the magistrate's order, file a request with the court for a de novo hearing by the judge of the juvenile court. The judge shall allow a hearing if a request for hearing is filed.' Thus, under Rule 10B, § 4.04, the magistrate's decision denying recusal must be reviewed by the juvenile court judge under Tenn. Code Ann. § 37-1-107, not by this Court under Rule 10B, § 2.

"When a case has been appealed to the wrong appellate court, Tenn. Code Ann. § 16-4-108(a)(2) provides that it should be 'transferred to the court having jurisdiction of the case, direct.' *See also*

In re Estate of White, 77 S.W.3d 765, 769 (Tenn. Ct. App. 2001). Here, the review must be made by the juvenile court judge rather than the Court of Appeals. Therefore, the matter is transferred to the juvenile court for the juvenile court judge to review the magistrate's recusal decision."

Neuman v. Phillips, No. M2021-01162-COA-T10B-CV, 2021 WL 6055923 (Tenn. Ct. App., McBrayer, Dec. 21, 2021).

"In September 2020, Nicole Marie Neuman petitioned to modify a parenting agreement with her former husband, Paul Phillips. Ms. Neuman claimed that a material change of circumstances had occurred since the parties reached their agreement. Among other things, she alleged that Mr. Phillips had 'established a pattern of being difficult toward[ ] [her]' and that he 'unnecessar[ily] contradict[ed] [her] on reasonable education decisions.' She also claimed that Mr. Phillips had 'demonstrated that he [wa]s incapable of making joint education decisions.'

"Nearly a year later, Mr. Phillips asked the court to order the parties to mediation or to set a final hearing. He also moved to hold Ms. Neuman in civil contempt. In his motion for contempt, Mr. Phillips claimed that he had attempted to consult with Ms. Neuman regarding whether their child should attend in-person or online classes. But, without Mr. Phillips's consent, Ms. Neuman enrolled the child in online classes. Mr. Phillips contended that her action violated their divorce decree because he was granted 'ultimate decision-making authority' on educational issues.

"Ms. Neuman responded by opposing everything but mediation. She also argued that the case could not be ready for a final hearing because she was seeking leave to amend her original petition. The proposed amended petition alleged additional material changes in circumstances, including the parties' disagreement over in-person versus online schooling. According to Ms. Neuman, Mr. Phillips's 'continued insistence that the [c]hild attend in-person school is contrary to the best interest of the [c]hild[ ] and potentially dangerous to his health and safety.' And '[a]nyone not living under a rock has to know that the delta variant of COVID-19 is raging like wildfire in Middle Tennessee, with thousands of school children contracting the virus.' For the first time, she asked that she 'be vested with sole and exclusive authority to make educational decisions for [the child], including, without limitation, where he will attend school and whether he will do so in-person or online.'

"Shortly thereafter, Ms. Neuman moved to recuse the trial judge. She submitted that the judge's husband, the majority leader of the state senate, 'ha[d] been a vocal proponent of the view that children should now be attending school in-person ... and that students and teachers should not be required to wear masks.' And 'there [wa]s good reason to infer that [the judge] probably ... share[d] [her husband's] view.' Ms. Neuman characterized the litigation with her former husband as over 'in-person versus online school attendance for the parties' minor child.' So recusal was warranted because of 'the possibility of [the judge] being influenced, consciously or otherwise, by [her husband's] views[ ] and/or her own ... views.'

"To support her contentions, Ms. Neuman submitted a guest editorial that the judge's husband had written for *The Tennessean* the previous month. In the editorial, the husband advocated for a return to the classroom and took issue with the local school board's decision to require students, staff, and visitors at elementary schools to wear face masks while indoors and on buses. As for the proposition that the judge's views might align with her husband's, Ms. Neuman cited the husband's political website, which showed the judge and her husband pictured together. The website included a statement that the husband and the judge had met at a Young Republican function and that they

shared the same conservative values. She also cited a social media post from the husband recalling that he and his spouse had protested against a state income tax. Finally, Ms. Neuman stated that the judge 'ha[d] (understandably) attended and stood by her husband's side at political events and rallies.'

"The trial court denied the recusal motion. The order noted that Ms. Neuman offered no evidence that the judge had expressed any opinion on in-person versus online learning or mask requirements for school children. The inference that the judge might share the publicly expressed opinions of her husband was based on speculation and 'unfounded beliefs.' The court reasoned that the opinions of the judge's husband had nothing to do with the judge's ability to be fair and impartial. And it concluded that personal and political opinions had 'no place in the courtroom.' The court also found that the recusal motion was 'without merit and was filed for an improper purpose and in bad faith.'"

"Our courts also recognize that 'the appearance of bias is as injurious to the integrity of the judicial system as actual bias.' *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 565 (Tenn. 2001); *see In re Cameron*, 151 S.W. 64, 76 (Tenn. 1912) ('[I]t is of immense importance, not only that justice shall be administered ..., but that [the public] shall have no sound reason for supposing that it is not administered.'). So a judge should recuse when they have 'any doubt as to [their] ability to preside impartially in [a] case.' *Davis*, 38 S.W.3d at 564. But a judge must also 'disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.' Tenn. Sup. Ct. R. 10, Rule 2.11(A). This test is 'an objective one.' *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008). It requires recusal 'when 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.' *Davis*, 38 S.W.3d at 564-65 (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994))."

"Here, Ms. Neuman first argues that, 'by deciding [her recusal] motion without a hearing, [the trial judge] improperly deprived her of the rightful opportunity to make a complete record that could later be made available for appellate review.' But we are aware of no right to an evidentiary hearing on a motion to recuse. In most cases, conducting such a hearing would run counter to our supreme court's directive that, when presented with a recusal motion, a trial judge must 'act promptly by written order and either grant or deny the motion.' Tenn. Sup. Ct. R. 10B § 1.03. And Ms. Neuman does not explain how she was prejudiced by the lack of an evidentiary hearing. She all but acknowledges a lack of prejudice by arguing that, 'even on just the existing record, there is ample reason for this Court to reverse.'

"Under the circumstances, we discern no error in the trial court ruling summarily and without a hearing on the recusal motion. An evidentiary hearing would not have added anything to Ms. Neuman's two core factual assertions. First, the judge's husband is a prominent elected official who had publicly endorsed in-person over online school attendance and criticized the local school board for requiring masks despite the COVID-19 pandemic. Second, the judge is 'well-known to be generally supportive of her husband's views[ ] and to be of the same political and ideological persuasion.'"

"Based on the factual assertions, Ms. Neuman makes a twofold argument for recusal. First, she 'contend[s] that there is a reasonable basis to believe that the judge may very well share [her husband's] opinion, and that this could influence her decisions in this case.' Second, she 'contend[s] that, even if [the trial judge] does not share that opinion, or does not have a definitive view on the

subject of in-person versus online school attendance, [her husband's] highly visible public profile and stated views could influence her consideration of this case.' But a judge 'is not disqualified merely because he or she is related to one who has an interest in some abstract legal question that is involved in the case.' 46 Am. Jur. 2d *Judges* § 118, Westlaw (database updated Nov. 2021). Even if the judge shared her husband's opinion—which Ms. Neuman did not prove—personal bias 'does not refer to any views that a judge may have regarding the subject matter at issue.' *Alley*, 882 S.W.2d at 821; *see also* 46 Am. Jur. 2d *Judges* § 136 ('Prejudice growing out of ... political ... relations generally is insufficient to disqualify a judge.'); 48A C.J.S. *Judges* § 273, Westlaw (database updated Nov. 2021) ('A judge will not be disqualified ... merely by expressing an opinion on a question of law involved in a case in the court.').

"This is not the first case in which a trial judge's impartiality has been called into question by virtue of a spouse. *See, e.g., Perry v. Schwarzenegger*, 630 F.3d 909, 911 (9th Cir. 2011) (recusal sought based on 'wife's beliefs, as expressed in her public statements and actions, both individually and in her capacity as Executive Director of the American Civil Liberties Union of Southern California'); *Hayes v. Oregon*, No. 1:20-CV-01332-CL, 2021 WL 374967, at *4 (D. Or. Feb. 3, 2021) (recusal sought on the basis of the judge's late husband who served as chair of the Democratic Party of Oregon); *Salazar v. United States*, No. 17-CV-3645 (GBD) (OTW), 2018 WL 2276163, at *1 (S.D.N.Y. May 16, 2018) (recusal sought by virtue of the judge's status as wife of a doctor); *Nat'l Abortion Fed'n v. Ctr. for Med. Progress*, 257 F. Supp. 3d 1084, 1089 (N.D. Cal. 2017) (recusal sought on the basis of social media activity of the judge's wife); *Akins v. Knight*, No. 2:15-CV-4096-NKL, 2016 WL 127594, at *3 (W.D. Mo. Jan. 11, 2016) (recusal sought based on criticism offered by the judge's spouse to a petition seeking United States Supreme Court review of a case); *Glair v. City of Los Angeles*, No. CV 13-8946 GAF, 2014 WL 12923962, at *1 (C.D. Cal. Apr. 30, 2014) (recusal sought on the speculative notion 'that a judge's marriage to a prosecutor makes it impossible for the judge to impartially apply qualified immunity principles to allegations about police officers' actions'). But the idea that a judge should recuse based on a spouse's opinion 'is based upon an outmoded conception of the relationship between spouses.' *Perry*, 630 F.3d at 912. In marrying, 'spouses do not give up their freedom of thought and expression.' *Nat'l Abortion Fed'n*, 257 F. Supp. 3d at 1090. So '[n]o thoughtful or well-informed person would simply assume that one spouse's views should always be ascribed or attributed to the other in the absence of an express disclaimer.' *Id.*

"We agree with the trial judge that the views of her spouse were irrelevant to the proceedings between Ms. Neuman and Mr. Phillips. *See Perry*, 630 F.3d at 911 (recognizing that the views of a judge's spouse 'public or private, as to any issues that may come before [a] court, constitutional or otherwise, are of no consequence'); *see also* Tenn. Sup. Ct. R. 10, Rule 2.4(B) (requiring judges to decide cases without regard to 'family, social, political, financial, or other interests or relationships'). The issue before the court is not the merits of in-person or online schooling or whether masks should be required in schools. As Mr. Phillips points out, the issues are whether the current parenting plan should be modified and whether Ms. Neuman should be held in contempt. As part of resolving the latter issue, the court will determine who had authority over educational decisions for the child. As part of resolving the former, the court may decide to modify that authority. A person of ordinary prudence would not find a reasonable basis for questioning the judge's impartiality based on the facts presented. *See Akins*, 2016 WL 127594, at *3 (determining that '[t]he average person on the street would not reasonably believe the [judge] would approach a case in a partial manner due to [her spouse's] independent views regarding a subject, whether those views are publicly expressed or not')."

"[T]he court provided little or no explanation for its improper purpose and bad faith finding. The court faulted Ms. Neuman for not carrying her burden of proof to successfully challenge a judge's impartiality. Specifically, the court ruled that she 'failed to identify any factual basis to support her suspicions and unfounded beliefs.' But the failure to meet an evidentiary burden does not establish an improper purpose or bad faith. Nor does reliance on 'an outmoded conception of the relationship between spouses.' *See Perry*, 630 F.3d at 912.

"Remarks, unsupported by the record, that 'suggest that the judge has taken a position favorable or unfavorable to a party ... indicate bias.' *Alley*, 882 S.W.2d at 822. Likewise, gratuitous comments in a court's order denying recusal that impute unprofessional and unfounded motives to a litigant can be grounds for recusal. *See Commonwealth v. McCauley*, 199 A.3d 947, 952-53 (Pa. Super. Ct. 2018); *cf. Markowitz & Co. v. Toledo Metro. Hous. Auth.*, 608 F.2d 699, 708 (6th Cir. 1979) ('We find no comments ... which were unwarranted or unsupported by the record, and see no indication of any bias or prejudice in [the judge's] findings of fact or conclusions of law.'); *Mallett v. Mallett*, 473 S.E.2d 804, 808 (S.C. Ct. App. 1996) ('It is ... not ... clear to us that the trial judge's remarks ... meet the bias test for recusal, nor are the trial judge's findings so unsupported by the record as to manifest impartiality.').

"Although attributing bad faith or improper motive to Ms. Neuman was unjustified, we conclude that that the erroneous finding does not support recusal of the judge. Ms. Neuman does not point to any other instances from the record that might serve as a basis to question the judge's impartiality. *See Cook v. State*, 606 S.W.3d 247, 257 (Tenn. 2020) (holding that a judge's inappropriate comments at the conclusion of a hearing permit a reviewing court to 'consider the entire record of the proceeding when evaluating whether those comments are a basis to conclude that the judge's impartiality might reasonably be questioned'). While it was imprudent, the finding alone does not raise a reasonable question as to the judge's impartiality."

State v. McMurry, No. M2021-00223-CCA-R3-CD, 2022 WL 1087087 (Tenn. Crim. App., Easter, Apr. 12, 2022).

"On November 23, 2020, Defendant entered an open guilty plea to robbery. Pursuant to the negotiated plea agreement, Defendant was to be sentenced as a Range II multiple offender. On January 15, 2021, Defendant filed a motion to recuse the trial judge from sentencing him on the grounds that the trial judge, while serving as an assistant district attorney general in 1990, prosecuted Defendant in a highly publicized trial on three charges of sexual offenses. Defendant averred that the trial judge was prejudiced against him because, during the trial, the trial judge/former prosecutor stated, '[t]here is a dark side to [Defendant] which teachers and coaches don't see, and when that dark side surfaces, no young girl is safe.' Defendant's convictions in that case were overturned by the Tennessee Supreme Court. Defendant also alleged prejudice on the grounds that the trial judge prosecuted him on a drug charge in 2002 for which conviction he was sentenced as a Range III persistent offender to a sentence of split confinement with a lengthy period of probation. Defendant pointed out that, by contrast, he was convicted on the same day in a forgery and theft case prosecuted by another assistant district attorney and was sentenced as a Range II multiple offender. Finally, Defendant alleged that the trial judge showed prejudice against Defendant when he remarked at Defendant's arraignment in this case that it had 'been a while' since Defendant was before the court.

"The trial court conducted a hearing on Defendant's motion to recuse on January 25, 2021, the day of Defendant's scheduled sentencing hearing. Defendant testified that the trial judge prosecuted

him for three sexual offenses in 1990. At the time of his 1990 trial, Defendant 'was a star football player, basketball [player], and [he] played every sport.' He testified that the media covered his trial extensively. Defendant believed that the trial judge/former prosecutor 'had something against [him].' Defendant could not remember 'too much about' the trial itself, but he appealed his convictions, and the Tennessee Supreme Court reversed them. Defendant also testified regarding his 2002 convictions in two separate cases that were prosecuted by different assistant district attorneys. He testified, 'I know I got a bunch of time back then for charges that should have been dismissed.'

"Defendant recalled that, at the arraignment in this case, the trial judge remembered him and commented, 'it's been a long time.' Defendant testified, 'I've always felt like Judge Gay wanted to see me behind bars.' Defendant testified that he 'just wanted to be treated fairly.' He affirmed that it was not his intention to delay the proceedings in this case and that he did not file the motion to recuse for any improper purpose.

"A transcript of Defendant's arraignment in this case reflects that the trial court stated to Defendant, 'I haven't seen you in a long time, sir. Are you doing okay?' Defense counsel informed the trial court that she was unable to obtain the court file from Defendant's 1990 trial. Defense counsel did not admit as exhibits to the hearing any news articles or other media coverage of the trial. Counsel stated that when she received the presentence report for the current matter, she learned of Defendant's 2002 convictions. She discovered that Defendant was sentenced as a Range III offender in the case on which the trial judge was the prosecutor and that, in two other cases disposed of on the same day and prosecuted by another assistant district attorney, Defendant was sentenced as a Range II offender.

"At the conclusion of the recusal hearing, the trial court noted that Defendant's 1990 trial was 'highly publicized' because Defendant was recognized for his athletic ability. The trial court stated, 'He's one of the best running backs that's ever come out of Sumner County, and I found myself in a difficult position as a prosecutor in this case.' The trial court stated:

> Now, the arena in this particular case is the court room where all the – everything is laid out in court, and I am an advocate for three young child abuse victims, in my opinion, at the time, and what I say in court does not necessarily reflect my personal opinion of a defendant. We must be advocates, [defense counsel].
>
> And for those times that I prosecuted and tried those cases involving sexual abuse of children, you cannot help but get tied up in the lives of those young victims. Some I never forget because of the trauma, but that doesn't mean that I have a lifelong bias against the defendant that caused it. My statements were legal, my statements were professional, and that's what we do in this arena.

"In its written order denying Defendant's motion, the trial court explicitly stated that it could preside over Defendant's sentencing 'fairly, impartially, and without bias.' The trial court noted that Defendant's motion did not procedurally comply with Tennessee Supreme Court Rule 10B in that Defendant did not support the motion with an affidavit and failed to state that the motion was not being presented for any improper purpose. Further, the motion was not promptly filed, as contemplated by the rule. The trial court noted that Defendant did not allege bias during the seven months that his case was pending prior to sentencing. Nevertheless, the trial court stated in its order that it 'overlooked the issue and held an evidentiary hearing.'

"The trial court found that when prosecuting Defendant 'in 1990 in a highly publicized trial[,]' the trial judge 'was merely doing his job and performing his statutory duties in the prosecution of that case.' The order states that during the trial judge's time as an assistant district attorney, he 'prosecuted many defendants for many different crimes' and 'there was no evidence anywhere that would lead a reasonable person to conclude that the [c]ourt was biased or prejudiced years later as a judge against [D]efendant in 2020 other than he was merely performing his duties as an Assistant District Attorney in those prosecutions.' Relative to the trial court's comment to Defendant at Defendant's arraignment, the trial court found that it 'was merely a greeting and nothing else.'

"The trial court concluded that there was no subjective or objective basis for recusal and denied Defendant's motion."

"A sentencing hearing was conducted immediately following the recusal hearing."

"The trial court stated that Defendant had wasted 24 years of his life committing crimes. The court further stated:

> I wish you were a Range I offender to where we wouldn't have to give you so much time. I wish that you had grabbed at your early age the importance of athletics and what you were pursuing. But after making mistakes, you never corrected it. You never developed into what you could be, and that's your fault.

"The trial court imposed the maximum sentence within the range of 10 years' incarceration, concluding that confinement was necessary based on Defendant's long history of criminal conduct."

"In three companion cases recently decided by our supreme court, the co-defendants moved to recuse the trial judge, who previously served as a deputy district attorney general and had supervisory authority over the defendants' cases. *State v. Griffin*, 610 S.W.3d 752 (Tenn. 2020); *State v. Clark*, 610 S.W.3d 739 (Tenn. 2020); *State v. Styles*, 610 S.W.3d 746 (Tenn. 2020). The trial judge in those cases was serving as the Deputy District Attorney General at the time the defendants were indicted in February of 2019. In December of 2019, he was appointed to serve as a trial judge in the Knox County Criminal Court, and he was assigned to preside over the defendants' cases. Prior to his appointment to the bench, the trial judge had no direct involvement in the defendants' cases and served only in a supervisory capacity in his role as a prosecutor.

"Our supreme court held that broad supervisory authority, without some evidence that the judge participated personally and substantially in the case, was an insufficient reason to reasonably question the judge's impartiality. The court noted that the analysis to be conducted 'is whether a person of ordinary prudence in the judge's position, *knowing all the facts known to the judge*, would find a reasonable basis for questioning the judge's impartiality.' *Griffin*, 610 S.W.3d at 762 (internal quotations omitted) (emphasis in original). In *Griffin*, *Clark*, and *Styles*, the supreme court held that the defendants failed to establish that the trial judge's supervisory responsibilities in his role as a deputy district attorney general were personal or substantial in the defendants' cases. *Id.*

"Unlike in the cases cited above, the trial judge in this case served in more than a supervisory capacity – he was directly and substantially involved in the prosecution of Defendant's prior case. However, also unlike the cases cited above, the case in which the trial judge prosecuted Defendant was more than 30 years prior and, therefore, not the 'matter in controversy.' Tenn. Sup. Ct. R. 10, R.J.C. 2.11 (A)(6)(b). In the present case, there is no question that the trial judge was actively

involved in the prosecution of Defendant in 1990; however, there is nothing in the record to show actual bias or give reason to question the trial judge's subjective determination that he should not be required to recuse himself for lack of impartiality in determining Defendant's sentence for his 2021 conviction.

"The trial judge explicitly stated that he could preside over Defendant's sentencing 'fairly, impartially, and without bias.' Defendant alleged in his motion for recusal that the trial judge made statements during Defendant's 1990 trial to the effect that 'there is a dark side to [Defendant] which teachers and coaches don't see, and when the dark side surfaces, no young girl is safe.' Although defense counsel referenced media coverage of Defendant's 1990 trial, no such evidence was introduced. The trial court explained that his actions and statements as a prosecutor in the 1990 trial were 'legal' and 'professional' only and did not reflect his 'personal opinion' about Defendant or indicate any lingering bias or prejudice toward Defendant.

"Defendant asserts that the trial judge 'still carries the 1990 high profile case in which he prosecuted [Defendant] with him,' creating an appearance of impartiality. Defendant points to statements by the trial court at sentencing that reference Defendant's 1990 convictions, including the trial court's comment that Defendant was 'an incredible athlete' and 'extremely strong' in discussing the relative weakness and vulnerability of the victim and the trial court's question to Defendant about whether he had 'some guilt issues back in 1990' as a reason for Defendant's subsequent criminal episodes.

"We disagree with Defendant's interpretation of any of the trial judge's actions or comments as an indication of his hostility, bias, prejudice, or prejudgment of Defendant in the instant case. *See State v. Warner*, 649 S.W.2d 580 (Tenn. 1983), *rehearing denied* (April 18, 1983). Defendant has failed to establish that the trial judge relied on his knowledge gleaned from his prior prosecutions of Defendant in sentencing him. Despite Defendant's assertion that the trial court 'applied enhancing factors or gave the appearance that the enhancing factors which [were] known only to the [t]rial [c]ourt from the prior prosecutions' of Defendant, the record shows that the trial court made findings at sentencing based on the evidence and argument presented at sentencing. Defendant has likewise failed to establish that the trial judge's impartiality should be questioned based on the supreme court's having overturned Defendant's 1990 convictions or the trial judge's greeting Defendant at his arraignment. We thus conclude that recusal was not objectively required. Defendant is not entitled to relief on this issue."

Clay County v. Purdue Pharma L.P., No. E2022-00349-COA-T10B-CV, 2022 WL 1161056 (Tenn. Ct. App., Goldin, Apr. 20, 2022).

"The matter pending before this Court is an accelerated interlocutory appeal filed pursuant to Tennessee Supreme Court Rule 10B. According to the materials submitted in connection with this matter, the underlying litigation involves claims against manufacturers of prescription opioid medications, including the petitioners in this appeal, Endo Health Solutions Inc. and Endo Pharmaceuticals Inc. ('the Endo Defendants'). The Endo Defendants' concern over the trial judge's ability to impartially preside over this case manifested in the wake of a February 10, 2022, hearing before the court on a motion for discovery sanctions.

"The trial judge stated during the February 10 hearing that he would hold the Endo Defendants in default and that their former counsel 'might be going to jail with or without their toothbrush' 'if they had ... show[n] up' at the hearing. Following the February 10 hearing, the trial judge gave an

interview to a Law360.com reporter, and the interview formed the basis for an article that appeared on the website on February 14, 2022. Per the article, the trial judge is quoted as saying, among other things, that the alleged discovery violations by the Endo Defendants were 'the worst case of document hiding that I've ever seen. It was like a plot out of a John Grisham movie, except that it was even worse than what he could dream up.' Subsequently, on February 15, 2022, the trial judge posted on his personal Facebook page about the apparent lack of local media coverage in this case, stating, 'Why is it that national news outlets are contacting my office about a case I preside over and the local news is not interested.' Screenshots of the trial judge's Facebook page reveal that the page appears to be devoted in part to a re-election effort given a 'Re-Elect' picture banner next to his name.

"In addition to the general comment regarding the apparent lack of local media coverage of this case, the trial judge's Facebook activity evidenced several other communications by the judge relative to his Facebook post and the case. After one commenter stated that 'You're not trying to ban drunken bridesmaids on peddle carts,' the trial judge responded, '[N]ope. Opioids.' The commenter then followed up by stating, 'I don't know if you're going to get the help or platform you need from those with power/deep pockets. Many of Tennessee's powerful have ties to pharmaceuticals.' The trial judge specifically 'liked' this comment.

"When another commenter inquired into whether the trial judge could say why the case was newsworthy, the judge responded, 'Is a $1.2 Billion opioid case. Our area has been rocked with that drug for decades. Lots of interesting and new developments about the manufacturers in this case.' Other commenters added a number of statements opining on who should be held accountable, following which one person commented, 'We do not have a serious local news reporting outfit around here.... The Tennessean is a left leaning rag so that leaves the internet to provide people the local "news."' The trial judge 'liked' this post and responded that '[t]his is an earth shattering case, especially for our community. Fake news is not always what they publish, but what they choose not too also.'

"The Endo Defendants took issue with the above communications and the trial judge's participation in the Law360.com article, among other things, and accordingly requested that the trial judge recuse himself from the case. Notably, prior to ruling on the request for recusal, the trial judge signed an order ruling on the sanctions matter that had been the subject of the February 10 hearing. The trial judge then signed an order denying the Endo Defendants' request for recusal. The order denying the Endo Defendants' motion to disqualify actually incorporated by reference the order on sanctions.

"The present appeal ensued when the Endo Defendants filed a petition for recusal appeal in this Court. Within their petition, the Endo Defendants stated that the trial judge's 'order [denying recusal], when combined with his previous expressions of apparent bias, was so egregious that it prompted an additional motion for disqualification by several non-Endo defendants.' Upon receiving the Endo Defendants' petition in connection with this appeal, we entered an order that stayed the trial court proceedings and directed that the other parties in this case file answers to the petition. *See* Tenn. Sup. Ct. R. 10B, § 2.04 (providing that 'the appellate court may grant a stay on motion of a party or on the court's own initiative, pending the appellate court's determination of the appeal'). . . ."

"Although the Plaintiffs oppose the Endo Defendants' recusal request on substantive grounds, they also take issue with the Endo Defendants' failure to affirmatively state in their recusal motion that

'it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.' Tenn. Sup. Ct. R. 10B, § 1.01. No doubt, the omission of such a statement has been deemed in some cases to result in a waiver of recusal issues on appeal, particularly when paired with other defects in connection with Rule 10B. *See, e.g.*, *Hobbs Purnell Oil Co., Inc. v. Butler*, No. M2016-00289-COA-R3-CV, 2017 WL 121537, at *14–15 (Tenn. Ct. App. Jan. 12, 2017). Nevertheless, we have also proceeded to consider appeals on their merits in certain circumstances despite the absence of the required affirmative statement from Rule 10B. *See, e.g., Dougherty v. Dougherty*, No. W2020-00284-COA-T10B-CV, 2020 WL 1189096, at *1 n.1 (Tenn. Ct. App. Mar. 12, 2020) (explaining that the trial judge had noted the absence of the required statement but proceeding with the appeal just 'as the Trial Court decided the motion on its merits').

"Here, we are of the opinion that proceeding to consider the merits of the recusal issue is appropriate. First, we observe that no issue appears to have been raised in the trial court about the Rule 10B affirmative statement requirement. Indeed, the response submitted by the Plaintiffs in the trial court contained argument about the merits of the disqualification request, but it did not take umbrage at the fact that the Endo Defendants did not include the affirmative statement from Rule 10B in their trial court submission."

"Second, and more importantly, there does not appear to us to be any attempt at harassment or abuse of the judicial system in connection with the Endo Defendants' request for recusal under the facts of this case. To this end, we observe that the Endo Defendants' trial court filing reflected forethought and an attempt to predicate the trial judge's disqualification on relevant legal principles. . . . Although without question the Endo Defendants failed to strictly comply with the dictates of Rule 10B, we certainly agree with them that their motion was animated by a proper purpose, a point our merits discussion below will make clear. Therefore, given all of the above, including the fact that no objection was raised by the Plaintiffs relative to the affirmative statement issue in the trial court, we proceed to address the merits of the matter before us.

"As indicated earlier in this Opinion, preserving the public's confidence in the judiciary requires much more than ensuring actual impartiality; the *perception* of impartiality is also important. *See Hawthorne*, 2020 WL 7395918, at *2. Indeed, 'the appearance of bias is as injurious to the integrity of the judicial system as actual bias.' *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 565 (Tenn. 2001). Thus, if a judge's impartiality might reasonably be questioned, the motion to recuse should be granted. *Id.* In this case, it is clear to us that a reasonable basis for questioning the trial judge's impartiality exists. Particularly noteworthy here in our view is the trial judge's engagement on Facebook concerning this litigation, activity that occurred after the trial judge had given the aforementioned interview to Law360.com concerning the case. In relevant part, we specifically highlight the following points from the trial judge's Facebook account which we have previously referenced:

> 1. When one commenter stated that 'You're not trying to ban drunken bridesmaids on peddle carts,' the trial judge responded, '[N]ope. Opioids.'
> 2. The commenter then followed up by stating, 'I don't know if you're going to get the help or platform you need from those with power/deep pockets. Many of Tennessee's powerful have ties to pharmaceuticals,' and the trial judge specifically 'liked' this comment.

"The above Facebook activity can reasonably be construed to suggest that the trial judge has a specific agenda that is antagonistic to the interests of those in the pharmaceutical industry. Indeed, although the Plaintiffs protest the significance of the first response highlighted above by pointing

to prior comments by the trial judge that are more nuanced and by accusing the Endo Defendants of 'cherry picking' and 'decontextualizing' quotes, the trial judge's post clearly appears to signal support for banning opioids on its face. Then, relative to the follow-up comment expressing skepticism as to whether the judge's efforts in this regard could be frustrated because of the ties 'Tennessee's powerful' have 'to pharmaceuticals,' the trial judge signaled apparent agreement when he 'liked' the comment. In our view, this activity by the trial judge positions himself publicly as an interested community advocate and voice for change in the larger societal controversy over opioids, not an impartial adjudicator presiding over litigation. This perception is enhanced when considered alongside the trial judge's ready participation in the Law360.com article and apparent desire, as expressed on his Facebook page, for more local media coverage. The trial judge appears to us to be motivated to garner interest in this case and draw attention to his stated opposition to opioids within a community that he noted had been 'rocked with that drug.' Regardless of the specific motivation, however, it is clear here to us that the trial judge's comments and social media activity about this case are easily construable as indicating partiality against entities such as the Endo Defendants. For this reason, and to promote confidence in our judiciary, we conclude that the trial judge erred in refusing to recuse himself from the case. We therefore reverse the trial court's order denying the Endo Defendants' motion for recusal and remand the case to the Presiding Judge of the Thirteenth Judicial District for transfer to a different judge.

"In connection with our decision in this matter, we note again that the trial judge signed an order on the sanctions matter against the Endo Defendants prior to adjudicating the pending motion for recusal and did so without finding good cause to do so. *See* Tenn. Sup. Ct. R. 10B, § 1.02 ('While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.'). In this circumstance and in light of our conclusion that the trial judge should have recused himself, we hold that the order on sanctions against the Endo Defendants, which had been incorporated into the order on recusal, should be vacated. *See State v. Coleman*, No. M2017-00264-CCA-R3-CD, 2018 WL 1684365, at *9 (Tenn. Crim. App. Apr. 6, 2018) (cautioning against intertwining rulings on recusal and substantive issues and noting that '[w]hen a trial court ignores a pending motion to recuse and enters further orders in a case without making a finding of good cause as dictated by Rule 10B section 1.02, the orders entered during the pendency of the motion to recuse may be vacated on appeal'); *Carney v. Santander Consumer USA*, No. M2010-01401-COA-R3-CV, 2015 WL 3407256, at *1, 8 (Tenn. Ct. App. May 28, 2015) (affirming denial of motion for recusal but nonetheless vacating order entered while recusal motion was pending)."

B. Order of Suspension

In re Hinson, Board of Judicial Conduct (Sept 7, 2021).

"This matter is before the Board of Judicial Conduct ('Board') upon a judicial ethics complaint filed by Cheryl Smith on July 16, 2021, against Judge Michael E. Hinson. Judge Hinson has served as a General Sessions Court Judge in Lewis County, Tennessee, since 2014. At all times relevant herein, Judge Hinson was subject to the provisions of Tenn. Sup. Ct. R. 10, the Code of Judicial Conduct. As such, Judge Hinson is subject to judicial discipline by the Board pursuant to Tenn. Code Ann. § 17-5-102(a)(l).

"On June 4, 2021, Judge Hinson heard an order of protection matter in which a wife was seeking an order of protection against her husband. Both parties and their attorneys were present in court.

"At the conclusion of the hearing, Judge Hinson explained to the parties that the evidence was insufficient to issue the order and that the issues raised in their filings would be addressed by the court handling their divorce. In a reference to the parties' divorce and child custody related issues, Judge Hinson stated that '[Lewis County Circuit Court Judge Michael E.] Spitzer would wade through the bullshit.' Multiple people in the courtroom heard Judge Hinson make this comment.

"In another case on his June 4, 2021, docket, Judge Hinson stated to the parties that they were putting their child custody dispute 'in the hands of a guy who wears a costume' to work, a reference to his judicial robe. Multiple people in the courtroom heard this comment as well.

"On June 22, 2021, an investigative panel of the Board composed of Judge Camille R. McMullen, Terica N. Smith, Esq., and Judge John W. Whitworth, authorized a full investigation of this matter pursuant to Tenn. Code Ann. § 17-5- 303(c)(3).

"In a notice dated June 24, 2021, Judge Hinson was advised that the conduct at issue implicated the following: Tenn. Code Ann. § 17-5-301G)(l)(C) (a judicial offense includes a violation of the Code of Judicial Conduct); Tenn. Code Ann. § 17-5-301G)(l)(H) (a judicial offense includes conduct calculated to bring the judiciary into public disrepute or 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); and 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).

"In a response dated July 9, 2021, Judge Hinson acknowledged making the comments identified above. He explained that he did not intend to make the comments 'in a derogatory manner,' but rather as a way of encouraging the parties to resolve their differences without judicial intervention in order to achieve the best outcome for themselves and their children.

"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. Participants in a legal proceeding hearing comments such as those involved here can reasonably perceive that the judge is disparaging their circumstances, disrespecting the legal process, and denigrating the judge's role as a jurist. Simply stated, using crude language from the bench does not promote public confidence in the judiciary.

"Moreover, it is essential that all persons appearing in Tennessee courts have confidence that the judge will dispense justice fairly and respectfully and otherwise conduct judicial business in a professional manner. 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. Telling a litigant seeking an order of protection that her 'bullshit' would be considered by another court does not inspire such confidence.

"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(2). This obligation includes the specific responsibility of being dignified and courteous with those with whom the judge deals in an official capacity. Tenn. Sup. Ct. R. 10, RJC 2.8(B). The statements involved here, made in open court, are neither dignified nor courteous, regardless of the intent behind them.

"Finally, while Judge Hinson may not have intended to be disrespectful or demeaning to any litigant or to the legal process, those who heard his comments have no way of determining his intent apart from the words used. Once such comments are made, the damage is done.

"In short, as the occupant of an honored position of public trust, a judge's role includes cultivating respect for the judicial process and its participants in both words and deeds. The comments at issue did just the opposite.

"In light of the foregoing, the investigative panel, on August 5, 2021, found reasonable cause to believe that Judge Hinson violated the following and authorized disciplinary counsel to file formal charges pursuant to Tenn. Code Ann. §17-5-303(e)(2)(A), if necessary:

- Tenn. Code Ann. § 17-5-301G)(l)(C) (a judicial offense includes a violation of the Code of Judicial Conduct);
- Tenn. Code Ann. § 17-5-301G)(l)(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); and
- 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).

"The investigative panel, pursuant to Tenn. Code Ann. § 17-5- 303(e)(2)(B)(i)(d), approved the suspension of Judge Hinson for a period of thirty (30) days. *See* Tenn. Code Ann. § 17-5-301(f)(l)(A) (authorizing a suspension without the impairment of compensation for such period as the Board determines). *See also* Tenn. Code Ann. § 17-5-303(e)(2)(B)(i)(d). The panel further determined that Judge Hinson should complete at his own expense, either in person or online, a judicial ethics program from the National Center of State Courts addressing demeanor from the bench and provide Disciplinary Counsel with a certificate of completion.

"Judge Hinson, who has been cooperative throughout this matter, agreed to accept the proposed sanction in lieu of the filing of formal charges.

"IT IS, THEREFORE, ORDERED that Judge Hinson is suspended for a term of thirty (30) days effective October 2, 2021, through and including October 31, 2021. During this term of suspension, Judge Hinson is prohibited from exercising any judicial power or authority, including, but not limited to, holding court, issuing subpoenas, setting or resetting cases, issuing warrants, setting or changing bonds, administrating oaths, or issuing oral or written rulings in any matter.

"IT IS FURTHER ORDERED that before resuming his judicial duties following his suspension, Judge Hinson will complete at his own expense, either in person or online, a judicial ethics program from the National Center of State Courts addressing demeanor from the bench and provide Disciplinary Counsel with a certificate of completion.

"IT IS FURTHER ORDERED that Judge Hinson shall refrain from making undignified, discourteous, or other inappropriate comments that demean a litigant or the solemnity of any court proceeding."

In re Humphrey, Board of Judicial Conduct (May 25, 2022).

"This matter is before the Board of Judicial Conduct ('Board') upon an investigation involving Judge Dennis W. Humphrey who has served as a General Sessions Court Judge in Roane County, Tennessee, since 1998. At all times relevant herein, Judge Humphrey was subject to the provisions of Tenn. Sup. Ct. R. 10, the Code of Judicial Conduct. As such, Judge Humphrey is subject to judicial discipline by the Board pursuant to Tenn. Code Ann. § 17-5-102(a)(l).

"On October 20, 2021, Judge Humphrey was involved in a motor vehicle accident with another car in Roane County, Tennessee. He received citations for failing to use due care in violation of Tenn. Code Ann. § 55-8-136 and for having an open container of alcohol in his vehicle in violation of Tenn. Code Ann. § 55-10-416. On November 12, 2021, Judge Humphrey pled guilty to both offenses and paid the associated fines.

"On February 24, 2022, Judge Humphrey was charged with driving under the influence ('DUI') stemming from the October 20, 2021, accident. He pled guilty to that offense on May 11, 2022.

"Following the October 20, 2021, accident, Judge Humphrey contacted the Administrative Office of the Courts and self-reported the accident. He also contacted the Tennessee Lawyers Assistance Program ('TLAP') and checked himself into Cornerstone of Recovery ('Cornerstone') in Knox County. Judge Humphrey was admitted to Cornerstone on October 26, 2021, where he underwent nine weeks of in-patient treatment for alcoholism.

"Judge Humphrey completed Cornerstone's in-patient program and is currently being monitored by TLAP, which includes attending AA meetings multiple times a week and random alcohol screenings for five years pursuant to a Substance Use Disorder Recovery Monitoring Agreement entered into by Judge Humphrey and TLAP.

"On March 17, 2022, an investigative panel of the Board composed of William C. Koch, Jr., Benjamin S. Purser, Jr., and Daniel Springer, authorized a full investigation of this matter pursuant to Tenn. Code Ann. § 17-5-303(c)(3).

"In a notice dated March 22, 2022, Judge Humphrey was advised that his conduct implicated the following: Tenn. Code Ann. §17-5-301G)(l)(C) (a judicial offense includes a violation of the Code of Judicial Conduct); Tenn. Code Ann. § 17-5- 301G)(l)(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 independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.'); Tenn. Sup. Ct. R. 10, RJC 3.1(A) (prohibiting personal activities that would interfere with the proper and timely performance of the judge's duties); and Tenn. Sup. Ct. R. 10, RJC 3.l(C) (prohibiting personal activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality).

"In a response dated April 6, 2022, Judge Humphrey admitted to the events described above.

"Judges are required to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, must avoid impropriety and the appearance of impropriety, and must comply with the law. Tenn. Sup. Ct. R. 10, RJC 1.1 and 1.2. Judges are also expected to maintain the highest standards of conduct and dignity of judicial office in their professional and personal lives. Preamble [2], Tenn. Sup. Ct. R. 10.

"When any judge, but especially a judge who adjudicates substance abuse or chemical dependency matters such as Judge Humphrey, is convicted of DUI or related offenses, respect for the judiciary and the administration of justice suffers. Clearly, the public is more likely to respect and have confidence in the integrity and quality of justice administered by a judge if the judge has complied with the same standards of conduct he or she is responsible for applying to others. A judge convicted of DUI, or any other crime, does not inspire such confidence.

"As the occupant of an honored position of public trust, a judge's role includes cultivating respect for the law and the administration of justice in both words and deeds. The conduct at issue here did just the opposite.

"In light of the foregoing, the investigative panel, on May 11, 2022, pursuant to Tenn. Code Ann. § 17-5-303(e)(2)(B)(i)(d), approved the suspension of Judge Humphrey for a period of thirty days. *See* Tenn. Code Ann. § 17-5-301(f)(l)(A) and Tenn. Code Ann. § 17-5-303(e)(2)(B)(i)(d). The panel further determined that Judge Humphrey should be monitored by and adhere to the recommendations of TLAP for a period of five years consistent with his Substance Use Disorder Recovery Monitoring Agreement with TLAP.

"Judge Humphrey, who has been transparent and cooperative throughout this matter and has accepted full responsibility for his actions, agreed to accept the sanctions described herein in lieu of the filing of formal disciplinary charges.

"IT IS, THEREFORE, ORDERED that Judge Humphrey is suspended for a term of thirty (30) days effective July 1 , 2022, through July 15, 2022, and September 1, 2022, through September 15, 2022. During this term of suspension, Judge Humphrey is prohibited from exercising any judicial power or authority, including, but not limited to, holding court, issuing subpoenas, setting or resetting cases, issuing warrants, setting or changing bonds, administrating oaths, or issuing oral or written rulings in any matter.

"IT IS FURTHER ORDERED that Judge Humphrey shall be monitored by and adhere to the recommendations of TLAP for a period of five years consistent with his Substance Use Disorder Recovery Monitoring Agreement with TLAP."

In re Young, Board of Judicial Conduct (July 26, 2022).

"This matter is before the Board of Judicial Conduct ('Board') upon the filing of three complaints against Judge Jonathan Lee Young. Judge Young has served as a Circuit Court Judge in the Thirteenth Judicial District, which includes the counties of Clay, Cumberland, DeKalb, Overton, Pickett, Putnam, and White, since 2014. At all times relevant herein, Judge Young was subject to the provisions of Tennessee Supreme Court Rule 10, the Code of Judicial Conduct. As such, Judge Young is subject to judicial discipline by the Board pursuant to Tenn. Code Ann. § 17-5-102(a)(1).

"On April 27, 2022, attorney Ronald Range, Jr., on behalf of Endo Pharmaceuticals, Inc., and Endo Health Solutions, Inc., filed a complaint against Judge Young contending that his extra-judicial conduct, such as an interview with a national media outlet, Law360.com, along with various social media posts and other activities while *Clay County, et al. v. Purdue Pharma L.P.*, et al. was pending in his court, violated the Code of Judicial Conduct and necessitated his removal from the case. The complaint correctly notes that the Court of Appeals found that by engaging in the extra-judicial conduct, Judge Young positioned himself 'publicly as an interested community advocate and voice for change in the larger societal controversy over opioids' rather than 'an impartial adjudicator presiding over litigation.' *Clay County*, No. E2022-00349-COA-T10B-CV, 2022 WL 1161056, at *4 (Tenn. Ct. App. Apr. 20, 2022). Accordingly, the court found that Judge Young's removal from the case, a major opioid case involving numerous parties and more than a billion dollars, was necessary to protect public confidence in the judiciary.

"The complaint further asserts that, rather than heeding the Court of Appeal's conclusions regarding his extra-judicial activities, Judge Young continued his public media campaign by conducting additional interviews about the pending case with local and national publications and authoring additional social media posts. According to the complaint, this continued course of conduct risked tainting the jury pool.

"In addition, the complaint contends that Judge Young had an *ex parte* communication about the case as evidenced by his comment to a local newspaper on April 20, 2022, that '[t]he plaintiffs tell me they're going to appeal to the Supreme Court, so this is obviously not the final decision on this.' No appeal was filed, and the decision to remove Judge Young from the case was, in fact, 'the final decision on this.'

"In addition to ordering Judge Young's removal from the case, the Court of Appeals vacated his February 28, 2022, order granting sanctions, including a default judgment and setting the case for trial on the issue of damages, because the sanctions order was entered while a recusal motion was pending. As determined by the Court of Appeals, the entry of this order by Judge Young violated Tennessee Supreme Court Rule 10B, § 1.02.

"In a letter dated May 16, 2022, Judge Young submitted an initial response to the complaint as part of the Board's preliminary investigation. Rather than take responsibility for the extra-judicial conduct that led to his removal from the case and the disruption to the orderly administration of justice caused by his conduct, Judge Young blamed the parties and their lawyers and attempted to portray himself as a victim. He also asserted, without citing any legal authority, that as a judge he essentially enjoyed a constitutional right to say and do as he pleased in the media and on social media platforms concerning cases assigned to his court. [Footnote]

"[Footnote: We note parenthetically that any reasonable jurist would know that using a case pending before him or her for their own extra-judicial purposes on social media or elsewhere runs a significant risk of undermining the administration of justice, public confidence in the individual judge, and violates the Code of Judicial Conduct.]

"On June 14, 2022, an investigative panel of the Board found probable cause and authorized a full investigation pursuant to Tenn. Code Ann. § 17-5- 303(c)(3).

"In a notice dated June 21, 2022, Judge Young was advised that his conduct implicated the following: Tenn. Code Ann. § 17-5-301G)(1)(C) (a judicial offense includes a violation of the

Code of Judicial Conduct); Tenn. Code Ann. § 17-5-301(E) (a judicial offense includes a persistent pattern of intemperate, irresponsible, or injudicious conduct); Tenn. Code Ann. § 17-5-301(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 independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.'); Tenn. Sup. Ct. R. 10, RJC 2.4(8) ('A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's conduct or judgment.'); Tenn. Sup. Ct. R. 10, RJC 2.9(A) (a judge shall not permit or consider *ex parte* communications made to the judge outside the presence of the parties or their attorneys concerning a pending or impending matter); Tenn. Sup. Ct. R. 10, RJC 2.10(A) ('A judge shall not make any public statements that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.'); Tenn. Sup. Ct. R. I 0, RJC 2.11(A) ('A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.'); and Tenn. Sup. Ct. R. 10, RJC 4.1(A)(12) ('[A] judge ... shall not ... make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.').

"The notice to Judge Young dated June 21, 2022, further advised Judge Young that he was required, pursuant to Tenn. Code Ann. § 17-5-303(d)(3), to submit a written response within fourteen days of receiving the notice. Judge Young failed to respond.

"Chelsey Hoover and Michael Hoover Complaints

"On June 7, 2022, Chelsey Hoover and Michael Hoover filed separate complaints, supported by affidavits, asserting that Judge Young initiated communications with Mrs. Hoover ranging from flirtatious to sexual before, during, and after she and Mr. Hoover were parties in an adoption case in Judge Young's court filed on March 29, 2022.

"According to Mrs. Hoover, Judge Young requested explicit pictures from her and also met with her on multiple occasions outside of court, including a hotel in Cookeville on or about April 28, 2022, where they had sex. Judge Young suggested to Mrs. Hoover that she use an app on her phone that would automatically delete their electronic communications.

"When Judge Young met Mrs. Hoover at the hotel on or about April 28, 2022, Mrs. Hoover presented him with legal documents in an unrelated custody matter she had pending in another court in his judicial district. Judge Young provided Mrs. Hoover advice about her custody case, including how to get the judge handling the case disqualified from hearing the matter. He also advised her about how to replace her attorney.

"Mr. Hoover, a party to the adoption matter before Judge Young, alleges that Judge Young failed to disclose any of the above information to him before or during the adoption matter in his court. When he learned that Judge Young had been soliciting intimate pictures from his wife and seeing her outside of court, including engaging in a physical relationship, Mr. Hoover, who felt betrayed by the court, confronted Judge Young.

"Despite the circumstances described above, Judge Young failed to recuse himself from the Hoovers' adoption case. Instead, he entered an order dated April 8, 2022, granting the adoption in which Mr. Hoover adopted one of Mrs. Hoover's children.

"Judge Young's conduct led to safety and security concerns for law enforcement officials and court employees. At one point, court staff were sent home, and an order was entered by the Presiding Judge of the district on May 27, 2022, closing Judge Young's court for that day.

"On June 9, 2022, an investigative panel of the Board found probable cause and authorized a full investigation pursuant to Tenn. Code Ann. § 17-5- 303(c)(3).

"In a notice dated June 14, 2022, Judge Young was advised that his conduct implicated 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. § 17-5-301(E) (a judicial offense includes a persistent pattern of intemperate, irresponsible, or injudicious conduct); Tenn. Code Ann. § 17-5-301(j)(1)(H) (a judicial offense includes any 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 independence, integrity, and impartiality of the judiciary, and shall 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.'); Tenn. Sup. Ct. R. 10, RJC 2.4(B) ('A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's conduct or judgment.'); Tenn. Sup. Ct. R. 10, RJC 2.11(A) ('A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.'); Tenn. Sup. Ct. R. 10, RJC 3.1(A) (prohibiting personal activities that will interfere with the proper performance of the judge's duties); Tenn. Sup. Ct. R. 10, RJC 3.1(C) (prohibiting personal activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality); Tenn. Sup. Ct. R. 10, RJC 3.1(D) (prohibiting personal activities that would appear to a reasonable person to be coercive); and Tenn. Sup. Ct. R. 10, RJC 3.10 ('A judge shall not practice law.').

"The June 14, 2022, notice to Judge Young advised him that he was required, pursuant to Tenn. Code Ann. § 17-5-303(d)(3), to submit a written response within fourteen days of receiving the notice. He failed to respond.

"Investigative Panel's Findings

"On July 22, 2022, an investigative panel of the Board composed of Chancellor Jeffrey M. Atherton, Judge G. Andrew Brigham, and attorney Robert W. Wilkinson, found reasonable cause to believe that Judge Young committed the misconduct described herein in both the Range and Hoover matters. Under normal circumstances, this finding would result in the filing of formal charges pursuant to Tenn. Code Ann. § 17-5-303(e)(2)(A).

"Although reasonable cause exists to believe that Judge Young committed the misconduct described above, Judge Young's term ends August 31, 2022, and he will no longer be subject to the Board's jurisdiction after that date. The statutorily established disciplinary process cannot be completed by that time. As a result, this Order and all pertinent documents will be provided to the

Board of Professional Responsibility to determine, in its discretion, what further action may be appropriate after August 31, 2022.

"While the timing of these circumstances presents unavoidable jurisdictional constraints that necessarily limit how far the judicial disciplinary process can proceed with the Board, Judge Young received a public reprimand on October 5, 2020, for having inappropriate social media communications with multiple women, including a legal professional in his district and a litigant who formerly had a child custody matter in his court. These communications included content ranging from flirtatious to overtly sexual. As a part of that reprimand, an agreed upon 30-day suspension was 'held in abeyance provided there are no meritorious complaints involving prospective ethical misconduct *of any type* for the remainder of [Judge Young's] current term' (emphasis added).

"In the *Range* matter, the investigative panel has before it Judge Young's media interviews and social media posts, along with a judicial finding that his extra-judicial activities necessitated his removal from the case in order to promote public confidence in the judiciary. This finding by the Court of Appeals came a mere 16 months after Judge Young was publicly reprimanded for his social media activities.

"In the *Hoover* matter, the investigative panel has before it the affidavits of the parties, the hotel receipt, and text messages between Judge Young and Mrs. Hoover that corroborate the allegations in the Hoovers' complaints.

"In addition, as noted above, Judge Young has failed to respond to the notices of a full investigation which, by itself, violates both the law and the Code of Judicial Conduct. See Tenn. Sup. Ct. R. 10, RJC 1.1 ('A judge shall comply with the law[.]').

"In light of the foregoing and in the interests of the administration of justice and public confidence in the judiciary, the investigative panel finds it appropriate to impose the thirty-day suspension for 'prospective ethical misconduct of any type' as provided in the Reprimand of October 5, 2020.

"In addition, the investigative panel finds and concludes that the contents of this Order meet and exceed the fair and adequate notice requirements of Tenn. Code Ann. § 17-5-306(b) and that the entry of this Order shall be issued in lieu of the issuance of formal charges. This Order shall not be interpreted as obviating or suspending the obligations of Judge Young as provided by Tenn. Code Ann. § 17-5-306(c).

"IT IS, THEREFORE, ORDERED that Judge Young is suspended for a term of thirty (30) days effective August 2, 2022, through August 31, 2022. During this term of suspension, Judge Young is prohibited from exercising any judicial power or authority, including, but not limited to, holding court, issuing subpoenas, setting or resetting cases, issuing warrants, setting or changing bonds, administrating oaths, or issuing oral or written rulings in any matter."

C. Letters of Public Reprimand

In re Crozier, Board of Judicial Conduct (Jan. 10, 2022).

"This letter shall serve as a public reprimand pursuant to Tenn. Code. Ann. § 17-5-303(e)(2)(B)(i)(c).

"On March 19 and 20, 2019, you conducted a bench trial in a termination of parental rights and adoption case, *Elizabeth Ann Baker Grace v. Jonathan Garrett Grace*. More than ten months later on February 5, 2020, you issued your decision. In a letter to Disciplinary Counsel dated October 19, 2021, you indicated that the case was 'a fairly easy call' and that the outcome was not 'close.' You further indicated that you 'knew what [your] opinion was going to be at the conclusion of the hearing.' The release of your ruling was nonetheless delayed well beyond the time permitted to issue a decision.

"In an unrelated divorce and custody matter in your court, *Sabrina Gear v. Chace Gear*, a party filed a motion seeking permission for an interlocutory appeal along with a 'motion for modification of ex parte order of protection.' The motions were heard on June 29, 2021. No orders were entered ruling on either motion . On August 3, 2021, the moving party filed a motion asking you to rule on the previously filed motions. No orders were forthcoming. The moving party sent follow-up communications to the clerk's office to no avail. In a letter to Disciplinary Counsel dated ecember 6, 2021, you explained that you orally denied the motions and requested that an attorney prepare the orders. However, no orders disposing of the motions were filed.

"The ethics rules require that judges 'perform judicial and administrative duties competently, promptly and diligently.' Tenn. Sup. Ct. R. 10, RJC 2.5(A). This directive includes the specific responsibility of promptly disposing of cases. *Id*. cmt. 5. Specifically, in non-jury cases like the present matters, judges are expected to render a decision and enter a judgment within sixty days of when the case was heard. Tenn. Code Ann. § 20-9-506. A case may not be held under advisement in excess of sixty days 'absent the most compelling of reasons.' Tenn. Sup. Ct. R. 11, § III(d). Similarly, a motion may not be held under advisement in excess of thirty days 'absent the most compelling of reasons.' *Id*. Failing to make timely rulings also implicates Tenn. Sup. Ct. R. 10, RJC 1.1 (a judge shall comply with the law) and RJC 1.2 (a judge shall promote confidence in the judiciary). In both cases described above, and in the absence of the most compelling of reasons , you failed to enter orders within the required timeframes.

"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 have taken full responsibility and have offered no excuses. In addition, you have fully cooperated with Disciplinary Counsel and have no prior record of disciplinary action since becoming a judge.

"The Board trusts that the public reprimand imposed today will result in an elevated consciousness about how to approach similar situations going forward, as undue delays in resolving cases prevents the parties from moving on from their litigation and undermines public confidence in the proper administration of justice."

In re Webb, Board of Judicial Conduct (Nov. 5, 2021).

"This letter shal1 serve as a public reprimand pursuant to Tenn. Code Ann. § l7-5-303(e)(2)(B)(i)(c).

"1. Social media activities: You have used social media to provide the public with a 'legal tip of the day.' In one such post on Facebook dated June 18, 2021, you advise those considering committing theft that '[w]hen stealing stealth is key. You want to blend in with your surroundings.' To help make your point, you provide an example: 'You and your 5' 10 sister walk in [Walmart] with green hair and green toenails and green flip flops that smack the back of your feet with every

step you make and you don't blend in and you are caught with three steaks shoved into your pants. You forgot to be stealth.'

"In another Facebook post, dated August 3, 2021, you state, '[r]emember people, the goal of criminal and bad behavior is to get away with it.' You provide an example of two women arguing outside the courthouse when one 'scream[s] out "b*tc* what's hood!"' You note that '[s]creaming and cursing and fighting in front of police officers 10 out of 10 times is detrimental to ones [sic] freedom.'

"In yet another social media post, dated August 5, 2020, you wrote that it is 'downright damn humiliating when [police are] pulling crack from your crack! Find someplace else to hide your stash.'

"In a response dated October 4, 2021, you explain that your social media posts are 'designed to get a laugh and to make people think about life choices.' However, regardless of motivation, it is neither dignified nor appropriate for a judge, especially one who hears criminal cases, to be providing legal advice such as '[w]hen stealing stealth is key' or urging the public to be mindful that 'the goal of criminal and bad behavior is to get away with it.'

"Judges are expected to maintain the highest standards of conduct and dignity of judicial office at all times. Preamble, Tenn. Sup. Ct. R. 10; *see also* Tenn. Sup. Ct. R. 10, RJC 1.2 (a judge shall act at all times in a manner that promotes public confidence in the integrity of the judiciary and avoid impropriety and the appearance of impropriety); Tenn. Sup. Ct. R. 10, RJC 3.1(C) (prohibiting personal activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality). The social media posts at issue do not meet the standards of conduct expected of those privileged to hold judicial office.

"Moreover, the Tennessee Supreme Court has cautioned that '[l]awyers who choose to post on social media must realize they are handling live ammunition[.]' *In Re Sitton*, 618 S.W.3d 288, 304 (Tenn. 2021). The same is true for judges. Judges choosing to participate in inherently public platforms must exercise caution and carefully evaluate whether their social media communications foster public confidence in the integrity, independence, and impartiality of the judiciary. *See State v. Madden*, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *8 (Tenn. Crim. App. Mar. 11, 2014) (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'). Your social media posts do not reflect the requisite caution and reflection.

"2. Suspension of your law license: The Tennessee Supreme Court entered two orders suspending your law license for failing to comply with mandatory continuing legal education requirements. *See* Tenn. Sup. Ct. R. 21. The first order, filed on August 18, 2020, suspended your license for failing to meet those requirements in 2019. The second order, filed on August 17, 2021, suspended your license for failing to meet the requirements in 2020. Thus, your license has been suspended twice for the same reason, albeit briefly each time. The most recent suspension was the subject of an article published in *The Chattanooga Times Free Press* on August 19, 2021. Thereafter, you posted on Facebook: 'Well damn! Give me a black hat and a black horse and call me a desperado, I feel like I was in [sic] just busted.'

"These circumstances are troubling for several reasons. First, judges are expected to follow the law and uphold the integrity and dignity of the judiciary. 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 integrity of the judiciary and avoid impropriety and the appearance of impropriety). Having one's professional license suspended for failing to abide by unambiguous requirements runs contrary to these standards.

"Second, the suspensions of your license occurred despite notifications by the Commission on Continuing Legal Education of both the deficiency and that the failure to take corrective action by a specified date would result in a suspension.

"Third, the suspensions of your license resulted in other judges having to cover your dockets. Thus, your failure to comply with Tenn. Sup. Ct. R. 21 resulted not only in an inability to discharge your own duties but also led to colleagues having to make last minute arrangements to handle your cases. *See* Tenn. Code Ann. § 17-5-301(j)(l)(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 2.5(A) (a judge shall perform judicial and administrative duties competently, promptly, and diligently).

"Finally, it is incumbent upon judges to comply with all requirements necessary to maintain an active law license in order to properly conduct judicial business. *See* Tenn. Code Ann. § 17-5-301G)(l)(D) (a judicial offense includes a violation of the Tennessee Rules of Professional Conduct as applicable to judges). When a member of the judiciary fails to properly maintain his or her law license, it reflects poorly on the individual judge and the judiciary as a whole.

"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 have taken full responsibility for your conduct and have offered no excuses. In addition, you have fully cooperated with Disciplinary Counsel and have no prior record of disciplinary action since becoming a judge.

"The Board trusts that the reprimand imposed today will result in an elevated consciousness about how to approach these and similar situations going forward."

D. Personal Solicitation of Campaign Contributions by Judicial Candidates

Chapter 668, Public Acts 2022, codified at Tenn. Code Ann. § 2-10-313 eff. Mar. 18, 2022.

"Notwithstanding any law to the contrary, a judicial candidate may personally solicit and accept campaign contributions."

E. Judicial Ethics Opinions

Judicial Ethics Committee Advisory Opinion 22-01 (Mar. 29, 2022).

"The Judicial Ethics Committee has been asked for an opinion concerning whether a judge or judicial candidate is permitted under the Code of Judicial Conduct (the 'Code') to personally solicit and accept campaign contributions now that the Governor has signed SB 2010/HB 1708 into law.

"Yes. The judge or judicial candidate may do so. Two things are directly and specifically responsive to the question submitted: (1) SB 2010/HB 1708 (the 'statute') which amends Title 2,

Chapter 10, Part 3 by stating, 'Notwithstanding any law to the contrary, a judicial candidate [Footnote] may personally solicit and accept campaign contributions' and (2) Rule 4.1(A)(8) of the Code of Judicial Conduct (the 'Code'), which states that '*Except as permitted by law* or by RJCs 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not: personally solicit or accept campaign contributions other than through a campaign committee authorized by RJ C 4.4' (emphasis added).

"[Footnote: While the statute only uses the term judicial candidate, based on the definition of candidate in Tenn. Code Ann. § 2-10-102(3), the statute applies to both sitting judges running for re-election, as well as any individual seeking election to a judicial office, as does the Code. See Tenn. Code Ann. § 2-10-102(3) ("'Candidate" means an individual who has made a formal announcement of candidacy or who is qualified under the law of this state to seek nomination for election or elections to public office . . .') and RJC Terminology ("'Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment.')]

"While the statute and the wording of Rule 4.1(A)(8) now allows a judge or judicial candidate to personally solicit and receive campaign contributions, we note that other sections of the Code may be implicated by the solicitation or receipt of campaign contributions. Consequently, we recommend that judges and judicial candidates be mindful of the Code as a whole when deciding whether or how he or she should personally solicit and accept contributions.

"As noted above, the legislature passed and the Governor signed into law an amendment to Title 2, Chapter 10, Part 3, which now permits judges and judicial candidates to personally solicit campaign contributions. Prior to the passage of the statute, the Code, specifically RJC 4.1(A)(8) prohibited the personal solicitation and acceptance of campaign funds by a judge or judicial candidate. However, as noted, the Code did so with the caveat of '[e]xcept as permitted by law.' Thus, the passage of the statute removes the specific prohibition against personal solicitation and acceptance of campaign contributions found in RJC 4.l(A)(8).

"Still, we encourage judges and judicial candidates to be mindful of other sections of the Code that could be indirectly implicated by a judge or judicial candidate personally soliciting or accepting campaign contributions. The Preamble of the Code states:

> An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent 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.

"The Code also requires a judge to '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.' RJC 1.2. 'A judge shall not be swayed by partisan interests, public clamor or fear of criticism' and 'shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.' RJC 2.4. Further, 'a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned....' RJC 2.11.

"While not an exhaustive list, the foregoing Code sections may be indirectly implicated by the statute, and they provide a foundation for judges and judicial candidates to consider when determining whether or how to personally solicit or accept campaign contributions."

Judicial Ethics Committee Advisory Opinion 21-02 (Sept. 7, 2021).

"The committee has received the following questions concerning the interplay between Rules 4.1 and 4.2 of the Code of Judicial Conduct (the 'Code'), Tenn. Sup. Ct. R. 10, Canon 4:

"Question 1. May a judge or judicial candidate contribute to a political party, a specific candidate's campaign, or some other form of political organization?

"Answer 1. Yes. Although RJC 4.l(A)(4) generally prohibits a judge or judicial candidate from soliciting funds for, paying an assessment to, or making a contribution to a political organization or candidate, RJC 4.2(C)(3) provides a limited exception to this prohibition for judges or judicial candidates allowing a contribution to a political organization or candidate in an amount up to the limitations provided in Tenn. Code Ann. § 2-10-301 *et seq*.

"Question 2. May a judge or judicial candidate pay what amounts to an assessment to a political organization for the purpose of offsetting the costs of activities of that organization related to its endorsement of the judge or judicial candidate?

"Answer 2. No. RJC 4.l(A)(4) generally prohibits a judge or judicial candidate from paying an assessment to a political organization, and RJCs 4.2 and 4.3 contain no exception for judges or judicial candidates.

"Question 3. May a judge or judicial candidate pay what amounts to an assessment to a political organization in order to join the organization's balloting efforts, and may the judge or judicial candidate be included on a ballot with nonjudicial candidates?

"Answer 3. No. As with Question 2, RJC 4.l(A)(4) generally prohibits a judge or judicial candidate from paying an assessment to a political organization, and RJCs 4.2 and 4.3 contain no exception for judges or judicial candidates. RJC 4.l(A)(3) generally prohibits a judge or judicial candidate from publicly endorsing a candidate for any public office. RJC 4.2(C)(4) provides a limited exception to this prohibition allowing judges or judicial candidates to publicly endorse or oppose judicial candidates in partisan, nonpartisan, or retention elections at any time. No such exception is made for the endorsement of non-judicial candidates, however. Appearing on the ballot with a non-judicial candidate might be perceived as an endorsement of that candidate by the judge or judicial candidate."

Judicial Ethics Committee Advisory Opinion 21-03 (Oct. 4, 2021).

"The Judicial Ethics Committee has been asked for an opinion on whether a judge or judicial candidate can agree to be listed as a member of a host committee for a fundraiser for another judge or judicial candidate.

"No. While the Code of Judicial Conduct (the 'Code') allows judges and judicial candidates to publicly endorse or oppose judges or judicial candidates in a partisan, nonpartisan, or retention

election for any judicial office, *see* RJC 4.2(C)(4), the Code prohibits a judge or judicial candidate from soliciting funds for a political organization or a candidate for public office. RJC 4.l(A)(4).

"The question posed to the Committee concerns judges or judicial candidates involved in a partisan, nonpartisan, or retention election asking other judges or judicial candidates to be listed as a host for a fundraising event for the candidate. While, as noted above, the Code allows judges and judicial candidates to publicly endorse other judges and judicial candidates, the Code clearly prohibits judges or judicial candidates from soliciting funds for a political organization or candidate for public office. RJC 4.l(A)(4). Accordingly, when read as a whole, the Code's prohibition on soliciting funds precludes judges or judicial candidates from being listed as hosts for a fundraising event. Though the judge or judicial candidate may not be directly soliciting funds for a candidate, the inclusion on the list of hosts and supporters on a fundraising invitation is clearly an indirect solicitation of funds, and the Code makes no distinction between direct or indirect solicitations. Rather, the Code clearly states that a judge or judicial candidate 'shall not' solicit funds for a candidate for public office. RJC 4.l(A)(4). Therefore, even an indirect solicitation is prohibited, thus, making the inclusion as a host for a fundraiser also prohibited."

F. New Federal Law Enhancing Stock Disclosure Requirements for Federal Judges

Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (May 13, 2022).

The new law requires federal judicial officers, including district judges, bankruptcy judges, and magistrate judges, to file periodic transaction reports disclosing certain securities transactions.

The law requires federal judicial officers, bankruptcy judges, and magistrate judges to file reports within 45 days after a purchase, sale, or exchange that exceeds $1,000 in stocks, bonds, commodities futures, and other forms of securities.

The law also requires online publication of judicial financial disclosure reports. The law directs the Administrative Office of the U.S. Courts to establish a searchable internet database of judicial financial disclosure reports. The office must, within 90 days of the date by which a report must be filed, make the report available on the database in a searchable, sortable, and downloadable format.

The law does not require the immediate and unconditional availability of reports filed by a judicial officer or employee if the Judicial Conference finds that revealing personal and sensitive formation could endanger that individual or a family member of that individual.

TLI 2022 Ethics Last Hour

Sneaking Around:
Protecting Your License While Practicing Multijurisdictionally

These days, lawyers and clients work remotely, from home or elsewhere. (What's an office?)

Clients' legal needs constantly cross state boundaries. And we all seem to be able to be present pretty much anywhere, anytime. So it's time for a refresher on the geographical limits of our law licenses.

We'll take a 60-minute tour of how to stay (reasonably) safe while serving clients who need our help all over the place, without regard to those pesky state lines.

A few relevant cases

Birbrower, Montalbano, Condon & Frank v. Superior Ct., 17 Cal. 4th 119, 949 P.2d 1 (1998), *as modified* (Feb. 25, 1998).

In re Charges of Unprofessional Conduct in Panel File No. 39302, 884 N.W.2d 661 (Minn. 2016).

Green v. Bd. of Prof. Resp. of Supreme Ct. of Tennessee, 567 S.W.3d 700 (Tenn. 2019).

Tennessee Unauthorized Practice of Law ("UPL") Law

Tenn. Code Ann. § 23-3-103:

> No person shall engage in the *practice of law* or do *law business*, or both, … unless the person has been duly licensed and while the person's license is in full force and effect, nor shall any association or corporation engage in the practice of the law or do law business, or both.

Tenn. Code Ann. § 23-3-101:

> "Law business" means the advising or counseling for valuable consideration of any person as to any secular law, the drawing or the procuring of or assisting in the drawing for valuable consideration of any paper, document or instrument affecting or relating to secular rights, the doing of any act for valuable consideration in a representative capacity, obtaining or tending to secure for any person any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services;
>
> "Practice of law" means the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any

act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

Tennessee Multi-Jurisdictional Practice ("MJP") Rule

Tenn. Sup. Ct. R. 8, RPC 5.5
Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

(3) A lawyer providing legal services pursuant to paragraph (d)(1) is subject to registration pursuant to Tenn. Sup. Ct. R. 7, § 10.01, and may be subject to other requirements, including assessments for client protection funds and mandatory continuing legal education. Failure to register in a timely manner may preclude the lawyer from later seeking admission in this jurisdiction.

(e) A lawyer authorized to provide legal services in this jurisdiction pursuant to paragraph (d)(1) of this Rule may also provide pro bono legal services in this jurisdiction, provided that these services are offered through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically authorized in this jurisdiction and provided that these are services for which the forum does not require pro hac vice admission.

(f) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall advise the lawyer's client that the lawyer is not admitted to practice in Tennessee and shall obtain the client's informed consent to such representation.

(g) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall be deemed to have submitted himself or herself to personal jurisdiction in Tennessee for claims arising out of the lawyer's actions in providing such services in this state.

(h) A lawyer or law firm shall not employ or continue the employment of a disbarred or suspended lawyer as an attorney, legal consultant, law clerk, paralegal or in any other position of a quasi-legal nature.

ABA Resource on Adoptions of ABA Model Rule 5.5

ABA Center for Professional Responsibility Policy Implementation Committee,
"Variations of the ABA Model Rules of Professional Conduct,"
https://www.americanbar.org/content/dam/aba/administrative/
professional_responsibility/mrpc-5-5.pdf

Association of Professional Responsibility Lawyers ("APRL") Proposal
(https://aprl.net/wp-content/uploads/2022/04/Letter-regarding-our-proposal-to-ABA-President.pdf)

RULE 5.5: Multijurisdictional Practice of Law

(a) A lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

(b) Only a lawyer who is admitted to practice in this jurisdiction may hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who provides legal services in this jurisdiction shall:

(1) Disclose where the lawyer is admitted to practice law;

(2) Comply with this jurisdiction's rules of professional conduct, including but not limited to Rule 1.1 (Competence), and with the admission requirements of courts of this jurisdiction;

(3) Be subject to Rule 8.5 regarding the disciplinary authority and choice of law rules of this jurisdiction; and

(4) Not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.

(d) A lawyer admitted and authorized to practice law in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates;

(2) are not services for which the forum requires pro hac vice admission; and

(3) do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice law in this jurisdiction.