The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Ashonti T. Davis

Office Address: (including county) 1021 Reams Fleming Boulevard, Franklin, Tennessee 37064 (Williamson County)

Office Phone: 615-807-7655 Facsimile:

Email Address: [redacted]

Home Address: (including county) [redacted], Nashville, Tennessee 37206 (Davidson County)

Home Phone: Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Counsel with Aetna Senior Supplemental Insurance Company, a subsidiary of CVS Health, Inc.

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

2009. Tennessee Board of Professional Responsibility No. 028001.

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

Tennessee – Board of Professional Responsibility No. 028001. I was admitted to practice on November 18, 2009.

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

No.

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

February 2017 – Present: Counsel, Aetna Senior Supplemental Insurance Company, Franklin, Tennessee

June 2012 – February 2017: Associate, Butler Snow LLP, Nashville, Tennessee

September 2011 – June 2012: Associate, Miller & Martin PLLC, Nashville, Tennessee

September 2009 – August 2011: Judicial Law Clerk, Judge John W. McClarty, Tennessee Court of Appeals, Eastern Section

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

Not applicable.

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

I currently serve as corporate business counsel supporting several business units within a health care company. This practice consists of advising, counseling, and providing legal support to a health insurance business that offers Medicare Supplement products and individual health insurance products. I also support other business units that market and promote Medicare Advantage and Prescription Drug plans. Because of my role in serving as legal counsel for several business units, my practice is broad and incorporates the following areas: health care regulatory, transactions, administrative law, and privacy. Because health insurance is heavily regulated by both state governments and the Federal government, I must remain apprised of the applicable regulations and laws in all 50-states, as well as any changes within the Federal regulatory framework.

Approximately fifty percent of my current practice is dedicated to remaining abreast of and interpreting regulatory changes, including new laws impacting health insurance products. In conjunction with legal and risk analysis, I provide recommendations to business leaders; troubleshoot and offer advice on operationalizing different and varied regulations depending on the jurisdiction; review new strategies; analyze and revise responses to regulatory complaints and attorney demand letters; and review product launches for compliance with existing law. Additionally, I serve as a liaison between our business and state Departments of Insurance and administrative boards in all 50 states. In that capacity as a liaison, I prepare briefs and memorandums challenging adverse regulatory actions and investigations.

The remaining fifty percent of my practice is transactional. I negotiate, review, and draft contracts and provide risk analysis and recommendations on new business initiatives and deals with other companies and vendors. In negotiating and supporting the close of successful business arrangements on behalf of the Company, I rely on my prior experience as a litigator and provide prospective advice, alerting business leaders to potential future pitfalls and challenges.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information

about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

My professional background includes a breadth of civil litigation and transactional matters. I am extremely fortunate to have substantial experience in both litigation and business. After graduating law school, I began my career as a law clerk for Judge John McClarty, who serves on the Tennessee Court of Appeals. In that multi-faceted role, I reviewed and analyzed the briefs filed by the parties, studied the appellate record, researched the legal issues presented, and prepared initial drafts of appellate opinions.

I worked as an associate with Miller & Martin, PLLC and thereafter Butler Snow LLP, primarily focusing on insurance defense on behalf of Tennessee Farmer Mutual Insurance Company. The insurance defense cases afforded me the opportunity to handle a wide range of civil litigation matters, including: court approval of settlements; subrogation; personal injury suits; tort claims; and property and landlord-tenant disputes. My practice in the afore-referenced matters required me to frequently appear in General Sessions Court and Circuit Court, as lead counsel, representing both individuals and small businesses. Being given the opportunity to autonomously handle my own cases at such an early stage in my career was invaluable, as it permitted me to hone my skill and experience in overseeing and managing civil litigation cases from beginning to end.

I managed a heavy caseload, and I was entirely responsible for all pleadings, written discovery, motions, depositions, mediations, settlement negotiations, trials, and appeals. Those skills were deepened and further developed at Butler Snow LLP when my practice areas were expanded to the following Practice Groups: Appellate and Written Advocacy, Commercial Litigation, General Litigation, and Products, Catastrophic, and Industrial Litigation. My inclusion in those practice groups at Butler Snow broadened my practice and sharpened my legal writing and research skills, as I was enlisted for drafting and preparing motions and appellate briefs for other practice areas.

Specifically, in managing my case load, I served as defense counsel in the following types of cases: medical malpractice claims; race and gender discrimination claims; product defect claims; violation of federal rights cases, including notably one case involving allegations of a violation of religious freedoms; and catastrophic injury claims. I also supported and assisted in complex litigation matters, including several federal multi-district medical device class action lawsuits by drafting various motions (e.g., motions in limine and summary judgment motions).

My diverse practice while at Butler Snow permitted me to frequently travel across the State of Tennessee to appear in trial courts for motion hearings and trying matters in Circuit Courts and General Sessions Courts. One highlight of my litigation practice was trying my first jury trial – alone – in Circuit Court and securing a defense jury verdict in a personal injury lawsuit involving a three-car accident in Nashville, Tennessee.

In addition to my robust litigation practice at Butler Snow, I was able to also dedicate about 25 percent of my time to representing clients in administrative and regulatory matters. Those

matters included appearing before administrative boards within the Tennessee Department of Commerce and Insurance and assisting on matters before the Tennessee Public Utility Commission.

While in private practice, I also began to do some transactional work representing about 10 percent of my practice. The transactional work included assisting on a merger, reviewing and drafting commercial leases, and assessing liabilities for life insurance contracts and providing advice.

For the past five years, I have served as counsel for Aetna Senior Supplemental Insurance. My practice is varied, encompassing both healthcare and insurance regulatory matters as well as transactional work. As counsel, my responsibilities are extensive and involve every aspect of the business units I support. In addition to providing advice and counsel, some of my key responsibilities include serving as a liaison on behalf of the Company before government agencies and administrative boards. In that capacity, I prepare briefs and legal memorandum. Further, in this role, I negotiate, provide risk analysis, and draft reinsurance contracts and other contracts for business arrangements with outside insurance companies and vendors.

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

Tennessee Court of Appeals

I served as appellate counsel, representing the appellee, on an appeal arising from the entry of summary judgment involving the interpretation of a health insurance contract (*Davis v. Tennessee Rural Health Improvement Association*, No. M2015-00573-COA-R3-CV (2015)). The Court of Appeals affirmed the trial court's decision in favor of the insurer.

I served as counsel on appeal, representing the appellant, in a conservatorship case challenging the trial court's entry of an injunction on speech and a visitation order (*In Re: Conservatorship of Jack Wayne Turner*, No. M2013-01665-COA-R3-CV (2014)). The Court of Appeals affirmed the trial court's decision, finding that the injunction was appropriate because it was narrowly tailored and the visitation order did not constitute an abuse of discretion.

Trial Courts

Serving as lead defense counsel, I secured a jury verdict on behalf of a small business and its employee in a personal injury case involving two plaintiffs and multiple defendants in the Davidson County Circuit Court in 2016 (*Bratton, et al v. All Things Exterminators, Inc., et al* (Davidson County Circuit Court No. 14C2336).

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

Not applicable.

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

Not applicable.

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

I currently serve as a Member of the Board of Zoning Appeals for Metro-Nashville in Davidson County. This Board typically hears appeals arising from decisions by the Zoning Administrator of the Metro-Nashville Codes Department or requests for variances. Serving on this Board requires analyzing the Metropolitan Code and existing land use law to decide appeals based on the facts of each case.

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

I have not submitted a prior application for a judicial appointment.

EDUCATION

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

Berea College (Bachelor of Arts, *cum laude,* August 2002 – December 2005). Major: Speech Communication.

Honors: Dr. William Parker Scholarship Award; Lambda Pi Eta Honor Society (Omicron Sigma Chapter Officer); Mortar Board Honor Society; Vincet Qui Patur Honor Society; Dean's List each semester enrolled; 2nd place Persuasive Speaking, Berea College's Debate Tournament; 3rd place Debate Speaker Award, Kentucky Forensics Association State Tournament; 2nd place Debate Finalists at Owensboro Debate Tournament

Activities: Speech and Debate Team; Representative for Dorm's House Council; Black Music Ensemble.

University of Tennessee, College of Law (Juris Doctorate, August 2006 – May 2009).

Honors: Order of the Barristers; McClung Medal for Excellence in Moot Court; Judge James M. Haynes Prize; Chancellor George Lewis Moot Court Board Award; Roy B.J. Campbelle Leadership Award; Academic Excellence Award for Public International Law; Managing Editor for the Tennessee Journal of Law and Policy; Chair of the Moot Court Board; Deputy Articles Editor for the Baker Journal of Applied Public Policy; Jerome Prince National Evidence Moot Court Team Member.

Activities: Advocacy Legal Clinic Attorney; Street Law Program Coordinator; Saturday Bar Volunteer at the Legal Aid Society of East Tennessee.

PERSONAL INFORMATION

15. State your age and date of birth.

My date of birth is [redacted], 1984; I am currently 37 years old.

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

I have lived continuously in Tennessee for approximately 16 years, and I am a native of Nashville, Tennessee graduating high school in 2002. After graduating college in December 2005, I moved home to Nashville before relocating to Knoxville, Tennessee to attend the University of Tennessee College of Law in August 2006. Upon completion of law school, I moved to Chattanooga, Tennessee for a judicial clerkship and returned to Nashville in 2011. In total, I have lived in Tennessee for 32 years.

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

I have lived continuously in Davidson County for approximately 11 years.

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

Davidson County.

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

Not applicable.

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

No.

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

No.

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

None.

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

No.

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

No.

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

Yes. I was involved in an accident involving a tractor-trailer truck that resulted in personal injuries. A lawsuit was filed the Superior Court of Catoosa County, Georgia in October, 2007 (Davis v. P&D Transportation, et al, Docket No. 2007SUCV), and the case settled prior to the setting of a trial date. Additionally, there was a dispute with a contractor involving repairs to a home that I had recently purchased. A lawsuit ensued in the Davidson County General Sessions Court (Davis v. Alvarez, et al, Docket No. 20-GC-17315), which was settled prior to trial.

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

Member, Crosspoint Church (2015 to present)

Member, Former Steering Committee Member and Former Treasurer, Highland Heights Neighborhood Association (2017 to present)

Member, The Links, Incorporated (Music City Chapter) (2016-2018)

Member of the Board, National MS Society (Southeast Chapter) (2013 to 2016)

Chair and Former Treasurer of the Board of Directors, Trinity Community Commons (2018 to present)

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

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

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected

for the position for which you are applying, state your reasons.

Yes. I was previously a member of The Links, Incorporated (Music City Chapter) from 2016 – 2018, which limits membership to African-American women.

ACHIEVEMENTS

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

- Elected President of Lawyers' Association for Women serving in that role from 2018-2019. Other leadership positions held: Treasurer, Newsletter Editor, First and Second Year Director, Co-Chair of Mentoring Committee, Co-Chair of Diversity Committee. (2012 – present)

- Barrister, Harry Phillips American Inn of Court (2015- present)
  - Membership Committee
  - Program Reporter (2019 – 2021)

- Member, Nashville Bar Association (2012 – present)
- Member, Napier Looby Bar Association (2012 – 2017)
- Member, Tennessee Bar Association (2012 – 2018)
- Member, American Bar Association (2012 – 2019)
- Young Leaders Council, Class 61 (2012)

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

- Selected as a Fellow for the Nashville Bar Foundation (2020)
- Recipient of the Rising Star Award from the Lawyers' Association for Women (2017)
- Selected as a Member of the Nashville Bar Foundation's Leadership Forum (2016)
- Selected as a Member of the Tennessee Bar Association's Leadership Law (2015)

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

"Survey of Design Defect Requirements – 50 State Survey" – Pro Te Solutio, June 2014

"Recent Bill May Forever Alter the Collateral Source Rule in Tennessee" – Butler Snow

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

Lawyers' Association for Women CLE, "Women Heroes," (One of many speakers, highlighting leadership experience within Nashville community) December, 2019

Lawyers' Association for Women CLE, "The Makings of Strong Mentorship with Andrea Perry, Brendi Kaplan, and Nina Kumar," October, 2015

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

In March 2019, Mayor David Briley appointed me to serve on the Metropolitan-Nashville Board of Zoning Appeals, and the Metropolitan Council confirmed my appointment on April 2, 2019. I am still an active Member on the Board of Zoning Appeals.

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

No.

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

The following writing samples are attached to my application:

1. An appellate brief filed in the Tennessee Court of Appeals regarding a dispute concerning the interpretation a health insurance contract. This brief represents approximately 95% of my own effort. A colleague reviewed the draft and provided minor edits.

2. A petition for reconsideration filed with the Department of Commerce and Insurance concerning an administrative action. This petition represents approximately 95% of my own effort. A colleague reviewed the draft and provided minor edits.

ESSAYS/PERSONAL STATEMENTS

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

To quote Jackie Robinson, "A life is not important except in the impact it has on other lives." Serving as an appellate judge, if selected, would permit me to have a measurable impact on the lives of others. The fair and impartial administration of justice is a cornerstone of our democracy, and appellate decisions have a very real and palpable impact beyond the litigants of a case. I desire to not only serve the citizens of Tennessee, but I would like to continue and emulate the example of accomplished and reputable judges I have worked for, witnessed, admired, and appeared before throughout my legal career. This position on the Court of Appeals is a unique one in that it provides the opportunity to ensure, on case-by-case basis, our courts work as designed and litigants have an objective and impartial forum to redress disputes.

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

While in private practice, I represented clients in several pro bono matters, including individuals in General Sessions Court with debt collection matters. Further, I volunteered at Legal Aid clinics and served as appellate counsel on a matter before the Court of Appeals. Through my long-standing and active participation in the Harry Phillips American Inn of Court and the Lawyers' Association for Women, I have helped produce programs and contributed content to CLE seminars that focused on and promoted issues concerning equal justice under the law.

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

I am seeking appointment to the Tennessee Court of Appeals, Middle Section. The Court of Appeals only hears civil appeals and consists of twelve (12) judges. The Court of Appeals is divided into three sections, representing each Grand Division of the State (East, Middle, and West), with four judges serving the Section from which he or she resides. The Court's jurisdiction includes civil cases appealed by right from either chancery or circuit court, and its decisions may be appealed, by permission, to the Tennessee Supreme Court. If selected to serve on the Court, I would be the fourth judge from the Middle Section. My selection would complement the Court's existing methodical and thoughtful approach to hearing and deciding cases, as I would rely on my prior professional experiences as both a litigator and business lawyer.

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

Volunteer work and community service are a part of my core values reflected in splitting time between governance positions with non-profit organizations and hands-on volunteer work. Currently, I serve as the Chair of the Board for Trinity Community Commons (TCC), a non-profit organization committed to creating space for residents to gather and grow, in order to activate their full potential. TCC hosts a community meal once a week for all residents of the neighborhood, regardless of a resident's housing status, along with offering services and programs like youth reading programs and financial empowerment seminars. My service on TCC's board includes volunteering with many of its programs.

I also currently volunteer and previously served on the Board of the Highland Heights Neighborhood Association, which coordinates donations, events, education, and advocacy in support of neighbors living in this East Nashville neighborhood. I have previously volunteered to coach mock trial teams at Stratford High School and through the 100 Black Men of Middle Tennessee's summer youth enrichment programs. And, lastly, I am proud of my prior service on the Board of the Southeast Chapter of the MS Society, which organizes events, fundraising, and advocacy for individuals living with Multiple Sclerosis.

Sustaining active and consistent community service cultivates a deeper understanding of the varied human experience and nourishes empathy. I am committed to community service because it humbles me, constantly instilling gratitude and a desire to do more for others. If appointed, I would continue my volunteer work absent any conflicts.

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

I am grateful for the opportunity to apply for this judgeship as my professional background uniquely positions me for the role. My experience as a law clerk provided an intimate view of the Court of Appeals, including its rhythm – a complicated rhythm that combines intensive legal research, rigorous analytical skills, and effective writing. After my clerkship, I represented corporations and individuals as an associate with an international law firm for nearly six years, which illuminated the challenges litigants confront, as well as the distinct strategies required to navigate those challenges. Transitioning to a business lawyer for a health care company after years of a rewarding litigation practice fostered a broad view of the law and equipped me with a rare set of skills. The Court hears a wide range of cases (business disputes, tort actions, review of administrative decisions), and I have a working knowledge of, and exposure to, various areas of the law. That exposure coupled with my professional background would invaluably aid me in a

judicial position.

Exceptional judges are foundational to Tennessee courts, and it is important that the judiciary reflects the diverse citizenry of Tennessee. As a native of Middle Tennessee, I am proud and thankful to have lived in this State for most of my life. I am a first-generation college graduate with hard-working parents who stressed the importance of dignity in all labor, humility, and persistence. Those values have guided my legal career and would permeate my approach as a judge, if selected.

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

Yes. It is incumbent upon judges to not only adhere to the law, but to apply it as enacted. Judges are not legislators, and our system of government only permits legally-elected representatives to enact law. After clerking on the Court of Appeals, I gained a deep appreciation and understanding that it is far more important for the Court to appropriately apply the law rather than deciding outcomes based on personal feelings about the substance of the law. Our courts should operate irrespective of personal opinion, bias, or prejudice. Judges upholding the law, with independence and impartiality, is critical, as it engenders faith in our democratic institutions and our court system.

My service on the Board of Zoning Appeals provides another example of upholding the law. This Board often hears cases in which stakeholders advocate divergent outcomes or seek relief that the Board is not entitled to grant. Notwithstanding any sympathies for the involved stakeholders or about the outcome, my role on that Board is to review the facts and applicable law, apply and analyze the Metropolitan Code and other relevant law, and ultimately reach a decision consistent with the current law. This position particularly underscores the required humility in serving in any appointed role and helps maintain a keen awareness that enacting laws is best suited for elected officials.

REFERENCES

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

A. Thomas W. Lawless, Partner, Lawless & Associates P.C., The Customs House, [redacted] Nashville, TN 37203, [redacted]
B. Andrea Lindsley, Partner, Finn Partners, [redacted] Nashville, TN 37203, 615[redacted]
C. Melvin Malone, Partner, Butler Snow LLP, [redacted], Nashville, TN 37201, [redacted]
D. Nate Paulk, Executive Director of Trinity Community Commons, [redacted] Nashville, TN [redacted]
E. DarKenya Waller, Executive Director of the Legal Aid Society of Middle Tennessee & the Cumberlands, [redacted], Nashville, TN 37217, [redacted]

AFFIRMATION CONCERNING APPLICATION

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

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

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

Dated: 2/25, 2022.

Signature

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

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Ashonti T. Davis
Type or Print Name

Ashonti T. Davis
Signature

2/25/2022
Date

028001
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Not applicable.

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE DIVISION AT NASHVILLE

RICHARD G. DAVIS,	)	
	)	
Petitioner/Appellant,	)	
	)	
v.	)	**No. M2015-00573-COA-R3-CV**
	)	
TENNESSEE RURAL HEALTH IMPROVEMENT ASSOCIATION,	)	**On appeal from the Davidson County Circuit Court, Honorable Joseph P. Binkley, Jr.**
	)	
Respondent/Appellee.	)	

BRIEF OF APPELLEE TENNESSEE RURAL HEALTH IMPROVEMENT ASSOCIATION

Travis Swearingen (BPR #25717)
Ashonti T. Davis (BPR #28001)
BUTLER SNOW LLP
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Nashville, Tennessee 37201
Telephone: (615) 651-6700
Fax: (615) 651-6701

Attorneys for Respondent/Appellee, Tennessee Rural Health Improvement Association

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TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

DESIGNATION OF THE RECORD

The Record in this case consists of two (2) volumes of the technical record composed of the pleadings and other papers filed before the Second Circuit Court for Davidson County, Tennessee consecutively paginated. References to the papers filed in trial court are designated by the volume number and record page, *e.g.*, (R. V. I, at 1).

ISSUES PRESENTED FOR REVIEW

1. The trial court found that Appellant's health insurance policy unambiguously required Appellant to exhaust the internal appeal procedure before filing suit. Appellant failed to do so. Was the grant of summary judgment proper?

STATEMENT OF THE CASE

Appellant, Richard G. Davis ("Appellant" or "Mr. Davis") filed suit against Tennessee Rural Health Improvement Association ("Appellee" or "TRH") in the General Sessions Court of Davidson County on December 16, 2011. (R. V. I, at 1). He alleged that TRH had breached his insurance policy by denying coverage. (*Id.*) The case was removed to the Davidson County Circuit Court by agreement on February 23, 2012. The parties then filed their initial pleadings and engaged in discovery. (R. V. I, at 6).

By Joint Stipulation of the parties, the following facts were conclusively established:

- Appellant's application to TRH for health coverage, executed on October 14, 2010, and attached as Exhibit No. 1 to TRH's Requests for Admissions, was a true and accurate copy.
- Appellant's health insurance policy with TRH ("the Policy"), evidencing coverage and the terms of Appellant's health insurance, and attached as Exhibit No. 2 to TRH's Requests for Admissions, was a true and accurate copy.
- Appellant did not file a grievance with TRH after coverage was denied for the treatment of his Non-Hodgkin's Lymphoma.

(R. V. I, at 54-55; R. V. II, at 178-182).

TRH moved for summary judgment on the grounds that (1) Appellant failed to exhaust the internal appeal procedure, as required by the Policy, prior to filing suit and (2) TRH properly denied health coverage for treatment of a pre-existing health condition. (R. V. I, at 65-66). At the hearing on TRH's motion, the trial court asked the parties to submit supplemental briefing on the issue of the internal appeal procedure. (R. V. II, at 212-258).

After consideration of the supplemental briefs, TRH's Motion, Appellant's Response, and the record as a whole, the trial court granted summary judgment to TRH. (R. V. II, at 259-260). Specifically, the trial court found that the undisputed material facts established that the Policy contains an internal appeal procedure in the event that an insured is dissatisfied with a coverage decision. (*Id.*) The trial court further found that as a condition precedent to filing a

lawsuit, an insured must exercise his rights through the internal appeal procedure. (*Id.*) Appellant never exercised his rights through the internal appeal procedure as outlined in the Policy.[1] (*Id.*)

After the entry of the Order granting summary judgment to TRH on February 27, 2015, this appeal ensued. (*Id.* at 262).

[1] After finding that summary judgment was appropriate due to Appellant's failure to exhaust the internal appeal procedure, the trial court did not "reach the issue of whether Plaintiff's [Appellant's] insurance coverage was properly denied because Plaintiff's medical condition was "pre-existing" as defined by the Policy. (R. V. II, at 260).

STATEMENT OF THE FACTS

On or about October 14, 2010, Appellant entered a TRH office near his home and applied for health insurance. (R. V. I, at 82-83; 101-105). At the time, Appellant had been without any health insurance of any kind since the beginning of 2006, when he left his prior employment. (R. V. I, at 82). Based on the representations in Appellant's application, TRH issued a policy of health insurance to Appellant that became effective on December 1, 2010. (*See Evidence of Coverage*, R. V. I, at 106 – V. II, at 175).

The Policy contains a number of terms and conditions relevant to this appeal. First, the Policy contains an internal appeal procedure in the event an insured is dissatisfied with a coverage decision. Section XIII of the Policy, on pages 48 through 50, describes the steps and instructions on how to pursue an appeal through the "Claims Review/Appeal Procedure" and reads as follows:

> *Claims Review/Appeal Procedure*
>
> *If You do not agree with the denial or partial denial of Your claim, You may appeal the decision.* ***You must begin the appeal within 60 days after you receive notice of a denial or partial denial.***

(R. V. II, at 157) (emphasis added). The Policy further provides that,

> *Legal action may not be taken until:*
>
> - *A properly completed notice of claim has been submitted, and*
> - *Such claim has either been denied in writing or not followed by a written response within 30 days after it is submitted, and*
> - *The Member has exercised all of his or her review and appeal rights under this EOC, as defined under Claims Review/Appeal Procedure.*

(R. V. II, at 159).

Second, the Policy also contains provisions on a pre-existing condition waiting period in Section XIV. During the waiting period, an insured is not eligible for medical benefits for conditions that existed prior to the Policy's effective date. Specifically, on page 56, the Policy states as follows:

> *A Member will not be eligible to receive benefits for Pre-Existing Conditions (as defined in Definitions) until the Member has completed a waiting period of at least 12 months beginning with the Effective Date of the Member's Coverage.*

(R. V. II, at 165). A pre-existing condition is defined as:

> *[A]n illness, injury, pregnancy or any other medical condition which existed at any time preceding the Effective Date of Coverage under this Contract for which:*
>
> - *Medical advice or treatment was recommended by, or received from a provider of health care services; or*
> - *Symptoms existed which would cause an ordinarily prudent person to seek diagnosis, care or treatment.*

(R. V. I, at 121).

On December 8, 2010, one week after his insurance became effective, Appellant presented to the Summit Primary Care clinic in Hermitage, Tennessee, complaining of a "growth on the [left] side of [his] face that seems to have gotten much bigger recently but has felt a small knot there for yrs." (R. V. II, at 176). The knot was "ping pong ball sized" located over Plaintiff's left jaw. (*Id.*) Appellant began to feel the knot on the left side of his face "three to four months" prior to presenting to the Summit Primary Care Center. (R. V. I, at 85-86). Plaintiff believed the knot to be a dental issue. (*Id.*) After the mass was surgically removed and biopsied, it was determined to be a high grade non-Hodgkin's lymphoma. (*Id.* at 86). TRH

denied coverage for expenses related to the treatment of Appellant's lymphoma on the basis that there was no coverage for his pre-existing condition.[2] (*Id.*)

Thereafter, Appellant filed suit in the Davidson County General Sessions Court, which was subsequently removed to Davidson County Circuit Court. (R. V. I, at 1-6). TRH served Appellant with Requests for Admissions to which the parties later filed a Joint Stipulation of Admissions. (R. V. II, at 178-182). It is undisputed that Appellant never submitted any grievance or appeal as required by the appeal procedure in the Policy. (*Id.*)

[2] Although the trial court did not reach the issue of whether TRH properly denied health insurance coverage due to Appellant's pre-existing condition, summary judgment was also appropriate on that ground. The Policy explicitly defined and excluded pre-existing medical conditions. TRH denied health coverage to Appellant for treatment of a pre-existing condition in accordance with the terms of the Policy.

SUMMARY OF THE ARGUMENT

This appeal involves a straightforward interpretation of a health insurance contract. The trial court granted summary judgment after the undisputed facts and the unambiguous terms of the Policy demonstrated that Appellant failed to exhaust the internal appeal procedure prior to filing suit after TRH denied coverage for a pre-existing condition.

Appellant claims that the Policy was ambiguous and that the provisions concerning the internal appeal procedure were elective and not mandatory. The Policy plainly describes the steps an insured must take prior to filing a lawsuit. Appellant admits that he did not take them. For these reasons, the trial court properly granted summary judgment to TRH.

Accordingly, the trial court's order dismissing Appellant's suit for breach of contract was proper and should be affirmed.

STANDARD OF REVIEW

In Tennessee, the interpretation of a contract presents a question of law. *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). The standard of review for questions of law is *de novo*, with no presumption of correctness afforded to the conclusions of the court below. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000). Similarly, under Rule 56 of the Tennessee Rules of Civil Procedure, "[t]he granting or denying of a motion for summary judgment is a matter of law, and [the appellate court's] standard of review is *de novo* with no presumption of correctness." S*ee Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013). However, "[a] grant of summary judgment is appropriate ... when the facts and the reasonable inferences from those facts would permit a reasonable person to reach only one conclusion." *Sykes v. Chattanooga Housing Auth.*, 343 S.W.3d 18, 26 (Tenn. 2011) (emphasis added) (citing *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000)).

ARGUMENT

I. TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO COMPLY WITH THE PLAIN TERMS OF THE POLICY.

This Court should affirm the trial court's grant summary judgment to TRH because the Appellant failed to initiate the Policy's appeal procedure prior to filing suit. The Policy at issue distinctly outlined the terms regarding the internal appeal procedure in the Claims Review/Appeal Procedure section. Contrary to Appellant's assertions, the Policy required an insured to exercise and exhaust the Claims Review/Appeal Procedure prior to bringing a legal action. Appellant's argument relies on a singular provision of the Policy without any consideration of the following provision:

> *Legal action may not be taken until:*
>
> - *A properly completed notice of claim has been submitted, and*
> - *Such claim has either been denied in writing or not followed by a written response within 30 days after it is submitted, and*
> - *The Member has exercised all of his or her review and appeal rights under this EOC, as defined under Claims Review/Appeal Procedure.*

(R. V. II, at 159).

Thus, Appellant's assertion that the Policy's provisions concerning the Claims Review/Appeal Procedure are "elective" or that they are somehow "ambiguous" is simply untrue. In fact, Appellant fails to address the second sentence of the provision in which his entire position rests. The provision, as cited by Appellant, provides:

> *Claims Review/Appeal Procedure*
>
> *If You do not agree with the denial or partial denial of Your claim, You may appeal the decision.* ***You must begin the appeal within 60 days after you receive notice of a denial or partial denial.***

(R. V. II, at 157) (emphasis added). That language directly contradicts Appellant's position. The use of the word "must" in the second sentence indicates that the internal Claims Review/Appeal Procedure is mandatory, as any dictionary or thesaurus will attest. *See, e.g.*, "Must," BLACK'S LAW DICTIONARY 919 (5th ed. 1979) (stating that "must" is primarily of mandatory effect like the word "shall"); "Must" AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1980) (defining "must" as "to be obliged; to be necessitated"). Consistent with the plain meaning of the word "must," this Court has interpreted provisions containing "must" as mandatory obligations. *See Circle C Constr., LLC v. Nilsen*, No. M2013-02330-COA-R3-CV, 2014 Tenn. App. LEXIS 444, at *8 (Tenn. Ct. App. July 29, 2014) (holding that a contractual provision containing the word "must" was mandatory without "any exceptions.") (copy attached).

Appellant's argument can be summed up in one sentence: the Policy is ambiguous and therefore unenforceable. Under Tennessee law, Appellant's argument fails for several reasons. First, Appellant's argument does not comport with basic principles of contract interpretation. Tennessee law requires that a written contract be read as an entire document. *See Maggart v. Almany Realtors, Inc.*, 259 S.W.3d 700, 704 (Tenn. 2008). Second, the argument ignores the plain language outlining the steps an insured must take prior to initiating legal action.

Under the principles of contract interpretation, a written agreement is interpreted in its entirety. *See, e.g., Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012) (observing that insurance policies are contracts and the same principles of contract interpretation apply). As explained by the Tennessee Supreme Court, when construing a contract, "the entire contract should be considered in determining the meaning of any or all of its parts. It is the universal rule that a contract must be viewed from beginning to end and all its terms must pass in review, for

one clause may modify, limit or illuminate another." *Cocke County Bd. of Highway Comm'rs v. Newport Utils. Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985) (internal citations omitted). Insurance policies are no exception and should be construed "as a whole in a reasonable and logical manner"; disputed language "should be examined in the context of the entire agreement." *Garrison*, 377 S.W.3d at 663-64 (quoting *Standard Fire Ins. Co. v. Chester-O'Donley & Assocs.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998)). Courts give effect to the words used in contractual provisions by interpreting such words by their "plain, ordinary, and popular sense." *See, e.g., Maggart*, 259 S.W.3d at 704. (citing *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975)). No plain, ordinary, or popular reading of the Policy renders it ambiguous.

Appellant's unsubstantiated claim to the contrary does not alter this reality. Indeed, ambiguity "does not arise in a contract merely because the parties may differ as to interpretations of certain of its provisions. A contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." *Johnson v. Johnson*, 37 S.W.3d 892, 896 (Tenn. 2001) (citations omitted). Courts will not use a strained construction of the language to find an ambiguity where none exists. *Garrison*, 377 S.W.3d at 663; *see also, Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975).

When the contractual provisions regarding the Claims Review/Appeal Procedure are read in conjunction with each other, their meaning is apparent – insureds, like Appellant, have the right to appeal the denial of a claim, and prior to taking legal action, must exercise their rights under the Claims Review/Appeal Procedure. By arguing that the Policy is ambiguous, Appellant seeks to distort the plain meaning of the Policy's provisions governing the appeal procedure to avoid the consequences for his failure to satisfy a condition precedent of the Policy. Without any

citation to legal authority, Appellant argues that the Policy's language afforded him the option to appeal a claims decision and that he exercised the option not to file an appeal. This argument is unsustainable in light of the Policy's specific language and the cardinal rules of contract interpretation.

Further, Tennessee courts have long held that insurance policy provisions establishing or altering the parties' dispute resolution rights are valid and enforceable. *See Brick Church Trans., Inc. v. S. Pilot Ins. Co.,* 140 S.W.3d 324, 329 (Tenn. Ct. App. 2003); *Certain Underwriter's at Lloyd's of London v. Transcarriers, Inc.,* 107 S.W.3d 496, 499 (Tenn. Ct. App. 2002). If the language in a contract is plain and unambiguous, courts then "determine the parties' intention from the four corners of the contract, interpreting and enforcing [the contract] as written." *Union Realty Co. v. Family Dollar Stores of Tenn., Inc.*, 255 S.W.3d 586, 591 (Tenn. Ct. App. 2007) (citing *Int'l Flight Ctr. v. City of Murfreesboro*, 45 S.W.3d 565, 570 (Tenn. Ct. App. 2000)). If the language is clear and unambiguous, "the literal interpretation of the language controls the outcome of the contract disputes." *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002).

The dispute resolution language of the Policy in this case is clear and unambiguous in requiring, among other things, that an insured exercise all of his review and appeal rights as defined under the Claims Review/Appeal Procedure provisions before bringing a legal action. (R. V. II, at 157-159). Appellant conceded that the Policy is true and accurate, and that he received a copy of it. (R. V. II, at 178-182). Appellant also conceded that he did not file an appeal after coverage was denied for the treatment of his lymphoma. (*Id.*) Accordingly, Appellant's legal action was premature, and summary judgment was appropriate.

CONCLUSION

Based upon the foregoing, TRH respectfully requests that this Court affirm the trial court's entry of summary judgment and dismiss of Appellant's action.

Respectfully Submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2015, the foregoing was served via U.S. Mail, postage prepaid upon:

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Ashonti T. Davis

27875893v1

APPENDIX

Circle C Constr., LLC v. Nilsen

Court of Appeals of Tennessee, at Nashville

April 25, 2014, Session; July 29, 2014, Filed

No. M2013-02330-COA-R3-CV

Reporter
2014 Tenn. App. LEXIS 444; 2014 WL 3763937

CIRCLE C CONSTRUCTION, LLC v. D. SEAN NILSEN, ET AL.

Subsequent History: Appeal granted by Circle C Constr., LLC v. Nilsen, 2014 Tenn. LEXIS 940 (Tenn., Nov. 20, 2014)

Prior History: Tenn. R. App. P. 3 [*1] Appeal as of Right; Judgment of the Circuit Court Affirmed. Appeal from the Circuit Court for Davidson County. No. 13C1465. Hamilton V. Gayden, Jr., Judge.
United States ex rel. Wall v. Circle C Constr., LLC, 700 F. Supp. 2d 926, 2010 U.S. Dist. LEXIS 90322 (M.D. Tenn., 2010)

Disposition: Judgment of the Circuit Court Affirmed.

Core Terms

tolling, parties, deadline, statute of limitations, trial court, issues, termination date, savings, days, summary judgment motion, malpractice, applies, summary judgment, resolving, Appeals, terms

Case Summary

Overview

HOLDINGS: [1]-A legal malpractice claim was barred by the termination date established in a tolling agreement because the agreement precluded application of the savings statute under Tenn. Code Ann. § 28-1-105(a); [2]-Here, the applicable time limitation was established by contract, not by rule or statute of limitation; [3]-The tolling agreement did not provide that the statute of limitation was tolled 120 days from the resolution of all of the issues in the lawsuit; rather, the pertinent date was the resolution of the issues in an appeal.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Governments > Legislation > Effect & Operation > Operability

HN1 A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. Tennessee's General Assembly has enacted Tenn. Code Ann. § 20-16-101, which is intended to return the summary judgment burden-shifting analytical framework to that which existed prior to Hannan

v. Alltel Publ'g Co. Tenn. Code Ann. m 20-16-101 applies to actions filed on or after July 1, 2011. 2011 Tenn. Pub. Acts ch. 498.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Absence of Essential Element

HN2 See Tenn. Code Ann. § 20-16-101.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Evidence > Inferences & Presumptions > Inferences

Evidence > Inferences & Presumptions > Presumptions

HN3 Summary judgments do not enjoy a presumption of correctness on appeal. When reviewing the evidence presented in support of, and in opposition to, a motion for summary judgment, an appellate court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN4 The construction of a statute is a question of law. The standard of review is de novo.

Contracts Law > Contract Interpretation > Intent

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN5 Tolling agreements are governed by contract law, and their interpretation requires the court to ascertain the intent of the parties. If the contract terms are 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. An unambiguous contract must be interpreted as written rather than according to the unexpressed intention of one of the parties. Only if the terms of the contract are ambiguous may parol evidence be admitted.

Governments > Legislation > Interpretation

HN6 When construing a statute, a court must ascertain and give effect to the legislature's intent. Ordinarily, courts derive this legislative intent from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning. If the language of a statute is ambiguous, courts construe the statute's meaning by examining 'the broader statutory scheme, the history of the legislation, or other sources.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN7 Tenn. Code Ann. § 28-1-105(a) applies if the action is commenced within the time limited by a rule or statute of limitation. By its terms, therefore, § 28-1-105(a) applies to periods of limitation established by rule or statute of limitation.

Counsel: Timothy W. Burrow, Nashville, Tennessee, for the appellant, Circle C Construction.

Darrell G. Townsend, Nashville, Tennessee, for the appellees, D. Sean Nilsen, et al.

Judges: ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G.

CLEMENT, JR., P.J., M.S., and VANESSA AGEE JACKSON, SP. J., joined.

Opinion by: ANDY D. BENNETT

Opinion

The issue in this case is whether a tolling agreement between the parties precludes the application of the savings statute set forth in Tenn. Code Ann. § 28-1-105(a). We agree with the trial court that the tolling agreement does preclude application of the savings statute and that the plaintiff's legal malpractice action is barred by the termination date established in the agreement.

OPINION

Factual and Procedural Background

The defendants in this case, D. Sean Nilsen, C. Dean Furman, and Furman, Nilsen & Lomond, PLLC (collectively "Nilsen"), provided legal representation for the plaintiff, Circle C Construction, LLC ("Circle C"), in the case of *United States of America ex rel. Brian Wall v. Circle C Construction, LLC*, 700 F. Supp. 2d 926 (M.D. Tenn.), [*2] a case brought under the False Claims Act. The United States alleged that Circle C violated the False Claims Act, 31 U.S.C. § 3729(a)(2), in its actions under a contract with the army to construct buildings at Fort Campbell Military Base. On March 15, 2010, the federal court granted the government's motion for summary judgment and found Circle C liable in the amount of $1,661,423.13. Circle C appealed to the Sixth Circuit.

Circle C maintains that Nilsen was negligent in its representation of Circle C in the federal false claims action. On November 30, 2010, Circle C and Nilsen entered into a tolling agreement, which includes the following pertinent provisions:

> WHEREAS, Plaintiff [Circle C] believes the deadline for Plaintiff to file legal action against Defendants [Nilsen] for professional negligence is March 15, 2011,[1] the date the federal Court entered Judgment against Circle C. Construction, LLC ("Filing Deadline");
>
> WHEREAS, the Parties desire to extend the Filing Deadline without prejudicing Plaintiff's rights to assert claims and without waiving or releasing in any manner any defenses of any kind that Defendant or any other potential party defendant may have to those claims [*3] as of the date of this Agreement; and
>
> WHEREAS, the Parties understand that Circle C Construction, LLC desires to wait for the decision of the U.S. Court of Appeals before it decides whether to sue defendants for legal malpractice, the determination of which shall be solely that of Circle C Construction, LLC.
>
> THEREFORE, in consideration of the mutual promises stated in this Agreement, the Parties agree as follows:
>
> 1. The Parties agree that the Filing Deadline shall be tolled so that the statute of limitations will not expire until a period of One Hundred Twenty (120) days after the United States Court of Appeals from the 6th Circuit has issued an opinion resolving all issues raised in the United States of America, *ex rel.* Brian Wall versus Circle C Construction, LLC, 697 F.3d 345("Termination Date"). If Plaintiff desires to assert claims for professional negligence, it must do so on or before the Termination Date.
>
> . . .
>
> 3. Nothing in this Agreement, or in the circumstances that gave rise to this Agreement, shall be construed as an acknowledgment by any Party that any claim exists or that any claim has been barred, has not been barred, or will be barred by the statute of limitations, [*4] statute of repose, laches, waiver, estoppel,

[1] This deadline is one year from the date of the federal court judgment.

or any other defense based on the passage of time.

. . .

5. This Agreement comprises the entire agreement of the Parties with respect to the matters addressed herein.

On September 21, 2011, Circle C filed suit against Nilsen for legal malpractice. Circle C filed a notice of voluntary dismissal on April 13, 2012, and an order of voluntary dismissal was entered on April 16, 2012.

The Sixth Circuit entered its opinion in the case of *United States of America ex rel. Brian Wall v. Circle C Construction, LLC*, 697 F.3d 345 on October 1, 2012. The Court affirmed the district court's judgment with regard to liability, but reversed the award of damages and remanded for a hearing to recalculate the amount of damages.

Circle C filed the instant lawsuit on April 8, 2013, asserting claims for legal malpractice in the case of *United States of America ex rel. Brian Wall v. Circle C Construction, LLC*. Nilsen responded with a motion for summary judgment asserting that Circle C's claims were time-barred by the contractual limitation period in the tolling agreement. In support of this motion, Nilsen submitted [*5] the affidavit of Sean Nilsen. Circle C opposed the motion for summary judgment and submitted the affidavits of John Cates, an owner of Circle C who signed the tolling agreement on behalf of Circle C, and of Barry Weathers, an attorney retained by Circle C to evaluate a potential claim for legal malpractice against Nilsen. Nilsen submitted a supplemental affidavit of Sean Nilsen with its reply.

Nilsen's motion for summary judgment was heard on August 30, 2013. On September 18, 2013, the trial court entered an order granting Nilsen's motion. Circle C subsequently filed a motion asking the court to make additional findings of
fact; the trial court denied this motion in an order entered on November 13, 2013.

On appeal, Circle C has asserted numerous issues, most of which relate to the question of whether the trial court erred in granting summary judgment to Nilsen and in interpreting the tolling agreement as precluding application of the savings statute. Circle C also makes the argument that the trial court erred in finding that the Sixth Circuit's decision resolved all issues in the case so as to trigger the running of the 120 days until the termination date.

Standard of Review

This appeal [*6] arises from the trial court's grant of summary judgment. ***HN1*** A motion for summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. Tennessee's General Assembly has enacted Tenn. Code Ann. § 20-16-101, which is intended to "return the summary judgment burden-shifting analytical framework to that which existed prior to *Hannan [v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008)]." *Coleman v. S. Tenn. Oil Inc.*, No. M2011-01329-COA-R3-CV, 2012 Tenn. App. LEXIS 453, 2012 WL 2628617, at *5 n.3 (Tenn. Ct. App. July 5, 2012). Tennessee Code Annotated section 20-16-101 applies "to actions filed" on or after July 1, 2011. 2011 Tenn. Pub. Acts ch. 498. As this action was filed on April 8, 2013, the new statute applies.

Tennessee Code Annotated section 20-16-101 provides:

HN2 [T]he moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:

(1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or

(2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

HN3 Summary judgments do not enjoy a presumption of correctness on appeal. BellSouth Adver. & Publ'g Co. v. Johnson, 100 S.W.3d 202, 205 (Tenn. 2003). When reviewing [*7] the evidence presented in support of, and in opposition to, a motion for summary judgment, we view "the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party." Giggers v. Memphis Hous. Auth., 277 S.W.3d 359, 364 (Tenn. 2009).

HN4 The construction of a statute is a question of law. Lee v. Franklin Special Sch. Dist. Bd. of Educ., 237 S.W.3d 322, 332 (Tenn. Ct. App. 2007). The standard of review is de novo. *Id.*

Analysis

(1)

The issue of whether the trial court correctly held that this case was barred by the termination date established in the tolling agreement turns upon the interpretation of the tolling agreement and Tenn. Code Ann. § 28-1-105(a).[2]

HN5 Tolling agreements are governed by contract law, "and their interpretation requires the court to ascertain the intent of the parties." Tenn-Fla Partners v. Shelton, 233 S.W.3d 825, 829 (2007). If the contract terms are 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." *Id.* An unambiguous contract must be interpreted as written "rather than according to the unexpressed intention of one of the parties." *Id.* Only if the terms of the contract are ambiguous may parol evidence be admitted. Memphis Hous. Auth. v. Thompson, 38 S.W.3d 504, 512 (Tenn. 2001); Jones v. Brooks, 696 S.W.2d 885, 886 (Tenn. 1985).

In this case, the language of paragraph one of the tolling agreement is plain and unambiguous:

> The Parties agree [*8] that the Filing Deadline shall be tolled so that the statute of limitations will not expire until a period of One Hundred Twenty (120) days after the United States Court of Appeals from the 6 Circuit th has issued an opinion resolving all issues raised in the United States of America, *ex rel.* Brian Wall versus Circle C Construction, LLC, 697 F.3d 345. ("Termination Date"). *If Plaintiff desires to assert claims for professional negligence, it must do so on or before the Termination Date.*

(Emphasis added). The language of the last sentence of paragraph one is mandatory and does not contain any exceptions.

We find no merit in Circle C's arguments that other provisions of the tolling agreement create limitations or exceptions to the final sentence of paragraph one. Circle C points to the "whereas clause" that states that the parties desired "to extend the Filing Deadline*without prejudicing Plaintiff's rights to assert claims* and without waiving or releasing in any manner any defenses of any kind that Defendant . . . may have to those claims as of the date of this Agreement." (Emphasis added). This aspirational language reflects the parties' desire to preserve the plaintiff's claims [*9] *and the defendant's defenses* (which include the statute of limitations) as of the time of the agreement. This general language does not override the specific time limit for bringing claims agreed upon by the parties.

The second provision emphasized by Circle C is paragraph three: "Nothing in this Agreement . . . shall be construed as an acknowledgment by any

---

[2] The parties agree that Tenn. Code Ann.§ 28-1-105(b) does not apply here.

Party that any claim exists or that any claim has been barred, has not been barred, or will be barred by the statute of limitations, statute of repose, laches, waiver, estoppel, or any other defense based on the passage of time." This paragraph makes clear that the parties are not, by the tolling agreement, acknowledging the existence of any claim or the barring of any claim due to any defense "based on the passage of time." We see nothing in this paragraph that changes or limits the agreement of the parties in paragraph one. Paragraph three indicates that the statute of limitations to which the parties are agreeing does not constitute an acknowledgment of any claim or defense.

Circle C asserts that the trial court erred in relying upon the case of *Kosloff v. State Auto. Mut. Ins. Co.*, No. 89-152-II, 1989 Tenn. App. LEXIS 788, 1989 WL 144006, at *1 (Tenn. Ct. App. Dec. 1, 1989), which involved an insurance [*10] policy that contained its own deadline for filing suit. As to the effect of the savings statute, the court relied upon *Guthrie v. Connecticut Indemnity Association*, 101 Tenn. 643, 49 S.W. 829, 830 (Tenn. 1899), for the proposition that the savings statute applied to statutory, not to contractual, limitations. *Kosloff*, 1989 Tenn. App. LEXIS 788, 1989 WL 144006, at *4. All of Ms. Kosloff's claims against the insurance company were barred by the policy restrictions. 1989 Tenn. App. LEXIS 788, [WL] at *5. The court went on to hold, however, that the time restrictions in the insurance contract had no application to claims made against the insurance agent. 1989 Tenn. App. LEXIS 788, [WL] at *6.

As the *Kosloff* court noted, the legislature enacted subsection (b)[3] of Tenn. Code Ann. § 28-1-105 in 1989 "to soften the impact of the *Guthrie* and *Schultz v. Hartford Mut. Ins. Co.*[, 776 S.W.2d 76 (Tenn. Ct. App. 1987)] decisions." 1989 Tenn. App. LEXIS 788, [WL] at *4. But subsection (b) took effect after the facts at issue in *Kosloff*. *Id.* The court, therefore, relied upon the law in existence at the time of the insurance policies and voluntary nonsuit in that case. *Id.*

In the present case, the trial court cited *Kosloff* to support its conclusion that the tolling agreement "was unambiguous and contained both the contract and professional negligence binders, and therefore the suit was not filed within 120 days after [*11] the federal court of appeals disposed of the case on the issues." The trial court relied upon *Kosloff* for basic propositions of law that remain valid. *See* *Shelton*, 233 S.W.3d at 829 (setting out principles of Tennessee law applicable to the construction of a tolling agreement). The trial court did not analogize the facts of the present case to the facts in *Kosloff*. We find no error here.

We must also examine the terms of Tenn. Code Ann. § 28-1-105(a) to determine whether the savings statute applies to a deadline for filing suit established in a tolling agreement. ***HN6*** When construing a statute, a court must "ascertain and give effect to the legislature's intent." *Home Builders Ass'n of Middle Tenn. v. Williamson Cnty.*, 304 S.W.3d 812, 817 (Tenn. 2010). Ordinarily, we derive this legislative intent "'from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning.'" *Id.* (quoting *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000)). If the language of a statute is ambiguous, we "construe the statute's meaning by examining 'the broader statutory scheme, the history of the legislation, or other sources.'" *Hayes v. Gibson Cnty.*, 288 S.W.3d 334, 337 (Tenn. 2009) (quoting *State v. Sherman*, 266 S.W.3d 395, 401 (Tenn. 2008)).

HN7 Subsection (a) of Tenn. Code Ann. § 28-1-105 applies "[i]f the action is commenced

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[3] Tenn. Code Ann. § 28-1-105(b) provides for application of the savings provisions to a "contract which limits the time within which an action *arising out of such contract* must be brought." (Emphasis added).

within the time limited by a rule or statute of limitation . . . ." By its terms, therefore, subsection (a) applies [*12] to periods of limitation established by "rule or statute of limitation." In this case, the applicable time limitation is established by contract, not by "rule or statute of limitation."[4] Tenn. Code Ann. § 28-1-105(a). We must conclude that the savings statute of Tenn. Code Ann. § 28-1-105(a), by its terms, does not trump the deadline established by the parties in the tolling agreement.

(2)

Circle C also argues that the Sixth Circuit's decision did not "resolv[e] all issues raised" in the appeal, as required by the tolling agreement, because the Court remanded for the calculation of damages. For the reasons discussed below, we find no merit in this argument.

The tolling agreement provides, in pertinent part, that the statute of limitations ("Termination Date") will expire 120 days "after the United States Courts of Appeals from the 6th Circuit has issued an opinion resolving all issues *raised in the United States of America, ex rel Brian Wall versus Circle C Construction, LLC*, 697 F.3d 345." (Emphasis added). Thus, the running of the 120 days begins with the issuance of an opinion resolving all issues raised in the *appeal*. The Sixth Circuit did, in fact, resolve [*13] all of the issues raised in the appeal by affirming the district court's judgment on liability and reversing the award of damages and remanding for a recalculation. The tolling agreement does not provide that the statute of limitations will be tolled 120 days from the resolution of all issues in the lawsuit; rather, the pertinent date is the resolution of the issues in the appeal.

Based upon the language of Tenn. Code Ann. § 28-1-105(a) and the tolling agreement, we agree with the trial court's conclusion that Circle C's legal malpractice action against Nilsen is barred by the time deadline established in the agreement.

CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the appellant, Circle C, and execution may issue if necessary.

ANDY D. BENNETT, JUDGE

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[4] As stated previously, Tenn. Code Ann. § 28-1-105(b) applies to certain contractual deadlines but does not apply here.

BEFORE THE TENNESSEE ALARM SYSTEMS CONTRACTORS BOARD
AT NASHVILLE, TENNESSEE

IN THE MATTER OF:	)	
	)	**Docket No. 12.34-135990A**
BEI COMMUNICATIONS, INC.	)	**Complaint No. 2015003281**
	)	
	)	

RESPONDENT BEI COMMUNICATIONS, INC.'S PETITION FOR RECONSIDERATION

Pursuant to Tenn. Code Ann. § 4-5-317 and Rule 1360-04-01-.18 of the Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies, Respondent BEI Communications, Inc. ("BEI" or "Respondent") hereby submits this Petition for Reconsideration and respectfully moves the Tennessee Alarm Systems Contractors Board ("the Board") to reconsider its Final Order entered on May 4, 2016. In further support of its Petition for Reconsideration, BEI files the Affidavits of David Iffergan and Nava Iffergan (attached hereto as Exhibit 1) and the transcript of the April 22, 2016 proceedings (attached hereto as Exhibit 2). Specifically, BEI asks the Board to review the additional evidence presented, consider that no harm to the public resulted from the violation at issue, and evaluate whether the penalty of $25,000.00 is appropriate in light of the circumstances of this case.

I.

STATEMENT OF FACTS

This matter was heard on April 22, 2016 before the Honorable Leonard Pogue, Administrative Law Judge. After hearing testimony from Cody Vest, Executive Director for the Board, Regina Oldham, Paralegal for the Legal Division of the Tennessee Department of Commerce and Insurance, and David Iffergan, President and CEO of BEI, the members of the

Board found BEI in violation Tenn. Code Ann. § 62-3-303 for providing monitoring services without a license and assessed a civil penalty of Twenty-Five Thousand Dollars ($25,000.00).

BEI is a private security company that is duly licensed with the Texas Department of Public Safety. As a private security company, BEI offers a wide range of services, including security fences and interactive remote surveillance. On January 27, 2015, a former BEI employee, who was terminated for cause, filed the Complaint at issue with the Board, alleging that BEI was doing business in Tennessee without a license. BEI received notice of the Complaint in February 2015 – approximately two months after BEI had ceased its limited operations in Tennessee. BEI had previously provided video monitoring services, from April 2010 through December 2014, to an automobile dealership in Memphis, Tennessee, which was owned and operated by AutoNation, Inc. ("AutoNation").

Before entering into the contract with AutoNation d/b/a Dobbs Nissan, Nava Iffergan, the Chief Financial Officer for BEI, contacted the Board's office to inquire whether BEI needed an additional license to provide its proposed video monitoring services in Tennessee. Mrs. Iffergan was told by someone in the Board's office that BEI did not need additional licensure to provide video monitoring services alone.

Based on its findings, the Board offered BEI a settlement through the entry of a Consent Order. BEI did not agree to the entry of Consent Order because, among other reasons, it contained inaccurate findings of fact. Specifically, the Consent Order erroneously concluded that BEI had conducted business in Tennessee for approximately eighty-three (83) months. (attached hereto as Exhibit 3). On February 18, 2016, the Tennessee Department of Commerce and Insurance ("the Department") filed formal disciplinary charges against BEI for engaging in unlicensed activity.

At the April 22, 2016 hearing before the Board, the evidence showed that BEI had, in fact, provided video monitoring services in Tennessee for approximately fifty-six (56) months, without any resulting harm to its customer or the public at large.[1] (Tr. Vol. 1, pp. 21:19-22:12). However, because BEI was not represented by counsel, the evidence presented at the hearing does not completely illuminate the circumstances surrounding BEI's limited operations in Tennessee. For instance, the affidavit testimony of Nava Iffergan, BEI's Chief Financial Officer, shows that BEI's unlicensed activity was the result of an honest mistake. If she had testified at the hearing, Mrs. Iffergan would have provided the following proof:

- BEI has maintained License No. B-08521 with the Texas Department of Public Safety since January 10, 1997;
- Prior to BEI entering into the contract with AutoNation d/b/a Dobbs Nissan, she contacted the Board's office in mid-2009 to inquire whether BEI would need an additional license to provide video monitoring services in Tennessee; and
- Based upon what she was told by someone in the Board's office, she then advised BEI, in her capacity as the CFO, that an additional license was not needed to provide video monitoring in Tennessee.

(Affidavit of Nava Iffergan, ¶¶ 4-9). David Iffergan's testimony at the hearing corroborates Nava Iffergan's affidavit testimony and reinforces that BEI conducted business in Tennessee on a good faith belief that it was in compliance with the Board's rules and regulations. (Tr. Vol. 1, pp. 36:5-37:18; Affidavit of David Iffergan ¶¶ 7-9).

Although it appears that this was not considered by the Board at the hearing, it is important to note that the Board's Rules underwent an amendment soon after Mrs. Iffergan contacted the Board's office. On May 26, 2009, Rule 0090—1—.02 was amended to add new definitions, including the term "Burglar Alarm System," which was defined as "an alarm or

[1] At the hearing, Cody Vest, Executive Director for the Board, testified that "no other complaints had been filed" against BEI and that she had never "heard of any problems" with BEI. (Tr. Vol. 1, pp. 21:19-22:1).

monitoring system, including but not limited to access control, having the primary function of detecting and/or responding to emergencies other than fire." *See* 2009 TN REG TEXT 138679 (NS) (attached hereto as Exhibit 4). The fact that the Board's Rules were amended and went into effect after BEI contacted the Board's office regarding licensure requirements supports BEI's good faith basis to conclude that the Board's rules and regulations concerning alarms were not applicable to its video monitoring services.

II.

LAW AND ARGUMENT

A. The additional evidence demonstrates that BEI committed an honest mistake.

Because BEI was unrepresented by counsel at the initial hearing, the Board should consider the additional evidence presented by the affidavit testimony of David Iffergan and Nava Iffergan. Through their affidavits, it becomes apparent that BEI's limited operations in Tennessee began on a good faith belief that the type of video monitoring services provided to AutoNation did not require licensure by the Board. Although a violation of the Board's Rules occurred as a result of this mistaken interpretation of the law, the testimony of Mr. Iffergan and Mrs. Iffergan displays a genuine attempt to comply with Tennessee law. (*See* Affidavit of David Iffergan, ¶¶ 7-9; Affidavit of Nava Iffergan ¶¶ 8-9).

Notwithstanding the foregoing, BEI is a licensed Texas private security contractor, and it has maintained its license for approximately nineteen (19) years. (Affidavit of David Iffergan, ¶ 4; Affidavit of Nava Iffergan ¶ 4). BEI's history of compliance with another state's applicable regulatory rules indicates BEI's willingness to conduct its business legally. BEI's history of compliance, coupled with its good faith belief that the Board's Rules were inapplicable to its video monitoring services, demonstrates that its violation was neither willful nor purposeful.

BEI's honest mistake regarding the status of Tennessee law is completely plausible in light of the amendments that the Board's Rules underwent in 2009. (Exhibit 4).

B. BEI's violation resulted in no harm to its sole customer in Tennessee or to the public at large.

Tennessee law charges the Board to consider several factors in determining the issuance of a civil penalty. Those factors, as outlined in Tenn. Code Ann. § 56-1-308(b), state:

> In assessing civil penalties, the following factors may be considered:
>
> (1) Whether the amount imposed will be a substantial economic deterrent to the violator;
> (2) The circumstances leading to the violation;
> (3) The severity of the violation and the risk of harm to the public;
> (4) The economic benefits gained by the violator as a result of noncompliance; and
> (5) The interest of the public.

Id. Additionally, Tenn. Code Ann. § 62-32-320(b) and Rule 0090—2—.01(5) of the Board's Rules provide that the Board "shall consider the degree and extent of harm caused by the violation" when determining "the amount of any civil penalty to be assessed." *See* Tenn. Code Ann. § 62-32-320(b); Tenn. Comp. R. & Regs. 0090-02-.01(5) (emphasis added).

Here, the record reveals that the members of the Board failed to make the requisite findings concerning the degree and extent of harm caused by the violation. The Final Order lacks any specific findings concerning the degree and extent of harm caused by the violation. (*See generally* Final Order). As evidenced by the hearing transcript, during its deliberations, the Board did not engage in any discussion at all concerning whether BEI's noncompliance caused any harm. (Tr. Vol. 1, pp. 54:1-57:21, 58:5-63:14 and 66:11-72:20).

In reaching its decision to assess a civil penalty, the Board's deliberations primarily focused on two factors: economic deterrent and the economic benefits gained by BEI. (Tr. Vol. 1, pp. 58:5-63:17, 66:11-72:20 and 73:14-74:8). Despite guidance from the Department's

counsel,[2] the Board completely disregarded the factors regarding the risk of harm to the public, interest to the public, and more importantly, the degree and extent of harm to the public. (Tr. Vol. 1, pp. 54:1-57:21, 58:5-63:17, 64:15-65:20, 66:11-72:20 and 73:14-74:8).

The Board's failure alone to deliberate, or even mention the issue of the degree and extent of harm warrants reconsideration. In fact, that oversight begs the question – what is the justification for such a severe civil penalty when no harm resulted to the public? Indeed, BEI only served one customer in Tennessee, and the Complaint was not filed by either that lone customer or a prospective customer. These undisputed facts, coupled with the negligible degree and extent of harm at issue in this case, support granting reconsideration in this case.

By failing to give consideration to the degree and extent of harm resulting from BEI's noncompliance, the Board did not fulfill its statutory obligations in assessing the civil penalty. As observed by the Tennessee Court of Appeals in *Tolleson v. Tennessee Dep't of Commerce & Ins.*, No. M2014-00439-COAR3CV, 2015 WL 176424, at *1 (Tenn. Ct. App. Jan. 13, 2015),

> The action of the administrative body may be reversed or modified only upon a determination that the action was: (1) in violation of constitutional or statutory provisions; (2) in excess of statutory authority; (3) the result of an unlawful procedure; (4) arbitrary or capricious; or (5) unsupported by material evidence.

Id. (citing *Demonbreun v. Metro. Bd. Of Zoning Appeals,* 206 S.W.3d 42, 46 (Tenn. Ct. App. 2005); *Massey v. Shelby County Retirement Bd.,* 813 S.W.2d 462, 464 (Tenn. Ct. App. 1991)) (attached hereto as Exhibit 5). Granting reconsideration in this matter would provide an opportunity for the Board's members to meaningfully discuss, and carefully weigh, the minimal extent and degree of harm present in this case, reassess the civil penalty, and enter an amended

[2] During the hearing, the Department's counsel acknowledged that it "was not asserting that there was a real risk of harm" in this matter and reminded the Board that "your law also requires you to determine the degree and extent of harm." (Tr. Vol. 1, pp. 47:14-17 and 66:6-10).

Final Order that includes findings of fact and conclusions of law on the issue of harm.[3] Thus, the Petition for Reconsideration should be granted.

C. The Board should evaluate whether the civil penalty of $25,000 is commensurate with the violation at issue.

Without any deliberations regarding the public interest or the degree and extent of harm, reconsideration is appropriate as it would permit review of the civil penalty. The evidence shows that BEI committed an honest mistake by conducting video monitoring to one customer in Tennessee, which resulted in no harm to the public. (Tr. Vol. 1, pp. 21:19-22:12 and 47:14-17). Even if the Board dismisses BEI's contention that its violation was an honest mistake, the record illustrates that the degree and extent of harm at issue in this case was minuscule. Several undisputed facts in the record support this conclusion. First, BEI provided video monitoring services to one customer at one location. Second, the Complaint was not initiated by a then-current or prospective customer. Finally, BEI had ceased its operations in Tennessee at the time of the filing of the Complaint.

In light of the foregoing, reconsideration of the Final Order is warranted. The Board's assessment of the $25,000 civil penalty substantially outweighs the violation at issue – a fact bolstered by the absence of harm to the public. Although BEI recognizes the Board's authority to issue penalties for noncompliance under Tenn. Code Ann. § 62-32-319, Tenn. Code Ann. § 62-32-320, and Rule 0090—2—.01 of the Board's Rules, the appropriate remedy in this case balances BEI's noncompliance with the negligible degree of harm to the public. BEI provided its service to one (1) customer in Tennessee for approximately fifty-six (56) months without any

[3] Alternatively, due to the amendment to the Board's Rules after BEI contacted the Board's office to inquire whether licensure was required for its video monitoring services, it is likely that BEI was informed that it did not need a license for its services. Based on the undisputed facts, the absence of harm, and the amendment to the Board's Rules, the Board may determine that it is appropriate to remand this matter back to the Board's Office for negotiations of the entry of a Consent Order.

complaints and without any harm to the public. Although BEI should have been compliant with the Board's rules and regulations prior to this matter, it is noteworthy from a safety, reliability and public interest standpoint that this Complaint was not filed either by a customer or a harmed member of the public. Rather than focusing on a dispute between an employer and a disgruntled employee, the Board's focus here is more appropriately placed upon the public's safety and well-being. Instructively, the primary purpose of the Board's authority is to assure the "competence of individuals or companies offering alarm systems and services to the general public" and to "protect the safety and security" of consumers. *See* Tenn. Code Ann. §§ 62-32-302 & 62-32-307(a); Board Rule 0090—01—.01.

In this case, the facts do not merit a severe civil penalty. Accordingly, a grant of the Petition for Reconsideration is appropriate.

III.

CONCLUSION

For the foregoing reasons, Respondent BEI Communications, Inc. respectfully requests that the Board grant its Petition for Reconsideration.

Respectfully submitted,

BUTLER SNOW LLP

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Attorneys for Respondent BEI Communications, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2016, a true and correct copy of the foregoing document was sent via Hand-Delivery and/or US Mail, postage prepaid, to the following:

Robyn Lynne Ryan
Assistant General Counsel
Department of Commerce & Insurance
500 James Robertson Parkway
Davy Crockett Tower
Nashville, Tennessee 37243-0569

Ashonti T. Davis

31258363v1

EXHIBIT 1

BEFORE THE TENNESSEE ALARM SYSTEMS CONTRACTORS BOARD
AT NASHVILLE, TENNESSEE

IN THE MATTER OF:	)	
	)	Docket No. 12.34-135990A
BEI COMMUNICATIONS, INC.	)	Complaint No. 2015003281
	)	
	)	

AFFIDAVIT OF DAVID IFFERGAN

I, David Iffergan, hereby swear and affirm that I have personal knowledge of the following statements and that they are true to the best of my knowledge, information and belief:

1. I am over eighteen (18) years of age and competent to testify to the matters contained herein.

2. I am the President and Chief Executive Officer of BEI Communications, Inc. d/b/a BEI Security ("BEI"). I have served as the President and Chief Executive Officer of BEI at all relevant times to Complaint No. 2015003281. I am authorized to provide this affidavit on behalf of BEI.

3. BEI is a private security company located at 15202 Exchange Drive, Houston, Texas 77477.

4. BEI is duly registered as private security company with the Texas Department of Public Safety. Since January 10, 1997, BEI has maintained a license, License No. B-08521, with the Texas Department of Public Safety.

5. I personally know Mrs. Nava Iffergan. Mrs. Iffergan is my wife. She is currently the Chief Financial Officer for BEI and has served in that role for approximately twenty-five (25) years.

6. As a private security company, BEI offers a wide range of services, including security fences and interactive remote surveillance.

EXHIBIT 1

7. For several years, BEI has provided video surveillance and monitoring to automobile dealerships owned and operated by AutoNation, Inc. ("AutoNation"). In 2009, AutoNation requested that BEI provide video monitoring services to the Dobbs Nissan dealership in Memphis, Tennessee. At the time, BEI was providing video monitoring to several AutoNation dealerships in Colorado, and the State of Colorado does not require any special licensure for BEI's monitoring services.

8. I subsequently asked Mrs. Iffergan to inquire whether the State of Tennessee had any licensure requirements for video monitoring services prior to entering into a contract with AutoNation d/b/a Dobbs Nissan. In mid-2009, Mrs. Iffergan contacted the office of the Tennessee Alarm Systems Contractors Board ("the Board") and was told that BEI's proposed video monitoring in Tennessee did not require licensure with the Board.

9. Based on the recommendation of Mrs. Iffergan, I executed a contract, on behalf of BEI, to provide video monitoring at the dealership on January 29, 2010. From April 2010 through December 2014, BEI only provided video monitoring services to the AutoNation dealership in Memphis, Tennessee and conducted no other business in Tennessee.

10. To the best of my knowledge and BEI's internal records, AutoNation did not register a complaint, either formally or informally, concerning BEI's services.

11. To date, BEI continues its video monitoring services to other AutoNation dealerships in the State of Colorado.

12. On January 27, 2015, after BEI ceased doing business in Tennessee, a former BEI employee, not a current or prospective customer, initiated the Complaint at issue (Complaint Number 2015003281). Nearly two months after the expiration of the contract with AutoNation in Memphis, Tennessee, BEI received notice of the Complaint in February 2015.

13. BEI never employed any employees in Tennessee.

14. No BEI customer has ever filed a complaint with the Board concerning BEI's services.

FURTHER AFFIANT SAYETH NOT:

DAVID IFFERGAN
President/CEO
BEI Communications, Inc.

STATE OF TEXAS)
COUNTY OF Fort Bend.)

Before me, a notary public, personally appeared David Iffergan, who swore to the accuracy of the foregoing affidavit this 18 day of May, 2016.

Notary Public

My Commission Expires: 03/26/2019

MASOOD AHMAD NOTARY PUBLIC STATE OF TEXAS NOTARY ID 130113488-2 MARCH 26, 2019

31224545v2

BEFORE THE TENNESSEE ALARM SYSTEMS CONTRACTORS BOARD
AT NASHVILLE, TENNESSEE

IN THE MATTER OF:	)	
	)	Docket No. 12.34-135990A
BEI COMMUNICATIONS, INC.	)	Complaint No. 2015003281
	)	
	)	

AFFIDAVIT OF NAVA IFFERGAN

I, Nava Iffergan, hereby swear and affirm that I have personal knowledge of the following statements and that they are true to the best of my knowledge, information and belief:

1. I am over eighteen (18) years of age and competent to testify to the matters contained herein.

2. I am the Chief Financial Officer of BEI Communications, Inc. d/b/a BEI Security ("BEI"). I have served as the Chief Financial Officer of BEI at all relevant times to Complaint No. 2015003281.

3. BEI is a private security company located at 15202 Exchange Drive, Houston, Texas 77477.

4. BEI is duly registered as private security company with the Texas Department of Public Safety. Since January 10, 1997, BEI has maintained a license, License No. B-08521, with the Texas Department of Public Safety.

5. I personally know Mr. David Iffergan. Mr. Iffergan is my husband. He is currently the President and Chief Executive Officer for BEI and has served in that role for approximately twenty-five (25) years.

6. As a private security company, BEI offers a wide range of services, including security fences and interactive remote surveillance.

7. For several years, BEI has provided video surveillance and monitoring to automobile dealerships owned and operated by AutoNation, Inc. ("AutoNation"). In 2009, AutoNation requested that BEI provide video monitoring services to the Dobbs Nissan dealership in Memphis, Tennessee. At the time, BEI was providing video monitoring to several AutoNation dealerships in Colorado, and the State of Colorado does not require any special licensure for BEI's surveillance services.

8. In mid-2009, I contacted the office of the Tennessee Alarm Systems Contractors Board ("the Board") and was told that BEI's proposed video monitoring in Tennessee did not require licensure with the Board.

9. Acting on that representation from the Board's office, I advised Mr. Iffergan that BEI could provide video monitoring to the dealership without a license. From April 2010 through December 2014, BEI only provided video monitoring services to the AutoNation dealership in Memphis, Tennessee and conducted no other business in Tennessee.

10. To the best of my knowledge and BEI's internal records, AutoNation did not register a complaint, either formally or informally, concerning BEI's services.

11. To date, BEI continues its video monitoring services to other AutoNation dealerships in the State of Colorado.

12. On January 27, 2015, after BEI ceased doing business in Tennessee, a former BEI employee, not a current or prospective customer, initiated the Complaint at issue (Complaint Number 2015003281). Nearly two months after the expiration of the contract with AutoNation in Memphis, Tennessee, BEI received notice of the Complaint in February 2015.

13. BEI never employed any employees in Tennessee.

14. No BEI customer has ever filed a complaint with the Board concerning BEI's services.

FURTHER AFFIANT SAYETH NOT:

NAVA IFFERGAN
Chief Financial Officer
BEI Communications, Inc.

STATE OF TEXAS)
COUNTY OF Tarrant)

Before me, a notary public, personally appeared Nava Iffergan, who swore to the accuracy of the foregoing affidavit this 12 day of May, 2016.

Notary Public

My Commission Expires: 03/26/2019

MASOOD AHMAD NOTARY PUBLIC STATE OF TEXAS NOTARY ID 130114482 MARCH 26, 2019

312267l6v2