The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Judge, Tennessee Court of Appeals.

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

1998; 019487.

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; 1998; active.

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

No.

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

August 2020-present: Judge, Tennessee Court of Appeals.

September 2014-August 2020: Judge, Knox County Circuit Court, Division I.

June 2000-September 2014: Attorney, Hodges, Doughty & Carson, PLLC in Knoxville.

May 1998-June 2000: Judicial Law Clerk, Judge Joseph M. Tipton, Tennessee Court of Criminal Appeals.

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 hear civil cases on appeal from Circuit, Chancery, and General Sessions Courts throughout Tennessee. These cases encompass a wide range of civil disputes, including health care liability, termination of parental rights, post-divorce matters, property disputes, breach of contract claims, employment disputes, personal injury, professional malpractice, statutory causes of action, and commercial disputes. My duties include reviewing appellate briefs in preparation for oral argument, participating in oral argument, researching relevant case law, writing opinions, reviewing other judges' opinions, and making decisions regarding motions filed with the Tennessee Court of Appeals. My cases generally come from the Eastern section of Tennessee, but I also hear cases from the Middle and Western sections.

My case load is heavy. During my tenure on the Court of Appeals, I have participated in 243 panels, which includes both argued and on-brief cases. I have been assigned 96 cases, and I have released opinions in 86 cases. I have also authored five separate concurring and dissenting opinions.

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.

Immediately after graduating from law school, I accepted a position as a judicial law clerk for Judge Joseph M. Tipton, Tennessee Court of Criminal Appeals. In this role, I was responsible for reviewing all appellate briefs submitted by the parties, preparing bench memoranda for the judge's use during oral argument, attending oral argument, attending post-oral argument briefings with all judges on the panel, performing legal research regarding the issues raised, drafting preliminary opinions, reviewing other judges' opinions, and drafting preliminary concurring and dissenting opinions, if warranted. This experience was incredibly valuable, as it gave me a solid foundation in legal analysis and writing, as well as the perspective of the appellate court.

I knew that I wanted to be a trial lawyer, so after two years as a judicial law clerk, I accepted a position as an associate with Hodges, Doughty & Carson in June of 2000. When I began my practice, I was given immediate responsibility for litigation files. I appeared in courtrooms

throughout East Tennessee and Southeast Tennessee and tried personal injury cases, property disputes, premises liability claims, landlord/tenant disputes, and breach of contract cases. I also had a large collections practice at that time. In addition, I agreed to accept appointed appellate cases from the Tennessee Court of Criminal Appeals, and I represented many indigent criminal defendants in the early years of my practice.

After a few years, my civil litigation practice expanded into more complex cases, and from that point on, almost all of my case load was within the Circuit and Chancery Courts of East Tennessee and the United States District Courts. Examples of the types of cases I handled include civil rights, personal injury, commercial litigation, workers' compensation, Tennessee Consumer Protection Act, representation of homeowner's associations, property disputes, and general negligence and tort claims. From the beginning of my civil litigation practice, my cases were my own to handle from start to finish, and I was solely responsible for all pleadings, written discovery, depositions, motions, trials, settlements, and appeals.

After several years of practice, I developed an interest in employment law, and I began receiving employment litigation files that were primarily defense files. These cases involved claims under the Tennessee Human Rights Act, the Tennessee Disability Act, the Family Medical Leave Act, Title VII, the Americans with Disabilities Act, and enforcement of non-compete agreements. I then began accepting plaintiff's employment cases, and at the end of my tenure at Hodges, Doughty & Carson, the majority of my employment case load involved representing individuals who had been wrongfully terminated or discriminated against in the workplace.

In addition to my litigation practice, I also maintained an appellate practice at Hodges, Doughty & Carson. During the course of my career in private practice, I briefed and argued twenty-six appeals in the Tennessee Court of Appeals, Tennessee Court of Criminal Appeals, Tennessee Supreme Court, and United States Court of Appeals for the Sixth Circuit. In addition to my own case load, I worked with other attorneys in my office on cases that were particularly complex or that required significant research and legal writing. My partners frequently enlisted my assistance in drafting dispositive motions and briefs, applications for permission to appeal, appellate briefs, and presenting oral argument in the appellate courts.

I was proud of the practice I developed, as it was varied, complex, and it allowed me to represent both plaintiffs and defendants. In late 2012, a vacancy occurred in Knox County Circuit Court when Judge Wheeler Rosenbalm retired. I applied for the position, and I was chosen to be in the panel of three sent to Governor Haslam's office. Ultimately, Governor Haslam selected Deborah Stevens for the position, and she has been a tremendous asset to Knox County in that role.

An opening arose again in 2014 when Judge Dale Workman announced that he would be retiring and would not seek re-election. I immediately knew that I would seek the position, which involved running in a contested, county-wide election. I had never run for office before, and I was not entrenched in local politics. Despite my lack of campaign knowledge, I embraced the campaign process with enthusiasm, and I spent six months campaigning while also maintaining my law practice. Two other lawyers also sought the position, so I was faced with a three-way race in the Republican primary. No Democrat ran for the seat. Campaigning was one of the most difficult and rewarding things I have ever done. I felt strongly that my background and professional experience would prove valuable for the position of Circuit Court Judge, and that was the basis of my campaign. I won the primary in May of 2014, and I took office in September

of 2014.

As a Circuit Court Judge, I presided over a wide range of civil disputes, including personal injury, property damage, health care liability, commercial disputes, breach of contract, defamation, employment disputes, and civil rights claims. My duties included researching and ruling on preliminary and dispositive motions and conducting bench and jury trials. I frequently wrote opinions on dispositive motions. I handled domestic litigation cases when the judges in Chancery Court and Fourth Circuit (Knox County's domestic court) had conflicts. I also heard Orders of Protection on a rotating basis.

In January of 2020, Judge Charles Susano announced his retirement from the Tennessee Court of Appeals. With the same excitement I had when I decided to run for Circuit Court Judge, I applied for the position. For me, the opportunity to become an appellate judge was a chance to bring my legal career full circle, returning to the things I love the most- legal research, analysis, and writing. It was a tremendous honor to be selected for the position by Governor Lee. This job has been the most rewarding and satisfying of my career, and I truly feel at home as an appellate court judge. I am thankful for the career I had before joining the Tennessee Court of Appeals, both as a trial lawyer and a trial court judge, as I believe those experiences have uniquely prepared me to address the issues that come before the Tennessee Supreme Court.

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

I have served as a Special Judge on the Tennessee Supreme Court Workers' Compensation Panel. I also sat with the Tennessee Court of Criminal Appeals when one of the judges had a conflict.

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.

When I was a Circuit Court Judge, I served as a facilitator for judicial settlement conferences, which are essentially mediations of other judges' Circuit Court cases in which I acted as the mediator.

With respect to noteworthy cases, as a trial judge, I presided over the lawsuits filed by the State of Tennessee against various pharmaceutical companies with respect to opioid manufacture and distribution. These were complex cases, and I heard and ruled on dispositive motions in those cases.

As an appellate court judge, I have had the opportunity to address several interesting issues, including the parameters of the "workplace" in sexual harassment cases, the circumstances

under which records can be sealed in estate proceedings, application of Tennessee's Anti-SLAPP statute, whether a supervising physician can be compelled to provide expert testimony about a nurse practitioner's care when the physician has not been named as an expert witness, and interpretation of Tennessee's statute requiring a copy of the trial transcript in criminal cases be maintained in the court clerk's record.

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.

Lawyering and judging are stressful, and we see people when they are facing their most difficult situations. As a trial judge, I was fortunate to be able to balance those somber occasions by participating in the most joyful of celebrations- adoptions. It is hard to describe the joy and happiness in the courtroom and in chambers on adoption days. Several families have sent me photos from their adoption days, and I treasure those photos and the memories of bringing families together. It is a reminder that ours is truly a profession of helping and problem-solving.

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.

In November of 2021, I applied for a position on the Tennessee Supreme Court. The Governor's Council met on December 9, 2021, and my name was submitted to Governor Lee.

In January of 2020, I applied for a position on the Tennessee Court of Appeals. The Governor's Council met on February 25, 2020, and my name was submitted to Governor Lee.

In November of 2012, I applied for the position of Knox County Circuit Court Judge, Division III. The Governor's Council met on December 14, 2012, and my name was submitted to Governor Haslam.

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.

1995-1998: The University of Tennessee College of Law, J.D. I graduated *magna cum laude* in the top 15% of my class. I was a member of the *Tennessee Law Review* and served as a Student Materials Editor. I was also a member of the Jerome Prince National Evidence Moot Court Team, and our team placed first in brief writing. I received the John D. Baugh Award for Excellence in Oral Advocacy, the Gunn, Ogden & Sullivan Award for Excellence in Brief Writing, and the E. Bruce & Mary Evelyn Foster Scholarship. I served as a member of the Moot Court Board, and I coached the Karns High School Mock Trial Team, which placed first in Knox County in 1998 and 1999.

1991-1995: The University of Tennessee, Knoxville, B.S. in Communications with a major in broadcasting and a minor in political science. I graduated *cum laude* and was awarded an academic scholarship my senior year. As a member of Pi Beta Phi fraternity for women, I served as a Pledge Educator and Vice President for Moral Advancement. I also served on the Senior Gift Challenge Steering Committee for UT and was a member of Vol Corps, a group of student ambassadors for UT.

PERSONAL INFORMATION

15. State your age and date of birth.

49; [redacted] 1973.

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

I have lived in the State of Tennessee continuously since birth.

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

Approximately 47 years.

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

Knox 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. A lawsuit was filed against my teenage daughter and I on November 10, 2022, in Knox County Circuit Court, docket number 2-323-22. The lawsuit alleges personal injuries as a result of a car accident involving my daughter in 2021. I was sued as the owner of the car.

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.

- University of Tennessee Chancellor's Associates
- Executive Women's Association
- Sacred Heart Cathedral

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.

None, other than my college sorority.

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.

- Knoxville Bar Association. I have served on the Board of Governors, co-chaired the Unauthorized Practice of Law Committee, and served on the Judicial Committee, Membership Committee, Professionalism Committee, Work-Life Balance Committee, and Wellness Committee. I have served on the nominating committee for the Board of Governors and the selection committee for the Governor's Award.
- Knoxville Bar Foundation.

- Tennessee Bar Association. I was a member of the TBA's Leadership Law class.
- Tennessee Judicial Conference. I served on the Executive Committee as a conference co-chair.
- American Inn of Court, Hamilton Burnett Chapter.
- East Tennessee Lawyers Association for Women.

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.

- *Cityview* Magazine Top Attorney in Appellate Law, 2012.
- *Cityview* Magazine Top Attorney in Labor and Employment Law, 2011.
- *MidSouth Super Lawyer's* Rising Star Award, 2012.

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

- *The Knoxville News Sentinel Business Journal,* "Know What to Expect When Co-Worker Is Expecting," October 2012.
- KBA *Dicta*, "There's More to It Than Passing the Bar Exam: What Every Law Firm Needs to Teach Its New Lawyers," August 2008.
- *Smoky Mountain Paralegal Association,* "Appellate Practice Tips," February 11, 2004.

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.

- KBA CLE, Ethics Bowl, December 2, 2022.
- Tennessee Lawyers Association for Women Empowerment Conference, September 16, 2022.
- East Tennessee Lawyers Association for Women, CLE and discussion regarding paths to the judiciary, July 13, 2022.
- KBA CLE, "*Ain't Behavin': What Not to Do- A View from the Bench,*" November 5, 2021.
- KBA CLE, Ethics Bowl, December 6, 2019.
- East Tennessee Lawyers Association for Women, presentation and discussion of the film, "*RBG*," September 19, 2019.
- KBA Law Day Luncheon, "*Judicial Independence and the Separation of Powers*," May 2, 2018 (panel member).
- KBA CLE, "*Sovereign Citizens*," January 1, 2018.

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.

Tennessee Supreme Court, applicant for appointment in 2021.

Tennessee Court of Appeals, appointed in May 2020.

Knox County Circuit Court Judge, Division I, elected in May 2014.

Knox County Circuit Court Judge, Division III, applicant for appointment in 2012.

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.

I have attached two opinions, both authored by me.

ESSAYS/PERSONAL STATEMENTS

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

During my tenure with the appellate court, I have had the opportunity to work with my fellow judges and make decisions on issues that are important to the development of Tennessee law. I am proud of that work, and it has been my honor to serve the State of Tennessee in this capacity. The work of the Tennessee Supreme Court is largely the same as the work I currently do, but the issues that are addressed by the Tennessee Supreme Court can profoundly affect the justice system in Tennessee. The volume of work is smaller, but the issues are significant and require extensive, in-depth research and analysis. Often, the issues concern the very heart of our legal system, the Tennessee Constitution. This is the work I love. To put it simply, I can think of no greater way to use my particular skills to serve the people of Tennessee.

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 accepted *pro bono* cases, including referrals from Legal Aid. I also volunteered for the *Pro Bono* Appellate Case Referral program sponsored by the Tennessee Bar Association. I represented many indigent criminal defendants on appeal.

As a judge at both the trial court and appellate level, my goal has always been to treat all litigants, regardless of representation, with fairness, respect, and dignity. Everyone deserves to be heard

in a meaningful way, and this should not be affected by one's ability to pay for an attorney.

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 a position on the Tennessee Supreme Court. The Court is comprised of five members, serves as the highest court in the State of Tennessee, and hears civil and criminal cases from across the state. I believe my experience as a trial lawyer, a trial judge, and an appellate court judge have prepared me for this position. I view legal issues not through a single lens but through the lens that each of those experiences has provided me. Lastly, although the majority of my experience has been in civil law, my previous work with the Tennessee Court of Criminal Appeals and representation of indigent criminal defendants on appeal has resulted in a solid foundation and understanding of criminal procedure, as well as the constitutional issues that often arise in criminal cases.

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)***

Judges should be visible in the community and should participate in community activities to the extent permitted by the Rules of Professional Conduct. Most of my community involvement has been through participation in my church and my children's school and activities. I have also served on several nonprofit boards, including Friends of Literacy and the American Heart Association's Circle of Red. I served for two years as a moderator for the Knox County Community Action Committee Neighborhood Issues Day, and I have participated in Constitution Day and Principal for a Day at local elementary schools. Also, I have spoken to students at local middle schools about the law and about personal success. My husband and I believe it is important for our children to be involved in community service, and we have participated as a family in the Salvation Army's bell ringing program and delivered FISH meals.

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)***

The Council may recall that shortly before my last application, my father passed away. My mother passed away in 2014, so I am in the unenviable position of having lost both parents at a fairly young age. These losses have forced me to think about the impact my parents have had on my life, as well as the impact I hope to have on my children's lives. Dad came with me to the interviews when I applied for the Court of Appeals, and he was so impressed with the process. He commented to me that if everyone could see how very thorough the process is, people would have a lot more faith in the justice system. I was blessed to have wonderful parents. The values they instilled in me cannot be fully articulated on a piece of paper, but all I can do is express that without them, I would not have had the education necessary to become a

lawyer, I would not have had the discernment to know when to take career chances, and I would not have had the confidence to believe that I could apply for a position on the Tennessee Supreme Court. Although they did not know it at the time, they taught me how to be a good lawyer and how to be a good judge, and I am thankful for them every day.

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. Judges must take an oath to do just that. We cannot be influenced by personal opinion or by public opinion. We are not legislators. We do not make the law. We are tasked with interpreting and applying it. In my tenure as a trial judge, there were a few times when existing law had been challenged or unsettled, and on several occasions, attorneys requested that I deviate from the rule while the issue was on appeal. My position, both as a trial judge and an appellate judge, is that my duty is to apply the law as it exists.

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. Representative Timothy Burchett, [redacted] Knoxville, TN 37902, [redacted]
B. Senator Richard Briggs, [redacted] Nashville, TN 37246, [redacted]
C. Senator Becky Massey, [redacted] Nashville, TN 37246, [redacted]
D. Knox County Mayor Glenn Jacobs, [redacted] Knoxville, TN 37902, [redacted]
E. Dr. Shawn Comerford, President of TealCom Holdings, LLC, [redacted] Knoxville, TN 37919, [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] Supreme Court 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: December 7, 2022.

Kristi M. Davis
Signature

When completed, return this application to John Jefferson at the 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.

Kristi M. Davis
Type or Print Name

Kristi M. Davis
Signature

12/7/22
Date

019487
BPR #

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

Kelly L. PHELPS

v.

STATE of Tennessee

Court of Appeals of Tennessee,
Eastern Section, AT NASHVILLE.

November 12, 2020 Session

FILED 03/10/2021

Background: Female employee, who was a server at a state-park restaurant, brought action against her employer, the State, for sexual harassment, discrimination, and retaliation under the Tennessee Human Rights Act (THRA). The Circuit Court, Davidson County, Thomas W. Brothers, J., granted employer's motion for summary judgment dismissing employee's claims. Employee appealed.

Holdings: The Court of Appeals, Davis, J., held that:

(1) as a matter of first impression, genuine issue of material fact existed as to whether sufficient nexus was present between workplace and sexual assaults, which occurred off-premises and after work hours, perpetrated by assistant park manager against employee at after-party at private residence and work situation during months following assault such that sexual assaults and work situation affected a term, condition, or privilege of employment, precluding summary judgment in favor of employer on sexual-harassment hostile-work-environment claim, and

(2) genuine issues of material fact existed as to whether employer took materially adverse action against employee, precluding summary judgment in favor of employer on retaliation claim.

Vacated and remanded.

1. Judgment ⇐185(6)

When a party moving for summary judgment does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. Tenn. R. Civ. P. 56.04.

2. Judgment ⇐185(2)

If a party moving for summary judgment bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict. Tenn. R. Civ. P. 56.04.

3. Judgment ⇐185(2)

At the summary judgment stage, whether the nonmoving party is a plaintiff or a defendant and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense, the nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. Tenn. R. Civ. P. 56.04.

4. Judgment ⇐181(21)

Genuine issue of material fact existed as to whether, considering totality of the circumstances, sufficient nexus was present between workplace and sexual assaults, which occurred off-premises and after work hours, perpetrated by assistant park manager against female employee at after-party at private residence and work situation during months following assaults, including employee being forced to work with assistant park manager, such that sexual assaults and work situation affected a term, condition, or privilege of employ-

ment, precluding summary judgment in favor of employer in sexual-harassment hostile-work-environment action under the Tennessee Human Rights Act (THRA). Tenn. Code Ann. § 4-21-401(a)(1).

5. Civil Rights ⇐1147

The Tennessee Human Rights Act (THRA) applies to claims of discrimination based on the existence of a hostile work environment. Tenn. Code Ann. § 4-21-401(a)(1).

6. Civil Rights ⇐1147

"Hostile work environment harassment" occurs where conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Tenn. Code Ann. § 4-21-401(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

7. Civil Rights ⇐1185

To prevail on a hostile work environment claim in a sexual harassment case, an employee must assert and prove that (1) the employee is a member of a protected class, (2) the employee was subjected to unwelcomed sexual harassment, (3) the harassment occurred because of the employee's gender, (4) the harassment affected a term, condition, or privilege of employment, and (5) the employer knew, or should have known of the harassment and failed to respond with prompt and appropriate corrective action. Tenn. Code Ann. § 4-21-401(a)(1).

8. Courts ⇐97(5)

In construing and applying the Tennessee Human Rights Act (THRA), decisions of federal courts addressing similar issues under Title VII are helpful as potentially persuasive authority. Civil Rights Act of 1964 § 704, 42 U.S.C.A. § 2000e et seq.; Tenn. Code Ann. § 4-21-101 et seq.

9. Civil Rights ⇐1036

If a single incident is severe, it may be actionable as sexual harassment despite the fact that the conduct was not repeated. Tenn. Code Ann. § 4-21-401(a)(1).

10. Civil Rights ⇐1736

Courts addressing whether employer can be held liable for supervisor or coworker's sexual harassment occurring off-premises and/or after traditional work hours consider totality of the circumstances, including following factors: (1) proximity in time and space to "traditional workplace," (2) relationship of event to employees' work duties, (3) extent to which employer planned, promoted, or sponsored event, (4) degree to which employees were pressured or encouraged to attend event and number of employees in attendance, (5) employer's knowledge of any pattern of similar harassment by offending employee under prior similar circumstances, (6) extent to which off-premises harassment impacted victim's workplace experience after it was reported to employer, including whether victim was forced to continue working with harasser, and (7) any other circumstances pertinent to the inquiry. Tenn. Code Ann. § 4-21-401(a)(1).

11. Civil Rights ⇐1245

The anti-retaliation provision of the Tennessee Human Rights Act (THRA) prohibits employer actions that are likely to deter employees from filing complaints asserting their rights under anti-discrimination statutes. Tenn. Code Ann. § 4-21-301.

12. Judgment ⇐181(21)

Genuine issues of material fact existed as to whether employer singled out female employee, who was a server at a state-park restaurant, for written warning,

whether employer reduced employee's hours, work shifts, and type of shifts, resulting in economic detriment to employee, and whether employer's managers knowingly allowed assistant park manager to intimidate and stalk employee both during and after work hours after employee had reported sexual assaults committed by assistant park manager, such that employer took materially adverse action against employee, precluding summary judgment in favor of employer in retaliation action under the Tennessee Human Rights Act (THRA). Tenn. Code Ann. § 4-21-301.

13. Civil Rights ⇐1243

To state a prima facie case for retaliation under the Tennessee Human Rights Act (THRA), an employee must demonstrate: (1) that she engaged in activity protected by the THRA, (2) that the exercise of her protected rights was known to the defendant, (3) that the defendant thereafter took a materially adverse action against her, and (4) there was a causal connection between the protected activity and the materially adverse action. Tenn. Code Ann. § 4-21-301.

14. Civil Rights ⇐1031

Retaliation under the Tennessee Human Rights Act (THRA) comes in many shapes and sizes, and the law deliberately does not take a laundry list approach to retaliation as its forms are as varied as the human imagination will permit. Tenn. Code Ann. § 4-21-301.

Appeal from the Circuit Court for Davidson County, No. 18C479, Thomas W. Brothers, Judge

Jason A. Lee and Laura E. Bassett, Nashville, Tennessee, for the appellant, Kelly L. Phelps.

Herbert H. Slatery III, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; and David M. Rudolph, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

Kristi M. Davis, J., delivered the opinion of the Court, in which D. Michael Swiney, C.J., and John W. McClarty, J., joined.

Plaintiff Kelly Phelps brought this action for sexual harassment, discrimination, and retaliation under the Tennessee Human Rights Act ("THRA") against her employer, the State of Tennessee. Plaintiff worked as a server at the restaurant at Paris Landing State Park ("the park"). She alleged that Josh Walsh, the assistant park manager who was described as "second in command" at the park, sexually assaulted her at an "after-party" on State property that immediately followed a Halloween party hosted by the park at the restaurant and inn. She further alleged that after she reported the incident, Defendant, among other retaliatory actions, allowed Walsh to continue working around her at the park as usual, and to continue harassing and threatening her. Following extensive discovery, Defendant moved for summary judgment. The trial court found that there were genuine issues of material fact as to whether Walsh was Plaintiff's supervisor; whether he "sexually harassed women at Paris Landing State Park prior to the Halloween party" and Defendant was aware of it; and whether "a reasonable fact-finder could conclude that Mr. Walsh's action in grabbing [Plaintiff] by the neck and thrusting his body against her in a sexual manner was 'extremely serious' and sufficient to impose liability on the Defendant." However, the trial court granted summary judgment to Defendant because it found that the sexual assault did not occur "in the workplace." Regarding the retaliation claim, the trial court held that

Plaintiff did not establish that Defendant took a "materially adverse action" against her after she reported the assault. We hold that there are genuine issues of material fact regarding whether the alleged harassment and discrimination affected a term, condition, or privilege of Plaintiff's employment, and whether Defendant unlawfully retaliated against her. We vacate the judgment of the trial court.

I. Background

The Halloween party was planned and thrown by the park's restaurant managers on October 21, 2017. It was open to the public, and park employees were strongly encouraged to attend in costume. The party was adults-only because the restaurant's bar was open and alcohol was served in abundance. Restaurant managers gave out buy-one-get-one-free drink coupons to employees. Most of the party attendees were park employees. The trial court found that "Mr. Walsh allegedly became intoxicated. He then proceeded to grope, molest, and make uncomfortable at least five women at the party." Four State employees–Plaintiff, her fellow servers Christen Patterson and Magan Davis, and room clerk Alison Otelo–subsequently filed reports with Defendant complaining of sexual harassment by Walsh that evening. One of them, Patterson, later filed a lawsuit at the same time as Plaintiff.

Plaintiff and Patterson filed many joint pleadings, conducted discovery together, and made many of the same arguments before the trial court. Although numerous pleadings and memoranda filed below state that the cases were consolidated, there is no order to that effect in the record. Both parties recognize on appeal that Plaintiff's and Patterson's cases were not officially consolidated. The trial court's final order disposes of both cases together. The trial court denied summary judgment in Patterson's action because some of her alleged harassment took place at the party, in or around the park restaurant. The trial court found as follows:

> As to the specific allegations of Plaintiff Patterson, Mr. Walsh put his hands on and rubbed her thighs. He also asked to frisk her while placing his hands on her ribcage. At one point he pinned her against the wall making her uncomfortable. He then stopped her as she was coming out of the bathroom and asked her to perform oral sex on him. Later, he told her that he wanted to have sex with her.
>
> This was not the first time Mr. Walsh had acted inappropriately with Patterson. On numerous previous occasions he had touched her on her back and ribcage, as well as several hugs. Mr. Walsh had also behaved inappropriately with other women prior to the Halloween party. Complaints had been made about him by other women prior to the Halloween party.

(Citations to record omitted).

The Halloween party ended after midnight. Keith Littles, a building maintenance worker employed at the park, invited some of the employees to his residence for an after-party. The attendees went directly to his residence, which was located on park property about a block and a half away from the restaurant and inn. According to Plaintiff's complaint, at the after-party, Walsh

> approached the Plaintiff and put his arm around her neck and pulled her body into his pelvis. He had a semi-erect penis and he pressed his penis into the Plaintiff's buttocks and rubbed and thrust his penis into her buttocks area. The Plaintiff physically moved Josh Walsh away from her body. She then verbally instructed Josh Walsh to cease this activity immediately and told him to

"go home to your wife." He then, a second time, grabbed the Plaintiff around the neck, pulled her in and rubbed his semi-erect penis against her buttocks and thrusted his penis in a sexual manner, into the Plaintiff. The Plaintiff was distraught, outraged and completely distressed over the actions of the assistant park manager[.]

According to the trial court's final order,

> After the party, complaints were made regarding Mr. Walsh's behavior. Joan Williams, the head park manager[,] blamed the women and suggested that Mr. Walsh's behavior was acceptable. Ms. Williams did not immediately remove Mr. Walsh from his duties after the complaints were filed. He was allowed to continue being around the women who had filed complaints against him.
>
> Eventually, on January 31, 2018, Mr. Walsh was placed on administrative leave with pay, pending formal disciplinary action more than two weeks later. On February 20, 2018, Mr. Walsh began serving a ten-day suspension without pay for his misconduct. When he came back to work, it was in a demoted position. On April 13, 2018, he resigned his employment with the State.

(Citations to record omitted).

Plaintiff filed a sworn declaration in which she alleged as follows, in pertinent part:

> Following my report on November 17, 2017 about Josh Walsh's actions directed at me, he continued to work around me in the restaurant area. There was no apparent separation between Josh Walsh and myself or Christen Patterson. Josh Walsh would stare at me and Christen Patterson from the balcony. From November 17, 2017 through January 31, 2018 Josh Walsh would stare at me, smirk at me and smile at me in an intimidating, harassing, hostile manner. The State of Tennessee did nothing to separate Josh Walsh from me and I reported his conduct to my managers, Sara Byrd and Alicia Brewer[,] on multiple occasions of Josh Walsh's actions directed at me in retaliation and harassing following my reports of sexual harassment. Josh Walsh drove by my home on multiple occasions to intimidate and stare at me during the "investigation" being performed by the State of Tennessee after I reported the sexual harassment and before he was placed on administrative leave. I reported this to my managers, and nothing was done to stop this activity.
>
> Management at the State of Tennessee retaliated against me for my reports of sexual harassment and reduced my work hours, work shifts and the type of shifts that I was getting so that I was not given as favorable shifts to work which were less profitable and impacted me [from] a monetary perspective.

(Numbering in original omitted).

Plaintiff also alleged that as further retaliation, Defendant unfairly singled her out for written discipline resulting from its determination that her Halloween costume was inappropriate. Defendant moved for summary judgment in both Patterson's case and the current case. Among other things, the parties filed the entire depositions of fourteen witnesses in support of, and opposition to, summary judgment. The trial court stated as follows in its order granting summary judgment:

> [T]he Court finds there that there is a genuine dispute of material fact as to whether Mr. Walsh was a supervisor. Even if Mr. Walsh was just a "co-worker," the Court also finds that there is a genuine dispute as [to] whether Defendant knew or should have known of the

> harassment and failed to take immediate and appropriate corrective action.
>
> There is evidence that Josh Walsh sexually harassed women at Paris Landing State Park prior to the Halloween party, including Magan Davis, Sara Byrd, and Plaintiff Patterson. He would also get physically close to the women who worked in the restaurant in a sexually harassing way, which was known, experienced by, and encouraged by manager Sara [Byrd]. Park manager Bridget Lofgren also experienced sexual harassment in 2017, when Walsh tried to get her to sit on his lap, and sent her 50÷ texts of a sexual nature. Ranger Amy O'Brien also experienced sexually explicit comments.
>
> The Court finds that there is a genuine dispute as to whether Defendant knew about all of Walsh's behavior before the Halloween party and had a duty to take prompt and appropriate remedial action, reasonably calculated to terminate the harassment.

(Citations in original omitted).

The trial court denied summary judgment in Patterson's action, finding among other things that "a reasonable fact-finder could conclude that the frequency, severity, and threatening nature of all of the actions of Mr. Walsh, ... establishes that Plaintiff Patterson's workplace was permeated with discriminatory ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment." Conversely, the court granted summary judgment against Plaintiff, on the following stated ground:

> The THRA prohibits sexual harassment and discrimination ***in the workplace***. *Spann v. Abraham*, 36 S.W.3d 452 (Tenn. Ct. App. 1999). By Plaintiff Kelly Phelps' own admission, Mr. Walsh did not sexually harass her at the Halloween party. Rather, the alleged harassment occurred at an after-party at the residence of Keith Littles.
>
> The Court finds that Defendant cannot be liable for the actions of Mr. Walsh on the private property of Keith Littles. There is no proof that employees were required to attend the after-party[;] instead it was a social gathering unconnected to work. Respectfully, the Court finds that there are no genuine issues of material fact concerning this essential element and that the [D]efendant is entitled to judgment as a matter of law as to [Plaintiff's] sexual harassment and sexual discrimination claim under the THRA.

(Emphasis in original; citations omitted).

II. Issues

The issue raised by Plaintiff, as restated, is whether the trial court erred in granting Defendant summary judgment on Plaintiff's THRA claims of sexual harassment, discrimination and retaliation.

III. Standard of Review

A trial court may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... 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. The propriety of a trial court's summary judgment decision presents a question of law, which we review de novo with no presumption of correctness. *Kershaw v. Levy*, 583 S.W.3d 544, 547 (Tenn. 2019).

[1, 2] "The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 83 (Tenn.

2008). As our Supreme Court has instructed,

> when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

Rye v. Women's Care Ctr. of Memphis, 477 S.W.3d 235, 264 (Tenn. 2015) (emphasis in original). "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

[3] When a party files and properly supports a motion for summary judgment as provided in Rule 56, "to survive summary judgment, the nonmoving party may not rest upon the mere allegations or denials of its pleading, but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, set forth specific facts ... showing that there is a genuine issue for trial." *Rye*, 477 S.W.3d at 265 (internal quotation marks and brackets in original omitted). "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects*, 578 S.W.3d at 889 (quoting *Rye*, 477 S.W.3d at 265).

In reviewing the trial court's summary judgment decision, we accept the evidence presented by the nonmoving party (in this case, Plaintiff) as true; allow all reasonable inferences in her favor; and "resolve any doubts about the existence of a genuine issue of material fact in favor of" Plaintiff, the party opposing summary judgment. *Id.* at 887.

IV. Analysis

A. Sexual Harassment and Discrimination Claims

[4–7] The THRA provides that it is unlawful for an employer "to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401(a)(1). The THRA applies to "claims of discrimination based on the existence of a hostile work environment." *Campbell v Fla. Steel Corp.*, 919 S.W.2d 26, 31 (Tenn. 1996). As our Supreme Court stated in *Campbell*,

> Hostile work environment harassment occurs "where conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor* [*Sav. Bank, FSB v. Vinson*], 477 U.S. [57,] 65, 106 S.Ct. [2399,] 2404 [91 L.Ed.2d 49] [1986].
>
> To prevail on a hostile work environment claim in a sexual harassment case, an employee must assert and prove that (1) the employee is a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment; (3) the harassment occurred because of the employee's gender; (4) the

> harassment affected a term, condition, or privilege of employment; and (5) the employer knew, or should have known of the harassment and failed to respond with prompt and appropriate corrective action.

Id. (internal quotation marks omitted). Three years after *Campbell*, the Tennessee Supreme Court, in response to a pair of landmark United States Supreme Court opinions, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), stated, "[w]e ... adopt the [U.S.] Supreme Court's recently articulated standard of vicarious liability in all supervisor sexual harassment cases," holding:

> under the THRA, an employer is subject to vicarious liability to a victimized employee for actionable hostile work environment sexual harassment by a supervisor with immediate (or successively higher) authority over the employee. The defending employer may raise an affirmative defense to liability or damages when no tangible employment action has been taken. The affirmative defense is comprised of two necessary elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or that the employee unreasonably failed to otherwise avoid the harm. The affirmative defense shall not be available to the employer when the supervisor's sexual harassment has culminated in a tangible employment action.

Parker v. Warren Cnty. Util. Dist., 2 S.W.3d 170, 176 (Tenn. 1999); *see also Allen v. McPhee*, 240 S.W.3d 803, 812 (Tenn. 2007), *abrogated on other grounds by Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 784 (Tenn. 2010).

[8] Appellate courts in Tennessee have frequently observed that in enacting the THRA, our General Assembly "intended to be coextensive with federal law," including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3. *Parker*, 2 S.W.3d at 172; *McClellan v. Bd. of Regents of State Univ.*, 921 S.W.2d 684, 691 (Tenn. 1996) ("we turn, as we often have in cases under our state's Human Rights Act, to Title VII"); *Campbell*, 919 S.W.2d at 31 ("Our analysis of the issues ... is the same under both the [THRA] and Title VII"); *Allen*, 240 S.W.3d at 812; *Ferguson v. Middle Tenn. State Univ.*, 451 S.W.3d 375, 381 (Tenn. 2014) ("Generally, we interpret the THRA similarly, if not identically, to Title VII, but we are not obligated to follow and we are not limited by federal law when interpreting the THRA."). Consequently, in construing and applying the THRA, decisions of our sister federal courts addressing similar issues under Title VII are helpful as potentially persuasive authority. *Id.*; *Spann v. Abraham*, 36 S.W.3d 452, 463 (Tenn. Ct. App. 1999) ("Tennessee courts may appropriately look to decisions of federal courts construing Title VII when analyzing claims under the Act"). In *Ferguson*, our Supreme Court instructed that "[l]ike Title VII, the THRA is a remedial piece of legislation that should be construed liberally." 451 S.W.3d at 381.

The issue in this case is whether Plaintiff has shown a genuine issue of material fact as to whether "the harassment affected a term, condition, or privilege of employment," which is element (4) as stated by the *Campbell* Court and quoted above. This element is derived directly from the language of the THRA itself. *See* Tenn.

Code Ann. § 4-21-401(a)(1). The U.S. Supreme Court has formulated an identical test under Title VII, stating, "[t]he phrase 'terms, conditions, or privileges of employment' " evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Meritor*, 477 U.S. at 64, 106 S.Ct. 2399; *accord Harris v. Forklift Sys, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

The trial court held that "the ... issue with Plaintiff Phelps' claim is the location where the event happened. The THRA prohibits sexual harassment and discrimination ***in the workplace***." (Emphasis in original). The court concluded that "there are no genuine issues of material fact concerning this essential element." In *Spann v. Abraham*, the case cited and relied upon by the trial court, this Court stated, "[r]ather than prohibiting all verbal or physical harassment in the workplace, Title VII prohibits discrimination in the workplace based on gender." 36 S.W.3d at 466. On other occasions, our Courts, in similar dicta, have described the THRA in such broad and general terms. *See Anderson v. Save-A-Lot, Ltd.*, 989 S.W.2d 277, 289 (Tenn. 1999) ("the THRA ... is designed to fully compensate victims of sexual harassment in the workplace"); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 603 (Tenn. Ct. App. 2007) ("If there is harassment in the work place, the burden is on the plaintiff to establish that such harassment is based upon [a] protected class characteristic that is prohibited by the civil rights statutes"); *Barnett v. B.F. Nashville, Inc.*, No. M2016-00762-COA-R3-CV, 2017 WL 2334229, at *4 (Tenn. Ct. App. May 30, 2017) ("It is well established that the THRA bars sexual harassment in the workplace").

None of these cases, however, supports the imposition of a bright-line principle that would disallow a court from considering harassing conduct that occurs away from the physical premises owned or controlled by an employer, or after traditional work hours. Further, none of the above-cited opinions addressed the issue of what constitutes "in the workplace," or more directly pertinent to the applicable test, what conduct can be considered as affecting "a term, condition, or privilege of employment," or "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Campbell*, 919 S.W.2d at 31 (quoting *Meritor*, 477 U.S. at 65, 106 S.Ct. 2399).

Both the U.S. and Tennessee Supreme Court has taken a relatively expansive view of what conduct may be examined in answering these questions, adopting a "totality of the circumstances" approach:

> In determining whether an environment is hostile or abusive, a court must consider the totality of the circumstances. While no single factor is required or conclusive, considerations relevant to the determination include, but are not limited to, the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and the employee's psychological well-being.

Campbell, 919 S.W.2d at 32 (citing *Harris*, 510 U.S. at 23, 114 S.Ct. 367; internal citations omitted).

[9] It is well established that "[i]f a single incident is severe, it may be actionable as sexual harassment despite the fact that the conduct was not repeated." *McClellan*, 921 S.W.2d at 692; *Davis v. Modine Mfg. Co.*, 979 S.W.2d 602, 606 (Tenn. Ct. App. 1998); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2nd Cir. 1995),

abrogated on other grounds by *Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment"); *Harvill v. Westward Communications, LLC*, 433 F.3d 428, 435 (5th Cir. 2005) (" '[W]e have often recognized that even one act of harassment will suffice [to create a hostile work environment] if it is egregious' ") (brackets in original; quoting *Worth v. Tyer*, 276 F.3d 249, 268 (7th Cir. 2001)); *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1072 (10th Cir. 1998) (disagreeing "with defendants' assertions that a single incident of physically threatening conduct can never be sufficient to create an abusive environment"). The trial court held that a reasonable fact-finder could conclude that Walsh's two serial sexual assaults against Plaintiff at the after-party were "extremely serious and sufficient to impose liability on Defendant." We agree. *See, e.g., Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 310 (6th Cir. 2016) (" 'Like several of our fellow circuits, we consider whether harassment was so severe and pervasive as to constitute a hostile work environment to be 'quintessentially a question of fact' ").

Tennessee courts have not had occasion to directly address the circumstances under which an employer might be liable for sexually harassing conduct by a supervisor or co-worker that occurred off-premises and/or after work hours. But federal courts construing Title VII have. In *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (1st Cir. 2001), the plaintiff flight attendant was raped by a co-worker in a hotel in Italy during an overnight layover between flights. The trial court in *Ferris* held that the assault could not be found to have occurred in the "work environment" as a matter of law. *Id.* at 135. The First Circuit disagreed, stating in pertinent part:

> In our view, the rape could be found to have occurred in a work environment within the meaning of Title VII. The circumstances that surround the lodging of an airline's flight crew during a brief layover in a foreign country in a block of hotel rooms booked and paid for by the employer are very different from those that arise when stationary employees go home at the close of their normal workday.... Although it is not mandatory for them to do so, they generally stay in a block of hotel rooms that the airline reserves for them and pays for. The airline in addition provides them as a group with ground transportation by van from the airport to the hotel on arrival, and back at the time for departure. It is likely furthermore in those circumstances that the crew members ... will band together for society and socialize as a matter of course in one another's hotel rooms. Even though the employer does not direct its employees as to how to spend their off-duty hours, the circumstances of the employment tend to compel these results. In view of the special set of circumstances that surround such a foreign layover, we disagree with the district court's conclusion. A jury could properly find on these facts that Young's hotel room was a part of Ferris's work environment within the terms of Title VII.

Id. In *Crowley v. L.L.Bean, Inc.*, 303 F.3d 387, 409 (1st Cir. 2002), the court considered "non-workplace conduct" of a co-worker at office Christmas and pool parties, a bar, and the plaintiff's home. The *Crowley* Court stated:

> Courts ... do permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace as well as to establish that the conduct was motivated by gender.... In this case, Juhl's intimidating behavior and hostile interactions

> with Crowley outside of work help explain why she was so frightened of Juhl and why his constant presence around her at work created a hostile work environment.

Id. at 409-10.

In *Tomka*, 66 F.3d at 1301-02, the Second Circuit considered events occurring at a pair of dinners attended by employees who were travelling on business. The plaintiff alleged that at the first dinner, her supervisor "encouraged his subordinates to drink, and that he directed the conversation to 'vulgar accounts of his exploitation of women.' " *Id.* at 1301. At the second dinner, which took place at a Holiday Inn, the supervisor "repeatedly ordered drinks for Tomka and insisted that she drink with the others," and he and two other co-workers "repeatedly made vulgar remarks about women and talked of past sexual exploits." *Id.* at 1302. The bar tab showed "approximately forty drinks and only a small quantity of food." *Id.* After the dinner, the plaintiff's supervisor and two other co-workers allegedly raped her in the supervisor's car. *Id.* The district court granted summary judgment to the employer on the grounds that the plaintiff failed to "show some nexus between the work environment and the sexual conduct." *Id.* at 1303. The Circuit Court reversed, considering the plaintiff's testimony that the "dinner was a business meeting convened by [the supervisor] which she felt compelled to attend." *Id.* at 1306. The Court also cited the plaintiff's testimony that "she felt forced to drink during the dinner in order to be accepted," observed that the supervisor charged the many drinks to the company credit card, and concluded:

> Of course, there is contradictory evidence in the record that the dinner was simply a social event which Tomka chose to attend and that her consumption of alcohol was likewise voluntary.... These issues, however, are for the fact finder. As discussed above, Tomka has presented sufficient evidence to create an inference that Lucey used his apparent authority to convene the December 6 dinner and encourage the free use of alcohol. If the trier of fact were to credit Tomka's testimony that the December 6 dinner was in fact a business meeting convened by Lucey, and that he used his apparent authority to foster the excessive drinking, this would provide the required nexus between that event and the alleged assaults which followed. In short, Tomka has created a series of reasonable inferences that Lucey used his apparent authority to convene the dinner and encourage the drinking which enabled the defendants to rape Tomka.

Id. at 1307.

In *Duggins v. Steak'n Shake, Inc.*, 3 Fed. App'x. 302 (6th Cir. 2001), the Court considered an alleged rape of an employee by a supervisor that occurred at a private party at the supervisor's apartment. The Court examined the nexus between the workplace and the party and found insufficient connections to impose liability on the employer, considering the following factors: (1) "Although [the supervisor] was an employee of Steak 'n Shake, Plaintiff never worked at the same restaurant with him and never worked under his supervision," 3 Fed. Appx. at 306; (2) "Plaintiff was not required to attend this party as part of her job and no manager instructed or encouraged her to attend the party," *id.*; (3) "Plaintiff did not report the alleged rape to the police, nor ... did [she] talk to anyone at Steak 'n Shake about the alleged rape," *id.*; and (4) "after the rape, she had contact with [the supervisor] on only three occasions, none of which were at Steak 'n Shake." *Id.*

In *Doe v. Oberweis Dairy*, 456 F.3d 704, 716 (7th Cir. 2006), the Seventh Circuit considered a statutory rape of an employee by a supervisor at his apartment, analyzing the question of whether "the connection to the workplace [was] too attenuated to constitute workplace harassment" as follows:

> Title VII is limited to employment discrimination, and therefore sexual harassment is actionable under the statute only when it affects the plaintiff's conditions of employment.
>
> The sexual act need not be committed in the workplace, however, to have consequences there.... But at the very least the harassment must, as in *Meritor*, be an episode in a relationship that began and grew in the workplace.
>
> * * *
>
> The relationship began with flirtatious talk and erotic touching in the workplace and continued there for nine months before Nayman and Doe had sex. Nor did it end with their sexual encounter. She continued working at the ice cream parlor in close proximity with her harasser—indeed under his supervision—after the statutory rape, though for less than two weeks. Because her consent to have sex with Nayman was, as a matter of law, ineffectual, this is a case of a worker subjected to nonconsensual sex by a supervisor or at least quasi-supervisor ... during, as well as arising from, the employment relation. That is a sufficiently strong case of workplace sexual harassment to withstand summary judgment.

456 F.3d at 715-16 (internal citations omitted).

The Eighth Circuit took a similar approach in the case of *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093 (8th Cir. 2001), stating,

> According to the union, since the conduct took place on public property in front of the plant instead of inside the plant, during work hours, it could not create "an abusive working environment." ... The union places too much importance on the time and place of the offensive conduct instead of the nature and manner of the offensive conduct.
>
> * * *
>
> Moreover, the union construes "working environment" too narrowly. The offensive conduct does not necessarily have to transpire at the workplace in order for a juror reasonably to conclude that it created a hostile working environment. We have upheld a jury verdict for a plaintiff in a sexual-harassment hostile-work-environment claim where the offensive conduct took place in a hotel, after hours, on a business trip. *See Moring v. Arkansas Dept. of Correction*, 243 F.3d 452 (8th Cir. 2001). Here, the offensive conduct was in physical proximity to the plant, and, arguably, perpetrated with the intention to intimidate and to affect the working atmosphere inside the plant. Thus, we hold a reasonable juror could have determined that the racial abuse hurled at the plaintiffs as they attempted to go to and from work was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."

253 F.3d at 1101-02; *see also Fuller v. City of Oakland*, 47 F.3d 1522, 1525-26 (9th Cir. 1995) (considering co-worker's abusive, threatening and stalking behavior during non-work hours and away from workplace to establish hostile working environment).

In *Parrish v. Sollecito*, 249 F.Supp.2d 342 (S.D.N.Y. 2003), the court comprehensively examined the "fundamental inquiry" of "[j]ust how far does the 'workplace' extend, and when and where may be found

the spacial and temporal continuum of the 'work environment' encompassed within the scope of discrimination Title VII proscribes?" The court noted that to strictly construe the concept of "workplace" would "allow a harasser to pick and choose the venue for his assaults so as to not account for those that occur physically outside the workplace." *Id.* at 350-51. The *Parrish* court continued:

> The employment relationship cannot be so finely and facilely parsed. It comprises multiple dimensions of time and place that cannot be mechanically confined within the precise clockwork and four walls of the office. The proper focus of sexual harassment jurisprudence is not on any particular point in time or coordinate location that rigidly affixes the employment relationship, but on the manifest conduct associated with it . . .
>
> [A]s a practical matter an employment relationship and the employee's corresponding status, while generally commencing and grounded in what constitutes the office or plant, often carries beyond the work station's physical bounds and regular hours. . . .
>
> In fact, employees travel and transact business while "on the road" or "in the field." They may also interact outside the office at business-related meals and social events. And they may encounter one another in external contexts not strictly stemming from or compelled by a business purpose, but to which the employment relationship may necessarily carry over by reason of circumstances that may have their origins in the workplace itself.

Id. at 351.

Emphasizing that the precise location of the harassing conduct "should not distract from the real focus of the misconduct: the degree to which, wherever a sexual assault occurs, its consequences may be felt in the victim's 'workplace' or 'work environment' and be brought to bear on her terms and conditions of employment," *id.*, the *Parrish* court observed as follows:

> often such outside misbehavior rebounds and transposes its consequences inside the actual workplace itself. However much the transgressor chooses to minimize or dismiss an act of harassment because it allegedly happened beyond the workplace, the victim may not have the equal aplomb to leave the matter behind, to simply park her wrong and hurt outside the office. . . . [T]he effects of an offensive sexual encounter that occurs outside the office may continue to manifest internally, within the actual working environment, and reflect in the terms and conditions of employment that the victim may have to cope with day-by-day[.]

Id. at 352.

Among the conditions that a victim may have to deal with following an off-premises assault or other threatening behavior by a co-worker, the court in *Parrish* recognized "the ability to perform work duties satisfactorily under the stress of the episode; the mortification aroused by encountering the offender on the job on a regular basis; enduring constant apprehension as to whether the aggressor's misconduct may recur at any moment, or whether the employee's response, or lack of it, ultimately will transform into a material alteration of the job: demotion, denial of promotion, even dismissal." *Id.*; *see also Echevarria v. Utitech, Inc.*, No. 3:15-cv-1840, 2017 WL 4316390, at *7 (D. Conn. Sept. 28, 2017) (quoting and applying *Parrish* in considering harassment "between co-workers, [that] happened after work hours, off-site, and at a non-company event," because, among other things, the "harassing conduct occurred during an event planned and attended by a sizable group of co-workers,

including two supervisors"); *Kohutka v. Town of Hempstead*, 994 F.Supp.2d 305, 325 (E.D.N.Y. Jan. 29, 2014); *Ratliff v. U.S. Postmaster Gen'l*, No. 2:06-cv-00115, 2008 WL 11450458, at *6-7 (S.D. Ohio Feb. 1, 2008) ("numerous courts have considered out-of-work place harassment as part of the totality of the circumstances in hostile work environment cases" and "[l]ower courts have also indicated out-of-workplace harassment may be actionable"); *Cromer-Kendall v. Dist. of Columbia*, 326 F.Supp.2d 50, 58 (D.D.C. July 9, 2004); *McGuinn-Rowe v. Foster's Daily Democrat*, No. 94623-SD, 1997 WL 669965, at *3 (D.N.H. July 10, 1997).

Expounding on this last point–that harassment or assault outside of the "traditional workplace" can and often does spill over and affect the victim's workplace experiences–numerous courts have recognized that "when an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile." *Duggins*, 3 Fed. App'x. at 311; *Ratliff*, 2008 WL 11450458, at *6; *Oberweis Dairy*, 456 F.3d at 716 (considering as a factor that plaintiff was forced to "continue working ... with her harasser" and supervisor after statutory rape); *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) ("in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment"); *Temporali v. Rubin*, No. CIV.A. 96-5382, 1997 WL 361019, at *3 (E.D. Pa. June 20, 1997) ("Requiring the victim of sexual harassment to work under the supervision of the harasser may 'alter the conditions of the victim's employment' and create an 'abusive working environment' "); *Vanover v. White*, No. 3:07-CV-15, 2008 WL 2713711, at *10 (E.D. Tenn. July 10, 2008) (quoting *Duggins*).

[10] As is evident from the above discussion, courts addressing whether an employer can be held liable for a supervisor or co-worker's sexual harassment occurring off-premises and/or after traditional work hours consider the totality of the circumstances, including the following factors: (1) the proximity in time and space to the "traditional workplace"; (2) the relationship of the event to the employees' work duties; (3) the extent to which the employer planned, promoted, or sponsored the event; (4) the degree to which employees were pressured or encouraged to attend the event and the number of employees in attendance; (5) the employer's knowledge of any pattern of similar harassment by the offending employee under prior similar circumstances; (6) the extent to which the off-premises harassment impacted the victim's workplace experience after it was reported to the employer, including whether the victim was forced to continue working with the harasser; and (7) any other circumstances pertinent to the inquiry.

With these factors in mind, we turn to the facts of the present case. The Halloween party took place on a Saturday night, at Plaintiff's workplace, the Paris Landing State Park restaurant and inn. The party was planned and thrown by TDEC employees, Plaintiff's two direct supervisors, restaurant managers Alisha Brewer and Sara Byrd. Both Brewer and Byrd testified that they distributed buy-one-get-one-free drink vouchers to the employees. Regarding the employees, Byrd testified that "we wanted everyone there. We wanted it to be another success like the St. Patrick's Day party was because the employees were there also." She stated, "I will admit, I really encouraged them to come."

Jeff Utley, a park ranger who attended the party and after-party, confirmed that

the restaurant managers were "pushing the employees to attend the party," testifying that "[t]hey were trying to get as many people to come as they could because they wanted it to be a productive event." Shana Gallion, a chef at the restaurant, testified that Byrd "told us we had to go" and "made it clear that all the employees at the restaurant had to be there." Plaintiff testified as follows:

> Q: Were you required to go to this Halloween party?
>
> A: I was not required, but I was pressured.
>
> Q: Who pressured you?
>
> A: Sara Byrd, mostly.
>
> * * *
>
> Q: This was not just an event for park employees?
>
> A: It was pushed more on park employees than it was anybody else ... It was very strongly pushed for us to be there.

Everyone who testified about the party agreed that the great majority of attendees were park employees. Chef Gallion stated that there were "very few other outside parties." She and manager Brewer agreed that the "vast majority" were employees. Ranger Utley said, "I believe I noticed approximately six people or so that were not employees." Brandon Williams, the park ranger on duty during the party, stated, "I was supposed to work until like 1:00, 1:30, somewhere around in there. Josh [Walsh] told me to take off early because it was all pretty much employees."

Neither Walsh nor his multiple sexual assault victims were on the clock that night. Walsh was the highest-ranking supervisor at the party. Restaurant managers Byrd and Brewer worked until about 11:00 pm. The State provided Brewer with a complimentary room at the inn, which she opened to female employees to allow them to change into their Halloween costumes. The managers made Jell-o shots to sell at the party. Byrd testified that at the end of the party, she sold the leftover Jell-o shots in bulk at a cut rate to make a little more money and so they wouldn't go to waste. The testimony suggests, but does not conclusively establish, that these shots made their way to the after-party. The bar tab for Walsh showed fifteen alcoholic beverages that he purchased, which did not include whatever free drinks he was provided.

The after-party at maintenance worker Littles' residence took place immediately after the party. It was located one to one-and-a-half blocks from the restaurant and inn. There was no evidence or suggestion that anyone other than employees and their dates attended the after-party. Plaintiff testified that she went straight there after the party, and further testified:

> Q: You're alleging ... that the harassment happened at the after party but not at the Halloween party itself?
>
> A: Not to myself at the Halloween party, itself, but it was a continuance of the Halloween party.
>
> Q: And you went to Keith Littles' house after the Halloween party for the after party?
>
> A: Yes.
>
> * * *
>
> Q: Keith Littles lived at that time in a park residence at Paris Landing State Park?
>
> A: Yes. During this time period I never left the state park property.

The after-party took place both outside (they had a bonfire) and inside the residence.

The next day, October 22, 2017, Plaintiff told her managers that Walsh was a "creeper" and that she didn't trust him. She stated that the managers "did not ask any follow up questions or ask me for any

information about what had occurred." Over the next couple of weeks, Plaintiff learned more details about Walsh's alleged sexual assaults and harassment of the other employees. On November 17, 2017, she had a long conversation with Brewer and Byrd, giving them a full oral report about what took place at the party and after-party. Nothing happened for four days, when Plaintiff again pressed the issue and said she wanted to file a report.

The State investigated the reports of Plaintiff and the three other employees who alleged harassment. As already noted, the trial court found that the park manager "did not immediately remove Mr. Walsh from his duties after the complaints were filed. He was allowed to continue being around the women who had filed complaints against him." Several witnesses, including fellow server Patterson, Chef Gallion, and Rangers Utley and Williams, confirmed Plaintiff's testimony that Defendant "did nothing to separate Josh Walsh from me" after Plaintiff's multiple reports of his retaliatory harassment.

These employees also testified about the apparent effect the harassment had on Plaintiff while she was working. For example, Gallion testified as follows, in pertinent part:

Q: Tell me what Josh [Walsh] started to do towards [Plaintiff] and Ms. Patterson that you actually witnessed and saw after the party.

A: Being back at work, we were in the restaurant. I'm a buffet cook. I'm cleaning the buffet. He's standing up at the balcony watching them, watching what they're doing.

Q: Would he stare at them specifically?

A: Yeah. They'd be at the tables doing silverware, doing orders, filling drinks, and he's walking back and forth watching them. Or he'd stand there and watch them like a creep.

Q: Do you recall him also being out in the parking lot waiting when they got off their shifts?

A: Yes. I had to take [Plaintiff] out every night because she was so scared to get in her car. Every night.

* * *

Q: Did it continue all the way up until Josh Walsh was out of there?

A: Yes, sir.

Q: So [park manager] Joan Williams said that she told Josh not to go anywhere near them. If she did tell him that, did he stop?

A: No, he did not.

Q: And you witnessed that with your own eyes?

A: Witnessed that myself.

Q: So anytime you saw him, you saw him doing this type of activity?

A: Yes, sir.

Q: And how many times a week approximately was he around there?

A: A week? If he was on shift, he was there a couple times a day.

Q: Okay. So, I mean, three to five times a week? Six to ten times a week?

A: Say more closer to ten times a week.

* * *

A: I cared about [Plaintiff] as far as being upset about this whole thing, and I wasn't going to let her walk out there alone when I actually seen him lurking round in the parking lot.... This guy wasn't making rounds. He was stalking.

* * *

Q: Did you ever see Ms. Patterson or [Plaintiff] have to serve Mr. Walsh in the restaurant?

A: I seen both of them have to take care of his kids. As far as him coming in to eat Friday and Saturday nights, both of them had to deal with him.

* * *

A: Being a friend, I seen [Plaintiff] going through depression. A lot of different emotions that she couldn't deal with at times, so she needed a friend to talk to. I mean, it really messed her up in a lot of ways. It made her emotional. She couldn't deal with things like she normally could, you know[.]

Q: Did you even have to spend the night at her house because she was so afraid sometimes?

A: Yeah. I'd protect her either way.

Ranger Utley testified:

A: I do remember [Plaintiff] being really worried about it and coming to me and stating that, at night, she would see [Walsh's] van drive by her house and there was no reason for him to be–that's not in our patrol routes at all. It's somewhat close, but, I mean, in my patrol rounds, I never go by her house.

Q: Right. Do you remember her also talking to you about how he would wait out in the parking lot for her ... when she would get off work?

A: When she would get off work and it made her very uncomfortable. It would have made me uncomfortable too.

Q: Based on what you saw and heard from [Plaintiff] specifically[,] how would you say this affected [her] based on what you saw of her mentally and emotionally?

A: Just totally stressed about it, of course and feeling like–she felt like nothing was being taken seriously. But it was a serious matter. I mean, this guy carries a gun, you know.... If I would have been in her shoes, I would have been really scared.

Ranger Williams testified quite similarly. He said that Plaintiff told him "how it made her uncomfortable, she got anxiety from it, stuff like that."

Plaintiff testified about her feelings of anxiety, anger, and depression at work. She stated, "[t]his man knew what he did and he knew he was getting away with it. And the State stood back and let him continue to do this to me." She further testified that

> During this whole time period I was required to work with [Walsh]. He didn't only do it to me, he did it to three other women including one of my bosses, so let's make that five.
>
> * * *
>
> For months, I had to work with this man while he–he more or less mocked me. I mean, I don't know a better word for it other than mocked me because he knew what he was getting away with.

Walsh declined to provide his side of the story. In his deposition, he answered the basic and general "housekeeping" inquiries and a few other short questions, 51 in total. On the substantive questions about what happened before, during, and after the parties, 186 total questions, Walsh refused to answer by invoking his Fifth Amendment right against self-incrimination.

On January 31, 2018, the TDEC Commissioner sent Walsh a letter stating, "[e]ffective immediately, you are being placed on Administrative Leave with Pay pending the investigation of a recent workplace harassment incident in which you were named a participant. You are not to report to work until the investigation has concluded." The investigation had in fact already concluded with a report filed on January 8, 2018, that found that Walsh had violated the State's workplace harassment policy.

Defendant argued at the trial level and on appeal that "TDEC primarily addressed inappropriate behavior that had occurred at the park-sponsored Halloween party; TDEC concluded that it lacked au-

thority to discipline Walsh and other employees for inappropriate behavior at the after-party because it occurred at a private residence and was not a state-sponsored event." However, on February 15, 2018, park manager Joan Williams sent letters to employees Jeff Utley and Alison Otelo, which stated in pertinent part as follows:

> This letter serves as documentation of this coaching session concerning your conduct that was unbecoming of a state employee. This is in association with allegations that park staff that attended an after-party at an on-park residence, [*sic*] which resulted in several *harassment complaints that have impacted the workplace.*
>
> * * *
>
> As a result of your unacceptable behavior, you are receiving a coaching session *concerning the activities that occurred at the after-party that were inappropriate*.... This is unacceptable and inappropriate conduct that requires management to address within this coaching session. Continued conduct of this nature may lead to *further disciplinary action* up to and including separation from state service.

(Emphasis added). These letters show that Defendant disciplined two other employees for actions at the after-party.

Considering the totality of the circumstances, we hold that there is a sufficient nexus between the workplace and the harassment for a reasonable trier of fact to conclude that the sexual assaults perpetrated against Plaintiff, and the work situation that followed in the next few months, "affected a term, condition, or privilege of [her] employment." *Campbell*, 919 S.W.2d at 31; Tenn. Code Ann. § 4-21-401(a)(1). A number of applicable factors favor this conclusion: the close proximity in space and time to the traditional workplace; the pressure applied to employees to attend; the roster of attendees at both parties, showing a great majority or entirety of employees; the sponsorship by Defendant of the party, including its provision of alcoholic beverages and encouragement to buy and drink them; Plaintiff's testimony that the after-party was a "continuation" of the State-sponsored party; and, as the trial court found, the "evidence that Josh Walsh sexually abused women at Paris Landing State Park prior to the Halloween party"[1] and the "genuine dispute as to whether Defendant knew about all of Walsh's behavior before the Halloween party." (Footnote added). *See, e.g., Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 341 (6th Cir. 2008) ("An employer's responsibility to prevent future harassment is heightened where it is dealing with a known serial harasser and is therefore on clear notice that the same employee has engaged in inappropriate behavior in the past"). We vacate the trial court's summary judgment against Plaintiff on her THRA discrimination and sexual harassment claims.

B. Retaliation Claim

[11, 12] Plaintiff also alleged retaliation by Defendant against her after she reported the sexual assaults. The THRA provides that it is a discriminatory practice to "[r]etaliate or discriminate in any manner against a person because such person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter." *See* Tenn. Code Ann.

1. There is also evidence in the record of Walsh's harassing behavior at other locations, including several other state parks, which also allegedly happened after he became intoxicated.

§ 4-21-301. The THRA's anti-retaliation provision "prohibit[s] employer actions that are likely to deter employees from filing complaints . . . asserting their rights under anti-discrimination statutes." *Ferguson*, 451 S.W.3d at 381. "To a large extent, the effectiveness and very legitimacy of discrimination law turns on people's ability to raise concerns about discrimination without fear of retaliation." *Id.* (internal quotation marks omitted).

> [13] As our Supreme Court has stated, Applying *White*, [548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)], we hold that in order to state a prima facie case for retaliation under the THRA an employee must demonstrate: 1) that she engaged in activity protected by the THRA; 2) that the exercise of her protected rights was known to the defendant; 3) that the defendant thereafter took a materially adverse action against her; and 4) there was a causal connection between the protected activity and the materially adverse action.

Allen, 240 S.W.3d at 820; *Perkins v. Metro. Gov't of Nashville*, 380 S.W.3d 73, 81 (Tenn. 2012). The question presented in this case is whether Plaintiff presented a prima facie case as to the third element, whether Defendant "took a materially adverse action against her." Addressing this question, we have held that "[a] plaintiff's prima facie burden is not onerous." *Lin v. Metro. Gov't of Nashville*, No. M2008-00212-COA-R3-CV, 2008 WL 4613559, at *5 (Tenn. Ct. App. Oct. 10, 2008); *accord Hicks v. Baines*, 593 F.3d 159, 164 (2nd Cir. 2010) (to show case of discriminatory retaliation, "[t]he plaintiff's burden in this regard is '*de minimis*,' and 'the court's role in evaluating a summary judgment request is to determine only whether proffered admissible evidence would be sufficient to permit a rational finder of fact to infer a retaliatory motive.' ").

> [14] As the Supreme Court stated in *Ferguson*,
>
> Federal and state courts recognize that retaliation comes in many shapes and sizes. "The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit." *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996). The United States Supreme Court has acknowledged that effective retaliation can take many forms. *White*, 548 U.S. at 64, 126 S.Ct. 2405.

451 S.W.3d at 381-82. In determining whether an employer's action is "materially adverse" to the employee, the *Perkins* Court applied the U.S. Supreme Court's guidance in *White* as follows:

> While the [*White*] Court broadly interpreted the scope of the anti-retaliation provision to "extend[ ] beyond workplace-related or employment-related retaliatory acts and harm," *id.* at 67, 126 S.Ct. 2405, the Court emphasized that the provision only protects against "retaliation that produces an injury or harm." *Id.* "An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." 548 U.S. at 68, 126 S.Ct. 2405. Rather, protection extends to "employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers." *Id.* (internal quotation marks omitted).
>
> The Court adopted an objective standard to differentiate petty slights from retaliatory action. *Id.* To satisfy this standard, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might

> have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (internal quotation marks omitted).

380 S.W.3d at 81-82. The *White* Court recognized that

> the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

548 U.S. at 69, 126 S.Ct. 2405.

At the outset of our application of these principles to this case, we note that there is clearly an abundance of disputed material facts pertinent to Plaintiff's retaliation allegations. In response to the summary judgment motion, she filed a statement of additional material facts as allowed by Tenn. R. Civ. P. 56.03. Forty-six of these facts were under the heading, "continued hostile work environment and retaliation by Walsh, management and Tennessee–against [Plaintiff] and Patterson." They generally alleged facts about what happened following the after-party, the State investigation and response, and the ongoing harassment and stalking that Defendant allegedly allowed to continue. Of these forty-six statements, Defendant responded that only two of them were "undisputed."

Plaintiff argues that Defendant retaliated against her in several ways. Park manager Joan Williams issued Plaintiff a written warning for "conduct unbecoming of an employee in state service" for wearing an "inappropriate article of clothing" at the Halloween party. Plaintiff's costume was a "child vampire." She wore a "onesie" and an oversized bib with blood spatters on it. On the reverse side of the bib, which Plaintiff said she got at a bachelorette party, were the words "Blow Job Queen." Every employee who testified about her costume, Byrd, Brewer, Gallion, Utley, and Brandon Williams, agreed that the words were not facing outward and showing during the party. Plaintiff showed the wording on the back side of the bib to certain of her friends over the course of the evening.

It is undisputed that the Halloween party was also attended by employees dressed as "a pimp and a ho," a male porn star, a "scantily-clad referee," a "police stripper," and a man "dressed as a woman with fake breasts." Restaurant manager Byrd testified that Plaintiff "was more clothed than anyone there." At some point during the party, there was a lap dance contest judged by Walsh. No one else received a warning, or other discipline, from his or her actions or attire that night. Several of the employees stated that they could think of no conceivable reason for Plaintiff having been singled out other than retaliation.

The trial court's only finding on this point states, "Ms. Patterson was dressed as a police officer and [Plaintiff] wore a sign that read 'Blow Job Queen.'" This finding regarding Plaintiff's costume is inaccurate, misleading, and unsupported by the evidence. The trial court granted summary judgment against Plaintiff on her retaliation claim on the following ground: "A written warning, without evidence that it led to a materially adverse consequence such as lowered pay, demotion, suspension, termination, is not a materially adverse action as a matter of law." The court cited *Creggett v. Jefferson Cnty. Bd. of Educ.* 491 Fed. App'x. 561, 566 (6th Cir. 2012) in support of this proposition. In *Hardy v. Tenn. State Univ.*, No. M2014-02450-COA-R3-CV, 2016 WL 1242659, at *29-30 (Tenn. Ct. App. Mar. 24, 2016), however, this Court considered several written warnings

issued to an employee, notwithstanding that "th[e] evidence show[ed] that his direct supervisor was willing to accommodate his late schedule," and concluded that "[t]he trier of fact could find that the scrutiny of Mr. Hardy and the warnings he received was causally related to the EEOC charges he filed. Accordingly, TSU was not entitled to summary judgment on this claim of retaliation." *Id.* at *30.

We need not resolve the question of whether Plaintiff's written warning, standing alone, would suffice to show a material issue regarding whether her employer's action was materially adverse, because she has alleged several other instances of retaliation, none of which were addressed by the trial court. In her sworn declaration, as already stated, Plaintiff alleged:

> [Defendant] retaliated against me for my reports of sexual harassment and reduced my work hours, work shifts and the type of shifts that I was getting so that I was not given as [many] favorable shifts to work which were less profitable and impacted me [from] a monetary perspective.

Defendant disputes this allegation. It produced Plaintiff's time sheets and argued that they showed she worked as many hours after the reports as before. Plaintiff responds by arguing that she may have worked a similar total number of hours but that the shifts she was assigned (fewer shifts during traditional meal times), and the areas of the restaurant she was assigned to (the middle sections that were less popular with diners), resulted in fewer customers and less income from tips. Manager Byrd, who was generally in charge of scheduling, testified that she tried to be fair to all the servers, but agreed that "probably" Plaintiff "worked less hours on Fridays than she did in the prior year."

In *Reed v. Cracker Barrel Old Country Store, Inc.*, 133 F.Supp.2d 1055, 1071 (M.D. Tenn. 2000), the court considered a similar situation, stating as follows:

> Ms. Reed's position as a server in a restaurant does not offer many opportunities for demotion, change in benefits, or decreased material responsibilities.... In this case, the plaintiff was required to work longer shifts, to stay beyond her scheduled shift, and to work until closing on a regular basis. Although it is difficult to imagine what a demotion or a decrease in responsibilities would involve with a server, these actions do constitute significant, negative changes in the plaintiff's work status. In addition, she suffered the economic detriment of being placed in the least desirable section of the restaurant on a regular basis. *In a profession where wage is determined almost solely by tips, the consistent decision to place the plaintiff in a section with fewer customers than anywhere else in the restaurant amounted to a decreased wage.* When taken together, the plaintiff has presented sufficient evidence to show that she suffered an adverse employment action, even prior to her termination.

(Emphasis added). Accepting Plaintiff's allegations as true and drawing reasonable inferences in her favor for summary judgment purposes, we hold that a reasonable trier of fact could conclude that Defendant took actions materially adverse to Plaintiff by altering her work schedule as alleged.

Finally, Plaintiff alleged that her supervisors knowingly allowed Walsh to continually intimidate her by staring, leering, lurking, and stalking her both during and after work hours. We have already described Walsh's alleged conduct at length above, and will not reiterate it here. Plaintiff presented testimony supporting her allegation that she reported Walsh's ongoing conduct to her managers "on multiple occasions ... and nothing was done to stop this activity." If the trier of fact believes

this proof, it could conclude that the action of Plaintiff's managers in knowingly allowing the harassment to continue was retaliatory and materially adverse. We vacate summary judgment against Plaintiff on her claim of unlawful retaliation under the THRA.

V. Conclusion

The judgment of the trial court is vacated and the case remanded to the trial court. Costs on appeal are assessed to the appellee, State of Tennessee, for which execution may issue if necessary.

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 30, 2021 Session

RELYANT GLOBAL, LLC v. ROYDEN FERNANDEZ ET AL.

Appeal from the Chancery Court for Blount County
No. 2020-CH-95 Telford E. Forgety, Jr., Chancellor

No. E2021-00515-COA-R3-CV

Plaintiff, a Tennessee limited liability company headquartered in Blount County, sued defendants, a former employee and a limited liability company both residents of the U.S. territory of Guam, alleging breach of a non-compete agreement. The trial court granted the defendants' motion to dismiss the action under the doctrine of *forum non conveniens*. Plaintiff argues on appeal that the trial court erred by failing to enforce the non-compete agreement's forum selection clause and its express waiver of the inconvenient forum defense. We reverse, holding that the forum selection clause dictates the proper forum.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

James H. Price and Michael R. Franz, Knoxville, Tennessee, for the appellant, Relyant Global, LLC.

Adam G. Russell and Robert W. Knolton, Knoxville, Tennessee, for the appellees, Royden Fernandez and Oia'i'O Halo MEC Remediation HUI, LLC.

OPINION

FACTS[1] AND PROCEDURAL HISTORY

The plaintiff, Relyant Global, LLC ("Relyant"), is a company organized under the laws of this state with its principal place of business in Blount County. As a primary area

[1] The facts below are taken from allegations in the complaint, which we presume to be true in reviewing the trial court's grant of defendants' motion to dismiss. *Lemon v. Williamson Cnty. Schs.*, 618 S.W.3d 1, 8 (Tenn. 2021); *Mitchell v. Campbell*, 88 S.W.3d 561, 565 (Tenn. Ct. App. 2002).

of its business, Relyant provides removal and abatement services for munitions and explosives of concern ("MEC") throughout North America, the Pacific, the Middle East, Africa, and Asia. In March of 2019, Relyant hired Royden Fernandez ("Fernandez") to be a project-based unexploded ordnance ("UXO") safety officer in the U.S. territory of Guam. Fernandez signed a confidentiality, non-disclosure, and non-compete agreement (the "Agreement") as a condition of employment. The "Non-Competition" paragraph of the Agreement provides:

> Employee agrees that during Employee's employment by RELYANT and for a period of one (1) year thereafter, Employee will not either directly or indirectly, on Employee's own behalf or in the service or on behalf of others, engage in any business that is the same as or essentially the same as the business of RELYANT in any capacity in the Non-Competition Area.

The Agreement defines the Non-Competition Area as "any country where RELYANT has engaged in or specifically solicited business for the two (2) year period of time prior to the Employees termination." Critical to this appeal, the Agreement also states:

> Governing Law; Venue: This Agreement shall be exclusively construed, governed and controlled by the laws of the State of Tennessee without regard to principles of law, including conflicts of law, of any other jurisdiction, territory, country and/or province. *Any dispute arising out of or relating to this Agreement shall exclusively be brought to any court of competent jurisdiction located within the State of Tennessee. Each party consents to personal jurisdiction thereto and waives any defenses based on personal jurisdiction, venue and inconvenient forum*. Each party hereby consents to service of process by United States certified mail, return receipt.

(Emphases added).

In late May 2020, Fernandez resigned and organized a one-member limited liability company under the laws of Guam, Oia'i'o Halo MEC Remediation HUI, LLC (the "LLC"). On its website, the LLC presents itself as a provider of UXO-related services, including "UXO/MEC Remediation Consultations," "UXO/MEC Construction Support/Escort," and "UXO/MEC Munition Response Site Clearance." In July of 2020, Fernandez and the LLC began bidding on federal government contracts and subcontracts for UXO-related services to be performed in Guam. Fernandez and the LLC were awarded a UXO contract for work at the Naval Base Guam Telecommunications Station, a contract for which Relyant had also submitted a bid.

On September 21, 2020, Relyant filed a complaint against Fernandez and the LLC (collectively, "Defendants") in the Blount County Chancery Court ("the trial court"), alleging breach of the Agreement and seeking lost profits resulting from the award of the

Naval Base Guam contract to Defendants. In addition to compensatory damages, the complaint asked the trial court for injunctive relief and a declaration of the parties' rights under the Agreement. On December 14, 2020, Defendants moved the trial court to dismiss the complaint under Rule 12.02 of the Tennessee Rules of Civil Procedure, asserting lack of personal jurisdiction over Defendants, lack of jurisdiction over the subject matter, and the doctrine of *forum non conveniens*. Defendants attached to the motion a Declaration from Fernandez,[2] which stated, in relevant part:

> 10. I do not recall signing a non-compete agreement for the Plaintiff.
>
> . . .
>
> 16. Any employment related document that I signed for Plaintiff was signed while I was in the State of Utah or in Guam.
>
> . . .
>
> 17. I am the President of Oia'i'o Halo MEC Remediation HUI, LLC (hereinafter the "LLC"), which was founded as a limited liability company in Guam.
>
> 18. Contrary to Plaintiff's Complaint allegation, I am not the only member of the LLC. There are presently two (2) other members, both of whom also live in Guam.
>
> . . .
>
> 21. I have never been to the State of Tennessee.

Relyant responded to the motion on April 6, 2021, arguing that the trial court had subject matter jurisdiction over actions for breach of contract under Tennessee Code Annotated section 16-11-101,[3] that Fernandez agreed to personal jurisdiction in the trial court pursuant to the Agreement, and that Fernandez expressly waived the defense of *forum non conveniens* in the Agreement. Concerning the LLC, Relyant contended that because it alleged in its complaint that Fernandez created the LLC as a vehicle to pursue unlawful competition with Relyant, the trial court should deny the motion to dismiss as to the LLC as well. In the alternative, Relyant submitted that the trial court should allow limited discovery as to the jurisdictional issues raised by Defendants.

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[2] Unlike motions to dismiss for failure to state a claim under Rule 12.02(6) of the Tennessee Rules of Civil Procedure, motions challenging personal jurisdiction under Rule 12.02(2) "are not converted to motions for summary judgment when either or both parties submit matters outside the pleadings either in support of or in opposition to the motion. *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 643 (Tenn. 2009) (citing *Chenault v. Walker*, 36 S.W.3d 45, 55 (Tenn. 2001)). Likewise, "motions challenging subject matter jurisdiction are not converted to summary judgment motions when matters outside the pleadings are considered or when disputes of material fact exist." *Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc.*, 531 S.W.3d 146, 160 (Tenn. 2017) (citations omitted).

[3] "The chancery court has all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity." Tenn. Code Ann. § 16-11-101.

On May 3, 2021, the trial court filed an order granting defendants' motion to dismiss. The trial court assumed the Agreement's forum selection clause to be valid, concluded that personal jurisdiction can be waived by a forum selection clause, and determined that it had subject matter jurisdiction to hear the case. However, it dismissed the action, finding that Blount County was not a convenient forum under the *forum non conveniens* doctrine.[4] Relyant timely appealed.

ISSUES PRESENTED

Relyant raises three issues on appeal, which we slightly restate as:

(1) Whether the trial court abused its discretion when it applied the doctrine of *forum non conveniens* without considering the parties' mandatory forum selection clause.

(2) Whether the trial court abused its discretion when it ignored Defendants' express written waiver of application of the doctrine of *forum non conveniens*.

(3) Alternatively, if the trial court had discretion to consider the doctrine of *forum non conveniens* despite Defendants' express waiver, whether the trial court abused its discretion in granting Defendants' Motion to Dismiss based on traditional *forum non conveniens* factors.

STANDARD OF REVIEW

As a preliminary matter, we must determine the appropriate standard of review. The trial court granted Defendants' motion to dismiss Relyant's complaint on the basis of the *forum non conveniens* doctrine. This Courts reviews a trial court's application of that doctrine solely for abuse of discretion. *Zurick v. Inman*, 426 S.W.2d 767, 772 (Tenn. 1968) (citations omitted); *Pantuso v. Wright Med. Tech. Inc.*, 485 S.W.3d 883, 888 (Tenn. Ct. App. 2015) (citing *Zurick*, 426 S.W.2d at 772). "In the context of *forum non conveniens*, an abuse of discretion arises when the lower court fails to review and balance the private and public factors that guide any consideration of the doctrine." *In re Bridgestone/Firestone*, 138 S.W.3d 202, 205 (Tenn. Ct. App. 2003) (citations omitted). Accordingly, appellate courts examine the particular factors relied upon by the trial court to determine whether an abuse of discretion occurred. *Zurick*, 426 S.W.2d at 772. The particular circumstances in this case, however, require our analysis to start elsewhere.

Relyant raises the issue of whether the trial court properly relied on the *forum non conveniens* doctrine to dismiss its complaint in light of Fernandez's written agreement (and allegedly the LLC's) to (1) litigate disputes arising out of or relating to the Agreement

[4] The trial court's order also denied as moot motions previously submitted by the parties requesting and opposing discovery concerning jurisdictional issues.

exclusively within this state and (2) waive the defense of inconvenient forum. "In considering an appeal from a trial court's ruling on a motion to dismiss, we take all allegations of fact in the complaint as true and review the trial court's legal conclusions de novo with no presumption of correctness." *Johnson v. Tomcat USA, Inc.*, No. E2021-00057-COA-R9-CV, 2021 WL 3737055, at *2 (Tenn. Ct. App. Aug. 24, 2021) (citing *Mid–South Indus., Inc. v. Martin Mach. & Tool, Inc.*, 342 S.W.3d 19, 27 (Tenn. Ct. App. 2010)) (other citations omitted). A motion to dismiss should not be granted unless "it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Cullum v. McCool*, 432 S.W.3d 829, 832 (Tenn. 2013) (citing *Webb v. Nashville Area Habitat for Humanity*, 346 S.W.3d 422, 426 (Tenn. 2011)).

ANALYSIS

We first address the import of the parties' contractual agreement concerning jurisdiction and venue. With respect to jurisdiction, the Agreement provides: "Any dispute arising out of or relating to this Agreement shall exclusively be brought to any court of competent jurisdiction located within the State of Tennessee." It continues: "Each party consents to personal jurisdiction thereto and waives any defenses based on personal jurisdiction, venue and inconvenient forum." Significantly, the Agreement also declares that it "shall be exclusively construed, governed and controlled by the laws of the State of Tennessee without regard to principles of law, including conflicts of law, of any other jurisdiction, territory, country and/or province." In adjudicating Defendants' motion to dismiss, the trial court assumed the Agreement's forum selection clause to be valid.

Under Tennessee law, "[g]enerally, a forum selection clause is enforceable and binding upon the parties." *Lamb v. MegaFlight, Inc.*, 26 S.W.3d 627, 631 (Tenn. Ct. App. 2000) (citing *Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 12 (1972)). Our Supreme Court recognized almost forty years ago that "the validity or invalidity of such forum selection clauses depends upon whether they are fair and reasonable in light of all the surrounding circumstances attending their origin and application." *Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co.*, 650 S.W.2d 378, 380 (Tenn. 1983) (citations omitted). In *Dyersburg*, the Court reviewed the provisions of the Model Choice of Forum Act[5] and of

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[5] The 1968 Model Choice of Forum Act provided that

> an *unselected* court must give effect to the choice of the parties and refuse to entertain the action unless (1) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (2) or the other state would be a substantially less convenient place for the trial of the action than this state; (3) or the agreement as to the place of the action was obtained by misrepresentation, duress, abuse of economic power, or other unconscionable means; (4) or it would for some other reason be unfair or unreasonable to enforce the agreement.

Dyersburg, 650 S.W.2d at 380 (emphasis added).

the Restatement (Second) of Conflict of Laws[6] and acknowledged that tribunals that enforce forum selection clauses have "refused to enforce them against third parties who did not agree to the contract containing such clause and are not parties to the agreement." *Id.* (citations omitted). The Court then held that "the courts of this state should give consideration to the above mentioned factors and any others which bear upon the fundamental fairness of enforcing such a forum selection clause, and should enforce such a clause unless the party opposing enforcement demonstrates that it would be unfair and inequitable to do so." *Id.*

This state's appellate courts have repeatedly applied the *Dyersburg* approach either to enforce forum selection clauses or to find them unenforceable. *See, e.g.*, *Cohn L. Firm v. YP Se. Advert. & Publ'g, LLC*, No. W2014-01871-COA-R3-CV, 2015 WL 3883242, at *12 (Tenn. Ct. App. June 24, 2015) (enforcing forum selection clause after finding "nothing in the record to suggest that any of the factors in *Dyersburg* exist to invalidate the forum selection clause in this case"); *Sevier Cnty. Bank v. Paymentech Merch. Servs., Inc.*, No. E2005-02420-COA-R3CV, 2006 WL 2423547, at *8 (Tenn. Ct. App. Aug. 23, 2006) ("After reviewing the factors set forth in *Dyersburg*, we conclude that the Trial Court did not err when it concluded that the forum selection clause contained within the Agreement is enforceable under Tennessee law."); *Lamb*, 26 S.W.3d at 631 (holding forum selection clause enforceable under *Dyersburg* where plaintiffs "failed to present any evidence indicating that the forum selection clause itself was procured by fraud, misrepresentation, duress, or any other unconscionable means"); *Cummings, Inc. v. H.I. Mayaguez, Inc.*, No. 01-A-01-9306-CH00258, 1993 WL 398475, at *5 (Tenn. Ct. App. Oct. 1, 1993) (reversing dismissal after concluding that "the grounds stated in *Dyersburg* for refusing to enforce a forum selection clause" were not present).

Importantly, the context of *Dyersburg* and its progeny, was a Tennessee court's consideration of whether to decline jurisdiction when a defendant invokes the parties' contractual selection of a forum *other than* Tennessee. Here, by contrast, Tennessee *is* the forum selected by the parties, and the plaintiff brought the action in Tennessee as required by the parties' Agreement. The trial court assumed the forum selection clause contained in the parties' Agreement to be valid for purposes of the motion to dismiss.[7] We conceive of no ground to disturb that assumption or to otherwise question the clause's validity. Firstly, when considering a non-compete agreement, "just as in any other type of contract, a cardinal rule is that a court must attempt to ascertain and give effect to the intent of the parties." *Christenberry v. Tipton*, 160 S.W.3d 487, 494 (Tenn. 2005). To ascertain the

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[6] Section 80 of the Restatement (Second) of Conflict of Laws provided: "The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." *Id.*

[7] Although forum selection clauses often mandate litigation in a specific county or court (i.e., the selected forum), they can also indicate—as is the case here—the particular state(s) where an action must be brought. *See Cohn Law Firm*, 2015 WL 3883242, at *5 (citation omitted).

parties' intent, "[c]ourts must look at the plain meaning of the words in a contract." *Allmand v. Pavletic*, 292 S.W.3d 618, 630 (Tenn. 2009). And, "[i]f the contractual language is clear and unambiguous, the literal meaning controls." *Id.* Defendants have not argued that the language of the forum selection clause is ambiguous or challenged its intent as expressed by that language's plain meaning. Those words literally provide that disputes arising out of the Agreement must be brought in Tennessee, and the complaint's allegations, in their entirety, are undeniably related to a breach of the parties' Agreement.

Moreover, Defendants have made no claim below or before this Court that the Agreement was procured by misrepresentation, duress, abuse of economic power, or other unconscionable means. *See Dyersburg*, 650 S.W.2d 378 at 380 (citing *The Model Choice of Forum Act*, 1968). We therefore see no reason to engage in the *Dyersburg* analysis when the forum agreed to by the parties and the forum in which the action was brought are one and the same—and when there is no allegation that the Agreement was obtained unfairly. Having assumed the parties' forum selection clause to be valid, the trial court should have enforced it and given effect to the parties' intent.

Defendants' primary contention on appeal is that the forum selection clause should not be enforced because Tennessee would be a less convenient place for *them* to try the case than Guam. Of that, we have little doubt given their residency there. However, we are constrained to decline Defendants' invitation to consider the applicability of the *forum non conveniens* doctrine in the instant case for one simple but compelling reason: they expressly and specifically waived "any defenses based on personal jurisdiction, venue and inconvenient forum." Indeed, the only two circumstances expressly referenced by the trial court for deeming Tennessee a less convenient place for litigation—that obtaining testimony from material witnesses in Guam would be costly and that additional procedural steps would be required to enforce in Guam any injunctive relief ordered by a Tennessee court—were no different or less foreseeable back in March 2019 when Fernandez signed the Agreement. Put another way, Defendants voluntarily agreed to the inconvenience they now seek to avoid. They would have this Court disregard an unambiguous provision in an arm's-length Agreement and, in effect, deprive the parties of the benefit of their bargain. But '"[p]arties challenging a forum selection clause cannot rely on facts and circumstances that were present or reasonably foreseen when they signed the contract."' *Sevier Cnty. Bank*, 2006 WL 2423547, at *6 (quoting *Safeco Ins. Co. of Am. v. Shaver*, No. 01A01-9301-CH-00005, 1994 WL 481402, at *4 (Tenn. Ct. App. Sept. 7, 1994)). Having discerned no basis to question the validity or enforceability of the parties' Agreement, we refuse to deviate from its express provisions and to nullify the parties' intent. *See Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.*, 566 S.W.3d 671, 688 (Tenn. 2019) ("The common thread in all Tennessee contract cases—the cardinal rule upon which all other rules hinge—is that courts must interpret contracts so as to ascertain and give effect to the intent of the contracting parties consistent with legal principles.").

For the same reason, Defendants' reliance on this Court's opinion in *Package Express Center v. Snider Foods, Inc.*, 788 S.W.2d 561 (Tenn. Ct. App. 1989), is misplaced. In that case, we affirmed the trial court's dismissal of a lawsuit on the basis of the *forum non conveniens* doctrine, notwithstanding the parties' designation of Greene County, Tennessee, in their lease agreement as the venue for litigation. *Id.* at 561-62. Just like Defendants here, the defendant in *Package Express* agreed to a Tennessee forum. In contrast, however, that defendant did not expressly and specifically waive the defense of inconvenient forum. *Package Express* is, therefore, not analogous and inapposite. In the instant case, the parties contractually precluded the doctrine of *forum non conveniens* as a defense should litigation arise. Their agreement as to the appropriate forum for litigation controls.

Pointing to this Court's opinion in *Hodges v. Attorney General*, 43 S.W.3d 918 (Tenn. Ct. App. 2000), Defendants advance the proposition that the trial court should have inherent authority to apply the *forum non conveniens* doctrine even when litigating parties had previously agreed to waive the inconvenient forum defense. Under the circumstances here, they submit that a Tennessee trial court should have the discretion to rely on the *forum non conveniens* doctrine to dismiss a complaint filed by a Tennessee plaintiff in a Tennessee court in accordance with a valid agreement to litigate in Tennessee under Tennessee law and to specifically waive the defense of inconvenient forum. We disagree. First, the circumstances here and in *Hodges* are poles apart. In *Hodges*, this Court affirmed the dismissal of a prisoner's complaint for failure to prosecute after the prisoner failed to provide the court clerk with copies of his complaint and to complete summons for service on the defendants—and, notably, did not offer an excuse for his failure to so do. *Id.* at 921. We explained: "Trial courts possess inherent, common-law authority to control their dockets and the proceedings in their courts. Their authority is quite broad and includes the express authority to dismiss cases for failure to prosecute or to comply with the Tennessee Rules of Civil Procedure or the orders of the court." *Id.* Here, in contrast, Relyant filed its complaint precisely in the jurisdiction agreed to by the parties and vigorously defended against Defendants' motion to dismiss the same; it did not fail to comply with any procedural rule or court order.

Even more significant, in our view, is the fundamental difference between a dismissal for failure to prosecute and a dismissal from a forum the parties had selected and on the basis of a defense the parties had specifically agreed to renounce. The former has to do with the trial court's ability to keep its dockets moving when plaintiffs show no interest in pursuing their claims; the latter infringes upon the ability of parties to rely on bargained agreements as to choice of forum for litigation and defense waivers. Defendants here do not contend that their voluntary agreement to waive the inconvenience forum defense was obtained by coercive or unjust means. As already mentioned, parties that waive the inconvenient forum defense also agree to the inconvenience the selected forum may present. Neither *Hodges* nor the three federal cases cited by Defendants involved application of the *forum non conveniens* doctrine where the parties had contractually

agreed to a particular forum and to waive the inconvenient forum defense. *See Wong v. PartyGaming Ltd.*, 589 F.3d 821, 830 (6th Cir. 2009) (enforcing forum selection clause; no waiver of the defense); *Est. of Thomson ex rel. Est. of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 366 (6th Cir. 2008) (no forum selection clause; no waiver of the defense); *Branch v. Mays*, 265 F. Supp. 3d 801, 810 (E.D. Tenn. 2017) (enforcing forum selection clause; no waiver of the defense).

We note that even in the absence of an express waiver such as the one contained in the Agreement between the parties here, some courts have deemed the *forum non conveniens* defense waived where the litigants have contractually agreed to a specific forum. *See, e.g., Nw. Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990) ("But one who has agreed to be sued in the forum selected by the plaintiff has thereby agreed not to seek to retract his agreement by asking for a change of venue on the basis of costs or inconvenience to himself; such an effort would violate the duty of good faith that modern law reads into contractual undertakings."); *Aon Corp. v. Utley*, 863 N.E.2d 701, 708 (Ill. App. Ct. 2006) ("Rather, we find that where defendant agreed to a valid forum selection clause, she waived any arguments based on *forum non conveniens*."); *see also ESI Cos., Inc. v. Ray Bell Const. Co.*, No. W2007-00220-COA-R3-CV, 2008 WL 544563, at *7 n.7 (Tenn. Ct. App. Feb. 29, 2008) ("Because we conclude that the forum selection clause should be enforced, we need not address whether the doctrine of *forum non conveniens* would have otherwise required the case to be dismissed in Shelby County.").

In sum, this is not a case where the parties simply agreed to a mandatory litigation forum that was later either challenged by a defendant or sua sponte raised by the trial court as inconvenient. Here, the parties specifically bargained and contracted that dismissal would not occur on the basis of inconvenient forum. Although the enforcement of a contractual waiver of the *forum non conveniens* defense appears to be an issue of first impression in this state, we do not think that the authority inherent in our trial courts to "control their dockets" goes as far as allowing them to, at their discretion, invalidate a voluntary contractual waiver and to apply a defense mutually surrendered by the parties.[8] Defendants have not cited any authorities to the contrary, and the trial court should have given effect to the parties' intent as expressed in their Agreement.

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[8] This Court had previously upheld a clear and unambiguous contractually agreed waiver of defenses. *See, e.g., Beach Cmty. Bank v. Labry*, No. W2011-01583-COA-R3CV, 2012 WL 2196174, at *11 (Tenn. Ct. App. June 15, 2012) ("This provision clearly states that the Appellants waive notice and foreclosure. If this Court were to hold that, notwithstanding this broad waiver provision, the Bank had a duty to provide notice or foreclose on the property, the waiver provision of the contract would be rendered meaningless."); *see also Cary v. Cary*, 937 S.W.2d 777, 782 (Tenn. 1996) ("We conclude that a voluntary and knowing waiver or limitation of alimony in an antenuptial agreement is not per se void and unenforceable as contrary to public policy."); *Maxwell v. Motorcycle Safety Found.*, Inc., 404 S.W.3d 469, 475 (Tenn. Ct. App. 2013) (holding that waiver of ordinary negligence did not violate public policy).

Last, Defendants argue that even if the forum selection clause of the Agreement is enforceable against Fernandez, it should not apply to the LLC because the company was not a party to the Agreement. In reviewing a trial court's dismissal of a complaint pursuant to a motion to dismiss, "we take all allegations of fact in the complaint as true." *Johnson*, 2021 WL 3737055, at *2. In its complaint, Relyant alleged that Fernandez is the only member of the LLC; that Fernandez created the LLC for the sole purpose of performing UXO-related services in direct competition with Relyant; that the LLC presents itself on its website as a '"munition of explosive concern (MEC) company' that performs a variety of UXO-related services"; and that, therefore, the LLC should be regarded as the "nominee and alter ego of Fernandez." Viewing these allegations as true, we are not persuaded that Relyant can "prove no set of facts" in support of its position that the LLC should be bound by the terms of the parties' Agreement, including the provisions concerning personal jurisdiction and forum. *Cullum*, 432 S.W.3d at 832. We do not readily see a logical basis for our courts to refuse exercising jurisdiction over the LLC where Relyant has alleged that the LLC was solely created by Fernandez, a signatory of the Agreement, as an instrument to unfairly compete with his former employer. At the motion to dismiss stage, we assess "only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb*, 346 S.W.3d at 426. Relyant's allegations might well be disproven in due course but are, at this juncture, sufficient for its complaint to survive the motion to dismiss the LLC from this action.

"Tennessee law is clear . . . that the party challenging the enforcement of a forum selection clause 'should bear a heavy burden of proof.'" *Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624, 631 (Tenn. Ct. App. 2017) (quoting *Chaffin v. Norwegian Cruise Line Ltd.*, No. 02A01-9803-CH-00080, 1999 WL 188295, *4 (Tenn. Ct. App. Apr. 7, 1999)). Defendants have neither carried that burden nor showed why their contractual agreement to waive the inconvenient forum doctrine should be disregarded. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) ("[E]nforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system."); *Castleberry v. Angie's List, Inc.*, 291 So. 3d 37, 40 (Ala. 2019) (enforcing forum selection clause that included waiver of personal jurisdiction, improper venue, and *forum non conveniens* defenses); *Four Star Resorts Bahamas, Ltd. v. Allegro Resorts Mgmt. Servs., Ltd.*, 734 So. 2d 576, 577 (Fla. Dist. Ct. App. 1999) ("Having contractually agreed to venue in Dade County, and having explicitly waived any venue or forum non conveniens objection, Four Star will not be heard to say otherwise now."). Under the circumstances here, we hold that the trial court abused its discretion by dismissing the action pursuant to the *forum non conveniens* doctrine when the parties specifically waived such defense and expressly agreed to this state as the mandatory forum for litigation arising out of or relating to their Agreement. The third issue raised by appellant is thus moot.

CONCLUSION

The judgment of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion. Costs on appeal are assessed to the appellees, Royden Fernandez and Oia'i'O Halo MEC Remediation HUI, LLC, for which execution may issue if necessary.

KRISTI M. DAVIS, JUDGE