The Governor's Council for Judicial Appointments
State of Tennessee
Application for Nomination to Judicial Office

Name: Dwight E. Tarwater

Office Address: Paine | Tarwater | Bickers, LLP
(including county) 900 South Gay Street, Suite 2200
Knoxville, TN 37902 (Knox Co.)

Office Phone: 865-525-0880 Facsimile: 865-521-7441

Email Address: [redacted]

Home Address: [redacted]
(including county) Knoxville, TN 37919 (Knox Co.)

Home Phone: [redacted] Cellular Phone: [redacted]

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.

Paine | Tarwater | Bickers, LLP (Partner)

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

1980; 007244.

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 (1980); 007244; My license is currently 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).

I have not.

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).

1979-1980: Judicial Law Clerk to Judge Houston M. Goddard, Tennessee Court of Appeals, Eastern Section.

1980 – 1984: Associate, Egerton, McAfee, Armistead and Davis, Knoxville, TN

1984 – 1987: Partner, Egerton, McAfee, Armistead and Davis, Knoxville, TN

1987 – 2014: Partner, Paine | Tarwater | Bickers, LLP (originally founded as Paine, Swiney and Tarwater), Knoxville, TN

2014 – 2019: General Counsel, Tennessee Governor Bill Haslam, Nashville, TN

2019 – Present: Partner, Paine | Tarwater | Bickers, LLP, Knoxville, TN

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.

I have been continuously employed since I completed my legal education.

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.

My current practice is almost 100% civil litigation. I generally deal with complex tort and commercial matters in state and federal courts. I also advise and counsel business owners in proposed transactions that might involve litigation.

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.

I have had extensive, diverse, and wide-ranging trial and appellate experience throughout Tennessee and in several other states. Early in my career, I handled all types of civil cases, including tort cases, commercial cases, domestic relations cases, and antitrust cases. I also handled a few criminal cases. I began to be recognized nationally in 1986 after a jury verdict win in *Lewis v. Raymark Industries, Inc.*, an asbestos related lung cancer in federal court in Chattanooga. Following that, I became regional and national trial counsel for several different defendants in the 80's and 90's, appearing in probably 20 states or more.

My practice became greatly diversified after 2000. For example, I defended numerous product

liability cases ranging from defective coffee pots to medical devices. I represented the target defendant in a sizeable estate related matter involving breach of fiduciary duty claims. That led to several other estate related litigation cases. I tried an accounting fraud case, and I represented the defendant in a sizeable defamation case. I have often served as counsel defending corporations in mass tort/class action cases involving allegedly defective products ranging from pvc pipes to motorcycle tires. I have been involved in intellectual property cases and significant commercial litigation. I have been asked to serve as appellate counsel in state and federal courts. In fact, I had two cases pending before the Tennessee Supreme Court when I agreed to become General Counsel to Governor Haslam. In addition to the appellate courts in Tennessee, I have handled cases in the 4th, 6th, 10th, and 11th Circuits.

In the early 2000s I was selected as one of four national trial counsel for General Electric. From 2007 to 2014, I represented GE nationally in the gadolinium contrast litigation involving a pharmaceutical agent known as Omniscan. I achieved a rare win in a Tennessee case, based on the application of the Tennessee statute of repose. Before I became Counsel to the Governor, my last court appearance was oral argument of that appeal in in the 6th Circuit, where I was successful in arguing that the Tennessee statute of repose should be upheld in the face of a collateral attack under Ohio law. The case is reported at *Wahl v. General Electric Co., et al*, No. 13-6622 (6th Cir. 2015).

In December 2014, I became General Counsel to Governor Haslam, a position which I was humbled to have been offered and honored to accept. My duties for the Governor were varied but full. I offered the Governor my counsel and advice on legal, political, and governmental issues. I reviewed, commented upon, and drafted legislation, particularly related to administration related initiatives, and, of course, I reviewed and approved the many legal documents which required the Governor's signature. I interacted with the Governor's Council on Judicial Appointments, the Administrative Office of the Courts, and the Governor regarding judicial appointments. I offered my counsel to the Attorney General and Constitutional Officers as needed, and I directed some of the activities and provided advice to the General Counsel of the various departments relating to legal matters involving the Governor and the administration. Occasionally, I would interact with members of the General Assembly regarding pending legislative matters. I coordinated the responses to any Open Records Requests involving the Governor, and I served as Chief Ethics and Compliance Officer for the Administration. As Chair of the Governor's Public Safety Sub-Cabinet, I worked on proposed reform measures in criminal justice, juvenile justice, law enforcement, and drug treatment. I also served as Tennessee's National Criminal Justice Policy Advisor to the National Governor's Association. Finally, I advised the Governor on criminal law issues involving defendants, such as extraditions, sentencing, and clemency requests, including those in capital cases.

Suffice to say that my experience in government was rewarding, interesting and rounded out my career in a full and complete way. It also brought within my heart a great appreciation of the value of public service.

Since I returned to my firm in 2019, I have been busy with a number of cases. For example, I

am defending Jacobs Engineering Group in 200+ personal injury cases brought by workers involved in the notable landfill breach at TVA's Kingston Steam Plant. This case was argued before the Tennessee Supreme Court in June 2022 and is referenced in Section 34 of this application. I represent a major health care insurer in cases alleging a particular form of health care fraud known as "upcoding." I am outside counsel to the State in the opioid litigation against Walgreens, a case filed in Knox County in August 2022.

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

This is a difficult question for me to answer given the nature of my practice. Nevertheless, I will relate some of my experiences here not mentioned elsewhere in the application.

In approximately 1994, I was lead counsel for Owens Corning in a case involving compensatory and punitive damages claims brought by 13,000+ asbestos plaintiffs in Charleston, WV. At the time, it was the largest personal injury case in history, or was said to be. Lead counsel for the plaintiffs was Ron Motley, who was quite prominent among the plaintiffs' bar, and whose life has been the subject of books and a movie or two. I invoked a risky trial strategy directed at the questionable Constitutionality of multiple punitive damages awards in mass tort litigation. The case settled favorably months into trial for substantially less than historical values, and the trial judge entered an order precluding punitive damage awards against Owens Corning in West Virginia. *In re: Kanawha Mass III* (Kanawha Co., WV 1994).

In 2004, I represented the Bristol Motor Speedway on appeal after it had suffered an adverse trial court decision regarding ownership of the real property on which the racetrack is located. During the post-trial proceedings, I agreed to allow a judgment to be entered in an *increased* amount in exchange for a stay of execution. The stay allowed the Speedway operations to continue uninterrupted. I then argued the appeal successfully, and the judgment was reversed. *Carrier v. Speedway Motorsports, Inc.*, 151 S.W. 3d 920 (Tenn. Ct. App. 2004).

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.

I am a Rule 31 Certified Mediator, although I have served as a mediator in only a few cases. On the other hand, I have served as an advocate for clients who were parties to mediations on numerous occasions.

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.

I was appointed by the Chancery Court for Knox County to serve as the Personal Representative of the Estate of Joseph Taylor, an investment advisor who engaged in questionable activities and ultimately took his life. There were numerous claims to be administered. This extremely complicated proceeding took several years to complete as assets were difficult to marshal and were vastly insufficient to satisfy the enormous claims.

I have also served as the Executor of a few Estates involving family members and as Trustee for Trusts established by my wife's parents and brothers. Finally, I have represented numerous fiduciaries in litigation matters.

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

The nature of my civil litigation practice led me to be deeply involved in important current issues regarding discovery and the admissibility of expert opinion testimony. I have taken hundreds of depositions, and I fully understand the issues that might arise during the discovery process. I have been involved in much electronic discovery and many related disputes involving technical issues of harvest, privilege, and spoilation, matters which are weighty and timely. Finally, I have been involved in Daubert and McDaniel hearings as the trial courts exercised their function as gatekeepers of expert opinion testimony. I would bring this deep understanding of discovery and evidence issues to the Court.

I have maintained a thriving practice with a client list comprised of mostly Fortune 500 companies. Yet, many of the clients that I vividly remember were those that I accepted on a pro bono or reduced fee basis: the drug addicted Vietnam vet that I defended in a paternity case; the lawyer whose sentence was reversed just days before his release date and who died of cancer shortly thereafter; the homeless man who lived in a dog house; the single mother trying to keep her car on the road. For me, it was their case, For them, it was their life. No matter who I represented, the rule of law was paramount. It exists so that the freedoms of Tennesseans are protected and their duties adjudicated fairly. If I were to be appointed, I would uphold the rule of law as a servant without bias or agenda and with diligence and full analysis.

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

I have not previously submitted an application to the Governor's Council for Judicial

Appointments or predecessor entity.

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.

University of Tennessee College of Law, J.D. (1980)

University of Tennessee, Knoxville, B.A., Political Science (1977), with honors. I was named a Torchbearer, the University's highest honor, which is based on academics, leadership, and service. During my undergraduate days, I was involved in numerous campus organizations, and I was recognized by a number of honorary societies.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 67. My date of birth is [redacted] 1955.

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

I have lived continuously in Tennessee since birth.

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

I have lived continuously in Knox County since birth. I also owned a condo in Nashville at 1212 Laurel Street, #1808, Nashville, TN 37203 from 2015 – 2018.

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.

I have not served in the military.

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.

I have no convictions or violations other than minor traffic violations.

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.

I am not.

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.

In the 1980's an adverse party filed a disciplinary complaint against me. The complaint was summarily dismissed by the Board of Professional Responsibility.

Also, in the 1980's I was held in contempt by a United States Magistrate in Memphis. The Magistrate had ordered the parties, including clients, to appear at a settlement conference. I appeared and participated in good faith, but my client, against my advice, chose not to attend, after giving me the maximum settlement authority. The basis of the Court's ruling was my client's failure to appear. It was not related to my professional conduct.

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.

There has never been any type of lien or collection procedure instituted against me.

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

No. I have never filed bankruptcy nor has any entity in which I had an ownership interest done

so.

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.

As far as I recall I have not been a party in any legal proceedings. On occasion my firm has been named, but what few claims there have been were all dismissed without payment on our part. There have been rare instances in which the firm filed claims in bankruptcy or in court to recover unpaid fees, and, on one occasion, the firm filed suit against a departing partner. This case was quickly settled. *Paine, Tarwater, and Bickers, LLP, et al. v. Harrison*, No. 3:19-cv-00318-TRM-HBG (U.S.D.C, Eastern District of Tenn. 2019).

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.

All Souls Church, Knoxville

Cherokee Country Club

Leadership Knoxville

Leadership Tennessee

Ocean Reef Club, Key Largo, FL

Phi Gamma Delta, Alumnus

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.

My college fraternity, Phi Gamma Delta, limits its membership to men. I am an alumnus, though

not particularly active. Cherokee Country Club originally limited its certificate holders/voting membership to men. This was changed in 1989, and currently there are no such membership limitations.

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.

American Bar Association

American Bar Foundation

American College of Trial Lawyers

Defense Research Institute

Harry Phillips American Inn of Court

International Association of Defense Counsel

Knoxville Bar Association, President (2000); President-Elect (1999); Secretary (1998); Board of Governors (1986–1988, 1995-2001); Barristers (Young Lawyers Division) President (1987)

Knoxville Bar Foundation

Litigation Counsel of America

Supreme Court Historical Society

Tennessee Bar Association: East Tennessee Governor (1991-1992); Tennessee Young Lawyers Conference Board (1986-1987)

Tennessee Bar Foundation

Tennessee Association for Justice

Tennessee Supreme Court Business Court Docket Advisory Commission

Tennessee Supreme Court Indigent Representation Task Force

Trial Attorneys of America

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.

I consider my most significant professional honor to have occurred in 2006 when I was inducted into the American College of Trial Lawyers. Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada. Fellowship is extended, by invitation only, after careful investigation to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical

conduct, professionalism, civility, and collegiality.

In 2002, I was first listed in the Best Lawyers in America, compiled through an exhaustive peer review survey of thousands of top lawyers. Since that time, I have been selected Lawyer of the Year for Knoxville numerous times in various categories. My firm was named as one of the nation's top firms by *U.S. News and World Report* and was awarded the Pro Bono Law Firm of the Year Award in 2010, 2012, and 2013.

In 2020, I received the Governor's Award, the highest honor of the Knoxville Bar Association, given for the distinction and honor brought to the profession by enduring, faithful, and distinguished service in the community.

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

I have published no books or legal articles other than papers submitted at conference proceedings or seminars in support of my oral presentations.

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.

Over the years I have spoken at numerous professional meetings and have been a guest lecturer at the University of Tennessee College of Law on various topics. More recently, I recall speaking to the Knoxville Bar Association on Ethics, Election Law and Civility, and the Business Court, to the Tort and Insurance Section of the American Bar Association on Relationships with In-House Counsel, to the Tennessee Bar Association Leadership Law Class on Government Service, and to the University of Tennessee College of Law on Health Care Policy.

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.

As stated, I served as Counsel to the Governor. Otherwise, I have never been elected or appointed to any public office.

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

I have never been a registered lobbyist.

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 attach two writing samples. The first is the main brief in *Wahl v. General Electric Co., et al.*, discussed elsewhere in this application. The second is the main brief in *Adkisson v. Jacobs Engineering* in the Tennessee Supreme Court on four certified questions from the United States District Court for the Eastern District of Tennessee. I argued that case in June 2022. As of the date of this application, the case remains pending.

As is our practice, I would lead a meeting in which the arguments would be discussed. Initial drafting and research would then be accomplished by a junior lawyer in the firm (Wahl) or by associated counsel (Adkisson). The drafts are subject to editing by me, and the arguments and much of the writing are attributable to me. I signed both briefs.

ESSAYS/PERSONAL STATEMENTS

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

As lawyers we are servants of the law and we owe to it our obedience, respect, honor, and hard work. We serve the law, and as such, we serve the people. The Courts are essential to the ultimate performance of this service as their role is to decide cases according to the law, not to make policy.

My life was greatly enriched during my service as Counsel to the Governor. So, I wish to be obedient. I wish to serve the law and the people as member of Tennessee's highest court and court of last resort. This I consider to be my ultimate service, not only to the profession, but also to the people of Tennessee. It is also an important recognition of the obligation that we have to those who follow. Given that, I believe fully that my skill set and experience uniquely qualify me to serve with integrity, humility, and diligence. Thus, I respectfully seek this position.

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)***

Since licensure in 1980, my commitment to pro bono work and equal justice under the law has been significant and unwavering. I have consistently accepted pro bono cases from Legal Aid of East Tennessee or its predecessor entities (LAET). I have also handled cases on a pro bono or reduced fee basis for clients who needed a lawyer but were not referred by LAET. For many years, because we believed in the cause, our firm did not charge for adoptions. More recently, I have assisted counsel with clemency applications, and I served on the Indigent Representation Task Force of the Tennessee Supreme Court.

I served on the Board of Directors of LAET, the Volunteer Legal Assistance Program, and the Pro Bono Project for several years. I worked in local high schools coaching their Mock Trial teams, and I visited local high schools with police officers to speak on the dangers of driving under the influence. I also led by giving significant financial support to LAET.

My firm received the Pro Bono Law Firm of the Year Award in 2010, 2012, and 2013.

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 seek appointment to the Tennessee Supreme Court, the state's highest court and court of last resort. The five justices handle appeals of civil and criminal cases.

I would bring a distinctly unique perspective to the court as it sits as a reflection of the values of society and our profession. I have never been a judge. Rather, my diverse experience is that of a veteran courtroom lawyer, General Counsel to the Governor, leader in the bar and the community, senior and founding partner of a successful law firm, successful student, pro bono advocate, faithful husband and devoted father. My life journey has been marked by great joy and great pain, glorious wins and stinging losses. I am well-seasoned by my life experiences, and I hope to bring that to the Court. In the words of Plato, "Justice in the life and conduct of the State is possible only as it resides in the hearts and souls of the citizens."

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)***

Over the years I have been involved in a number of community organizations in addition to professional organizations. For example, I have been active in church work, serving in leadership, teaching Sunday School, and participating in small groups and prayer ministries. I have volunteered my time for non-profits involved with culture and the arts, children's issues, and health-related issues. I served on the Boards of Webb School of Knoxville, the All Souls Church Foundation, and the East Tennessee Foundation, and on an Advisory Board for a local bank. I expect to continue with my service work, and I hope to find new opportunities as might be presented to a member of the Court.

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)***

My mentor was Donald F. Paine, who served for 35 years as a Reporter of the Tennessee

Supreme Court's Advisory Commission on the Rules of Practice and Procedure. Professor Paine served as President of the Knoxville and Tennessee Bar Associations, authored the seminal work, Tennessee Law of Evidence, and taught at both the University of Tennessee College of Law and Vanderbilt University Law School. He modeled respect for the Court, obedience to the law, civility for his colleagues, and an uncompromising commitment to excellence, if not perfection, in the written word. His influence upon my career has been profound.

On a completely different note, I would frankly offer that my 34-year marriage, the circumstances surrounding my wife's tragic death, and the subsequent reconstruction of my life and family, have dramatically shaped me into the person that I am today. I am happy to elaborate on that, or not, as the Council may wish.

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)***

As I believe that the role of the Court is to apply the law, not to make it, I would decide the cases based on the law as it is, not as I wish it were. During my service as Counsel to the Governor, there were many instances when the law unambiguously compelled a certain result which was not necessarily that which a constituency (on either side) might appreciate.

In my private practice, I once defended a paternity case in which the DNA evidence demonstrated an overwhelming probability that my client was, in fact, the father. I argued that the Report was inadmissible under the Rules of Evidence because the methodology employed was technically unreliable and the report itself was hearsay. The trial court sustained my objection. The result, of course, was that the trier of fact was not privy to the strong conclusions of the scientific evidence. In my view, the Rules of Evidence compelled that result, and the Court ruled correctly. I would also point out that the Court, in my opinion, also ruled correctly on the merits after hearing the other evidence in the case, finding my client to be the father.

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. Bill Haslam, Tennessee Governor 2011–2019, [redacted] Knoxville, TN 37919 [redacted]

B. Herbert H. Slatery, III, Tennessee Attorney General 2014-2022, [redacted] Nashville, TN 37219, [redacted]

C. Deborah Taylor Tate, former Director of the Tennessee Administrative Office of the Courts, [redacted] Nashville, TN 37215 [redacted]

D. Tom Hill, former Corporate Counsel, GE, [redacted] Sunapee, NH 03782 [redacted]

E. Doug Banister, Pastor, All Souls Church, [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: Dec. 9, 2022.

Bright G. Tarwater

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.

Dwight E. Tarwater

Type or Print Name

Dwight E. Tarwater

Signature

December 9, 2022

Date

007244

BPR #

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

Case No. 13-6622

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Marye Wahl,
Plaintiff-Appellant,

v.

General Electric Company, GE Healthcare Inc., and GE Healthcare AS,
Defendants-Appellees

On Appeal from the United States District Court for the Middle District of Tennessee, Case No. 3:13-CV-0329
The Honorable Aleta Trauger, Judge Presiding

BRIEF OF APPELLEES GENERAL ELECTRIC COMPANY, GE HEALTHCARE INC., AND GE HEALTHCARE AS

Dwight E. Tarwater
det@painetar.com
Taylor A. Williams
taw@painetar.com
Paine, Tarwater, and Bickers, LLP
900 South Gay Street, Suite 2200
Knoxville, TN 37902-1821
865.525.0880 (phone)
865.521.7441 (fax)

Attorneys for Defendants-Appellees
General Electric Company;
GE Healthcare Inc.; and GE Healthcare AS

CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Appellees General Electric Company, GE Healthcare Inc., and GE Healthcare AS make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Yes. GE Healthcare Inc. and GE Healthcare AS are wholly owned subsidiaries of General Electric Company, which is a publicly traded company.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Catlin Group Limited potentially has a financial interest in this appeal by reason of insurance. Additionally, HDI-Gerling potentially has a financial interest in this appeal by reason of insurance and is an affiliate of Berkshire Hathaway, which is publicly traded.

Dated: March 31, 2014

/s/ Dwight E. Tarwater
Counsel for Defendants-Appellees General Electric Company, GE Healthcare Inc., and GE Healthcare AS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The GE Defendants request oral argument because this case involves important issues that will have wide-ranging implications for mass tort Multidistrict Litigation ("MDL") practice. First, oral argument is appropriate on the developing area of law in the federal district courts regarding which state's choice-of-law rules should apply when a case directly filed in an MDL, where venue was never determined to be proper, is transferred to another federal district court pursuant to 28 U.S.C. § 1404(a).

Second, the GE Defendants request oral argument to argue affirmance of the District Court's correct holding that Tennessee law applies to a products liability case involving a Tennessee plaintiff who was prescribed and administered a drug in Tennessee, and allegedly injured in Tennessee.

STATEMENT OF ISSUES

Did the District Court correctly rule that Tennessee choice-of-law rules apply to this direct-filed MDL case transferred by stipulated order from an Ohio MDL to the Middle District of Tennessee where Plaintiff lived in Tennessee, was prescribed and administered the subject drug in Tennessee, and where Plaintiff thoroughly presupposed the application of Tennessee substantive law to her cause of action from her first pleading onward?

Did the District Court correctly apply the most significant relationship test of the *Restatement (Second) Conflict of Laws* to Plaintiff's cause of action to conclude that Tennessee substantive law, including the statute of repose contained in Tennessee's Products Liability Act, should apply to this case?

Even if the District Court should have analyzed Ohio public policy and § 90 of the *Restatement (Second) Conflict of Laws*, would Tennessee substantive law still apply to this action where Ohio has no significant interest in the outcome of this litigation?

STATEMENT OF THE CASE

Plaintiff Marye Wahl ("Plaintiff"), a resident of Tennessee for at least ten years, originally filed suit against Defendants General Electric Company, GE Healthcare Inc., and GE Healthcare AS. ("GE Defendants") in the United States District Court for the Northern District of Ohio, MDL 1909 ("MDL Court") pursuant to Pretrial Order No. 1 ("Direct Filing Order") which authorizes cases to be directly filed in the MDL Court. (Plaintiff's Response to Defendant's Statement of Facts, RE 40, Page ID # 342-343, ¶ 11 (ten year residency)); (Complaint, RE 1, Page ID # 3, ¶ 14) (referencing Direct Filing Order's authorization to directly file cases). Plaintiff filed this lawsuit based on personal injuries she allegedly suffered as a result of being prescribed and administered the gadolinium-based contrast agent known as Omniscan on May 8, 2006 and November 1, 2006 in Tennessee. (Plaintiff's Response to Defendant's Statement of Facts, RE 40, Page ID # 339-340, 343, ¶¶ 1-3, 14). Plaintiff was living in Tennessee when she was diagnosed by a Tennessee physician with the disease which gave rise to her Complaint. (*Id.* at Page ID # 343, ¶ 13). Plaintiff's treating physicians and the healthcare facilities where she received medical treatment are all located in Tennessee. (*Id.* at ¶ 15).

From the inception of the lawsuit, Plaintiff embraced the venue of the Middle District of Tennessee as her home district by stating as follows in her Complaint:

> 14. Venue in this district is appropriate based on MDL 1909 Pretrial Management Order 1 which allows any plaintiff whose case would be subject to transfer to MDL 1909 to file her case directly in the MDL proceedings and the Northern District of Ohio. The venue of the current case **would have been appropriate under 28 U.S.C. § 1391 in the Middle District of Tennessee** because a substantial part of the events giving rise to this claim occurred in that district as Plaintiff Marye Wahl was administered Omniscan™ in that district, and because Plaintiff has at all times relevant resided in that district.

(Complaint, RE 1, Page ID # 3, ¶14) (emphasis supplied). Prior to the filing of Plaintiff's Complaint, the MDL Court had already ruled that "[t]he inclusion of any action" in the MDL Court "shall not constitute a determination by this Court that jurisdiction or venue is proper in this District." (Case Management Order No. 3, RE 51-3, Page ID # 958, ¶ 3) ("CMO No. 3"). CMO No. 3 also stated that "[n]o reference in this Order to actions filed originally or directly in the United States District Court for the Northern District of Ohio shall constitute a waiver of any Defendant's contention that jurisdiction or venue is improper and/or that the action should be dismissed or transferred, or any Plaintiff's contention that jurisdiction or venue is proper." (*Id.* at Page ID # 958-59, ¶ 3).

In her original Complaint, Plaintiff anticipated and desired the application of Tennessee law and presupposed the propriety of Tennessee as the ultimate venue by pleading:

> 9. Upon information and belief, at all relevant times, the Defendants were present and doing business *in the State of Tennessee and in the Middle District of Tennessee in particular.*

> 10. At all relevant times, the Defendants transacted, solicited, and conducted business *in the State of Tennessee* and derived substantial revenue from such business.
>
> 11. At all relevant times, the Defendants expected or should have expected that its acts would have consequences within the United States of America, *the State of Tennessee, and the Middle District of Tennessee in particular.*
>
> 13. The Court has personal jurisdiction over Defendants consistent with the *Tennessee* and United States Constitutions because Defendants caused tortious injury in *Tennessee* and by virtue of Defendants' regularly conducted business in *Tennessee* from which they derive substantial revenue.

(Complaint, RE 1, Page ID # 2-3, ¶¶ 9-11, 13) (emphasis supplied).[1] The first responsive pleading filed by the GE Defendants in the MDL Court was its Answer which expressly raised as an affirmative defense the Tennessee statute of repose codified at Tennessee Code Annotated § 29-28-103 ("TSOR"). (Answer to Amended Complaint, RE 11, Page ID # 120, ¶ 3).

After pretrial proceedings and in accordance with the Direct Filing Order, the parties agreed, and the MDL Court subsequently ordered, the transfer of the case pursuant to 28 U.S.C. § 1404(a) to the Middle District of Tennessee as the

[1] Plaintiff plainly incorporated her presupposition that venue was proper in Tennessee when she filed her Amended Complaint, by eliminating the reference to Pretrial Order No. 1 altogether, and simply alleging that "Venue in this district is appropriate under 28 U.S.C. § 1391 because...Plaintiff have [sic] at all times relevant resided in this judicial district and has sustained injury in this district." (Amended Complaint, RE 5, Page ID # 72, ¶ 21). As Plaintiff resides in Nashville, Tennessee (*id.* at Page ID # 68, ¶ 1), it is clear that this Amended Complaint was filed *as if* it were already in the Middle District of Tennessee.

proper venue. (Agreed Order of Transfer Pursuant to 28 U.S.C. § 1404(a), RE 18, Page ID # 155, p. 2) ("Agreed Transfer Order"). The parties reaffirmed their prior agreement in the Agreed Transfer Order that a plaintiff could "file his/her case directly in the Northern District of Ohio" without "challenge [to] the venue of direct-filed cases for purposes of pretrial proceedings." *Id.* Furthermore, "upon completion of pretrial proceedings and pursuant to 28 U.S.C. § 1404(a), [the MDL Court] would transfer certain cases to the federal district court of *proper venue* based on the recommendation of the parties to that case." *Id.* (emphasis supplied) (footnote omitted). The MDL Court next acknowledged that the parties had "jointly asked the Court to transfer this case *to the district court of proper venue.*" (*Id.* at Page ID # 156-57, pp. 3-4) (emphasis supplied). After the case was transferred to the Middle District of Tennessee ("District Court"), the District Court entered a Case Management Order, agreed to by the parties, which stated that both "jurisdiction" and "venue" had been resolved. (Initial Case Management Order, RE 39, Page ID # 336, ¶ C). There is nothing in the record that establishes that venue was proper in Ohio.

Based on the expiration dates of the Omniscan that Plaintiff received, Defendants moved for summary judgment pursuant to the anticipated life clause of the TSOR on grounds that this statute barred Plaintiff's claims because she did not file her lawsuit until May 11, 2011, well after November 1, 2009, the date of the

TSOR's expiration. (Motion for Summary Judgment, RE 35, Page ID # 253-257). After extensive briefing, the District Court granted the Motion for Summary Judgment, dismissing Plaintiff's claims with prejudice. (Order, RE 70, Page ID #1381; Entry of Judgment, RE 71, Page ID #1382).

Plaintiff appealed. She does not challenge any of the factual conclusions regarding application of the TSOR. Instead, she focuses on the District Court's choice-of-law analysis and application of the most significant relationship test.

SUMMARY OF ARGUMENT

Until Plaintiff learned that a Tennessee statute of repose barred her claims against the GE Defendants, she pled, argued, and completely presupposed the application of Tennessee substantive law to her lawsuit. Although she lives in Tennessee, was prescribed and administered Omniscan in Tennessee, and allegedly injured in Tennessee, she now argues that New Jersey's substantive law should apply to her case. The District Court's ruling that Tennessee choice-of-law principles apply to this direct-filed MDL case which was transferred by agreement to the United States District Court for the Middle District of Tennessee is correct. In holding that Tennessee choice-of-law principles and subsequently, Tennessee substantive law, applied to Plaintiff's claims, the District Court appropriately distinguished *Van Dusen v. Barrack*, 376 U.S. 612 (1964). To the extent *Van Dusen* and *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) are applicable, their policy considerations and reasoning are not furthered by Plaintiff's proposed rule that after a 28 U.S.C. § 1404(a) transfer, the choice-of-law rules of the "transferor" court automatically apply with no exception. Plaintiff's argument also overlooks the fact that *Van Dusen* and *Ferens* do not control here due to the unique procedural posture of a direct-filed MDL case.

Rather, as many district courts have held, the choice-of-law rules applicable to a direct-filed MDL case pursuant to a stipulated direct-filing order should be that

of the "originating" state, i.e., the state where the plaintiff was prescribed and administered the drug. Here, the District Court correctly applied the choice-of-law rules of the "originating" state, eschewed mechanical application of *Van Dusen*, and elevated substance over form.

The District Court also correctly held that under the most significant relationship test of the *Restatement (Second) of Conflict of Laws* (1971) ("*Restatement*"), the test applied by both Ohio and Tennessee, the overwhelming amount of contacts point to Tennessee, making Tennessee law applicable. Finding only a tangential connection to New Jersey, the District Court held that Tennessee had significant interests in applying its own law to its own citizen who resided, was treated, and allegedly injured in Tennessee.

Tennessee substantive law applies under either state's choice-of-law rules because Tennessee and Ohio employ identical provisions of the *Restatement.* Even if Ohio choice-of-law rules apply, the District Court correctly rejected Plaintiff's attempts to avoid the imposition of the TSOR through § 90 of the *Restatement* and Ohio public policy considerations. Section 90 does not apply to affirmative defenses like the TSOR, and Ohio has no material connection to this lawsuit such that its public policy is in any way threatened by application of Tennessee law.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY APPLIED TENNESSEE CHOICE-OF-LAW RULES TO THIS TRANSFER FROM A DIRECT-FILED MDL ACTION.

The District Court correctly determined that but for the procedural oddity of the case being direct-filed in the MDL Court, this case actually "originated" in Tennessee and therefore, Tennessee choice-of-law rules applied.[2] Plaintiff, on the other hand, directs this Court to *Ferens v. John Deere Co.,* 494 U.S. 516 (1990), for the proposition that upon a 28 U.S.C. § 1404(a) transfer, the transferor court's choice-of-law rules control under all circumstances. In fact, upon reading Plaintiff's Brief, one would think that no cases had been decided since *Ferens*. This is incorrect. Numerous federal courts, including the Supreme Court, have decided a substantial body of law post-*Ferens* which clearly rejects any mechanical approach to which state's choice-of-law rules control upon transfer pursuant to § 1404(a) in a variety of contexts.

The substance of the procedure in this case is that the parties *by agreement* allowed direct filing in a jurisdiction where venue was not otherwise proper solely for pretrial proceedings, and in so doing authorized Plaintiff to skip the initial step

[2] It is undisputed on appeal that if Tennessee substantive law applies to this case, the District Court must be affirmed, and Plaintiff has no cause of action pursuant to the TSOR, a statute which this Court has already held to bar a plaintiff's claims. *Montgomery v. Wyeth*, 580 F.3d 455 (6th Cir. 2009); *Spence v. Miles Laboratories, Inc.*, 37 F.3d 1185 (6th Cir. 1994).

of filing first in her home jurisdiction. Plaintiff's Complaint makes it clear that she would never have filed in Ohio but for the Direct Filing Order. The District Court correctly observed that apart from the consolidation of pretrial proceedings, an event predestined by the JPML's arbitrary MDL selection process, "[t]his case has no connection to Ohio." (District Court Memorandum Opinion, RE 69, Page ID # 1364, p. 9). Thus, to decide that Ohio choice-of-law rules now apply would contravene the parties' expectations and defy reason.

A. The Policy and Reasoning Behind *Van Dusen* and *Ferens* Support the District Court's Decision to Apply Tennessee Choice-of-Law Rules to this Case.

Plaintiff's proposed rule does violence to the policy reasons which supported *Van Dusen* and *Ferens*, and would subvert the reasons in favor of allowing direct filing in MDL cases.[3] A brief review of the Supreme Court's jurisprudence in this

[3] Multidistrict litigation is controlled by 28 U.S.C. § 1407 and the Judicial Panel on Multidistrict Litigation ("JPML"). Generally, the purpose of multidistrict litigation is to "provide centralized management of pretrial proceedings and to ensure their just and efficient conduct." *United States of Am. ex rel Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 273 (D.D.C. 2002) (internal quotation marks omitted) (citation omitted). After deciding that consolidation is proper, the JPML is responsible for choosing which judge the MDL is assigned to, a decision over which the JPML has significant discretion. Traditionally, cases filed after the consolidation of an MDL are treated as "tag-along actions." *See* R.P.J.P.M.L. 7.1-7.2. They are filed in home jurisdictions and are then transferred to the MDL. *Id.* Some MDL courts, including the present one, allow both traditional "tag-along actions," as well as direct filing actions simply for the convenience of the parties, provided that all parties agree. Under this scenario, plaintiffs can choose whether to file in their home jurisdiction and await transfer,

area will explain the reasoning behind this conclusion. The genesis of Plaintiff's proposed rule comes from the law applicable to federal courts sitting in diversity, which began with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* held that federal courts sitting in diversity must apply state substantive law. *Id.* at 78. In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), the Supreme Court extended the *Erie* doctrine to require federal courts sitting in diversity to apply the forum state's choice-of-law rules as well.

The post-*Erie* cases upon which Plaintiff relies—*Van Dusen* and *Ferens*—centered on which state's law should apply upon transfer from one federal court to another pursuant to the venue transfer statute, 28 U.S.C. § 1404(a). *Van Dusen* involved wrongful death actions brought in Pennsylvania federal court by the families of airline crash victims. 376 U.S. at 614. The defendants subsequently sought transfer under § 1404(a) to Massachusetts federal court. *Id.* On appeal, the United States Supreme Court held that the law of the transferor state must apply in order to uphold the policies behind *Erie*: "where the defendants seek transfer, the transferee district court must be obligated to apply the state law that *would have been applied* if there had been no change of venue." *Id.* at 639 (emphasis supplied). *Van Dusen* was concerned with "ensur[ing] that the 'accident' of

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or bypass that initial step by filing directly in the MDL Court. The JPML rules provide that "[t]ypically, the transferee judge recommends remand of an action…to the transferor court." R.P.J.P.M.L. 10.1(b).

federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." *Id.* at 638 (internal quotation marks in original). Allowing defendants who were "*properly subjected to suit* in the transferor State" to use § 1404(a) "to gain the benefits of the laws of another jurisdiction" would subvert the *Erie* doctrine. *Id.* (emphasis supplied).

Ferens held that regardless of whether the plaintiff or defendant was seeking transfer, the law of the transferor court follows the action to the transferee court. *Ferens*, 494 U.S. at 531. In *Ferens*, a Pennsylvania plaintiff filed suit in Mississippi to avoid Pennsylvania's shorter statute of limitations, and then sought transfer back to his home district pursuant to § 1404(a). *Id.* at 519. The Supreme Court noted that "[d]iversity jurisdiction and *venue* were proper" in Mississippi. *Id.* (emphasis supplied). It then held that the policies behind *Van Dusen* "require a transferee forum to apply the law of the transferor court, regardless of who initiates the transfer. A transfer under § 1404(a), in other words, does not change the law applicable to a diversity case." *Id.* at 523. *Ferens* noted that "[t]he *Van Dusen* policy against forum shopping simply requires us to interpret § 1404(a) in a way that does not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue." *Id.* at 527.

In these cases, the Supreme Court only arrived at a holding after it had ensured that the policy goals behind *Erie* were advanced. To apply the *Van Dusen* rule to a transferred direct-filed MDL case would be an extension of that rule to a procedural posture foreign to *Van Dusen* and its progeny, an extension that would not be warranted here because the policy considerations of *Erie* would be defeated under Plaintiff's proposed rule.

Read together, *Van Dusen* and *Ferens* stand for the propositions that: (1) § 1404(a) should not be used to achieve different results in federal and state courts, and (2) § 1404(a) should not be used to promote forum shopping. Applying Plaintiff's proposed approach defeats these policies. First, if Plaintiff's approach is used, the Agreed Transfer Order would result in the application of "more favorable law" for Plaintiff that would not otherwise apply had the case been filed originally in Tennessee state or federal court, as Plaintiff's Complaint presupposes.[4] As *Ferens* reasoned, applying the law of the transferee state after a typical § 1404(a) transfer "would undermine the *Erie* rule in a serious way" because "[i]t would mean that initiating a transfer under § 1404(a) *changes* the state law applicable to a diversity case." *Id.* at 526 (emphasis supplied). A significant and dispositive change in state law through a § 1404(a) transfer is precisely the result Plaintiff

[4] This is true only if Plaintiff is correct that under Ohio choice-of-law rules, § 90 and Ohio public policy would preclude the application of the TSOR.

urges upon this Court. If Plaintiff had not skipped the initial step of filing first in Tennessee, there would be no question that Tennessee's choice-of-law rules govern this action. To change the result based solely on the artifice of the Direct Filing Order would undermine *Erie* because it would interpret a § 1404(a) transfer in a manner that changes the applicable choice-of-law rules from those of Tennessee to those of Ohio.

Second, Plaintiff's proposed rule encourages forum shopping. Under Plaintiff's proposed rule, Tennessee plaintiffs could simply avoid Tennessee statutes of limitations and choice-of-law rules by filing in Ohio or any other MDL jurisdiction *where venue was not otherwise proper* pursuant to a direct-filing order. Plaintiff is attempting to use § 1404(a) to obtain "a more favorable law by selecting a forum through a transfer of venue," a result that should be precluded by the policy disfavoring forum shopping. *Id.* at 527. Her argument is that New Jersey's limitations period should apply to her lawsuit, law which is obviously more favorable for Plaintiff than the TSOR. If Plaintiff is correct that New Jersey law applies to this lawsuit, then it would presumably apply to *every* other case in the MDL involving the GE Defendants. Such a result would run roughshod over the place of injury for all MDL plaintiffs other than those actually injured in New Jersey, and run counter to the MDL Court's practice of applying "the law of the

state where the plaintiff allegedly was injured." (Declaration of Heidi Levine, RE 64-2, Page ID # 1205, ¶ 7).

Taking Plaintiff's argument at face value, she is claiming that the New Jersey limitations period applies because of the § 1404(a) transfer, a result that she never could have obtained unless she had skipped the initial step of filing first in federal court in Tennessee. Plaintiffs would be encouraged to use § 1404(a) transfers based on which forum would provide them with the most advantageous statute of limitations and choice-of-law rules. This result runs afoul of *Erie* in cases where, like here, Plaintiff could not have obtained that result but for the artifice of the Direct Filing Order. Accordingly, to apply the proposed rule Plaintiff urges on the Court subverts the reasoning behind *Van Dusen* and *Ferens*.

Third, Plaintiff's advocacy for an inflexible rule—that all literal transferee courts must apply the transferor court's law—is actually based on case law that actively argues against imposition of Plaintiff's proposed rule. Even *Van Dusen* recognized that there may be cases where its rule should not apply. *Van Dusen*, 376 U.S. at 639 ("In so ruling, however, we do not and need not consider whether in all cases s 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State.").

Consistent with this approach, the United States Supreme Court recently departed from a mechanical application of *Van Dusen* and *Ferens* in *Atlantic*

Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas, 134 S.Ct. 568, 582 (2013). In that case, a subcontractor filed suit in Texas federal court in contravention of a Virginia forum-selection clause, and the general contractor moved to transfer the action to Virginia under § 1406(a) and alternatively, § 1404(a) based on the forum-selection clause. *Id.* at 576. A literal application of the *Van Dusen* rule would apply Texas law to the transferred Virginia action, but the Court rejected that conclusion in terms that operate as a direct rebuttal to Plaintiff's arguments advanced on this issue:

> In *Van Dusen*, we were concerned that, through a § 1404(a) transfer, a defendant could "defeat the state-law advantages that might accrue from the exercise of [the plaintiff's] venue privilege." . . . But as discussed above, a plaintiff who files suit in violation of a forum-selection clause enjoys no such "privilege" with respect to its choice of forum, and therefore it is entitled to no concomitant "state-law advantages." Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship. Because "§ 1404(a) should not create or multiply opportunities for forum shopping," . . . we will not apply the *Van Dusen* rule when a transfer stems from enforcement of a forum-selection clause. . .

Id. at 582-83 (citations omitted) (quotation marks in original). Similarly, Plaintiff has no such "privilege" to avail herself of Ohio choice-of-law rules in a direct-filed MDL case merely because the parties agreed to allow a foreign court (without waiver of venue or jurisdiction) to manage cases until such time as they are transferred to their proper venue. Just as *Atlantic Marine* refused to mechanically apply *Van Dusen* where doing so did not advance the policies behind *Erie* and its

progeny, this Court should refuse Plaintiff's invitation to mechanize *Van Dusen* and remove it from its well-reasoned moorings.

The District Court correctly rejected the mechanical application of *Van Dusen* and by implication, *Ferens*, by stating that "[i]f this court applied *Van Dusen* mechanically, the court would be obligated to apply the choice-of-law rules of Ohio to this case, even though, as both parties acknowledge, this case has absolutely no legal or factual connection to Ohio, other than the procedural reality that CMO No. 3 permitted Wahl to file her case directly in the MDL Court in Ohio." (District Court Memorandum Opinion, RE 69, Page ID # 1363, p. 8). To interpret these Supreme Court cases as if they allowed no exception to the rules they announced is to read out every portion of those decisions except the holdings, ignore subsequent precedent, and then pretend that it is not a court's function to routinely examine the reasoning behind the rules that govern that body of law.

A second basis for distinguishing *Van Dusen* and its progeny is that the MDL Court never determined venue to be proper in this case, whereas venue was determined to be proper in both *Van Dusen* and *Ferens*. *Van Dusen*, 376 U.S. at 634 (stating that § 1404(a) could not be used by defendants to defeat plaintiff's forum choice where the forum "*was a proper venue*") (emphasis supplied); *Ferens*, 494 U.S. at 519 (expressly noting that venue was proper in the original transferor jurisdiction). Unlike *Ferens* and *Van Dusen*, no actor in this case—Plaintiff, the

GE Defendants, the MDL Court, or the District Court—ever even contemplated that venue was proper in the MDL Court. Just the opposite, all parties and courts viewed Tennessee as the proper venue. As *Van Dusen* and *Ferens* only apply to those cases in which venue has been determined to be otherwise proper, they have no direct application here where there has been no prior determination that venue was otherwise proper.

For example, the Agreed Transfer Order expressly declared that the transferee court was the proper venue, which in this case was the Middle District of Tennessee. (Agreed Transfer Order, RE 18, Page ID # 156-157, pp. 3-4). Thus, the Agreed Transfer Order, the very order Plaintiff relies on for her claim that venue in the MDL Court was agreed to for all purposes, flatly contradicts her position. Further, the MDL Court itself expressly stated that venue should not be considered proper there just by virtue of direct filing.[5] (CMO No. 3, RE 51-3, Page ID # 958, ¶ 3) (ordering that direct filing "shall not constitute a determination by this Court that jurisdiction or venue is proper in this District.").

[5] Plaintiff contends that she "likely" could have filed this case originally in the MDL Court *without* the stipulated authority of the Direct Filing Order, (Appellate Brief, Document: 006111975350, p. 19), although this contention has no relevance or factual support. Rather than speculating about where she might have filed, it is clear that she actually filed in the MDL Court while taking pains to establish her Tennessee residency and to describe the GE Defendants' allegedly tortious conduct in Tennessee. (Complaint, RE 1, Page ID # 3-4, ¶¶ 9-11, 13-14; Amended Complaint, RE 5, Page ID # 71-72, ¶¶ 17-19, 21).

Finally, Plaintiff's odd claim that "Defendants chose not to contest venue" in the MDL Court omits the fact that there was nothing to contest, as venue was expressly not ruled upon pursuant to Pretrial Order No. 1. In fact, the GE Defendants were under a Court Order *not to* contest venue in the pretrial proceedings. (Agreed Transfer Order, RE 18, Page ID # 155, p. 2) (referencing Pretrial Order No. 1's no-challenge-to-venue provision). If the GE Defendants challenged the propriety of venue in the MDL Court for pretrial proceedings, the very purpose of the Direct Filing Order would be destroyed. As evidenced by court orders and Plaintiff's own judicial admissions, venue was never actually determined to be proper in the MDL Court, and was instead always contemplated to exist in Tennessee.

B. The State Where a Plaintiff Was Prescribed and Received a Pharmaceutical Product Should Be Considered the "Originating" State for Purposes of Applying Choice-of-Law Rules After Transfer of a Direct-Filed Action.

In her argument regarding which state's choice-of-law rules apply to this case, Plaintiff completely omits on-point opinions rendered by various federal courts, and she refuses to recognize the District Court's express reliance on those cases. As the well-reasoned cases addressing this issue have held, the most reasonable rule to apply is that the law of the "originating" state should control which state's choice-of-law rules apply. In the pharmaceutical context, this is generally held to be "the state where the plaintiff purchased and was prescribed the

subject drug." *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09–md–02100–DRH–PMF, 2011 WL 1375011, at *6 (S.D. Ill. Apr. 12, 2011).

Most MDL cases originate in a separate forum, one that the plaintiff chooses absent a stipulated direct filing order, and in such a case the MDL as the "transferee" court easily applies choice-of-law rules from the "transferor" court as that court is considered the original forum. *Sanchez v. Boston Scientific Corp.*, No. 2:12–cv–05762, 2014 WL 202787, at *3-4 (S.D. W.Va. Jan. 17, 2014) (discussing typical MDL procedure and the challenge direct-filing cases presents). "The difficulty with [direct filing] cases is there technically is no prior proper forum whose choice-of-law rules should apply." *Id.* at *4. Courts have dealt with this difficulty by treating the MDL Court essentially as if it were a transferee court from an originating state. The rationale is based on the very reasons behind direct filing, which is that the parties get to skip the initial step of filing in their home (or other preferred) district, and avoid awaiting entry of a transfer through a "tag-along" order to the MDL. *See In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 904 (E.D. La. 2007) ("Direct filing into the MDL avoids the expense and delay associated with plaintiffs filing in local federal courts around the country after the creation of an MDL and waiting for the Panel to transfer these 'tag-a-long' actions to this district.").

In re Yasmin involved a choice-of-law question centered on the application of the work-product doctrine and the attorney-client privilege in a discovery dispute. 2011 WL 1375011, at *1-*5. With respect to direct-filed cases, the court noted that the "choice of law decision is not as clear" and concluded that the "better approach" was "to treat foreign direct filed cases as if they were transferred from a judicial district sitting in the state where the case originated," that is, "the state where the plaintiff purchased and was prescribed the subject drug." *Id.* at *5-*6. "Thus, for a foreign direct filed member action involving a plaintiff that purchased and was prescribed the subject drug in Tennessee, the Court will treat that plaintiff's claims as if they were transferred to this MDL from a district court in Tennessee." *Id.* at *6. *In re Yasmin* appears to have been the first direct-filed MDL case applying such a rule, and its reasoning and holding were expressly followed by several subsequent cases. *See Sanchez*, 2014 WL 202787, at *4 (applying California choice-of-law rules because it was state where plaintiff was "implanted with the product"); *In re Watson Fentanyl Patch Prods. Liab. Litig.*, MDL No. 2372, 2013 WL 4564927, at *2 (N.D. Ill. Aug. 27, 2013) (applying Ohio law to an Illinois MDL proceeding based, *inter alia*, on reasoning that the originating state was where the drug was prescribed and ingested); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07–MD–01871, 2012 WL 3205620, at *2 (E.D. Pa. Aug. 7, 2012) (holding that foreign direct-filed cases

"should be governed by the law of the states where Plaintiffs received treatment and prescriptions for Avandia") (footnote omitted).

On the other hand, some cases, clearly distinguishable and often with little or no analysis, have applied the choice-of-law rules of the MDL forum state to direct-filed cases. *See In re Trasylol Prods. Liab. Litig.*, No. 1:08–MD–01928, 2011 WL 1033650, at *3 (S.D. Fla. Jan. 18, 2011) (applying choice-of-law rules of state where MDL court sits to direct-filed MDL case, but engaging in no analysis); *Byers v. Lincoln Elec. Co.*, 607 F. Supp. 2d 840, 844 (N.D. Ohio 2009) (applying choice-of-law rules of state where MDL court sits to a direct-filed MDL case); *In re Express Scripts, Inc., PBM Litig.*, Master No. 4:05-MD-01672-SNL, Member No. 4:05-CV-00862 SNL, 2007 WL 4333380, at *1-*2 (E.D. Mo. Dec. 7, 2007) (Missouri federal MDL court applying Missouri choice-of-law rules); *In re Vioxx*, 478 F. Supp. 2d at 904 (concluding that direct-filed MDL case "suggests that the Court should apply the choice-of-law rules of the state in which [the MDL] sits").

However, these cases are distinguishable. In *Express Scripts*, the Eastern District of Missouri applied Missouri choice-of-law rules to a direct-filed MDL case based on *Erie*, but in that case, the complaint alleged that the injurious conduct occurred partially in Missouri and both defendants maintained their principal place of business in Missouri. *Express Scripts*, 2007 WL 4333380, at *2 n.2. Similarly, *Byers* featured two defendants headquartered in Ohio. *Byers*, 607

F. Supp. 2d at 843. In other words, venue was otherwise proper in *Express Scripts* and *Byers*, which presumably simplified the decision to apply the "forum" state's choice-of-law rules. Furthermore, neither of these cases grappled with the procedural uniqueness of a direct-filed MDL case.

Vioxx did address direct filing, but only applied local Louisiana choice-of-law rules to non-Louisiana plaintiffs after concluding that the end result would be avoidance of the more favorable Louisiana statute of limitations. *Vioxx*, 478 F. Supp. 2d at 904. Although the *Vioxx* court applied the forum's choice-of-law rules, the decision to do so came only after wondering whether *Van Dusen* even mandated such a result, and the reassurance that the plaintiffs would not get the advantage of the shorter limitations period. Furthermore, the *Vioxx* court was ultimately more aligned with *In re Yasmin* because it noted that "[o]n two occasions this Court has determined that the applicable substantive law in Vioxx cases is the law of the state where the plaintiffs resided when they were prescribed Vioxx, when they ingested Vioxx, and when they were allegedly injured by the drug." *Id.* at 905 (citations omitted). The *Vioxx* court's decision to apply the MDL state's choice-of-law rules to the direct-filed cases was heavily footnoted with caveats and qualifications:

> Direct filing will also create another oddity when cases are eventually transferred to the plaintiffs' home districts for trial, as the traditional "transferor"/"transferee" roles will be reversed. At that point in time, the MDL court will be considered the "transferor" court and the local

> trial courts will be considered "transferee" courts. In light of *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990), the local "transferee" courts may be faced with the odd duty of applying the law of the MDL forum, including the MDL forum's choice-of-law rules, especially if the MDL forum *could* exercise personal jurisdiction over the defendant.

Vioxx, 478 F. Supp. 2d at 904 n.2. Notably, none of the cases cited above involved a *transferee* court's analysis of which state's choice-of-law rules apply *after* a § 1404(a) transfer from a direct-filed MDL case. *Wahl* is the only district court decision of which the GE Defendants are aware that has squarely addressed this question, although undoubtedly transferee courts will continue to be faced with these issues. Faced with the *Vioxx* court's prophesied "odd duty," the District Court correctly decided that the choice-of-law rules applicable to a case after a direct-filed transfer were those of the state where Plaintiff was prescribed and received the pharmaceutical product.

Rather than honor the choice-of-law rules of the artificial forum—in this case, the Ohio MDL Court—the District Court saw through such artifice and valued substance over form. Using similar reasoning as the District Court, previous courts have looked past the artificial semantics of "transferor/transferee":

> But unlike the usual case filed in this district, the present case has no connection with Illinois other than the fortuity that the JPML authorized an MDL proceeding to take place here, supervised by the undersigned judge. Illinois is essentially an *artificial forum* created for purposes of convenience and efficiency. That is doubly true for the present case, which was filed here only by virtue of a court-approved direct-filing

> procedure whose sole purpose was to maximize convenience and save the parties' and judicial resources.

In re Watson, 2013 WL 4564927, at *2 (emphasis supplied). The reason why parties engage in this process is easy to understand: direct filing is desirable because it serves to "streamline the litigation and help to eliminate the judicial inefficiency involved in the MDL transfer process." *In re Yasmin*, 2011 WL 1375011, at *5. Direct filing should have no consequence on choice-of-law, for either party. Rather than advance these direct filing goals, Plaintiff's proposed rule encourages forum shopping because the calculation in deciding whether to direct file would be based primarily on whether the MDL forum's choice-of-law rules would result in a more advantageous result. That "more advantageous result" would not be possible *but for* a direct-filing order which allows cases to be filed regardless of whether venue is proper.

II. UNDER EITHER TENNESSEE OR OHIO CHOICE-OF-LAW RULES, TENNESSEE SUBSTANTIVE LAW CONTROLS THE OUTCOME OF THIS CASE.

The District Court correctly found that Tennessee has the most significant relationship to this case involving a Tennessee Plaintiff who was administered the drug in Tennessee, alleged injury in Tennessee, and received continual medical treatment in Tennessee. This conclusion is correct under both Ohio and Tennessee choice-of-law rules because those states use identical *Restatement* provisions to guide their choice-of-law analyses.

A. In the Choice-of-Law Analysis Under Both Tennessee and Ohio law, There is a Strong Presumption that the Jurisdiction's Laws Where the Injury Occurred Apply.

As the place where Plaintiff's alleged injury occurred, there is a strong presumption that Tennessee substantive law applies under both Ohio and Tennessee choice-of-law rules. All parties agree that both Ohio and Tennessee have adopted the *Restatement's* most significant relationship test. (*See* Appellate Brief, Document: 006111975350, pp. 28-29).[6] The most significant relationship test begins with the presumption in § 146 "that the law of the place of the injury controls." *Morgan v. Biro Mfg. Co., Inc.*, 474 N.E.2d 286, 289 (Ohio 1984); *Aguirre Cruz v. Ford Motor Co.*, 435 F. Supp. 2d 701, 703 (W.D. Tenn. 2006) (quoting *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992)). The law of the place of injury is the "default rule" in the choice-of-law analysis, *Montgomery v. Wyeth*, 580 F.3d 455, at 459 (6th Cir. 2009), and will only be set aside if another "'state legitimately has a stronger interest in the controversy.'" *Aguirre*, 435 F. Supp. 2d at 703 (quoting *Hataway*, 830 S.W.2d at 59); *Bearden v. Honeywell Int'l*

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[6] *See Byers*, 607 F. Supp. 2d at 844 (Ohio *Restatement*); *Montgomery v. Wyeth*, 580 F.3d 455, at 459 (6th Cir. 2009) (Tennessee *Restatement*) (citing *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992) (expressly adopting §§ 6, 145, 146)). If Tennessee choice-of-law rules apply, then there is no Ohio public policy argument, thereby obviating the arguments advanced in § II of the Appellate Brief. In this section, citations will be provided to applicable Tennessee and Ohio law in order to demonstrate that the result cannot vary based on which state's choice-of-law rules are chosen to apply.

Inc., No. 3:09-01035, 2010 WL 1223936, at *8 (M.D. Tenn. Mar. 24, 2010) ("The fact that Honeywell is based in New Jersey is not enough to overcome the 'default rule' that 'the law of the place where the injury occurred applies when each state has an almost equal relationship to the litigation.'") (quoting *Hataway*, 830 S.W.2d at 59)[7]; *see also Muncie Power Prods., Inc. v. United Technologies Auto., Inc.*, 328 F.3d 870, 874 (6th Cir. 2003) ("Therefore, in Ohio, a party may overcome the presumption that the law of the place where the injury occurs will be applied to a tort action, if it can demonstrate that another state has a more significant relationship to the action."); *Jernigan v. Columbia Elec. Mfg. Co.*, No. 63441, 1992 WL 388872, at *1 (Ohio Ct. App. Dec. 17, 1992) ("The law of the place where the injury occurred still plays a significant role in determining which law is applicable.").

This presumption may only be defeated if some other state has "a more significant relationship to the lawsuit" based on the § 145 factors: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place

[7] *See also McKinnie v. Lundell Mfg. Co.*, 825 F. Supp. 834, 836 (W.D. Tenn. 1993) (applying Tennessee law to products liability claim filed by Tennessee plaintiff for injuries sustained in Tennessee where "action's sole relationship with any state other than Tennessee is Defendant's status as an Iowa corporation"); *Harwell v. Am. Med. Sys., Inc.*, 803 F. Supp. 1287, 1294-95 (M.D. Tenn. 1992) (applying Tennessee law to Tennessee plaintiff's product liability claims against a Minnesota manufacturer where "injur[y] occurr[ed] in Tennessee").

of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Byers*, 607 F. Supp. 2d at 844 (footnote omitted); *Aguirre*, 435 F. Supp. 2d at 703-04 (citation omitted). These contacts should not merely be counted, but "evaluated according to their relative importance with respect to the particular issue." *Byers*, 607 F. Supp. 2d at 844. Plaintiff does not contest that the place of the injury is Tennessee. Rather, she conveniently disregards it as if it had been impliedly rebutted and focuses her analysis on the § 145 factors, which also fail to support her position.

B. The Place of Injury is Tennessee, and this Contact Carries the Greatest Weight in the "Most Significant Relationship" Test.

Apart from its presumptive status as the governing law, the place of injury is also the first factor in the "[c]ontacts to be considered in determining which state has the most significant relationship." *Montgomery*, 580 F.3d at 459. The place of injury could hardly be more important than in products liability lawsuits, such as this one, where a Tennessee resident is injured by a product that was sold in Tennessee, received in Tennessee, and allegedly caused injury in Tennessee.[8]

[8] *See In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, No. 2:11-md-2266-DCR, 2013 WL 663575, at *2 (E.D. Ky. Feb. 22, 2013) (applying Mississippi law to Mississippi plaintiff's pharmaceutical liability claims where she purchased and ingested product in Mississippi); *In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-MD-1760, 2008 WL 2944910, at *2-*3 (M.D. Tenn. July 25, 2008) (applying Texas law to Texas plaintiff's failure-to-warn claims where majority of plaintiff's prescriptions and infusions occurred in Texas).

Although Plaintiff devotes two sentences of her brief to conceding that Tennessee is the place of injury, this factor is much more important than such a cursory treatment would indicate. *See Byers*, 607 F. Supp. 2d at 846 (describing the "law of the state where the injury occurred" as "the most important").

C. The Place Where the Conduct Causing the Injury Occurred is Tennessee, as well as New Jersey and Abroad.

Next, the place where the conduct causing the injury occurred was Tennessee, New Jersey, and the GE Defendants' operations overseas. (Amended Complaint, RE 5, Page ID # 71, ¶¶ 17-19, 27; Plaintiff's Response to Defendants' Material Facts, RE 40, Page ID # 343, ¶¶ 12-15).[9] Plaintiff claims that all relevant conduct causing the alleged injury occurred only in New Jersey, but courts applying this factor in product liability cases consistently rule that the relevant

[9] As scant support for her argument that New Jersey is the only place where the conduct causing the injury occurred, Plaintiff relies on a motion by the GE Defendants requesting application of New Jersey law *solely as to the issue of punitive damages* that was filed in another Omniscan lawsuit, *Kerrigan*. (Defendants' Motion to Apply New Jersey Law to Plaintiffs' Punitive Damages, RE 55-1, Page ID # 1070-1095). In citing to this motion, Plaintiff ignores the well-established doctrine of dépeçage, which is predicated on § 145's requirement that courts must determine which state has the most significant relationship "*with respect to that issue*." *Restatement*, § 145(1) (emphasis added). "[C]ourts have long recognized that they are not bound to decide all issues under the local law of a single state." *Id.* at cmt. d; *see also Byers*, 607 F. Supp. 2d at 846 n.16. In *Kerrigan*, the GE Defendants did not argue that their New Jersey residence compelled the application of New Jersey law to the entire case, but rather to the distinct issue of punitive damages, a well-accepted practice. *See, e.g., Aguirre*, 435 F. Supp. 2d at 704-07.

conduct causing injury often occurs in multiple states. For instance, in *Bearden v. Wyeth*, 482 F. Supp. 2d 614 (E.D. Pa. 2006), the court found that the conduct causing the injury occurred where (i) the manufacturer issued "representations, warranties, or warnings"; (ii) the plaintiff and her physician received the manufacturer's "representations, warranties, or warnings"; *and* (iii) the plaintiff "was prescribed, bought, ingested, and was allegedly injured by the drug." *Id.* at 620. Other district courts have applied similar reasoning.[10] Applying this reasoning to the present case, the conduct causing Plaintiff's alleged injury occurred in (1) Tennessee, where Plaintiff's physicians reviewed Omniscan's label, and where Plaintiff was prescribed, administered, and allegedly injured by Omniscan, (2) Ireland or Norway where Omniscan was manufactured, and (3) New Jersey, where the GE Defendants are headquartered and where labeling decisions were made.

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[10] *See Kammerer v. Wyeth*, No. 8:04CV196, 2011 WL 5237754, at *5 (D. Neb. Nov. 1, 2011) (ruling that conduct causing the injury occurred in state of manufacturer's headquarters, *and also* in plaintiff's home state where manufacturer aimed marketing efforts at her and her physician); *Mardegan v. Mylan, Inc.*, No. 10-14285-CIV, 2011 WL 3583743, at *2-*3 (S.D. Fla. Aug. 12, 2011) (ruling that conduct causing injury occurred where product was designed and manufactured, *as well as* where product was bought and prescribed); *Jones v. Brush Wellman, Inc.*, No. 1:00 CV 0777, 2000 WL 33727733, *4 (N.D. Ohio Sept. 13, 2000) ("However, the majority of courts hold that a failure to warn occurs at the place where the plaintiffs could reasonably have been warned regardless of where the decision not to warn took place.") (citations omitted).

Even assuming that this Court rejects those cases finding conduct in differing states, and localizes the conduct in New Jersey, the *Restatement* nonetheless advises that the law of Tennessee, as the place of injury, should govern:

> *When conduct and injury occur in different states.* On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort. . . .

Restatement, § 146, cmt. e.

D. Plaintiff is Domiciled in Tennessee, Which Favors Application of Tennessee Law.

Plaintiff's domicile is more important that Plaintiff would have this Court believe. The fact that Plaintiff lives in Tennessee, and has for a decade, substantiates the conclusion that Plaintiff's alleged injuries did not arise in Tennessee "fortuitously." *See Hataway*, 830 S.W.2d at 60 (describing occurrence of injury in Arkansas as merely "fortuitous"); (Plaintiff's Response to Statement of Material Facts, RE 40, Page ID # 342-43, ¶ 11) (establishing decade long residency in Tennessee). Instead, Tennessee is the place of injury *because* Plaintiff was domiciled in Tennessee.

E. The Parties' Relationship was Centered in Tennessee.

Although Plaintiff focuses upon where the alleged "tortious conduct" occurred, the parties' *actual* relationship was centered exclusively in Tennessee

where Plaintiff alleges she was prescribed Omniscan, administered it, and suffered injury. Contrast agents are not direct-to-consumer products; rather they are always administered through intermediaries. In this case all of the intermediaries were in Tennessee as Plaintiff's treating physicians. Under the learned intermediary doctrine, a manufacturer "may reasonably rely on intermediaries to transmit their warnings and instructions." *Harden v. Danek Med., Inc.*, 985 S.W.2d 449, 451 (Tenn. Ct. App. 1998) (citation omitted).[11] Thus, because Plaintiff purchased, was prescribed, administered, and allegedly injured by Omniscan in Tennessee, the parties' relationship is centered in Tennessee. *Madregan*, 2011 WL 3583743, at *3; *see also Kammerer*, 2011 WL 5237754, at *5 ("[T]he relationship between plaintiffs and Wyeth arose from the plaintiff's purchase and use of defendant's product in Nebraska"); *Yocham v. Novartis Pharm. Corp.*, 736 F. Supp. 2d 875, 882 (D.N.J. 2010) (ruling that parties' relationship was centered in state where information related to drug was revealed to plaintiff and her physician); *In re Prempro Prods. Liab.*, MDL Nos. 4:03CV1507–WRW, 4:04CV0120, 2008 WL 1699211, at *3 (E.D. Ark. Apr. 9, 2008) ("[T]he place where the relationship of the parties was centered in a product liability action of this type is where Plaintiff used the product."); *Henderson v. Merck & Co.*, No. 04-CV-05987-LDD, 2005 WL

[11] New Jersey also allows the learned intermediary defense. *Niemiera by Niemiera v. Schneider*, 555 A.2d 1112, 1117 (N.J. 1989) (citation omitted).

2600220, at *7 (E.D. Pa. Oct. 11, 2005) ("[Plaintiff] purchased the drugs in Michigan, thereby making Michigan the center of the parties' relationship.").

In a three sentence argument regarding where the parties' relationship was centered, Plaintiff cites to *In re Bendectin*, 857 F.2d 290, 305 (6th Cir. 1988), notes that *Montgomery* was silent on this factor, and concludes that the "relationship between the parties is centered in New Jersey." (Appellate Brief, Document: 006111975350, p. 31). *Bendectin* does not control this issue for several reasons, chiefly because the plaintiffs in *Bendectin* failed to object to the application of Ohio substantive law prior to the jury retiring. *Bendectin*, 857 F.2d at 303 ("[T]he plaintiffs themselves urged the district judge to apply the law of Ohio to th[e] case, and never argued that any other law should apply.") Where, as in this case, the "parties hotly contest which state's law is applicable", citations to *Bendectin* are "unpersuasive." *Byers*, 607 F. Supp. 2d at 848.

Further, the factual predicate of *Bendectin's* holding is distinguishable, because in that case the court heavily relied on the state where the drug was manufactured for its conclusion that the relationship between the parties was centered in Ohio: "[t]he State of Ohio is responsible for regulating local aspects of the marketing, manufacture, distribution, and labeling of the drug, and thus the relationship between the parties is essentially centered in Ohio, where the tortious conduct and the safety of the product are regulated." *Bendectin*, 857 F.2d at 305.

Plaintiff urges application of *Bendectin* and thus a finding that New Jersey is where the parties' relationship is centered, but omits the fact that Omniscan is not manufactured in New Jersey, but rather in either Ireland or Norway. (Declaration of Danny Healy, RE 35-3, Page ID # 266, ¶ 4). Further, *Bendectin* has been repeatedly distinguished in the 26 years since its publication. *See Montgomery*, 580 F.3d at 461-62 (distinguishing *Bendectin* by noting that it "applied Ohio law under Ohio choice-of-law rules because the drug was manufactured in Ohio, where the manufacturer also maintained its principal place of business"); *Byers*, 607 F. Supp. 2d at 849 (observing that "it is notable that no other court in this Circuit has ever followed the *Bendectin* choice-of-law analysis in a products liability action"); *In re Trasylol Prod. Liab. Litig.*, No. 08–MD–01928, 2010 WL 5151579, at *4 n.9 (S.D. Fla. Nov. 16, 2010) (distinguishing *Bendectin* because it "involved circumstances where plaintiffs did not necessarily reside in the state in which the drug may have been prescribed, dispensed, or ingested") (citation omitted).

F. Tennessee has a Greater Interest than New Jersey in the Application of its Laws to a Lawsuit Concerning a Product Sold in Tennessee to a Tennessee Citizen.

Upon review of the applicable § 6 principles which help guide the *Restatement* factors discussed above, Tennessee's overwhelming interest in applying the TSOR to one of its own citizens claiming injury in Tennessee is

demonstrated again and again.[12] Tennessee, as the forum state, has clearly articulated policies which weigh in favor of applying Tennessee substantive law.

In passing the TPLA, it was the General Assembly's intent "'to protect the public interest by enacting measures,'" to make product liability insurance more affordable, and "'to provide a reasonable time within which action may be commenced against manufacturers and/or sellers.'" *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 187 (Tenn. 2000) (quoting 1978 Tenn. Pub. Acts ch. 703 preamble). The TSOR was considered "one of the most important keys in solving the perceived products liability crisis." *Penley*, 31 S.W.3d at 187. Accordingly, Tennessee forum policy is substantially advanced by the enforcement of its own TSOR in relation to one of its own citizens who was prescribed a drug by

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[12] The § 6 principles are as follows:

> a) the needs of the interstate and international systems,
> b) the relevant policies of the forum,
> c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> d) the protection of justified expectations,
> e) the basic policies underlying the particular field of law,
> f) certainty, predictability, and uniformity of result, and
> g) ease in the determination and application of the law to be applied.

Hataway, 830 S.W.2d at 59, n.3 (quoting *Restatement* § 6 (2)).

Tennessee doctors, administered that drug in a Tennessee medical facility, and allegedly injured in Tennessee.

Furthermore, the TSOR has withstood numerous challenges to its constitutionality, and therefore remains a vital public policy in Tennessee. *See Kochins v. Linden–Alimak, Inc.*, 799 F.2d 1128, 1141 (6th Cir. 1986) (rejecting "open courts" clause challenge to TSOR); *Greene v. Brown & Williamson Tobacco Corp.*, 72 F. Supp. 2d 882, 888 (W.D. Tenn. 1999) (holding "that the Tennessee Supreme Court would . . . [find] that § 29-28-103 does not impair vested rights under Tennessee law"); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882, 883 (Tenn. 1986) (rejecting constitutional challenge to TSOR under "open courts" clause). In addition to being upheld on constitutional challenges, the TSOR's policies are regularly cited as support for its application, and this Court should reject Plaintiff's invitation to rewrite Tennessee law. *Montgomery*, 580 F.3d at 463; *Montgomery v. Wyeth*, 540 F. Supp. 2d 933, 945 (E.D. Tenn. 2008) ("The policy of Tennessee as exemplified through its statute of repose is that residents who suffer from diseases with long incubation or latency periods are not entitled to recover for harms done to them.").

New Jersey has very little interest in this action, notwithstanding Plaintiff's exclusive reliance on *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996). *Gantes* refused to apply a Georgia statute of repose in a case involving a product

manufactured in New Jersey, but as recognized by the New Jersey Supreme Court, *Gantes* is distinguishable because it involved an Ohio corporation whose product was not regulated by the FDA. *Rowe v. Hoffman-La Roche, Inc.*, 917 A.2d 767, 776 (N.J. 2007). In *Rowe*, a case involving an FDA-approved pharmaceutical, New Jersey's interests were not "paramount" where there was already regulatory oversight. *Id.* As if it were ruling on the case at bar, *Rowe* concluded:

> To allow a life-long Michigan resident who received an FDA-approved drug in Michigan and alleges injuries sustained in Michigan to by-pass his own state's law and obtain compensation for his injuries in this State's courts completely undercuts Michigan's interests, while overvaluing [New Jersey's] true interest in this litigation.

Id. Here, it would be unwarranted to elevate New Jersey's hypothetical interests above Tennessee's interests in litigating a dispute involving a Tennessee citizen, featuring a drug prescribed and administered in Tennessee, when New Jersey itself has rejected this approach.

As the District Court correctly found, applying New Jersey law here would not promote § 6's principle of "certainty, predictability, and uniformity of result" because future cases would "be subject to the fortuitous circumstance that the drugs that injured them were labeled or manufactured in a particular foreign jurisdiction." (District Court Memorandum Opinion, RE 69, Page ID # 1374-1375, pp. 19-20). Future failure-to-warn cases would hinge on the variable outcomes associated with a state's law with no discernible connection to the litigation other

than it happened to be the state where manufacturing and/or labelling occurred, regardless of where the injury actually occurred.[13] Furthermore, direct-filing plaintiffs would be treated differently than plaintiffs who transferred into the MDL. *See In re Avandia*, 2012 WL 3205620, at * 2 (noting that applying "law of the states where Plaintiffs received treatment and prescription for Avandia . . . will promote uniform treatment between those Plaintiffs whose cases were transferred into the MDL from their home states and those Plaintiffs who filed directly into the MDL") (footnote omitted).

Although Plaintiff dismisses the justified expectation principle of § 6 of the *Restatement*, the fact that Plaintiff consistently pled application of Tennessee law, and that the GE Defendants raised the TSOR as an affirmative defense in its first responsive pleading in the MDL, shows that the parties had justified expectations that Tennessee substantive law would apply to this case. *Montgomery v. Wyeth* found that the parties' reliance on Tennessee law "in pleadings" was relevant to this inquiry because "the Court cannot protect 'justified expectations' if it switches the law after the parties have extensively relied on Tennessee law." 540 F. Supp. 2d at 945; *see also* (Answer to Amended Complaint, RE 11, Page ID # 120, ¶ 3) (raising affirmative defense under T.C.A. § 29-28-103). Based on all these

[13] Plaintiff overlooks the fact that the "state" of manufacture here is one of two foreign countries, Norway or Ireland.

applicable § 6 principles, New Jersey's marginal interests in this action are far outweighed by Tennessee's interests in its own citizen's claim of injury in Tennessee and administration of a pharmaceutical product in Tennessee.

G. Even if the District Court Erred in Applying Tennessee's Choice-of-Law Rules, Such Error Does Not Warrant Reversal.

As the preceding sections demonstrate, regardless of whether one applies Tennessee or Ohio choice-of-law rules, the *Restatement's* most significant relationship test demands application of Tennessee substantive law. Because either state's choice-of-law rules lead to the same result, the dispute Plaintiff raises is merely academic, and the decision of the District Court should be affirmed. Where district courts err or struggle in their analysis of which state's choice-of-law rules apply, appellate courts have held that these errors do not warrant reversal if each jurisdiction's choice-of-law rules would lead to the same result. For example, in *Judson Atkinson Candles, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 378 (7th Cir. 2008), plaintiff filed suit in Texas federal court. After the case was transferred to Illinois federal court, the Illinois court mistakenly applied Illinois choice-of-law rules. *Id.* On appeal, the Seventh Circuit noted the district court's error but refused to criticize the district court any further because under either Texas or Illinois choice-of-law rules, Illinois law would apply. *Id.* Several other federal courts have ruled similarly. *See In re Morris*, 30 F.3d 1578, 1581 (7th Cir. 1994); *Royal Bus. Group, Inc. v. Realist, Inc.*, 933 F.2d 1056, 1064 (1st Cir. 1991);

Woods–Tucker Leasing Corp. v. Hutcheson–Ingram Dev. Co., 642 F.2d 744, 749 (5th Cir. 1981).

The District Court did not err in its choice to apply Tennessee choice-of-law rules. However, even if it did, such error does not warrant reversal because Ohio subscribes to the same most significant relationship test as Tennessee, which dictates application of Tennessee substantive law. Accordingly, the District Court's order should be affirmed.

III. APPLYING TENNESSEE LAW TO THIS CASE IS NOT BARRED BY § 90 OF THE *RESTATEMENT* OR ANY ARTICULABLE OHIO PUBLIC POLICY.

Even assuming *arguendo* that the District Court erred in applying Tennessee choice-of-law rules to this case, Tennessee law would still apply pursuant to Ohio's most significant relationship test, notwithstanding § 90 or any public policy argument. The crux of Plaintiff's argument is that assuming Ohio choice-of-law rules apply, those principles would bar the application of the TSOR because it violates public policy and the Ohio Constitution. However, the Ohio Constitution and any public policy relating to it, has never been, and never will be, an issue in this case.

A. The Plain Language of § 90 of the Restatement Precludes its Application to this Case.

Section 90 of the *Restatement* has been expressly discussed a single time in the history of Ohio jurisprudence, and in that case, the court declined to invoke §

90 to bar application of Louisiana law. *Am. Interstate Ins. Co. v. G & H Serv. Ctr., Inc.*, 861 N.E.2d 524, 526-28 (Ohio 2007). There is no need for this Court to blaze a new path in this case. Indeed, on its face, § 90 simply cannot apply here: "[n]o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." *Id.* at 528.

Thus, by its express terms, § 90 does not apply to the *affirmative defense* at issue because the TSOR does not have anything to do with the "enforcement" of Plaintiff's cause of action. Plaintiff has read into § 90 language that is not there. Furthermore, the first comment to § 90 further precludes its application to the affirmative defense at issue:

> *a. Scope of section.* The rule of this Section has a narrow scope of application. . . .
>
> ***The rule of this Section does not justify striking down a defense good under the otherwise applicable law on the ground that this defense is contrary to the strong public policy of the forum.***

Restatement, § 90 cmt. a (emphasis supplied); *see also Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) (holding due process violation where Texas state court barred a defense based on state law where there was no reasonable relationship between Texas and parties) (cited in cmt. a).

Every case relied upon by Plaintiff save one featured efforts to *enforce* a cause of action. *Am. Interstate*, 861 N.E.2d at 528 (analysis of whether attempt to enforce subrogation rights under Louisiana law violated Ohio public policy

pursuant to § 90); *Griffin v. McCoach*, 313 U.S. 498, 506-07 (1941) (decided thirty years before § 90 was created, analyzing attempted *enforcement* of an insurance contract under Texas law, and declining to rule on Texas public policy); *but see Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277, 285 (N.Y. 1993) (refusing to enforce a claim for contribution based on claim being barred under Missouri law, and holding no violation of New York public policy in so doing).

The other cited cases were decided well before § 90 was ever drafted, are cited out of context for propositions not advanced in those decisions, and at any rate, are distinguishable. *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (N.Y. 1918) (holding that *enforcement* of a foreign cause of action for wrongful death did not violate New York public policy); *Pittsburgh, C., C.& St. L. Ry. Co. v. Kinney*, 115 N.E. 505, 511 (Ohio 1916) (Ohio court invalidating Ohio contract; no choice-of-law issue involved). Ironically, Plaintiff quotes Justice Cardozo's *Loucks* opinion as if he—and the *Loucks*' opinion—would bar application of the TSOR. However, *Loucks*, despite its lofty language, clearly *applied* the law of a foreign jurisdiction in the face of robust challenges to its application under the forum state's public policy.

Plaintiff nowhere addresses the actual preclusive effect § 90 and its comment has on its application to this lawsuit, but even if the language were ignored, Plaintiff still has a heavy burden to bear in applying § 90 because "[t]he

public-policy exception found in § 90 of the *Restatement* is narrow and should be applied only in rare circumstances." *Am. Interstate*, 861 N.E.2d at 524. "In applying a similar public-policy exception to determine whether application of foreign law, as opposed to entertainment of a foreign cause of action, would run counter to citizens' interests, courts have required that a state's interest in, and relation to, an issue be significant enough that application of foreign law would threaten that policy." *Id.* at 524-25. Ohio has absolutely no "interest in" or "relation to" this lawsuit, and it is impossible to see how applying the TSOR on these facts would "threaten" any policy Ohio might have.

Cases applying Ohio's choice-of-law rules under other sections of the *Restatement*—for example, contract law—have noted the limited applicability of the public-policy exception. *Jarvis v. Ashland Oil, Inc.*, 478 N.E.2d 786, 789 (Ohio 1985). In fact, the Supreme Court of Ohio has stated that the public-policy exception will "*only* be applied when it can be shown that this state has a materially greater interest than the chosen state in the determination of the particular issue." *Id.* (emphasis added).

B. Ohio Has No Significant Interest in the Outcome of This Litigation, and Therefore There is no "Threat" to its Public Policy.

Plaintiff expends much energy arguing ostensible application of § 16, Article I of the Ohio Constitution which states that "All courts shall be open, and

every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *Groch v. Gen. Motors Corp.*, 883 N.E.2d 377, 397 (Ohio 2008). However, the policies embodied by the "right to remedy" clause of the Ohio Constitution are in no way violated by application of the TSOR for several reasons. First, Ohio has rejected Plaintiff's argument by applying the TSOR in an Ohio case, thereby precluding a claim that Ohio public policy somehow bars application of the TSOR. *Jernigan*, 1992 WL 388872, at *2 (Ohio court applying ten year provision of product liability TSOR to Tennessee citizen). If Ohio wanted to refuse application of the TSOR on public policy grounds, *Jernigan* was an opportunity to do so.

Second, the Northern District of Ohio has addressed the specific question of whether application of a foreign products liability statute of repose would be repugnant to Ohio's public policy, and refused to apply Ohio law where there was no significant Ohio interest at stake. *Bills v. Newbury Industries Corp.*, C88-2015, 1990 WL 301522, at *2 (N.D. Ohio Aug. 9, 1990) *aff'd*, 935 F.2d 269 (6th Cir. 1991). Plaintiffs in *Bills* argued that the Indiana statute of repose "should not be applied because it is contrary to Ohio's public policy." *Id.* at *2. In response, the *Bills* court determined that "even if the statute of repose is repugnant to the public policy of Ohio, it controls because plaintiffs have not demonstrated that Ohio has a

significantly greater interest in having its law applied." *Id.* (footnoted omitted). Here, Ohio not only has no "significantly greater interest" than Tennessee; it has no interest whatsoever.

Third, once a state's substantive law has been selected, "[t]here is no need to inquire further into the specific operation [of the law]," especially where "no Ohio party or citizen has a substantive interest in the outcome." *Am. Interstate*, 861 N.E.2d at 526. Tennessee has determined that the TSOR is a valid, constitutional exercise of the Tennessee General Assembly's legislative authority. Plaintiff's right to sue was extinguished under Tennessee law prior to her filing suit against the GE Defendants in May 2011. Ohio has no interest in "inquir[ing] further into the specific operation" of the Tennessee law where Plaintiff never attempted to avail herself of a Ohio state law remedy and whose relationship with Ohio was based *solely* on the Direct Filing Order's fortuity. *Id.* Accordingly, Plaintiff had no "existing, vested right" to which Ohio's "right-to-remedy" clause would apply.

Finally, Plaintiff argues that Ohio public policy is violated because Plaintiff's cause of action supposedly did not vest until after the TSOR expired pursuant to Tennessee state law. This argument is as confusing as it is without merit. Ohio and Tennessee substantially agree on when a tort claim vests and therefore accrues, so this argument is a red herring. *See Ruther v. Kaiser*, 983 N.E.2d 291, 297 (Ohio 2012) ("If there is no discovery of any injury, the claim has

not accrued. Nor has it vested.")[14]; *Bowman v. A-Best Co., Inc.*, 960 S.W.2d 594, 596 (Tenn. Ct. App. 1997) (reaffirming existing law that a tort cause of action "does not accrue until a judicial remedy is available" and defining a judicial remedy as being triggered when the plaintiff "discovers or 'reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced . . . injury; and (2) the identity of the defendant who breached the duty'") (citing *Potts v. Celotex Corp.*, 796 S.W.2d 678, 681 (Tenn.1990)).

Plaintiff's various public policy arguments overlook her status as a Tennessee plaintiff, allegedly injured and treated in Tennessee, with no discernible connection to Ohio. Ohio has no interest, significant or otherwise, in this matter. Any public policy that might be derived from cases featuring Ohio litigants is of no import to the adjudication of this Tennessee case. Accordingly, the District Court correctly held that Tennessee substantive law applies to this case, and refused Plaintiff's invitation to avoid Tennessee law based on hypothetical policies of an unrelated state.

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[14] Plaintiff cites *Ruther* as if it demonstrates that the TSOR somehow violates Ohio public policy, but *Ruther* not only upheld the constitutionality of the statute of repose being challenged in that case, it also reaffirmed long standing Ohio law which precludes Plaintiff's claims from ever vesting (or accruing) prior to the running of the TSOR. *Ruther*, 983 N.E.2d at 300.

CONCLUSION

For the reasons set forth above, the GE Defendants request that this Court affirm the United States District Court for the Middle District of Tennessee's entry of summary judgment in favor of the GE Defendants.

Respectfully submitted this 31st day of March, 2014.

/s/ Dwight E. Tarwater
Dwight E. Tarwater
Taylor A. Williams
PAINE, TARWATER, AND BICKERS, LLP
900 South Gay Street, Suite 2200
Knoxville, TN 37902-1821
865.525.0880 (phone)
865.521.7441 (fax)
det@painetar.com
taw@painetar.com

Attorney for Defendants-Appellees
General Electric Company;
GE Healthcare Inc.; and GE Healthcare AS

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

AT NASHVILLE

JACOBS ENGINEERING GROUP, INC.,	No. M2021-01239-SC-R23-CV
Petitioner,	On a Certified Question of Law from the United States District Court for the Eastern District of Tennessee
v.	
GREG ADKISSON, ET AL.,	District Court Docket No. 3:13-CV-00505; No. 3:13-CV-00666; No. 3:14-CV-00020; No. 3:15-CV-00017; No. 3:15-CV-00420; No. 3:15-CV-00460; No. 3:15-CV-00462; No. 3:16-CV-00636 (consolidated)
Respondents.	Hon. Thomas A. Varlan, United States District Judge

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BRIEF OF PETITIONER JACOBS ENGINEERING GROUP INC.

Theane Evangelis
(*Pro Hac Vice Motion Pending*)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Dwight E. Tarwater
Catherine W. Anglin
PAINE TARWATER BICKERS, LLP
900 S. Gay St., Suite 2200
Knoxville, Tennessee 37902-1821
Telephone: (865) 525-0880
Facsimile: (865) 229-7441

James F. Sanders
J. Isaac Sanders
William J. Harbison II
NEAL & HARWELL, PC
1201 Demonbreun St., Suite 1000
Nashville, Tennessee 37203-5078
Telephone: (615) 244-1713
Facsimile: (615) 726-0573

Attorneys for Petitioner

November 8, 2021

Oral Argument Requested

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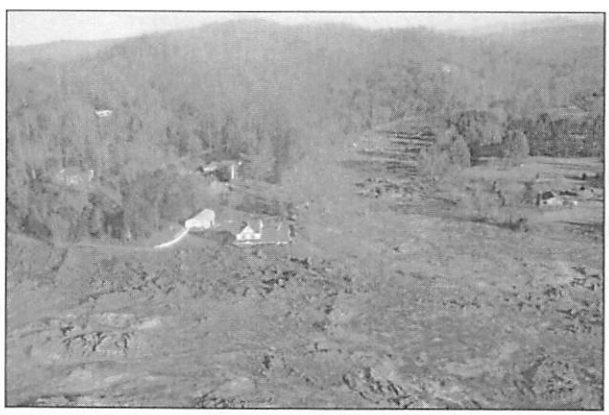
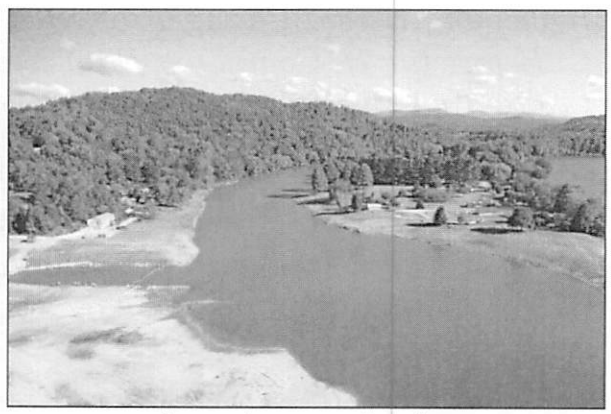
INTRODUCTION

In 2008, a containment dike at the Tennessee Valley Authority's Kingston Fossil Fuel Plant burst, spilling over five million cubic yards of coal fly ash onto surrounding land and into the Emory River. Facing a massive cleanup project, the Tennessee Valley Authority ("TVA") hired Jacobs Engineering Group Inc. to assist with managing the remediation effort as TVA's on-site agent.

Together, TVA and Jacobs, in close coordination with the U.S. Environmental Protection Agency, the Tennessee Department of Environment and Conservation, and other government agencies, worked around-the-clock for six years to restore the environment:



East embayment before cleanup



East embayment after cleanup

From 2013 to 2016, 72 Plaintiffs in the consolidated *Adkisson* cases filed suit in federal district court, alleging that they were injured by exposure to coal fly ash while working on the cleanup.

Under the Tennessee Silica Claims Priorities Act ("Silica Act"), workers who bring claims resulting from exposure to silica or mixed dust must make a "prima facie" showing by meeting specific requirements to ensure the claims have a minimal level of plausibility. *See* Tenn. Code

Ann. § 29-34-304(a)–(c). To make this showing, a plaintiff must submit a report of a qualified treating physician (not a lawyer-retained expert) opining that the plaintiff's medical history meets specific prima facie criteria. *Id.* Without such a showing, plaintiffs may not pursue a claim based on exposure to silica or mixed dust. Because, pursuant to the plain terms of the Silica Act, coal ash is both silica and mixed dust, Jacobs brought a motion for summary judgment as to 40 (of the 61 remaining) Plaintiffs who cannot meet the statute's prima facie requirements.

Given the lack of caselaw interpreting the scope of the Silica Act, the district court certified four questions to this Court. Those questions of law are ripe for this Court's decision, and the unambiguous text of the statute provides the answers:

- *First*, are the requirements of the Silica Act an affirmative defense that must be pleaded in a responsive pleading, or are they prima facie requirements which can be raised at any stage of litigation? The Silica Act does not create an affirmative defense, but instead imposes a burden of proof on plaintiffs to establish a "prima facie showing" in any civil action that alleges a silica or mixed dust disease claim. Tenn. Code Ann. § 29-34-304(a)–(c). By using the phrase "prima facie showing"—repeatedly—the Silica Act makes clear that the burden rests with the plaintiff, not the defendant, to meet the Silica Act's requirements.
- *Second*, do the Silica Act's requirements apply to all cases involving exposure to silica or mixed dust, or, if coal ash is silica

or mixed dust within the meaning of the Silica Act, are Plaintiffs' claims exempted from the Silica Act's requirements because they are raised under the common law? The Silica Act unambiguously states that its prima facie requirements "apply to *all civil actions* that allege a silica or mixed dust disease claim." *Id.* § 29-34-309 (emphasis added). "All civil actions" necessarily include the common-law tort claims Plaintiffs bring here and a contrary interpretation would make the Silica Act a nullity.

- *Third*, does coal ash, which contains silica, fibrogenic dusts, and other components that may cause injury, but are not "fibrogenic dusts," constitute "silica" or "mixed dust" such that the requirements of the Silica Act would apply in these cases? Because it is undisputed that coal ash contains primarily silica and at least one fibrogenic dust, it constitutes "silica" and "mixed dust" under the plain language of the Silica Act, even if coal ash also contains other elements. *Id.* § 29-34-303(13), (23).
- *Fourth*, if coal ash does qualify as silica or mixed dust, does the Silica Act apply even if Plaintiffs' claims are based on injury resulting from exposure to elements of coal ash that are not silica or fibrogenic dusts? The Silica Act's prima facie requirements apply to any injuries allegedly "arising out of, based on, or in any way related to the inhalation of, exposure to, or contact with" silica or mixed dust. *Id.* § 29-34-303(14), (24). Under this language, a plaintiff cannot avoid the statute by attempting to fashion an argument that one or more of their injuries were

caused by elements of coal ash other than silica or fibrogenic dusts. *Id.*

If the Court agrees with Jacobs' answers to these four questions, the Court's holdings will bring finality to 40 Plaintiffs in the consolidated cases in the underlying *Adkisson* litigation, many of which date back to 2013, because those Plaintiffs cannot satisfy the Silica Act's prima facie requirements. At the same time, those few Plaintiffs who can make the requisite prima facie showing will not be barred by the Silica Act from proceeding to trial of their claims.

Rulings in Jacobs' favor would also result in dismissal of non-meritorious claims in the hundreds of related cleanup worker cases not consolidated with *Adkisson* that are also pending before the district court, because those plaintiffs have not presented the necessary and threshold opinion from a treating physician (not a hired expert) that their injuries were caused by exposure to coal fly ash. Moreover, the Court's guidance will materially impact how the surviving claims are litigated going forward by making clear what plaintiffs must prove at trial.

STATEMENT REGARDING ORAL ARGUMENT

Jacobs requests oral argument to assist the Court in deciding the four certified questions concerning the scope and proper application of Tennessee's Silica Claims Priorities Act.

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Tennessee certified four questions of Tennessee law to this Court in the case of *Greg Adkisson, et al. v. Jacobs Engineering Group, Inc.*, No. 3:13-CV-00505-TAV-HBG (E.D. Tenn., filed Oct. 18, 2021). This Court has

jurisdiction over this case pursuant to Tennessee Supreme Court Rule 23. Tenn. Sup. Ct. R. 23.

STATEMENT OF THE CERTIFIED QUESTIONS

1. Are the requirements of the Silica Act an affirmative defense that must be pleaded in a responsive pleading, or are they prima facie requirements which can be raised at any stage of litigation?
2. Do the Silica Act's requirements apply to all cases involving exposure to silica or mixed dust, or, if coal ash is silica or mixed dust within the meaning of the Silica Act, are Plaintiffs' claims exempted from the Silica Act's requirements because they are raised under the common law?
3. Does coal ash, which contains silica, fibrogenic dusts, and other components that may cause injury, but are not "fibrogenic dusts," constitute "silica" or "mixed dust" such that the requirements of the Silica Act would apply in these cases?
4. If coal ash does qualify as silica or mixed dust, does the Silica Act apply even if Plaintiffs' claims are based on injury resulting from exposure to elements of coal ash that are not silica or fibrogenic dusts?

STATEMENT OF THE CASE

1. The Silica Act, in multiple sections, requires a "prima facie showing" for which a plaintiff bears the burden of proof. Tenn. Code Ann. § 29-34-304(a)–(c). A "prima facie" requirement is by definition not an affirmative defense.
2. The Silica Act's requirements "apply to *all civil actions* that allege a silica or mixed dust disease claim." Tenn. Code Ann. § 29-34-309

(emphasis added). Given this broad definition of "civil action," it necessarily applies to common-law claims like the ones brought by Plaintiffs here.

3. Coal ash constitutes "silica" and "mixed dust" as those terms are defined in the Silica Act, Tenn. Code Ann. § 29-34-303(13), (23), because it is undisputed that coal ash is primarily composed of silica and contains one or more other fibrogenic dusts. In addition, the Silica Act nowhere provides that if a substance also contains elements besides silica and fibrogenic dusts, that somehow means the substance is neither silica nor a mixed dust under the statute.

4. The Silica Act's prima facie requirements apply whenever a plaintiff claims injuries "arising out of, based on, or *in any way related* to the inhalation of, exposure to, or contact with" silica or mixed dust. Tenn. Code Ann. § 29-34-303(14), (24) (emphasis added). It is therefore irrelevant whether the plaintiff alleges the injuries were specifically caused by the silica or fibrogenic dusts, so long as the lawsuit is "in any way related to" silica or fibrogenic dusts.

STATEMENT OF FACTS

I. The Coal-Ash Cleanup & Subsequent Worker Litigation

Nearly five years into the Kingston remediation as the project was coming to an end, on August 22, 2013, the *Adkisson* Plaintiffs brought suit, alleging "personal injuries resulting from continuous unlawful

exposure" to "toxic fly ash." Dkt. 1 at PageID # 2.[1] Over the next three years, other Kingston workers and their family members filed nine similar suits, which the district court (Judge Varlan) eventually consolidated with the *Adkisson* action. Plaintiffs filed these actions despite the fact that the remediation was governed by a comprehensive Site Wide Safety and Health Plan ("Safety Plan") approved by both the Environmental Protection Agency and TVA, and the cleanup featured continuous air monitoring to protect against excessive exposures.

In addition to *Adkisson*, nearly 300 Kingston cleanup workers and their family members filed a number of additional actions—*i.e.*, *Muse*, *Hemingway*, *Allen*, *Anderson*, and *Fair*—making similar allegations and claims of injury. Each of those actions, which also involve claims that come within the reach of the Silica Act, is currently before the same district court as *Adkisson*. Dkt. 795 at PageID # 26540.

In January 2017, the district court ordered a bifurcated trial plan for the *Adkisson* consolidated cases: Phase I would involve (1) whether Jacobs owed Plaintiffs a legal duty, (2) whether Jacobs breached that duty, and (3) whether Jacobs' breach was capable of causing the alleged injuries; Phase II would consider (1) specific causation regarding individual Plaintiffs, (2) each Plaintiff's alleged injuries, and (3) damages. Dkt. 136 at PageID # 3555. The district court held a three-

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[1] Unless otherwise noted, all citations to a "Dkt." entry refer to filings in *Adkisson v. Jacobs Engineering Group, Inc.*, No. 3:13-cv-00505 (E.D. Tenn.). Should this Court desire a copy of any portion of the record before the district court, Jacobs could furnish those docket entries. Tenn. Sup. Ct. R. 23 § 5.

week Phase I trial in October and November 2018, which resulted in a jury verdict for Plaintiffs on the Phase I issues. Dkt. 408. No jury, however, has yet considered whether any Plaintiff's alleged injuries were actually caused by coal-ash exposure during the Kingston cleanup versus other known causal factors (such as smoking, obesity, genetic disposition, etc.).

II. The Composition of Coal Ash

The Silica Act defines silica as "a respirable crystalline form of the naturally occurring mineral form of silicon dioxide, including, but not limited to, quartz, cristobalite, and tridymite." Tenn. Code Ann. § 29-34-303(23). The statute further defines mixed dust as a "mixture of dusts composed of silica and one (1) or more other fibrogenic dusts [such as asbestos and beryllium] capable of inducing pulmonary fibrosis if inhaled in sufficient quantity." *Id.* § 29-34-303(13); *see also* Dkt. 770 at PageID # 24182 (opposing Jacobs' motion for summary judgment, Plaintiffs defined asbestos and beryllium as fibrogenic substances).

Plaintiffs' lawsuits rest on their contention that the cleanup workers had "continuous, unlawful exposure" to the constituents of coal ash, which Plaintiffs allege to include "arsenic, the neurotoxin mercury, barium, strontium, thallium, lead, ***silica-quartz***, ***asbestos***, radioactive material, selenium, aluminum oxide, iron oxide, calcium oxide, boron and other hazardous substances associated with the toxic fly ash." Dkt. 753 at PageID # 22974–75 (emphasis added). As detailed in the Kingston Safety Plan, fly "ash itself is primarily composed of fine silica particles," along with "trace amounts of arsenic, selenium, cadmium, boron, thallium, ***beryllium***, and other metals which occur naturally in the coal

remain[ing] in the ash after coal combustion." Dkt. 570-1 at PageID # 18087. Specifically, coal ash is comprised of three to seven percent crystalline silica and 33 to 57 percent amorphous silica, meaning that silica has the "highest relative concentration of all constituents listed for fly ash." *Id.* at PageID # 17758; *see also* Doc. 237-7 at PageID # 6907 ("Fly ash from burning coal is an agglomeration of materials, mostly metals, bonded to silica.").

Plaintiffs' own experts have confirmed the primary silica content of coal fly ash. During the Phase I trial, Plaintiffs' epidemiologist, Dr. Paul Terry, testified there is "lots of silica [] in coal ash." Doc. 421 at PageID # 14699.[2] During Phase II, Plaintiffs' epidemiologist, Dr. Elizabeth Ward, stated in her expert report that coal ash "is 40-60% silica." Dkt. 767-1 at PageID # 23381, 23383, 23385. Similarly, Plaintiffs' industrial hygienist, Dr. Michael Ellenbecker, concluded coal fly ash contains constituents including "fine particulate matter [], *silica*, toxic metals and metalloids," Dkt. 767-2 at PageID # 23388 (emphasis added), and claimed that numerous Plaintiffs had "substantial exposure" to silica in his "Individualized Exposure Assessment[s]" as to various Plaintiffs, Dkt. 767-3.

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[2] Dr. Terry also specifically referenced silica in his general causation opinions. For example, he stated "[s]ilica, which is present in coal ash, is also a cited mechanism" for lung cancer. Dkt. 261-1 at PageID # 8354 (citing OSHA, *Silica, Crystalline*, Dep't of Labor, https://www.osha.gov/dsg/topics/silicacrystalline/ (last visited Nov. 5, 2021), which in turn notes that workers who inhale "very small," "respirable crystalline silica" particles are "at increased risk of developing serious silica-related diseases").

Plaintiffs themselves have even noted that Jacobs' contention that the coal fly ash at the Kingston Site was composed, at least in part, of silica dust "is n[ot] disputed." Doc. 586 at PageID # 18508. And in opposing Jacobs' motion, Plaintiffs admitted that "coal ash contains silica and other substances that may be 'fibrogenic,' such as asbestos and beryllium." Dkt. 770 at PageID # 24182.

III. The Tennessee Silica Claims Priorities Act

The history of state statutes like Tennessee's Silica Act demonstrates their fundamentally restrictive nature. In the early 2000s, as asbestos litigation started to wane, "new Mississippi silicosis claims skyrocketed" to levels that were "shockingly high." *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 571 (S.D. Tex. 2005). But the claims "def[ied] all medical knowledge and logic," creating what "appear[ed] to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system." *Id.* at 572–73. The *Silica Products Liability Litigation* court decried the "crush" of meritless lawsuits, which consumed limited judicial resources, reduced the pot of money available to plaintiffs whose claims had merit, and denied those meritorious plaintiffs "full and meaningful access to the courts." *Id.* at 620, 636.

In response, the American Legislative Exchange Council ("ALEC") drafted model legislation that state legislatures could adopt to *limit* these claims. *Lawsuit Reform*, ALEC, https://www.alec.org/issue/lawsuit-reform/ (last visited Nov. 5, 2021) ("Reform should focus on filtering out meritless lawsuits."). Through this model legislation, ALEC sought "to enact state by state limits on silica claims." Elizabeth Ann Glass Geltman, *Regulation of Silica: Will Lowering the Exposure Level Cost*

Jobs or Improve Public Health?, 120 W.Va. L. Rev. 1135, 1138 (2018). As of 2018, Tennessee was one of four states to adopt the ALEC model statute, "set[ting] specific medical criteria to establish" a prima facie case and thus "enhanc[ing] judicial oversight" over these claims. *Id.* at 1159–60. Tennessee chose not only to adopt the statute, but also to expand the breadth of its scope by having it apply not just to silica, but also to mixed-dust exposures.

Pursuant to the plain language of the statute, the Tennessee General Assembly enacted the Silica Act to, among other things, "supervise and control silica litigation," in order to "[p]rovide access to the court system for those who are *actually* physically impaired by exposure to silica." Tenn. Code Ann. § 29-34-302(e)(3)–(4) (emphasis added). The principal means by which the statute accomplishes this screening purpose is by requiring that "[n]o person shall bring or maintain a civil action alleging a silica or mixed-dust disease claim" "in the absence of a prima facie showing." *Id.* § 29-34-304(a)–(c).

The statute then provides in great detail every element of the required "prima facie showing." For nonmalignant conditions, a person must (1) provide evidence that a competent medical authority (a treating physician with specific qualifications) has taken a detailed medical history, (2) provide evidence verifying there has been a sufficient latency period for the claimed condition, (3) show a diagnosis of a permanent respiratory impairment *and* silicosis or mixed dust disease based on radiological or pathological evidence, and (4) verify that the medical authority has concluded that exposure to silica or mixed dust was a substantial contributing factor to the impairment. Tenn. Code Ann. § 29-

34-304(a). For lung cancer and wrongful death claims, the requirements are materially the same, *in addition* to requiring (1) evidence of "substantial occupational exposure" (*i.e.*, five years or more) to silica or mixed dust, and (2) in lung cancer cases, that at least ten years have passed from the date of first exposure until diagnosis (*i.e.*, a minimum latency period). *Id.* §§ 29-34-303(27)–(28); 29-34-304(b)–(c).

These prima facie requirements help to filter out meritless silica and mixed-dust claims that are based on questionable science. To ensure that court and party resources are not wasted on such claims, the Silica Act provides that at the outset of litigation—within 120 days of filing a complaint—a plaintiff "in any civil action" must file a written report by a competent medical authority and any supporting evidence making out their prima facie case. Tenn. Code Ann. § 29-34-305(a). The defendant may then challenge that proffered prima facie evidence, and a court that finds the plaintiff failed to make their prima facie case "shall dismiss the plaintiff's claim." *Id.* § 29-34-305(a)–(b).

Under the Silica Act, a mixed-dust disease claim means "any claim for damages, losses, indemnification, contribution, or other relief *arising out of, based on, or in any way related to inhalation of, exposure to, or contact with mixed dust.*" Tenn. Code Ann. § 29-34-303(14) (emphasis added). The statute similarly and broadly defines a silica claim as "any claim for damages, losses, indemnification, contribution, or other relief *arising out of, based on, or in any way related to inhalation of, exposure to, or contact with silica.*" *Id.* § 29-34-303(24) (emphasis added).

The Silica Act expressly provides that it "shall apply to all civil actions that allege a silica or mixed dust disease claim" that are filed after

July 1, 2006. Tenn. Code Ann. § 29-34-309; *id.* § 29-34-303(8) (defining a "civil action," with certain exceptions not relevant here, as "all suits or claims of a civil nature in a court of record").

IV. Jacobs' Motions for Summary Judgment Pursuant to the Tennessee Silica Claims Priorities Act

In August 2020, Jacobs filed a motion for summary judgment pursuant to the Silica Act as to two *Adkisson* Plaintiffs who undisputedly cannot satisfy the statute's prima facie requirements for lung-cancer latency and "substantial occupational exposure." Dkts. 568–69. After briefing on that motion was complete, the district court—"exercis[ing] its inherent power to manage the docket"—directed Jacobs "to refile any summary judgment motion based on the [Silica Act]" as to "any and all plaintiffs against whom Jacobs believes summary judgment is appropriate." Dkt. 757 at PageID # 23076–77.

Jacobs refiled its motion under the Silica Act in April 2021, this time moving on the claims of 40 Plaintiffs (in seven of the ten consolidated *Adkisson* cases) that cannot satisfy the statute's prima facie requirements. Dkts. 765–66. As Jacobs explained in its motion (Dkt. 766 at PageID # 23338), one cleanup worker—who passed away from lung cancer in 2015 less than seven years after the coal-ash spill—could not meet the Silica Act's prima facie ten-year latency requirement for lung-cancer claims. Tenn. Code Ann. § 29-34-304(b)(2) (plaintiff must present "[e]vidence sufficient to demonstrate that at least ten (10) years have elapsed from the date of the exposed person's first exposure to silica or mixed dust until the date of diagnosis of the exposed person's primary lung cancer"). Two others could not satisfy the Silica Act's "substantial

occupational exposure" requirement for wrongful death claims, *id.* § 29-34-304(c)(4)—*i.e.*, "employment for a cumulative period of at least five (5) years" in an occupation where the person was exposed to either mixed dust or silica, *id.* § 29-34-303(27)–(28). *See* Dkt. 766 at PageID # 23338.

Eleven more Plaintiffs failed to provide the required report from a "competent medical authority"—*i.e.*, an actual treating physician, as opposed to a lawyer-retained expert—regarding the cause of their claimed medical conditions. *Id.* at PageID # 23344; Tenn. Code Ann. § 29-34-304(a). And 17 other Plaintiffs submitted an inadequate opinion from a treating physician, either because that doctor did not have the required board certifications, *id.* § 29-34-303(9)(A)(i), or because the physician failed to offer an opinion that the plaintiff's "exposure to silica or mixed dust [was] a substantial contributing factor to [that plaintiff's] physical impairment," *id.* § 29-34-304(a).[3] *See* Dkt. 766 at PageID # 23352.

In the briefing before the district court, Plaintiffs did not dispute that they failed to comply with these requirements of the Silica Act. Instead, Plaintiffs argued that Jacobs waived reliance on the Silica Act by not raising it sooner and that the Silica Act does not apply to Plaintiffs' claims. *See generally* Dkt. 770.

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[3] Jacobs also moved as to eight spousal Plaintiffs' derivative loss of consortium claims, because under Tennessee law their claims could not survive independent of the worker Plaintiffs who could not satisfy the Silica Act's requirements. Dkt. 766 at PageID # 23352; *see DeJesus v. Geren*, 2008 WL 2558009, at *20 (M.D. Tenn. June 23, 2008) (loss of consortium claim could not survive where the injured plaintiff's claims were "subject to dismissal or summary judgment").

In May of this year, Jacobs also moved to dismiss the separate *Hemingway*, *Muse*, *Allen*, and *Anderson* actions because those 270 plaintiffs each failed to comply with the Silica Act's preliminary reporting requirement, discussed above. Tenn. Code Ann. § 29-34-305(a); *see also Hemingway v. Jacobs Eng'g Grp., Inc.*, No. 3:17-cv-00547-TAV-HBG (E.D. Tenn., filed May 24, 2021), Dkt. 52 at PageID # 409.

On September 29, 2021, the district court certified the four questions listed above to this Court pursuant to Tennessee Supreme Court Rule 23 and stayed *Adkisson* and the separate related worker cases pending a ruling by this Court. Dkt. 795 at PageID # 26537–38.[4]

STANDARD OF REVIEW

This matter involves questions of Tennessee law. As such, the standard of review is de novo. *Allmand v. Pavletic*, 292 S.W.3d 618, 624–25 (Tenn. 2009) (citing Tenn. R. App. P. 13) (de novo review when case presented certified question of law under Tennessee Supreme Court Rule 23).

[4] Separately, the Sixth Circuit recently granted Jacobs' petition for interlocutory review of a dispositive immunity issue, *In re Jacobs Eng'g Grp., Inc.*, No. 21-0504 (6th Cir. Aug. 24, 2021), Dkt. 16-2, and that federal appeal is pending, *Adkisson v. Jacobs Eng'g Grp., Inc.*, No. 21-5801 (6th Cir. 2021). Jacobs will promptly notify this Court of any decision from the Sixth Circuit, in the event that this Court wishes to hold this matter in abeyance until after the Sixth Circuit issues its decision.

ARGUMENT

I. This Court Should Answer the Four Certified Questions.

This Court should exercise its discretion to clarify the scope and applicability of the Silica Act. Under Tennessee Supreme Court Rule 23, this Court may answer questions of law certified to it by a United States District Court when those questions will be determinative of the cause and there is no controlling precedent in the Court's prior decisions. Tenn. Sup. Ct. R. 23 § 1.

First, answering these questions in the manner Jacobs has described above will result in summary judgment in Jacobs' favor as to the claims of 40 (roughly two-thirds of the remaining) Plaintiffs in the long-running, consolidated *Adkisson* cases, because those Plaintiffs have failed to satisfy the Silica Act's threshold prima facie requirements. It may also result in dismissal of hundreds of related worker cases pending in the district court, if those plaintiffs (or some subset of them) cannot meet the Silica Act's screening requirement—*i.e.*, a written report by a treating physician (not a hired gun) that concludes, among other things, "that exposure to silica or mixed dust was a substantial contributing factor to the impairment" suffered by the plaintiff. Tenn. Code Ann. § 29-34-304(a)–(c).

Second, not only is there no controlling precedent in this Court's decisions, but Jacobs has not been able to locate any decision in which this Court or any Tennessee court has addressed the Silica Act in any substantive manner (other than one court of appeals decision that addressed in a footnote a limitations issue irrelevant to Jacobs' motion). And *third*, "[i]ssues of statutory construction"—like those raised by the

district court's four certified questions—"are [among the] questions of law" that may (and here, should) be certified and answered. *Embraer Aircraft Maint. Servs., Inc. v. AeroCentury Corp.*, 538 S.W.3d 404, 409 (Tenn. 2017); *see Seals v. H&F, Inc.*, 301 S.W.3d 237, 242, 247 (Tenn. 2010) (same).

Accordingly, each of the factors necessary for this Court to exercise its discretion to answer questions certified by a United States district court has been met here. And the Court should answer those questions, because adopting Plaintiffs' restrictive interpretation of the Silica Act would effectively make it inapplicable to claims the Tennessee General Assembly intended to address. That result would have wide-ranging harmful effects on businesses across this State.

Crystalline silica is used in "over 30 major industries and operations," including construction, glass manufacturing, hydraulic fracturing, dental laboratories, and foundries. Occupational Exposure to Respirable Crystalline Silica, Final Rule, 81 Fed. Reg. 58 (Mar. 25, 2016); *see also Silica Statistics & Information*, USGS, https://www.usgs.gov/centers/nmic/silica-statistics-and-information (last visited Nov. 5, 2021). Nationwide, roughly "two million construction workers are exposed to respirable crystalline silica in over 600,000 workplaces." OSHA Fact Sheet, OSHA's Respirable Crystalline Silica Standard for Construction (Dec. 2017), https://www.osha.gov/sites/default/files/publications/OSHA3681.pdf.

On a given jobsite, silica is found in concrete, plaster, cement, mortar, granite, insulation, roofing, tiles, and a number of other materials. *Reviewing Recent Changes to OSHA's Silica Standards*,

Hearing Before the H. Comm. on Education & Labor, 114th Cong. 3 (2016), https://edlabor.house.gov/imo/media/doc/BradyTestimony-Final041916.pdf (statement of Ed Brady on behalf of the Nat'l Ass'n of Home Builders). In fact, silica is so common that it prompted one construction industry leader to testify to Congress that "Silica is everywhere." *Id.*

If Plaintiffs' cramped view of the Silica Act's applicability were to prevail, it would effectively nullify the statute by preventing it from reaching many of the claims the General Assembly intended. The purpose of the Silica Act is to preclude plaintiffs from pursuing claims that do not have merit by forcing them to satisfy certain prima facie requirements. Most critically, the General Assembly wanted to ensure that courtrooms were reserved for those plaintiffs with evidence from a treating physician that they have plausible claims for injury caused by exposure to silica or mixed dust. This promotes judicial efficiency by preserving court resources for deserving plaintiffs, while at the same time protecting Tennessee businesses from frivolous claims. The Court therefore should answer these questions and clarify that the General Assembly meant what it said in enacting the Silica Act.

II. The Silica Act Does Not Create an Affirmative Defense, but Instead Imposes Requirements for a Prima Facie Showing on Plaintiffs Who Bring Silica or Mixed-Dust Disease Claims.

In response to Jacobs' motion for summary judgment against 40 of the *Adkisson* Plaintiffs, Plaintiffs argued that the Silica Act is an affirmative defense that needed to be included in Jacobs' answer. Dkt. 770 at PageID # 24176–79. As a result, the district court certified

question no. 1, asking whether the Silica Act's requirements are an affirmative defense or whether they are prima facie requirements that may be raised at any stage of a litigation.

The plain language of the statute makes clear that it does not give rise to an affirmative defense, but instead governs the plaintiffs' burden to establish the elements of their claims. Because the Silica Act provides the "prima facie" requirements plaintiffs must prove when they make a silica or mixed-dust disease claim, they are not for the defendant to plead and prove.

The Silica Act expressly and repeatedly imposes these prima facie requirements on plaintiffs:

- "No person shall bring or maintain a civil action alleging a silica or mixed dust disease claim based on a nonmalignant condition in the absence of a *prima facie showing*." Tenn. Code Ann. § 29-34-304(a) (emphasis added).
- "No person shall bring or maintain a civil action alleging that silica or mixed dust caused that person to contract lung cancer in the absence of a *prima facie showing*." *Id.* § 29-34-304(b) (emphasis added).
- "No person shall bring or maintain a civil action alleging a silica or mixed dust disease claim based on the wrongful death of an exposed person in the absence of a *prima facie showing*." *Id.* § 29-34-304(c) (emphasis added). In fact, even the title of section 304 includes the phrase "prima facie showing." *Id.*

Under section 305, an action *must* be dismissed where no genuine issue of material fact exists concerning a plaintiff's inability to make his prima

facie case. *Id.* § 29-34-305(b); *Walker v. Moldex-Metric, Inc.*, 2009 WL 778775, at *1 (E.D. Tenn. Mar. 20, 2009).

This Court has repeatedly held that a plaintiff, not the defendant, bears "the burden . . . to make a prima facie showing." *Cmty. Bank, N.A. v. First Tenn. Bank, N.A.*, 489 S.W. 3d 369, 382–83 (Tenn. 2015) (quotations omitted); *see Phillips v. Interstate Hotels Corp. No. L07*, 974 S.W. 2d 680, 684 (Tenn. 1998); *see also Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 547 (6th Cir. 1986) (when a defendant argues that a plaintiff has failed to establish an element of its case, as Jacobs has here, that "defense is not an affirmative one").

In addition to its express terms, the structure of the Silica Act plainly shows it is not intended to create any affirmative defense. As the district court noted, the Silica Act requires (in a provision not at issue in the *Adkisson* motion) that within 120 days of filing the complaint, a plaintiff must submit a written report regarding his "prima facie case," and that a defendant has 120 days from the filing of the report to challenge the adequacy of that initial evidentiary offering. Tenn. Code Ann. § 29-34-305(a); Dkt. 795 at Page ID # 26558.

Because plaintiffs are not required to file the report for 120 days, a Tennessee (or federal) defendant may be required to answer the complaint *before* the deadline for filing that report (*i.e.*, without knowing whether a plaintiff can satisfy the Silica Act's requirements). Tenn. R. Civ. P. 12.01 (answer due within 30 days of service of the complaint); Fed. R. Civ. P. 12(a)(1)(A) (answer due within 21 days, or 60 days if service

has been waived).[5] Therefore, in many cases, it would not even be possible for a defendant to raise non-compliance with the Silica Act as an affirmative defense in its answer.

The Court should take this opportunity to reinforce that Tennessee follows the plain language of its statutes. *State v. Welch*, 595 S.W.3d 615, 623–24 (Tenn. 2020) (courts "need not look beyond the plain language of the statute to ascertain its meaning" when the language is "clear and unambiguous"); *Corum v. Holston Health & Rehab. Ctr.*, 104 S.W.3d 451, 454 (Tenn. 2003) (similar). Accordingly, on certified question no. 1, this Court should hold that the Silica Act's provisions constitute "prima facie" requirements on which Plaintiffs alone hold the burden of proof.

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[5] Whether Jacobs needed to include the Silica Act in its answer is not properly before this Court because that is a matter of federal law. *Ford Motor Co. v. Transp. Indem. Co.*, 795 F.2d 538, 547 (6th Cir. 1986); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). It is also complicated by the procedural history in the federal court, because it is undisputed that the Silica Act does appear in Jacobs' operative answer. Doc. 755 at PageID # 23051. The critical, and dispositive, question properly before this Court is whether the requirements of the Silica Act are part of the plaintiff's "prima facie" burden or an affirmative defense. *See Roskam Baking Co., Inc. v. Lanham Mach. Co., Inc.*, 288 F.3d 895, 901 (6th Cir. 2002) (holding that the federal district court "properly looked to [state] law to determine" whether the defendant's argument that the case should be dismissed under a state statute of repose "operate[d] as an affirmative defense" or "prevent[ed] a cause of action from ever arising" in the first place).

III. Plaintiffs Who Bring Silica or Mixed-Dust Disease Claims Cannot Circumvent the Silica Act's Requirements by Bringing Suit Under the Common Law.

Plaintiffs also sought to avoid summary judgment by contending in the district court that the Silica Act does not provide an exclusive remedy and therefore does not apply to common-law claims. Dkt. 770 at PageID # 24184–93. Consequently, the district court asks, in certified question no. 2, whether the Silica Act's requirements apply to any case involving exposure to silica or mixed dust, or whether such claims raised under the common law are exempted from those requirements.

Contrary to Plaintiffs' assertions in the district court, by its express terms, the Silica Act broadly applies to claims brought under any legal theory: "This part shall apply to *all civil actions* that allege a silica or mixed dust disease claim that are filed on or after July 1, 2006." Tenn. Code § 29-34-309 (emphasis added). A "civil action" is defined elsewhere in the Silica Act to "mean[] *all suits or claims* of a civil nature in a court of record." *Id.* § 29-34-303(8)(A) (emphasis added). The Silica Act unambiguously imposes prima facie requirements on *all* civil actions involving silica claims or mixed-dust disease claims, regardless of their statutory or common-law basis. *Id.* § 29-34-304(a)–(c) (providing that "[n]o person shall bring or maintain a *civil action* alleging a silica or mixed dust disease claim" or "that silica of mixed dust caused that person to contract lung cancer" without satisfying the statute's prima facie requirements (emphasis added)).

The Silica Act applies to "all civil actions"—including common-law tort claims like those at issue here—that allege a silica or mixed dust

disease claim. As a result, Plaintiffs' claims are not "exempted" from the statute's prima facie requirements. This Court should hold that the Silica Act's unambiguous application to "all civil actions" means what it says.

Holding otherwise would turn on its head the longstanding notion that courts enforce the plain meaning of the statute when the statutory language is, as here, clear and unambiguous. *Welch*, 595 S.W.3d at 623–24 ("The words contained in a statute must be given their ordinary and common meaning."); *see Green v. Green*, 293 S.W.3d 493, 507 (2009) ("When a statute's language is clear and unambiguous, we need not look beyond the statute itself, . . . but rather, we must simply enforce it as written." (citations omitted)).

As the U.S. Supreme Court recently said: "This Court has explained many times over many years that, when the meaning of the statute's term is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (Gorsuch, J.); *see Conn. Natl. Bank v. Germain*, 503 U.S. 249, 254–55 (1992) (Thomas, J.) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (citation omitted)); *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (Thomas, J.) (similar).

In opposing Jacobs' motion in the district court, Plaintiffs attempted to evade the plain language of the Silica Act by arguing that

they cannot apply to common-law claims, but instead only to claims brought under the Silica Act itself, because the statute "is not an exclusive remedy" that has "abrogate[d] claims under the common law." Dkt. 770 at PageID # 24171, 24190. But the Silica Act does not provide a cause of action at all; instead it imposes the burden on Plaintiffs to make certain prima facie showings in any case involving a silica or mixed dust disease claim.

Plaintiffs' "strained" "construction" of the Silica Act—that it applies only to claims brought under the statute itself—would "render . . . the statute inoperative or void," as this Court has warned against. *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995). The Silica Act, as Plaintiffs expressly acknowledge, does not create any claims. Dkt. 770 at PageID # 24185, 24189. So under Plaintiffs' reading, the Silica Act disappears. This cannot possibly be what Tennessee meant when it enacted a statute that expressly applies to "*all* civil actions." *State v. Miller*, 575 S.W.3d 807, 810–11 (Tenn. 2019) (explaining that this Court's "duty" is "'to construe a statute so that no part will be inoperative, superfluous, void, or insignificant'" (quoting *Tidwell v. Collins*, 522 S.W.2d 674, 676–77 (Tenn. 1975))); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 175–76 (2012) (cautioning against "the total disregard of a [statutory] provision" and also "an interpretation that renders [said provision] pointless").

On certified question no. 2, this Court should hold—in accordance with the ordinary meaning of the statute's clear and unambiguous language—that the Silica Act's requirements apply to "all civil actions" that, like Plaintiffs' civil suits, involve exposure to silica or mixed dust.

IV. Coal Ash Constitutes Silica or Mixed Dust Under the Silica Act.

Although Plaintiffs admit that coal ash contains silica and fibrogenic dust, they argued in the district court that coal ash is neither silica nor mixed dust pursuant to the Silica Act, because it also contains constituents that are not fibrogenic. Dkt. 770 at PageID # 24180–84. As a result, the district court certified question no. 3, asking whether coal ash constitutes silica or mixed dust under the Silica Act even if it contains non-fibrogenic dusts in addition to silica and fibrogenic ones. Pursuant to unambiguous statutory definitions, coal ash plainly constitutes both silica and mixed dust under the Silica Act, although no Tennessee court has yet had an opportunity to weigh in on this issue.

The Silica Act defines silica as the "respirable crystalline form of the naturally occurring mineral form of silicon dioxide, including, but not limited to, quartz, cristobalite, and tridymite." Tenn. Code Ann. § 29-34-303(23). According to Plaintiffs' complaint, they were "continuous[ly]" exposed to "silica-quartz" in coal ash. Dkt. 753, at PageID # 22974–75. In addition, Plaintiffs' expert Dr. Terry testified during the Phase I trial that the ash contains "lots of silica." Dkt. 421 at PageID # 14699. And during Phase II, Plaintiffs' epidemiologist Dr. Ward noted coal ash "is 40-60% silica." Dkt. 767-1 at PageID # 23381, 23383. It is therefore undisputed that coal ash is comprised primarily of silica.

The Silica Act defines "mixed dust" as "a mixture of dusts composed of silica and one (1) or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity." Tenn. Code Ann. § 29-34-303(13). Notably, the Silica Act *nowhere* provides that this

"mixture of dusts" cannot *also* contain other material beyond silica and fibrogenic dusts. Although "fibrogenic dust" is undefined in the Silica Act, the term refers to dusts capable of causing pneumoconiosis—*i.e.*, "dust in the lung"—and includes components such as asbestos, talc, beryllium, and coal dust. Douglas J. Giuliano, *Mixed Dust Claims - The Next Asbestos, or Much Ado About Nothing?*, 1 FIU L. Rev. 107, 112–16, 119 (2006); *see* Dkt. 767-36 (Dennis M. Marchiori, Clinical Imaging With Skeletal, Chest, & Abdomen Pattern Differentials, Ch. 26 Miscellaneous Chest Diseases (2d ed. 2004)).

Coal ash contains at least one fibrogenic dust, and likely more. For example, Plaintiffs alleged they were exposed to asbestos in the Kingston ash. Dkt. 753 at PageID # 22974–75. As explained above, asbestos has been identified as a fibrogenic dust. In addition, the Safety Plan that Plaintiffs relied on in their operative complaint and during the Phase I trial notes that coal ash contains trace amounts of metals like beryllium, which occurs naturally in coal and remains in the ash after combustion. Dkt. 570-1 at PageID # 18087; *see also* Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21302, 21311 (Apr. 17, 2015). Beryllium is considered a fibrogenic dust capable of inducing pulmonary fibrosis. Dkt. 767-37 (*Pneumoconiosis*, ScienceDirect ("Asbestos, silicon, talc, beryllium, and coal dust incite a fibrogenic tissue reaction throughout the lung." (citing Dennis M. Marchiori, Clinical Imaging With Skeletal, Chest & Abdomen Pattern Differentials (3d ed. 2014)))). In the district court, Plaintiffs acknowledged that "coal ash contains silica and other substances that may be 'fibrogenic,' such as asbestos and beryllium." Dkt. 770 at PageID # 24182.

In other words, coal ash plainly constitutes a mixed dust as well as silica. That is why the West Virginia Supreme Court in *State ex rel. American Electric Power Co. v. Swope*, 801 S.E.2d 485, 488–90, 495 (W. Va. 2017), affirmed a trial court's determination that injuries related to coal-ash exposure were mixed-dust diseases subject to Ohio's similar silica statute.[6] The trial court in that case found coal ash was properly classified as mixed dust under the Ohio statute because it is composed of silica and one or more fibrogenic dusts, like beryllium. *In Re Gavin Landfill Litig.*, 2016 WL 8224338, at *2, 6 (W. Va. Cir. Ct. Oct. 21, 2016).[7]

In the district court, Plaintiffs argued that "coal ash is not a 'mixed dust' under the [Silica Act]" because "no plaintiff is seeking damages on the basis that they developed pulmonary fibrosis or pneumoconiosis." Dkt. 770 at 24180–81 & n.13. But that argument is a straw man.

The definition of "mixed dust" is not dependent in any way on what diseases a plaintiff claims; it requires only the presence of silica and at

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[6] Like the Silica Act, Ohio Revised Code § 2307.84 *et seq.* concerns silica and mixed-dust disease claims. The statutes are based on the same model legislation, contain many of the same definitions, and have many of the same prima-facie requirements. *Compare* Ohio Rev. Code § 2307.84(X) ("'Silica' means a respirable crystalline form of silicon dioxide, including, but not limited to, alpha quartz, cristobalite, and trydmite."), *with* Tenn. Code Ann. § 29-34-303(23) (materially the same).

[7] The Ohio statute has the same definition of mixed dust as the Silica Act. *Compare* Ohio Rev. Code § 2307.84(M) ("'Mixed dust' means a mixture of dusts composed of silica and one or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity."), *with* Tenn. Code Ann. § 29-34-303(13) (same).

least one fibrogenic dust. Nor is the definition of "mixed dust disease claim" limited to pulmonary fibrosis or pneumoconiosis, but instead broadly includes "any claim for damages" relating to mixed dust exposure. Tenn. Code Ann. § 29-34-303(14). That is why, in construing the virtually identical Ohio silica statute, West Virginia courts have held that coal ash was a mixed dust even though none of plaintiffs' dozens of alleged medical conditions included silicosis, pulmonary fibrosis, or pneumoconiosis. *In re Gavin Landfill Litig.*, 2016 WL 8224338, at *2, 6.

Accordingly, on certified question no. 3, this Court should hold that because coal ash is comprised primarily of silica and at least one (and possibly more) fibrogenic dust, it is both silica and a "mixed dust" under the Silica Act. Under the plain language of the statute, the fact that coal ash may also contain non-fibrogenic components is *irrelevant* to the Silica Act's application here.

V. The Silica Act Applies to Plaintiffs' Claims of Coal-Ash Exposure, Even if Plaintiffs' Alleged Injuries Were Caused by Elements of Coal Ash That Are Neither Silica Nor Fibrogenic Dusts.

Finally, in the district court Plaintiffs have argued that the Silica Act does not apply, because they have not claimed that their injuries were caused by the silica or fibrogenic dust in coal ash. Dkt. 770 at PageID # 24179–80. In response, the district court certified question no. 4, asking whether the Silica Act applies to a plaintiff's claims based on injury resulting from exposure to the non-silica and non-fibrogenic elements of coal ash. Once again, the statutory language conclusively answers this question.

Because coal ash qualifies as silica or mixed dust under the Silica Act and Plaintiffs' alleged injuries are the result of coal-ash exposure, the Silica Act applies. Plaintiffs cannot avoid this result by attempting to focus on non-fibrogenic elements of coal ash.

The Silica Act applies when a person brings a civil action alleging a "silica claim" or a "mixed dust disease claim." Tenn. Code Ann. § 29-34-304(a)–(c). "Silica claim[s]" and "mixed dust disease claim[s]" are broadly defined as "any claim for damages . . . or other relief arising out of, based on, or ***in any way related to inhalation of, exposure to, or contact with***" silica or mixed dust. *Id.* § 29-34-303(14) (emphasis added). Contrary to Plaintiffs' assertions, the Silica Act does *not* say that it only applies when a plaintiff alleges his conditions were caused by silica and fibrogenic dusts, as opposed to other components of coal ash.

Plaintiffs cannot seriously contest that their claims are *in some way* related to "contact with" or "exposure" to silica and mixed dust. Plaintiffs' complaint alleges "[t]his action is for personal injuries from toxic fly ash *exposure*," Dkt. 753 at PageID # 22970–71, and more specifically that such exposure was to "substances associated with toxic fly ash" like "silica-quartz" and "asbestos," *id.* at PageID # 22974–75; *see also* Dkt. 770 at PageID # 24182 (acknowledging "coal ash contains silica and other substances that may be 'fibrogenic,' such as asbestos and beryllium").

Moreover, the language of the statute makes clear that the "mixed dust" here is the "mixture" of dusts, Tenn. Code Ann. § 29-34-303(13)—*i.e.*, the coal ash—and not just two of the many components of the coal ash. Because, under the Silica Act's plain language, the statute applies to *any claims* "in any way related" to "contact with" or "exposure" to the

mixture—here coal ash—the statute applies here. *Id.* § 29-34-303(14), (24). Tennessee law "enforce[s]" the statute "as written." *Walker v. Sunrise Pontiac-GMC Truck Inc.*, 249 S.W.3d 301, 309 (Tenn. 2008).

On certified question no. 4 this Court should answer "yes," holding that the Silica Act's requirements apply as long as coal ash qualifies as silica or mixed dust and Plaintiffs' claims are "in any way related to inhalation of, exposure to, or contact with" coal ash, which they indisputably are here.

CONCLUSION

This Court should accept the certified questions and hold:

(1) the Silica Act does not create an affirmative defense, but instead imposes upon a plaintiff the burden of proof to establish the prima facie elements of his claim;

(2) that as the Silica Act's language plainly indicates, the statute's requirements apply to any and all civil claims, including the common-law tort claims at issue here;

(3) that coal ash constitutes silica and mixed dust under the statute, even if it contains some elements besides silica and fibrogenic dusts; and

(4) that the Silica Act applies when plaintiffs allege injuries related to coal-ash exposure, even when plaintiffs claim that the non-silica and non-fibrogenic elements of coal ash actually caused those injuries.

The Court should take this opportunity to answer each of the district court's four certified questions to help bring nearly all of the long-running *Adkisson* litigation to a close as well as any non-meritorious claims among the more than three hundred brought by other workers in the related cases, and provide certainty to the many businesses

throughout this State that have long, and rightfully, believed that the Silica Act protects them from claims like those at issue here.

Respectfully Submitted,

By: Dwight E. Tarwater
Dwight E. Tarwater (No. 007244)
det@painetarwater.com
Catherine W. Anglin (No. 028120)
cwa@painetarwwater.com
PAINE TARWATER BICKERS, LLP
900 S. Gay St., Suite 2200
Knoxville, TN 37902-1821
Telephone: (865) 525-0880
Facsimile: (865) 229-7441

Theane Evangelis (*Pro Hac Vice Motion Pending*)
tevangelis@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

James F. Sanders
jsanders@nealharwell.com
J. Isaac Sanders
isanders@nealharwell.com
William J. Harbison II
jharbison@nealharwell.com
NEAL & HARWELL, PC
1201 Demonbreun St., Suite 1000
Nashville, TN 37203-5078
Telephone: (615) 244-1713
Facsimile: (615) 726-0573

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Tennessee Supreme Court Rule 46. According to the word processing system used to file this brief, the word count is 8,036 words, excluding the Title/Cover page, Table of Contents, Table of Authorities, and this Certificate of Compliance.

Dated: November 8, 2021

/s/ Dwight E. Tarwater
Dwight E. Tarwater

ADDENDUM

The following addendum includes all provisions of the Tennessee Silica Claims Priorities Act.

West's Tennessee Code Annotated
Title 29. Remedies and Special Proceedings
Chapter 34. Torts
Part 3. Silica Claims Priorities Act

T. C. A. § 29-34-301

§ 29-34-301. Short title

Currentness

This part shall be known and may be cited as the "Silica Claims Priorities Act."

Credits
2006 Pub.Acts, c. 728, § 2, eff. July 1, 2006.

T. C. A. § 29-34-301, TN ST § 29-34-301
Current with laws from the 2021 First Regular Sess. of the 112th Tennessee General Assembly. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

End of Document

West's Tennessee Code Annotated
Title 29. Remedies and Special Proceedings
Chapter 34. Torts
Part 3. Silica Claims Priorities Act

T. C. A. § 29-34-302

§ 29-34-302. Legislative intent; purpose

Effective: August 14, 2008
Currentness

(a) Silica is a naturally occurring mineral and is the second most common constituent of the earth's crust.

(b) Silica-related disease, including silicosis, can occur when silica is inhaled. To be inhaled, silica particles must be sufficiently small to be respirable.

(c) Silicosis was recognized as an occupational disease many years ago. The American Foundry Society has distributed literature to its members warning of the dangers of silica exposure for more than seventy (70) years. By the 1930s, the federal government had launched a silica awareness campaign that led to greater protection for workers exposed to silica dust.

(d) The legislature finds that the public interest requires giving priority to the claims of exposed individuals who are sick, in order to help preserve, now and for the future, access to our court system for those who develop silica-related disease and to safeguard the jobs, benefits, and savings of workers in Tennessee.

(e) It is the purpose of this part to:

(1) Give priority to silica claimants who can demonstrate actual physical impairment caused by exposure to silica;

(2) Fully preserve the rights of claimants who were exposed to silica to pursue compensation, should they become impaired in the future as a result of exposure;

(3) Enhance the ability of the judicial system to supervise and control silica litigation; and

(4) Provide access to the court system for those who are actually physically impaired by exposure to silica, while securing the right to similar access for those who may suffer physical impairment in the future.

Credits
2006 Pub.Acts, c. 728, § 3, eff. July 1, 2006.

T. C. A. § 29-34-302, TN ST § 29-34-302

Current with laws from the 2021 First Regular Sess. of the 112th Tennessee General Assembly. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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West's Tennessee Code Annotated
Title 29. Remedies and Special Proceedings
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T. C. A. § 29-34-303

§ 29-34-303. Definitions

Effective: August 14, 2008
Currentness

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

(1) "AMA guides to the evaluation of permanent impairment" means the most recent version of the American Medical Association's "Guidelines for Assessment of Permanent Medical Impairment" at the time of the performance of any examination or test required under this part;

(2) "Board-certified" means the medical doctor is currently certified by one of the medical specialty boards approved by either the American Board of Medical Specialties or the American Osteopathic Board of Osteopathic Specialties;

(3) "Board-certified in occupational medicine" means a medical doctor who is certified in the subspecialty of occupational medicine by the American Board of Preventive Medicine or the American Osteopathic Board of Preventive Medicine;

(4) "Board-certified oncologist" means a medical doctor who is certified in the subspecialty of medical oncology by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine;

(5) "Board-certified pathologist" means a medical doctor who holds primary certification in anatomic pathology or clinical pathology from the American Board of Pathology or the American Osteopathic Board of Internal Medicine;

(6) "Board-certified pulmonary specialist" means a medical doctor who is certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine;

(7) "Certified B-reader" means a person who has successfully completed the x-ray interpretation course sponsored by the national institute for occupational safety and health (NIOSH) and passed the B-reader certification examination for x-ray interpretation and whose NIOSH certification is current at the time of any readings required by this part;

(8)(A) "Civil action" means all suits or claims of a civil nature in a court of record, whether cognizable as cases at law or in equity or admiralty;

(B) "Civil action" does not include a civil action:

(i) Relating to any claim for workers compensation under title 50;

(ii) Alleging any claim or demand made against a trust established pursuant to 11 U.S.C. § 524(g);

(iii) Alleging any claim or demand made against a trust established pursuant to a plan of reorganization confirmed under the federal bankruptcy code; or

(iv) Arising under the Federal Employers Liability Act pursuant to 45 U.S.C. § 51 et seq.;

(9)(A) "Competent medical authority" means a medical doctor who meets the following requirements:

(i) The medical doctor is board-certified in occupational medicine, a board-certified oncologist, a board-certified pathologist, or a board-certified pulmonary specialist;

(ii) The medical doctor is actually treating, or has treated, the exposed person and has or had a doctor-patient relationship with the exposed person, or in the case of a board-certified pathologist, has examined tissue samples of pathological slides of the exposed person at the request of a treating medical doctor;

(iii) As the basis for the diagnosis, the medical doctor has not relied, in whole or in part, on the reports or opinions of any doctor, clinic, laboratory, or testing company that performed an examination, test, or screening of the exposed person's medical condition:

(*a*) In violation of any law, regulation, licensing requirement, or medical code of practice of the state in which that examination, test, or screening was conducted, with regard to the diagnosis set forth in the report required pursuant to § 29-34-305;

(*b*) Outside the context of an existing doctor-patient relationship; or

(*c*) That required the exposed person to agree to retain the services of a law firm or lawyer sponsoring the examination, test, or screening; and

(iv) The medical doctor spends not more than twenty-five percent (25%) of the doctor's annual practice time in providing consulting or expert services in connection with prosecuting or defending actual or potential tort actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty-five percent (25%) of its revenues from providing those services;

(B) The requirements for determining "competent medical authority" set forth in subdivisions (9)(A)(ii)-(iv) may be waived by written agreement of all of the parties;

(10) "Exposed person" means a person whose exposure to silica or mixed dust is the basis for a silicosis claim or mixed dust disease claim under this part;

(11) "ILO scale" means the system for the classification of chest x-rays set forth in the International Labour Office's "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses," 2000 edition, or if amended, the version in effect at the time of the performance of any examination or test on the exposed person required under this part;

(12) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs;

(13) "Mixed dust" means a mixture of dusts composed of silica and one (1) or more other fibrogenic dusts capable of inducing pulmonary fibrosis if inhaled in sufficient quantity;

(14) "Mixed dust disease claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with mixed dust. "Mixed dust disease claim" includes a claim made by or on behalf of any person who has been exposed to mixed dust, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to the person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to mixed dust;

(15) "Mixed dust pneumoconiosis" means the lung disease caused by the pulmonary response to inhaled mixed dusts, and does not mean silicosis and another pneumoconiosis, including, but not limited to, asbestosis;

(16) "Nonmalignant condition" means a condition, other than a diagnosed cancer, that is caused or may be caused by either silica or mixed dust, whichever is applicable;

(17) "Pathological evidence of mixed dust pneumoconiosis" means a statement by a board-certified pathologist that more than one (1) representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar and parenchymal stellate, star-shaped, nodular scarring and that there is no other more likely explanation for the presence of the fibrosis;

(18) "Pathological evidence of silicosis" means a statement by a board-certified pathologist that more than one (1) representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of round silica nodules and birefringent crystals or other demonstration of crystal structures consistent with silica, consisting of well-organized concentric whorls of collagen surrounded by inflammatory cells, in the lung parenchyma and that there is no other more likely explanation for the presence of the fibrosis;

(19) "Physical impairment" means a condition of an exposed person as defined in § 29-34-304(a)(3), (b)(3), (b)(4), (c)(3) or (c)(4);

(20) "Premises owner" means a person who owns, in whole or in part, leases, rents, maintains, or controls privately owned lands, ways, or waters, or any buildings and structures on those lands, ways, or waters, and all privately owned and state-owned lands, ways, or waters leased to a private person, firm, or organization, including any buildings and structures on those lands, ways, or waters;

(21) "Radiological evidence of mixed dust pneumoconiosis" means an ILO quality chest x-ray read by a certified B-reader as showing bilateral rounded or irregular opacities in the upper lung fields graded at least 1/1 on the ILO scale;

(22) "Radiological evidence of silicosis" means an ILO quality chest x-ray read by a certified B-reader as showing either bilateral small rounded opacities (p, q, or r) occurring primarily in the upper lung fields graded at least 1/1 on the ILO scale or A, B, or C sized opacities representing complicated silicosis, also known as progressive massive fibrosis;

(23) "Silica" means a respirable crystalline form of the naturally occurring mineral form of silicon dioxide, including, but not limited to, quartz, cristobalite, and tridymite;

(24) "Silica claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to inhalation of, exposure to, or contact with silica. "Silica claim" includes a claim made by or on behalf of any person who has been exposed to silica, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to the person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to silica;

(25) "Silicosis" means a lung disease caused by the pulmonary response to inhaled silica;

(26)(A) "Substantial contributing factor" means both of the following:

(i) Exposure to silica or mixed dust is the predominate cause of the physical impairment alleged in the silica claim or mixed dust disease claim, whichever is applicable; and

(ii) A competent medical authority has determined with a reasonable degree of medical certainty that without the silica or mixed dust exposures the physical impairment of the exposed person would not have occurred;

(B) In determining whether exposure to silica or mixed dust was a substantial contributing factor in causing the plaintiff's injury or loss, the trier of fact in the action shall consider, but not be limited to, all of the following:

(i) The manner in which the plaintiff was exposed;

(ii) The proximity of silica or mixed dust to the plaintiff when the exposure occurred;

(iii) The frequency and length of the plaintiff's exposure; and

(iv) Any factors that mitigated or enhanced the plaintiff's exposure to silica or mixed dust;

(27) "Substantial occupational exposure to mixed dust" means employment for a cumulative period of at least five (5) years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(A) Handled mixed dust;

(B) Fabricated mixed dust-containing products so that the person was exposed to mixed dust in the fabrication process;

(C) Altered, repaired, or otherwise worked with a mixed dust-containing product in a manner that exposed the person on a regular basis to mixed dust; or

(D) Worked in close proximity to other workers who experienced substantial occupational exposure to silica in a manner that exposed the person on a regular basis to mixed dust;

(28) "Substantial occupational exposure to silica" means employment for a cumulative period of at least five (5) years in an industry and an occupation in which, for a substantial portion of a normal work year for that occupation, the exposed person did any of the following:

(A) Handled silica;

(B) Fabricated silica-containing products so that the person was exposed to silica in the fabrication process;

(C) Altered, repaired, or otherwise worked with a silica-containing product in a manner that exposed the person on a regular basis to silica; or

(D) Worked in close proximity to workers who experienced substantial occupational exposure to mixed dust in a manner that exposed the person on a regular basis to silica;

(29) "Veterans' benefit program" means any program for benefits in connection with military service under title 38 of the United States Code; and

(30) "Workers' compensation law" means title 50, chapter 6, and judicial decisions rendered under title 50, chapter 6.

Credits

2006 Pub.Acts, c. 728, § 4, eff. July 1, 2006.

T. C. A. § 29-34-303, TN ST § 29-34-303

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West's Tennessee Code Annotated
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T. C. A. § 29-34-304

§ 29-34-304. Silica or mixed dust disease claims; actions; prima facie evidence; AMA guidelines; exhumation

Effective: August 14, 2008
Currentness

(a) No person shall bring or maintain a civil action alleging a silica or mixed dust disease claim based on a nonmalignant condition in the absence of a prima facie showing that, in the opinion of a competent medical authority, the exposed person has a physical impairment, and that the person's exposure to silica or mixed dust is a substantial contributing factor to the physical impairment. The prima facie showing shall include:

(1) Evidence that a competent medical authority has taken from the exposed person a detailed medical history, which includes, to the extent necessary to render the opinion referred to in this subsection (a), the occupational and exposure history of the exposed person. If the exposed person is deceased, the occupational and exposure history of the exposed person shall be taken from the person or persons who are most knowledgeable about these areas of the exposed person's life;

(2) Evidence verifying that there has been a sufficient latency period in the context of the chronic, accelerated, or acute forms of the silicosis or mixed dust disease;

(3) A diagnosis by a competent medical authority, based on the detailed medical history, a medical examination, and pulmonary function testing, that both of the following apply to the exposed person:

(A) The exposed person has a permanent respiratory impairment rating of at least Class 2, as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment; and

(B) The exposed person has silicosis or mixed dust disease based at a minimum on radiological or pathological evidence of silicosis or radiological or pathological evidence of mixed dust disease; and

(4) Verification that the competent medical authority has concluded that exposure to silica or mixed dust was a substantial contributing factor to the exposed person's impairment. A diagnosis that states that the medical findings and impairment are consistent with or compatible with silica or mixed dust exposure does not meet the requirements of this subdivision (a)(4).

(b) No person shall bring or maintain a civil action alleging that silica or mixed dust caused that person to contract lung cancer in the absence of a prima facie showing that, in the opinion of a competent medical authority, the person has a primary lung

cancer, and that the person's exposure to silica or mixed dust is a substantial contributing factor to the lung cancer. The prima facie showing shall include:

(1) Evidence that a competent medical authority has taken from the exposed person a detailed medical history, which includes, to the extent necessary to render the opinion referred to in this subsection (b), the occupational and exposure history of the exposed person. If the exposed person is deceased, the occupational and exposure history of the exposed person shall be taken from the person or persons who are most knowledgeable about these areas of the exposed person's life;

(2) Evidence sufficient to demonstrate that at least ten (10) years have elapsed from the date of the exposed person's first exposure to silica or mixed dust until the date of diagnosis of the exposed person's primary lung cancer;

(3) Radiological or pathological evidence of silicosis or of mixed dust disease;

(4) Evidence of the exposed person's substantial occupational exposure to silica or mixed dust; and

(5) Verification that the competent medical authority has concluded that exposure to silica or mixed dust was a substantial contributing factor to the exposed person's lung cancer. A diagnosis that states that the cancer is consistent with or compatible with silica or mixed dust exposure does not meet the requirements of this subdivision (b)(5).

(c) No person shall bring or maintain a civil action alleging a silica or mixed dust disease claim based on the wrongful death of an exposed person in the absence of a prima facie showing that, in the opinion of a competent medical authority, the death of the exposed person was the result of a physical impairment, and that the person's exposure to silica or mixed dust was a substantial contributing factor to the physical impairment causing the person's death. The prima facie showing shall include:

(1) Evidence that a competent medical authority has taken from the exposed person a detailed medical history, which includes, to the extent necessary to render the opinion referred to in this subsection (c), the occupational and exposure history of the exposed person. If the exposed person is deceased, the occupational and exposure history of the exposed person shall be taken from the person or persons who are most knowledgeable about these areas of the exposed person's life;

(2) Evidence sufficient to demonstrate that at least ten (10) years have elapsed from the date of the exposed person's first exposure to silica or mixed dust until the date of diagnosis of the exposed person's primary lung cancer or, if the death is not alleged to be cancer-related, evidence verifying that there has been a sufficient latency period in the context of the chronic, accelerated, or acute forms of the silicosis or mixed dust disease;

(3) Radiological or pathological evidence of silicosis or radiological or pathological evidence of mixed dust disease;

(4) Evidence of the exposed person's substantial occupational exposure to silica or mixed dust; and

(5) Verification that the competent medical authority has concluded that exposure to silica or mixed dust was a substantial contributing factor to the exposed person's death. A diagnosis that states that the medical findings, impairment, or lung cancer are consistent with or compatible with silica or mixed dust exposure does not meet the requirements of this subdivision (c)(5).

(d) Evidence relating to any physical impairment under this part, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance, quality control, and equipment incorporated in the AMA guides to the evaluation of permanent impairment and the official statements of the American Thoracic Society regarding lung function testing, including general considerations for lung function testing, standardization of spirometry, standardization of the measurement of lung volumes, standardization of the single-breath determination of carbon monoxide uptake in the lung, and interpretative strategies for lung testing in effect at the time of the performance of any examination or test on the exposed person required under this part.

(e) Nothing in this part shall be interpreted as authorizing the exhumation of bodies.

Credits

2006 Pub.Acts. c. 728. § 5, eff. July 1, 2006.

Notes of Decisions (1)

T. C. A. § 29-34-304, TN ST § 29-34-304

Current with laws from the 2021 First Regular Sess. of the 112th Tennessee General Assembly. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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T. C. A. § 29-34-305

§ 29-34-305. Report by competent medical authority; dismissal of cause; findings and decision

Effective: July 9, 2012
Currentness

(a) The plaintiff in any civil action, alleging a silica claim or a mixed dust disease claim, shall file, within one hundred and twenty (120) days after filing the complaint, a written report by a competent medical authority, and any supporting evidence, making out the applicable prima facie case described in § 29-34-304. Any defendant shall have one hundred and twenty (120) days from the filing of the plaintiff's proffered prima facie evidence to challenge the adequacy of the proffered prima facie evidence for failure to comply with the minimum applicable requirements specified in § 29-34-304.

(b) If the court finds that no genuine issue of material fact exists with respect to plaintiff's failure to make out a prima facie case as described in § 29-34-304, the court shall dismiss the plaintiff's claim without prejudice as a matter of law. The court shall maintain its jurisdiction over any case that is so dismissed without prejudice. Any plaintiff whose case has been so dismissed without prejudice may move at any time to reinstate the plaintiff's case, upon a renewed prima facie showing that meets the applicable minimum requirements specified in § 29-34-304.

(c)(1) The court's findings and decision on the prima facie showing shall not:

(A) Result in any presumption at trial that the exposed person has a physical impairment that is caused by silica or mixed dust exposure;

(B) Be conclusive as to the liability of any defendant in the case; or

(C) Be admissible at trial.

(2) If the trier of fact is a jury:

(A) The court shall not instruct the jury with respect to the court's findings or decision on the prima facie showing; and

(B) Neither counsel for any party nor a witness shall inform the jurors or potential jurors of the prima facie showing.

Credits

2006 Pub.Acts, c. 728, § 6, eff. July 1, 2006.

T. C. A. § 29-34-305, TN ST § 29-34-305

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T. C. A. § 29-34-306

§ 29-34-306. Period of limitations; consolidation of claims

Effective: July 9, 2012
Currentness

(a) Notwithstanding any other law, with respect to any silica claim or mixed dust disease claim that is not barred as of July 1, 2006, the period of limitations shall not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment resulting from silica or mixed dust exposure.

(b) A court may consolidate for trial any number and type of silica or mixed dust disease claims only with the consent of all of the parties. In the absence of such consent, a court may consolidate for trial any claims relating to the exposed person and members of the person's household.

Credits
2006 Pub.Acts. c. 728, § 7, eff. July 1, 2006.

Notes of Decisions (1)

T. C. A. § 29-34-306, TN ST § 29-34-306
Current with laws from the 2021 First Regular Sess. of the 112th Tennessee General Assembly. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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T. C. A. § 29-34-307

§ 29-34-307. Actions against premises owners

Effective: July 9, 2012
Currentness

The following shall apply to all civil actions for silica or mixed dust disease claims brought against a premises owner to recover damages or other relief for exposure to silica or mixed dust on the premises owner's property:

(1) A premises owner is not liable for any injury to any individual resulting from silica or mixed dust exposure, unless that individual's alleged exposure occurred while the individual was on the premises owner's property;

(2) If exposure to silica or mixed dust is alleged to have occurred after January 1, 1972, it is presumed that products containing silica or mixed dust used on the premises owner's property contained silica or mixed dust only at levels below safe levels of exposure. To rebut this presumption, the plaintiff must prove by a preponderance of the evidence that the levels of silica or mixed dust in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state; and

(3)(A) A premises owner is presumed to be not liable for any injury to any invitee who was engaged to work with, install, or remove products containing silica or mixed dust on the premises owner's property, if the invitee's employer held itself out as qualified to perform the work. To rebut this presumption, the plaintiff must demonstrate by a preponderance of the evidence that the premises owner had actual knowledge of the potential dangers of the products containing silica or mixed dust at the time of the alleged exposure that was superior to the knowledge of both the invitee and the invitee's employer;

(B) A premises owner that hired a contractor before January 1, 1972, to perform the type of work at the premises owner's property that the contractor was qualified to perform shall not be liable for any injury to any individual resulting from silica or mixed dust exposure caused by any of the contractor's employees or agents on the premises owner's property, unless the premises owner directed the activity that resulted in the injury or approved the critical acts that led to the individual's injury;

(C) If exposure to silica or mixed dust is alleged to have occurred after January 1, 1972, a premises owner is not liable for any injury to any individual resulting from that exposure caused by a contractor's employee or agent on the premises owner's property, unless the plaintiff establishes the premises owner's intentional violation of an established safety standard in effect at the time of the exposure, and that the alleged violation was in the plaintiff's immediate breathing zone and was the proximate cause of the plaintiff's injury.

Credits
2006 Pub.Acts, c. 728, § 8, eff. July 1, 2006.

T. C. A. § 29-34-307, TN ST § 29-34-307

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Title 29. Remedies and Special Proceedings
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T. C. A. § 29-34-308

§ 29-34-308. Residency requirements; venue

Currentness

(a) No civil action alleging a silica claim or mixed dust disease claim may be filed in the courts of Tennessee after July 1, 2006, unless the plaintiff was a resident of Tennessee at the time the claim arose or the plaintiff's claim arose in Tennessee. For purposes of this part, a claim arises in Tennessee if the plaintiff was located in Tennessee at the time the plaintiff alleges to have been exposed to silica or mixed dust.

(b) To comply with this section in relation to an action that involves both claims that arose in this state and claims that arose outside this state, a court shall consider each claim individually and shall sever from the action the claims that are subject to this part.

(c) A civil action under this part may be filed only in the venue where the plaintiff resides, or was exposed to silica, mixed dust, or both, that was a substantial contributing factor to the physical impairment on which plaintiff's claim is based. If a plaintiff alleges that the plaintiff was exposed to silica, mixed dust, or both, in more than one (1) venue, the court shall determine, upon motion of any defendant found outside the venue in which the tort action is pending, which venue is the most appropriate forum for the claim, considering the relative amounts and lengths of the plaintiff's exposure to silica or mixed dust in each venue.

Credits
2006 Pub.Acts, c. 728, § 9, eff. July 1, 2006.

T. C. A. § 29-34-308, TN ST § 29-34-308
Current with laws from the 2021 First Regular Sess. of the 112th Tennessee General Assembly. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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T. C. A. § 29-34-309

§ 29-34-309. Application of part

Currentness

This part shall apply to all civil actions that allege a silica or mixed dust disease claim that are filed on or after July 1, 2006.

Credits
2006 Pub.Acts, c. 728, § 10, eff. July 1, 2006.

T. C. A. § 29-34-309, TN ST § 29-34-309
Current with laws from the 2021 First Regular Sess. of the 112th Tennessee General Assembly. Pursuant to §§ 1-1-110, 1-1-111, and 1-2-114, the Tennessee Code Commission certifies the final, official version of the Tennessee Code and, until then, may make editorial changes to the statutes. References to the updates made by the most recent legislative session should be to the Public Chapter and not to the T.C.A. until final revisions have been made to the text, numbering, and hierarchical headings on Westlaw to conform to the official text. Unless legislatively provided, section name lines are prepared by the publisher.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2021, the foregoing brief was served via the Court's e-filing system and overnight mail upon the following:

Louis M. Ringger, III
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN PLLC
800 S. Gay Street, Suite 1100
Knoxville, TN 37902
Tel: (865) 247-0080
bringger@milberg.com

Gregory F. Coleman
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN PLLC
800 S. Gay Street, Suite 1100
Knoxville, TN 37902
Tel: (865) 247-0080
gcoleman@milberg.com

Adam A. Edwards
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN PLLC
800 S. Gay Street, Suite 1100
Knoxville, TN 37902
Tel: (865) 247-0080
aedwards@milberg.com

Mark A. Silvey
MILBERG COLEMAN BRYSON
PHILLIPS GROSSMAN PLLS
800 S. Gay Street, Suite 1100
Knoxville, TN 37902
Tel: (865) 247-0080
msilvey@milberg.com

/s/ Dwight E. Tarwater
Dwight E. Tarwater