The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

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

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

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

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Equity Member; Leitner, Williams, Dooley & Napolitan, PLLC ("LWDN").

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

2008; TN Bar # 027445

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; November 12, 2008. My license is active.

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

No.

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

Leitner, Williams, Dooley & Napolitan, PLLC; Memphis, TN
Equity Member, January 2017 – Present
Associate, January 2009 – January 2017

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 had not been hired by any firm when I completed law school in May 2008 and did not start with LWDN until January 2009. During that interregnum, I focused on studying for and passing the Tennessee bar exam. I was interviewing with firms about potential openings but the economy was slowing at that time, and firms wanted to see if I passed the bar exam before making hiring decisions. I was hired by LWDN in November 2008 after being admitted to practice law in Tennessee and started in its Memphis office on January 2, 2009.

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 practice is devoted almost entirely to civil litigation defending individuals and companies. My cases include, but are not limited to, personal injury actions, wrongful death cases, UM/UIM, products liability, healthcare liability, insurance coverage and insurance litigation, commercial litigation, environmental law and toxic torts, professional liability, construction law, trucking cases, and appellate practice. I spend over 90% of my time on litigation matters and the rest advising clients on legal issues or coverage questions.

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.

In addition to the above answer, I have tried, or assisted in, several trials in Tennessee federal and state courts. I manage cases for clients and supervise my associates and staff on these matters, working collaboratively to obtain the best outcomes for our clients.

As an associate, I started under members in my firm and handled the day-to-day matters on the cases. That included answering complaints, written discovery, and case evaluations. I handled all manner of motions from discovery motions, evidentiary motions, motions on Rule 702 experts, Rule 12,02(6), Rule 12.03 and Rule 56 motions, motions to quash, and other types of motions. I have taken numerous depositions of fact witnesses, corporate representatives, and experts across several topical areas.

I have drafted briefs filed in the Tennessee Supreme Court, Tennessee Court of Appeals, Tennessee Special Workers' Compensation Panel, Mississippi Supreme Court, and the Sixth Circuit Court of Appeals. I have orally argued appeals before the Tennessee Supreme Court, Tennessee Court of Appeals, and Tennessee Special Workers' Compensation Panel.

As a member, I continue to do many of these things but am more responsible for the overall legal strategy approach and advising clients directly on these issues while overseeing and participating in the legal work performed. I still do a considerable amount of drafting on dispositive and major motions.

On work habits, this is not a 9-to-5 job. I do what needs to be done to accomplish the goals and obtain the results for the client. That has, from time to time, meant working nights, weekends,

or holidays.

Before going to law school, I worked in Nashville for a full-service design firm in the field of landscape architecture:

Lose & Associates; Nashville, TN
Senior Land Planner / Land Planner, May 2003 - August 2005

While with Lose & Associates, I helped design and plan large-scale residential, commercial, recreational, and mixed-use developments in Davidson County and its surrounds, and helped obtain planning commission and city council approvals for those projects. Representative project work includes the Indian Lake Village development in Hendersonville, Tennessee; the Stockett Creek subdivision in Franklin, Tennessee; and the Richard Siegel Soccer Complex in Murfreesboro, Tennessee.

A more specific discussion of particular legal matters I have worked on is below in response to Question # 9.

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

Below are some representative matters at the trial and appellate level that I have worked on.

Ghane v. Mid-South Institute of Self-Defense Shooting. Mississippi state court (admitted *pro hac vice*). Defense of private military contractor sued by the mother of a deceased Navy SEAL after her son died in a live-fire training accident at the contractor's training facility. We successfully obtained summary judgment based on federal Political Question Doctrine. Matter heard and overturned by Mississippi Supreme Court (on brief; primary drafter).

Britt v. Dyer Employment Agency. Tennessee state court. Conducted trial with successful workers' compensation defense on contested damages claims in matter. Drafted and argued the appeal. After the panel opinion came out that overturned part of the trial verdict, I filed the Motion for Discretionary Review with the full Tennessee Supreme Court. That was granted, and I then wrote the brief and orally argued the matter before the full Court.

Moore v. Indus. Maint. Serv. of Tenn. at al. Western District of Tennessee (Jackson). Personal injury/subrogation matter involving a driver of a roll-off truck who was injured while removing a loaded dumpster from a former job site (dumpster was too heavy; plaintiff's winch lifted his truck cab off the ground, the cable broke, tractor cab slammed into pavement, and plaintiff fractured his back). Handled all the of motion practice, which was considerable. Drafted the summary judgment motion. The motion was granted on comparative fault grounds. Matter was appealed to Sixth Circuit. I was on brief. Summary judgment was overturned by the Sixth Circuit. The matter subsequently resolved.

Union Ins. Co v. Delta Casket Co. Western District of Tennessee (Memphis). Complex insurance coverage dec action/bad faith counterclaim over CGL policy coverage of an insured who copied caskets of a major American manufacturer and imported the Chinese-made knockoffs for resale in the USA. Three-week bench trial before Judge Mays. I was a first-year associate but I questioned witnesses (direct and cross) during trial and argued several substantive

motions. I handled the motion writing and responses to other motions. We lost on the coverage question but successfully defended the bad faith and TCPA counterclaims.

Hall v. USF Holland. Western District of Tennessee (Memphis). Case involved a motorcyclist who allegedly ran into the side of a USF Holland tractor trailer. Notable matter because we had a question on how the medical expenses would be calculated (based on the amount billed versus what was paid on the bills to settle the charges) certified to the TN Supreme Court. I wrote and filed that brief. TN Supreme Court ultimately declined the question (and later took the same question up in *Dedmon*). Judge Lipman ultimately agreed with our position on the medical expense question and granted our motion for partial summary judgment on that issue.

Lloyd's Acceptance Corp., et al. v. Carroll Property Management, LLC, et al. Western District of Tennessee (Memphis). Lawsuit brought by a real estate investor and various entities he used to purchase an apartment complex in Memphis. The lawsuit claimed the previous owners/managers of the property misrepresented and hid information on a mold infestation when the investor sought to purchase the property. The developer claimed he detrimentally relied on that information when purchasing the property and there were subsequent remediation costs to alleviate the mold. This was the second lawsuit brought over the issue, the first having been dismissed and dismissal affirmed by the Sixth Circuit. This Court dismissed all but one of the plaintiffs on a motion to dismiss. The remaining plaintiff settled prior to trial.

Ronnie Saulsberry et al. v. Henry Schein, Inc. et al. Shelby County Circuit Court. Two cases filed over patients of a medical practice who reportedly suffered abscesses after being injected with Depo-Medrol from a multi-use vial. Henry Schein was the distributor through whom the medical practice obtained the Depo-Medrol, which was stored in sealed containers at Henry Schein's facility. The court partially granted a motion for summary judgment that Henry Schein was improperly sued under the Tennessee Healthcare Liability Act as it was not acting as a "health care practitioner" in distributing the vials but allowed the claims to survive under the good faith exception in the THCLA. Henry Schein was non-suited from the cases shortly thereafter.

The Guest House at Graceland Legionnaires' cases. Shelby County Circuit Court, Davidson County Circuit Court, and Western District of Tennessee (Memphis). Series of lawsuits filed over alleged exposure to *Legionella* bacteria by patrons at the Guest House at Graceland hotel. The lawsuits were a mix of personal injury and wrongful death claims. Our client was the manufacturer of the water chemistry controllers used by the hotel to control the chemical balances in the swimming pool and hot tub. The claims against the manufacturer were product liability claims alleging the water chemistry controllers did not properly function as intended. One or two cases were dropped, and the rest were resolved.

West Bend Mutual Insurance Company v. Healy Homes, LLC. Eastern District of Tennessee (Knoxville). A land developer sought coverage after its construction of a residential subdivision on top of a ridge resulted in considerable erosion and sediment runoff through an adjacent stream and into the pond of a downstream property. The developer, among others, was sued by the property owner. West Bend disclaimed coverage on multiple grounds, including application of the total pollution exclusion in the CGL policy form. West Bend sought a judgment in its favor on the pollution exclusion. The District Judge certified two questions on the scope of the total pollution exclusion to the Tennessee Supreme Court as no Tennessee court had ruled on the scope of the exclusion. After briefing, the Tennessee Supreme Court declined to answer the

question.

Union University v. Evanston Insurance Company. Western District of Tennessee (Jackson). Insurance coverage matter of disclaimed coverage sought by Union University related to a Union SRNA administering an incorrect drug to a Vanderbilt University Medical Center patient while on an a clinical externship. Union failed to report the incident until the next policy period and only after VUMC's counsel sought indemnification under a written agreement for the clinical externships. Union sued seeking a declaration that a duty to defend and/or indemnify existed and for bad faith failure to pay. Evanston counterclaimed for a declaration that coverage did not exist. The District Judge granted in part and denied in part Evanston's summary judgment motion but held certain questions in abeyance.

Patricia Ramos et al. v. Marten Transport, Ltd. et al. Hamilton County Circuit Court. Series of consolidated cases over a fatal truck wreck in a construction zone outside of Ooltewah, Tennessee. Marten Transport Logistics had brokered a load to an independent motor carrier for transportation from Kentucky to Florida. The carrier's driver hauled the cargo to Florida and successfully delivered the load. The driver, on his own decision and with the acquiescence of his employer, dead-headed empty back to Kentucky. On the way the driver, who tested positive for methamphetamines, ran into slowed or stopped traffic in the construction zone on I-75, killing six and injuring nine. Plaintiffs sued our clients under a litany of theories including agency theories, vicarious liability, statutory employer, and illegal double-brokering.

The following are appellate decisions of matters I was counsel of record in:

Halliburton v. Ballin, No. W2023-01285-COA-R3-CV, 2024 Tenn. App. LEXIS 240 (Tenn. Ct. App. Sept. 24, 2024) (on brief; oral argument waived)

Kyuhwan Hwang v. Holt, No. W2023-00627-COA-R3-CV, 2024 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 15, 2024) (on brief; oral argument waived).

Allen v. Am. Yeast, Inc., No. W2021-00956-COA-R3-CV, 2023 WL 2520134 (Tenn. Ct. App. Feb. 7, 2023) (on brief; oral argument).

Lyon v. Castle Retail Group, LLC, No. W2019-00405-COA-R3-CV, 2020 WL 1867368 (Tenn. Ct. App. Jan. 15, 2020) (on brief).

Allen v. Am. Yeast, Inc., No. W2017-00874-COA-R3-CV, 2018 Tenn. App. LEXIS 587 (Tenn. Ct. App. Oct. 4, 2018) (on brief; oral argument).

Mack v. Comcast Corp., No. W2017-02326-COA-R3-CV, 2018 Tenn. App. LEXIS 519 (Tenn. Ct. App. Aug. 31, 2018) (on brief; oral argument)

Forest Creek Townhomes, LLC v. Carroll Prop. Mgmt., LLC, 695 Fed. App'x 908 (6th Cir. 2017) (on brief).

Callins v. NSK Steering Sys. Am., Inc., 2015 Tenn. LEXIS 934 (Tenn. Sp. Workers' Comp. Panel Nov. 30, 2015) (on brief).

Mattress Firm, Inc. v. Mudryk, 2015 Tenn. LEXIS 689 (Tenn. Sp. Workers' Comp. Panel Aug. 24, 2015) (on brief; oral argument).

Moore v. Indus. Maint. Serv. of Tenn., 570 Fed. App'x 569 (6th Cir. 2014) (on brief).

Ghane v. Mid-South Inst. of Self Def. Shooting, Inc., 137 So. 3d 212 (Miss. 2014) (on brief).

Britt v. Dyer's Empl. Agency, Inc., 396 S.W.3d 519 (Tenn. 2013) (on brief; oral argument).

Taylor v. Airgas Mid-South, Inc., 2013 Tenn. LEXIS 304 (Tenn. Sp. Workers' Comp. Panel Feb. 26, 2013) (on brief; oral argument).

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 have not.

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.

Since 2017, I have been an equity member of my law firm, which makes me a fiduciary to my fellow members related to the governance and furtherance of the firm's interests. I also serve as a board member for a Memphis-based non-profit, Child Evangelism Fellowship of Memphis, and maintain fiduciary responsibilities as part of my board member duties.

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

Commonwealth Attorney's Office, Louisville, Kentucky
Criminal Justice Extern, January - April 2008
Conducted and handled numerous criminal hearings before Circuit Court judges, including probation revocation hearings, plea bargains, and shock probation hearings with a limited-practice license under the supervision of an experienced prosecutor. Successful prosecution with supervising prosecutor of multiple defendants in a felony robbery trial.

Thompson, Miller & Simpson, PLC; Louisville, KY
Law Clerk, May - August 2007
Researched and drafted civil litigation-related documents, including discovery, summary judgment motions, motions to dismiss, *Daubert* motions and in-house memoranda. Assisted in court proceedings and depositions.

United States Attorney's Office; Chattanooga, TN
Volunteer Law Student - Federal Student Intern Litigation Program, May - August 2006
Observed and assisted in all types of federal court criminal proceedings before federal Magistrate and District judges. Researched and drafted motion responses, memoranda, and Sixth

Circuit appellate briefs. Experienced other civil proceedings through depositions, court hearings and settlement negotiations.

In addition, my prior employment in landscape architecture had a legal parallel. It regularly involved working with local development codes and ordinances, and also working the local planning commissions and city councils to navigate those codes and to obtain project approvals for our clients.

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.

This is my first such application.

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 Louisville, Brandeis School of Law; Louisville, KY
Juris Doctor, cum laude, May 2008
University of Louisville Law Review (2006-07). Participant in the National Trial Competition (2007-08), the National Moot Court Competition (2007) and the National Health Law Moot Court Competition (2006). Runner-up in the Pirtle-Washer Oral Advocacy Competition (2007). Highest Grade awards in Legal Research, Evidence, and Constitutional Practice classes.

Ball State University, College of Architecture and Planning; Muncie, IN
Master of Landscape Architecture, May 2003
American Society of Landscape Architects Certificate of Merit (2003).

Taylor University; Upland, IN
Bachelor of Science, Environmental Biology, cum laude, August 2000
Dean's List (1997, 1998, 1999). Intercollegiate Athletics, Golf: MCC All-Conference Team (1997-2000), NAIA All-Regional Team (2000), and NAIA Golf National Championship Qualifier (1998).

PERSONAL INFORMATION

15. State your age and date of birth.

[redacted]

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

Since January 2009.

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

Since January 2009.

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

Shelby County.

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

Not applicable.

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

No.

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

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of

professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

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

No.

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

No.

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

I was involved in an adoption proceeding in 1999 in Louisville, Kentucky. I was formally adopted and my last name was changed to my current surname. *Bryant Nicoson v. Jeffrey Edward Nicoson*, No. 99 FC 06844 A, Jefferson County (KY) Family Court.

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.

Renewal Church; member since 2019.

Child Evangelism Fellowship of Memphis; board member since 2022.

BMW Car Club of America; 2021 to present.

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

or synagogues.

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

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

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.

Tennessee Bar Association (uncertain on dates; I have been a member during the last ten years)

Memphis Bar Association (uncertain on dates; I have been a member during the last ten years)

Defense Research Institute (2017-present); I am a member of the Defense of Government Actions sub-litigation group for the Drug and Medical Device Committee.

Federalist Society (2013-2014, 2019-2020, 2023-present).

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 was named a Mid-South Super Lawyer "Rising Star" in 2018 by Mid-South Super Lawyers magazine, and have also recognized since 2021 by Best Lawyers, including this year in insurance and health care litigation, product liability defense, medical malpractice defense, and insurance law. In 2024, I was given an Outstanding Advocacy award by Medmarc Casualty Insurance Company for defense efforts on behalf of its insureds.

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

RX For The Defense; Defense Research Institute, Drug and Medical Device Committee *Legal Drug Manufacturers As Illegal Drug Dealers: The Recent Attempt To Use The Drug Dealer Liability Act In Tennessee To Recover Directly From Opioid Manufacturers;* Volume 27, Issue 2 (May 8, 2019). Examination and analysis of litigation involving the Tennessee Drug Dealer Liability Act, Tenn. Code Ann. § 29-38-101 *et seq.*, and efforts to hold opioid manufacturers liable for the opioid crisis.

RX For The Defense; Defense Research Institute, Drug and Medical Device Committee

False Claims Act Claims and Recoveries in the Age of Escobar; Volume 26, Issue 2 (May 1, 2018). Examination of the impact of *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), on False Claims Act prosecutions by the Department of Justice and the Department's approaches to the heightened "materiality" requirement pronounced in *Escobar*.

University of Louisville Law Review; Louisville, KY. *Note, A Case for Certiorari: Whether Federal Courts Should Consider State Law When Admitting State- Collected Electronic Surveillance Evidence*, 46 U. LOUISVILLE L. REV. 335 (2007). Detailed assessment of various federal appellate court approaches to incorporating state wiretap laws when determining the admissibility of state-collected wiretap evidence in federal proceedings.

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.

Medmarc Medical Device Seminar, June 2024; *The Complete Lawyer's Guide to Memory*. Discussion of the recent developments in the science of memory and demeanor evidence, how those developments apply to litigation, and the attendant impact on legal proceedings and interplay with the Rules of Evidence.

Medmarc Broker Meeting, September 2023; *The Legal Nuisance of Public Nuisance: Past and Present Developments and Why it Matters to Your Business*. Seminar for insurance brokers on public nuisance litigation, recent trends in public nuisance lawsuits, and how brokers can work with their clients to assess insurance coverage needs.

Medmarc Medical Device Seminar, June 2023; *Parens Patriae and Public Policy Through Litigation: Insights and Applications from Opioid Lawsuits*. Focused on the use of public nuisance law along with *parens patriae* standing claims by state and local governments as a basis to sue companies over opioid abuse issues, and lessons litigators can draw from these cases.

I have also taught some legal ethics seminars for the **National Business Institute**. I co-taught a session in December 2016 and taught the same ethics session alone in December 2017.

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.

None, and none.

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

Never.

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.

Attached are two briefs filed with the Tennessee Supreme Court on certified questions. These represent my own writing and work in their entirety, save possible proofreading for the *Hall* matter by Marc Harwell, who was the member on the case.

Theaudry Hall and Miracle Hall v. USF Holland, Inc., No. M2015-01051-SC-R23-CV (July 2015). Respondent's brief filed on the issue of whether the proper measure of medical damages were the original charges or the amounts paid to settle those charges.

Healy Homes, LLC v. West Bend Mutual Insurance Company, No. M2021-00902-SC-R23-CV (October 2021). Respondent's brief filed on the scope of the absolute pollution exclusion in a CGL policy.

ESSAYS/PERSONAL STATEMENTS

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

Since pursuing law, I've always been intrigued by the possibility of becoming a judge. I chose litigation because it put me in front of judges, and it allowed me to argue and wrestle with legal issues of all kinds in front of courts. I see the give and take between lawyers and judges as critical to reasoned decision-making and to identifying core issues, and desire to do that in a different capacity than I do now.

Second, I value the rule of law and desire to help foster that crucial tenet of our society from the bench. I see judging as service to the citizenry to uphold the laws of Tennessee justly, to ensure my decisions follow those laws faithfully, and to promote the trust and confidence of Tennessee's citizens though a fair, thorough, and judicious application of those laws.

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)***

I have performed some pro bono work while in private practice. My firm also encourages attorneys to perform pro bono work if they wish to do so.

My practice has allowed me to represent all manner of persons. Clients have included teenagers, persons involved in abuse situations, persons across all classes and walks of life, to small businesses, medium-sized entities, insurance companies, and Fortune 500 and publicly-traded corporations. Every person or entity has inherit worth, value, and deserves quality legal representation and advocacy.

On equal justice, Justice Lewis Powell correctly pointed out that "it is fundamental that justice should be the same, in substance and availability, without regard to economic status." This speaks not only to the need for lawyers to provide services pro bono to assist those who cannot always afford legal services, but also that a person or company's wealth, class, status, or other characteristics are not outcome determinative. That outcome is guided, every time, by what the

relevant law is and what the applicable facts are.

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)***

Tennessee Court of Appeals, Western Division.

My selection would place an experienced attorney on the bench who is well-versed in all manner of tort claims, commercial disputes, and insurance coverage issues, and the law involved in those matters. I believe it would be a positive impact given the breadth of matters I have handled in the past and my desire to see that the law is upheld justly and fairly.

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)***

I serve at my church, Renewal Church, in various capacities with their tech team, children's ministry, and worship team. I also serve on the board of directors for Child Evangelism Fellowship of Memphis.

I intend to continue serving in those capacities if appointed and to further serve in my community as opportunities or needs may arise in the future, so long as those commitments to do run afoul of the Code of Judicial Conduct.

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

I am not afraid to roll up my sleeves to accomplish a task. I had the example of my parents and was shown how to work industriously, to take pride in doing things right, and to achieve academically. If I wanted money, I had to earn it and work for it. I spent long hours working summers at Valhalla Golf Club in the run-up to the 2000 PGA Championship and served on that championship crew. In college, I successfully maintained a heavy academic load while participating in intercollegiate athletics and assisting in planning and putting on biannual leadership conferences. I have served as a "judge" at moot courts and mock trials to assist the students in honing their skills through competition and feedback.

One of my strengths is legal research and writing, especially, I believe, on the appellate side. I enjoy the process of reviewing law and relevant cases, and analyzing how those impact one's position. I do not like to be out-researched in a matter by opposing counsel. I enjoy getting to what I call the "second-" or "third-level" issues beneath the initial issues to figure out where my clients' cases are weak or strong, and the same for the other side. I focus on briefing those matters thoroughly and attempt to convey the issues and arguments in a way that hits what needs to be hit while also engaging the judge(s) who read it. I try not to be boring; my aim is for my

work to stand out among the many briefs or motions read daily.

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

Yes. I have no problem doing so. That is the requirement of the job. My personal opinions would give way when the law is at issue, and my judgment would be guided by a review and application of constitutional provisions, statutes, regulations, or case law as applicable to the question(s) at hand.

As an example, the recent Tennessee Supreme Court in *Binns* is a decision I did not see eye-to-eye with. While I understand the Court's reasoning, it is not the reasoning I personally agree with based on my review of the issues and from my time asserting arguments on the "pre-emption rule" for clients. But that matters not one bit if I take on the role of a judicial officer and am called on to apply *Binns* or any other decision or law I may not personally find enthralling or agreeable.

Since then, my personal opinions have been set aside when advising clients on *Binns* and the impact it has on their cases while also charting an approach to advocate best for my clients on post-*Binns* issues. The duty of applying the law is a higher obligation than my own personal considerations. Just as my views are routinely set aside to advise clients, so too would those views be shelved if I am selected and approved to the Court of Appeals.

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. Greg Grisham, Fisher Phillips LLP, 1715 Aaron Brenner Drive, Suite 312, Renaissance Center, Memphis, TN 38120; phone: (901) 333-2076; ggrisham@fisherphillips.com

B. Frank Day, FordHarrison, 1715 Aaron Brenner Drive, Suite 200, Memphis, TN 38120; phone: (901) 291-1529; fday@fordharrison.com

C. William E. "Bill" Godbold, III, Leitner, Williams, Dolley & Napolitan, PLLC, 200 W. ML King Blvd., Tallan Building, Suite 500, Chattanooga, TN 37402; phone: (423) 424-3907, bill.godbold@leitnerfirm.com

D. Janie Walker, Executive Director, Child Fellowship Evangelism of Memphis, 2091 Lee Pl., Memphis, TN 38104; phone [redacted]

E. Chris Bennett, Lead Pastor, Renewal Church, 5016 Summer Avenue, Memphis, TN 38122; phone: [redacted]

AFFIRMATION CONCERNING APPLICATION

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

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals, Western Division 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: October 21, 2024.

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
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TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
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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.

Jeffrey E. Nicoson
Type or Print Name

Signature

10/21/2024
Date

027445
BPR #

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

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

THEAUDRY HALL and MIRACLE HALL, Individually and As Husband and Wife, *Petitioners/Plaintiffs,* v. USF HOLLAND, INC. and JOHN DOE, *Respondents/Defendants.*	No. M2015-01051-SC-R23-CV Cause No. 2:14-cv-2494-SHL-dkv The United States District Court for the Western District of Tennessee, Western Division, at Memphis

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF OF RESPONDENT USF HOLLAND, INC.

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Respondent Requests and Applies for Oral Argument Pursuant to Rule 23, § 7(B) of the Rules of the Supreme Court of the State of Tennessee

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JURISDICTIONAL STATEMENT

This matter is before this Court pursuant to a certified question of state law from the United States District Court for the Western District of Tennessee (the "District Court"). This Court has jurisdiction to hear this matter pursuant to Rule 23 of the Rules of the Supreme Court of the State of Tennessee. The District Court is a proper applicant pursuant to Rule 23, § 1. It certified a question of state law to this Court from the case of *Theaudry Hall and Miracle Hall v. USF Holland, Inc. and John Doe*, No. 2:14-cv-02494-SHL-dkv (W.D. Tenn., filed May 21, 2014), on May 20, 2015. The Clerk of the District Court served copies of this Certification Order upon all counsel of record in this matter and filed the order on June 9, 2015, with the Clerk of the Supreme Court of Tennessee in Nashville under seal along with proof of service.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The District Court certified the following question of law:

1. Is the decision in *West v. Shelby County Healthcare Corporation*, 459 S.W.3d 33 (Tenn. 2014), limited to the Hospital Lien Act or is it also applicable to personal injury actions filed directly against the alleged tortfeasor?

STATEMENT OF THE CASE

Petitioners filed suit against USF Holland and a John Doe in the Circuit Court of Shelby County on May 21, 2014. (Pet'r Br. App. A, A01-A09.) Petitioner/Plaintiff Theaudry Hall alleges he sustained injuries in a June 12, 2013 motor vehicle collision between the motorcycle he was operating and a tractor trailer purportedly owned by Respondent/Defendant USF Holland, Inc. ("USF Holland") and operated by an employee of USF Holland. (*Id.*) Mr. Hall claims he sustained personal injuries along with economic and non-economic losses due to the negligence of USF Holland. (*Id.*) The claimed economic losses include past medical expenses. (*See id.*) The primary medical provider was the Shelby County Healthcare Corporation d/b/a Regional One Health[1] (the "Med"). (*Id.*) Mr. Hall also claims medical expenses from private medical providers. (*See id.*) Petitioner/Plaintiff Miracle Hall asserts a loss of consortium claim. (*Id.*) USF Holland removed the case to the District Court on June 25, 2014, pursuant to 28 U.S.C. § 1332. (Pet'r Br. App. A, A09-A14.)

USF Holland moved for partial summary judgment on March 30, 2015. (Pet'r Br. App. A, A28-A30.) It argued that *West v. Shelby County Healthcare Corporation*, 459 S.W.3d 33 (Tenn. 2014), barred Petitioners from claiming the non-discounted amounts of medical expenses charged by Mr. Hall's medical providers as reasonable medical expenses and that *West* limited Petitioners to the discounted amount of expenses paid by Petitioners' private health insurance to the medical providers. (*Id.*) Petitioners responded in opposition. (Pet'r Br. App. A, A57-A59.)

Petitioners filed a motion, pursuant to Rule 23, seeking to certify the issue raised in USF Holland's dispositive motion to this Court. (Pet'r Br. App. A., A82-84.) USF Holland did not

[1] Regional One Health used to be known as the Regional Medical Center at Memphis, or "the Med." It will be referred to throughout as the Med as it was known as the Regional Medical Center during the time period that it provided treatment to Mr. Hall and because the records provided in this case list it as the Regional Medical Center at Memphis.

oppose the motion. (Pet'r Br. App. A., A90-93.) The District Court granted the motion and filed an order certifying the Question Presented to this Court. (Pet'r Br. App. A, A98-A101.)

STATEMENT OF FACTS

Petitioners are attempting to recover medical expenses in the amount of $90,641.85 based on the total amounts charged for medical treatment provided to Mr. Hall by the Med and other private providers. (Pet'r Br. App. A, A15-A18.) The Med charged Mr. Hall a total of $72,173.90 for treatment provided and the remainder was charged by Mr. Hall's private medical providers. (Pet'r Br. App. A, A55, A79.)

Petitioners had health insurance through Cigna. (Pet'r Br. App. A, A55, A80.) Cigna paid $27,417.20 to the Med and $12,997.68 to the remaining private providers as final settlements for all medical charges issued. (*Id.*)

In addition, the Med filed a Notice of Hospital Lien on August 12, 2013. (Resp't Br. App. A, Ex. 1.) The lien claims the amount due is $57,083.72. (*Id.*) It is for treatment rendered to Mr. Hall between June 12, 2013, and June 16, 2013. (*Id.*)

SUMMARY OF THE ARGUMENT

The definition in *West* of what qualifies as a reasonable medical expense applies to personal injury claims against purported tortfeasors. In *West*, despite having received full payment from the patients' insurers, the Med claimed its liens remained valid and it could collect more from patients and/or third-party tortfeasors. This Court conducted a detailed examination of what a reasonable medical expense was to determine if the liens had been extinguished. This discussion linked directly to tort law standards for determining a reasonable medical expense. Tort law standards were incorporated by the General Assembly into the applicable lien statute. In so doing, this Court also recognized the current economic realities that hospital charges today bear no relationship to the value of services provided to patients. These authorities formed the basis for the Court's determination that "[a] more realistic standard is what insurers actually pay and what the hospitals [are] willing to accept." *West*, 459 S.W.3d at 45 (footnote omitted) (alterations in original). *West* clearly applies in the personal injury context.

Applying *West* does not run afoul of the collateral source rule. As in this case, *West* involved the full satisfaction of the non-discounted charges billed by a hospital based on the payment of a discounted amount to settle those charges. The differentials between the discounted amounts paid for Mr. Hall by Cigna and the non-discounted charges from the Med are not a collateral source. Those differentials are not payments made on Mr. Hall's behalf because no money ever changed hands. Those differentials did not become payable when the Med accepted the discounted amount from Petitioners' insurer to settle the charges. These differentials did not forgive the debt and the debt could not be forgiven since full satisfaction was received by the Med for all services provided. Likewise, the differentials are not a gratuitously rendered benefit as Mr. Hall was charged for all services provided and the discounted amounts paid by Cigna addressed all of the medical treatment Mr. Hall received. Finally, the differentials were not a

benefit conferred directly on Petitioners as the Med and Cigna negotiated a lower rate between the two for their benefit. Mr. Hall's direct benefit was the payment of his medical expenses independent of any negotiated rate of reimbursement.

Petitioners incorrectly claim *West* is not applicable to this case because it involved a contract action. *West*, however, was a lawsuit seeking to quash liens filed by the Med and for tort damages against the Med. The contract examinations within the holding arose primarily because the Med was attempting to argue it was permitted to continue to seek recovery from the patient and/or the third-party tortfeasor based on the agreements between it and the patients' insurers. In rendering a holding, this Court primarily looked to tort law and tort law standards for what constituted a reasonable medical expense to determine if the liens were extinguished. The contractual basis was a second reason supporting the first.

Last, public policy considerations support applying the standard in *West* to personal injury lawsuits. The standard set forth in *West* is consistent with Tennessee's approach to economic damages permitting an injured person to recover their financial losses. *West* conforms Tennessee's approach to those damages with the modern economic realities that hospitals issue grossly inflated charges designed to be negotiated down with insurers, and where few persons ever pay the full amount of those charges. By stating that the appropriate standard looked to what was paid and what was accepted by hospitals as payments, *West* clarifies what is relevant evidence when determining the extent of reasonable medical expenses. Finally, if Petitioners' position were accepted, it would create a double standard in damages law where a plaintiff could rely on *West* to limit their debt to the discounted amounts paid to extinguish the lien but claim the non-discounted charges as damages in a tort claim. Such would be a double standard and would lead to an improper windfall to plaintiffs and Petitioners.

STANDARD OF REVIEW

The District Court certified a question of law to this Court on the application of *West* to the determination of what constitutes reasonable medical expenses in a personal injury lawsuit. Such a question requires the application of law to the facts of the case. The standard of review is de novo. *See Benz-Elliott v. Barrett Enterprises, LP*, 456 S.W.3d 140, 147 (Tenn. 2015); *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008).

LAW AND ARGUMENT

This certified question asks this Court to define the outer limits of what constitutes a reasonable medical expense when calculating damages in a tort claim. Petitioners assert certification is needed to address the splintered opinions in Tennessee trial courts over the extent *West* applies to personal injury claims and its impact on the amount of medical expenses that can be claimed as damages. (Pet'r Br. 12-14.) USF Holland agrees the issue is ripe and it should be addressed given the importance of the question raised and the fractured rulings across the State illustrated in Section I of Petitioners' Brief. (Pet'r Br. 12-13.)

The fundamental dispute centers over whether Petitioners can seek to recover as damages the "difference between the original amount of a medical bill and the amount accepted by the medical provider as the bill's full payment." *Robinson v. Bates*, 857 N.E.2d 1195, 1198 (Ohio 2006). *Robinson* refers to this as a "write-off." *Id.* This "write-off" is alternatively referred to as a "negotiated rate differential" since it is the result of the medical provider agreeing to accept a lesser amount as full compensation from the injured party's insurer.[2] *See Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130 (Cal. 2011).

West answers this dispute by foreclosing a litigant's claims that he or she can recover medical charges that exceed what was paid to settle those charges. Petitioners take the incorrect position that they can recover as damages the full amounts charged by the Med and Mr. Hall's medical providers because *West* does not apply to personal injury claims. (*See* Pet'r Br.) That position ignores the scope and basis of this Court's determination.

This Court's holding in *West* applies in personal injury cases because it addressed a subject central to both the Tennessee Hospital Lien Act, Tenn. Code Ann. § 29-22-101 *et seq*. ("HLA")

[2] Given the various use of these terms in the cases being discussed throughout this brief, "write-off" and "negotiated rate differential" will be used interchangeably throughout.

and personal injury claims: economic damages. *See* 459 S.W.3d at 43-46. *West* held that reasonable medical expenses equal what is actually paid to the hospital by the patient's insurer. *Id.* at 45-46. The holding in *West* recognized the current market reality where "[t]he complexities of health care pricing structures make it difficult to determine whether the amount paid, the amount billed, or an amount in between represents the reasonable value of medical services." *Stanley v. Walker*, 906 N.E.2d 852, 857 (Ind. 2009); *see* Michael K. Beard & Dylan H. Marsh, *Arbitrary Healthcare Pricing and the Misuse of Hospital Lien Statutes by Healthcare Providers*, 38 Am. J. Trial Advoc. 255, 273 (2014) ("Beard & Marsh") (discussing the same).

It used to be different. Less than sixty years ago, every patient treated at a hospital was usually charged the base cost of services along with a ten percent markup. Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643, 663 (2008) ("Hall & Schneider"). That direct link between costs and services fractured once insurers began to seek lower rates with the hospitals to pay for medical treatment provided. *See id.* at 663-65. These companies, who insured a large number of persons, negotiated rate reductions with the hospitals who, in turn, began to increase their list charges to counteract the impact the agreed-to discounts had on profit margins. *See id.* Studies have demonstrated that "since the early 1990s, list prices have increased almost three times more than costs, and markups over costs have more than doubled, from 74% to 164%." *Id.* at 663 (footnote omitted). Now, hospital charges "are generally at least double and may be up to eight times what [that] hospital would accept as payment in full for the same services from Medicare, Medicaid, HMOs, or private insurers." George A. Nation III, *Obscene Contracts: The Doctrine of Unconscionability and Hospital Billing of the Uninsured*, 94 Ky. L.J. 101, 104 (2006); *see* Todd R. Lyle, *Phantom Damages and the Collateral Source Rule: How Recent Hyperinflation in*

Medical Costs Disturbs South Carolina's Application of the Collateral Source Rule, 65 S.C. L. Rev. 853, 866-67 (2014).

It follows that the chargemaster, or list, prices of hospitals no longer relate to medical services. "[A] hospital's chargemaster prices are set to be discounted not paid." George A. Nation III, *Determining the Fair and Reasonable Value of Medical Services: The Affordable Care Act, Government Insurers Private Insurers and Uninsured Patients*, 65 Baylor L. Rev. 425, 446 (2013). Issued charges in hospital bills are now arbitrary, inflated amounts used as a negotiating point with health insurers to maximize potential recovery. *See id.* Those charges have no rational relation to the actual value of the medical treatment provided. *See* Hall & Schneider, 106 Mich. L. Rev. at 665 ("Hospital executives confess that 'the vast majority of [charges] have no relation to anything, and certainly not to cost,' and see 'no method to this madness.'" (footnotes omitted)); *see also* John D. Gleissner, *Proving Medical Expenses: Time for a Change*, 28 Am. J. Trial Advoc. 649, 650 (2005) ("A bewildering number of methodologies, agreements, regulations, statutes, limitations, schedules, accounting systems, software, review policies, reports, and practices control the coding, billing, and reimbursement for a diverse and expanding range of medical services."). The result is that "the amount the hospital has agreed to accept for the same services and goods varies dramatically depending on who is paying the hospital." Hall & Schneider, 106 Mich. L. Rev. at 665. Very few patients[3] ever pay the amount of charges issued. *See id.* Nationwide, because of the prevalence of private insurance, government programs and HMOs, "*less than five percent* of patients actually pay [the] full amount" of the charges issued. Lyle, 65 S.C. L. Rev. at 866-67 (emphasis added).

[3] The unfortunate result is "[t]he only patients actually paying the stated charges are the uninsured, a small fraction of medical bill payors." *Law v. Griffith*, 930 N.E.2d 126, 133 (Mass. 2010).

This occurs in Shelby County and at the Med. There is a wide disparity in medical charges issued for similar services among hospitals in Shelby County. *See* Jennifer Johnson Backer, The Daily News Publishing Co. Inc., *Hospital Billings Vary Widely in Memphis*, http://www.memphisdailynews.com/news/2013/may/15/hospital-billings-vary-widely-in-memphis/ (last accessed July 1, 2015). Medicare Provider Utilization and Payment Data from the Centers for Medicare & Medicaid Services ("CMS") reported that the average bill for a Medicare patient who treated at the Med in 2011 was $46,580.54. *See* Doctors.org, *REGIONAL MEDICAL CENTER AT MEMPHIS - Costs, Expenses, & Pricing*, http://www.doctors.org/Tennessee/Memphis/Regional_Medical_Center_At_Memphis/ (last accessed July 1, 2015). In contrast, the Med accepted an average total payment of $11,505.17 for services rendered between payments from Medicare and any deductibles paid by the patient. *See id.* Also in 2011, for the treatment of medical back problems without major complications, the diagnostic code most closely aligned with Mr. Hall's injuries[4], the Med billed an average amount of $58,969.41 but settled those charges for an average of $7,937.17 from Medicare. *See* Data.CMS.gov, *Inpatient Prospective Payment System (IPPS) Provider Summary for the Top 100 Diagnosis-Related Groups (DRG) - FY2011*, https://data.cms.gov/Medicare/Inpatient-Prospective-Payment-System-IPPS-Provider/97k6-zzx3 (last accessed July 1, 2015).

Petitioners ask this Court to ignore the very realities it acknowledged in *West* and that led to this Court's holding. Their view is that the charges issued by the Med and medical practitioners are the best evidence of the reasonable value of medical treatment received. Studies say otherwise. So did this Court when it determined that "reasonable" medical charges do not

[4] Dr. Thomas Schroeppel, Mr. Hall's treating physician, testified that Mr. Hall sustained several transverse process factures in his thoracic and lumbar spine, small pneumothorax on the right side, a renal laceration and a retroperitoneal hematoma on the right side of his back. (*See* Dr. Schroeppel Dep. 29:2-12, 32:17-33:4, 41:16-21, May 7, 2015, Resp't Br. App. A, Ex. 2.) No surgical intervention was performed. (*Id.* at 33:5-11.)

include negotiated rate differentials. 459 S.W.3d at 44-46. This Court's holding in *West* addressed the personal injury context as a foundation for its holding, and the natural and functional result of this Court's determination is that its holding applies in the context of a personal injury lawsuit.

I) THE HOLDING IN *WEST* STATING WHAT QUALIFIES AS A REASONABLE MEDICAL EXPENSE APPLIES TO ECONOMIC DAMAGES SOUGHT IN PERSONAL INJURY CLAIMS

"An injured plaintiff bears the burden of proving that medical expenses the plaintiff is seeking to recover are necessary and reasonable." *Borner v. Autry*, 284 S.W.3d 216, 218 (Tenn. 2009). "In Tennessee, the focus has always been on the 'reasonable' *value* of 'necessary' services rendered." *Fye v. Kennedy*, 991 S.W.2d 754, 764 (Tenn. Ct. App. 1998) (emphasis in original); *see Harkavy v. Phoenix Ins. Co.*, 417 S.W.2d 542, 546 (Tenn. 1967). Petitioners, who have to prove the reasonable value of Mr. Hall's medical expenses, take the position that *West* has no application to this kind of action and it does not impact the outer limits of what they want to claim as damages. (*See* Pet'r Br.)

USF Holland disagrees. *West* limits the damages Petitioners can recover because it stated what a "reasonable" medical expense is. "A more realistic standard is what insurers actually pay and what the hospitals [are] willing to accept" because charges issued by hospitals do not "reflect what is [actually] being paid in the market place." *West*, 459 S.W.3d at 45 (alterations in original) (footnote omitted). "[W]ith regard to an insurance company's customers, 'reasonable charges' are the charges agreed to by the insurance company and the hospital." *Id.* at 46. This is the standard that now applies and the standard should be applied.

Petitioners acknowledge they had insurance coverage through Cigna and Cigna paid discounted rates to Mr. Hall's medical providers, primarily the Med, in full satisfaction of the charges issued. Cigna paid $27,417.20 to the Med and $12,997.68 to the other providers in full

satisfaction of the $72,173.90 in charges from the Med and $18,467.95 from the other providers. Under *West*, Petitioners are precluded from seeking to recover the $90,641.85 charged and are limited to seeking to recover the $40,414.88 actually paid and accepted.

A) *West* Relied On Cases Involving The Determination Of "Reasonable" Medical Expenses In Personal Injury Lawsuit Contexts

West made its primary determination via reliance on personal injury cases. The cases cited to address the standard for a "reasonable" medical expense did not focus on statutory liens for hospitals. *See West*, 459 S.W.3d at 44-45 & n.12-14. This Court focused on cases from other jurisdictions addressing "reasonable" medical expenses in tort claims. *See id.* For example, *Howell v. Hamilton Meats & Provisions, Incorporated,* involved a motor vehicle collision where the plaintiff sustained injuries due to the negligence of the defendant's employee driver. 257 P.3d at 1134. On appeal, the Supreme Court of California addressed whether the defendant was entitled to reduce the awarded medical expenses of $189,978.63 by $130,286.90, which was the amount of medical expenses written-off by the medical providers after plaintiff's insurance paid a reduced rate to settle the charges. *Id.* The *Howell* court rejected an argument that the reasonable medical expenses were the amounts charged by medical providers. *See id.* at 1138. Instead, where a discount had been negotiated on a bill either by the patient or the insurer, the Supreme Court of California did not permit the plaintiff to seek the negotiated rate differential since "the plaintiff ha[d] not suffered a pecuniary loss or other detriment in the greater amount and therefore cannot recover damages for that amount." *Id.* Instead, *Howell* held "an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." *Id.* at 1145.

Howell was to the sole authority this Court relied on. It also cited and quoted with approval the dissent in *Kenney v. Liston*, 760 S.E.2d 434, 451 (W. Va. 2014). *See West*, 459 S.W.3d at 45 n.14. Consistent with Tennessee law, Justice Loughry discussed how the purpose of tort law is to "put the plaintiff in the same position, so far as money can do it, as he would have been [in] if . . . the tort [had] not [been] committed." *Kenney*, 760 S.E.2d at 449 (Loughry, J., dissenting); *see Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999) ("The goal of awarding damages is to repair the wronged party's injury or, at least, to make the wronged party whole as nearly as may be done by an award of money."). He further explained that "allowing a jury to award compensable damages based on fictitious evidence that bears no relationship to the plaintiff's actual losses" but rather "based upon an artificially inflated number that exists only in the medical provider's billing system rather than the actual amount the medical provider willingly accepts as full payment for the services rendered" turns the fundamental rules regarding compensatory damages on its head. *Kenney*, 760 S.E.2d at 449 (Loughry, J., dissenting). Allowing a plaintiff to recover non-discounted hospital charges "allows a plaintiff's damages to be based on an amount a medical provider wishes it could charge for a particular service, not the amount necessary to put the plaintiff in the same financial position he or she was in before the tort occurred." *Id.* at 450.

The reliance on these cases shows *West* extends to the personal injury context. Instead of limiting its discussion to statutory interpretation, the Court looked to tort law standards of reasonableness in order to determine what the appropriate standard is. *West*, 459 S.W.3d at 44-46. Tort law formed the foundation for this Court's declarations that "[a] more realistic standard is what insurers actually pay and what the hospitals [are] willing to accept" and "with regard to

an insurance company's customers, 'reasonable charges' are the charges agreed to by the insurance company and the hospital." *See id.* at 45-46.

B) The Hospital Lien Act Incorporates Tort Law Standards Applicable To Personal Injury Lawsuits

This focus on tort law damages is not surprising given the direct linkage between the HLA and tort law claims. The HLA does not define what a "reasonable" medical expense is. *See* Tenn. Code Ann. § 29-22-101(a). Without an internal definition, this Court had to look elsewhere to determine what qualified as a "reasonable" medical expense. 459 S.W.3d at 44. It looked to several types of lawsuits permitting litigants to recover medical expenses *as damages*. *Id.* This discussion was conjunctive, meaning that the various types of actions – including tort claims – shared a common approach to what is "reasonable" and what is "necessary." *See id.*

This discussion flowed naturally since HLA directly incorporates standards from personal injury lawsuits. The General Assembly enacted the HLA due to "hospitals [] losing funds from providing care to individuals who later collected a settlement or judgment for their injuries but failed to pay their hospital bills." *Shelby Cnty. Health Care Corp. v. Nationwide Ins. Co.*, 325 S.W.3d 88, 93 (Tenn. 2010). It allows a hospital to recover its reasonable medical expenses that the plaintiff recovered as damages in a tort claim when that patient has refused to settle up. *See* Tenn. Code Ann. § 29-22-101(a); *see Martino v. Dyer*, No. M1999-02397-COA-R3-CV, 2000 WL 1727778, at *2 (Tenn. Ct. App. Nov. 22, 2000) ("We interpret Tenn. Code Ann. § 29-22-101 as providing hospitals with a mechanism to ensure that those people who recover damages for injuries pay their hospital bills out of those recoveries."). The language in the HLA confirms this by using language adapted from tort law. It provides liens in favor of hospitals "for all reasonable . . . charges for hospital care, treatment and maintenance of . . . injured persons upon any and *all causes of action* . . . *accruing* to the person to whom such care, treatment or

maintenance was furnished . . . *on account of . . . injuries giving rise to such causes of action* . . . which necessitated such hospital care, treatment or maintenance." Tenn. Code Ann. § 29-22-101(a) (emphases added). Such incorporation is not a limiting factor; it expands the holding in *West* into the personal injury realm the Court sought guidance from to come to its holding.

C) The Discussion in *West* Is A Discussion Of How To Determine The Amount Of An Economic Damage

West also applies to personal injury claims because it focused its examination of "reasonable" medical expenses within the context of an economic loss sustained by the patients. The case arose because the Med claimed several former patients still owed it money even though the patients' insurers had paid a lesser amount to fully satisfy issued charges. *West*, 459 S.W.3d at 36-37. The patients objected and sued to quash the liens. *Id.* at 37. This Court's examination focused on the "debt owed by a patient" to determine the viability of the Med's liens. *Id.* at 43. It then linked the debt to the charges from the Med, stating that a "debt" is "nothing more than charges that have not been paid" and that "[a] hospital's charges and a patient's debt are two sides of the same coin." *Id.* Given the equality of the "charge" and the "debt," the central determination was to determine what the reasonable medical expenses were. *See id.* at 43-44.

A "debt" and a "pecuniary" loss in tort are the same thing. A "pecuniary" loss is a "monetary" loss. *See Black's Law Dictionary* (9th ed. 2009). Similarly, a "debt" is defined as "a specific sum of money due by agreement or otherwise." *Id.* In tort law, economic damages are generally described as "objectively verifiable monetary losses." Tenn. Code Ann. § 29-39-101(1). Those damages include "out-of-pocket medical expenses," which is the amount of money a patient has paid to a medical provider for treatment rendered. *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 419 (Tenn. 2013). Therefore, any determination of the amount

of a "debt" owed to a hospital is a determination of what the patient's economic damages are or could be in a lawsuit. The two are inexorably linked.

II) Negotiated Rate Differentials From The Charges Issued By Medical Providers Are Not Collateral Sources

The "negotiated rate differentials" or "write-offs," that is, the difference between the non-discounted amounts charged and the discounted amounts paid for Mr. Hall's medical treatment, are not collateral sources. "In terms of operation, the collateral source rule has both a substantive aspect that relates to the law of damages, and an evidentiary component that governs what types of evidence may be admitted in evidence at trial." *Law v. Griffith*, 930 N.E.2d 126, 132 (Mass. 2010). In Tennessee, the rule is as follows:

> The collateral source rule precludes a defendant from attempting to prove that a "reasonable" charge for a "necessary" service actually rendered, has been, or will be, paid by another – not the defendant or someone acting on his or her behalf – or has been forgiven, or that the service has been gratuitously rendered. However, a defendant is permitted to introduce relevant evidence regarding necessity, reasonableness, and whether a claimed service was actually rendered.

Fye, 991 S.W.2d at 764.

Petitioners equate any argument or evidence challenging the amounts charged to run afoul of *Fye*. (Pet'r Br. 23-24.) They view the negotiated rate differentials as part and parcel to the insurance payments actually made. (*See id.*) This position lumps together two things that differ drastically. It also misreads the collateral source rule and, in fact, extends the collateral source rule beyond its reasonable limitations.[5]

[5] USF Holland does not take the position the collateral source rule does not apply to the amounts *actually paid* to Mr. Hall's medical providers by Cigna. Those amounts, totaling, $40,414.88, are collateral sources under *Fye*, and Petitioners can attempt to recover those amounts subject to establishing the reasonableness and necessity of the same and any rebuttal of that from USF Holland. 991 S.W.2d at 764. What is at issue is the "negotiated rate differentials" not paid, that is, the difference between the $90,641.85 originally charged less the $40,414.88 actually paid, or $50,226.97.

A) Negotiated Rate Differentials For Charged Medical Expenses Are Not "Payments" Made Under The Collateral Source Rule

The collateral source rule does not apply to the negotiated rate differentials for Mr. Hall's medical bills. Those differentials are not "payments" made on Mr. Hall's behalf. Multiple courts have explained why these "write-offs" do not violate this rule of evidence. The Ohio Supreme Court, examining the common-law collateral source rule, addressed this question succinctly:

> The collateral-source rule does not apply to write-offs of expenses that are never paid. . . . Because no one pays the write-off, it cannot possibly constitute *payment* of any benefit from a collateral source. Because no one pays the negotiated reduction, admitting evidence of write-offs does not violate the purpose behind the collateral-source rule. The tortfeasor does not obtain a credit because of payments made by a third party on behalf of the plaintiff.

Robinson, 857 N.E.2d at 1200 (internal citations omitted) (emphasis in original).

West cited and relied on legal authority in accord with *Robinson* on this point. *Howell* found that the collateral source rule "has no bearing on" negotiated rate differentials to a patient's medical bill due to "the provider, by prior agreement, accept[ing] a lesser amount as full payment." 257 P.3d at 1133. The rule "does not speak to losses or liabilities the plaintiff did not incur and would not otherwise be entitled to recover." *Id.* at 1143. The *Howell* "plaintiff did not incur liability for her providers' full bills, because at the time the charges were incurred the providers had already agreed on" a reimbursement rate with the plaintiff's insurer. *Id.* "Having never incurred the full bill, plaintiff could not recover it in damages for economic loss." *Id.*

Justice Loughry also addressed the collateral source rule in his dissent in *Kenney*. He noted write-offs between a hospital and an insurance company "are not sums for which the plaintiff has incurred any liability because these are amounts which the medical provider never actually expects to be paid and never will be paid." *Kenney*, 760 S.E.2d at 450 (Loughry, J., dissenting). "Because neither the plaintiff, nor anyone on the plaintiff's behalf, pays the 'write-offs' or discounts, no loss occurs[,] [and] [t]herefore, these amounts should not be recoverable." *Id.* As a

result, "*[t]he collateral source rule should not be extended* to permit plaintiffs to receive compensation for medical expenses that were *never paid by anyone*." *Id.* at 452 (emphases added).

Here, Cigna never made payments to the Med or the other medical providers beyond the discounted amounts paid to settle the charges. Lesser amounts were accepted and it is undisputed those payments completely satisfied all debts owed. As *West* makes clear, once the medical provider accepts a reduced amount as full payment, the debt of the patient is extinguished and the hospital's lien is likewise extinguished. 459 S.W.3d at 46. No additional payment is owed or needs to be made. Since no more payments need to be made, negotiated rate differentials do not fall within the collateral source rule.

B) Negotiated Rate Differentials For Charged Medical Expenses Are Not "Forgiven" Amounts Under The Collateral Source Rule

Petitioners also incorrectly claim that the collateral source rule applies if "medical costs are absorbed in whole or in part by the provider as a matter of contract[.]" (Pet'r Br. 24.) Such an argument essentially equates to a claim that the negotiated rate differential is a forgiven amount subject to the collateral source rule. *Fye* applies the collateral source rule to reasonable and necessary charges that have been forgiven. 991 S.W.2d at 764.

The collateral source rule does not apply here because medical expenses were not forgiven. There is no evidence in the record of any of Mr. Hall's charges being forgiven. The opposite occurred. All charges were satisfied for an amount less that the amount charged. Mr. Hall "was never liable for the inflated bill because at the time the charges were incurred, the [Med] and [Cigna] had already agreed on a different price for the services rendered." *Kenney*, 760 S.E.2d at 450 (Loughry, J., dissenting).

The negotiated rate differentials are not forgiven debts; they are an ancillary number resulting from the Med accepting a lesser amount from Cigna in full satisfaction. Given there was no additional debt to be paid, there was no amount remaining to be forgiven. *See West*, 459 S.W.3d at 42 ("When the underlying debt is extinguished, the basis for the lien is extinguished as well.").

C) Negotiated Rate Differentials For Charged Medical Expenses Are Not Gratuitously Rendered Benefits Under The Collateral Source Rule

Further, negotiated rate differentials are not "service[s] . . . gratuitously rendered." *Fye*, 991 S.W.2d at 764. *Fye* clarified that "gratuitously rendered" services refer to "cash gratuities" or "the rendering of services" to a patient by a doctor for which charges were not issued. *Id.* (quoting Restatement (Second) of Torts § 920A cmt. c(3) (1979)). Petitioners attempt to generally equate, by the breadth of their assertions, the "[h]ealth insurance payments" for Mr. Hall with gratuitous services. (Pet'r Br. 23-24.)

No evidence demonstrates Mr. Hall received any gratuitous medical treatment. The record before this Court shows all treatment was provided in return for monetary payment. There is no testimony that any of the treatment was provided free of cost. *Howell* further illustrates why no gratuitous benefit has been provided:

> Where a plaintiff has incurred liability for the billed cost of services and the provider later "writes off" part of the bill because, for example, the plaintiff is unable to pay the full charge, one might argue that the amount of the write-off constitutes a gratuitous benefit the plaintiff is entitled to recover under the collateral source rule. But in cases like that at bench, the medical provider has agreed, before treating the plaintiff, to accept a certain amount in exchange for its services. *That amount constitutes the provider's price, which the plaintiff and health insurer are obligated to pay* without any write-off. *There is no need to determine a reasonable value of the services, as there is in the case of services gratuitously provided.* "[W]here, as here, the exact amount of expenses has been established by contract and those expenses have been satisfied, there is no longer any issue as to the amount of expenses for which the plaintiff will be liable. In the latter case, the injured party should be limited to recovering the amount paid for the medical services."

Howell, 257 P.3d at 1140-41 (quoting *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786 (Pa. 2001), *abrogated on other grounds by Northbrook Life Ins. Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008)) (emphases added).

That is what occurred here. Petitioners had insurance coverage through Cigna that paid a contractually-agreed reduced amount to satisfy the obligation owed. No gratuitous services were provided given that all treatment was paid for. Petitioners have not obtained any gratuitous benefits through the negotiated rate differentials.

D) Negotiated Rate Differentials For Charged Medical Expenses Are Not "Benefits Conferred" Under The Collateral Source Rule

Finally, the negotiated rate differentials between the Med and other providers are not benefits conferred on Petitioners, specifically Mr. Hall. *Fye* adopted the following Restatement provision:

> (2) Payments made to *or benefits conferred on* the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

991 S.W.2d at 764 (quoting Restatement (Second) of Torts § 920A) (emphasis added). Petitioners argue that any reduction to the issued medical charges qualifies as a "benefit" to them and runs afoul of the collateral course rule. (Pet'r Br. 23-24.) However, the collateral source rule only applies to "a benefit that is *directed to* the injured party." *Fye*, 991 S.W.2d at 763 (quoting Restatement (Second) of Torts § 920A cmt. b) (emphasis added). This means a direct benefit and not some secondary result that may favorably impact Petitioners.

How and why negotiated rate differentials occur in the first place demonstrates why there is no direct benefit to Petitioners. "The benefit of insurance to the insured is the payment of charges owed to the health care provider." *Haygood v. De Escabedo*, 356 S.W.3d 390, 395 (Tex. 2012). "An adjustment in the amount of those charges to arrive at the amount owed is a benefit to the

insurer, one it obtains from the provider for itself, not for the insured." *Id.* Instead, "[a]ny effect of an adjustment on such liability is at most indirect and is not measured by the amount of the adjustment." *Id.*

Cases cited and relied upon by this Court in *West* concur with *Haygood*. The *Howell* court explained that "[m]edical providers that agree to accept discounted payments by managed care organizations or other health insurers as full payment for a patient's care do so *not as a gift to the patient* or insurer, but for commercial reasons and as a result of negotiations." *Howell*, 257 P.3d at 1139-40 (emphasis added). Furthermore,

> *[t]he negotiated rate differential lies outside the operation of the collateral source rule also because it is not primarily a benefit to the plaintiff and, to the extent it does benefit the plaintiff, it is not provided as "compensation for [the plaintiff's] injuries."* . . . The primary benefit of discounted rates for medical care goes to the payer of those rates – that is, in largest part, to the insurer. . . . *Nor does the insurer negotiate or the medical provider grant a discounted payment rate as compensation for the plaintiff's injuries.*
>
> . . .
>
> Plaintiff's insurance premiums contractually guaranteed payment of her medical expenses at rates negotiated by the insurer with the providers; *they did not guarantee payment of much higher rates the insurer never agreed to pay.* Indeed, had her insurer not negotiated discounts from medical providers, plaintiff's premiums presumably would have been higher, not lower. In that sense, *plaintiff clearly did not pay premiums for the negotiated rate differential.* Recovery of the amount the medical provider agreed to accept from the insurer in full payment of her care, but no more, thus ensures plaintiff "receive[s] the benefits of [her] thrift" and the tortfeasor does not "garner the benefits of his victim's providence."

Id. at 1144 (citations removed) (emphases added). Justice Loughry agreed in his dissent in *Kenney*. *See* 760 S.E.2d at 450 (Loughry, J., dissenting) ("[T]he 'write off' or discount does not primarily benefit the plaintiff and to the extent that it does, it was not intended as compensation for the plaintiff's injuries.").

This Court implicitly concurred with those cases when it discussed how "[t]he Med *furthered its own economic interest* when it agreed in these contracts to discount its charges for

patients insured by [various insurers]." *West*, 459 S.W.3d at 45 (emphasis added). It then cited to cases in other jurisdictions agreeing that the contracts between the insurers and hospitals further the interests of those entities and are not negotiated for the direct benefit of the insureds. *See id.*

Further, while insureds may be third-party beneficiaries to a contract between a hospital and an insurer, *see Benton v. Vanderbilt University*, 137 S.W.3d 614, 620 (Tenn. 2004), those contracts do not confer a direct benefit on the insured under the collateral source rule. "Insurers and medical providers negotiate rates in pursuit of their own business interests, and the benefits of the bargains made accrue directly to the negotiating parties." *Howell*, 257 P.3d at 1144.

What each party seeks in the transactions involved proves this. Insureds maintain insurance coverage to be indemnified against medical expenses less their deductible or office visit payments in the event such losses occur. The expectation is that the insurer will pay off those expenses, regardless of the amount actually paid to settle the debt. The insurer, in turn, is obligated to pay off any such amounts accrued. That is the benefit conferred on the insured. The insurer, quite clearly, has its own financial interest to consider when paying to settle the insured's charges; it wants to pay less. The hospital, in turn, wants the business from the insurer's insureds and is willing to negotiate a lower rate with the insurer to secure that business. This agreement does not impact the insurer's obligation to pay for medical care; it simply impacts the amount actually paid to the hospital, which only directly benefits the payee (the hospital) and the payor (the insurer). *See Haygood*, 356 S.W.3d at 395; *Howell*, 257 P.3d at 1144. Such an agreement falls outside of the collateral source rule.

III) The Other Arguments By Petitioners Do Not Negate The Application Of *West* To Personal Injury Lawsuits

Petitioners also give several other reasons why they believe *West* does not apply. These arguments can be broken down into two categories. The first is that *West* is a contract case

interpreting and applying contract law and assessing damages under the terms of a contract. (Pet'r Br. 18-22.) The second is that applying *West* violates public policy. (*Id.* at 25-27.) Neither of these arguments demonstrates the inapplicability of *West* here.

A) The Application Of *West* To Personal Injury Actions Is Not An Issue Of Contract Law

Contract law is not at issue here. Petitioners spend considerable time trying to cast *West* as a contract case and to assert USF Holland is seeking to obtain the benefit of the Cigna insurance policy without being a contracting party. (Pet'r Br. 18-22.) This approach is unpersuasive considering what was primarily discussed in *West*.

West was not a contract case. It was a case over how much money was owed to the Med for medical services provided to patients. 459 S.W.3d at 36-37. The Med insisted on enforcing its liens for non-discounted charges despite accepting discounted amounts as full payment from the patients' insurers. *See id.* The Med appealed to this Court because it wanted to seek additional recovery from patients who recovered in lawsuits against the third-party tortfeasors or in a direct action against those tortfeasors. *See id.* at 37-38. That challenge was focused as it was because at least one of the plaintiffs in *West* had filed a personal injury claim against the third-party tortfeasor. *See* Br. for Appellees, *West v. Shelby County Healthcare Corp.*, 459 S.W.3d 33 (Tenn. 2014) (No. W2012-00044-SC-R11-CV), 2013 WL 6159742, at *1. Contracts were examined in *West* in part because the plaintiffs relied on those contracts as a basis for the Med having received full satisfaction and to declare the liens extinguished. 459 S.W.3d at 39. But, this Court looked to those contracts not only for the contractual terms but also as concrete examples of the current market reality that hospitals issued unreasonable charges for treatment provided. *Id.* at 44-45. The determination of what constituted a reasonable medical expense centered on tort law principles with support drawn from the contracts between the Med and the patients' insurers. *Id.* at 45-46.

Petitioners further go astray when they claim that *West* has no application to this matter because contract, not tort, damages were at issue. (Pet'r Br. 19-20.) Again, the plaintiffs in *West* were not claiming they were owed contractual damages. They were claiming the Med wrongly refused to release its liens after accepting full satisfaction from the insurers. *See West*, 459 S.W.3d at 37. Strikingly, the Plaintiffs did not focus on the contracts between the Med and the insurers as a basis for recovery. *Id.* at 39. They instead sought to quash the liens and asserted tort claims against the Med. *See id.* It was the Med that primarily relied on the contracts to claim its liens were not extinguished. *Id.* at 39-40.

Finally, Petitioners focus on irrelevant privity of contract issues. (Pet'r Br. 20-22.) The issue is not whether USF Holland is a third-party beneficiary to the Cigna policy of insurance. USF Holland is neither asserting that it is nor could it make such a claim under *West*. *See* 459 S.W.3d at 47. What USF Holland points out, and what Petitioners ignore, is that this Court did not focus on contracts to find that the non-discounted charges were unreasonable. *Id.* at 44-45. The primary reason was the fact that the hospital charges had no relation to what was "being paid in the market place." *Id.* (footnote omitted). This came after a detailed discussion of tort law principles relating to reasonable medical expenses and how the HLA protects hospitals in the event a patient does not pay the hospital but recovers against the tortfeasor. *Id.* at 43. Privity of contract is simply not at issue.

B) Public Policy Favors Applying The Reasonable Medical Expense Standard In *West* To Personal Injury Actions

Petitioners also point to public policy considerations for why *West* should not be applied to personal injury cases. (Pet'r Br. 25-27.) Careful review of these positions shows little, if any, support for Petitioners. To the contrary, strong policy reasons demonstrate why this Court should confirm that the reasonable medical expense standard in *West* applies to personal injury actions.

1) Applying *West* Is Consistent With The Purpose Of Economic Damages In Personal Injury Lawsuits

The standard for a reasonable medical expense in *West* is consistent with the award of damages Petitioners can seek. "An award of damages, which is intended to make a plaintiff whole, compensates the plaintiff for damage or injury caused by a defendant's wrongful conduct." *Meals,* 417 S.W.3d at 419; *see Overstreet,* 4 S.W.3d at 703. "[O]ut-of-pocket medical expenses," the specific category of damages to be addressed in this matter, are economic damages. *Meals*, 417 S.W.3d at 419. One's recovery of medical expenses in Tennessee law is limited to the actual out-of-pocket losses. *See id.* The easiest means, and the means most consistent with Tennessee's approach to economic damages, is to determine reasonable value of medical services by out-of-pocket losses, or payments, from or on behalf of the specific plaintiff.

Petitioners' position denies this since they claim the amounts charged, not the amounts paid, are their economic losses. (Pet'r Br. 25-26.) They attempt to secure their position by claiming that applying *West* will lead to "disparate, unfair results" primarily because the amount paid for a certain procedure can have a varying range depending what was paid. (*See id.*) No such unfair effects will occur.

Petitioners' argument assumes that medical charges are consistent across the board for patients receiving similar treatment for similar injuries. That is not the case. There is no uniform pricing for hospital charges. *See* Hall & Schneider, 106 Mich. L. rev. at 665. The data clearly shows that the charges vary drastically among hospitals in Shelby County, including the Med, for similar types of services. *See* Data.CMS.gov, *Inpatient Prospective Payment System (IPPS) Provider Summary for the Top 100 Diagnosis-Related Groups (DRG) - FY2011*, https:// data.cms.gov/Medicare/Inpatient-Prospective-Payment-System-IPPS-Provider/97k6-zzx3 (last accessed June 17, 2015). Petitioners' position is that this Court should ratify a system of

damages based on incongruent, fictional charges that bear no relation to the real value of the medical services provided.[6]

Further undercutting Petitioners' position is that it is understood that damage awards in one case may not be similar to what has been awarded in cases with similar injuries or incidents.[7] Damages are a question for the jury to decide. *Lunn v. Ealy*, 141 S.W.2d 893, 894 (Tenn. 1940). Consistent with this, Tennessee has never required that economic damages for similar injuries and similar medical procedures lead to the same awards. *Meals*, 417 S.W.3d at 419. "[T]he proof of damages need not be exact or mathematically precise." *Overstreet*, 4 S.W.3d at 703 (citing *Provident Life & Accident Ins. Co. v. Globe Indem. Co.*, 3 S.W.2d 1057, 1058 (Tenn. 1928)); *see Meals*, 417 S.W.3d at 419. Further, economic damages are only one part of the potential award. *Meals*, 417 S.W.3d at 419-20. Non-economic damages are also recoverable, and those can vary greatly from case to case. *See id.* at 420; Tenn. Code Ann. § 29-39-102. The fact that one party may recover drastically different damages than another similarly situated is a result of several factors, not the least of which is the specific facts of each case and the ultimate verdict decided upon by the jury. These possible differences are not a reason to not apply *West*.

2) Applying *West* Brings Tennessee's Approach To Medical Damages In Line With Current Economic Realities

Not applying *West* would permit plaintiffs to claim medical charges as damages when those charges have no relationship to the actual value of services rendered. Two questions raised in

[6] The problem created by this lack of relationship is amply illustrated in this matter. The treating physician, Dr. Thomas Schroeppel, was deposed by Petitioners on the reasonableness of the medical expenses charged by the Med for treating Mr. Hall between June 12 and June 16, 2013. (Dr. Schroeppel Dep., May 7, 2015, Resp't Br. App. A, Ex. 2.) When cross-examined, Dr. Schroeppel admitted he did not know whether the Med had a chargemaster, how the bills are generated, or even the criteria used to set the charges issued. (*Id.* at 71:2-74:21.) He candidly admitted he has "no idea how they [the Med] come up with the actual numbers." (*Id.*)

[7] Petitioners' concerns about subrogation are mitigated by this. Subrogation is a derivative claim where the insurer stands in the shoes of the insured after making the insured whole. *York v. Sevier Cnty. Ambulance Auth.*, 8 S.W.3d 616, 618 (Tenn. 1999). It is well understood in insurance law that the subrogated insurer is only entitled to recover the amounts it paid to make its insured whole. *See* 16 Steven Plitt et al., *Couch on Insurance* § 223:85 (3d ed. 2014). Petitioners' concerns about insurers having to recover less in subrogation is not problematic since the amount recoverable in subrogation is linked to what the insurer actually pays to its insured.

Justice Loughry's dissent encapsulate the problem with Petitioners' position: "What more probative evidence of reasonable value of the services could there be than the negotiated and paid rate for the services? . . . . Are we to blindly accept the fiction that hospitals and other medical providers routinely and as a matter of freely-negotiated contracts accept *less* than the reasonable value of their services?" *Kenney*, 760 S.E.2d at 452 (Loughry, J., dissenting) (emphasis in original).

The answer to those questions is "no" based on the clear evidence that hospital charges are arbitrary numbers with zero relationship to the actual value of the services provided. *See* Hall & Schneider, 106 Mich. L. Rev. at 663-65; Nation, 94 Ky. L.J. at 104. Those charges are set for purposes of negotiating reimbursement rates with insurers and not to accurately reflect costs. Nation, 65 Baylor L. Rev. at 446; Hall & Schneider, 106 Mich. L. Rev. at 665. Less than five percent of all charges issued by hospitals are paid at the full amount because hospitals agree to accept less from insurance, HMOs or Medicare. *See* Lyle, 65 S.C. L. Rev. at 866-67.

Moreover, this percentage will almost certainly fall given the recent enactment of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), and its mandate that persons purchase insurance coverage in order to expand the health insurance markets. *See* 26 U. S. C. § 5000A; 42 U.S.C. §18091(2)(I). The ACA also included language that requires non-profit hospitals, to keep non-profit status, to not overcharge poor, uninsured patients and to only bill those patients the "amounts generally billed to individuals who have insurance covering such care." I.R.C. §501(r)(5)(A); *see* Nation, 65 Baylor L. Rev. at 467 (discussing the same). These mandates apply nationwide and reinforce the reality that what is paid to hospitals by insurers sets the market value for medical services.

Petitioners ask this Court to ignore the economic reality it addressed in *West*. This Court acknowledged, when discussing the purpose of the HLA, that years ago Tennessee hospitals began increasing charges for reasons unrelated to the actual costs or value of services provided. *West*, 459 S.W.3d at 43("Because of these losses, the hospitals had to increase their charges to their patients."). It also acknowledged the lack of correlation between what hospitals charge for services and what is actually paid for those services based on the current market conditions. *See id.* at 44-45. What Petitioners ask this Court to do is to ignore its own findings on what the best evidence of a reasonable medical expense is.

3) The Standard In *West* Sets Forth A Clear Statement Of The Relevant Evidence Related To Medical Expenses Sought In Personal Injury Lawsuits

In light of these economic realities, a better and fairer approach is to determine the extent of medical damages based on what this Court decreed in *West*. Tennessee permits a tort litigant to recover "objectively verifiable pecuniary damages arising from medical expenses and medical care." Tenn. Code Ann. § 29-39-101(1). Petitioners have the burden of proving[8] the reasonable value of medical expenses as damages. *See Borner*, 284 S.W.3d at 218; *Fye*, 991 S.W.dd at 764. "Reasonable value is what someone normally receives for a given service in the ordinary course of its business from the community that it serves." *Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501, 510 (Pa. Super. Ct. 2003). *West* acknowledged this by stating that "[a] more realistic standard is what insurers actually pay and what the hospitals [are] willing to accept." 459 S.W.3d at 45 (footnote omitted) (alteration in original).

[8] Petitioners raise the argument that applying *West* would nullify the statutory presumption of reasonableness in Tenn. Code Ann. § 24-5-113(b). (Pet'r Br. 17-18.) Applying *West* has no such effect. Section 24-5-113 only provides a rebuttable presumption of reasonableness; it does not fully relieve Petitioners of their burden to prove their medical expenses. *Borner*, 284 S.W.3d at 218. The statute simply exists to "assist[] claimants for whom the expense of deposing an expert may exceed the value of the medical services for which recovery is sought." *Id.* Proponents of medical expenses still have to meet their burdens of production and persuasion since defendants can challenge with "proof contradicting either the necessity or reasonableness of the medical expenses." *Id.*

The lack of relationship between a hospital's charges and the treatment provided negates the relevance of a hospital's charges when determining reasonable value. Relevant evidence is required to establish that value.[9] Tenn. R. Evid. 401 & 402. *West* made clear the amounts charged do not establish the reasonableness of medical expenses by stating what the standard of reasonableness is. 459 S.W.3d at 45-46. "[E]vidence that the reasonable value of such services exceeded the amount paid is irrelevant and inadmissible on the issue of the amount of damages for past medical services." *Corenbaum v. Lampkin*, 156 Cal. Rptr. 3d 347, 361 (Cal. Ct. App. 2013) (citing *Howell*, 257 P.3d at 1140); *see Temple Univ. Hosp.*, 832 A.2d at 510; *but see Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205, 208 (Kan. 2010) (finding both the amounts charged by a hospital and the amounts accepted by the hospital in full satisfaction are admissible and relevant to determining reasonable value); *Stanley*, 906 N.E.2d at 858 (holding same); *Robinson*, 857 N.E.2d at 1200-01 (holding same).

4) Petitioners' Position Equates To A Windfall To Plaintiffs In Personal Injury Lawsuits If *West* Is Not Applied To Tort Claims

Finally, the position taken by Petitioners goes against the purpose of tort law damages. Petitioners are only entitled to be made whole with respect to the actual economic losses incurred for the payment of medical expenses. *Meals*, 417 S.W.3d at 419; *Overstreet*, 4 S.W.3d at 703. Yet, based on the holding in *West*, Petitioners' position is one that would permit them to recover well in excess of those economic damage limitations.

Petitioners want to use *West* as a sword and shield. The Med has asserted a lien against Mr. Hall in the amount of $57,083.72 for treatment provided between June 12 and June 16, 2013.

[9] Any concerns of jury confusion based on the introduction of the amounts paid as evidence of the reasonable value of the medical services can be addressed via a limiting instruction of the jury and/or preventing the jury from being made aware those amounts were paid by insurance. *See* Tenn. R. Evid. 105; *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 199 (Tenn. Ct. App. 2008) (limiting instruction can be provided per the Tennessee Rules of Evidence or the Court's own initiative).

(Ex. 1.) The total charges issued by the Med equal $72,173.90. However, the Med accepted $27,417.20 from Cigna on behalf of Petitioners to settle all charges. Under *West*, the $27,417.20 is Petitioner's amount of the reasonable and necessary medical expenses. 459 S.W.3d at 46.The Med's lien has also been extinguished because the Med has been paid in full. *See id.* Thus, Petitioners will use *West* as a sword to fight any efforts by the Med to recover any other amounts from them due to the Med being fully satisfied. Yet, Petitioners seek to use *West* as a shield on grounds that it does not apply to prevent a party in tort litigation from rightly pointing out the disparity between the $27,173.90 in reasonable medical expenses paid to the Med and the $72,173.90 in charges Petitioners desire to assert are their reasonable medical expenses.

It cannot be had both ways. There is no logical basis to apply different definitions to what constitutes a reasonable medical expense between settling a HLA lien and medical damages recovered in a personal injury case. The standard should be the same. The HLA was expressly designed to reach to tort damages obtained by Petitioners. *See Martino*, 2000 WL 1727778 at *2. This Court examined and applied tort law standards in *West* precisely because there was no definition of "reasonable and necessary charges" in the HLA. 459 S.W.3d at 44. It would likewise be logically inconsistent to not apply *West*'s explanation of what a reasonable medical expense for personal injury cases when there is a similar limitation in the HLA based on tort law principles. *See id.* at 44-46.

Anything less results in a windfall to Petitioners. "To impose liability for medical expenses that a health care provider is not entitled to charge does not prevent a windfall to a tortfeasor; it creates one for a claimant[.]" *Haygood*, 356 S.W.3d at 395. Since Petitioners do not owe those negotiated rate differentials to the Med and their providers, they have not suffered an economic loss for those amounts. *West*, 459 S.W.3d at 45-46. It would override the law of economic tort

damages to permit Petitioners to claim an amount as an economic damage when that amount was never owed to the hospital and, therefore, never paid. *See Haygood*, 356 S.W.3d at 396 (citing *Daughters of Charity Health Services of Waco v. Linnstaedter*, 226 S.W.3d 409, 412 (Tex. 2007)). This would create a double standard in Tennessee tort law, result in a windfall to the plaintiff, and that should not occur.

CONCLUSION

For the above-stated reasons, this Court should hold that *West* applies to personal injury actions filed directly against alleged tortfeasors. Per *West*, an injured person should not be permitted to claim as a reasonable medical expense the non-discounted medical charges – the "negotiated rate differentials" or "write-offs" – never paid when a discounted amount has been paid by the insurer of the injured person as full satisfaction of the debt owed. This Court should hold that the applicable standard in personal injury claims for a "reasonable" medical expense in a situation such as this where the plaintiff has insurance that has paid or is paying the medical expenses in a personal injury lawsuit "is what insurers actually pay and what hospitals [are] willing to accept," and when insurance is involved "'reasonable charges' are the charges agreed to by the insurance company and the hospital." *West*, 459 S.W.3d at 45-46 (alteration in original).

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Counsel for Respondent/Defendant USF Holland, Inc.

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that the foregoing document has been served upon all counsel in this cause by via electronic notification or by placing a true and correct copy of same in the United States mail, postage prepaid, in a properly addressed envelope, or by hand delivering same to each such attorney as follows:

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This the 2nd day of July, 2015.

/s/ Nicoson
Jeffrey E. Nicoson

V00083080368

FILED
AUG 12 2013
CIRCUIT COURT CLERK
BY JBenish D.C.

TO: Shelby County Circuit Court
140 Adams Avenue, Room 324
Memphis, TN 38103

HL-002388-13

NOTICE OF HOSPITAL LIEN

1. Shelby County Healthcare Corporation d/b/a the Regional Medical Center at Memphis maintains and operates a hospital in the State of Tennessee located at 877 Jefferson Avenue Memphis, TN 38103, and has been duly licensed by this state. Regional Medical Center at Memphis hereby gives notice that it is entitled to a lien upon any and all claims of liability or indemnity for damages accruing to Theaudry Hall or to his/her legal representative, for the customary charges for care and treatment or transportation of Theaudry Hall on account of injuries giving rise to such claims and which necessitated such services.

2. Pursuant to statutory requirements to perfect the lien, Regional Medical Center at Memphis submits the following information:

Patient's Name:	**Theaudry Hall**
Address:	**4580 Hansberry Drive** **Memphis, TN 38125**
Account No.:	**V00083080368**
Admit Date:	**June 12, 2013**
Discharge Date	**June 16, 2013**
Amount Due:	**$57,083.72**

3. To the best of the claimant's knowledge, the following is/are the names and addresses of the persons, firms or corporations claimed by the above named ill or injured person or by such person's legal representative, to be liable for damages aring from such illnesses or injuries.

Glenn Vines III - Nahon, Saharovich & Trotz, PLLC
488 South Mendenhall
Memphis, TN 38103

BY: Shane Scott

STATE OF MISSISSIPPI
COUNTY OF ALCORN

The foregoing statement was acknowledged and verified before me this Thursday, August 8, 2013, by Shane Scott the duly authorized Hospital of the above-named health care provider for and on behalf of said hospital.

STATE OF MISSISSIPPI NOTARY PUBLIC ID # 93802 SAILI E. SALINAS Commission Expires Aug. 4, 2017 ALCORN COUNTY

Saili E. Salinas
NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

EXHIBIT
tabbies
A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

THEAUDRY HALL and
MIRACLE HALL,

Plaintiffs,

Vs. Case No. 2:14-CV-02494-SHL-dkv

USF HOLLAND, INC., and
JOHN DOE,

Defendants.

THE DEPOSITION OF THOMAS J. SCHROPPEL, M.D.
May 7th, 2015

ALPHA REPORTING CORPORATION
BRIAN F. DOMINSKI, LCR
236 ADAMS AVENUE
Memphis, Tennessee 38103
(901) 523-8974

EXHIBIT
tabbies
B

abnormalities were found on that CAT scan?
A. He had a small pneumothorax, or puncture of his lung, on the right side. He had Ribs 11 and 12 fractured on the right side. He had transverse process fractures of T-11 and L-1 through L-5.

He also had a retroperitoneal hematoma, which, again, is that collection that we were feeling on exam on the right adjacent to the areas of the rest of his injuries. Additionally he had the renal laceration, which was a Grade 3 out of 5.

MR. VINES: Let's mark this combo CT of the chest as Exhibit Number 7, please, chest, abdomen and pelvis as Number 7. It is a two-page collective exhibit.

MR. NICOSON: 7 or 8?

MR. VINES: 7. I'm sorry. It is Number 8. Thank you.

(The above-mentioned document was marked Exhibit 8, CAT scan combo.)

Q. (BY MR. VINES) Let's talk about those injuries if we could in turn. The puncture of the lung, was that a chronic injury or acute

Q. I see. Okay. The facet joints, those are -- that's a part of the spine. What is the purpose of the facet joints? I'm sorry. I said "facet." Strike that. I'm sorry.

The transverse process, is that a part of the spine?

A. It is. It is a lateral bony process that has ligaments that run from vertebral body to vertebral body to stabilize the spine.

Q. Those transverse process, do they sort of hold the ligaments in place?

A. They do.

Q. Do they hold nerves in place, too?

A. Not nerves.

Q. Just ligaments?

A. Ligaments.

Q. Did he have any fracture of his spine in the mid-back?

A. He had a T-11 transverse process fracture.

Q. Did he have any fractures in his spine in the low back?

A. Lumbar Vertebral Body 18 through 5 transverse process fractures.

Q. So he had fractured Lumbar 1 level, Lumbar 2 level, Lumbar 3 level, Lumbar 4 and Lumbar 5 level?

A. Correct.

Q. Is there any surgery in Mr. Hall's case that could take away the pain?

A. He did not require any surgery for his fractures.

Q. Any surgery that would have been available to take away the pain that he had?

A. He did not require any.

Q. In regard to renal lacerations, what is that?

A. That is essentially a cut or fracture of the kidney.

Q. Okay. In regard to pain, those types of injuries, how painful are they?

A. It is hard to say because that is a visceral organ. Most of his pain is probably honestly related to his hematoma and his other fractures.

Q. I see. Are those -- the laceration of his kidney, are those graded?

A. They are.

therapy and occupational therapy notes in there as well.

MR. VINES: We'll mark that as the next collective exhibit. It is a six-page Collective Exhibit Number 11.

(The above-mentioned documents were marked as Collective Exhibit 11, progress reports and PT/OT notes.)

Q. (BY MR. VINES) What was the purpose of the occupational and physical therapy?

A. To get him up and around and make sure that he was moving and functional with his activities of daily living as well as his ambulation, getting the bathroom, those sorts of things.

Q. Okay. Let me refer you to the progress report of 6/14/2013. In regard to the interval history, was he having any right-flank hematoma pain?

A. Well, it says "right-flank hematoma," paragraph, "painful."

Q. Okay. How was he ambulating at that time?

A. "Well with a walker," according to the

marked Exhibit 17, encounter form, re, Hall.)
Q. (BY MR. NICOSON) I'll ask you very briefly about this document, Doctor.
A. Sure.
Q. The encounter form lists if a patient has insurance coverage or not, does it?
A. It does.
Q. It shows that Mr. Hall had insurance?
MR. VINES: Objection, collateral source.
A. Yes. It lists that.
Q. (BY MR. NICOSON) Cigna is listed as the insurance company?
MR. VINES: Objection, collateral source.
A. Yes.
Q. (BY MR. NICOSON) The Med was a contract with Cigna for reimbursement for medical charges of insured patients, does it not?
A. Have no idea. Those contracts vary by almost -- certainly by year and sometimes more frequently. I have no idea whether The Med has a contract with Cigna.
Q. The Med does have contract with

insurance providers to order to cover medical charges that are generated at The Med?

MR. VINES: Objection, collateral source.

A. Yes, some medical providers.

Q. (BY MR. NICOSON) Some medical providers?

A. Correct.

Q. You are uncertain of the extent of those medical providers?

A. Again, uncertain.

MR. NICOSON: If you'd like to make a running objection, I'll agree to that.

MR. VINES: Sure, standing objection.

MR. NICOSON: Understand, just so we're not gumming up the record.

MR. VINES: Makes sense.

Q. (BY MR. NICOSON) You are unaware of the number of contracts The Med has with medical providers?

A. I have no idea about the number of contracts.

Q. Excuse me. Strike that. You have no idea about the number of contracts between the

Regional One Medical Center and insurance carriers?

A. Correct.

Q. You therefore have no yeah idea in a certain insurance carrier as negotiated a different rate for a certain treatment that another carrier may have?

A. Correct.

Q. Who is involved in those processes?

A. I would imagine the administration.

Q. Is the administration the people who keep the charge master for the hospital?

A. I would imagine so.

Q. The charge master, just for the benefit of the jury, contains the prices for all services, goods and procedures that is used to generate patient's bill in a hospital?

A. I believe so. That's completely out of my area of expertise.

Q. You unaware of whether or not the Regional Medical Center has a charge master?

A. I imagine they do, but, again, I have no idea who that person is or where they work.

Q. For purposes of the bills you opine on,

you have no involvement in the generation of those bills?

A. I provided the services. Someone else entirely generates the bills based on the services provided. I have no involvement with the rates negotiated, unnegotiated or even what they charge for.

Q. That's what I was going to ask you, if you had any familiarity with the charge that is actually provided based on the bill.

A. My familiarity with the bills is providing -- is having reviewed multiple bills from other depositions. I have no idea where they come up with the actual numbers.

Q. You don't know the criteria for how the rates from a charge master might be set?

A. No.

Q. So you don't know how often those rates would then be modified or amended?

A. Correct. I have no idea how often they are modified or amended.

Q. The Med also accents reimbursement for Medicare or Medicaid, does it not?

A. It does.

IN THE SUPREME COURT FOR THE STATE OF TENNESSEE

HEALY HOMES, LLC, *Defendant/Petitioner,* v. WEST BEND MUTUAL INSURANCE COMPANY, *Plaintiff/Respondent.*	}	No. M2021-00902-SC-R23-CV Trial Court Docket No. 3:20-cv-00003-DCLC-HBG, The United States District Court for the Eastern District of Tennessee, Knoxville Division

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BRIEF OF RESPONDENT WEST BEND MUTUAL INSURANCE COMPANY

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Counsel for Plaintiff/Respondent West Bend Mutual Insurance Company

Respondent Requests and Applies for Oral Argument Per Rule 23, § 7(B) of the Rules of the Supreme Court of the State of Tennessee

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JURISDICTIONAL STATEMENT

This matter is before this Court on certified questions from the United States District Court for the Eastern District of Tennessee, Knoxville Division (the "District Court"). This Court has jurisdiction to hear this matter pursuant to Rule 23 of the Rules of the Supreme Court of the State of Tennessee. The District Court is a proper applicant pursuant to Rule 23, § 1. It certified two question of state law to this Court from the case of *West Bend Mutual Insurance Company v. Healy Homes, LLC*, No. 3:20-cv-00003-DCLC-HBG (E.D. Tenn., filed January 3, 2020), on August 5, 2021. (Pet'r Br. App. 1.) The Clerk of the District Court served copies of this Certification Order upon all counsel of record in this matter and filed the order on August 9, 2021, with the Clerk of the Supreme Court of Tennessee in Nashville under seal along with proof of service.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The District Court certified the following questions of law:

1. Does a standard CGL Form Pollution Exclusion, like the one contained in the insurance Policy executed between West Bend Mutual Insurance Company and Healy Homes, LLC, apply only to traditional environmental pollution into the air, water, and soil, or does it apply equally to negligence involving toxic substances and traditional environmental pollution?

2. Do the materials complained of in the Underlying Lawsuit[1], namely "debris, dirt, top soil, mud, silt, and other waste material" qualify as "pollutants" according to Tennessee's interpretation of the definition for "pollutant" contained in the Policy's CGL Form Pollution Exclusion?

(Pet'r Br. App. 1 at 11-12.)

[1] Per the Order, "[t]he 'Underlying Lawsuit' refers to the action filed by landowners Charles and Shirley Holland against Healy Homes, LLC: *Charles Holland and his wife Shirley Holland, v. Healy Homes, LLC et al.*, No. 2-276-19, Knox County Circuit Court, filed August 1, 2019." (Pet'r Br. App. 1 at 12 n.5.)

STATEMENT OF THE CASE

Plaintiff/Respondent West Bend Mutual Insurance Company ("West Bend") filed a declaratory judgment action against Defendant/Petitioner Healy Homes, LLC ("Healy Homes") in the United States District Court in the Eastern District of Tennessee on January 3, 2021. (*See* Pet'r Br. App. 2.) West Bend sought a declaration that it did not owe a duty to defend and/or a duty to indemnify Healy Homes in a lawsuit filed by Charles and Shirley Holland (the "Hollands") against Healy Homes and other named defendants, styled as *Charles Holland, et al. v. Healy Homes, LLC, et al.*, Case No. 2-276-19, presently pending in the Circuit Court of Knox County, Tennessee (the "Underlying Lawsuit"). (*See id.* at 1-18.) West Bend contended the absolute pollution exclusion in the Commercial General Liability ("CGL") Coverage Form of the Policy bars coverage and indemnification for the Underlying Lawsuit.[2] (*See id.* at 16 ¶¶ 63-64.) Healy Homes answered and denied West Bend was entitled to declaratory relief. (*Id.* App. 3.)

On October 3, 2020, West Bend filed a Motion for Judgment on the Pleadings with an accompanying Memorandum of Law that asked the District Court to declare that the absolute pollution exclusion barred coverage and indemnification for the Underlying Lawsuit. (Pet'r Br. App. 5 & 6.) Healy Homes responded in opposition on December 4, 2020. (*Id.* App. 7 at 1-25.) Healy Homes included an alternative request that the District Court

[2] West Bend also contended a defense and indemnification was not owed under the known loss/loss-in-progress doctrine and due to a material misrepresentation in the insurance application of Healy Homes. (Pet'r Br. App. 2 at 16-17 ¶ 64.) Those issues are not before this Court.

certify a question to the Tennessee Supreme Court on whether the absolute pollution exclusion applies to all pollutants or only to traditional environmental pollutants. (*See id.* at 24.) West Bend filed a Reply in support of its Motion. (Pet'r Br. App. 11 at 1-4.) West Bend also opposed the certification request. (*See id.* at 8-10.)

On August 5, 2021, the District Court granted the request for certification and certified two questions to this Court on the absolute pollution exclusion. (Pet'r Br. App. 1.)

STATEMENT OF FACTS

The Hollands filed the Underlying Lawsuit on August 1, 2019. (Pet'r Br. App 2 at 89-103.) They own real property and reside at 11520 Hardin Valley Road, Knoxville, Tennessee 37932. (*See id.* at 92 ¶ 1 & 94 ¶ 7.) The Hollands had "constructed, at their own expense, a lake on the property which they used to recreate, including stocking the lake with fish." (*Id.* at 94 ¶ 7.) Healy Homes began developing an adjacent plot of land in 2016 to construct a residential subdivision. (*See id.* ¶¶ 8-9.) The development, named "The Highlands at Hardin Valley," sits "on top of a ridge above the [Hollands'] property" and "[s]lopes on the ridge between the site project property Plaintiffs' property exceed 25% in several places." (*Id.* ¶¶ 10-11.) The approved construction plans laid out the substantial excavation and extensive grading needed to build the roads and lots in the subdivision.[3] (*See id.* at 94-95 ¶¶ 11-13.)

The Hollands claim work began on the Highlands at Hardin Valley around August 2016. (*Id.* at 95 ¶ 13.) The earthwork and grubbing denuded the ridgetop to the point that, from August 2016 forward, substantial rains led to "water, mud, silt and debris from the site project property flow[ing] down the ridge into [the Hollands'] lake." (*Id.*) "The flow of water, mud, silt and debris from the site project property into [the Hollands'] lake, which did not occur prior to the commencement of construction, [] caused significant damage to [the Hollands'] lake rendering it unusable for the purposes for which it was originally constructed." (*Id.* ¶ 14.)

[3] The Pipe Doctor, LLC performed the grading and earthwork for Healy Homes. (Pet'r Br. App. 2 at 94-95 ¶ 12.)

The Underlying Lawsuit asserted causes of actions for negligence, nuisance, and trespass against Healy Homes and the other defendants. (Pet'r Br. App 2 at 95-102.) The Hollands alleged Healy Homes negligently failed to control project construction and site grading leading to the flow and "deposit of debris, dirt, top soil, and other waste material" into the Hollands' lake. (*Id.* at 96 ¶ 18(c).) In the nuisance cause of action, the Hollands asserted "an increased flow of water, mud, silt and debris has come on the property . . . in large quantities and has flowed into the [Hollands'] lake in a manner that did not occur prior to the Defendants' actions" and that "[t]he stagnant water, mud, silt and debris has rendered the [Hollands'] pond unusable for its prior purposes, unwholesome and unhealthy." (*Id.* at 100 ¶ 25.) The Underlying Lawsuit asks for $1,500,000 in damages, plus reimbursement of various costs and fees. (*Id.* at 102.) Healy Homes notified West Bend of the Underlying Lawsuit and requested a defense and/or indemnification. (*Id.* at 15 ¶ 58.)

Prior to this, on June 11, 2018, West Bend issued a Commercial Lines Package policy, policy # A4644587 00, effective from June 11, 2018, to June 11, 2019 (the "Policy"), with Healy Homes as the Named Insured. (*Id.* at 8 ¶ 43, 39-88.) The Policy contained a Commercial General Liability Coverage Form (CG 00 01 04 13) (the "CGL Form"). (*Id.* at 8 ¶ 45, 57-72.) The CGL Form extends coverage to Healy Homes to "pay those sums [Healy Homes] becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." (*Id.* at 57 § I(1)(a).) Coverage only exists if the "'property damage' is caused by an 'occurrence[.]'" (*Id.* § I(1)(b)(1).)

The CGL Form contains an Exclusion section with the following relevant exclusion:

> **2. Exclusions**
>
> This insurance does not apply to:
>
> * * *
>
> **f. Pollution**
>
> **(1)** "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" . . . .

(*Id.* at 58-59.) "Pollutants" are defined in the Definitions section as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." (*Id.* at 71.)

West Bend agreed to provide a defense to Health Homes subject to a full reservation of rights and sent a detailed Reservation of Rights letter to Healy Homes. (*See id.* at 15 ¶ 59, 104-110.) West Bend filed its Complaint for Declaratory Judgment on January 3, 2020. (*Id.* at 111-113.)

SUMMARY OF THE ARGUMENT

The Certified Questions should be answered in favor of West Bend. First, the absolute pollution exclusion in the CGL form of the Policy is not limited to only excluding traditional environmental pollution. This is a judicially-created limitation that does not draw directly from the exclusionary language. Instead, a "pollutant" refers to "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste," with "waste" referring to "materials to be recycled, reconditioned or reclaimed." The language is inclusive and contains no internal references to environmental laws or specific types of environmental pollution. Instead, a "pollutant" is "any solid, liquid, gaseous or thermal irritant or contaminant" not bound by any environmental limitations.

The main body of the exclusion is written similarly. The absolute pollution exclusion applies when there is an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" There are no limitations within to environmental laws, that the "pollutant" be hazardous, or any reference to a specific kind of pollution. Further, any limitation to "traditional environmental pollution," as it is generally understood, would effectively rewrite the exclusion to remove the "alleged" or "threaten" language.

Numerous courts have examined the plain language of the absolute pollution exclusion, concluded it is unambiguous as written, and found the exclusion is not limited to traditional environmental pollution.

To the second Certified Question, the "debris, dirt, top soil, mud, silt, and other waste material" alleged in the Underlying Lawsuit are "pollutants." The Hollands assert solid and liquid contaminants were loosened by grading on the ridgetop development and flowed into the their lake during rainstorms. Those contaminants meet the definition of a "pollutant" and satisfies the "actual" and "alleged" requirements within the exclusionary text. Further, several courts have concluded that the absolute pollution exclusion applied in similar contexts to construction fill materials or earth loosened during construction activities that then is swept away by stormwater.

Such an approach is consistent with how Tennessee and federal authorities view sediment and silt in waterways. Several analogous laws treat sediment, silt, and contaminated stormwater runoff as pollutants. Land developers like Healy Homes are required to account for these potential pollutants when developing land. A reasonable person in Healy Homes' position would view and understand that sediment-laden stormwater runoff that flows onto a property adjacent to the development would be "pollution."

STANDARD OF REVIEW

The District Court certified two questions to this Court on an insurance policy. Questions on the extent of coverage permitted by a policy of insurance are contractual questions and, therefore, questions of law. *See St. Paul Fire & Marine Ins. Co. v. Torpoco*, 879 S.W.2d 831, 833 (Tenn. 1994). Additionally, "Rule 23 permits consideration of questions of law only, not questions of fact or controversies as a whole." *Embraer Aircraft Maint. Servs., Inc. v. AeroCentury Corp.*, 538 S.W.3d 404, 409 (Tenn. 2017) (quoting *Seals v. H & F, Inc.*, 301 S.W.3d 237, 241 (Tenn. 2010)). Certified questions of law are reviewed *de novo*. *Id.*

LAW AND ARGUMENT

Soil science is not a terribly exciting discussion topic. Few people would bring it up for fun; most would make a hasty exit if someone did start discussing it *ad nauseum*. Most people do not regularly discuss the composition of soil.[4] They likely do not consider how soil forms through the interaction of several factors, including location and parent material.[5] Nor would they drone on about the various horizons in soil and how those horizons interact with one another.[6] To pretty much everyone, soil is just "dirt."

"Dirt" on its own seems innocuous. Soil the stuff right below the grass and trees. Farmers plant crops to grow in it. Families build houses on top of it. The dog might dig down into the soil to bury a bone or to exasperate its owner. It is not a natural inclination to view soil or its components as a "pollutant." In its natural, undisturbed state, it is not one. But soil can be disturbed and those disturbances can turn soil into a pollutant.

---

[4] "Soil is a naturally occurring mixture of mineral and organic ingredients with a definite form, structure, and composition" comprised of varying amounts of minerals, water, air, and organic matter. Natural Res. Conservation Serv., *Soils 101*, *available at* https://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/edu/7thru12/?cid=nrcseprd885606#form (last accessed Oct. 15, 2021).

[5] "Soils develop as a result of the interactions of climate, living organisms, and landscape position as they influence parent material decomposition over time." *Id.*

[6] "A soil horizon . . . is a layer within a soil sample that exists because of differences in chemical, physical, and biological processes at different depths below the land surface of the soil, measured from the surface of the land downward." *Babel v. Schmidt*, 765 N.W.2d 227, 236 (Neb. Ct. App. 2009).

Developers disturb the soil when they clear, grub, and regrade land to build residential subdivisions and commercial properties. And developers, such as Healy Homes, are fully aware "[d]isturbed soil, if not managed properly, can be washed off-site during storms." Tenn. Dep't of Env't & Conservation, *Tennessee Erosion & Sediment Control Handbook*, at iii, *available at* https://tnepsc.org/TDEC_EandS_Handbook_2012_Edition4/TDEC%20EandS%20Handbook%204th%20Edition.pdf (last accessed Oct. 15, 2021). The Tennessee Department of Environment and Conservation ("TDEC") notes "[e]xcessive silt" from washed-off soil "causes adverse impacts due to biological alterations, reduced passage in rivers and streams, higher drinking water treatment costs for removing the sediment, and the alteration of water's physical/chemical properties, resulting in degradation of its quality" through a process known as "siltation." *Id.* Because of this, developers like Healy Homes must use erosion prevention and sediment control measures and execute stormwater pollution prevention plans to stop disturbed soil and stormwater runoff from polluting waterways, lakes and ponds, sewer systems, and neighboring lands. *See generally id.* at 72-307.

The Hollands assert Healy Homes wanted to build a subdivision on the ridgetop above their property. Healy Homes moved copious amounts of soil when creating what became the Highlands at Hardin Valley. The Underlying Lawsuit[7] states earthmoving by Healy Homes disturbed the soil so much that

[7] Healy Homes pretends the operative underlying complaint is the First Amended Complaint filed by the Hollands. (Pet'r Br. at 10 n.1.) The Underlying Lawsuit is the one attached to the Complaint for Declaratory Judgment. (*Id.* App. 2 at 89-103.) There is, however, no substantive difference between the two pleadings on the relevant allegations against

substantial rains led to "water, mud, silt and debris from the site project property flow[ing] down the ridge into [Hollands'] lake" and this "flow of water, mud, silt and debris from the site project property into [Hollands'] lake . . . caused significant damage to [the Hollands'] lake rendering it unusable for the purposes for which it was originally constructed." (Pet'r Br. App. 2 at 95 ¶¶ 13-14.) The "increased flow of water, mud, silt and debris has come on the property . . . in large quantities and has flowed into the [Hollands'] lake in a manner that did not occur prior to the [Healy Homes'] actions" and "[t]he stagnant water, mud, silt and debris has rendered the [Hollands'] pond unusable for its prior purposes, unwholesome and unhealthy." (*Id.* ¶ 25.)

The certified questions center on the sediment, silt, and waste materials that flowed from the Highlands at Hardin Valley into the Hollands' lake and ask this Court to decide a question of first impression: how extensive is scope of the absolute pollution exclusion in a CGL form policy? "This type [of] pollution exclusion is common in the insurance industry." *State Auto. Mut. Ins. Co. v. Frazier's Flooring, Inc.*, No. 3:08-CV-178, 2009 WL 693142, at *6 (E.D. Tenn. Mar. 13, 2009). "[I]ts applicability depends upon the affirmative confluence of three elements: the bodily injury or property damage in question must have been caused by exposure to a 'pollutant'; that exposure must have arisen out of the actual, alleged, or threatened discharge, dispersal, release, or escape of the pollutant; and that discharge, dispersal,

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Healy Homes. The allegations in those two pleadings are the same; the only difference is the addition of the so-called "Steele Defendants," who are alleged to have committed the same acts and omissions as Healy Homes on a separate nearby parcel. (*Compare id. with* Pet'r Br. App. 4-1 at 4-19.)

release, or escape must have occurred at or from certain locations or have constituted 'waste.'" *Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789, 801 (Ala. 2002).

Courts, however, have split into "two distinct views on the scope of the exclusion." *Sulphuric Acid Trading Co. v. Greenwich Ins. Co.*, 211 S.W.3d 243, 251 (Tenn. Ct. App. 2006). "One camp maintains that the exclusion applies only to traditional environmental pollution into the air, water, and soil, but generally not to all injuries involving the negligent use or handling of toxic substances that occur in the normal course of business." *Id.* (quoting *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1208-09 (Cal. 2003)). "The other camp maintains that the clause applies equally to negligence involving toxic substances and traditional environmental pollution." *Id.* (quoting *MacKinnon*, 73 P.3d at 1209). The overriding question on "whether [the exclusion] is interpreted to apply to any kind of pollution or only traditional environment pollution depends upon which state's law is applied." *Frazier's Flooring*, 2009 WL 693142 at *6.

Issues with delineating the outer boundaries of pollution exclusions started after these exclusions were first introduced into insurance policies during times of heightened environmental awareness. *Sulphuric Acid Trading Co.*, 211 S.W.3d at 248-49 (quoting *American States Ins. Co. v. Koloms*, 687 N.E.2d 72 (Ill. 1997)). In 1966, insurers switched from accident-based policies to occurrence-based policies in response to courts finding the former covered "pollution-related injuries." *See id.* (quoting *Koloms*, 687 N.E.2d at 80). "Despite these changes, courts continued to construe the policy to cover damages resulting from long-term, gradual

exposure to environmental pollution." *Koloms*, 687 N.E.2d at 80. Subsequent environmental legislation at the federal level spurred further changes as the new laws "included provisions for cleaning up the environment, [which] imposed greater economic burdens on insurance underwriters, particularly those drafting standard-form CGL policies." *Sulphuric Acid Trading Co.*, 211 S.W.3d at 249 (quoting *Koloms*, 687 N.E.2d at 80). Insurers began issuing an endorsement to CGL policies in 1970 that excluded coverage for "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants . . . but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." *Id.* at 249-50 (quoting *Koloms*, 687 N.E.2d at 80). This endorsement was "incorporated . . . directly into the body of the policy as exclusion 'f'" in 1973. *Id.* at 250 (quoting *Koloms*, 687 N.E.2d at 80). These exclusions were "[o]riginally developed by commercial insurers in response to environmental regulations enacted by Congress in the 1960s and 1970s which exposed them to exponentially greater liability related to claims arising from mass environmental contamination." *Georgia Farm Bureau Mut. Ins. Co. v. Smith*, 784 S.E.2d 422, 425 (Ga. 2016) (citing *Peace ex rel. Lerner v. Northwestern Nat. Ins. Co.*, 596 N.W.2d 429, 445 (Wis. 1999)). Those initial exclusions "were directed specifically at environmental pollution claims." *Id.*

Following this, insurers and insureds frequently litigated what "sudden and accidental" meant. *See Sulphuric Acid Trading Co.*, 211 S.W.3d at 250 (quoting *Koloms*, 687 N.E.2d at 80-81). The so-called "qualified pollution

exclusion"[8] was redrafted in 1985 into the language that exists today and is at issue before this Court. *See id.* (quoting *Koloms*, 687 N.E.2d at 81). Four key changes were made:

- First, the revised language "dropped the phrase 'but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;'"
- Second, the revised language "dropped the phrase 'into or upon the land, the atmosphere or any water course or body of water;'"
- Third, the revised language "restructured the exclusion and added four conditional phrases including the key phrase 'at or from premises you own, rent or occupy;'" and
- Fourth, the revised language "dropped the adjective 'toxic' before the word 'chemicals.'"

Peace, 596 N.W.2d at 445. Once again, the purpose of these changes was to limit potential liability for the emission of "pollutants," but litigation continued apace with respect to the exclusion's scope. *Sulphuric Acid Trading Co.*, 211 S.W.3d at 250-51 (quoting *Koloms*, 687 N.E.2d at 81).

Tennessee courts have not yet decided on scope of the absolute pollution exclusion. The *Sulphuric Acid Trading Company* court came the closest but it took neither side. 211 S.W.3d at 252-54. That case involved the discharge of "1,800 gallons of sulphuric acid . . . into the air and onto the surrounding area" after "a transloading coupling on top of the rail tank car allegedly broke." *Id.* at 245. An employee of a subcontractor to the loading company

[8] Pollution exclusion versions from 1973 to 1985 were commonly called "qualified pollution exclusions" primarily due to the "sudden and accidental" language that added an exception to the exclusion. *See Drexel Chem. Co. v. Bituminous Ins. Co.*, 933 S.W.2d 471, 474-75 (Tenn. Ct. App. 1996) (discussing the history of the "qualified pollution exclusion").

was sprayed with the acid. *Id.* The injured employee sued the owner of the sulphuric acid and the loading company. *See id.* The owner of the acid filed a declaratory judgment action seeking coverage on the insurance policy of the loading company; the insurer contended the absolute pollution exclusion excluded coverage. *See id.* at 246. The Tennessee Court of Appeals affirmed the decision to grant summary judgment to the insurer. *See id.* at 247-55.

The decision was affirmed without deciding on the scope of the absolute pollution exclusion. The insurer argued the exclusion applied regardless of which interpretive approach was adopted and, alternatively, that the exclusion covered both traditional environmental pollution and the negligent release of toxic substances. *Sulphuric Acid Trading Co.*, 211 S.W.3d at 252-53. The insured loading company posited that the exclusion on barred coverage for "classic environmental pollution" only. *Id.* at 251-52. After reviewing the approaches taken in other jurisdictions, the Tennessee Court of Appeals determined the exclusion language was "not ambiguous" and that the sulphuric acid spill was "the type of 'classic environmental pollution' that would trigger the Absolute Pollution Exclusion under *either* of the two lines of reasoning adopted by the various states." *Id.* at 254 (emphasis in original). Thus, the issue was tabled for the time being. *Id.* at 254 ("As to which of the two diverse lines of cases should be adopted in Tennessee, that decision must await another day and another case.")

Now, the District Court has requested that this Court determine the scope of the absolute pollution exclusion in a form CGL policy and if the "debris, dirt, top soil, mud, silt, and other waste material" that flowed into and fouled the Hollands' lake are "pollutants." (Pet'r Br. App. 1.) Healy

Homes claims this exclusion is ambiguous because Tennessee has no controlling precedent and because there is a disagreement among various courts on the scope of the exclusion. (Pet'r Br. at 17-26.) West Bend takes a straight-forward position based on the actual text found in the exclusion: the exclusion language is not limited to traditional environmental pollution and the "debris, dirt, top soil, mud, silt, and other waste material" in the Underlying Lawsuit are "pollutants."

The Certified Questions turn on interpreting contractual provisions in an insurance policy. *See Lammert v. Auto-Owners (Mut.) Ins. Co.*, 572 S.W.3d 170, 172-73 (Tenn. 2019). Tennessee courts "construe insurance contracts in the same manner as any other contract." *Id.* (quoting *Am. Justice Ins. Reciprocal v. Hutchison*, 15 S.W.3d 811, 814 (Tenn. 2000)). "The language of the policy must be taken and understood in its plain, ordinary and popular sense." *Hutchison*, 15 S.W.3d at 814. "In addition, contracts of insurance are strictly construed in favor of the insured, and if the disputed provision is susceptible to more than one plausible meaning, the meaning favorable to the insured controls." *Lammert*, 572 S.W.3d at 173 (quoting *Garrison v. Bickford*, 377 S.W.3d 659, 664 (Tenn. 2012)). However, "[a] strained construction may not be placed on the language used to find ambiguity where none exists." *Id.* (quoting *Farmers-Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975)).

I) The Absolute Pollution Exclusion In The Standard CGL Form Applies Beyond Traditional Environmental Pollution

The District Court requested a determination if the exclusion is limited to "traditional environmental pollution." But that raises a question: what

does "traditional environmental pollution" refer to? Courts using this as a limiting principle for the absolute pollution exclusion have not settled on a uniform definition. Generally, it appears to refer to "hazardous material discharged into the land, atmosphere, or any watercourse or body of water." *Kim v. State Farm Fire & Cas. Co.*, 728 N.E.2d 530, 535 (Ill. Ct. App. 2000); *see Westchester Fire Ins. Co. v. City of Pittsburg, Kan.*, 768 F. Supp. 1463, 1471 (D. Kan. 1991) ("environmental degradation or contamination . . . such as waste water treatment, smokestack emissions, or dumping at a landfill"); *R.T. Vanderbilt Co., Inc. v. Hartford Accident & Indem. Co.*, 156 A.3d 539, 626 (Conn. Ct. App. 2017) (definition includes "the dumping of hazardous waste"); *Travelers Indem. Co. v. MTS Transp., LLC*, No. 11-CV-01567, 2012 WL 3929810, at *15 (W.D. Pa. Sept. 7, 2012) ("[T]raditional environmental pollution may be defined as the release of a hazardous substance into the water, land, or air of the United States."); *Starr Surplus Lines Ins. Co. v. Star Roofing, Inc.*, No. 1 CA-CV 18-0641, 2019 WL 5617575, at *5 (Ariz. Ct. App. Oct. 31, 2019) ("an unintended toxic chemical spill or during a hazardous waste remediation effort").

Other courts use other definitions. One court says the term only refers to "environmental catastrophe related to *intentional* industrial pollution." *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 937 (N.J. 2005) (quoting *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679, 681 (Ky. Ct. App. 1996)) (emphasis added). Another approach limits the term to "chemical spills that would require massive and costly environmental cleanups under federal environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")."

Amerisure Mut. Ins. Co. v. Paul Howard Constr. Co., No. 1:06CV202, 2007 WL 9747637, at *6 (M.D.N.C. Mar. 27, 2007) (citing *MacKinnon*, 73 P.3d at 1208-09 (Cal. 2003)). Some courts in the same state cannot even agree on a uniform definition. *Compare Kim*, 728 N.E.2d at 534 ("Traditional environmental pollution" defined as "hazardous material discharged into the land, atmosphere, or any watercourse or body of water.") *with Country Mut. Ins. Co. v. Hilltop View, LLC*, 998 N.E.2d 950, 958 (Ill. Ct. App. 2013) ("We find this definition somewhat misleading because many materials can be hazardous to a body of water but beneficial to the land. As a result, the fact a material is hazardous in certain situations does not always justify a label it constitutes a 'hazardous material.'"). One court summed up the lack of clarity by noting, somewhat tongue-in-cheek, that decisions often "applied the standard used by most courts, *i.e.*, the '"[w]e-know-it-when-we-see-it' standard to determine what constitutes traditional environmental pollution.'" *Chubb Custom Ins. Co. v. Standard Fusee Corp.*, 2 N.E.3d 752, 761 (Ind. Ct. App. 2014) (quoting *Conn. Specialty Ins. Co. v. Loop Paper Recycling, Inc.*, 824 N.E.2d 1125, 1138 (Ill. Ct. App. 2005)).

A contract, however, cannot be subjected to such a definition that changes on the whims of those who review it. The lack of precision in defining "traditional environmental pollution" shows it is an improper tipping point for assessing scope and would result a more splintered body of jurisprudence based on what each court decides that term means. When it comes to determining what a "pollutant" is, the CGL form in the Policy "assign[ed] a specific definition and [did] not leave the term 'pollutant' open

to such an interpretation." *Evanston Ins. Co. v. Harbor Walk Dev., LLC*, 814 F. Supp. 2d 635, 648 (E.D. Va. 2011).

Thus, overriding question is not centered on what "traditional environmental pollution" is but what the absolute pollution exclusion text says. There are two crucial components of the exclusion to assess based on the Certified Questions. The first is there must be a "pollutant," that is, a "solid, liquid, gaseous or thermal irritant or contaminant." (Pet'r Br. App. 2 at 71.) The second is there a movement component of that pollutant through an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape[.]" (*Id.* at 59.) Review of these specific exclusion components[9] show the judicial-imposed limitation to "traditional environmental pollution" does not exist in the Policy language and the unambiguous language goes beyond "traditional environmental pollution."

A) The "Pollutants" In The Policy Go Beyond Traditional Environmental Pollutants

The CGL Form defines a "[p]ollutant" as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed." (Pet'r Br. App. 2 at 71.) "Irritant," "contaminant," and "waste" are not defined terms in the CGL Form. (*See id.* at 69-72.) "When called upon to interpret a term used in an insurance policy

[9] Exclusion (f) also requires that the at-issue "bodily injury" or "property damage" be caused by the "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" (Pet'r Br. App. 2 at 59.) West Bend does not address those components as the District Court limited its Certified Questions to the scope of the exclusion and not the causation or injury requirements.

that is not defined therein, courts in Tennessee sometimes refer to dictionary definitions." *Hutchison*, 15 S.W.3d at 815.

Those definitions are useful in examining what is a "pollutant" for purposes of the absolute pollution exclusion. "An '[i]rritant' is defined as 'a source of irritation" and "'[i]rritation' is defined as 'a condition of inflammation, soreness, or irritability of a bodily organ or part.'" *CBL & Assocs. Mgmt., Inc. v. Lumbermens Mut. Cas. Co.*, No. 1:05-CV-210, 2006 WL 2087625, at *7 (E.D. Tenn. July 25, 2006) (quoting *American Heritage Dictionary of the English Language* 926 (4th ed. 2000)). Another court recently noted an "irritant" was "a substance that makes part of your body sore or painful" or was "a cause of an uncomfortable physical reaction." *Love Lang v. FCCI Ins. Co.*, No. 1:19-CV-3902-AT, 2021 WL 1351857, at *9 (N.D. Ga. Mar. 30, 2021) (quoting *Irritant*, Cambridge Online Dictionary (last accessed Mar. 28, 2021)).

"A 'contaminant' . . . is commonly understood to mean a substance that contaminates by making something unfit for use or impure by the introduction of unwholesome or undesirable elements." *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020, 1024 (Colo. 2013) (collecting cases). It is material that "soil[s], stain[s], corrupt[s], or infect[s] by contact or association" or "render[s] unfit for use by the introduction of unwholesome or undesirable elements." *Webster's Third New International Dictionary* 1491 (2002). A federal court sitting in Tennessee that has interpreted the absolute pollution exclusion noted "'[c]ontaminant' is defined as 'one that contaminates'" while "'[c]ontaminate' means 'to make impure or unclean by contact or mixture.'" *CBL*, 2006 WL 2087625 at *7

(quoting *American Heritage Dictionary of the English Language* 396 (4th ed. 2000)).

The *CBL* court also found "'[w]aste' means 'an unusable or unwanted substance or material, such as a waste product,' 'garbage; trash,' or 'the undigested residue of food eliminated from the body; excrement.'" *Id.* (quoting *American Heritage Dictionary of the English Language* at 1942). The Supreme Court of Michigan determined "'[w]aste' is commonly understood to include sewage" along with "countless other substances typically introduced into a sewer system." *City of Grosse Pointe Park v. Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 113 (Mich. 2005) (finding the absolute pollution exclusion barred coverage of an alleged discharge of overflow sewage into a creek). Another court recently stated, "the common use of waste includes material that is purely garbage, but it also includes excrement and sewage" and "waste must include manure (excrement) even if the manure will eventually be used (i.e., recycled/reconditioned) for fertilizer." *Dolsen Companies v. Bedivere Ins. Co.*, 264 F. Supp. 3d 1083, 1090 (E.D. Wash. 2017) (holding the absolute pollution exclusion precluded coverage for the inadvertent seepage of manure out of holding ponds into the surrounding soil and drinking water). The CGL form clarifies "[w]aste includes materials to be recycled, reconditioned or reclaimed." (Pet'r Br. App. 2 at 71.)

These definitions are not constrained to so-called "traditional environmental pollution." A "pollutant" is "*any* solid, liquid, gaseous or thermal irritant or contaminant, *including* smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste." (*Id.* (emphases added).) The use of

"including" signals a "pollutant" is not strictly limited to the compounds or solids listed. *See Kendrick v. Kendrick*, 902 S.W.2d 918, 924 (Tenn. Ct. App. 1994) ("When used in conjunction with a general definition, the term 'includes' is a term of enlargement, not limitation.") Rather, those are examples of potential qualifying "irritant[s] or contaminant[s]" and do not comprise all of the possible "irritant[s] or contaminant[s]" that fall within the definition. *See id.* ("[T]he use of the term 'includes' in a statutory definition indicates that the enumerated items that follow are illustrative, not exclusive."). Instead, a "pollutant" covers "*any* solid, liquid, gaseous or thermal irritant or contaminant." (Pet'r Br. App. 2 at 71 (emphasis added).)

Neither these definitions nor the policy language itself require the irritant or contaminant to fall within the range of so-called "traditional environmental pollution." The potential "pollutants" do not have to be a defined hazardous substance "in order to be a toxic substance." *Heringer v. Am. Fam. Mut. Ins. Co.*, 140 S.W.3d 100, 106 (Mo. Ct. App. 2004). The definition of "pollutants" does not contain the word "hazardous" or any synonym of that word. (Pet'r Br. App. 2 at 71.) Nor does the language require an insured to "be found in violation of an environmental law for the pollution exclusion to apply." *Heringer*, 140 S.W.3d at 106 (quoting *Cas. Indemn. Exch. v. City of Sparta*, 997 S.W.2d 545, 550 (Mo. Ct. App. 1999)). The language certainly encompasses polluting events that qualify as traditional environmental pollution but it does not limit exclusion to those alone. *See Firemen's Ins. Co. of Washington, D.C. v. Kline & Son Cement Repair, Inc.*, 474 F. Supp. 2d 779, 796 (E.D. Va. 2007) ("The Pollution Exclusion clause does not say the discharges or dispersals of pollutants must be 'into the

environment' or 'into the atmosphere,' or in any way indicate that environmental 'incidents' are the only conditions that bar coverage under the clause.").

Such limitations could have easily been included. But those were not put in. Instead, the exclusion as currently worded came about as "insurers revised the language of these clauses in form CGL policies to encompass non-environmental pollution claims, thus substantially broadening their application." *Georgia Farm Bureau*, 784 S.E.2d at 425; *see also Peace*, 596 N.W.2d at 445 (detailing the changes made). The "revised provisions . . . extended the application of pollution exclusions beyond the natural environment to premises owned, rented or occupied by the insured, and removed the adjective 'toxic' before the word 'chemicals,' thus expanding the number of chemicals regarded as pollutants." *Id.* (citing *Peace*, 596 N.W.2d at 445). Taken as a whole, a "pollutant" as defined in this Policy "encompasses more than traditional conceptions of pollution." *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 477 (5th Cir. 1996).

B) The Movement Requirements In The Absolute Pollution Exclusion Are Also Not Constrained To Traditional Environmental Pollution

The movement requirements in the exclusion are also not limited to "hazardous material discharged into the land, atmosphere, or any watercourse or body of water." *Kim*, 728 N.E.2d at 535. The CGL form requires an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants.'" (Pet'r Br. App. 2 at 59.) Some courts have taken the view that "discharge, dispersal, seepage, migration, release or escape" are "terms of art in environmental law, generally used to

describe the improper disposal or containment of hazardous waste." *Peace*, 596 N.W.2d at 444 (quoting *Sphere Drake Ins. Co. v. Y.L. Realty Co.*, 990 F. Supp. 240, 243 (S.D.N.Y. 1997)). But, again, this reads something into the Policy language that is not present.

"[D]ischarge, dispersal, seepage, migration, release or escape" can be assessed just as "irritant" and contaminant" were assessed above. *See Hutchison*, 15 S.W.3d at 815. These words focus on similar types of actions:

- "Discharge" means "[t]o release, as from confinement" "[t]o pour forth, emit, or release contents." *Peace*, 596 N.W.2d at 438 (quoting *American Heritage Dictionary of the English Language* 530 (3d ed. 1992)).
- "Dispersal" means ""the condition of being dispersed," "scatter[ed] in different directions," or "strew[n] or distribute[d] widely." *Id.* (quoting *American Heritage Dictionary* at 537).
- "Seepage" means "[t]he act or process of seeping," "ooze," or "[t]o enter, depart, or become diffused gradually." *Id.* (quoting *American Heritage Dictionary* at 1634).
- "Migration" means "'[t]he act or an instance of migrating,' as in moving from one location and settling in another." *Hirschhorn v. Auto-Owners Ins. Co.*, 809 N.W.2d 529, 539 (Wis. 2012) (quoting *Peace*, 596 N.W.2d at 538); *see American Heritage Dictionary* at 1143.
- "Release" means ""liberation" or "[a]n unfastening or letting go[.]" *Peace*, 596 N.W.2d at 538 (quoting *American Heritage Dictionary* at 1524).
- "Escape" means "[a] means of obtaining temporary freedom" or "[a] gradual effusion of an enclosure; a leakage." *Id.* (quoting *American Heritage Dictionary* at 625-26).

Read as a whole, those terms "appear to describe the entire range of actions by which something moves from a contained condition to an uncontained condition." *Peace*, 596 N.W.2d at 438.

These are ordinary words people use in everyday life. The mere fact that environmental scientists use these words when discussing pollution events does not turn these words into technical terminology. "[T]echnical terms and words of art are given their technical meaning when used in a transaction within their technical field." Restatement (Second) of Contracts § 202(3)(b) (1981). This Policy is a contract for insurance and not a scientific treatise. "The intention of the parties is based on the *ordinary* meaning of the language contained within the four corners of the contract." *84 Lumber Co. v. Smith*, 356 S.W.3d 380, 383 (Tenn. 2011) (emphasis added).

Additionally, limiting the exclusion to the discharge of hazardous material into the environment ignores core pieces of the exclusion's language. The CGL form clearly states the movement can be an "*actual, alleged or threatened* discharge, dispersal, seepage, migration, release or escape[.]" (Pet'r Br. App. 2 at 59 (emphasis added.) Any limitation to traditional environmental pollution means the focus is only an "actual" discharge to the exclusion of an "alleged or threatened" discharge. "Alleged or threatened" does not require the "actual" release of a "pollutant" for the exclusion to be triggered. Reduction of the exclusion to traditional environmental pollution only would nullify the "alleged or threatened" language clearly in the contract. *Cf. Fireman's Ins. Co.*, 474 F. Supp. 2d at 796 ("The Pollution Exclusion is quite specific. To hold in favor of the Defendants would require this Court to interject words into the writing

contrary to the elemental rule that the function of the court is to construe the contract made by the parties, and not to reformulate a contract for them.").

Likewise, if the exclusion was designed to only exclude costs for "hazardous material discharged into the land, atmosphere, or any watercourse or body of water," *Kim*, 728 N.E.2d at 535, then the drafters would not have "dropped the phrase 'into or upon the land, the atmosphere or any water course or body of water'" when revising the qualified pollution exclusion into the current absolute pollution exclusion. *See Peace*, 596 N.W.2d at 445. "Modification of this language was clearly intended to expand the pollution exclusion to permit insurers to deny coverage for within-premises contamination, as well as broadly dispersed environmental pollution." *Mount Vernon Fire Ins. Co. v. Valencia ex rel. Viruet*, No. 92 CV 1253 RR, 1993 WL 13150704, at *7 (E.D.N.Y. Aug. 6, 1993).

C) Numerous Courts Have Concluded The Absolute Pollution Exclusion Is Not Limited To Traditional Environmental Pollution

Substantial authority exists that supports this broader scope. A federal court sitting in Tennessee has concluded this Court would not limit the absolute pollution exclusion to only traditional environmental pollution. *See CBL*, 2006 WL 2087625 at *6-8. *CBL* involved a lawsuit by a mall tenant against its landlord over a "plumbing problem . . . that 'caused sewage, debris, waste and water to shoot out of the sink drains and flood [the tenant's space] during rainfalls.'" *Id.* at *1. The "plumbing problem" was an improperly constructed storm sewer system that tied into the building sewer system for the mall. *Id.* The insured landlord's insurance policies contained the same pollution exclusion seen in WBMI's CGL Form. *Id.* at *2. The

insurers relied on the pollution exclusions to decline defending the landlord when the tenant filed suit against the landlord, who maintained the sewer systems. *Id.* at *2-3. The landlord sued the insurers and argued the pollution exclusions "apply only to traditional environmental pollutants and not to sewage and waste." *Id.* at *6.

The *CBL* court disagreed. It acknowledged the disparate lines of cases interpreting the exclusion. *Id.* at *7-8. But it also reviewed the definition of "pollutants" along with common usage definitions for the terms "irritant," "contaminant," and "waste," which were not defined in the policies. *Id.* at *6-7. The *CBL* court reasoned the "sewage, debris, waste, and water" that flooded the tenant's space qualified as "contaminants" and "waste," which triggered the exclusions. *Id.* at *7. The court then found Tennessee courts[10] "would adopt the reasoning of the second line of cases and would conclude that the pollution exclusion applies to all types of pollution, including sewage, and not just to traditional environmental pollutants." *Id.* at *8. It came to this conclusion based on "the Tennessee rules of construction for interpreting insurance policies." *Id.*

The *CBL* court is not the only court to come to this conclusion. According to one court, "[a] majority of state and federal jurisdictions have held that absolute pollution exclusions are unambiguous as a matter of law

[10] Another federal court in Tennessee has also applied the absolute pollution exclusion but it did not get into any detailed scope analysis as the decision was made on a motion for default judgment. *See Certain Underwriters at Lloyd's, London v. Alkabsh*, No. 09-2711, 2011 WL 938407, at *8-9 (W.D. Tenn. Mar. 15, 2011) (gasoline leaking from an underground storage tank on the insureds' property was a "pollutant" and the exclusion was unambiguous).

and, thus, exclude coverage for all claims alleging damage caused by pollutants." *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 635 N.W.2d 112, 118 (Neb. 2001). Consistent with this, numerous other courts have determined the absolute pollution exclusion is not limited to "traditional environmental pollution." *See*, *e.g.*, *United Fire & Cas. Co. v. Titan Contractors Serv., Inc.*, 751 F.3d 880, 885 (8th Cir. 2014) (applying Missouri law); *Nat'l Elec. Mfrs. Ass'n v. Gulf Underwriters Ins. Co.*, 162 F.3d 821, 826 (4th Cir. 1998) ("That the pollution exclusion at issue here clearly is not limited to atmospheric or environmental pollution further supports the argument that it should be enforced as written.") (applying D.C. law); *Certain Underwriters at Lloyd's v. C.A. Turner Const.*, 112 F.3d 184, 188 (5th Cir. 1997) ("[T]he phenol gas emission constituted bodily-injuring pollution or contamination, and coverage for C.A. Turner's claim is precluded under the pollution exclusion clause.") (applying Texas law); *Nethery*, 79 F.3d at 477 (5th Cir. 1996) ("The pollution exclusion at issue encompasses more than traditional conceptions of pollution.") (applying Mississippi law); *Georgia Farm Bureau*, 784 S.E.2d at 425 ("Georgia courts have repeatedly applied these clauses outside the context of traditional environmental pollution."); *Bituminous Cas. Corp. v. Cowen Const., Inc.*, 55 P.3d 1030, 1035 (Okla. 2002); *Porterfield*, 856 So. 2d at 805-06; *Becker Warehouse*, 635 N.W.2d at 120 ("The language of the policy does not specifically limit excluded claims to traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage."); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779–80 (Minn. 1999) ("The

'absolute pollution exclusion' clause at issue eliminates all language limiting coverage by describing the objects to be affected by the pollutants."); *Peace*, 596 N.W.2d at 437-38; *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So. 2d 1135, 1138 (Fla. 1998).

The breadth of authority rejecting the "traditional environmental pollution" restriction relies on a plain reading of the exclusionary language without applying any outside influences or implicit assumptions on what the absolute pollution exclusion covers. *Cf. Porterfield*, 856 So. 2d at 800-01 ("To guide our approach to this universe of precedent, we first parse the structure of the absolute pollution-exclusion clause at issue here."). Review of Exclusion (f) in the CGL form of the Policy shows "no distinction between 'traditional environmental pollution' and injuries arising from normal business operations." *Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216, 221 (Iowa 2007) (assessing two Total Pollution Exclusions with Hostile Fire exceptions).

II) The "Debris, Dirt, Top Soil, Mud, Silt, And Other Waste Material" From The Underlying Lawsuit Are "Pollutants" Under The CGL Form Pollution Exclusion

Using Tennessee's contractual interpretation approach in conjunction with authorities using a similar approach, the "debris, dirt, top soil, mud, silt, and other waste material" that flowed into the Hollands' lake are "pollutants" under the absolute pollution exclusion in the CGL form.

A) The "Debris, Dirt, Top Soil, Mud, Silt, And Other Waste Material" Satisfy The Policy Definition Of "Pollutants"

Both conditions from the Certified Questions exist here. The two factors at issue is there must be a "pollutant" and some modicum of movement of

that "pollutant." First, the Underlying Lawsuit shows the Hollands complain of "pollutants." The Hollands state "water, mud, silt and debris" and a "deposit of debris, dirt, top soil, and other waste material" fouled their lake. (Pet'r Br. App. 2 at 95-96 ¶¶ 13-14, 18(c).) The underlying allegations assert the soil, silt, debris, and waste materials made the lake "unusable for the purposes for which it was originally constructed," the lake "was rendered unfit for the purposes previously used," made the lake "unwholesome and unhealthy," and the Hollands suffered "substantial ongoing property damage." (*Id.* at 95 ¶ 14, 100 ¶ 25 & 101 ¶ 32.) This complains of damage by both solid contaminants and liquid contaminants.[11] The soil, silt, debris, and waste material are solids that have turned the lake from a useful body of water into a contaminated body of water that cannot be used as intended. Further, the reference to "water" describes sediment-laden stormwater runoff, in which the colloidal particles from soil and silt are suspended. (*See id.*) This leads to downstream complications "[w]hen sediment is released by construction operations and settles in ponds, lakes, streams, and other water sources, [and] the resulting change can damage wildlife and fish habitats and cause other environmental complications." *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Triangle Paving, Inc.*, 973 F. Supp. 560, 563 (E.D.N.C. 1996). These suspended soil components "do not significantly dissipate or dissolve over time" and "when discharged into a

[11] "Under the policy, a pollutant includes the following: (1) any solid irritant; (2) any liquid irritant; 3) any gaseous irritant; (4) any thermal irritant; (5) any solid contaminant; (6) any liquid contaminant; (7) any gaseous contaminant; and (8) any thermal contaminant." *Peace ex rel. Lerner v. Nw. Nat. Ins. Co.*, 596 N.W.2d 429, 436 (Wis. 1999).

system such as [a] lake[], stay intact over time and thus continue to have roughly the same net polluting effect years or even decades after the time of their deposit." *City of Mountain Park, GA v. Lakeside at Ansley, LLC*, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008).

Moreover, the movement requirements are satisfied. Again, there must be an "actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape[.]" (Pet'r Br. App. 2 at 59.) The Underlying Lawsuit is littered with examples showing movement of the contaminants onto the Hollands' property and into their lake. The Hollands allege the earthwork for the Highlands at Hardin Valley "altered" the natural runoff courses and substantial rains led to flows full of contaminants pouring into their lake. (*Id.* at 95 ¶ 13.) These flows did not happen prior to the development being constructed. (*Id.* ¶ 14.) The allegations in the Underlying Lawsuit emphasize this:

- Healy Homes "wrongfully and willfully diverted from its natural course the rainfall and water falling on the premises belonging to the Defendants and caused the same to be discharged and flow onto the property of the Plaintiffs;"
- Healy Homes "knew or should have known that the above-mentioned development and grading would cause water, mud, silt and debris to flow onto the property of the Plaintiffs and into the Plaintiffs' lake,"
- The work by Healy Homes resulted in an "increased flow of water, mud, silt and debris" onto their premises and "flowed into the [Hollands'] lake in a manner that did not occur prior" to the Healy Homes development; and
- Now, "water flows freely onto the [Hollands'] property during rain events and flows into the [Hollands'] lake, carrying mud, silt and debris."

(*Id*. at 99-10 ¶¶ 23-25, 101 ¶ 33.)

The Hollands clearly allege a "discharge." They even say pollutants were "discharged" onto their property. (*Id.* at 99 ¶ 23.) The Hollands also allege a "release" or "escape" given they assert the project earthwork led to sediment-laden stormwater runoff taking new channels and directions off the property to which it was supposed to remain and entered the Hollands' property and lake. These descriptions by the Hollands satisfy the second prong in the exclusion.

B) Other Courts Agree Sediment, Silt, And Waste That Flow Into Waterways From Earthmoving And Grading Activities Are "Pollutants"

Numerous courts have concluded slurries of "water, mud, silt and debris" and "other waste material" similar to what befell the Hollands are "pollutants." *See, e.g., Triangle Paving*, 973 F. Supp. at 563. *Triangle Paving* is substantially similar to this matter. The insured prime contractor hired a subcontractor to "perform site work for the construction of a shopping center development" but "[d]espite precautions taken by defendant, sediment dislodged by the construction activity escaped the construction site and contaminated downstream water located on private property." *Id.* at 562. Notices of violations were issued to the prime contractor and the downstream property owner complained of damage. *Id.* The insurer sought a declaration that coverage was not owed based on the absolute pollution exclusion. *See id.* at 561-62. The district court in North Carolina examined North Carolina law to assess the scope of the exclusion. *See id*. at 562-63. The *Triangle Paving* court determined the sedimentation was a "solid

contaminant" based on a review of the policy and in conjunction with North Carolina's treatment of sedimentation as pollution. *See id.* at 563-64. It rejected the argument that "the pollution exclusion only encompasses industrial-related contamination" based on the policy terms and North Carolina law. *Id.* at 565-66. In doing so, the court also rejected an attempt by the insured to defeat the exclusion by claiming it did not "regard ordinary sediment runoff to qualify as a pollutant."[12] *Id.*

Other courts have come to similar conclusions when construction excavation material and sediment was not properly corralled and flowed into local waterways. *See*, *e.g.*, *JTO, Inc. v. Travelers Indem. Co. of Am.*, 242 F. Supp. 3d 599, 607 (N.D. Ohio 2017) ("discharge of dredged and fill material into the waterways"); *Essex Ins. Co. v. H & H Land Dev. Corp.*, 525 F. Supp. 2d 1344, 1352–53 (M.D. Ga. 2007) ("Essex has presented persuasive authority that storm water runoff and the resulting sediment deposits are 'contaminants' excluded by the terms of such a pollution exclusion.");

[12] Healy Homes attempts the same maneuver in its Brief. (*See* Pet'r Br. at 27-28.) As the *Triangle Paving* court observed, "[i]f defendant's reasoning was adopted, an insured could always create an ambiguity by claiming that it did not interpret an exclusion to apply to its particular conduct. Ambiguities cannot be manufactured so easily." 973 F. Supp. at 565. Similarly, Healy Homes cannot override the terms and scope of its Policy by now claiming it has a different understanding of "pollutants" after West Bend contested coverage. *Cf. Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671, 694 (Tenn. 2019) ("Tennessee courts 'give primacy to the contract terms, because the words are the most reliable indicator – and the best evidence – of the parties' agreement when relations were harmonious, and where the parties were not jockeying for advantage in a contract dispute.'" (quoting 21 Steven W. Feldman, *Tennessee Practice: Contract Law and Practice* § 8:14 (June 2018)).

Century Communities of Georgia, LLC v. Selective Way Ins. Co., No. 1:18-CV-5267-ODE, 2019 WL 7491504, at *1 (N.D. Ga. Oct. 25, 2019) ("runoff of water, sediment, silt, mud, and other pollutants" from residential subdivision construction project); *see also Ortega Rock Quarry v. Golden Eagle Ins. Corp.*, 141 Cal. App. 4th 969, 980-90 (Cal. Ct. App. 2006) (discharge of fill material into creek during rainstorms); *New Salida Ditch Co. v. United Fire & Cas. Ins. Co.*, No. 08-CV-00391-JLK, 2009 WL 5126498, at *9 (D. Colo. Dec. 18, 2009) ("unpermitted discharge of fill material into the Arkansas River"). Some courts have concluded *uncontaminated* storm water runoff satisfies the definition of "pollutants." *See Centro Dev. Corp. v. Cent. Mut. Ins. Co.*, 720 F. App'x 1004, 1005 (11th Cir. 2018); *Associated Indem. Corp. v. Hughes*, No. 4:18-CV-00201-HLM, 2019 WL 2713056, at *7 (N.D. Ga. Apr. 25, 2019). These precedents mesh with the terms within the absolute pollution exclusion and show the Hollands complain of "pollutants."

C) Federal And Tennessee Law Treat Contaminated Stormwater Runoff And Sedimentation As Pollutants

Statutes also provide guidance confirming the flow and "deposit of debris, dirt, top soil, and other waste material" in the Hollands' lake are "pollutants." Courts examining absolute pollution exclusions have found "state and federal environmental laws may provide insight into the scope of the policies' definition of pollutants without being specifically incorporated in those definitions." *Ortega Rock Quarry*, 141 Cal. App. 4th at 980. These courts looked at relevant authorities to assess how those states treat unconstrained sediment and fill material from construction sites. *See*, *e,g.*,

JTO, 242 F. Supp. 3d at 607 (looking to Ohio and federal environmental statutes to determine if the allegations in the underlying complaint were of "traditional environmental pollution"); *Triangle Paving*, 973 F. Supp. at 563-64 (examining North Carolina statutes and regulations on sedimentation); *New Salida Ditch Co.*, 2009 WL 5126498 at *8 ("It is [] undisputed that fill material is regulated as a pollutant by both the Clean Water Act and the Colorado Water Quality Control Act and their implementing regulations."). "A review of the extensive state and local commentary on the topic helps to supply the common meaning or understanding." *Triangle Paving*, 973 F. Supp. at 565; *see id.* at 563 ("Recognizing that sedimentation is not excluded as a type of pollutant based on the enumerated examples, the issue becomes whether a reasonable person in the position of defendant would understand the pollution exclusion to encompass sedimentation contamination as a solid contaminant."); *see also New Salida Ditch Co.*, 2009 WL 5126498 at *8 (discussing how consideration of federal and state regulations on fill material "is an important factor in determining the plain meaning of the TPE within the context of this dispute.")[13]

As a land developer operating in Tennessee, Healy Homes was aware, or should have been aware, that it polluted the Hollands' lake. Federal law treats sediment and silt runoff as pollution. Construction sediment and spoil are "pollutants" under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et*

[13] Referencing these types of authorities does not introduce ambiguity into the language of the policy. The lack of incorporation of federal or state statutes defining or discussing types of pollution does not make the policy language ambiguous. *See Ortega Rock Quarry*, 141 Cal. App. 4th at 980-81.

seq. *See*, *e.g.*, *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993); *North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 676 (E.D.N.C. 2003) (collecting cases). Under the CWA, a "'[p]ollutant' includes not only traditional contaminants like 'radioactive' or 'chemical waste,' but also basic solids like 'dredged spoil, . . . rock, sand [and] cellar dirt.'" *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) (quoting 33 U.S.C. § 1362(6)); *see also* 33 C.F.R § 323.2(e)(2) (defining "fill materials" subject to regulation if placed into the waters of the United States). A federal district court in Tennessee looked at the CWA's definition of "pollutant" in this context. *See Tungett v. Papierski*, No. 3:05-CV-289, 2006 WL 51148, at *2 (E.D. Tenn. Jan. 10, 2006). It held that while "sediment, soil, dirt, trees, and organic debris are not expressly included" in the definition of "pollutant" those items are nevertheless "pollutants" based on the breadth of the term's definition. *See id*. (collecting and quoting cases).

Comparable provisions in the Tennessee Water Quality Control Act ("TWQCA"), Tenn. Code Ann. § 69-3-101 *et seq*., track the federal definition of a "pollutant" since the TWQCA applies the same aims as the CWA. *Cf. Jones v. City of Lakeland*, 224 F.3d 518, 526 (6th Cir. 2000) (en banc) ("The overarching goals of the Clean Water Act and the TWQCA are the same: each seeks to abate existing water pollution, reclaim polluted waters, prevent future pollution, and plan for the future use of water resources."). The TWQCA defines a "pollutant" as "sewage, industrial wastes, or other wastes." Tenn. Code Ann. § 69-3-103(28). "Other wastes" means "any and all other substances . . . including, but not limited to, decayed wood, *sand*,

garbage, *silt*, . . . *dredged spoil*, solid waste, . . . sewage sludge, . . . *biological materials*, . . . rock, and *cellar dirt*." *Id.* § 69-3-103(24) (emphases added). "Pollution" is defined as the "alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state, including, but not limited to, changes in temperature, taste, color, turbidity, or odor of the waters that will . . . [r]esult or will likely result in harm, potential harm or detriment to the health of animals, birds, fish, or aquatic life." *Id.* § 69-3-103(29). Any construction activities that could impact the waters of Tennessee require a permit for the project to proceed. *See* Tenn. Code Ann. § 69-3-108.

TDEC is equally clear on how it views sediment and silt that has escaped construction sites. "Silt is one of the most frequently cited pollutants in Tennessee waterways." *Tennessee Erosion & Sediment Control Handbook* at iii. Elsewhere, TDEC states stormwater runoff "picks up *pollutants like* trash, chemicals, oils, and *dirt/sediment* that can harm our rivers, streams, lakes, and wetlands." Tenn. Dep't of Env't & Conservation, *NPDES Stormwater Permitting Program*, *available at* https://www.tn.gov/environment/permit-permits/water-permits1/npdes-permits1/npdes-stormwater-permitting-program.html (last accessed Oct. 15, 2021) (emphases added). "Operators of construction sites involving clearing, grading or excavation that result in an area of disturbance of one or more acres" must obtain a National Pollutant Discharge Elimination System ("NPDES") Stormwater Construction Permit through TDEC to proceed. *See* Tenn. Dep't of Env't & Conservation, *NPDES Stormwater Construction Permit*, *available at* https://www.tn.gov/content/tn/environment/permit-

permits/water-permits1/npdes-permits1/npdes-stormwater-permitting-program/npdes-stormwater-construction-permit.html (last accessed Oct. 15, 2021). The Highlands at Hardin Valley project comprised twenty acres of land; Healy Homes would have had to obtain a NPDES permit to build the subdivision and the grading plans required approval by the "Knox County Commission." (Pet'r Br. App. 2 at ¶¶ 10-11.)

Knox County shares the same view as TDEC. The Hollands noted the Highlands at Hardin Valley "sits on top of a ridge" in Knox County, Tennessee. (Pet'r Br. App. 2 at 92 ¶ 2, 94 ¶¶ 7, 11.) Knox County has implemented a Hillside and Ridgetop Protection Plan to protect ridgelines and minimize the downstream impact of developing those areas. *See* Knoxville Knox County Metro. Planning Comm'n, *Knoxville • Knox County Hillside and Ridgetop Protection Plan*, *available at* https://archive.knoxplanning.org/plans/taskforce/hrpp_adopted.pdf (last accessed Oct. 15, 2021). Within, Knox County states "[s]ediment is the foremost pollutant in Knox County's waterways" and "[c]onstruction activities, particularly grading and cleared un-stabilized sites are major causes" of this pollution. *Id.* at 16. This "[s]ediment increases flooding, impacts public and private water supply, and destroys aquatic habitat" in part because "runoff that flows across an uncovered lot can release as much as 30 tons of soil during a rain storm." *Id*. The Hollands complained of exactly these types of events when they asserted the negligent clearing and grading led to sediment and silt runoff during major rain events that hit the ridge above their land. (Pet'r Br. App. 2 at 95 ¶ 13.)

The ordinances in Knox County also speak to this. The Hollands assert they made "filed reports with Knox County about the flooding issues" and Healy Homes had been advised it was "not in compliance with the requirements of the Knox County Code." (Pet'r Br. App. 2 at 101 ¶ 31.) Knox County requires land developers to implement and maintain erosion prevention and sediment control measures during grading and construction activities. *See* Knox Co. Code §§ 26-252, -273. Nonconforming measures or failures to implement those measures that lead to "off-site sedimentation or sediment discharges to waters of the state or onto adjacent properties shall be in violation" of that code. *Id.* § 26-251.

These provisions suggest that construction spoil, soil, sediment, and waste swept offsite by stormwater are reasonably understood[14] as "pollutants" in the area Healy Homes operates. Healy Homes was aware its plans required substantial earth movement on a ridgetop site with slopes

[14] Healy Homes relies on *Ryan v. MFA Mutual Insurance Company*, 610 S.W.2d 428 (Tenn. Ct. App. 1980), for the proposition that the "reasonable expectations" of the insured control when an ambiguity is found, thus its declarations should be credited and considered. (Pet'r Br. at 26-27.) This position misconstrues *Ryan*. The portion Healy Homes quotes from is an assessment of how a Delaware court applied Delaware law when deciding if an innocent co-insured could recover when the other co-insured burned the house down. *See id.* at 436 (citing and discussing *Steigler v. Ins. Co. of N. Am.*, 384 A.2d 398 (Del. 1978)). The Court of Appeals did not decide the case based on Delaware law or the "reasonable expectations" of the innocent co-insured under Tennessee law. *See id.* at 437. This Court, when it examined *Ryan*, also did not adopt a "reasonable expectations of the insured" approach. *See Spence v. Allstate Ins. Co.*, 883 S.W.2d 586 (Tenn. 1994).

exceeding 25% between the Highlands at Hardin Valley parcel and the Hollands' property. (*Id.* ¶ 11.)

A residential developer must account for the potential impact of stormwater runoff carrying silt, sediment, and debris off-site and into bodies of water, as well as the environmental impact of the same to adjacent landowners and downstream waterways. Healy Homes had to prepare detailed plans to demonstrate to Knox County how Healy Homes was going to prevent sediment and stormwater runoff during construction and from impacting downstream properties. These laws and regulations strongly suggest a developer in the same position as Healy Homes would understand and appreciate that a "deposit of debris, dirt, top soil, and other waste material" in the Hollands' lake was a conglomeration of "pollutants" and would be treated as such by governing authorities when violations occurred.

CONCLUSION

For the above-stated reasons, this Court should HOLD as a matter of law that the absolute pollution exclusion in the CGL form of the Policy is not limited to traditional environmental pollution and that the "debris, dirt, top soil, mud, silt, and other waste material" that damaged (or allegedly damaged) the Hollands' lake in the Underlying Lawsuit are "pollutants" as defined in the CGL form of the Policy.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the brief complies with the requirements set forth in Section 3.02(a) of Rule 46 of the Rules of the Tennessee Supreme Court. This brief contains 10,709 words, excluding those not to be counted pursuant to the foregoing Rule.

/s/ Jeffrey E. Nicoson
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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that the foregoing document has been served upon all counsel in this cause by via electronic notification or by placing a true and correct copy of same in the United States mail, postage prepaid, in a properly addressed envelope, or by hand delivering same to each such attorney as follows:

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