# CASE COMMENTARIES

## TAXATION
## MUNICIPAL LIQUOR LAWS

**The Tennessee Supreme Court ruled that Tennessee Code Annotated § 57-4-306 does not require municipalities to distribute liquor-by-the-drink tax proceeds to their respective counties.** *Coffee County Board of Education v. City of Tullahoma*, 574 S.W.3d 832 (Tenn. 2019).

*Matt Holman*

This case presents a question of statutory interpretation of Tennessee Code Annotated § 57-4-306 ("Distribution Statute") before it was amended in July of 2014. Specifically, the Tennessee Supreme Court answered whether a city—with its own school system separate from the county school system—was required to distribute tax proceeds received from the Commissioner of the Tennessee Department of Revenue ("Commissioner") for liquor-by-the-drink ("LBD") sales generated within the city to the corresponding county school system. Ultimately, the court ruled in favor of the city, because the legislative history of the statute suggested it was the legislature's intent for the city to use the tax proceeds towards its own school system, rather than distribute it to a county whose separate governing body had not yet adopted LBD sales.

This case was one of five cases on appeal to the Tennessee Supreme Court in the Middle Section of Tennessee for the same question. In this particular case, the two parties were the City of Tullahoma ("City") and Coffee County ("County"). Tullahoma is located in Coffee County, and the County brought suit against the City because it believed it was entitled to half of the LBD taxes given to the City by the Commissioner in accordance with the Distribution Statute. Specifically, that statute states that half of the LBD taxes "shall be expended and distributed in the same manner as the county property tax for schools is expended and distributed." Tenn. Code. Ann. § 57-4-306(a)(2)(A). Since 1987, when it approved LBD sales within city limits, the City had retained all the revenue from LBD taxes and distributed half to the City's general fund—which contains the funds for primary government functions—and half to its own school system. However, the County argued that the language of the

Distribution Statute required the City to distribute the LBD tax *pro rata* with the County school system in accordance with Tennessee Code Annotated § 49-3-315(a), which sets out the manner in which counties distribute county property taxes for schools.

In response, the City presented two arguments to the County's interpretation of the statute. The City argued that the language of the statute does not put an obligation on the City to distribute the LBD taxes to the County; rather, the language meant that the City is supposed to distribute the tax within its own city school system in the same way it would if it were distributing property taxes to the County. The City's second contention was that the statute did not apply to the County because it had not approved LBD sales. Interestingly, in each of the five cases on appeal to the court, none of the counties had approved LBD sales within their county limits.

In 2017, the trial court granted summary judgment in the City's favor for two reasons. First, the trial court agreed with the City's argument that the statute did not apply to the County because it had not approved LBD sales; therefore, the County was not entitled to distributions under the Distribution Statute. Second, the trial court held that, even if the County were entitled to distributions, the language of the Distribution Statute was ambiguous. Because the language was ambiguous, the trial court looked to the legislative history along with the intent of the Distribution Statute and concluded that the language did not require the City to distribute part of the LBD tax revenue to the County.

While this case was on appeal to the Tennessee Court of Appeals for the Middle Section, a similar group of cases was being litigated in the Eastern Section. Importantly, in those cases, the court issued four contemporaneous opinions ruling in favor of the cities. That court also held that the language of the Distribution Statute was ambiguous, and after conducting a similar analysis to the trial court in this case, ruled that the cities were not required to distribute any of the LBD tax revenue to the counties.

After this ruling, the Court of Appeals hearing the instant case handed down an opposing verdict, holding that the language of the Distribution Statute was unambiguous and swung in the County's favor. Ultimately, the appellate court was persuaded by the County's interpretation of the statute. Specifically, it held that the Distribution Statute clearly requires the City to distribute the tax proceeds in the same manner it distributes property taxes to schools—meaning *pro rata* with the County's schools

according to a daily attendance formula. Because the intermediate court held that the language was unambiguous, it did not address legislative intent or purpose. Notably, the Tennessee Supreme Court acknowledged in its opinion that all the courts and judges involved in deciding this same issue reached several different conclusions involving legislative intent, ambiguity, and public policy considerations.

The Distribution Statute is no stranger to legal interpretation. In fact, it has been the subject of two separate Attorney General Opinions. *See* 10 Op. Atty Gen. Tenn. 231 (1980); 10 Op. Atty Gen. Tenn. 711 (1981). The first opinion was the result of a Weakley County attorney posing a question to the Attorney General regarding what the proper distribution was under the Distribution Statute when a municipality, but not the county, had approved LBD sales. *See* 10 Op. Atty Gen. Tenn. 231 (1980). The Attorney General stated that only counties and municipalities that approved LBD sales were intended to be subject to the Distribution Statute, and therefore the counties that had not approved LBD sales were not entitled to any of the proceeds paid to the cities. *Id.* Since the publication of that Attorney General opinion, many cities have relied on it in determining what to do with LBD proceeds from the Commissioner.

Further, the second question posed to the Attorney General posited whether municipalities were required to distribute LBD proceeds to county schools when the municipality did not have a school system of its own. *See* 10 Op. Atty Gen. Tenn. 711 (1981). The Attorney General reaffirmed its previous opinion, but stated that a city would clearly need to distribute part of its proceeds from LBD tax distributions to the county school system when it did not have a school system of its own. *Id.* Soon after this second opinion, the legislature amended the statute to reflect the interpretation the Attorney General laid out in the two opinions. That provision, referred to as the "1982 proviso," read as follows:

> One half (1/2) of the proceeds shall be expended and distributed in the same manner as the county property tax for schools is expended and distributed; provided, however, that except in [Bedford County] any proceeds expended and distributed to municipalities which do not operate their own school systems separate from the county are required to remit one half (1/2) of their proceeds of the gross receipts liquor-by-the-drink tax to the county school fund.

Tenn. Code Ann. § 57-4-306(a)(2)(A) (2013). The Attorney General offered a third opinion after the 1982 amendment, reaffirming that

municipalities that had approved LBD sales were not required to distribute LBD tax proceeds to counties that had not approved LBD sales. *See* 1983 Tenn. AG LEXIS 381.

After analyzing the opinions issued by the Attorney General, and determining the City had distributed its LBD proceeds in accordance with those opinions, the court then turned to the legislative intent behind the statute, stating that the main point of statutory interpretation is effectuating legislative intent. The court then eloquently explained the difficulty in determining ambiguity for statutory interpretation purposes, noting that there is no "reliable tool" to determine whether a statute is ambiguous. Indeed, the Court attributed the many conflicting decisions in these cases to the difficulty in determining ambiguity. *See generally* 129 Harv. L. Rev. 2118 (2016). Regardless of the purported difficulty, however, the court eventually concluded that the language of the statute was ambiguous.

The court stated that, in determining ambiguity, there were several considerations to be made—including the language of the statute, the subject matter of the statute, the wrong the statute intended to right, and the overall purpose sought in enacting the statute. The court then pointed to several facts that supported the City's reading of the statute. First, the history of the statute suggested that the City was distributing the LBD funds in a way consistent with the way the legislature intended because of the opinions issued by the Attorney General and the amendments to the statute that did not indicate an obligation to pay the County school system from the LBD proceeds. The court noted that, because the legislature was aware that cities were distributing LBD proceeds to their own school systems when the amendments were made, its clear exclusion of the County's contentions in the subsequent amendments did not intend for the cities to discontinue its practice of distributing LBD proceeds solely to its own school system.

Second, because the City's interpretation aligned with opinions issued by the Attorney General, it could not be said that its interpretation was clearly erroneous. Finally, because the statute was written in the passive voice and did not indicate who was supposed to expend the tax in the same "manner" of distribution of county property taxes, interpretation of the statute required adding words to the statute. Both the County's and the City's interpretation of the statute required adding words to the statute, which made the Distribution Statute ambiguous. Because the distribution statute was ambiguous, and the City's practices were aligned with both the

ascertained legislative intent and opinions issued by the Attorney General, the court overturned the Court of Appeals for the Middle Section and upheld the City's practice of distributing half of the LBD proceeds to its own school system.

The holding in this case represents a win for municipalities that have approved LBD sales but are located within counties that have not approved such sales. These cities are now able to take the proceeds paid to them by the Commissioner and distribute half of those LBD funds into their school systems, rather than splitting those proceeds with the county school systems. On the other hand, the counties that have not approved LBD sales, such as Coffee County, are losing out on a large sum of revenue that they could put toward their schools. The ruling in this case could incentivize counties to approve LBD sales if they have not done so already.

## CORPORATE GOVERNANCE
## ATTORNEY-CLIENT PRIVILEGE

**The Supreme Court of Tennessee held that, under Tennessee Code Annotated § 23-3-105, the attorney-client privilege can also extend to communications between an entity's legal counsel and a third-party nonemployee if the nonemployee is the functional equivalent of an employee, and the communication both involves the subject matter of the representation and is made with the intention that the communication will be kept confidential.** *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019).

*Rachel West*

In *Dialysis Clinic Inc. v. Medley*, the Supreme Court of Tennessee addressed whether a third-party nonemployee of a client could invoke the attorney-client privilege on requested production of documents based on the agency relationship between the third-party and the client. Normally, communications that take place in the presence of third parties lose their privilege, because they are not made with the intention that the communications be kept confidential. However, when a third party is considered an agent of the client, the attorney-client privilege can apply if the third party is the functional equivalent of an employee of the client. At that point, the communication must still satisfy a two-prong test: 1) the communication must involve the subject matter of the representation; and 2) the communication must be made with the intention that the

communication will be kept confidential. *See State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Test, Inc.*, 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006). Ultimately, in this case, the Court articulated a framework that Tennessee courts should follow when determining whether a third-party nonemployee is the functional equivalent of an employee and should therefore be afforded the protection of attorney-client privilege.

Dialysis Clinic, Inc. ("Dialysis Clinic") is a corporation that owns and operates dialysis centers. Dialysis Clinic is also in the business of owning and leasing commercial properties to third parties. Because Dialysis Clinic's expertise is in dialysis centers, Dialysis Clinic hired a third-party property management company, XMi Commercial Real Estate ("XMi"), to manage several of its commercial properties. As an agent of Dialysis Center, XMi was responsible for managing and operating Dialysis Center's properties, including negotiating lease renewals and amendments, collecting rents, terminating leases, and handling litigation issues involving the properties.

In 2014, Dialysis Clinic filed unlawful detainer actions against the tenants of four of its leased properties located on Church Street in Nashville. These actions were against Kevin Medley, individually; Kevin Medley, LLC; Canvas Lounge, LLC; 3 Entertainment Group, LLC; and OutCentral, Inc. (collectively, the "Defendants"). As part of the Defendants' discovery requests, the Defendants sent XMi a request for production of documents related to the properties at issue. In response, XMi, under the protection of attorney-client privilege based on the agency-relationship between XMi and Dialysis Clinic, withheld some of the requested documents.

After a hearing and an *in camera* review of the disputed documents, the trial court agreed with XMi and ruled that the documents withheld should receive attorney-client privilege. In response, the Defendants filed a motion for an interlocutory appeal, which the Court of Appeals denied. The Defendants then applied for review by the Supreme Court of Tennessee. The court granted the application to answer the following certified issue: "whether the trial court extended the attorney-client privilege beyond what Tennessee law allows by finding that XMi properly withheld certain documents from production based on attorney-client privilege because of its agency relationship with Dialysis Clinic." Interestingly, the court has previously held the attorney-client privilege applies to a third party when the third party is an agent of the client. *See, e.g.*, *Smith Cty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328 (Tenn. 1984).

However, in that case, the Court failed to formulate a definition of "agent" when used in the context of such privilege.

Therefore, to determine whether XMi was an agent of Dialysis Clinic and subsequently afforded the protection of attorney-client privilege, the Court looked to case law from other jurisdictions. Turning to the Eight Circuit Court of Appeals, in *In re Bieter Co.*, the court held that when a third-party agent of a company is the "functional equivalent of an employee," the third party's communications between the company's attorneys and the third-party agent will receive attorney-client privilege. 16 F.3d 929, 938 (8th Cir. 1994). The Eighth Circuit reasoned that this protection was an extension of the United States Supreme Court decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

In *Upjohn Co.*, the Supreme Court held that attorney-client privilege should also include lower-level employees of corporations, because the employees retain important information relating to the attorney's representation of the client. Likewise, in *Bieter*, an independent contractor to a partnership retained vital information the attorneys of the partnership needed in order to properly represent the partnership in the pending litigation. *See Bieter*, 16 F.3d at 939. Therefore, the Court extended the independent contractor the protection of the attorney-client privilege under the functional equivalent analysis.

Other jurisdictions have since adopted the functional equivalent analysis as articulated by the Eight Circuit. These jurisdictions have followed the same logic by reasoning that third-party nonemployees, and not the client, are sometimes the individuals who hold important information that the client's attorneys will need to prepare and defend in litigation.[1]

[1] *See, e.g.*, United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) (holding that an owner of an insurance company that denied having employee status at the company was the functional equivalent of a company employee because he had authority to communicate with the company's attorneys about legal matters); *In re Flonase Antitrust Litig.*, 879 F. Supp. 2d 454 (E.D. Pa. 2012) (determining that a pharmaceutical consulting firm was the functional equivalent of an employee of a pharmaceutical company because of the consulting firm's development and implementation of a brand maturation plan for the pharmaceutical company); In re Copper Market Antitrust Litig., 200 F.R.D. 213 (S.D.N.Y. 2001) (concluding that a public relations firm was the functional equivalent of an employee of a corporate client because the firm communicated with the corporate client's counsel about the scandal and litigation in order to advise the client); Huggins v. Prince George's Cty., No. AW-07-825, 2008 WL 11366503, at *4 (D. Md. Sept. 25, 2008) (holding that a landscaping company was the functional equivalent of an employee of a landowner because the landscaping company communicated directly with the landowner's counsel in confidence about information the counsel needed to defend the landowner).

The court also cited to other Tennessee courts when formulating the framework for how Tennessee should define "agent" within the attorney-client privilege protection.[2] After synthesizing case law from outside and inside its jurisdiction, the Court determined that the functional equivalent analysis should be adopted by the Tennessee courts when addressing whether a third-party nonemployee's communication with counsel of the client should be afforded the protection of attorney-client privilege.

Not only did the court adopt the functional equivalent analysis, but the court also enumerated non-exclusive factors to consider when determining whether a third-party nonemployee is the functional equivalent of an employee. According to the court, the factors to consider are:

> whether the nonemployee performs a specific role on behalf of the entity; whether the nonemployee acts as a representative of the entity in interactions with other people or other entities; whether, as a result of performing its role, the nonemployee possesses information no one else has; whether the nonemployee is authorized by the entity to communicate with its attorneys on matters within the nonemployee's scope of work to facilitate the attorney's representation of the entity; and whether the nonemployee's communications with the entity's attorneys are treated as confidential.

The court further explained that the functional equivalent analysis is only the first prong of determining whether a communication with a third-party nonemployee should receive attorney-client privilege; after the court determines as much, the court must still consider whether the relationship satisfies the traditional requirements of a communication protected by the

[2] *See* Royal Surplus Lines Ins. Co. v. Sofamor Danek Grp., 190 F.R.D. 463 (W.D. Tenn. 1999) (holding that a third-party insurance broker was the functional equivalent of an employee of the insured corporation because the communication between the broker and insured corporation's attorney were made for the purpose of seeking legal advice and with the intention of keeping the communication confidential); Jones v. Nissan N. Am., Inc., No. 3:07-0645, 2008 WL 4366055 (M.D. Tenn. Sept. 17, 2008) (determining that a third-party medical director of Nissan was the functional equivalent of an employee of Nissan because she held the records of medical restrictions on Nissan Employees and was necessary for discussions with Nissan's counsel during a workers' compensation case); Waster Admin. Servs., Inc. v. Krystal Co., No. E2017-01094-COA-R9-CV, 2018 WL 4673616 (Tenn. Ct. App. Sept. 27, 2018) (holding that a third-party vendor was the functional equivalent of an employee of Krystal because the vendor was lead for negotiating a waste services deal for Krystal and communicated directly with Krystal's in-house counsel about changing waste service providers).

attorney-client privilege by determining whether the communication involves the subject matter of counsel's representation and whether the communication was made in confidence.

Applying this two-step framework to the case at hand, the court first addressed whether XMi was the functional equivalent of an employee of Dialysis Center. Applying the court's own factors and recognizing XMi's special ability to perform functions for Dialysis Center that Dialysis Center had no ability to fulfill for itself, the court held that XMi was the functional equivalent of an employee of Dialysis Center. Then, the court moved to the second step of the framework and concluded that XMi communicated with Dialysis Center's counsel for the purpose of relaying information about lease matters in order for counsel to best represent Dialysis Center. Therefore, the information was directly related to the subject matter of counsel's representations. In a similar vein, the court also concluded that because both Dialysis Center and XMi testified to their intentions that the communications remain confidential, the communications satisfied the traditional requirements of attorney-client privilege. Accordingly, the court affirmed the ruling of the trial court and remanded the case to the trial court for further proceedings.

In light of this ruling, Tennessee practitioners should be fully versed on the court's list of considered factors, as they provide a helpful guide. Importantly, this case officially set the framework to be applied by a Tennessee court when determining whether a communication by a third-party nonemployee should be granted attorney-client privilege and provides practitioners a clear rule to follow in order to keep confidential communications confidential. In practice, attorneys should apply the factors articulated by the court with their communications with third-party nonemployees to determine whether their communications will receive protection. Being aware of one's client's functionally equivalent employees will save your client both hardship and money in future litigation.

## TITLE VII
## STATUTE OF LIMITATIONS

**The United States Court of Appeals for the Sixth Circuit held that contractual clauses purporting to shorten the statute of limitations period to bring lawsuits under Title VII are unenforceable.** *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824 (6th Cir. 2019).

*Bei Yang*

In *Logan v. MGM Grand Detroit Casino*, the Sixth Circuit addressed the issue of whether the statute of limitations to bring suit under Title VII of the Civil Rights Act of 1964 may be contractually shortened. Upon review, the Sixth Circuit held that the contractual alteration of the statute of limitations cannot supersede the statutory limitation period under Title VII and held the limitation period in the agreement unenforceable.

This case arose out of an employment discrimination dispute between an employee and her former employer. Plaintiff Barbrie Logan ("Logan") started working as a culinary utility worker for Defendant MGM Grand Detroit Casino ("MGM") in August 2007. As a condition of her employment, Logan agreed to a six-month limitation period for any claim arising out of her employment with MGM. On December 4, 2014, Logan resigned but alleged that the resignation was a constructive discharge caused by the discriminatory conduct of her employer. On July 8, 2015, two hundred and sixteen (216) days later, Logan filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against MGM, alleging discrimination based on sex and retaliation for participation in a protected activity. Shortly thereafter, in November 2015, the EEOC issued Logan a right-to-sue letter. On February 17, 2016, exactly four hundred and forty (440) days after Logan's resignation, Logan filed a lawsuit against MGM for discrimination under Title VII. Importantly, Logan filed the lawsuit within the statutory limitation period under Title VII but after the contractual six-month limitation period in her employment agreement.

MGM argued that Logan's claim should be time-barred because Logan did not commence the action arising out of the employment within the contractually agreed six-month period. The district court agreed with MGM and entered summary judgment in its favor. Following this ruling, Logan then appealed to the Sixth Circuit. Upon review, the Sixth Circuit held that the contractual alteration of the statute of limitation under Title VII was not enforceable. In reversing the lower court's ruling, the Sixth

Circuit based its holding on two main considerations: (1) the detailed enforcement scheme of Title VII; and (2) the national implications of congressional anti-discrimination policies.

With respect to the enforcement scheme of Title VII, the court first emphasized the procedure and function of the EEOC. Notably, no employee can sue his/her employer directly under Title VII; rather, an employee has to first bring the dispute before the EEOC for resolution. Specifically, the EEOC process begins by the employee filing a "charge" with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice. 42 U.S.C. § 2000e-5(e) (2009). However, in some "deferral jurisdictions" that have "State or local law prohibiting the unlawful employment practice alleged," and "a State or local agency with authority to grant or seek relief from such practice," the filing period may be extended to three hundred (300) days. *Id.*[1] The case at hand arose in Michigan, which is a deferral jurisdiction, so the three hundred-day (300) limitation period applied for Logan.[2]

After the filing of the "charge" with the EEOC, the EEOC has exclusive jurisdiction over the complaint for 180 days. *Id.* § 2000e-5(f)(1).[3] Following this period of time, the EEOC will then issue a "right-to-sue letter" if the EEOC makes any of the following conclusions: (1) that "there is not reasonable cause to believe that an unlawful employment practice has occurred;" (2) that "a violation has occurred, and that the employer refuses to enter into a conciliation agreement, and the EEOC decides not to pursue a civil action against the employer;" (3) the EEOC entered into a conciliation agreement but the complaining employee has not entered into the conciliation agreement; or (4) where the charge is dismissed. 29 C.F.R. §§ 1601.19(a), 1601.28(b). Once the EEOC issues a "right-to-sue letter," the employee has 90 days to sue the employer. 42 U.S.C. § 2000e-5(f)(1).

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[1] The 300-day period applies when the employee has actually instituted a proceeding with the appropriate state agency. 42 U.S.C. § 2000e-5(e)(1). When the State or local proceeding starts, the State or local agency has exclusive jurisdiction over the complaint for the first sixty (60) days after the filing, unless it terminates the complaint earlier. *Id.* § 2000e-5(c). If the EEOC has a "work-sharing agreement" with state and local agencies, the EEOC may waive the 60-day deferral period and take immediate action. *See* EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 121 (1988).

[2] The Michigan Department of Civil Rights is the applicable agency in the state for investigating unlawful employment practices, and it has entered into a "work-sharing agreement" with EEOC. *See Detriot Field Office Information*, https://eeoc.gov/field/detroit/fepa.cfm (last visited Mar. 29, 2020).

[3] *See also* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 456 (6th Cir. 1999).

The EEOC's main task is not to adjudicate claims but to eliminate the alleged unlawful employment practice by informal methods, including conference, conciliation, and persuasion. Therefore, the court believed that by putting the EEOC procedure in between the litigants and the court system, Congress's purpose was to "afford non-compliant employers the chance to voluntarily cure their violations before Title VII litigation may be brought against them." Consequently, the court worried that allowing alteration of the statute of limitations set in Title VII would "remov[e] the incentive of employers to cooperate with the EEOC" and "encourag[e] litigation that gives short shrift to pre-suit investigation and potential resolution of disputes through the EEOC and analog state and local agencies."

Apart from the procedure and function of the EEOC, the court also emphasized the fact that Title VII contains its own limitation period, rather than using a general limitation period or choosing not to set a limitation period at all. The court acknowledged that statutes of limitations traditionally are treated as "procedural" mechanisms. However, the court noted that according to the Supreme Court, "where statutes that create rights and remedies contain their own limitation periods, the limitation period should be treated as a substantive right," and such rights are generally "not waivable in advance."[4] Accordingly, because Title VII contains its own limitation period, the court concluded that the limitation period to sue under Title VII is "a substantive, rather than procedural, rule," and is not therefore, "prospectively waivable."

To show that enforcing the express limitation period of Title VII is in harmony with previous interpretation of similar statutes, the court compared previous cases in which contractual limitation periods were allowed with those in which the contractual limitation periods were disallowed. On one hand, the court found that some previous cases had allowed the parties to contractually shorten limitation periods for claims under 42 U.S.C. § 1981 and ERISA. However, the court pointed out that 42 U.S.C. § 1981 and ERISA do not have self-contained limitation periods; only general limitation periods applied. On the other hand, the court had also previously disallowed parties to contractually define limitation periods under the Fair Labor Standards Act ("FLSA") and the Equal Pay Act ("EPA"). The court noted that Congress had specifically set the statute of limitation for FLSA claims, which also applied to the EPA because "the

[4] In its analysis, the court mainly relied on Supreme Court precedent in *Davis v. Mills*, 194 U.S. 451 (1904) and *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).

EPA was an amendment to the FLSA." The court again emphasized that "when a federal law that extends rights to private individuals contains its own limitation period . . . we should put the statutory limitation period on the substantive side of the ledger." Accordingly, the court concluded that the contractual statute of limitation periods in those contexts were treated differently, because the limitation period was a non-waivable substantive right under the FLSA and EPA—based on the inclusion of the limitation periods within those statutes—and was contractually alterable under 42 U.S.C. § 1981 and ERISA—because the limitation periods were not within those statutes.

As to the court's second main consideration—the uniform national scope of Title VII—the court pointed out that the objective behind the enactment of Title VII was to "achieve equality of employment opportunities and remove barriers," and this objective was "national in scope" and required "uniform enforcement." To allow the limitation period of a Title VII claim to be altered by contracts would leave the validity of the contractually altered limitation period to individual state-law contract principles. As a result, courts might reach different conclusions applying different state contract laws and would thus "frustrate or interfere with the implementation of [the] national policies of Title VII, while derailing the integrated, multistep enforcement procedure." Therefore, the court reasoned that the uniform application of Title VII also warranted invalidating the contractual limitation period in this case.

It is important to note that the court distinguished its holding for contractual limitation periods under a Title VII claim when occurring in the arbitration context. In that context, the court suggested it would apply a "case-by-case approach" and balance the "liberal policy favoring arbitration" and "the important goals of federal anti-discrimination statutes." In other words, in the arbitration context, the limitation period to bring a Title VII claim could be contractually altered, but it would be held unenforceable if it is "unduly burdensome" to the litigant. Specifically, the court stressed that "outside the arbitration context, Congress has not authorized litigants to alter the Title VII limitations periods."

In light of this decision, employers need to be aware that the statute of limitation for a Title VII claim cannot be contractually altered in an employment agreement, and thus, they should not let their guard down when they have contractually agreed to such. If employers want more

flexibility and control in the limitation period under Title VII, they could instead resort to arbitration and set a reasonable limitation period for filing arbitration request in their employment agreement beforehand.

## COPYRIGHT LAW
## INFRINGEMENT

**The United States Supreme Court held that a claimant may commence an infringement suit only when the U.S. Copyright Office registers a copyright; an application alone does not suffice to make registration.** *Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019).

*Walker Lewis*

In *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC*, the Supreme Court resolved a circuit split and addressed an issue of statutory interpretation in answering whether copyright registration occurs when an owner files an application to register a copyright or when the U.S. Copyright Office registers the copyright.

Fourth Estate Public Benefit Corporation ("Fourth Estate") is an online news organization that licenses its publications out to other websites but retains the copyright to its material. One such website that Fourth Estate licensed its material to was Wall-Street.com, LLC ("Wall-Street"). The licensing agreement required that Wall-Street, upon cancelling the agreement, remove all of Fourth Estate's material from the website. Prior to this action, Wall-Street cancelled the licensing agreement, but failed to remove the licensed material. Accordingly, Fourth Estate sued Wall-Street and its owner for copyright infringement, claiming that an application[1] to the U.S. Copyright Office for registration was sufficient to satisfy the statutory prerequisite to a copyright action. *See* 17 U.S.C. § 411(a) (2008).

Wall-Street and its owner subsequently moved to dismiss, arguing that full registration[2] under § 411(a) was a prerequisite to filing suit. The District Court agreed, dismissing the case. The Eleventh Circuit affirmed, finding that dismissal was warranted "[b]ecause registration occurs when the Register of Copyrights 'register[s] the claim.'" 856 F.3d 1338, 1339

[1] The Court characterized this as the "application approach."
[2] The Court referred to this as the "registration approach."

(11th Cir. 2017) (internal citations omitted). The Eleventh Circuit's holding, like that of the Tenth Circuit, was opposite of the Fifth and Ninth Circuit's position on this issue. [3] *Compare La Resolana Architects v. Clay Realtors Angel Fire*, 416 F.3d 1195 (10th Cir. 2005), *with Cosmetic Ideas, Inc. v. IAC/InteractiveCorp*, 606 F.3d 612 (9th Cir. 2010), *and Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357 (5th Cir. 2004). Accordingly, the Supreme Court granted certiorari to resolve the issue.

Pursuant to the Copyright Act of 1976, an author retains exclusive rights to their work *immediately* upon creation. *See* 17 § U.S.C. 106 (2002); *Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003) ("[F]ederal copyright protection . . . run[s] from the work's creation."). However, § 411(a) adds an administrative prerequisite to enforcing that right. Thus, despite the language in the Copyright Act, the threshold matter in any copyright infringement action is clearly registration. As Congress described:

> [no] civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

Thus, on appeal to the Supreme Court, the issue at hand was the interpretation of the word "registration." Fourth Estate argued for an interpretation consistent with finding registration to be the application by the copyright owner, because Congress did not define the word "registration" and because of their use of passive voice.[4] The Court did not accept this reading of the statute, however, finding that interpreting §

[3] In *Action Tapes, Inc. v. Mattson* the Eighth Circuit, in *dicta*, endorsed the "application approach" applied by the Fifth and Ninth Circuit. 462 F.3d 1010, 1013 (8th Cir. 2006). The Seventh Circuit was conflicted on the matter, endorsing both approaches in differing *dicta*. *See* Chi. Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 631 (7th Cir. 2003) (noting that an application must be filed, thereby approving the "application" approach). *But see* Gaiman v. McFarlane, 360 F.3d 644, 655 (7th Cir. 2004) (noting that the application must be granted or denied, thereby approving the "registration" approach). The First and Second Circuits have acknowledged the circuit splits but have yet to definitively rule on the matter. *See* Psihoyos v. John Wiley & Sons, Inc., 748 F.3d 120, 125 (2d Cir. 2014); Alicea v. Machete Music, 744 F.3d 773, 779 (1st Cir. 2014).

[4] Fourth Estate raised this issue, but the Court quickly dismissed the notion, stating how the word "registration" was used depends on the specific context of the phrase, not the passive voice. As such, this issue will not be further discussed.

411(a) in that manner would impart contrary meanings to the word "registration" in back-to-back sentences.

The Court reasoned that if a mere application was sufficient to satisfy the word "registration" in the first sentence of § 411(a), it would not have been necessary for Congress to include the next sentence—in fact, it would be a "superfluous" inclusion. Specifically, if the Court were to read § 411 in the manner that Fourth Estate argued, the word "registration" in the first sentence would mean the claimant's application for registration, but in the next sentence, the word would mean the exact opposite: the Register of Copyright's review of the application. The Court declined to read different meanings into the same word in consecutive sentences and noted that the third sentence of § 411(a) further supported its conclusion. That provision provides that the Register of Copyrights may become a party to a suit "with respect to the issue of registrability of the copyright claim," and thus, reading the word "registration" as merely an application would eliminate the Register's ability to become a party in a suit for an application it had not yet reviewed.

Moreover, the Court listed additional reasons as to the validity of its interpretation—chiefly the meaning of the word "registration" in § 410. That section discusses the review and examination of submitted materials and the subsequent issuance, or non-issuance, of a certificate of registration. Further, § 410(d) provides that once the U.S. Copyright Office determines that a submission is registrable, the effective date of registration is the date that the claimant made a proper submission. Accordingly, if the registration and application were to be interpreted to have the same meaning, Congress would not have delineated or specified "the effective date of registration." Furthermore, the Court took additional note of § 408, explaining that an author of material vulnerable to predistribution infringement would have no need to apply for preregistration if all they needed to do was file an application for registration and suddenly be allowed to enforce their copyright.

Next, the Court backed up its reasoning by deciphering congressional intent. The Court stated that part of Fourth Estate's error in reading the Copyright Act was in their "misapprehension" of some of the 1976 revisions. Notably, § 411(a)'s predecessor previously provided, "[n]o action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with." 17 U.S.C. § 13 (1970 ed.). This provision left the same question as presented in this

case open, but it was a question that the Court claimed was similarly answered by Judge Learned Hand in *Vacheron* & *Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F. 2d 637 (2d Cir. 1958).

While Fourth Estate maintained that the 1976 revisions to the Copyright Act adopted the dissenting opinion in *Vacheron*,[5] the Court dispelled that argument. The Court noted that Congress's revisions supported the Court's conclusion based on the second sentence in § 411(a)—specifically, the sentence which provides for the situation in which registration is refused. Additionally, the Court noted all the failed attempts that have been made over time to pressure Congress to repeal § 411(a). The Court firmly believed that Congress intended the provision to stay, because despite the past revisions Congress has needed to make to comply with other law, Congress has kept the other parts of § 411(a).[6]

Lastly, the Court thwarted Fourth Estate's final attempted workaround when they raised the issue of the statute of limitations. Indeed, Fourth Estate argued that a copyright owner might lose their ability to enforce their rights if the statute of limitations ran. In response to this argument, the Court cited the statute of limitations for an infringement claim—three years—and compared it with the current wait times cited from the Government Accounting Office: seven months. Accordingly, the Court stated there would be ample time to receive—or be denied—registration and then to subsequently sue before the statute of limitations ran.

In light of the Supreme Court's ruling in *Fourth Estate*, which resolved the circuit split surrounding what action constituted "making registration," practitioners should inform their clients of the newly cemented prerequisite. The Court has clarified that the application alone does not suffice to make registration, and that it is the action on the part of the U.S. Copyright Office in receiving and making a decision on the application that qualifies as registration. The Court's decision could have negative legal ramifications for any client who is proceeding under the other interpretation of registration, and American practitioners should take care to keep their clients abreast of the new standard.

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[5] The dissenting judge argued that an application alone constituted registration for the purposes of filing an infringement suit. 260 F.2d at 642–46 (Clark, C.J. dissenting).

[6] For example, in 1988, Congress revised the statute, removing "foreign works" in order to comply with the Berne Convention. Berne Convention Implementation Act of 1988, PUB. L. NO. 100-568, § 102 Stat. 2859 (1988) (codified as amended at 17 U.S.C. § 411).

## FAIR DEBT COLLECTION PRACTICES ACT
## THIRD PARTIES

**The Sixth Circuit Court of Appeals held the Fair Debt Collection Practices Act imposes a duty on debt collectors to prevent third parties from engaging in foreclosure activities after receiving notice that the debtor disputes the debt.** *Scott v. Trott Law, P.C.*, 760 F. App'x 387 (6th Cir. 2019).

*Kaleb Byars*

In *Scott v. Trott Law, P.C.* ("*Scott*"), the Sixth Circuit addressed whether the Fair Debt Collection Practices Act (the "FDCPA") imposes an affirmative duty on debt collectors to prevent elements of a foreclosure from occurring after they receive notice that the debtor disputes the debt. The FDCPA expressly requires a debt collector to "cease collection of the debt" after receiving notice that the debtor disputes the debt. The Sixth Circuit held this statute specifically imposes an affirmative duty on debt collectors to not only halt debt collection activity themselves, but also to prevent third parties from engaging in debt collection activity.

Kevin Scott ("Debtor") obtained a mortgage (the "debt") on his Michigan home in 2004. After nonpayment, the bank retained Trott Law, P.C. ("Debt Collector") to collect Debtor's debt via a foreclosure proceeding. In accordance with the FDCPA, on September 20, 2016, Debt Collector sent Debtor a letter notifying Debtor of the foreclosure and of Debtor's rights. The letter informed Debtor he had a right to dispute the debt, and that if Debtor disputed the debt within thirty days, Debt Collector would procure and provide verification of the debt.

On October 5, 2016, Debt Collector took three important actions: it (1) arranged for a sheriff's auction of the home—to occur on November 8, 2016; (2) arranged for the local newspaper to post a foreclosure notice at Debtor's home and advertise the foreclosure for four consecutive weeks; and (3) mailed the foreclosure notice to Debtor. However, on October 8, Debtor responded to Debt Collector's September 20 letter to dispute the debt's legitimacy. After receiving Debtor's dispute letter—which was received within the thirty-day timeframe—Debt Collector took no further action to collect the debt. However, Debt Collector did not cancel or otherwise delay the sheriff's auction or the newspaper's postings or advertisements. Furthermore, Debt Collector failed to respond to Debtor's further attempts to communicate with Debt Collector.

After learning that Debt Collector had not delayed or cancelled the foreclosure after Debtor sent his dispute letter, Debtor filed a complaint on October 20, 2016, alleging civil violations. First, Debtor sought an injunction to prevent the November 8 foreclosure auction. Additionally, the complaint alleged Debt Collector's actions violated the FDCPA, among other state and federal laws. Debt Collector responded in opposition to Debtor's motion for temporary injunction.

In December, the district court gave Debtor and Debt Collector three months to conduct discovery. After four months, the court granted Debt Collector's motion for summary judgment, finding the Debt Collector "cease[d] collection of the debt" because it did not itself engage in debt collection activity after receiving Debtor's dispute. On appeal, the Sixth Circuit addressed whether five of Debt Collector's activities violated the FDCPA: (1–3) Debt Collector's three actions taken on October 5, 2016 as provided above; (4) Debt Collector's failure to communicate with Debtor; and (5) Debt Collector's response in opposition to Debtor's injunction.[1]

First, the Sixth Circuit set forth the applicable provisions of the FDCPA. Importantly, Michigan law permits mortgage foreclosures via advertisement. *See* Mich. Comp. laws § 600.3201 (1979). However, when a debt collector executes such a foreclosure, it "must publish a detailed notice for four consecutive weeks in a county newspaper and publish the notice in a conspicuous place on the premises." *Id.* § 600.3208. Moreover, under the FDCPA, within five days after publishing notice, the debt collector must send the debtor a letter containing information regarding the debt, the creditor, and the debtor's rights. *See* 15 U.S.C. § 1692g(a) (2018). Among these rights are the rights to dispute the debt and to require the debt collector to provide verification of the debt. *Id.* If a debtor disputes the debt, "the debt collector *shall cease collection of the debt* . . . until the debt collector obtains verification of the debt. . . ." *Id.* § 1692(g)(b) (emphasis added).

The Sixth Circuit initially addressed whether the auction and newspaper's advertisement and postings constituted violations under the FDCPA. The court first noted that these activities constituted debt

[1] Debtor also averred the district court's grant of summary judgment was improper because the court had not yet adjudicated several of Debtor's discovery motions. However, the Sixth Circuit held that the trial court did not err by granting summary judgment because Debtor produced his discovery motions only after the discovery period concluded. Further, the Sixth Circuit noted Debtor did not allege sufficient facts to avoid summary judgment.

collection activities because their purpose was to procure payment for the debt. However, Debt Collector argued it did not personally violate the FDCPA because it was not the entity taking such actions; rather, it only directed third parties to take the actions.

Ultimately, the Sixth Circuit found that Debt Collector's argument frustrated the FDCPA's intent. More specifically, while Debt Collector did not itself take the actions, it still personally initiated the actions in order to satisfy Michigan's requirements for foreclosure by advertisement. Thus, the court refused to find that Debt Collector "ceased" debt collection activities merely because third parties (rather than Debt Collector) performed the foreclosing functions.

Accordingly, the court held the FDCPA includes an affirmative duty on debt collectors to stop *all* activities regarding debt collection, even activities of third parties. More specifically, the court stated that "[t]he debt collector cannot allow the essential statutory elements of a Michigan foreclosure to proceed after receiving" a debtor's timely challenge of the debt.[2]

Consequently, the court concluded Debt Collector violated the FDCPA because Debt Collector did not cancel the auction or newspaper advertisements or postings. Rather, Debt Collector allowed the newspaper to publish three consecutive advertisements and post a foreclosure notice at Debtor's home, even after it received Debtor's dispute letter.

On the other hand, though, the court held that Debt Collector's other actions did not violate the FDCPA. More specifically, Debt Collector's failure to communicate with Debtor did not violate the statute because it is common practice for debt collectors to avoid communicating with debtors. Moreover, the FDCPA dissuades and even disallows such communications. *See id.* § 1692(c). Likewise, Debt Collector's response to Debtor's complaint did not violate the statute because it constituted Debt Collector's attorneys' "zealous advocacy" rather than Debt Collectors own individual debt collection activity. However, because Debt Collector's other actions constituted violations of the FDCPA, the Sixth Circuit reversed the district court's grant of summary judgment.

*Scott* has several important ramifications for legal practitioners in the Sixth Circuit. Most importantly, attorneys should advise debt collectors to adopt one of the following alternatives to avoid violating the FDCPA. First, practitioners may recommend that their debt collector clients

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[2] The Sixth Circuit noted, however, that this duty survives only until the debt collector procures and provides debt verification to the debtor in accordance with the statute.

proactively maintain an ledger listing the debt collector's actions in furtherance of collecting the debt.[3] Accordingly, if a debtor challenges a debt's validity, the debt collector could use this ledger to ensure it cancels all actions effectuated to collect the debt.

Alternatively, debt collectors may simply refrain from engaging in debt collection activity until the dispute period elapses. However, this approach suffers an efficiency shortcoming in that it imposes unnecessary costs upon debt collectors. Particularly, if debt collectors delay initiating foreclosure proceedings until the dispute period expires, they will necessarily delay foreclosure by several weeks. Such a delay will inevitably cause debt collectors to incur lost interest and opportunity costs associated with not collecting the debt earlier. That said, these costs may be lesser than those costs that the debt collector would incur by violating the FDCPA.

In any event, *Scott* clarifies that a debt collector must cease its own foreclosure practices as in addition to those practices implemented by third parties after a debtor disputes a debt. Thus, it is imperative that attorneys who represent debt collectors take some action to ensure their clients remain on the pleasant side of the FDCPA.

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[3] *See* Katie Grzechnik Neill, *Sixth Circuit: "Cease" Requirement Include Third Party Activities Put into Action by Debt Collector*, INSIDEARM (Jan. 14, 2019, 12:00 PM), https://www.insidearm.com/news/00044637-sixth-circuit-cease-includes-activities-p/ ("[W]hile this decision focuses on foreclosures, it may have broader impacts on debt collection as a whole."). Of course, the ledger must also include those debt collection activities of third parties that the debt collector put into motion.

## REAL PROPERTY
## TENANCY LAW

**The Tennessee Court of Appeals held that: (1) a cotenant who excludes their cotenants from jointly owned real property is required to pay rent to their cotenants; and (2) the trial court did not abuse its discretion in awarding the ousting cotenant compensation for improvements or repairs made on the joint property from the remaining cotenants.** *McCants v. McGavock,* No. E2017-01712-COA-R3-CV, 2019 WL 1934868; 2019 Tenn. App. LEXIS 210 (Tenn. Ct. App. May 1, 2019).

*Autumn Bowling*

The pertinent facts are as follows. Four siblings were devised their family home ("the Property") through their father's will upon the passing of their parents in 2013. Based on the language of the will, it was intended that the four siblings be co-owners and cotenants of the Property. As executrix of her father's estate, Janella McCants ("Appellant") executed a deed to the Property that included all four siblings' names. Before their father's death, Appellant lived at the Property to care for both her father and the Property. In late 2013, Appellant emailed her three siblings (collectively "Appellees") an outlined agreement stipulating that Appellant would continue to live at the Property and would renovate and maintain it for the purpose of being a rental property. All parties agreed to this arrangement.

Indisputably, through their email communications, Appellees agreed to financially contribute to the necessary upkeep and repairs of the Property. Accordingly, Appellant emailed a $48,000 estimate of repairs to the Property to Appellees. On April 5, 2014, Appellant began renovations to the Property despite lack of assent from Appellees for the aforementioned quote.

Appellant's pursuit of the repairs without agreement between all cotenants caused tension and hostility amongst the siblings. In the midst of this tension, Appellant moved the personal effects of Appellees left at the Property to a locked portion of the basement in order to make the necessary renovations. However, Appellant demanded Appellees retrieve their belongings by specific deadlines and even threatened disposal of the belongings, which was contrary to the Agreement that removal of personal effects was not necessary until a renter was found.

Five days after starting renovations, Appellant emailed Appellees with the following ultimatum: "1) Sign the house over to me voluntarily or 2) I will take the house involuntarily through partition sale after the deed is recorded and the estate is closed. . . . Give me your decision by tomorrow morning." From this point forward, Appellant did not communicate with Appellees until July 6, 2014, when one sibling requested to retrieve her items from the Property, to which Appellant agreed. But when the sibling arrived earlier than agreed, Appellant refused to allow the sibling to enter. Ultimately, the police intervened, and the sibling was allowed to enter. After this event, Appellees began to express their concern of being excluded from the Property.

Appellant filed a complaint alleging breach of contract pertaining to the agreement between the siblings about repairing and maintaining the Property. In response, Appellees filed a counterclaim to partition the Property. The trial court determined Appellant did not meet her burden of proof for the contract claim and agreed with Appellees that they had met their burden for partition. Subsequently, the trial court determined that Appellant had excluded her cotenants and ordered Appellant to pay rent to Appellees in the amount of $27,000, partitioned the Property, and awarded Appellant $60,000 for the cost of the property renovations. Both parties appealed, each appealing their requirement to pay the other.

On appeal, the Court of Appeals first addressed whether Appellant's actions constituted exclusion—and if that exclusion required paying rent to Appellees. The court began its discussion by assessing whether ownership of the Property was held in a joint tenancy or a tenancy in common, the pertinent issue being whether the four unities—interest, time, title, and possession—existed when the Property was conveyed. At common law, the result of this difference was impactful. Specifically, a common-law joint tenancy, where all four unities were present, included a right to survivorship, while a tenancy in common, where all four unities were not present, did not have that inherent right.

In deciding the first issue, the court cited *Bryant v. Bryant*, where the Tennessee Supreme Court clarified that because joint tenancies no longer have an inherent right to survivorship, a joint tenancy and tenancy in common have essentially the same rights today—thus implying that there is no longer a distinction between the two. *See* 522 S.W.3d 392, 399-401 (Tenn. 2017). Therefore, the characterization of joint tenancy versus tenancy in common was irrelevant to Appellant's case. Consequently, the court characterized the Property as jointly held.

After determining the characterization of the Property, the Court used its right to "adjust the equities and settle all claims between or among the parties." *See Yates v. Yates*, 571 S.W.2d 293, 296 (Tenn. 1978). In exercising this inherent right, the court cited five principles from *Parker v. Lambert* that a court should apply when determining the equitable distribution of partition sale proceeds:

> (1) that courts will compensate a cotenant's renovations if those renovations actually improved the property's value; (2) that it is necessary that cotenants contribute equally to satisfy encumbrances on the property; (3) that it is necessary that cotenants contribute equally to necessary repairs of the property except those that are for payment of personal services for maintenance and caretaking, unless there is a contract to stipulate such payment; (4) that a cotenant with sole possession is of the property is liable to other cotenants for any profits received in excess of his or her pro rate share; and (5) that rent must be paid for use and occupation of a property by a cotenant who is in sole possession and has excluded her cotenants or denied cotenants their title of any part of the property.

206 S.W.3d 1, 5 n.2 (Tenn. Ct. App. 2006) (internal quotes and alterations omitted).

Because cotenants enjoy an equal right to possession, the *McGavock* court quoted *Parker*, noting that "a cotenant must equally share both the burdens of land ownership . . . as well as the benefits of the lands ownership. If one cotenant bears a disproportionate share of the burden, the other cotenants must provide compensation." The court, further relying on *Parker*, explained that exclusion does not bar the excluder from bringing a contribution claim. Additionally, citing *Brewer v. Brewer*, the court emphasized that "a tenant who pays more than his or her share for the property may seek contribution to compensate him or her." 2011 Tenn. App. LEXIS 63, No. M2010-00768-COA-R3-CV, 2011 WL 532267, at *2 (Tenn. Ct. App. Feb 14, 2011). Therefore, the court concluded that the partition of the Property and an equal split of the sale proceeds between all cotenants from the partition was not improper.

The court then applied the fifth *Parker* principle to Appellant's case. The court determined that the language of *Parker* did not require aggressive "ouster" to be established and affirmed the trial court's finding that ouster had been shown. Specifically, the court stated that "[a]n ouster, in the law of tenancy in common, is the wrongful dispossession or

exclusion by one tenant in common of his cotenant or cotenants from the common property of which they are entitled to possession."

Finding that ouster had been established, and thus, affirming the trial court's previous ruling, the court denied Appellant's argument that Appellees were free to come and go as they pleased from the Property. As Appellees contended, Appellant not only refused Appellees access to the Property unless it was on her terms, but she also demanded that Appellees remove their personal belongings from the Property. Accordingly, because Appellant's actions were considered exclusionary, the award of rent to Appellees was in harmony with the fifth *Parker* principle.

The court then turned to the second issue, which was whether the award of compensation to Appellant for the renovations to the Property was an abuse of discretion. For this issue, the Court applied principles one, two, and three from *Parker*.

Previously, the trial court held that Appellant had unclean hands because, in addition to the $19,000 of renovations she had completed prior to filing her complaint, she completed another $41,000 of renovations after filing. However, the trial court opted not to apply that doctrine when considering its award to Appellant and granted her the sum of those two figures, $60,000. Because the applicability of the doctrine is generally incredibly fact-specific and most properly suited for the trial court's determination, the court in this case affirmed that the non-application of the doctrine as within the discretion of the trial court.

Appellees also argued that the Court should remand the case to decide if the renovations were improvements that actually enhanced the Property's value as required by *Parker* principle 1. But the Court found the award to be within the trial court's equitable discretion because Appellees conceded to paying their share of taxes. The earlier agreement was for Appellant to renovate and maintain the Property while living there for the purpose of renting, and the Appellees had not objected to contributing. Instead, they had objected to the cost of contributing.

This case is important to Tennessee practitioners because, despite the court's attempt to clarify its earlier ruling in *Bryant*, the court failed to provide explicit guidance. The Court instead appears to teeter on characterizing joint tenancies and tenancies in common as identical joint ownerships, consolidating them into a "concurrent tenancy" while also avoiding classifying an ouster as an adverse possession. The court's tiptoeing around these issues—and the Tennessee Supreme Court's subsequent denial of certiorari—leaves room to wonder if the same

outcome and award would have occurred had the parties not been siblings; perhaps the Court was playing "Mom and Dad" to ensure each kid got his or her fair share of the family property. Regardless of the court's motives, Tennessee practitioners should be aware of the court's new "concurrent tenancy" classification, as this opinion could affect many of their client's properties in this state.

## CONTRACT LAW
## EXTRINSIC EVIDENCE

**The Tennessee Supreme Court utilized a contract dispute between defendant, an insurer, and plaintiff, a company selling the defendant's insurance plans, to clarify Tennessee's use of extrinsic evidence in constructing integrated agreements. The Court affirmed in part, reversed in part, and remanded holding that defendant could retroactively adjust commission rates; defendant could pay subagents directly; the agreement did not allow for attorney fees for intraparty disputes; and the statute of limitations would not be tolled given defendant's underpayments were undiscoverable.** *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee*, 566 S.W.3d 671 (Tenn. 2019).

*Gary Brackett*

From 1999 to 2012, in exchange for commission payments, Individual Healthcare Specialists, Inc. ("Plaintiff") sold BlueCross BlueShield of Tennessee, Inc.'s ("Defendant") insurance policies.[1] The commissions for these sales were governed by schedules which were updated sporadically and appended to the General Agency Agreement (the "Agreement"), which structured the pair's overall relationship. These insurance policies merited two types of commissions: first year commissions that were paid the year the policy was enacted, and renewal commissions that were paid if the policies were renewed annually.[2] However, on May 1, 2011, Defendant's updated commission schedule removed the language

[1] The Agreement at issue here also provided Plaintiff would manage the administrative rules of the subagents who sold the policies.

[2] Each commission schedule surrendered controlling authority to the Agreement in the event of conflict and allowed renewal commission rates to be set at the rate in place at the time of sale, subject to change at Defendant's discretion.

preserving renewal rates at time of sale and lowered the commission rates on renewals.

Subsequently, Plaintiff discovered Defendant had likely been underpaying commissions owed to it since the parties formed their relationship, prompting Plaintiff to file an action against Defendant for underpayments totaling $15 million.[3] Plaintiff claimed Defendant "wrongfully concealed" these underpayments, thus tolling the six-year statute of limitations.[4] Finally, Plaintiff claimed Defendant breached the Agreement by unilaterally and retroactively reducing commissions on policy renewals.

After the action was filed, Defendant terminated the Agreement "without cause" and began paying Plaintiff's subagents directly. This action prompted Plaintiff to amend its complaint, claiming Defendant breached the Agreement by paying subagents directly rather than Plaintiff. Later, Plaintiff filed a motion for partial summary judgement[5] which the trial court denied.[6] Following the denial of Plaintiff's motion, Defendant also filed a motion for partial summary judgement, claiming it was entitled to judgment as a matter of law on the issues of attorney fees and statute of limitations.[7] In response, Plaintiff submitted extrinsic evidence involving testimony of employees involved in negotiating the contract, which stated their understanding that the Agreement prevented Defendant from enacting retroactive modifications and, further, that the Agreement's indemnification clause covered attorney fees for inter-party disputes. The trial court relied on this evidence to deny the motion, stating it created ambiguities within the instrument.

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[3] Around this time, Plaintiff and Defendant began negotiations for Defendant to purchase Plaintiff. As a result, Plaintiff began analyzing and forecasting their revenue, leading them to the discovery that Defendant had likely been underpaying commissions owed to Plaintiff.

[4] Plaintiff also alternatively claimed unjust enrichment and conversion if the court opted not to toll the statute of limitations.

[5] The motion stated Defendant breached the agreement by: (1) retroactively reducing rates on renewal commissions; (2) paying Plaintiff subagents directly; and (3) claiming Plaintiff was entitled to judgement as a matter of law for attorney fees from the action.

[6] The trial court's order stated the claims were "a matter of contract construction" of an agreement where no "ambiguities" were present. From this, the court stated the Agreement allowed Defendant to modify rates and pay subagents, but did not provide attorney fees for Plaintiff.

[7] Defendant claimed the statute of limitations prevented consideration of: (1) underpayments more than six years before the action was filed; and (2) unjust enrichment claims five years before the action was filed.

At trial, the Plaintiff's extrinsic evidence relied on in Defendant's motion for partial summary judgment was admitted.[8] At the conclusion of the trial, the court held Defendant breached the Agreement by (1) adjusting renewal commission rates on existing policies; (2) paying commissions directly to subagents; and (3) underpaying Plaintiff its due commissions. Additionally, the court tolled the statute of limitations, stating Defendant's underpayments were "inherently undiscoverable."[9] In response to the court's ruling, both parties filed motions to alter or amend the court's judgment.[10] On appeal, the court upheld the trial court's rulings but reversed its award to Plaintiff for attorney fees.[11]

On appeal to the Tennessee Supreme Court, Defendant claimed the trial court erred by considering Plaintiff's extrinsic evidence regarding the parties' intentions for the Agreement. Specifically, they contended it was error for the trial court to hold the Agreement: (1) prevented Defendant from modifying commission rates on existing policies; (2) prevented Defendant from paying subagents directly; and (3) allowed for attorney fees for inter-party disputes. Defendant also claimed the discovery rule applied to breach of contract actions and *arguendo* the underpayments were not inherently undiscoverable by Plaintiff.[12] Of course, on the other hand, Plaintiff's appeal countered Defendant's positions and additionally argued the appellate court erred by reversing its award of attorney fees.

In the end, the Tennessee Supreme Court held the following: (1) Defendant did not breach the Agreement by modifying renewal commission rates for existing policies; (2) Defendant did breach the Agreement by paying subagents directly in lieu of Plaintiff; (3) Plaintiff was not entitled to attorney fees under the Agreement's indemnity clause; and (4) the statute of limitations would not be tolled as Defendant's

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[8] Initially, Defendant objected to Plaintiff's attempts to introduce extrinsic evidence of the parties' intention regarding the Agreement as inadmissible by virtue of the Agreement's integration. The court overruled these objections, relying on contextual principles espoused in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968).

[9] The court award Plaintiff $2.1 million, excluding attorney fees.

[10] The court relied on Plaintiff's extrinsic evidence that the parties intended the indemnity clause to include inter-party disputes.

[11] The appellate court held that the trial court erred in considering extrinsic evidence on the issue of attorney fees.

[12]Conversely, Plaintiff's appeal to the Tennessee Supreme Court claimed the trial court did not err in holding that Defendant breached the Agreement by: (1) modifying commission rates on existing renewals, and (2) paying subagents directly; or (3) applying the discovery rule to toll the statute of limitations.

underpayments were not inherently discoverable. Specifically, the issue before the Tennessee Supreme Court involved the lower court's use of Plaintiff's extrinsic evidence in construction of the Agreement. First, the inclusion of the extrinsic evidence affected whether Defendant breached the agreement by either retroactively adjusting the commission rate or paying subagents directly. Additionally, the trial court's use of the extrinsic evidence also impacted whether Plaintiff was entitled to attorney fees under the Agreement's indemnity provision.

The central aim throughout Tennessee's evolution on contract construction has always been to uphold the parties' intent.[13] However, intent has been understood in different ways throughout Tennessee's history, leading some to classify the state's jurisprudence as "deep[ly] conflict[ed]."[14] Initially, Tennessee employed a more contextual approach, with emphasis on "ascertaining the intention" of the parties.[15] Later courts would come to reject this holistic approach and apply a more plain meaning or textual consideration of the instrument's written terms.[16] Specifically, contextualism seeks to interpret the contract by considering the full picture of the agreement, including the surrounding circumstances.[17] Recalling Tennessee's focus on the parties' intent, this approach equips courts to consider the "strongest evidence of intent[:]" the parties "course of conduct."[18]

Early courts recognized the overall goal of inferring the intention of the parties and allowed consideration of their "situation[,] . . . motive[,] . . .

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[13] Wallis v. Brainerd Baptist Church, 509 S.W.3d 886, 899 (Tenn. 2016); *see also* McNairy v. Thompson, 33. Tenn. 141, 149 (1853) (The goal of constructing contracts is to "do justice between the parties by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time.").

[14] STEVEN W. FELDMAN, 21 TENNESSEE PRACTICE: CONTRACT LAW & PRACTICE § 8:12 at 982 (2016).

[15] Nunnelly v. Warner Iron Co., 29 S.W. 124 (Tenn. 1895). This wholistic contextual approach was accomplished by consideration of the situation and motives of the parties which induced the agreement and the purpose designed to be affected by it. *See* Nashville & N. W. R.R. Co. v. Jones, 42 Tenn. 574, 583 (1865).

[16] Intent was gleaned from the "usual, natural and ordinary meaning the contractual language . . . without recourse to matters *extraneous* to the text of the agreement." Planters Gin Co. v. Fed. Compress & Warehouse Co., 78 S.W.3d 885, 890 (Tenn. 2002) (emphasis added).

[17] Staub v. Hampton, 101 S.W. 776 (Tenn. 1906).

[18] Pinson & Assocs. Ins. Agency, Inc. v. Kreal, 800 S.W.2d 486, 487 (Tenn. Ct. App. 1990). Contextualism considers the agreement itself only a "memorial" of the agreement, while intent is garnered from evidence outside of the instrument.

and design . . . ."[19] However, at times, this holistic approach was conditioned on the presence of ambiguities within the instrument.[20] Accordingly, whether the contract was ambiguous began to serve as the threshold question of whether extrinsic evidence was needed to interpret the contract.[21] This consideration served as a rebuke of extreme contextual applications as embodied in *Pacific Gas*.[22] However, the Tennessee Supreme Court still allowed consideration of outside evidence in situations where no ambiguities were apparent if outside evidence revealed ambiguities.[23]

The threshold question explained above prompted courts to first consider whether the instrument at issue possessed ambiguities warranting consideration of outside evidence. This approach focused court's attention on the terms within the document's four corners and "exalt[ed]" the written instrument over external evidence.[24] Accordingly, this theory of contract construction requires the court to adhere to the plain meaning of the agreement's terms even if unjust outcomes result. Unfortunately, focusing strictly on the "four corners" of the written agreement may result in harsh outcomes not reflective of the true intention of the parties. Accordingly, to avoid the pitfalls of strict textualism while still prioritizing the written text, Tennessee courts opt for a middle ground by preserving the contract's plain language but also considering its surrounding circumstances.[25] This approach results in Tennessee courts both

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[19] Nunnelly v. Warner Iron Co., 29 S.W. 124, 127 (Tenn. 1895); s*ee also* Barnes v. Black Diamond Coal Co., 47 S.W. 498, 499 (Tenn. 1898) (seeking to avoid "technical rules" obstructing "common sense" in interpreting contracts).

[20] *See* Perkins Oil Co. v. Eberhart, 64 S.W. 760, 762 (Tenn. 1901). Tennessee courts recognized that not all agreements required consideration of extraneous evidence if the contract's writing and meaning were "plain and ambiguous" allowing the court to "interpret [it] as a matter of law." *Id.*

[21] Ascertaining parties' "inten[t] is a question of law . . . when the language is plain, simple, and unambiguous." Petty v. Sloan, 277 S.W.2d 355, 361 (Tenn. 1955).

[22] *See* 442 P.2d 641 (Cal. 1968) (allowing consideration of circumstances "even if the contract language initially appears unambiguous").

[23] Staub v. Hampton, 101 S.W. 776 (Tenn. 1907). These "latent ambiguities required consideration of outside evidence "to plac[e] the court in the same situation . . . [as] the actors themselves." *Id.* at 785.

[24] This approach also presumes the parties have "spoken for themselves" and that their words should be given the highest priority, particularly when ambiguities are absent. Smithart v. John Hancock Mut. Life. Ins., 71 S.W.2d 1059, 1063 (Tenn. 1934).

[25] *See, e.g.*, Kroger Co. v. Chem. Sec. Co., 526 S.W.2d 468, 471 (Tenn. 1975) ("A contract cannot be varied" by oral evidence, but it "aids in determining the meaning of the contract" and is "proper to be looked to by the court in arriving at the intention of the parties."); *see also* Penske Truck Leasing Co., L.P. v. Huddleston, 795 S.W.2d 669, 671

prioritizing the text of the agreement and considering contextual evidence to discern the parties' intent. Typically, parties illustrate their intention to bar extrinsic evidence by including an integration clause, or merger clause, within the agreement. Specifically, there are two types of integrations: partially integrated, which allows extrinsic evidence to supplement terms,[26] and completely integrated, which bars any outside evidence. Parties elect between partially and fully integrated agreements by the language of the instrument or the completeness of the document.[27]

The first issue the Court addressed was the Defendant's contention that the lower courts erred in concluding it breached the Agreement by unilaterally reducing renewal commission rates on existing policies. Ultimately, the Court agreed with Defendant's assertion that this evidence invoked the parol evidence rule and used this opportunity to clarify how this type of evidence is affected by the parol evidence rule. Importantly, the Court classified the schedule at issue within the Agreement as unambiguous and fully integrated. Thus, the Agreement's integrated status barred the use of pre-contract negotiations that would in any way vary the terms of the agreement. Accordingly, the Court reversed the lower court's finding that the Agreement's terms did not allow Defendant to unilaterally modify commissions, thus barring consideration of Plaintiff's extrinsic evidence.

The second issue the Court addressed was whether the lower courts erred in holding Defendant breached the Agreement by refusing to pay post-termination commissions to Plaintiff and instead payed those commissions directly to the subagents associated with the policies. Defendant contended that pursuant to the language of the Agreement, Plaintiff was no longer entitled to receive the commission payments, and thus was not in breach of the Agreement. Further, the Defendant again asserted that the trial court's reliance on Plaintiff's extrinsic evidence was

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(Tenn. 1990) (Tennessee courts have shown that within its rules of contract construction the intention of the parties is also determined by its "subject matter . . . circumstances . . . and the construction . . . placed on the agreement by the parties carrying out its terms.").

[26] A partially integrated agreement may not be contradicted by parol evidence, but may be supplemented by consistent, additional terms. *See* Hines v. Wilcox, 33 S.W. 914, 915 (Tenn. 1896); *cf.* RESTATEMENT (SECOND) OF CONTRACTS §§ 209–210 (1981).

[27] If the agreement "appears to be a complete agreement on its face, it is presumed to be a final, complete agreement." Schaeffer v. Am. Honda Motor Co., 976 F.Supp. 736, 741 (W.D. Tenn. 1997). Alternatively, the less formal the instrument, and the more terms the agreement leaves out that reasonable parties under the circumstances would otherwise include the more likely the agreement is not "final." *Id.*

in error.. In determining this issue, the Court identified two relevant provisions that governed Defendant's payments to Plaintiff: (1) the "Compensation Provision"; and (2) the "Termination Provision." Together, these provisions established that Plaintiff was "solely responsible" for payments to subagents as long as they are "able, entitled, or available." Additionally, under the language of the Termination Provision, if the Agreement was terminated, Defendant remained obligated to pay Plaintiff commissions. Given this plain language, the Court upheld the lower court's ruling and supported its use of extrinsic evidence.

Next, the Court considered the lower court's use of extrinsic evidence involving testimony that the parties intended their fee-shifting provision to cover attorney fees for inter-party disputes. Specifically, Plaintiff argued that inter-party disputes are covered by that provision, and the extrinsic evidence further showed the parties' mutual intent to this effect.[28] As such, Plaintiff argued that they were not varying the terms of the agreement but rather using contextual evidence to illustrate the intent of the parties to give effect to the plain terms of the agreement. In its analysis of the indemnity provision, the Court raised Tennessee's adherence to the "American rule" for attorney fees, which requires the contract to explicitly state that attorney fees are provided.[29] Accordingly, the Court found the language of the Agreement's indemnity provision insufficient to explicitly allow for attorney fees. Further, the Court supported its holding with cases that showed that even if boilerplate language within the fee-shifting provision qualified under the American rule, it did not extended to inter-party litigation.[30] Notably, the Court affirmed that in Tennessee, parties must specifically describe their indemnity provisions and outside evidence will not compensate for inadequate drafting.[31]

This case ultimately clarified Tennessee's text-centered-but-context-friendly approach to discern the intent behind a contract. The Court explained that the parol evidence rule allows consideration of extrinsic

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[28] When the parties formed their agreement, they were "fierce competitors" giving rise to the probability of litigation arising between them. This concern prompted the parties to intend their indemnity clause to cover litigation amongst themselves.

[29] If the contract does not specifically state that attorney fees are recoverable in the event of litigation, they are excluded. *See, e.g.*, Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303, 308 (Tenn. 2009).

[30] *See, e.g.*, Holcomb v. Cagle, 277 S.W.3d 393, 397 (Tenn. Ct. App. 2008).

[31] The court was not swayed by Plaintiff's argument that other jurisdictions allow boiler plate indemnity clauses to include inter-party disputes.

evidence as long as it does not contradict the agreement's text. In the event of ambiguous text, extrinsic evidence can be considered to aid in interpretation. Furthermore, extrinsic evidence will not compensate for imprecise fee-shifting arrangements in indemnity provisions. Additionally, the Court emphasized that post-contract conduct is not necessarily indicative of pre-contract intent and should not trump an agreement's writing. Finally, the Court declined to consider whether the discovery rule should apply to breach of contract cases. This case informs contract drafters to ensure the text reflects the parties' intentions, though outside evidence may be considered depending on its effect, and courts are not shelters against an agreement's harsh outcomes.

## ASSET VALUATION
## WITNESS CREDIBILITY

**The Tennessee Court of Appeals affirmed the trial court's classification of the appreciated value in shares of stock as marital property under Tennessee Code Annotated § 36-4-121(b)(1)(B)(i).** *Lucchesi v. Lucchesi*, No. W2017-01864-COA-R3-CV, 2019 WL 325493; 2019 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 23, 2019).

*Morgan Kain*

In *Lucchesi v. Lucchesi*, the Court of Appeals addressed whether the trial court (1) properly designated an asset as marital property; (2) correctly determined the value of several marital assets when granting a divorce; and (3) appropriately granted the correct amount of *in solido* alimony to the wife, as well as the award of attorney's fees incurred during the appeal. This case first entered the court system because the wife filed for divorce in the Circuit Court of Shelby County on November 7, 2013, claiming "inappropriate marital conduct and irreconcilable differences."

Throughout the nine day trial, various witnesses, called by both parties, introduced testimonial evidence to assist with the trial court's ruling. Ultimately, the trial court found that the husband's witnesses—as well as the husband himself—lacked credibility and granted the divorce, citing inappropriate marriage conduct as the reasoning. Additionally, evidence and testimony showed that the wife originally worked as a teacher until the couple had their only child; she later began working intermittently as a part-time realtor earning a maximum of $20,000 per year. The husband worked at his family-owned business, Delta Wholesale Liquors ("Delta"),

during the marriage as well as pursued a career as a venture capitalist. The trial court considered the parties' employment when making its asset distributions and determining alimony. In the trial court's order, the court distributed the marital assets between the parties, as well as allocated $200,000 *in solido* alimony to the wife and $200,000 for her attorney's fees. However, the trial court later amended its order specifying that the "[w]ife shall only be awarded the total sum of $200,000 as alimony *in solido*, rather than a total of $400,000."

Following the trial court's decision, both parties appealed. In pertinent part, the husband raised several issues on appeal surrounding the classification and valuation of specific marital assets, including the appreciation value of his shares of stock in Delta. On the other hand, the wife's appeal focused on the amount of alimony awarded to her as well as her attorney's fees incurred on appeal.

First, the court examined the trial court's determination of the appreciation value of the husband's shares of Delta stock as marital property. Both parties agreed that when the two were married, the "[h]usband owned 103.25 shares of Delta" which the "court valued . . . at $75,000 [originally]." Throughout the marriage, the husband was involved with and worked at Delta until he sold his interest for $3,699,983. During the trial, the husband confirmed and stipulated that due to the "[w]ife's role as a homemaker[, she] significantly contributed to the appreciation in value of the shares of Delta." Therefore, the court ultimately found the appreciation of said stock to be marital property in light of both parties' contribution to its appreciation. The husband challenged this finding and argued that the increase in value of the stock was not due to any contributions on his part.

In determining whether the appreciation in stock should be marital property, the Court looked to Tennessee Code Annotated § 36-4-121(b)(1)(B)(i), which states that marital property "include[s] income from and *appreciation on separate property* that accrues during the marriage where each party *substantially contributed to* [the separate property's] preservation and appreciation." (emphasis added). Further expanding on what is considered "substantially contributed to," the Court quoted *Yates v. Yates*, which held that "a spouse's contributions must be real and significant[; t]hey need *not*, however, be *monetarily* commensurate to the appreciation in the separate property's value, nor must they relate *directly* to the separate property at issue." No. 02A01-9706-CH-00122, 1997 Tenn. App. LEXIS 849; 1997 WL 746377 (Tenn. Ct. App. Dec. 4, 1997) (emphasis added).

Regarding both parties' substantial contributions, the Court highlighted the trial court's seven page discussion on its determination that both parties "substantially contributed to the preservation and appreciation of [the husband's] stock in the [Delta]." Primarily, the lower court relied on the stipulation made by the husband indicating the wife's contribution to the appreciation in the stock and his steady involvement in Delta throughout the marriage. Accordingly, the Court upheld the lower court's ruling and found no error, emphasizing that the evidence demonstrated that the husband's involvement with Delta did, in fact, show substantial contribution to the appreciation in the stock.

Next, the Court inspected the trial court's valuation of marital assets, carefully considering various properties, including CGN Energy (a business), "Investec 1407 Union Partnership" (a real estate investment), ownership interest in LGR Beverage Group, an account with a credit union, and a security interest in a patent. In reviewing the trial court's valuation, the Court clarified the standard by which it examined the determinations, stating that "the trial court's decisions with regard to the valuation and distribution of marital property will be presumed to be correct unless the evidence preponderates otherwise."

Although both the husband and wife introduced expert testimony that established values for each marital asset, the trial court ultimately took the determination of the wife's expert under advisement. The wife's expert relied upon Shelby County and Cheatham tax assessments and appraisals from 2015 in making his assessment. The husband argued against this expert, claiming that the expert was not qualified to give such determinations. The Court noted that "'[g]enerally, questions pertaining to the qualifications, admissibility, relevancy, and competency of expert testimony are matters left to the trial court's discretion.'" (quoting *City of Pulaski v. Morris,* No. M2010-00047-COA-R3-CV, 2010 Tenn. App. LEXIS 591; 2010 WL 3732161 (Tenn. Ct. App. Sept. 23, 2010)).

Upon reviewing the trial court's conclusion on such assets, the Court affirmed all findings of value except for one. When considering the trial court's determinations, the Court indicated that tax assessments and appraisals are an acceptable measurement to determine value of such assets, and the husband never once objected to the tax appraisals' introduction into evidence. Additionally, the Court expressed that each determination made by the trial court regarding the value of the various marital assets was supported by said appraisals as well as testimonial

evidence from the expert witness. Therefore, the Court concluded that the trial court did not err in its findings for the majority of the marital assets.

However, the Court did vacate and remand for further classification the trial court's valuation of one property owned by Atled Investments, LLC. Atled Investments, LLC—a company owned by the husband along with his two brothers—purportedly owned two condos, but the wife alleged the existence of a third condominium—the "unnamed condominium." The Court noted the trial court's contradictions when the trial court asserted that the unnamed condo was sold and no longer in the possession of the husband, yet also stated that the husband did not produce evidence of said sale and categorized the condo as marital property. Because of this apparent contradiction, the Court vacated and remanded the determination of the unnamed condo to the trial court for further clarification.

Finally, the Court addressed the wife's arguments concerning alimony and attorney's fees on appeal. First, the Court considered the amount of alimony allocated to the wife. The Court looked to "'determine whether the trial court applied the correct legal standard and reach[ed] a decision that is not clearly unreasonable.'" (quoting *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006)). The lower court granted $200,000 of *in solido* alimony. The wife contended, however, that her attorney's fees equaled $272,000—forcing her to utilize her determined amount of marital assets to cover the remaining fees. Accordingly, the Court modified the award to allocate a total of $300,000 *in solido* alimony to the wife.

Furthermore, the Court inquired into whether long-term alimony—also known as rehabilitative or transitional alimony—should additionally be awarded to the wife based on the wife's previous employment as a special education teacher and part-time work as a realtor when the couple's child was born. Because the trial court "did not consider whether an award of short-term alimony would be appropriate" or if long-term alimony would be applicable due to the wife's circumstances, the Court remanded the issue for further consideration. Lastly, the wife asserted a claim for her attorney's fees on appeal. The court has the discretion to determine the allocation of such fees if applicable. See *Seaton v. Seaton,* 516 S.W.2d 91, 93–94 (Tenn. 1974); *Davis v. Davis*, 138 S.W.3d 886, 890 (Tenn. Ct. App. 2003). Ultimately, the court concluded that because of the "disposition of the appeal and [the w]ife's need and [the h]usband's ability to pay," the wife should be granted her attorney's fees.

In light of the court's rulings, attorneys should be aware of the experts they bring forth to determine the valuation of various marital assets. The wife's expert in this case likely valued the properties higher than the husband's expert, which ultimately impacted the final amount of assets split between the two parties simply because the trial court found the wife's expert to be a more creditable source for determination.

Additionally, when looking to categorize appreciation as either separate or marital, attorneys should focus significantly on how much the parties "substantially contributed" to the appreciation of the asset. Here, the husband and his attorney *stipulated* to the wife's contribution to the appreciation of Delta's stock. Therefore, the wife did not have to put on any proof that she did, in fact, contribute to said stock. If not for the stipulation, the wife would have had the burden to introduce evidence demonstrating that she also *substantially contributed* to the appreciation in the husband's separate property stock.

Lastly, this case is a good reminder to practicing attorneys that the image and impression that their client(s) exude matters within the court room. Here, the trial court had a negative view of the husband, ultimately finding him lacking in credibility because of his evasiveness, demeanor, actions and reactions in the court, lack of truthfulness, failure to provide specific documents, and the continual admonishment by both the court and the husband's own attorney. Because of these instances, the trial court's view of the husband and the statements made by him and those involved in his argument were negatively impacted. Therefore, etiquette and demeanor are important factors to keep in mind not only during the trial itself, but also through various interactions and the processes leading up to the trial.