IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

THE PARKING GUYS, INC.,	§	
	§	
Petitioner-Appellant,	§	
	§	
v.	§	M2018-01409-COA-R3-CV
	§	
METROPOLITAN GOVERNMENT	§	
OF NASHVILLE AND DAVIDSON	§	
COUNTY, acting by and through the	§	Chancellor Bill Young
TRAFFIC AND PARKING	§	
COMMISSION,	§	Trial Court No. 17-970-II
	§	
Respondent-Appellee,	§	
	§	
and	§	
	§	
LINDA SCHIPANI,	§	
	§	
Proposed Intervenor-Respondent	§	
and Cross-Appellant.	§	

CROSS-APPELLANT AND APPELLEE LINDA SCHIPANI'S TENN. R. APP. P. 27(c) REPLY BRIEF

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III. STATEMENT REGARDING RECORD CITATIONS

Mrs. Schipani's brief uses the following designations:

1. Citations to the Administrative Record are abbreviated as "A.R. at (page number)."

2. Citations to the Technical Record are abbreviated as "R. at (page number)."

3. Given Mrs. Schipani's status as Cross-Appellant, The Parking Guys' "Reply" Brief is, in substance, a response to which Mrs. Schipani is entitled to reply. *See* Tenn. R. App. P. 27(c) ("If the appellee also is requesting relief from the judgment, the appellee may file a brief in reply to the response of the appellant to the issues presented by appellee's request for relief."). Nonetheless, this brief adopts The Parking Guys' terminology, and The Parking Guys' "Reply" Brief is therefore cited as "Appellant's Reply, (page number)."

4. Mrs. Schipani's Principal Brief is cited as "Schipani's Principal Brief, (page number)."

Record citations and citations to authority are footnoted throughout Mrs. Schipani's brief unless including a citation in the body of the brief improves clarity.

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IV. INTRODUCTION

This appeal concerns the Trial Court's denial of The Parking Guys' petition for a discretionary writ of certiorari. Because abundant evidence supported the Traffic and Parking Commission's decision to deny The Parking Guys a permanent valet permit, the Trial Court properly denied certiorari. The Parking Guys—a no-good, very-bad actor that regularly flouted the law and trespassed on neighboring properties—now appeals.

In her Principal Brief, Mrs. Schipani raised three central arguments supporting affirmance of the Trial Court's Order denying certiorari. ***First***, Mrs. Schipani argued that substantial and material evidence in the Administrative Record supported the Metropolitan Traffic and Parking Commission's decision to deny the Appellant a valet permit.[1] ***Second***, Mrs. Schipani observed that the Trial Court correctly applied the "substantial and material evidence standard of review" in reaching its decision to deny certiorari.[2] ***Third***, Mrs. Schipani noted that in light of the considerable record evidence that The Parking Guys trespassed on neighboring business owners' property, conducted its valet

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[1] Schipani's Principal Brief, pp. 25-26.

[2] *Id.* at pp. 26-31.

operation illegally, and otherwise conducted its valet operation in a manner that undermined public safety, health, and welfare, The Parking Guys failed to meet its burden of proving that a valet permit should issue under Metro Code § 12.41.030.[3]

In response, The Parking Guys raises two contrary arguments. Each is unpersuasive.

First, The Parking Guys insists that this Court must conduct a *de novo* review, rather than reviewing the Trial Court's Order denying certiorari based on the well-settled abuse of discretion standard.[4] Because unambiguous precedent instructs otherwise, however, The Parking Guys is wrong.

Second, The Parking Guys avers that Mrs. Schipani "has failed to identify sufficient substantianl [sic] and material evidence to sustan [sic] the Commission's decsion [sic] to deny the valey [sic] permit."[5] But Mrs. Schipani identified a wealth of such evidence, and The Parking Guys' insistence that this Court must overlook its trespassing and self-styled

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[3] *Id.* at pp. 31-37.

[4] Appellant's Reply, pp. 12-13.

[5] *Id.* at p. 13.

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"technical violations"[6] of the law is similarly wrong.

As Cross-Appellant, Mrs. Schipani additionally argued that the Trial Court's Order denying her Motion to Intervene should be reversed because the Trial Court applied an incorrect legal standard.[7] The Parking Guys' response to that claim—which rests on a combination of a waived (and meritless) procedural objection, a misreading of Mrs. Schipani's brief, and its own erroneous application of the relevant timeliness factors—is meritless as well.

V. ARGUMENT

A. CERTIORARI PROCEEDINGS ARE NOT REVIEWED DE NOVO.

The Parking Guys insists that "this Court should apply the de novo standard of review" on appeal,[8] and that Mrs. Schipani's "assertion that this Court reviews common law writs of certiorari under any standard of review other than a deferential de novo review is, simply put, incorrect."[9] The Parking Guys is clearly and incontrovertibly mistaken.

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[6] *Id.* at pp. 13-14.

[7] Schipani's Principal Brief, pp. 41-53.

[8] Appellant's Reply, p. 13.

[9] *Id.* at p. 12.

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Our Supreme Court has unambiguously set forth the applicable standard of review regarding a common law writ of certiorari as follows:

> A common-law writ of certiorari is not available as a matter of right. *Boyce v. Williams*, 215 Tenn. 704, 713–14, 389 S.W.2d 272, 277 (1965); *State ex rel. Karr v. Taxing Dist. of Shelby Cnty.*, 84 Tenn. 240, 246 (1886). **The petition for a writ is addressed to the trial court's discretion.** *Biggs v. Memphis Loan & Thrift Co.*, 215 Tenn. 294, 302, 385 S.W.2d 118, 122 (1964); *Gaylor v. Miller*, 166 Tenn. 45, 50, 59 S.W.2d 502, 504 (1933). **Accordingly, appellate courts must review a trial court's decision either to grant or to deny a petition for common-law writ of certiorari using the "abuse of discretion" standard of review**. *State v. Lane*, 254 S.W.3d at 354.

Heyne v. Metro. Nashville Bd. of Pub. Educ., 380 S.W.3d 715, 730 (Tenn. 2012) (emphases added).

This Court, too, has cited and reiterated this standard of review. *See Gray v. Tennessee Dep't of Correction*, No. E2012-00425-COA-R3CV, 2013 WL 5677004, at *3 (Tenn. Ct. App. Oct. 17, 2013) (citing *Heyne*, 380 S.W.3d at 730). For instance, in *Brookside Homeowners Ass'n v. Vaught*, No. M2015-00432-COA-R3-CV, 2015 WL 7180760, at *2 (Tenn. Ct. App. Nov. 13, 2015), this Court explained:

> **A court's decision to issue or dismiss a writ of certiorari is a discretionary one.** *Heyne v. Metro. Nashville Bd. of Educ.*, 380 S.W.3d 715, 730 (Tenn.2012); *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn.1965). Thus, **our review of this issue is limited to a determination of whether the trial court abused its discretion in dismissing the petition.** *See Ancro Fin. Co. v.*

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> *Johnson*, No. W2000–02709–COA–R3–CV, 2001 WL 1298913, at *2 (Tenn.Ct.App. Oct. 23, 2001).

Id. (emphases added).

Mrs. Schipani's brief correctly identified the above standard of review.[10] The Trial Court correctly observed the limited and discretionary standard of review that governs certiorari proceedings as well. *See* R. at 231. Specifically, it noted that: "[R]eview under the writ of certiorari process is very limited . . . . 'It is not available as a matter of right, but rather is addressed to the trial court's discretion.'" *Id.* (quoting *Lanier Worldwide, Inc. v. State*, No. M2006-02630-COA-R3-CV, 2003 WL 1145281, *6 (Tenn. Ct. App. April 17, 2007)).

Thus, The Parking Guys stands alone in insisting that "this Court should apply the de novo standard of review" to its appeal.[11] Appellant's erroneous claim on the matter is premised upon a severe misreading of *Lafferty v. City of Winchester*, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2000), which made clear that while <u>the record</u> is reviewed de novo, "th[e] writ affords quite limited judicial review," and "[t]his review does not permit the courts to reweigh the evidence, or to scrutinize the intrinsic

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[10] Schipani's Principal Brief, p. x.

[11] Appellant's Reply, p. 13.

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correctness of the decision." *Id.* Put differently: The Parking Guys' sole demand on appeal—that this Court reweigh the evidence *de novo* and then accord dispositive (and selectively favorable) weight to the Collier Report while according no weight at all to any other evidence in the record—is flatly impermissible.

B. SUBSTANTIAL AND MATERIAL EVIDENCE SUPPORTS THE TRAFFIC AND PARKING COMMISSION'S DECISION TO DENY THE PARKING GUYS A VALET PERMIT.

The Parking Guys additionally contends that Mrs. Schipani "has failed to identify sufficient substantianl [sic] and material evidence to sustan [sic] the Commission's decsion [sic] to deny the valey [sic] permit."[12] Again, The Parking Guys' contention is meritless.

1. There is substantial and material evidence that The Parking Guys failed to meet its burden of proof under Metro Code § 12.41.030 by operating illegally and trespassing on neighboring properties.

The record contains abundant evidence to support the Commission's decision to deny The Parking Guys a valet permit, which Mrs. Schipani cited repeatedly. For instance, Mrs. Schipani cited the clear record evidence that The Parking Guys operated illegally beyond

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[12] Appellant's Reply, p. 13.

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permitted hours.[13] The record also contains evidence that The Parking Guys continued to operate—also illegally—after its temporary valet permit expired, and Mrs. Schipani's brief cited that evidence as well.[14] The record similarly contains evidence that The Parking Guys trespassed on neighboring properties, and Mrs. Schipani cited that evidence, too.[15]

In Response, The Parking Guys contends that Mrs. Schipani has failed to identify evidence supporting "the Parking Guys [sic] inability to lawfully operate under a permanent permit,"[16] and it insists that "the solution" to its illegal behavior is for the Commission to reward it with a permanent permit of longer duration.[17] This response refutes itself. Here, the record proves that The Parking Guys operated illegally. That illegal operation itself constitutes evidence that The Parking Guys failed to prove that a permanent permit should issue. *See* R. at 63 (indicating that Metro Code 12.41.030's requirements come "<u>in addition to</u> the

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[13] Schipani's Principal Brief, pp. 35-36.

[14] *Id.* at pp. 34-35.

[15] *Id.* at pp. 32-34.

[16] Appellant's Reply, p. 15.

[17] *Id.* at p. 15 ("the solution is to make the permanent permit expire at 4:00 a.m.").

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licensing requirements of Metro Code 12.41.020 of this chapter," which require that a licensee be "ready, willing and able to comply with all the rules and regulations of the department, and the laws of the metropolitan government" and "conform to the laws of the metropolitan government."). The Commission's denial may be affirmed accordingly.

2. The Commission's decision may be affirmed based on grounds unrelated to "traffic problems."

Alternatively, The Parking Guys demands that this Court overlook its illegal operation and trespassing, because it claims that: "Schipani points to nowhere in the record where either the Commission or the Chancery court relied on violations of the lane closure permit or claims of trespassing to deny the permit or affirm the denial."[18] But these concerns constitute legitimate, independent bases for affirming the Commission's decision, and The Parking Guys' insistence to the contrary relies on a fundamental misunderstanding of law.

To prevent this Court from considering its illegal operation and trespassing, The Parking Guys contends that "[t]his appeal centers on" the Commission's traffic study, which it characterizes as "the issue that

[18] Appellant's Reply, p. 14.

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troubled the Chancery Court."[19] The claimed basis for this restrictive focus on the traffic study is a statement from a Commission member requesting a deferral until additional evidence could be secured.[20]

Because the subsequent traffic study undermines its claims, The Parking Guys vastly overstates the significance of the Commission's deferral. Regardless, it is well-settled that a lower tribunal[21] "speaks through its order, not through the transcript." *In re Adoption of E.N.R.*, 42 S.W.3d 26, 31 (Tenn. 2001) (citing *Morat v. State Farm Mut. Auto. Ins. Co.*, 949 S.W.2d 692, 696 (Tenn. Ct. App. 1997)). *See also Smith v. Smith*, No. M2007-02650-COA-R3CV, 2008 WL 5158189, at *2 (Tenn. Ct. App. Dec. 8, 2008) ("it is well-settled that a court speaks through its orders, not through transcripts."). Consequently, this Court's review is not limited in any way by any Commissioner's transcript statements.

Instead, this Court reviews only whether the Commission's order denying The Parking Guys a valet permit was supported by substantial and material evidence. *Id.* The Parking Guys' illegal operation and

[19] Appellant's Reply, p. 4.

[20] *Id.*

[21] As the Trial Court correctly held, the Commission "exercis[es] judicial functions" when it adjudicates permit applications. R. at 230.

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trespassing are directly relevant to that inquiry. Further—and independently—this Court may affirm the Commission's permit denial based on any ground supported by the record. *See Portice v. Portice*, No. E2016-01682-COA-R3-CV, 2017 WL 3433110, at *5 (Tenn. Ct. App. Aug. 10, 2017) ("This Court will affirm a decree correct in result, but rendered upon different, incomplete, or erroneous grounds.").

Based on the substantial evidence of The Parking Guys' illegal operation and trespassing, there was abundant evidence in the record to support the Commission's determination that The Parking Guys failed to meet its burden of proving that a permanent valet permit should issue. *See* R. at 63 (setting forth the requirements for a permit under Metro Code 12.41.030 and Metro Code 12.41.020, which include compliance with the law). As a result, The Parking Guys' insistence that "the claimed technical violations of the lange [sic] closure permits is [sic] not a basis for denying the permit"[22] lacks merit.

3. The Commission's decision may additionally be affirmed based on traffic problems.

Even focusing, as The Parking Guys prefers, on "traffic problems"

[22] Appellant's Reply, p. 14.

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alone, the record additionally contains substantial and material evidence that The Parking Guys created traffic problems. Consequently, the Commission's decision may be affirmed on that basis as well.

The record evidence regarding the traffic problems created by The Parking Guys' operation carried multiple forms:

First, six separate neighboring business owners provided evidence that The Parking Guys' valet operation created traffic and parking problems.[23] The Parking Guys insists that this Court should not accord that evidence any weight.[24] Again, though, this Court may not reweigh evidence on appeal. *See Heyne*, 380 S.W.3d at 729 ("reviewing courts may not reweigh the evidence or substitute their judgment for the judgment of the entity whose decision is being reviewed.") (citing *State v. Lane*, 254 S.W.3d at 355); *Howard v. Turney Ctr. Disciplinary Bd.*, No. M2017-00230-COA-R3-CV, 2018 WL 625115, at *1 (Tenn. Ct. App. Jan. 30, 2018). Consequently, for the very same reasons detailed by the Trial

[23] A.R. 94-98; A.R. 77; A.R. 71; A.R. 65.

[24] The Parking Guys analogizes this evidence to "the hunt for Bigfoot." Appellant's Reply, p. 3. Other than its monstrous behavior toward its neighbors and the fictional conspiracy that it imagines, however, the comparison is wholly inapt.

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Court, the Commission's denial must be affirmed.

Second, the referenced traffic study evaluating The Parking Guys' valet operation determined that "there were five (5) vehicles that experienced delay on 15th Avenue North due to congestion at the valet stand and curb face," and that "[a] couple of vehicles were observed making U-turns from the valet stand to go south on 15th Avenue North and access the traffic signal."[25] Significantly, the record also demonstrates that the Commission had previously rescinded a different valet operator's permit *for exactly that reason*—because of concerns about people making "u-turns in the middle of the road."[26] Accordingly, this finding, too, was independently sufficient to support the Commission's denial.

Third, even if The Parking Guys' valet operation only presented "typical"[27] traffic problems, the record reflects that The Parking Guys' operation took place on a narrow "32-foot" street[28] that serves as a

[25] A.R. at 47-48.

[26] A.R. at p. 104, line 24 – p. 105, line 5.

[27] A.R. at 130, lines 22.

[28] A.R. at 46.

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hospital corridor for emergency vehicles.[29] As a consequence, The Parking Guys' valet operation presented unique health and safety concerns that were not shared by "typical" valet stands. Multiple witnesses presented such concerns.[30] Because those concerns went unaddressed, however, and because The Parking Guys had the burden of establishing that its valet operation "would not be detrimental to the public safety, health and welfare of the inhabitants of Nashville and Davidson County,"[31] the Commission's decision may independently be affirmed on that basis as well.

C. THE TRIAL COURT APPLIED AN INCORRECT LEGAL STANDARD WHEN ADJUDICATING MRS. SCHIPANI'S MOTION TO INTERVENE, WHICH CONSTITUTED AN ABUSE OF DISCRETION.

As Cross-Appellant, Mrs. Schipani additionally argued that the Trial Court's Order denying her Motion to Intervene should be reversed because the Trial Court applied the wrong legal standard. Specifically, she argued that because the Trial Court's Order denying Mrs. Schipani's motion as "untimely" neither cited nor applied the mandatory factors

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[29] A.R. at 137, lines 12-14; A.R. at 19; A.R. at 67.

[30] *Id.*

[31] R. at 63; Metro Code 12.41.030.

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that govern the timeliness of intervention,[32] the Trial Court abused its discretion.

In response, The Parking Guys raises a waived procedural objection to Mrs. Schipani's motion while insisting—wrongly—that Mrs. Schipani waived her claim. It further argues that "[t]here is no requirement that the Chancery Court conduct the five factor analysis set forth in *American Materials Technologies, LLC v. City of Chattanooga*, 42 S.W. 3d 914 (Tenn. Ct. App. 2000)."[33] Alternatively, The Parking Guys contends that "*if* the Chancery Court abused its discretion in denying Schipani's motion to intervene,"[34] then the Trial Court's Order applying the wrong legal standard should be affirmed anyway. Each claim is unpersuasive.

1. The Parking Guys' claim that there was a procedural defect in Mrs. Schipani's Motion to Intervene is both waived and meritless.

The Parking Guys initially claims that "Schipani's failure to file a pleading with her motion to intervene, as required by Tenn. R. Civ. P. 24.03, is fatal to her appeal."[35] The claim is baseless for several reasons.

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[32] R. at 334-37.

[33] Appellant's Reply, p. 8.

[34] Appellant's Reply, p. 1.

[35] Appellant's Reply, p. 6.

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First, because The Parking Guys failed to raise any objection on the matter in the Trial Court and strategically waited to do so for the first and only time in its response on appeal,[36] the claim is waived. *See Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived."); *Villages of Brentwood Homeowners Ass'n, Inc. v. Westermann*, No. 01A01-9708-CH-00388, 1998 WL 289342, at *2 (Tenn. Ct. App. June 5, 1998) ("arguments not asserted at trial are deemed waived on appeal."); *Meeks v. Tennessee Bd. of Prob. & Parole*, No. M2007-00584-COA-R3-CV, 2008 WL 802458, at *3 (Tenn. Ct. App. Mar. 24, 2008) ("These issues were not raised in the trial court, and issues raised for the first time on appeal are considered waived."). Such strategic failures to raise objections in the trial court have frequently been condemned. *See, e.g.*, *State v. Mounce*, 859 S.W.2d

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[36] The Parking Guys' response to Mrs. Schipani's Motion to Intervene is set forth at R. 236-242. The procedural objection that The Parking Guys raises now was never presented. *But see* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party . . . who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). *Cf. Francis v. Hughes*, No. E2017-02139-COA-R3-CV, 2018 WL 4090988, at *4 (Tenn. Ct. App. Aug. 28, 2018) ("Tennessee Court of Appeals Rule 6 . . . . [requires]: A statement showing how such alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded.").

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319, 323 (Tenn. 1993) ("the rationale for requiring an objection to a mistake is that it gives the trial judge an opportunity to cure a situation that one or both parties perceive to be in error. A party ought not be permitted to stand silently by while the trial court commits an error in procedure, and then later rely on that error when it is to his advantage to do so."). Consequently, even if there were some procedural defect contained in Mrs. Schipani's motion—and there was not—The Parking Guys' failure to raise any objection to it in the Trial Court results in waiver. *Anderson Cty. Quarterly Court v. Judges of 28th Judicial Circuit*, 579 S.W.2d 875, 883 (Tenn. Ct. App. 1978) ("This question is raised for the first time on appeal. Even if it be error, it must be considered waived . . . .").

The argument is also meritless. Because this case is a certiorari proceeding, ***there were no pleadings from any party***. *See* Tenn. R. Civ. P. 7.01. Indeed, pleadings were ***forbidden***. *See id.* (narrowly defining "pleadings," and stating that: "No other pleading shall be allowed. . . .").

Specifically, Tenn. R. Civ. P. 7.01 narrowly limits pleadings to "a complaint and an answer," "a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a

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third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14," and "a third-party answer, if a third-party complaint is served." *Id.* Thus, because the Trial Court's review was initiated via a petition for a writ of certiorari, no "pleading" was ever filed by any party. *Id.* *Cf. Monroe Contract Corp. v. Harrison Square, Inc.*, 266 Pa. Super. 549, 554 (1979) ("a petition is not a pleading within the ambit of Pa.R.C.P. No. 1017(a).").

As a result, there was no proposed pleading for Mrs. Schipani to file in response. Instead, the only "pleading" involved in this case was The Parking Guys' federal Complaint—which Mrs. Schipani filed[37]—and her response to that pleading, which she filed as well.[38]

Further still, Mrs. Schipani indicated her willingness to limit her intervention to this appeal.[39] Particularly in federal court—which, as The Parking Guys emphasizes, applies a rule with "identical language" regarding intervention[40]—appellate intervention is routinely permitted. *See, e.g., Carter v. Welles-Bowen Realty, Inc.*, 628 F.3d 790, 790 (6th Cir.

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[37] R. at 186-207.

[38] R. at 252-77.

[39] R. at 246, n. 2.

[40] Appellant's Reply, p. 8.

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2010) ("On appeal, we may grant either intervention of right or permissive intervention. . . . The failure of the government to intervene in the district court does not preclude its intervention on appeal. We find the government's motion to be timely and conclude that its intervention in this appeal will not unduly prejudice the defendants.") (citing *United States v. Locke*, 529 U.S. 89, 98 (2000)). And to the extent that there are "pleadings" in the appellate process, they are the parties' briefs. Here, Mrs. Schipani timely filed her brief; The Parking Guys' had a full and fair opportunity to respond to it, and no claim to prejudice has been raised.

2. Mrs. Schipani did not "waive[] her claim that the Court abused its discretion in rejecting her request for permissive intervention."

In a two-sentence section devoid of a single citation, The Parking Guys further claims that Mrs. Schipani "does not specifically articulate how the Chancery Court abused its discretion in denying her request for permissive intervention," and it calls for waiver as a result.[41] However, a cursory review of Mrs. Schipani's brief refutes the claim.

In her briefing, Mrs. Schipani noted that "[t]he Trial Court

[41] Appellant's Reply, p. 12.

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considered Mrs. Schipani's claims for both intervention as of right and permissive intervention simultaneously," and she expressly argued that "the Trial Court failed to apply the correct legal standard regarding the 'timeliness' of either" one.[42] Mrs. Schipani further argued that "under both Tenn. R. Civ. P. 24.01 and Tenn. R. Civ. P. 24.02, a movant's intervention must be 'timely'";[43] she detailed the Trial Court's failure to apply the proper legal standard governing timeliness;[44] and she explained why "[a]pplying an incorrect legal standard constitutes reversible error even under the highly deferential abuse of discretion standard."[45] The Parking Guys' claim for waiver fails accordingly.

3. The Parking Guys' arguments regarding the merits of Mrs. Schipani's Motion to Intervene are baseless.

Last, The Parking Guys argues that Mrs. Schipani's Motion to Intervene was properly denied on its merits. But The Parking Guys misconstrues the legal standard that governs the merits of her motion, contending—wrongly—that "[t]here is no requirement that the Chancery

[42] Schipani's Principal Brief, p. 44.

[43] *Id.*

[44] *Id.* at pp. 45-51.

[45] *Id.* at p. 50.

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Court conduct the five-factor analysis set forth in *American Materials Technologies, LLC v. City of Chattanooga*, 42 S.W. 3d 914 (Tenn. Ct. App. 2000)."[46]

The Parking Guys is mistaken. "In *American Materials Technologies, LLC v. City of Chattanooga*, 42 S.W.3d 914 (Tenn. Ct. App. 2000), this Court outlined the factors courts should consider in determining whether a motion for intervention is timely." *In re Estate of Smith*, No. W2017-02035-COA-R3-CV, 2018 WL 4859045, at *5 (Tenn. Ct. App. Oct. 8, 2018). This Court has further indicated that *American Materials* sets forth the "factors to be considered." *Nat'l Pub. Auction Co., LLC v. Camp Out, Inc.*, No. M2015-00291-COA-R3-CV, 2016 WL 690438, at *4 (Tenn. Ct. App. Feb. 18, 2016). Thus, what this Court has referred to as "the *American Materials* factors" are mandatory. *See Estate of Smith*, 2018 WL 4859045, at *7. As a consequence, the Trial Court's failure to consider those factors constituted an abuse of discretion. *See State v. Shuck,* 953 S.W.2d 662, 669 (Tenn. 1997) ("an appellate court should find an abuse of discretion when it appears that a trial court applied an incorrect legal standard . . . .").

[46] Appellant's Reply, p. 8.

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Alternatively, The Parking Guys argues that "consideration of the five factors does not reveal an abuse of discretion."[47] There are, however, several significant problems with The Parking Guys' position.

First, given that The Parking Guys argued in the Trial Court that Mrs. Schipani's Motion to Intervene should be denied based on an inapposite 1961 case, its novel arguments regarding the *American Materials* factors were never presented below.[48] As noted, however, "arguments not asserted at trial are deemed waived on appeal." *Villages of Brentwood Homeowners Ass'n, Inc.*, 1998 WL 289342, at *2.

Second, The Parking Guys' arguments as to each *American Materials* factor are almost uniformly unsupported by citations, which also results in waiver. *See Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000) ("Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue."); *Commerce Union Bank, Brentwood, Tennessee v. Bush*, 512 S.W.3d 217, 224 (Tenn. Ct. App. 2016) ("It is not the duty of

[47] Appellant's Reply, p. 9.

[48] R. at 236-42

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this court to verify unsupported allegations or search the record for facts in support of an appellant's poorly-argued issues.”).

__Third__, The Parking Guys’ claims regarding the applicable timeliness factors are contradicted by the record. For instance, The Parking Guys contends that Mrs. Schipani only sought intervention “to buttress the existing position of Metro,”[49] even though her Motion to Intervene unmistakably reflects that she did not. *See, e.g.,* R. at 181 (noting several of Mrs. Schipani’s divergent interests, particularly her “interest in ensuring that her separate defenses in Middle District Case 3-:18-cv-00511 are protected through this litigation”). Her arguments as Appellee in this case also plow substantially more ground than Metro’s—something that presumably accounts for The Parking Guys’ complaint that Mrs. Schipani “has no right to make them”[50] and its decision to reply to her brief alone.

The Parking Guys further contends—without citation—that “the prejudice to the Parking Guys is significant because, if [Mrs. Schipani’s] intervention was to serve any purpose below, the Parking Guys would be

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[49] Appellant’s Reply, p. 13.

[50] *Id.* at p. 10.

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required to expend resources re-briefing the position and responding to the duplicative arguments of Schipani, and rearguing the petition."[51] Yet again, however, the record proves otherwise. *See* R. at 246, n. 2. To the contrary, the record demonstrates that Mrs. Schipani specifically proposed to limit her intervention to protecting her interests on appeal, and she expressly indicated that no briefing requiring any response from The Parking Guys would be forthcoming. *Id.*

The Parking Guys additionally contends that Mrs. Schipani failed to "explain, with authority or otherwise, how [its federal lawsuit] mitigates [sic] in favor of intervention."[52] Again, though, the record demonstrates otherwise, reflecting that Mrs. Schipani explained in considerable detail that:

(1) This proceeding will carry preclusive effect as to The Parking Guys' federal claim that its permit was denied unlawfully, *see* R. at 180,

(2) Her available defenses in the federal proceeding diverge from Metro's, *see* R. at 181, and

(3) The Parking Guys took a directly conflicting position in this

[51] *Id.* at p. 11.

[52] *Id.* at p. 10.

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proceeding regarding whether Mrs. Schipani's statements to the Traffic and Parking Commission constituted assertions of fact or opinions—an issue that affected Mrs. Schipani's defense alone. *See* R. at 249.

Finally, The Parking Guys contends—once again without citation—that the timeliness factor governing "the length of time preceding the application during which the proposed intervener knew or reasonably should have known of [her] interest in the case" is "difficult to analyze. . . ."[53] But there is no ambiguity on the matter, and the analysis regarding it is not difficult in any regard.

Here, given the preclusive effect that this proceeding has on the claims raised in The Parking Guys' federal lawsuit against Mrs. Schipani, that lawsuit alone created an interest supporting intervention as of right. *See, e.g., Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) ("Where a party seeking to intervene in an action claims an interest in the very property and very transaction that is the subject of the main action, **the potential stare decisis effect may supply that practical disadvantage which warrants intervention as of right**.") (emphasis added). *See also Kleissler v. U.S. Forest Serv.*, 157 F.3d 964,

[53] Appellant's Reply, p. 10.

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970 (3d Cir. 1998); *Francis v. Chamber of Commerce of U. S.*, 481 F.2d 192, 195, n. 8 (4th Cir. 1973)). Further, the record makes plain that The Parking Guys' federal lawsuit was filed on June 1, 2018,[54] and that it was not even properly served until many months later.[55] Thus, Mrs. Schipani demonstrated that her central interest in this proceeding ***could not*** have arisen until after The Parking Guys' June 1, 2018 lawsuit was filed.

Because the Trial Court failed to consider multiple mandatory timeliness factors that governed her claim for intervention, remanding her Motion to Intervene with instructions to apply the correct legal standard is a proper remedy. If this Court considers those factors in the first instance, however, then for the reasons set forth in Mrs. Schipani's Principal Brief, her Motion to Intervene should be granted.[56]

Further, notwithstanding The Parking Guys' newly-formed arguments regarding timeliness, *Shedd v. Cmty. Health Sys., Inc.*, No. W2010-02140-COA-R3-CV, 2010 WL 4629020, at *5 (Tenn. Ct. App. Nov. 12, 2010), is the proper analogue to the unique circumstances presented

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[54] R. at 186.

[55] Schipani's November 8, 2018 Motion to Consider Post-Judgment Fact, Exhibit 1.

[56] Schipani's Principal Brief, pp. 51-53.

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in this case. There, this Court held that despite a delay in intervention of "more than two years," *id.* at *3, given: (1) the intervenor's clear interests in the proceeding, (2) the absence of publication by the original parties to support a finding that the intervenor knew or should have known about the proceeding, and (3) the absence of any testimony demonstrating prejudice to the party opposing intervention, "the trial court abused its discretion in declaring [the intervenor's] motion to intervene untimely." *Id.* at *5. In the instant case, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed for precisely the same reasons.

VI. CONCLUSION

For the foregoing reasons, the Trial Court's Order denying certiorari should be affirmed, and the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, the argument of this brief contains 4,946 words pursuant to § 3.02(a)(1)(b), as calculated by Microsoft Word, and this brief was prepared using 14-point Century font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2019, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

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