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 TRAFFIC AND PARKING COMMISSION,	§	Chancellor Bill Young
	§	
	§	Trial Court No. 17-970-II
Respondent-Appellee,	§	
	§	
and	§	
	§	
LINDA SCHIPANI,	§	
	§	
Proposed Intervenor-Respondent and Cross-Appellant.	§	

BRIEF OF INTERVENING RESPONDENT-APPELLEE AND CROSS-APPELLANT LINDA SCHIPANI

DANIEL A. HORWITZ, ESQ.
LAW OFFICE OF DANIEL A. HORWITZ
1803 BROADWAY, SUITE #531
NASHVILLE, TN 37203
(615) 739-2888
daniel.a.horwitz@gmail.com

Date: February 19, 2019

Counsel for Linda Schipani

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III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Mrs. Schipani's Issues as Appellee:

Pursuant to Tenn. R. App. P. 27(b), Mrs. Schipani submits her own competing Statement of the Issues Presented for Review:

(1) Whether—given the substantial record evidence that The Parking Guys trespassed on neighboring business owners' property, conducted its valet operation illegally, created parking issues and congestion on a hospital corridor, and conducted its valet operation in a manner that undermined public safety, health, and welfare—there is substantial and material evidence in the Administrative Record to support the Metropolitan Traffic and Parking Commission's determination that The Parking Guys failed to meet its burden of proving that its valet operation "would not be detrimental to the public safety, health and welfare of the inhabitants of Nashville and Davidson County" under Metro Code 12.41.030.[1]

(2) Whether the Trial Court abused its discretion in declining to grant The Parking Guys' petition for a writ of certiorari; and

(3) Whether the Trial Court properly applied the "substantial and

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

material evidence" standard of review" in reaching its decision.

B. Mrs. Schipani's Issues as Cross-Appellant:

Mrs. Schipani also advances two additional claims as Cross-Appellant pursuant to Tenn. R. App. P. 3(h) and 13(a):

(4) Whether the Trial Court applied an incorrect legal standard in adjudicating Mrs. Schipani's Motion to Intervene by failing to consider four mandatory timeliness factors; and

(5) Whether Mrs. Schipani's Motion to Intervene should have been granted.

IV. 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. The Parking Guys' Principal Brief is cited as "Appellant's Brief at (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.

V. APPLICABLE STANDARDS OF REVIEW

The following three standards of review govern this appeal:

(1) The Appellant's claim that the Trial Court erred in denying certiorari is reviewed for abuse of discretion,[2] and this Court's review is "is essentially a determination of whether or not the trial court properly applied the 'substantial and material evidence' standard of review" in reaching its decision.[3]

(2) The Trial Court's denial of Mrs. Schipani's Motion to Intervene **As of Right** is reviewable de novo, but the timeliness of her intervention is reviewed for abuse of discretion.[4]

(3) The Trial Court's denial of Mrs. Schipani's Motion to

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[2] *Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 730 (Tenn. 2012) ("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.") (quoting *State v. Lane*, 254 S.W.3d 349, 354 (Tenn. 2008)).

[3] *State, Dep't of Children's Servs. v. Davis*, No. E2010-02016-COA-R3CV, 2011 WL 3209187, at *5 (Tenn. Ct. App. July 28, 2011).

[4] *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 191 (Tenn. 2000) ("The standard of review on appeal for the denial of intervention as of right is de novo, except for the timeliness of the application which is reviewed under an abuse of discretion standard.") (citing *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). *See also Gregory v. Melhorn*, No. E2012-02417-COA-R3CV, 2013 WL 6857945, at *6 (Tenn. Ct. App. Dec. 27, 2013).

Intervene **By Permission** is reviewed for abuse of discretion.[5]

[5] *Brown & Williamson Tobacco Corp.*, 18 S.W.3d at 191 ("The standard of review for the denial of permissive intervention is abuse of discretion.") (citing *Chaille v. Warren*, 635 S.W.2d 700, 703 (Tenn. App. 1982)).

VI. INTRODUCTION

This is a case about a valet company that routinely trespassed on local business owners' private property, regularly interfered with the operations of area businesses by obstructing the entrances and exits of their parking lots and parking in alleys, and conducted an illegal valet operation both without a valid permit to operate and outside of permitted hours.[6] In the face of uniform and overwhelming opposition from aggrieved local business owners who expressed concerns about the Appellant's trespassing, parking issues, and other misbehavior,[7] the misbehaving valet company sought a permanent valet permit from the Metropolitan Traffic and Parking Commission. Based on substantial and material evidence that militated against issuing the Appellant a valet permit, however, the Commission denied the Appellant's valet permit application.[8] Thereafter, the Appellant sought certiorari.[9]

Upon review, the Trial Court denied certiorari, finding that there was substantial and material evidence in the record to support the

[6] *See, e.g.,* A.R. at 65; A.R. at 77; A.R. at 67.

[7] A.R. at 60-86.

[8] A.R. at 142.

[9] R. at 1-6.

Metropolitan Traffic and Parking Commission's decision to deny the Appellant a valet permit.[10] Specifically, the Trial Court cited the extensive record of complaints from a multitude of local business owners regarding the Appellant's trespassing, misconduct, parking, and congestion issues.[11] The Trial Court further cited the area District Council Member's concerns about the Appellant's inappropriate behavior and its illegal valet operation.[12] Accordingly, after reciting and applying the correct standard of review, the Trial Court denied certiorari.[13]

Notwithstanding the extensive evidentiary record of the Appellant's pervasive trespassing, misconduct, and misbehavior, the Appellant smells a conspiracy, and it attributes the Commission's permit denial entirely to "Metro's mischief."[14] Rather than addressing those issues, however, in appealing the Trial Court's denial of certiorari, the Appellant simply ignores the impressive array of complaints from local business owners about its trespassing, misconduct, illegal operation, and

[10] R. at 230-235.

[11] R. at 220-229.

[12] R. at 230.

[13] R. at 230-235.

[14] Appellant's Brief, p. 6.

parking problems.[15] Instead, the Appellant focuses—to the exclusion of literally everything else in the record—upon the purported absence of any "traffic concern"[16] attributable to its valet operation.

The Appellant's sole claim—that the purported absence of any "traffic concern" militated against denying certiorari—is premised in full upon a traffic study commissioned by the Metropolitan Traffic and Parking Commission.[17] Notably, however, the study at issue was conducted over a narrowly restricted time period when the Appellant knew it was "being surveilled"[18]—a concern that the Commission itself specifically noted.[19] Moreover, the traffic study itself—which did not and was not intended to evaluate any of the Appellant's wholly independent trespassing, misconduct, parking, or illegal operation issues—also emphasized its own significant limitations even with respect to traffic.

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[15] A.R. at 60-86.

[16] *See* Appellant's Brief, p. 22 (claiming that "[t]he only material evidence is that there was no traffic concern caused by The Parking Guy's operation").

[17] Appellant's Brief, p. 2.

[18] R. at 283, lines 23-24.

[19] A.R. at 130, lines 20-21 ("let me say – preface this by saying maybe they knew they were being videotaped").

See A.R. 48 ("It should be noted that the observations were conducted over one weekend, and it is not known how it compares to typical operations and number of customers.").

In light of the foregoing, the Trial Court did not abuse its discretion in denying certiorari, because substantial and material evidence supported the Commission's decision to deny the Appellant a valet permit. The Trial Court did, however, err in denying Mrs. Schipani's Motion to Intervene by applying an incorrect legal standard and failing to consider four of the five mandatory factors that govern the timeliness of a movant's intervention.

Because neither the Appellant nor Metro ever provided her notice of the instant lawsuit, Mrs. Schipani was blissfully unaware of this proceeding until June 2018.[20] On June 1, 2018, however—based on the same imagined conspiracy noted above—the Appellant sued Mrs. Schipani, another local business owner, the area District Council Member, and Metro's Traffic and Parking Commission in federal court.[21]

A paragraph on the eighteenth page of the Appellant's June 1, 2018

[20] R. at 179.

[21] R. at 186-207.

federal lawsuit made passing reference to this proceeding,[22] which is how Mrs. Schipani came to learn of it.[23] Thus, promptly upon discovering the existence of this proceeding and her legal interests in it—several of which only materialized on June 1, 2018—Mrs. Schipani diligently moved to intervene in this case both as of right and by permission on June 25, 2018.[24] Metro consented to Mrs. Schipani's intervention,[25] but the Appellant opposed it.[26] Of note, the Appellant did not even serve Mrs. Schipani with proper process in its federal lawsuit until September 19, 2018—almost three months after her motion to intervene in this proceeding was filed.[27]

On July 23, 2018, the Trial Court denied Mrs. Schipani's Motion to

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[22] R. at 204, ¶ 77.

[23] R. at 179. *See also* R. at 177, n. 3.

[24] R. at 175-184.

[25] R. at 175.

[26] R. at. 236-42.

[27] *See* Schipani's November 8, 2018 Motion to Consider Post-Judgment Fact, **Exhibit 1**. This Court has reserved judgment on Mrs. Schipani's motion to consider the date that she was served with the Appellant's federal lawsuit "pending the completion of the briefing schedule and oral argument, if requested." *See* Nov. 27, 2018 Order, Case M2018-01409-COA-R3-CV.

Intervene.[28] In so doing, the Trial Court did not cite or directly address the five timeliness factors established by this Court in *Am. Materials Techs., LLC v. City of Chattanooga*, 42 S.W.3d 914, 916 (Tenn. Ct. App. 2000), though it did consider one of them—"the point to which the suit has progressed."[29] *Id.* Because the Trial Court did not consider four of the five required timeliness factors in ruling on Mrs. Schipani's Motion to Intervene, however, this Court should reverse and remand the matter to the Trial Court with instructions to apply the proper legal standard to Mrs. Schipani's Motion to Intervene. In the alternative, Mrs. Schipani's Motion to Intervene should be granted.

VII. SUMMARY OF ARGUMENT

The Trial Court correctly denied the Appellant's petition for a writ of certiorari. Independent of the well-supported concerns about the Appellant's valet operation creating parking issues and congestion, the Administrative Record contains overwhelming evidence that the Appellant was trespassing on neighboring properties and operated an

[28] R. at 334-337.

[29] R. at 336.

illegal valet operation—all of which the Trial Court both noted and appropriately considered. As a consequence, the Trial Court's Order denying certiorari should be affirmed for each of the following reasons:

First, the Metropolitan Traffic and Parking Commission's decision to deny the Appellant a valet permit was supported by substantial and material evidence.

Second, the Trial Court properly applied the "substantial and material evidence standard of review" in reaching its decision.

Third, given the uncontroverted record evidence that the Appellant regularly trespassed on neighboring business owners' private property, had conducted its valet operation illegally, and otherwise conducted its valet operation in a manner that undermined public safety, health, and welfare, the Appellant failed to meet its burden of proving that a valet permit should issue pursuant to Metro Code § 12.41.030.

Fourth, the Appellant's sole contrary argument regarding traffic concerns is unpersuasive.

With respect to the Trial Court's Order denying Mrs. Schipani's Motion to Intervene, however, the Trial Court applied an incorrect legal standard and failed to consider four mandatory factors that govern the

timeliness of a movant's intervention. Consequently, this Court should reverse the Trial Court's denial of Mrs. Schipani's Motion to Intervene and remand with instructions that the Trial Court evaluate the four timeliness factors that it failed to consider. Alternatively, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed and remanded with instructions that it be granted.

VIII. STATEMENT OF FACTS

Between June and July 2017, Appellant "The Parking Guys"[30] sought and obtained a series of week-long, temporary valet permits to service Déjà Vu of Nashville, a local strip club.[31] On June 8, 2017, the Appellant applied for a permanent valet permit from the Metropolitan Traffic and Parking Commission to service the same location.[32]

a. The Commission's July 10, 2017 Hearing and Preceding Complaints.

On July 10, 2017, the Metropolitan Traffic and Parking

[30] The Appellant is referred to as "The Parking Company" on the temporary valet permits contained in the Administrative Record and in several other portions of the Administrative Record. *See* A.R. at 6-10. The Appellant is registered as "The Parking Company, Inc.," but it does business as "The Parking Guys." *See* A.R. at 12.

[31] A.R. at 6-10.

[32] A.R. at 12.

Commission held a public hearing on the Appellant's application for a valet permit.[33] In advance of the July 10, 2017 public hearing, the Metropolitan Traffic and Parking Commission also received several negative complaints about the Appellant's valet operation from Mrs. Schipani and others.[34] During the July 10, 2017 hearing, four affected local business owners—Lee Molette,[35] Todd Roman,[36] Mrs. Schipani,[37] and Lisa Buoy[38]—additionally provided live testimony in opposition to the Appellant's valet permit application.

Significantly, the affected local business owners' complaints and testimony were not remotely limited to concerns about "traffic."[39] For instance, Mrs. Schipani expressed frustration that despite having "No Trespassing" and "No Parking" signs, the Appellant's "valet parkers themselves" were illegally parking on her property and "constantly"

[33] *See* A.R. at 90-112.

[34] A.R. at 16-20.

[35] A.R. at 94-95.

[36] A.R. at 95-96.

[37] A.R. at 96-97.

[38] A.R. at 98.

[39] *See* A.R. at 94-98.

parking "between [her] exit, or entrance, right there from the alley to [her] parking lot," such that she could "hardly get out" of either side of her own property safely.[40] Similarly, Mr. Molette testified that the Appellant's valet parkers were "not following the actual policies that [the Appellant] may have in place,"[41] which was causing him to incur "increased expenses."[42] Mr. Roman separately expressed concerns about pedestrian safety.[43] And Ms. Buoy, a local property manager, expressed concerns about inadequate parking being left for her building's residents.[44]

At the conclusion of the July 10, 2017 hearing, some of the Commission's Members determined that they did not "have enough info" to make a final determination regarding the Appellant's valet operation,[45] and they decided that they wanted additional observational information before ruling on the Appellant's valet permit application.[46]

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[40] A.R. at 97, lines 5-18.

[41] A.R. at 95, lines 9-10.

[42] A.R. at 95, line 8.

[43] A.R. at 96, lines 8-14.

[44] A.R. at 98, lines 17-20.

[45] A.R. at 105, line 15.

Accordingly, at the conclusion of its July 10, 2017 hearing, the Metropolitan Traffic and Parking Commission voted unanimously to defer a decision on the Appellant's valet permit application for one month.[47]

b. The Commission's August 14, 2017 Hearing and Preceding Complaints.

The Commission's deferred hearing on the Appellant's permit application was held on August 14, 2017.[48] In advance of the August 14, 2017 hearing, the Commission received another outpouring of complaints about the Appellant's behavior from local business owners—including several new business owners—as well as the District's Metro Council Member.[49] Further, yet again, the complaints about the Appellant's valet operation were not limited to—or even predominantly concerned with—concerns about "traffic."

For example, writing on behalf of The Midtown Church Street Business and Residential Association,[50] Mrs. Schipani communicated

[46] A.R. at 111.

[47] A.R. at 112, line 9 ("we have a one-month deferral.").

[48] A.R. at 127-43.

[49] A.R. at 60-86.

concerns that:

(1) Local residents could "not find parking" after 9:00 p.m.;[51]

(2) The Appellant was conducting its valet operation outside of its approved permit hours;[52]

(3) The Appellant was parking cars "between the alley and the entrance to [her] parking lot at 1500 Church St., which is only one car length,"[53] and, perhaps most importantly:

> (4) **The valet workers continue to trespass by parking cars on private property.** Cars were booted in the DCI parking lot . . . the past two weekends. They had been parked there by the valet company and the company paid for the boots to be taken off. Another business, Wilder Motor and Equipment, . . . has his parking lots completely full most nights as the valet is utilizing his lot despite the fact there's a no trespassing [sign] & private parking signage.[54]

Wilder Motor and Equipment's owner also wrote separately to express the same frustrations about the Appellant's trespassing. Urging

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[50] A.R. at 65.

[51] A.R. at 65 ("If our residents at 221 15th Ave. return home after 9:00 PM, they cannot find parking.").

[52] A.R. at 65 ("They are valeting before 7:00 PM and after their 3:00AM temporary permit.")

[53] A.R. at 65.

[54] A.R. at 65 (emphasis added)

denial of the Appellant's valet permit application, its owner, Jack Wilder, complained:

> **[C]ars are parked on my property without my permission.** When I became aware of this parking situation I confirmed with my insurance company that I have liability exposure for any criminal incident, accident, or damage that occurs on my property. Since then I have contracted with Nashville Booting and Parking Enforcement Co in an attempt to discourage illegal parking. Last Friday night . . . I had someone doing surveillance of my property from 9:30-11:45. **A 'parking attendant' with a flashlight was directing Déjà vu traffic on 15th Ave N. to park on my property, telling them to ignore the booting warning signs and saying he would 'take care of' the booting company. OMG.**
>
> I strongly urge the parking commission to deny the valet parking permit request.[55]

In advance of the August 14, 2017 hearing, new complaining business owners wrote to the Commission urging denial as well. For instance, Country Delite—a local "dairy, juice, drink, and beverage company" that does "24 hours a day, 7 days per week . . . shipping and receiving"—wrote that it was often "find[ing] the road blocked for traffic" due to the Appellant's valet operation, which served to increase its drivers' waiting times and caused the street to be "impassable throughout the night due to cars parked on both sides of the street."[56] Williams

[55] A.R. at 77 (emphasis added).

Medical Supply wrote to the Commission urging denial of the Appellant's permit application as well.[57]

The area District Council Member, Freddie O'Connell, similarly urged denial.[58] Specifically, he stated that although he "would recommend denial even without evidence of prior inappropriate behavior" given "the traffic and parking impact" of the Appellant's operation, the fact that the Appellant had "begun operation before the availability of a permit should be consequential enough. . . ."[59]

In addition to reviewing these complaints, during its August 14, 2017 hearing, the Traffic and Parking Commission also considered the results of a traffic study that it commissioned after deferring its July 10, 2017 hearing.[60] The purpose of the traffic study was "to observe and record the number of valet maneuvers by hour and note the number of instances and degree of impact when the valet operations affected traffic flow on 15th Avenue North and Church Street."[61] As a consequence, the

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[56] A.R. at 71.

[57] A.R. at 76.

[58] A.R. at 67.

[59] A.R. at 67.

[60] A.R. at 46-48.

traffic study's purpose was not to identify or evaluate any of the other concerns that had been expressed about the Appellant's valet permit operation—such as whether valet operators were parking in neighboring business owners' parking lots without permission.

The traffic study at issue—which was limited to the "period between 5:00 PM – 4:00 AM on July 24 – 31, 2017"[62]—first determined that: "It should be noted that the valet stand begins operation at 6:00 PM and ends at approximately 4:00 AM."[63] This observation carries significance for two reasons. First, **the Appellant's temporary valet permit expired on July 25, 2017**[64]—meaning that the study confirmed that the Appellant was operating illegally between from July 26 – July 31, 2017. Second, **the Appellant's temporary valet permit only authorized operation until 3:00 a.m.**[65]—meaning that the study also confirmed that the Appellant was unlawfully exceeding the permitted

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[61] A.R. at 46.

[62] A.R. at 46.

[63] *Id.*

[64] A.R. at 10. *See also* R. at 217 (noting that the Appellant held a valid temporary valet permit "July 19, 2017 through July 25, 2017."

[65] A.R. at 10.

duration of its valet operation even when it had a valid permit to operate.

The traffic study further 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."[66] A commission staffer characterized these issues as "typical valet concerns,"[67] although during the previous July 2017 meeting, a Traffic and Parking Commissioner noted that the Commission has previously rescinded another valet operator's permit because of people making "u-turns in the middle of the road."[68] The staffer also did not address whether "typical valet concerns" are acceptable for a location like Church Street, which is a hospital corridor. As Eric Steer—the plant manager of Country Delite[69]—noted during the August 14, 2017 hearing, however, a "number of emergency vehicles [] travel Church Street going to the number of hospitals that are down

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

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

[68] A.R. at 105, lines 1-5.

[69] A.R. at 136.

there."[70] Mrs. Schipani and the area District Council Member had expressed similar concerns about interference with emergency vehicles.[71]

Regardless, however, the traffic study at issue was admittedly conducted over a narrowly restricted time period when the Appellant knew it was "being surveilled"[72]—a concern that the Commission itself specifically noted.[73] Moreover, the traffic study itself—which did not and was not intended to evaluate any of the Appellant's wholly independent trespassing, misconduct, parking, or illegal operation issues—emphasized its own significant limitations *even with respect to traffic*, stating that: "It should be noted that the observations were conducted over one weekend, and it is not known how it compares to typical operations and number of customers."[74]

After reviewing all of the evidence before it, the Commission approved a motion to deny the Appellant's permit for a valet stand.[75]

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[70] A.R. at 137, lines 12-14.

[71] A.R. at 19; A.R. at 67.

[72] R. at 283, lines 23-24.

[73] A.R. at 130, lines 20-21 ("let me say – preface this by saying maybe they knew they were being videotaped").

[74] *See* A.R. at 48.

That decision is the subject of the instant appeal.

c. Proceedings in Davidson County Chancery Court

On September 7, 2017, the Appellant filed a petition for a writ of certiorari in Davidson County Chancery Court (the "Trial Court").[76] During the course of litigation in the Trial Court, the Appellant sought "leave to conduct discovery on possible undue influence upon the Commission."[77] The Appellant also filed a formal Motion to Conduct Discovery, which the Trial Court ultimately denied.[78]

On June 1, 2018, having been denied discovery in this litigation, the Appellant filed a parallel federal conspiracy lawsuit against the

[75] A.R. at 142.

[76] R. at 1-6.

[77] R. at 93.

[78] R. at 336 ("In a prior Order, this Court denied the Petitioner's request to pursue discovery in this case."). Of note, neither the Appellant nor Metro opted to include either the Appellant's Motion to Conduct Discovery or the Trial Court's Order regarding discovery in the record on appeal. Further, having been denied the opportunity to intervene, Mrs. Schipani had no authority to control the content of the record. *See* Tenn. R. App. P. 24(h) (providing that only "parties" may control the record on appeal). She also expressed precisely this concern related to her need for intervention. *See* R. at 249. Accordingly, only references to the Appellant's Motion and the Trial Court's Order on the Motion appear in the record on appeal. *See, e.g.,* R. at 336; R. at 178; R. at 178, n. 4.

Traffic and Parking Commission, Mrs. Schipani, and others in the United States District Court for the Middle District of Tennessee.[79] Paragraph 77 of the Appellant's June 1, 2018 federal lawsuit—located on its eighteenth page—made reference to this proceeding and included the Appellant's Petition for a Writ of Certiorari as its twenty-fourth exhibit.[80] Because Mrs. Schipani had never received notice of the Appellant's petition for a writ of certiorari from either party to this case, Mrs. Schipani's first and only knowledge of this lawsuit came as a product of her attorney reviewing paragraph 77 of the Appellant's June 1, 2018 federal Complaint.[81]

Promptly upon discovering the existence of this proceeding and her legal interests in it—several of which only materialized on June 1, 2018—on June 25, 2018, Mrs. Schipani diligently moved to intervene in this case both as of right and by permission.[82] Metro consented to Mrs. Schipani's

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[79] R. at 186-207.

[80] R. at 204, ¶ 77.

[81] *See* R. at 177, n. 3 ("Mrs. Schipani was never served with notice of this lawsuit by either party. She learned of it due to its mention in a parallel federal proceeding filed on June 1, 2018, for which proper service also has not yet been effected.").

[82] R. at 175-184.

intervention,[83] but the Appellant opposed it.[84] Of note, the Appellant also did not even serve Mrs. Schipani with proper process in its federal lawsuit until September 19, 2018—almost three months after her motion to intervene in this proceeding was filed.[85]

On July 6, 2018, the Trial Court issued its Memorandum and Order denying the Appellant's petition for a writ of certiorari.[86] In so doing, the Trial Court conducted an exhaustive review of the evidence of the Administrative Record[87] and then recited and properly applied the correct "substantial and material evidence" standard of review.[88] Based on that standard of review and the substantial and material evidence in the Administrative Record that supported the Commission's decision to

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[83] R. at 175.

[84] R. at. 236-42.

[85] Schipani's November 8, 2018 Motion to Consider Post-Judgment Fact, **Exhibit 1**. This Court has reserved judgment on Mrs. Schipani's motion to consider the date that she was served with the Appellant's federal lawsuit "pending the completion of the briefing schedule and oral argument, if requested." *See* Nov. 27, 2018 Order, Case M2018-01409-COA-R3-CV.

[86] R. at 216-35.

[87] R. at 217-30.

[88] R. at 230-31.

deny the Appellant a valet permit, the Trial Court denied certiorari.[89]

On July 23, 2018, the Trial Court similarly denied Mrs. Schipani's Motion to Intervene.[90] In so doing, the Trial Court did not cite or directly address the five timeliness factors established by this Court in *Am. Materials Techs., LLC v. City of Chattanooga*, 42 S.W.3d 914, 916 (Tenn. Ct. App. 2000), though it did consider one of them—"the point to which the suit has progressed."[91] *Id.* Instead, the Trial Court offered only the following three reasons support its denial:

First, the Trial Court found that it would be improper to "allow[] Ms. Schipani, whose testimony before the Commission is part of the administrative record, to intervene to present further arguments and/or evidence on what is essentially an appeal of the Commission's ruling to this Court"[92]—even though Mrs. Schipani had instead asserted that she had an interest in opposing discovery and new evidence based on what was then an appealable denial of the Appellant's improper motion to

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[89] R. at 235.

[90] R. at 334-337.

[91] R. at 336.

[92] R. at 336.

conduct discovery involving her.[93]

Second, the Trial Court found that "the Commission's position is well represented by its counsel"[94]—even though Mrs. Schipani's interests in this proceeding were and remain materially distinct from the Commission's interests.[95]

Third, even though Mrs. Schipani continues to have interests in this appeal and diligently moved to intervene **on June 25, 2018**,[96] the Trial Court found that because "the Court has already held its hearing on the Petition and entered an Order **on July 6, 2018**," Mrs. Schipani's motion was "not only unnecessary but untimely."[97]

Significantly, however, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene[98] did not consider any of the following four

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[93] R. at 178 (noting Mrs. Schipani's interest in: "Urging affirmance of this Court's March 27, 2018 Order denying the Petitioner's motion to obtain irrelevant, unnecessary, expensive, and time-consuming discovery from Mrs. Schipani.").

[94] R. at 336.

[95] R. at 181.

[96] R. at 175-184.

[97] R. at 336 (emphasis added).

[98] R. at 334-37.

mandatory timeliness factors:

> (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervener knew or reasonably should have known of [her] interest in the case; (4) the prejudice to the original parties due to the proposed intervener's failure after [she] knew or reasonably should have known of [her] interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Am. Materials Techs., LLC, 42 S.W.3d at 916.

Thereafter, the Trial Court's judgment having become final, both the Appellant and Mrs. Schipani filed separate appeals.

IX. ARGUMENT

A. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S PETITION FOR A WRIT OF CERTIORARI.

With respect to its permit application before the Metro Traffic and Parking Commission, the Appellant had the burden of proving that its valet operation "would not be detrimental to the public safety, health and welfare of the inhabitants of Nashville and Davidson County."[99] Given the extensive evidence of the Appellant's misconduct—including trespassing on neighboring properties, operating illegally without a

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

permit, and other documented misbehavior that the Appellant flatly ignores in this appeal[100]—the Appellant utterly failed to meet that burden.

The Administrative Record contains overwhelming evidence that the Appellant was trespassing on neighboring properties, disrupting adjacent businesses, creating parking issues, and conducting an illegal valet operation.[101] The Trial Court both noted and appropriately considered that evidence in reaching its decision.[102] The Trial Court similarly considered well-supported eyewitness reports of the parking issues and disruption that the Appellant created through its operation of the valet stand.[103]

Upon review of all of this evidence, the Trial Court cited and applied the correct standard of review and appropriately denied the Appellant's petition for a writ of certiorari.[104] The Trial Court did not abuse its discretion in doing so. Accordingly, for the reasons that follow, the Trial

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[100] A.R. at 60-86.

[101] A.R. at 60-86.

[102] R. at 220-35.

[103] R. at 220-29.

[104] R. at 230-35.

Court's Order denying certiorari should be **AFFIRMED**.

1. **The Metropolitan Traffic and Parking Commission's decision to deny the Appellant a valet permit was supported by evidence that was both substantial and material.**

The Trial Court's Memorandum and Order denying the Appellant's petition for certiorari came as a result of an exhaustive review of the evidence in the Administrative Record.[105] The Trial Court's review specifically addressed the July 10, 2017 hearing testimony of Lee Molette, Todd Roman, Mrs. Schipani, and Lisa Buoy;[106] the Commission's traffic study;[107] the written complaints and testimony submitted by Mr. Molette, Mr. Roman, Mrs. Schipani, Ms. Buoy, Eric Steer of Country Delite Farms, and Jack Wilder of Wilder Motor & Equipment Company;[108] and the additional concerns expressed by the area District Council Member about the Appellant's illegal and otherwise disruptive valet operation.[109] Of note, the Trial Court's Order also not only referenced this evidence—it cited and evaluated all of it independently

[105] R. at 217-30.

[106] R. at 217.

[107] R. at 217-20.

[108] R. at 220-29.

[109] R. at 229-30.

and included the evidence in the body of its Order.[110]

Based on this extensive evidence, the Trial Court correctly held that there was substantial and material evidence in the Administrative Record to support the Commission's decision. Here, the Administrative Record evidence supporting the Commission's decision not only "exceed[ed] a scintilla"—instead, the evidence of extensive problems with the Appellant's permit operation, including trespassing, illegal operation, parking concerns, disruption, congestion, and other problems, was *overwhelming*.[111] *See Leonard Plating Co. v. Metro. Gov't of Nashville & Davidson Cty.*, 213 S.W.3d 898, 904 (Tenn. Ct. App. 2006). As a consequence, the Trial Court correctly determined that substantial and material evidence supported the Commission's decision, and it properly exercised its discretion to deny certiorari as a result.

2. The Trial Court properly applied the "substantial and material evidence standard of review" in reaching its decision.

The Trial Court's Memorandum and Order reflects that it reviewed the extensive material evidence in the Administrative Record before

[110] R. at 217-30.

[111] A.R. at 60-86.

denying certiorari.[112] Based on that evidence—which the Trial Court both cited and specifically addressed at pages 2-15 of its Memorandum and Order, *see* R. at 217-230—the Trial Court concluded that "[u]pon a careful review of the record, the Court finds the commission's decision was not arbitrary and that material evidence exists in the administrative record to support the Commission's decision."[113]

In other words: After reviewing the evidence in the Administrative Record—much of which the Trial Court addressed in detail in the body of its Order[114]—the Trial Court both recited and properly applied the correct standard of review to the Commission's proceedings.[115] Further, because this Court's review of the Commission's proceedings is subject to the same standard of review as the Trial Court's review of the Commission's decision, *see Johnston v. Metro. Gov't of Nashville & Davidson Cty.*, 320 S.W.3d 299, 309 (Tenn. Ct. App. 2009), the fact that the Trial Court's Order recited and applied the correct standard of review

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[112] R. at 217-30.

[113] R. at 233.

[114] R. at 217-30.

[115] R. at 230-31.

is also outcome-determinative of this appeal. *See State, Dep't of Children's Servs. v. Davis*, No. E2010-02016-COA-R3CV, 2011 WL 3209187, at *5 (Tenn. Ct. App. July 28, 2011).

The Appellant's claim that the Metro Traffic and Parking Commission erred in denying the Appellant a valet permit "is brought pursuant to Tennessee Code Annotated section 27–8–101, *et seq.*, which governs the extraordinary remedy of common law writ of certiorari, and section 27–9–101 *et seq.*, which provides procedures for review by writ of certiorari of decisions by boards and commissions." *Royal Properties, Inc. v. City of Knoxville*, 490 S.W.3d 1, 6 (Tenn. Ct. App. 2015). Certiorari proceedings filed pursuant to Tenn. Code Ann. § 27-8-101 are initially governed by "a limited standard of review." *State ex rel. Moore & Assocs., Inc. v. West*, 246 S.W.3d 569, 574 (Tenn. Ct. App. 2005). Under that standard, "decisions of the lower tribunal may be set aside only if the reviewing court determines that the decision maker exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its

decision." *Johnston*, 320 S.W.3d at 308–09 (cleaned up).[116]

Because "[a] common-law writ of certiorari is not available as a matter of right," a "petition for a writ is addressed to the trial court's discretion." *Heyne*, 380 S.W.3d at 730 (citations omitted). Accordingly, this Court "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." *Id.* (quoting *Lane*, 254 S.W.3d at 354).

Here, the Appellant only appeals the Trial Court's finding that the Traffic and Parking Commission's decision to deny the Appellant a valet permit was properly "based on material evidence and not arbitrary . . . ." *See* Appellant's Brief, p. 2. Notably, with respect to the evidence submitted to an administrative agency, "the standard of review for the trial court and for this Court is the same." *Johnston*, 320 S.W.3d at 309. Consequently, where—as here—a litigant appeals a trial court's denial of certiorari only on the basis that an agency's decision was not supported by substantial and material evidence, **this Court has explained that its**

[116] Jason P. Steed, *Cleaning Up Quotations in Legal Writing,* AMERICAN BAR ASS'N (Dec. 7, 2017), https://www.americanbar.org/groups/litigation/committees/appellate-practice/articles/2017/fall2017-cleaning-up-quotations-in-legal-writing.html.

review "is essentially a determination of whether or not the trial court properly applied the 'substantial and material evidence' standard of review" in reaching its decision. *State, Dep't of Children's Servs. v. Davis*, No. E2010-02016-COA-R3CV, 2011 WL 3209187, at *5 (Tenn. Ct. App. July 28, 2011) (emphasis added).[117]

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[117] This Court has previously noted the similarities between the standard or review that governs petitions for a writ of certiorari and the standard of review that governs administrative appeals filed under the Uniform Administrative Procedures Act (UAPA). *See Wright v. Tennessee Peace Officer Standards and Training Com'n*, 277 S.W.3d 1, 8 (Tenn. Ct. App. 2008) (holding that "the standard [is] essentially the same" and "the UAPA language is virtually identical" to the standard that governs petitions for a writ of certiorari.). When reviewing UAPA appeals—which share the same "substantial and material" evidence standard, *see* Tenn. Code Ann. § 4-5-322(h)(5)—this Court has repeatedly observed that its review is limited to determining whether the trial court applied the proper standard of review in the first instance. *See, e.g., Jones v. Bureau of Tenn Care*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002) ("When reviewing a trial court's review of an administrative agency's decision, this Court essentially is to determine 'whether or not the trial court properly applied the ... standard of review" found at Tenn. Code Ann. § 4–5–322(h).'"); *Papachristou v. Univ. of Tennessee*, 29 S.W.3d 487, 490 (Tenn. Ct. App. 2000) ("This Court's review of the trial court's decision is essentially a determination of whether or not the trial court properly applied the foregoing standard of review."); *Bryant v. Tennessee State Bd. of Accountancy*, No. 01A01-9303-CH-00088, 1993 WL 330987, at *6 (Tenn. Ct. App. Sept. 1, 1993) ("The review by this court of the Chancery Court's decision is essentially a determination of whether or not the Chancery Court properly applied the foregoing standard of judicial review") (citing *Metropolitan Gov't. v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977)).

Here, there is little doubt that the Trial Court properly applied the substantial and material evidence standard of review in reaching its decision. *Id.* Fourteen pages of the Trial Court's Order are devoted to addressing the substantial and material evidence in the Administrative Record that supported the Commission's permit denial.[118] Thereafter, the Court both correctly recited and applied the proper standard of review to that evidence in finding that the cited evidence in the Administrative Record was substantial and material.[119] The Trial Court's Order denying certiorari should be affirmed accordingly.

3. **Given the uncontroverted record evidence that the Appellant trespassed on neighboring business owners' private property, conducted its valet operation illegally, and otherwise conducted its valet operation in a disruptive manner that undermined public safety, health, and welfare, the Appellant failed to meet its burden of proving that a valet permit should issue pursuant to Metro Code § 12.41.030.**

In prosecuting this appeal, the Appellant misleadingly implies that evaluating "traffic concern[s]"[120] was the only issue that the Metropolitan

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[118] R. at 217-30.

[119] R. at 30-35.

[120] *See* Appellant's Brief, p. 22 (claiming that "[t]he only material evidence is that there was no traffic concern caused by The Parking Guy's operation").

Traffic and Parking Commission was permitted to review. But "traffic concern" is not the standard that governs the issuance of a valet permit under Metro Code 12.41.030.[121] Indeed, Metro Code 12.41.030 does not even *mention* traffic.[122]

Here, the Administrative Record indicates that the Appellant's valet operation was characterized by trespass, illegality, and a series of other wholly unaddressed issues that have nothing to do with traffic—all of which the Appellant uniformly ignores in its briefing. The Commission's decision to deny the Appellant's valet permit application under Metro Code 12.41.030 was appropriate as a consequence.

During the course of conducting its valet operation, the record reflects that the Appellant regularly trespassed on neighboring business owners' property.[123] Mrs. Schipani was among the business owners who was affected by the Appellant's callous disregard for others' private property.[124] She also was not alone.

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

[122] *Id.*

[123] A.R. at 77; A.R. at 97, lines 5-18; A.R. at 19.

[124] A.R. at 97, lines 5-18; A.R. at 19.

The most pointed and detailed frustration about Appellant's trespassing was provided by Jack Wilder, the owner of Wilder Motor and Equipment. Urging denial of the Appellant's valet permit application, Mr. Wilder complained:

> **[C]ars are parked on my property without my permission.** When I became aware of this parking situation I confirmed with my insurance company that I have liability exposure for any criminal incident, accident, or damage that occurs on my property. Since then I have contracted with Nashville Booting and Parking Enforcement Co in an attempt to discourage illegal parking. Last Friday night . . . I had someone doing surveillance of my property from 9:30-11:45. **A 'parking attendant' with a flashlight was directing Déjà vu traffic on 15th Ave N. to park on my property, telling them to ignore the booting warning signs and saying he would 'take care of' the booting company. OMG.**[125]

The Appellant's briefing flatly ignores this evidence. It was also unable to address it competently before the Trial Court. Indeed, the Appellant badly mischaracterized the evidence in the record regarding its trespassing before the Trial Court. Specifically, Appellant's counsel claimed that no record evidence regarding trespass existed at all, insisting that: "[T]here's no evidence on the record that The Parking Guys didn't have permission to park at the Wilder property, or that that

[125] A.R. at 77 (emphasis added).

permission was later revoked for certain reasons. There's – there's no evidence either way."[126]

But there *was* evidence in the record that the Appellant didn't have permission to park at the Wilder property.[127] That evidence came directly from Mr. Wilder himself, who specifically and unambiguously complained both that "cars are parked on my property without my permission" and that the Appellant's employees were "directing Déjà vu traffic on 15th Ave N. to park on my property, telling them to ignore the booting warning signs and saying he would 'take care of' the booting company."[128]

Nor does the Appellant attempt to address the uncontroverted evidence that it was conducting its permit operation illegally. With respect to that concern, too, the record demonstrates conclusively that the Appellant was indeed operating illegally. Further, yet again, the Appellant's briefing fails even to mention this problem.

The traffic study at issue in this appeal indicates that it monitored

[126] A.R. at 315.

[127] A.R. at 77.

[128] A.R. 77.

the Appellant's valet operation "between 5:00 PM – 4:00 AM on July 24 – 31, 2017,"[129] and that the Appellant's valet stand "begins operation at 6:00 PM and ends at approximately 4:00 AM."[130] Critically, however, the Appellant did not have a valid valet permit after July 25, 2017, when its temporary valet permit expired.[131] Accordingly, the traffic study upon which the Appellant relies revealed conclusively that the Appellant was operating illegally from July 26 – July 31, 2017.

Further, even during the period when the Appellant had a temporary valet permit, the Appellant's temporary permit only authorized operation until "3:00 a.m."[132] Accordingly, by operating until "approximately 4:00 AM,"[133] the Appellant was unlawfully exceeding the permitted duration of its valet operation even when it had a valid permit to operate.

Concerns about such illegal operation were specifically articulated

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[129] A.R. at 46.

[130] *Id.*

[131] A.R. at 10. *See also* R. at 217 (noting that the Appellant held a valid temporary valet permit "July 19, 2017 through July 25, 2017.").

[132] A.R. at 10.

[133] *Id.*

by both Mrs. Schipani in her written statements to the Commission[134] and by Councilman O'Connell, the area District Council Member.[135] As a result, the traffic study at issue conclusively confirmed previous complaints about the Appellant's illegal valet operation. Of note, Metro Code 12.41.030 also states clearly that its requirements come "in addition to the licensing requirements of Metro Code 12.41.020 of this chapter,"[136] which separately 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"[137] and "conform to the laws of the metropolitan government."[138]

Based on the Appellant's open disregard for both the rights of others and the law, the Commission properly concluded that Appellant failed to meet its burden of establishing that its operation "would not be detrimental to the public safety, health and welfare of the inhabitants of

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[134] A.R. at 74 (noting that the Appellant was operating "after their 3:00 AM temporary permit" allowed).

[135] A.R. 67.

[136] *Id.* (emphasis added).

[137] R. at 63; Metro Code 12.41.020(C)(3).

[138] R. at 63; Metro Code 12.41.020(D).

Nashville and Davidson County."[139] The Commission's decision—and the Trial Court's appropriate refusal to overturn it—should be affirmed accordingly.

4. **The Appellant's sole contrary argument regarding "traffic concerns" is unpersuasive.**

The Appellant's sole claim in this appeal is premised upon a week-long traffic study that was conducted between the Traffic and Parking Commission's July 10, 2017 and August 14, 2017 hearings.[140] Critically, however, although the Appellant insists otherwise, the traffic study upon which the Appellant premises its entire appeal **was not favorable to the Appellant**, for several reasons:

First, as noted in the preceding section, the study's very first observation was that the Appellant was operating *illegally*. The Appellant's final temporary valet permit expired on July 25, 2017.[141] Accordingly, every single valet maneuver cited on page 10 of the Appellant's briefing demonstrates an independent illegality.

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

[140] Appellant's Brief, p. 2.

[141] A.R. at 10.

Second, the traffic study at issue had no bearing on any issue other than traffic. As Metro noted before the Trial Court, the study was "essentially a camera set up looking at the valet stand itself," and it was not designed to "show things like where those cars are being parked" or "how are they operating."[142] Thus, the study does absolutely nothing to help the Appellant overcome or address in any way the wealth of other complaints that were expressed about the Appellant's valet operation. As such, the many significant additional concerns raised by affected business owners—each of which was independently sufficient to justify the Commission's decision—remain wholly uncontroverted. *See, e.g.,* A.R. at 97, lines 5-18 (concerns about illegal and obstructive parking); A.R. at 95, lines 9-10 (concerns about Appellant's employees violating policy); A.R. at 98, lines 17-20 (concerns about inadequate parking being left for residents); A.R. at 65 (separate concerns about inadequate parking being available for residents after 9:00 p.m.); A.R. at 65 (concerns about parking in alleys and parking lot entrances); A.R. at 65 (concerns about trespass); A.R at 77 (more concerns about trespass); A.R. at 71 (concerns about the road being "impassable throughout the night due to

[142] R. at 295, lines 15-21.

cars parked on both sides of the street."); A.R. at 137, lines 12-14 (concerns about the effect of Appellant's parking on emergency vehicles).

Third, even with respect to evaluating traffic alone, the study had significant limitations. For instance, in stark contrast to the Appellant's neighboring business owners—who had the opportunity to observe the Appellant's operation over an extended time period—the traffic study at issue emphasized that: "It should be noted that the observations were conducted over one weekend, and it is not known how it compares to typical operations and number of customers."[143] The study was also conducted during a period when the Appellant knew it was "being surveilled"[144]—a concern that the Commission itself specifically noted.[145]

Fourth, the traffic study additionally 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

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[143] A.R. at 48.

[144] R. at 283, lines 23-24.

[145] A.R. at 130, lines 20-21 ("let me say – preface this by saying maybe they knew they were being videotaped").

on 15th Avenue North and access the traffic signal."[146] Significantly, the Commission had previously rescinded another valet operator's permit because of people making such "u-turns in the middle of the road."[147]

Fifth, even if the study accurately depicted the level of disruption that was likely to be observed through permanent operation—and even if the Appellant's valet operation only presented "typical valet concerns"[148] —the Appellant's operation took place on a narrow "32-foot" street[149] that serves as a hospital corridor for emergency vehicles.[150] As a consequence, the Appellant's valet operation presented unique health and safety concerns that were not shared by other valet stands. Because these concerns were unaddressed, and because the Appellant had the burden of establishing that its operation "would not be detrimental to the public safety, health and welfare of the inhabitants of Nashville and Davidson County,"[151] the Trial Court did not abuse its discretion by

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

[147] A.R. at 105, lines 1-5.

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

[149] A.R. at 46.

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

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

denying certiorari.

B. THE TRIAL COURT APPLIED AN INCORRECT LEGAL STANDARD IN ADJUDICATING MRS. SCHIPANI'S MOTION TO INTERVENE.

On June 1, 2018, the Appellant sued Mrs. Schipani for damages in federal court regarding the evidence and testimony that she provided to Metro's Traffic and Parking Commission.[152] The Appellant's frivolous SLAPP-suit[153] suffered from a wealth of glaring defects,[154] and it has since been dismissed outright for failure to state a claim.[155]

Nonetheless, the District Court's dismissal of the Appellant's federal lawsuit remains appealable, and because the outcome of this appeal has significant bearing upon the Appellant's federal claim against her, Mrs. Schipani continues to have an important personal stake in this

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[152] R. at 186-207.

[153] A SLAPP-suit is a "strategic lawsuit against political participation." *See* Tenn. Code Ann. § 4-21-1002 ("The general assembly finds that the threat of a civil action for damages in the form of a 'strategic lawsuit against political participation' (SLAPP), and the possibility of considerable legal costs, can act as a deterrent to citizens who wish to report information to federal, state, or local agencies. SLAPP suits can effectively punish concerned citizens for exercising the constitutional right to speak and petition the government for redress of grievances.").

[154] R. at 235.

[155] *See* Schipani's Feb. 5, 2019 Motion For Extension to File Brief, Exhibit A.

litigation. For instance, if affirmed, the Trial Court's holding that "the decision to deny [the Appellant a valet] permit was made by the Commission and not by those who spoke against the permit"[156] will independently foreclose the Appellant's federal claim against Mrs. Schipani, because it represents a conclusive determination that she is not and could not have been responsible for the Appellant's claimed injury. To date, because Mrs. Schipani has been denied the opportunity to intervene as a party to this proceeding, the Appellant has also successfully avoided consequences for taking irreconcilably conflicting positions in the two cases regarding Mrs. Schipani's statements to the Commission. *Compare* R. at 285, lines 5-8 & Appellant's Brief at p. 20 (characterizing and minimizing Mrs. Schipani's testimony as mere "opinion"), *with* R. at 195, ¶ 42 (characterizing the very same testimony as being knowingly false statements of fact).

Mrs. Schipani did not receive notice of this proceeding until after the Appellant sued her in federal court in June 2018.[157] She only then received notice of this proceeding at all because a paragraph on the

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[156] R. at 235.

[157] R. at 179. *See also* R. at 177, n. 3.

eighteenth page of the Appellant's June 1, 2018 federal lawsuit made a passing reference to it.[158] Promptly upon discovering the existence of this proceeding and her legal interests in it, however—several of which only materialized on June 1, 2018—on June 25, 2018, Mrs. Schipani diligently moved to intervene in this case both as of right and by permission.[159]

Mrs. Schipani's June 25, 2018 Motion to Intervene was thus filed before the Trial Court issued its July 6, 2018 Memorandum and Order on the Appellant's petition.[160] At the time she moved to intervene, Mrs. Schipani also had significant interests in this litigation that are wholly independent of her interests in the Appellant's parallel federal action. For example, during its proceedings in the Trial Court, the Appellant sought "leave to conduct discovery on possible undue influence upon the Commission" that plainly involved her.[161] Although the Appellant has since abandoned any claim to discovery by failing to raise the issue in its briefing on appeal, *see, e.g., Watson v. Watson*, 309 S.W.3d 483, 497

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[158] R. at 204, ¶ 77.

[159] R. at 175-184.

[160] R. at 216-35.

[161] R. at 93.

(Tenn. Ct. App. 2009) ("The appellate court may treat issues that are not raised on appeal as being waived.") (citing Tenn. R. App. P. 13(b)), at the time that Mrs. Schipani sought to intervene, that controversy was live, and she had a direct and concrete interest in its outcome.

After Mrs. Schipani moved to intervene in the Trial Court, Metro consented to Mrs. Schipani's intervention,[162] but the Appellant opposed it.[163] Notably, the Appellant also did not even serve Mrs. Schipani with proper process in its federal lawsuit until September 19, 2018—almost three months after her motion to intervene in this proceeding was filed.[164]

The Trial Court considered Mrs. Schipani's claims for both intervention as of right and permissive intervention simultaneously.[165] For the reasons that follow, however, the Trial Court failed to apply the correct legal standard regarding the "timeliness" of either claim, and its

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[162] R. at 175.

[163] R. at. 236-42.

[164] *See* Schipani's November 8, 2018 Motion to Consider Post-Judgment Fact, **Exhibit 1**. This Court has reserved judgment on Mrs. Schipani's motion to consider the date that she was served with the Appellant's federal lawsuit "pending the completion of the briefing schedule and oral argument, if requested." *See* Nov. 27, 2018 Order, Case M2018-01409-COA-R3-CV.

[165] R. at 334-337.

Order denying her motion should be reversed and remanded accordingly.

1. The Trial Court failed to consider four of the five mandatory timeliness factors.

The Trial Court applied an incorrect legal standard when ruling on Mrs. Schipani's Motion to Intervene. Specifically, the Trial Court failed to consider four of the five mandatory factors that govern the timeliness of a movant's intervention. Accordingly, this Court should reverse and remand the Trial Court's denial of Mrs. Schipani's Motion to Intervene with instructions that the Trial Court evaluate the four timeliness factors that it initially failed to consider.

Mrs. Schipani's Motion to Intervene sought intervention both as of right and by permission.[166] Her Motion was filed before the current version of Tenn. R. Civ. P. 24 took effect,[167] but for purposes of this appeal, the differences are immaterial. Further, under both Tenn. R. Civ. P. 24.01 and Tenn. R. Civ. P. 24.02, a movant's intervention must be "timely." *Id.*

In *Am. Materials Techs., LLC v. City of Chattanooga*, 42 S.W.3d

[166] R. at 175-84.

[167] R. at 176, n. 2.

914, 916 (Tenn. Ct. App. 2000), this Court adopted the five-factor federal test for evaluating the timeliness of a movant's intervention. *Id.* (citing *Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524, 531 (6th Cir. 1993)). Under that test, this Court held that:

> In determining whether an intervention is timely, courts consider the following factors:
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> > (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervener knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervener's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Am. Materials Techs., LLC, 42 S.W.3d at 916.

Additionally, among the five mandatory timeliness factors, this Court has long held that "[t]he most important consideration in determining the timeliness of a motion to intervene is whether the existing parties will be unduly prejudiced by any delay that might be caused if the intervention is granted." *Thompson v. Am. Holding Corp.*, No. 85-357-II, 1986 WL 5542, at *8 (Tenn. Ct. App. May 16, 1986).

In support of her Motion to Intervene, Mrs. Schipani provided

detailed briefing as to why "all five timeliness factors favor Mrs. Schipani's claim for intervention as of right."[168] That all five factors favored Mrs. Schipani's intervention also was not meaningfully disputed by the Appellant,[169] who largely opposed intervention based on an inapposite 1961 case that also predated this Court's modern test for evaluating timeliness.[170]

Most critically, as to "[t]he most important consideration in determining the timeliness of a motion to intervene"—"whether the existing parties will be unduly prejudiced by any delay that might be caused if the intervention is granted"—there was also no doubt that neither party would have experienced any prejudicial delay whatsoever. *Thompson*, 1986 WL 5542, at *8. Metro, for its part, consented to Mrs. Schipani's intervention.[171] Similarly, because the Trial Court's Order could be affirmed on appeal on any basis, Mrs. Schipani expressly indicated in Reply that she would not and did not need to submit any

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[168] R. at 177-80.

[169] R. at 243-51.

[170] R. at 236-42

[171] R. at 175.

briefing before the Trial Court,[172] meaning that there would be no delay to the Parties at all—much less any "unduly prejudic[ial]" delay. *Id.*

On July 23, 2018, the Trial Court denied Mrs. Schipani's Motion to Intervene.[173] In so doing, the Trial Court did not even evaluate "[t]he most important consideration in determining the timeliness of a motion to intervene"—"whether the existing parties will be unduly prejudiced by any delay that might be caused if the intervention is granted." *Thompson*, 1986 WL 5542, at *8. Indeed, the Court did not evaluate fully four of the five timeliness factors established by this Court in *Am. Materials Techs., LLC*, 42 S.W.3d at 916."[174] *Id.* Instead, the Trial Court offered only the following three reasons to support its denial:

First, the Trial Court found that it would be improper to "allow[] Ms. Schipani, whose testimony before the Commission is part of the administrative record, to intervene to present further arguments and/or evidence on what is essentially an appeal of the Commission's ruling to this Court"[175]—even though Mrs. Schipani had instead asserted that she

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

[173] R. at 334-337.

[174] R. at 336.

had an interest in opposing discovery and new evidence based on what was then an appealable denial of the Appellant's improper motion to conduct discovery involving her.[176]

Second, the Trial Court found that "the Commission's position is well represented by its counsel"[177]—even though Mrs. Schipani's interests in this proceeding were and remain materially distinct from the Commission's interests.[178] For example, the Appellant's characterization of Mrs. Schipani's statements as "opinions" in this proceeding significantly affects her own defenses in the Appellant's still-pending federal lawsuit against her, but it has no bearing whatsoever on Metro's.

Third, even though Mrs. Schipani continues to have interests in this appeal and diligently moved to intervene **on June 25, 2018**,[179] the Trial Court found that because "the Court has already held its hearing on the Petition and entered an Order **on July 6, 2018**," Mrs. Schipani's

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[175] R. at 336.

[176] R. at 178 (noting Mrs. Schipani's interest in: "Urging affirmance of this Court's March 27, 2018 Order denying the Petitioner's motion to obtain irrelevant, unnecessary, expensive, and time-consuming discovery from Mrs. Schipani.").

[177] R. at 336.

[178] R. at 181.

[179] R. at 175-184.

motion was "not only unnecessary but untimely."[180]

Thus, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene[181] makes clear that it applied an incorrect legal standard by failing even to consider any of the following four mandatory timeliness factors, including the "most important" factor:

> (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervener knew or reasonably should have known of his interest in the case; (4) the prejudice to the original parties due to the proposed intervener's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Am. Materials Techs., LLC, 42 S.W.3d at 916.

Applying an incorrect legal standard constitutes reversible error even under the highly deferential abuse of discretion standard. *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 . . . ."). *See also Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) ("A trial court abuses its discretion only when it

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[180] R. at 336 (emphasis added).

[181] R. at 334-37.

'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'") (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). As a consequence, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed and remanded with instructions to apply the proper legal standard and consider all five mandatory timeliness factors pursuant to *Am. Materials Techs., LLC*, 42 S.W.3d at 916.

2. All four of the timeliness factors that the Trial Court failed to consider militate in favor of granting intervention.

Alternatively, because all four additional timeliness factors that the Trial Court failed to consider militated in favor of granting Mrs. Schipani's Motion to Intervene, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed and remanded with instructions that it be granted.

With respect to "the purpose for which intervention is sought," *see Am. Materials Techs., LLC*, 42 S.W.3d at 916, there was no dispute that Mrs. Schipani's proposed intervention aimed to protect her own significant legal interests in this proceeding. Nor did the Trial Court find otherwise. To the contrary, the Trial Court's Order appears to have

recognized her significant legal interests in this case, which are indisputable. *See* R. at 335 (acknowledging that "[Mrs. Schipani] and the Petitioner are adverse parties in a federal lawsuit pending in the United States District Court for the Middle District of Tennessee, Case 3:18-cv-00511, and that the outcome of the case before this Court would impact the Petitioner's claims in the federal proceedings.").

Similarly, with respect to "the length of time preceding the application during which the proposed intervener knew or reasonably should have known of [her] interest in the case," *see Am. Materials Techs., LLC*, 42 S.W.3d at 916, Mrs. Schipani's knowledge of this case and her most significant legal interests in it only developed after she was sued on June 1, 2018. She timely moved to intervene barely three weeks later. Accordingly, this factor favored intervention as well.

Additionally, with respect to the most important factor—"the prejudice to the original parties due to the proposed intervener's failure after [she] knew or reasonably should have known of [her] interest in the case to apply promptly for intervention," *see Am. Materials Techs., LLC*, 42 S.W.3d at 916—because Mrs. Schipani expressly indicated that she would not and did not need to submit any briefing before the Trial

Court,[182] no prejudice or delay whatsoever would have resulted to either party if Mrs. Schipani had been permitted to intervene to protect her interests in the instant appeal.

Finally, with respect to "the existence of unusual circumstances militating against or in favor of intervention," *see id.*, this factor overwhelmingly favored intervention as well. Nearly a year after initiating this action, the Appellant sued Mrs. Schipani in federal court regarding near-identical subject matter. Thereafter—within weeks—Mrs. Schipani promptly and diligently moved to intervene to protect her interests in this case. It goes without saying that such circumstances are unusual. Further, a litigant should not be able to prevent an interested party from intervening in litigation in which she has clear legal interests by deliberately delaying parallel proceedings that reveal those interests.

Thus, all four of the additional, mandatory timeliness factors that the Trial Court failed to consider militated in favor of granting intervention. *Am. Materials Techs., LLC*, 42 S.W.3d at 916. As such, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed and remanded with instructions that it be granted.

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

XI. CONCLUSION

For the foregoing reasons, the Trial Court's Memorandum and Order denying the Appellant's petition for a writ of certiorari should be affirmed.

Further, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed and remanded with instructions to apply the correct legal standard. In the alternative, the Trial Court's Order denying Mrs. Schipani's Motion to Intervene should be reversed and remanded with instructions that it be granted.

Respectfully submitted,

By:

/s/ Daniel A. Horwitz
Daniel A. Horwitz, BPR #032176
1803 Broadway, Suite #531
Nashville, TN 37203
daniel.a.horwitz@gmail.com
(615) 739-2888

Counsel for Linda Schipani

CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, this brief contains 11,534 words pursuant to § 3.02(a)(1)(a), as calculated by Microsoft Word, and it was prepared using 14-point Century font pursuant to § 3.02(a)(3).

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2019, a copy of the foregoing was sent via the Court's electronic filing system and/or via email to the following parties:

Matthew J. Hoffer
Shafer & Associates, P.C.
Lansing, MI 48906
Matt@bradshaferlaw.com

Bob Lynch, Jr.
Washington Square, Suite 316
222 Second Ave. North
Nashville, TN 37201
office@boblynchlaw.com

Counsel for Petitioner-Appellant

Lora Fox
Catherine Pham
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 37219

Counsel for Respondent-Appellee

By /s/ Daniel A. Horwitz
Daniel A. Horwitz