TORT AND COMPARATIVE FAULT LAW UPDATE 2009

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This paper includes summaries of what in my opinion are the most important tort opinions issued by Tennessee appellate courts in the last year.

Table of Contents

APPEALS

- **Frivolous Appeal**

***Curtis Morris v. AmSouth Bank*,** No. W2007-01688-COA-R3-CV, 2008 WL 4335077 (Tenn. Ct. App. Sept. 23, 2008). Author: Judge Holly M. Kirby. Trial: Judge Rita L. Stotts.

The Court of Appeals awarded Defendant fees and costs under Tenn. Code Ann. § 27-1-122 for Plaintiff's frivolous appeal of a summary judgment ruling. The court concluded that Plaintiff had no reasonable chance for success on appeal since he had not contested Defendant's statement of undisputed material facts at the trial court level. The court remanded to the trial court to determine the amount of damages. Lesson: don't appeal if you don't follow the rules at the trial court level.

- **Waiver on Appeal**

State v. Pewitte, No. W2008-00747-CCA-R3-CD, 2009 WL 29891 (Tenn. Crim. App. Jan. 5, 2009). Author: Judge David H. Wells. Trial: Judge Clayburn Pepples.

We bring this case to your attention only to remind you of two rules of appellate procedure. Criminal Defendant lost his right to complain about an alleged "confession" because (a) he failed to object at trial; and (b) failed to cite legal authority in support of his position in his brief. The former results in a waiver under Tenn. R. App. P. 36(a), the later results in a waiver under Tenn. R. App. P. 27(a)(7).

CAUSATION

- **Loss of a Chance**

Valadez v. Newstart, LLC., No. W2007-01550-COA-R3-CV, 2008 WL 4831306 (Tenn. Ct. App. Nov. 7, 2008). Author: Judge Allan E. Highers. Trial: Judge Donna M. Fields.

As they were duty-bound to do, the Western Section rejected a valiant effort to reverse existing law and permit recovery on a "loss of chance" theory.

Defendants failed to promptly notify Plaintiff parents that their unborn child was afflicted with spina bifida. The two month delay meant that the mother and child could not participate in an experimental study to repair the condition via intrauterine surgery.

Defendants moved for summary judgment saying that the parents could not prove with greater that 50% certainty that they would have been admitted to the study. The parents asked the court to change existing law and permit recovery under a "loss of chance" theory.

The court reviewed Tennessee law and the law around the nation on the issue and concluded that it was bound by a Tennessee Supreme Court decision holding that Plaintiffs could not proceed on a "loss of chance" theory.

There is no doubt that a Rule 11 appeal will be sought in this case. Assuming the facts stated are true, this is an egregious case that compels a serious discussion of the law. Should the law refuse access to the courthouse just because a plaintiff cannot meet the 50% threshold? That means 100 similarly wronged plaintiffs automatically lose even though 50 of them would have been saved. Is that fair?

To be sure, the 50.1% rule is a bright-line test. It is efficient. But is it just?

- **Cause-in-Fact**
- **Legal Cause**

Donald Wayne Robbins and Jennifer Lynn Robbins, For Themselves and As Next Friend Of Alexandria Lynn Robbins v. Perry County, Tennessee, A Governmental Entity, No. M2008-00548-COA-R3-CV, 2009 WL 1162579 (Tenn. Ct. App. April 28, 2009). Author: Judge Frank G. Clement, Jr. Trial: Judge Robert E. Lee Davies.

Plaintiffs' sixteen-year-old daughter died in a single-vehicle accident. The only other occupant of the vehicle was Decedent's boyfriend, against whom Plaintiff Mother had obtained an *ex parte* order of protection eight days earlier. The order of protection had not yet been served by the Perry County Sheriff's Department. By statute, it was not required to be served until a date after Decedent's fatal accident. Plaintiffs sued Perry County, alleging negligence by failure to serve the order of protection before the accident occurred.

The trial court granted a motion to dismiss the complaint, finding no causation. The Court of Appeals affirmed. The court found that the complaint did not state cause-in-fact, because it did not identify who was driving the vehicle at the time of the accident or how the accident occurred. Likewise, the court found Plaintiffs' complaint would not make out a sufficient legal cause of Decedent's death, as it assumed (without explicitly alleging) that Decedent's boyfriend would have stayed away from Decedent if he had been served with the order of protection.

- **Causation**
- **Negligence in Placement of Child**

Candace Mullins v. State of Tennessee, No. M2008-01674-COA-R3-CV, 2009 WL 1372209 (Tenn. Ct. App. May 15, 2009). Author: Judge John W. McClarty. Trial: Commissioner Stephanie R. Reevers, Tennessee Claims Commission.

Decedent and his siblings were removed from their home after an investigation by the Tennessee Department of Children's Services (DCS). At a team decision meeting (TDM), Mother requested the children be temporarily placed in the custody of Mother's aunt. Mother's aunt had

her own child who was mentally challenged living with her. DCS investigated the aunt, who was found to be fit to take custody of the children, and they were placed with the aunt.

Less than a month later, Mother called the DCS case manager for Decedent. Mother reported that the aunt was away from the home as much as twelve hours per day and the children were being cared for by the aunt's mentally challenged daughter, Ms. Williams. Mother reported that Williams had been in special education classes and had previously set fire to the kitchen in the home. Mother also reported that Decedent had received a burn while in the home. The DCS case manager instructed Mother to call in an official referral. The day Mother called in the referral, the DCS case manager went to the home. After an investigation into the child's living conditions, the case was closed.

Nine days after the case was closed, Decedent was admitted to Vanderbilt Children's Hospital. The editors will spare you the details of the tragic death of this five-year-old, but suffice it to say that Williams was ultimately charged with first-degree murder and aggravated child abuse.

After Decedent's death, DCS conducted an administrative inquiry, concluding that the DCS case manager's investigation of Mother's report of abuse had violated the disciplinary offenses of DCS regulations, including offenses related to negligence and incompetence.

Mother sued DCS in the Claims Commission, asserting jurisdiction under Tenn. Code Ann. § 9-8-307(a)(1)(E) for "negligent care, custody and control of persons." The central issue in the case was whether the Claims Commission had subject matter jurisdiction over the claim.

Mother contended that, because DCS has a statutory duty to screen all reports of alleged child abuse and/or neglect and to investigate referrals when appropriate, it exercised some form of control over her son, even if he was not under the State's direct care, custody and control at the time of his death. Mother also argued that DCS was responsible for supervising Decedent's environment in aunt's home for the juvenile court. According to Mother, because DCS was required to actively supervise Decedent's temporary placement, it assumed a duty to act when the aunt's home was investigated upon the referral, thereby becoming subject to the Commission's jurisdiction.

Mother relied on *Stewart v. State,* 33 S.W.3d 785 (Tenn. 2000). The Court of Appeals summarized the *Stewart* holding:

> In *Stewart*, the Tennessee Supreme Court considered whether, under T.C.A. § 9-8-307(a)(1)(E), jurisdiction could be asserted outside of institutions maintained by the State. *Id.* The Court had to determine if a state trooper "had a legal duty to control local police authorities at an arrest scene – irrespective of whether he had actual care and custody over the deputies – and if he was negligent in the fulfillment of that duty." *Id.* at 792. The *Stewart* Court first said that no statute, regulation, or case law decision established a state trooper's legal duty to supervise local law enforcement officials at an arrest scene. The Court then held that the state trooper could have a duty to protect a plaintiff, however, if he assumed

> such a duty. In construing § 9-8-307(a)(1)(E), the *Stewart* Court held that if a state trooper had a legal duty – irrespective of whether he had actual care, custody, and control over the individual – and if he was negligent in the fulfillment of that duty, the Commission had jurisdiction to hear the case. *Id.* Therefore, if a State employee assumes a duty to control a situation and is negligent, the Claims Commission may assume jurisdiction. *Id.* at 793.

The State contended, and the Commissioner and Court of Appeals agreed, that the Claims Commission did not have subject matter jurisdiction under these circumstances. The Court of Appeals ruled that, once Decedent was placed into a temporary home, Decedent left the care, custody, or control of DCS. Relying on *Draper v. State,* No. E2002-02722-COA-R3-CV, 2003 WL 22092544 (Tenn. Ct. App. E.S., Sept. 4, 2003) (no application for permission to appeal filed) and *Holloway v. State*, No. W2005-01520-COA-R3-CV, 2006 WL 265101 (Tenn. Ct. App. M.S., Feb. 3, 2006) (permission to appeal granted - Tenn. Aug. 21, 2006), the Court of Appeals affirmed the Commissioner's ruling that the DCS case manager's actions in this case did not indicate DCS had voluntarily undertaken a duty to care for or control Decedent in investigating the referral.

The Court of Appeals ruled that the Commissioner did have jurisdiction over claims that DCS was negligent in its initial decision of where to temporarily place the child. However, the Commissioner found DCS was not negligent in this decision, and the Court of Appeals found the evidence did not preponderate against the Commissioner's decision.

Finally, the Court of Appeals affirmed the Commissioner's ruling that, even if the Commission had subject matter jurisdiction in this case, Mother's claim failed because she did not proffer proof of causation. The Commissioner determined she could not say that, had DCS not committed the violations listed on the DCS internal investigation report, the child would have been removed from the home before he suffered fatal injuries.

So what additional evidence would have been necessary to establish causation? Some proof about what DCS would have done if the violations on the internal report had not occurred, and how quickly DCS would have done it. In essence, some proof was necessary to establish that DCS should have, in the exercise of reasonable care, removed Decedent from the home before his ultimate injuries.

COMPARATIVE FAULT

- **Comparative Fault**
- **Collateral Estoppel**

***Juanita Mullins v. State of Tennessee*,** No. E2007-01113-SC-R11-CV, ___ S.W.3d ___, 2009 WL 3126232 (Tenn. September 30, 2009). Author: Justice William C. Koch, Jr. Trial: Commissioner William O. Shults.

This case is unique procedurally, but the result is necessary and important. In a nutshell, if a plaintiff pursues claims against different tortfeasors in different courtrooms arising out of the same circumstance, a finding of no fault by one jury should not bar the plaintiff from continuing to pursue the claim against another tortfeasor in a separate courtroom.

The procedural posture in the case is critical to its outcome. Plaintiff sued various defendants in a medical malpractice case in federal court. After learning that one defendant was a state employee, and therefore immune from suit in federal court, Plaintiff non-suited the claim against that particular defendant and re-filed against the State in the Tennessee Claims Commission. In the federal case, other defendants asserted the comparative fault of the state employee. Although there was no competent expert testimony against the state employee, the federal court included him on the verdict form as a potential at-fault party. The federal jury returned a finding of no fault against any of the defendants or the state employee.

Then, in Plaintiff's case in the Claims Commission, the State moved for summary judgment based on collateral estoppel, asserting that the verdict in federal court had already decided that the state employee was not at fault for contributing to the death in the case. The trial court denied the motion but granted interlocutory appeal, the Court of Appeals affirmed the trial court's decision, and the Supreme Court granted review.

The Supreme Court first summarized the law of collateral estoppel. It promotes finality, conserves judicial resources, and prevents inconsistent decisions by preventing the same parties from re-litigating the same legal or factual issues that were actually raised and necessarily determined in an earlier proceeding. The party invoking collateral estoppel has the burden of proving:

> (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded. *Gibson v. Trant*, 58 S.W.3d at 118 (Birch, J., concurring and dissenting) (citing *Beaty v. McGraw*, 15 S.W.3d 819, 824-25 (Tenn. Ct. App. 1998)).

The Supreme Court explained that, under RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h (1982), determinations of an issue or issues that are not necessary to a judgment have the characteristics of dicta and will not be given preclusive effect.

Under RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. d, an issue is actually litigated if it is "properly raised, by the pleadings or otherwise, and ... submitted for determination, and ... determined." In this case, a defendant in the federal case alleged the state employee's negligence in an answer, appropriately raising the issue. The verdict form permitted the jury to consider the state employee's negligence, and the jury found no fault on the state employee's part. The Supreme Court concluded this demonstrated the issue was actually litigated, and that the jury's determination that the doctor was not at fault was necessary to its judgment.

The court next looked to whether Plaintiff had a "full and fair opportunity to litigate" the issue in the federal proceedings. Based on federal cases from various jurisdictions, the Supreme Court held it was "appropriate to consider (1) the procedural and substantive limitations placed on the plaintiff in the first proceeding, (2) the plaintiff's incentive to litigate the claim fully in the first proceeding, and (3) the parties' expectation of further litigation following the conclusion of the first proceeding." The court found Plaintiff did not have a full and fair opportunity to litigate in the federal proceeding, in part because common sense dictated that Plaintiff had little incentive to put on proof to establish the state employee's negligence in the federal forum, which could have reduced the fault on the other defendants in the federal case while offering Plaintiff no opportunity to recover monetarily for any fault against the state employee.

Lastly, the State argued that Plaintiff could have filed the suit in state court and proceeded there, a venue where the claim against the state employee could be transferred. The Supreme Court rejected this argument as well, noting that a plaintiff may choose the venue to which she will assert her claim, and the Supreme Court was not inclined to hold that a plaintiff who pursues a claim in federal court inherently foregoes the plaintiff's rights against any State employees arising from the same circumstance.

This decision makes perfect sense. It is always refreshing to see a court take a common-sense view of litigation. Only a very foolish lawyer would have aggressively litigated the fault of the State's employee in the federal action, and the Court's recognition of that fact is yet another sign that its members did not lose their understanding of what lawyers actually do when they were elevated to the High Court.

- **Comparative Fault**
- **Summary Judgment in Comparative Fault Cases**

Marsha Salyer, et al v. Felicia McCurry, et al, No. M2006 E2008-01017-COA-R3-CV, 2009 WL 211873 (Tenn. Ct. App. Jan 30, 2009). Author: Judge Richard H. Dinkins. Trial: Judge Royce Taylor.

Plaintiff was being shown a house by Realtor. Plaintiff asked what was behind a closed door, and Realtor told Plaintiff it was a bedroom and to "go on in." Plaintiff opened the door and

stepped inside what was actually the basement. Plaintiff fell down stairs and suffered injuries. Plaintiff sued Realtor and Realtor's employer for negligence. Defendants moved for and were granted summary judgment on the ground that Plaintiff was at least 50% at fault for her own injuries. The Court of Appeals reversed, finding a genuine issue of material fact as to whether Plaintiff was at least 50% at fault.

- **T.C.A. § 20-1-119**
- **Premises Liability**

Allen v. Historic Hotels of Nashville, LLC, No. M2007-02423-COA-R3-CV, 2008 WL 5169567 (Tenn. Ct. App. Dec. 9, 2008). Author: Frank G. Clement, Jr. Trial: Judge Walter C. Kurtz.

The world is changing. We have an African-American President who has a funny name. Google is worth more than GM, Ford, and Chrysler – combined. Vanderbilt will play in a bowl game. And now two Republicans have filed a personal injury case.

What happened? The Tennessee GOP was having a party at the Hermitage Hotel after the 2004 election. Apparently, a flag pole and flag had been draped over a painting of a landscape and for unknown reasons it fell, hitting the male Plaintiff on the head. He claimed that the pole caused a head injury which, among other things, resulted in an unintended vote for Barack Obama in 2008. (The last part of this sentence is a total lie.)

Despite these introductory words, this is an important decision that, in my opinion, is wrongly decided on an issue of interest to every tort lawyer.

Plaintiff and his wife sued the hotel 11 months after the incident. The hotel said this in its Answer: "To the extent that Plaintiffs claim that the offending condition was caused because of flags being placed in portraits, upon information and belief, said condition was created at the request of the organizing party of this election reception (the Republican Party of Tennessee) and if Plaintiffs contend that it was improper to request placement of the flags, Defendant identifies said organizer and host of the reception as a potentially negligent party to the extent supported by the proof."

Ten months later it amended to Answer to say this: "Plaintiff's injuries were caused by the negligence of the Tennessee Republican Party. Upon information and belief, the Tennessee Republican Party was responsible for the placement of the flag at issue that allegedly struck Plaintiff. Defendant pleads the doctrine of comparative fault as to the Tennessee Republican Party."

Two important facts must be mentioned. The Tennessee Republican Party ("TRP") admittedly asked the hotel to cover portraits of three Tennessee presidents (who happened to be Democrats) with flags. It was disputed who put the flag over the landscape painting. Second, TRP did not ask that fault be assigned to President Clinton.

After the Amended Answer, Plaintiff sued TRP. TRP asserted the statute of limitations as a defense, saying that Plaintiff failed to bring suit against it within the 90-day period provided by Tenn. Code Ann. § 20-1-119.

The Court of Appeals agreed, saying that the allegation in the original Answer that the "TRP created the 'offending condition' gave rise to the 'clear implication' that any negligence in the placement of the flags over the portraits in the ballroom should be attributed to the TRP." Thus, under its interpretation of the teachings of *State v. Austin,* 222 S.W.3d 354 (Tenn. 2007), the Plaintiff should have filed suit within 90 days after the original answer was filed. The failure to do so was fatal to the Plaintiffs claim against TRP.

The hotel sought summary judgment saying that it had not created the offending condition and that it was not foreseeable that the flag pole and flag would cause injury. The court held that the hotel did not introduce sufficient evidence to negate the possibility that one of its employees placed the flag on the landscape portrait.

It also held that given the size of the pole and the flag it was foreseeable that it could cause injury.

I respectfully disagree with the court's opinion on the Tenn. Code Ann. § 20-1-119 issue. The first Answer filed by the hotel did not accuse TRP of anything with regard to the flag over the landscape painting. It focused its potential allegations of wrongdoing on the portrait paintings, and as far as I can tell Plaintiffs never alleged that the portrait paintings had anything to do with the injury. If this is correct, the hotel's Answer was meaningless and should not be construed as the imposing the obligation on Plaintiff's lawyer to sue TRP within 90 days.

State v. Austin does not require a different result. The original government defendant in that case was clearly trying to avoid blaming the State while at the same time denying it had anything to do with the condition that caused the wreck. Thus, a game was being played to attempt to avoid liability and yet deny the plaintiff in that case the opportunity to sue the real tortfeasor. The Tennessee Supreme Court saw through that game and let the plaintiff get the benefit of § 20-1-119 despite a clear effort to deprive the plaintiff from using the statute.

I think that Plaintiffs' lawyer reasonably relied on a fair reading of the allegations in the original complaint that TRP had nothing to do with the draping of the flag that actually caused the injury. Why sue them for contributing to cause a condition that had nothing to do with the injury?

To be sure, Plaintiff could have sued TRP under the teachings of *State v. Austin* which, once again, makes it clear that a defendant cannot play language games to deprive a plaintiff of the benefit of § 20-1-119. But that does not mean that a plaintiff has to file suit within 90 days, especially given the language here, assuming the hotel was answering in good faith, that the conduct of TRP was unrelated to the injury. Plaintiff should not be required to assume that the hotel was acting in bad faith, forcing them to file suit to protect their rights even though the allegations of the hotel are immaterial to their claims.

No, this decision turns § 20-1-119 on its head. The statute has been consistently interpreted by State courts (with one exception which was later overruled) to protect plaintiffs. This decision does just the opposite. The Tennessee Supreme Court should reverse it if given the opportunity to do so.

Let me end with this comment. The original Answer alleging whatever you want to call it was totally inappropriate. It did not allege fault – at best it said TRP was potentially at fault. That is not a proper affirmative defense under Tenn. R. Civ. P. 8.03. The appropriate response to this inadequate effort is to file a motion to strike under Rule 12 and force the defendant to either file an amended answer which includes an affirmative defense that complies with the rules or drop the issue altogether until it has some proof of what it is attempting to allege.

DAMAGES

- **Duty to Mitigate Damages**

Trezevant Realty Corporation v. John E. Threlkeld, No. W2007-01572-COA-R3-CV, 2008 WL 4613582 (Tenn. Ct. App. Oct. 14, 2008). Author: Judge Allan E. Highers. Trial: Chancellor Walter L. Evans.

This opinion concerns a dispute over a commercial lease and real estate brokerage agreement that includes a section on the duty to mitigate damages.

The law is relatively simple: the aggrieved party must use reasonable efforts to avoid and minimize loss. This decision cites three reported decisions that say just that.

- **Damages**
- **Medical Expenses**

Bernard Hughes v. Demar Hudgins, No. E2008-01385-COA-R3-CV, 2009 WL 2502001 (Tenn. Ct. App. Aug. 17, 2009). Author: Judge Patricia J. Cottrell. Trial: Judge Ward Jeffrey Hollingsworth.

This is a rear-end automobile collision with admitted fault. A jury returned a verdict finding Plaintiff suffered no damages as a result of the accident, and Plaintiff appealed.

The only issue worth noting for tort lawyers is that the Court of Appeals rejected Plaintiff's contention that he should be awarded the costs of ambulance services taking him from the scene, and the emergency room bill for the hospital to which he was taken. The court refused to rule that Plaintiff should be entitled to such expenses as a matter of law, even if no injury is diagnosed at the hospital. The court acknowledged "a strong argument might be made for such a rule," but the court believed there was "an even stronger argument for letting the question remain in the hands of the jury."

Does this mean diagnostic expenses are *per se* unrecoverable? No. It just means that they depend on the circumstances of the case.

DRAM SHOP ACT

- **Dram Shop Act**
- **Intoxicating Beverages**
- **Wrongful Death**

Edwina Montgomery, ex rel. Thomas M. Montgomery v. Kali Orexi, LLC, et al, No. E2008-01207-COA-R3-CV, 2009 WL 837711 (Tenn. Ct. App. Mar. 27, 2009). Author: Judge Charles D. Susano, Jr. Trial: Judge Rex Henry Ogle.

This is a case of first impression construing whether the Dram Shop Act applies to claims brought *on behalf* of the intoxicated person, rather than claims on behalf of an individual *injured by* the intoxicated person. The short answer: the Dram Shop Act does not apply; claims by or on behalf of the intoxicated person are judged under the common law; and ordinary foreseeability principles apply.

Because the trial court granted summary judgment for Defendant, the Court of Appeals summarized the facts in the light most favorable to Plaintiff. Decedent was drinking at Defendant restaurant and became extremely intoxicated. Defendant's staff called a cab for Decedent to take him home. On the way to his house, Decedent insisted on being taken back to Defendant's restaurant. When the cab driver did not turn around, Decedent grabbed the steering wheel and veered the cab into the other lane. The cab driver warned Decedent not to do it again, but soon Decedent grabbed the wheel a second time. The cab driver pulled over, removed Decedent from the cab, and called 911 to report he had put a "very drunk" man on the side of the road. The police were unable to find Decedent that night. Two days later his body was located in a river.

Decedent's wife sued Defendant restaurant, and after summary judgment was granted for Defendant, appealed. Plaintiff claimed that the Dram Shop Act created a cause of action for injuries to an intoxicated person distinct from common law negligence principles, while Defendant argued against Plaintiff's interpretation.

The Court of Appeals construed the Dram Shop Act to apply only to claims for injuries to or death of third parties by intoxicated persons. The Act does not apply to first party claims, or claims for injuries to or death of an intoxicated person that the intoxicated person should not have been served (or over-served) alcohol, and that the serving of alcohol to the intoxicated person caused their injuries or death. Because the Dram Shop Act does not apply to claims brought on behalf of the intoxicated person themselves, those claims are judged under common law negligence principles.

The Court of Appeals reached this conclusion by reading the two sections of the Dram Shop Act, Tenn. Code Ann. § 57-10-101 and 102, in combination with one another. Section 101 states:

> The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of *injuries inflicted upon another* by an intoxicated person.

(Emphasis added in Court of Appeals' opinion).

Section 102 states:

> Notwithstanding the provisions of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:
>
> (1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or
>
> (2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

The Court of Appeals rejected Plaintiff's argument that Section 102 permitted a "first party cause of action" based on injuries to or death of the intoxicated person. Instead, the court ruled that Section 101 states the general rule, that the Dram Shop Act applies to "injuries inflicted upon another by an intoxicated person[,]" and Section 102 provides exceptions to the general prohibition on third-party claims. Since first-party claims are not addressed in the general rule stated in Section 101, Section 102 has no affect on third party claims, and they are judged under common law negligence principles.

The court further held that the Dram Shop Act did not affect the common law rules applicable to first-party actions, including the common law foreseeability inquiry set forth in *Brookins v. The Round Table, Inc.*, 624 S.W.2d 547 (Tenn. 1981). The Court of Appeals explained that the *Brookins* rule provides that "whether the sale of intoxicants is the proximate cause of subsequent injuries is essentially a question of foreseeability." *Id*. at 549. The court found that, as a matter of law, Defendant could not reasonably foresee the manner in which Decedent would be injured, and therefore Defendant owed no duty to Decedent.

The court ruled that, even if Defendant owed a duty to Decedent, as a matter of law it fulfilled that duty under the circumstances.

The Court of Appeals therefore affirmed summary judgment for Defendant.

The good news for plaintiffs? This means the harsh provisions of the Dram Shop Act – requiring a jury of twelve to find liability and causation beyond a reasonable doubt – do not apply to so called "first party" claims.

EXPERTS

- **Expert Testimony**

State v. Scott, No. M2006-02067-CCA-R3-CD, 2008 WL 4253722 (Tenn. Ct. App. Sept. 17, 2008). Author: Judge Joseph M. Tipton. Trial: Judge Don Ash.

Retrograde extrapolation? No, this case is not about a nightmare you had in the eighth grade about a math problem you missed. This is a criminal case that addresses the admissibility of testimony concerning what a person's blood alcohol level would have been several hours before a blood alcohol test was actually administered.

The jury found that Defendant was under the influence of alcohol and cocaine when her car collided with another vehicle, killing a 12-year old child and injuring three others.

A forensic toxicologist utilized retrograde extrapolation to opine that Defendant's blood alcohol level was probably .102 percent at the time of the wreck and that she was also under the influence of cocaine. He also opined that she was impaired in the operation of her vehicle.

Defendant was convicted of vehicular homicide by intoxication and three counts of vehicular assault.

The issue before the court was the appropriateness of introducing the evidence under the circumstances of this case and whether the expert should have been permitted to give an opinion that Defendant was impaired from alcohol and cocaine at the time of the wreck.

Defendant did not contest the reliability of retrograde extrapolation in general and did not challenge the qualifications of the expert. Indeed, the court references that point at least twice, once in the text and another time in footnote 1.

Indeed, the opinion includes some reference to other cases and secondary sources that raise a question as to whether such opinions should be admissible at all. Readers facing the issue would undoubtedly benefit from looking at these sources.
The court held that the trial judge did not abuse his discretion in permitting the expert to state his opinions. On the first issue, the court said "[t]he witness's opinion was based upon an assumed average elimination rate developed from scientific research, and he explained that his opinion was an estimate which could be affected by certain variables. The witness did not testify that he attempted to use the known factors to develop an elimination rate that was unique to the defendant or that his estimation was absolute."

On the second issue (an opinion on the ultimate issue) the court said that the expert's "opinion testimony about the defendant's impairment provided substantial assistance to the trier of fact in interpreting the many factual components related to the question of impairment. Further, the information was not misleading. He noted the limits of his opinion given the lack of perfect information."

If you are attempting to prove your adversary's (or a witness') blood alcohol content at a certain point of time based on what it was several hours later, this decision is a great place to start your legal research. There are six pages of discussion on the issue, not including an extensive statement of the facts underlying the testimony. Judge Tipton clearly understands this issue and did an excellent job of applying the law to the evidence in the case.

We get the distinct impression that the court would have entertained a challenge to the reliability of this testimony. Counsel who have clients who have the resources to mount such a challenge should consider it.

- **Expert Testimony**

State v. Seals*,* No. E2007-02332-CCA-R3-CD, 2009 WL 55914 (Tenn. Crim. App. Jan. 9, 2009). Author: Judge Jerry L. Smith. Trial: Judge Donald R. Elledge.

The Court of Criminal Appeals affirmed the exclusion of the testimony of Dr. William Bernet, a Vanderbilt psychiatrist. Dr. Bernet was prepared to testify that Defendant could have had a genetic defect that made him more susceptible to stress and thus less likely to be able to premeditate the killing with which he was charged. The appellate court found that the trial judge did not abuse his discretion in concluding that the testimony was unreliable and untrustworthy.

The opinion includes a nice summary of the law of expert testimony in Tennessee.

- **Expert testimony**
- **Causation**
- **Medical Malpractice**
- **Motions *in Limine***
- **Motions for Summary Judgment**

Jackie Jackson, Administrator of the Estate of Karon Jackson v. Johnny Joyner, M.D., et al., No. W2008-00906-COA-R3-CV, 2009 WL 928290 (Tenn. Ct. App. Apr. 7, 2009). Author: Judge David R. Farmer. Trial: Judge Lee Moore.

In this case, the Court of Appeals appears to reiterate its prior holding that a motion *in limine* should not be used to wholly wipe out a claim or defense such that it would necessitate summary judgment. If a trial court does grant a motion *in limine* that does equate to summary judgment, even the evidentiary decision will be reviewed under a *de novo* standard. (Read on to see why the court's ruling on that issue is implicit at best.)

The Court of Appeals' opinion also suggests that an expert witness in a medical malpractice case can give expert causation testimony about the likely outcome if a patient had received earlier treatment of a condition, even if the expert does not typically follow patients who suffer from the condition, but instead bases opinions on the expert's experience in seeing other patients' outcomes after referral to other specialists. Once again, this is not a clear holding, but is a logical conclusion from the Court of Appeals' summary of the issue and ultimately its ruling in the case.

Defendant Doctor performed a total hysterectomy on Decedent. Decedent was discharged three days later. Two weeks after that, Defendant Doctor referred Decedent to a urogynecologist for evaluation of complications from the surgery. The urogynecologist diagnosed Decedent as having a vesicovaginal fistula and urinary tract infection and scheduled her for follow up in six weeks. The day after her evaluation by the urogynecologist, Decedent was taken to the emergency room by ambulance. Defendant Doctor and a general surgeon diagnosed Decedent with necrotizing fasciitis, an infection/sepsis that resulted from a previously undiagnosed subfascial hematoma/hemorrhage following the hysterectomy. Decedent died two days later.

Decedent's family filed suit against Defendant Doctor and his employer, alleging Defendant Doctor failed to timely diagnose and treat the hematoma, leading to Decedent's necrotizing fasciitis, sepsis, and death. Plaintiff planned to present expert testimony by deposition. Defendant moved to exclude certain portions of Plaintiff's expert witness testimony, and then moved for summary judgment based on the lack of expert causation testimony by Plaintiff. The trial court granted both motions, and Plaintiff appealed.

On appeal, Plaintiff contended that Defendants' motion *in limine* to exclude Plaintiff's expert causation testimony was, in effect, a summary judgment motion and therefore was not subject to review under an abuse of discretion standard. Plaintiff pointed the Court of Appeals to its prior holding that a motion *in limine* should not be used as a vehicle to preclude a claim or defense or as a substitute for a motion for summary judgment. *Duran v. Hyundai Motor America, Inc.*, 271 S.W.3d 178, 192 (Tenn. Ct. App. 2008). Defendants did not address Plaintiff's assertion that their motion to exclude portions of the expert witness's testimony was an improper use of a motion *in limine*, but Defendants did contend the trial court's decision is subject to an abuse of discretion standard of review and that summary judgment was appropriate where Plaintiff could provide no evidence of causation. The Court of Appeals did not state whether it applied an abuse of discretion standard (as in reviewing evidentiary rulings) or a *de novo* standard (as in reviewing summary judgment rulings). In reading between the lines, however, it appears the court applied a *de novo* standard in its review.

Defendants did not challenge the medical qualifications of Plaintiff's expert witness as a practicing obstetrician/gynecologist nor his competency to testify regarding the applicable standard of care (notwithstanding their contention that his testimony is erroneous). Similarly, there was no dispute that Decedent died as a result of becoming severely septic. Defendants instead asserted that Plaintiff's expert was not sufficiently personally experienced with the treatment of necrotizing fasciitis and sepsis to opine on whether earlier diagnosis and treatment would have prevented Plaintiff's death.

The Court of Appeals perceived the trial court's determination that Plaintiff's expert was not qualified to give the causation opinion as based on the expert's lack of direct experience in treating necrotizing fasciitis after diagnosis of the condition. The Court of Appeals stated that:

> Defendants further asserted that [Plaintiff's expert] based his causation opinion upon nothing but experience despite admitting that he had never treated necrotizing fasciitis, that he is not an infectious disease specialist and would not treat the actual condition at issue; that he knew of no scientific article or study which would support his causation opinion; and that [Plaintiff's expert's] testimony was entirely speculative.

The expert testified that, if Decedent's condition had been identified, evaluated, and managed in a timely fashion, "it could have been treated well before she became so severely septic that she was no longer salvageable."

The expert opined that, if the surgery to evacuate Decedent's hematoma had been done earlier, more likely than not it would have prevented Decedent's death.

The Court of Appeals ruled it could not say the evidence was inadmissible or that Plaintiff's expert was not qualified to offer an expert opinion on the issue. (This language is what leads the editors to believe the court applied a *de novo* review.) The court determined that the expert's testimony was probative and was not outweighed by the danger of unfair prejudice.

The Court of Appeals therefore reversed summary judgment and the portions of the trial court's order excluding the testimony of Plaintiff's expert witness.

- **Expert Testimony**
- **Hearsay Relied Upon by Experts**

State of Tennessee v. David Lynn Jordan, No. W2007-01272-CCA-R3-DD, 2009 WL 1607902 (Tenn. Ct. Cr. App. June 2, 2009). Author: Judge Alan E. Glenn. Trial: Judge Roy B. Morgan, Jr.

Prosecution's expert testified regarding statements from witnesses that the expert obtained by interviewing the witness. Prosecution's expert testified he relied upon those statements in forming his opinions. Defendant objected to expert testimony based on the hearsay statements of these witnesses to the expert, and asked for a limiting instruction. The Court of Appeals ruled it was harmless error for the trial court to fail to give a limiting instruction to the jury explaining that these statements should be used solely to understand and assess the expert's testimony and should not be considered as substantive evidence. The court's decision that the error was harmless was based, in part, on the fact that the same witnesses testified at trial consistently with their statements to the expert.

Note that Tenn. R. Evid. 703 has been amended, effective July 1, to modify this result. The Rule now includes a sentence, taken from Fed. R. Evid. 703, that specifies:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

So under amended Rule 703, the trial court must first determine whether to let the jury hear the witness interviews in the first place. And, under *Jordan*, if the trial court does allow the interviews into evidence, it should give a limiting instruction.

- **Failure to Disclose Experts**
- **Sanctions**
- **Admissibility of Expert Testimony**

Walls v. Conner, No. E2007-01917-COA-R3-CV, 2008 WL 4735311 (Tenn. Ct. App. Oct. 27, 2008). Author: Judge Charles D. Susano, Jr. Trial: Judge Wheeler A. Rosenbalm.

Defendant gave late and incomplete answers to interrogatories requesting expert witness disclosures. The trial judge barred the experts from testifying at trial, and after hearing the evidence, entered a judgment for Plaintiff. In rejecting the experts, he rejected the notion that Plaintiffs could have obtained more complete information if they had taken the expert's deposition. Defendant appealed.

The Court of Appeals for the Eastern Section affirmed, finding that the trial judge acted within the bounds of discretion given Defendant's failure to respond to the interrogatories in a timely fashion and failure to meet a deadline imposed by an order on a motion to compel. The opinion does a nice job summarizing the law in this area.

The Court of Appeals also held that Plaintiff's expert was qualified to testify despite the fact that he did not have direct experience doing construction of the type at issue.

It is nice to see a seasoned trial judge and the Court of Appeals enforce the rules in this case. Far too often parties serve incomplete, late expert witness disclosures and then argue that the opponent should be required to go fishing at a deposition to see what nuggets were excluded from the disclosure. Some of this is laziness, and some of it is sandbagging. Regardless of the cause, it is unfair. Litigants have a right to assume that the interrogatories will be answered completely.

If you face lawyers who do a poor job answering interrogatories and you want to bar the expert's testimony in whole or in part, read this opinion. If you are a violator, read it and think about the risk you are undertaking when you do so.

GENERAL TORT STUFF

- **Deceased Plaintiffs**
- **Suggestions of Death**
- **Waiver of Defenses**

Sam McCormick v. Illinois Central Railroad Company, No. W2008-00902-COA-R9-CV, 2009 WL 1392575 (Tenn. Ct. App. May 19, 2009). Author: Judge Alan E. Highers. Trial: Judge John R. McCarroll.

Plaintiff filed suit as part of a multi-plaintiff federal lawsuit. Plaintiff then passed away. The case was dismissed without prejudice. Suit was re-filed on Plaintiff's behalf in state court. Nine months after the state litigation was filed, Plaintiff's wife filed a suggestion of death and motion to substitute herself as the party plaintiff. Defendant objected, but the trial court ultimately granted Plaintiff's motions. Defendant appealed.

The Court of Appeals held suit filed on behalf of a deceased person amounts to a nullity that cannot be corrected by substitution of parties. Tennessee law permits a suit to proceed on behalf of a person who dies before suit is filed, but not if brought in the person's own name.

Plaintiff contended that Defendant waived the defense under Tenn. R. Civ. P. 12.08 by failing to raise the defense of lack of capacity to sue in Defendant's initial answer. The Court of Appeals disagreed, finding Defendant could not possibly have known it had the defense because Plaintiff's complaint "intentionally or negligently" misrepresented that Plaintiff was still alive.

- **Suits Against Deceased Persons**

Stephanie Bryant, et al. v. Estate of Henry H. Klein, No. M2008-01546-COA-R9-CV, 2009 WL 1065936 (Tenn. Ct. App. April 20, 2009). Author: Judge Richard H. Dinkins. Trial: Judge C. L. Rogers.

Plaintiffs did not follow the statutory procedure for pursuing claims against deceased persons, and the Court of Appeals ruled Plaintiffs' claims were therefore time-barred by the statute of limitations. Under Tenn. Code Ann. § 20-5-103, a plaintiff pursuing a claim against a deceased person must file suit against the decedent's personal representative. Suit filed against the decedent directly, or naming the estate of the decedent, is not valid and will not preserve the statute of limitations. Plaintiffs tried both of these tacts, and the Court of Appeals ruled Plaintiffs' efforts were not sufficient to commence the action under Tenn. R. Civ. P. 3 within the statute of limitations.

- **Reopening Proof**

Psalms, Inc. d/b/a Kirby Pines Estates v. William Pretsch, No. W2008-00653-COA-R3-CV, 2008 WL 5424084 (Tenn. Ct. App. Dec. 31, 2008). Author: Judge J. Steven Stafford. Trial: Judge Karen R. Williams.

Plaintiff nursing home filed suit to recover medical bills from Defendant, whose parents were admitted to the nursing home. At the close of Plaintiff's proof, Defendant moved for directed verdict because Plaintiff had not proved its damages. The trial court *sua sponte* gave Plaintiff twenty days to submit proof of its damages. Defendant objected to admission of the new proof, but it was ultimately admitted. A judgment was entered against Defendant, and Defendant appealed.

The Court of Appeals acknowledged that a trial court has broad discretion to re-open the proof, but in examining Tennessee case law, noted this discretion is not unfettered. The court quoted from *Rainbo Baking Co. of Louisville v. Release Coatings of Tennessee, Inc.*, in which the court said the plaintiff, "in effect, received a new trial or another bite at the apple because it was allowed to re-present its case regarding the issue of damages after it had previously failed to do so." No. 02A01-9510-CH-00223, 1996 Tenn. Ct. App. LEXIS 767, *8-9 (Tenn. Ct. App. Dec. 3, 1996).

In this case, the Court of Appeals ruled that the trial court erred in re-opening the proof under the circumstances. The court found that Plaintiff failed to prove its damages at the hearing before the proof was closed, and therefore reversed the judgment and dismissed the case.

- **Expert Witnesses**
- **Handwriting Experts**
- **Potentially Inflammatory Photographs**

State v. Quartes Williams**,** No. W2008-01946-CCA-R3-CD, 2009 WL 2971046 (Tenn. Crim. App. September 14, 2009). Author: Judge Alan E. Glenn. Trial: Judge Carolyn Wade Blackett.

Defendant challenged admission of testimony from a handwriting expert. The expert testified he began handwriting analysis in 1998 when he was chosen to attend the Secret Service's two-week academy, worked as an apprentice for a year under a handwriting expert, and had been analyzing handwritings for the past ten years. The expert stated that he received updates on new findings and opinions from the professional organizations he belonged to, and that he had to be re-certified every year through the organizations, which involved sending in his hours and number of cases worked. He said that he had been allowed to testify as an expert in the field of handwriting analysis in the courts of Tennessee on forty to fifty occasions and also in the federal courts. The Court of Appeals noted that it had previously affirmed the same expert in response to a challenge under *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), and affirmed admission of the expert's testimony in this case as well.

The Court of Criminal Appeals also affirmed the trial court's admission into evidence of potentially inflammatory autopsy photographs for the purpose of supporting the medical examiner's testimony as to how the victim died. The court rejected Defendant's Tenn. R. Evid. 403 argument.

- **Discoverability of Insurance Policy Limits**

James G. Thomas, Jr., Brother and Next of Kin of Karen G. Thomas, Deceased v. Elizabeth Oldfield, M.D., et al, No. M2006-02767-SC-R11-CV, 279 S.W.3d 259 (Tenn. Feb. 2, 2009). Author: Justice Janice M. Holder. Trial: Judge Walter C. Kurtz.

In a nutshell, the Tennessee Supreme Court ruled that information regarding a defendant's liability insurance is generally not discoverable.

Plaintiff filed a medical malpractice complaint for wrongful death against several doctors and hospitals. Through interrogatories and requests for production, Plaintiff sought "information concerning the extent and amount of liability insurance coverage for the claims forming the basis of this lawsuit." Defendants objected, and Plaintiff filed a motion to compel. The trial court entered an order compelling Defendants to respond, and granted Defendants permission to seek an interlocutory appeal. The Court of Appeals reversed, and the Supreme Court of Tennessee granted permission to appeal.

The question before the Supreme Court was whether information concerning Defendant's liability insurance coverage is discoverable under Tenn. R. Civ. P. 26.02(1). The court stated that, in construing Rule 26.02(1), the court needed to determine "whether information concerning the defendants' liability insurance coverage is 'relevant to the subject matter involved in the pending action.'" The court explained:

> The United States Supreme Court has interpreted the identical phrase in Federal Rule of Civil Procedure 26(b) to "encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Thus, the subject matter of a case is not limited to the merits of the case because "a variety of fact-oriented issues may arise during litigation that are not related to the merits." *Id*. Under this broad interpretation, information concerning the existence and extent of liability insurance coverage may be relevant to settlement negotiations or trial preparation. *See Johanek v. Aberle*, 27 F.R.D. 272, 278 (D. Mont. 1961); *Hill v. Greer*, 30 F.R.D. 64, 66 (D.N.J. 1961); *Terry v. Fisher,* 145 N.E.2d 588, 593 (Ill. 1957).

The parties in the case conceded that Defendants' liability insurance coverage would be inadmissible at trial under Tenn. R. Evid 411, and Plaintiff did not argue that discovery of the inadmissible evidence appeared "reasonably calculated to lead to the discovery of admissible evidence" under Tenn. R. Civ. P. 26.02(1). The Supreme Court stated:

> After a considered review, we are unable to conclude that discovery of this information appears reasonably calculated to lead to the discovery of admissible evidence. Therefore, the existence and extent of the defendants' liability insurance is not subject to discovery in this case.

The court looked to the history of courts analyzing Fed. R. Civ. P. 26(b) and similarly phrased rules from other states. The court noted that, before 1970, both Federal and state courts with similar rules were divided as to whether insurance coverage information was discoverable under the Rule. In 1970, the Federal Rule was modified to expressly allow discovery of insurance coverage information. Since then, forty-five states allow discovery of insurance information by rule or statute, three other states have construed their rules to allow discovery, and New Hampshire permits discovery for settlement purposes if the insurer is joined as a party.

In 1979, Tenn. R. Civ. P. 26.02 was revised to conform substantially to Fed. R. Civ. P. 26(b), except that Tenn. R. Civ. P. 26.02 did not include the Federal provision expressly allowing discovery of information regarding insurance coverage. The court described the absence of the insurance discovery provision from Tenn. R. Civ. P. 26.02 as "conspicuous."

The court went on to say it was "convinced that the time has come to align Tennessee with the rules in forty-eight states and the federal rule in allowing discovery of this information." The court explained that discovery of insurance information would encourage mediation and settlement of cases by "enabl[ing] counsel on both sides to make the same realistic appraisal of the case […]." (Citations omitted). Finally, the court noted that the insurance company is often the real party in interest, and "it is beneficial to both the plaintiff and the defendant to engage in 'purposeful discussions of settlement []' […] and "[a]llowing discovery in such circumstances apprises the parties of information necessary to produce results fair to both sides[.]" (citations omitted).

Nonetheless, the court held information regarding Defendants' liability insurance coverage not discoverable under Tenn. R. Civ. P. 26.02 because it was neither admissible nor did it appear reasonably calculated to lead to the discovery of admissible evidence.

In footnote 10, the Supreme Court noted that there are certain circumstances where information concerning a defendant's insurance coverage is discoverable, saying:

> Rule 411 of the Tennessee Rules of Evidence allows such information to be admissible to show "proof of agency, ownership, or control, or bias or prejudice of a witness." In addition, even when the information sought will be inadmissible at trial, it is discoverable when it is reasonably calculated to lead to the discovery of admissible evidence.

Obviously this opinion has significant import for every tort case in Tennessee. The inability to discover insurance information in Tennessee state courts hurts settlement possibilities, drives up litigation costs, and encourages conduct by insurers to protract litigation.

There is no compelling reason to withhold insurance information from an injured plaintiff. If a plaintiff receives adequate assurance early in a case (or before filing suit) that the available liability insurance is not sufficient to fully compensate the plaintiff, then the plaintiff may simply present the insurer with enough information for the insurer to recognize it as an excess case. Everyone involved – including the court – saves time and money. On the other hand, with a plaintiff unable to discover the total available insurance limits, the plaintiff must assume that the defendant has the ability to pay for the plaintiff's total losses, and prosecute the case accordingly. The plaintiff, defendant, and the court waste time and money litigating issues even though it will not make a material difference to the amount ultimately collected by the plaintiff.

(Of course, a plaintiff may recover from the defendant personally beyond the defendant's insurance limits. This is beside the point – before delving into considering whether the defendant can make a meaningful personal contribution to any settlement, the plaintiff needs to know the defendant's liability insurance limits to determine whether the defendant even faces any personal exposure. If the plaintiff discovers that the defendant lacks sufficient liability insurance to cover the plaintiff's losses, then the plaintiff can inquire into the defendant's ability to pay personally. Until the plaintiff knows how much insurance is available, however, the plaintiff is really not in a position to evaluate the defendant's personal finances.)

One important question: In order to discover whether a witness may have some bias or prejudice based on sharing the same insurer as the defendant, isn't it necessary to permit discovery of the defendant's insurance information? Particularly in medical malpractice cases (such as this one), the only way to determine whether the defendant's expert witness (or witnesses) stand to lose dividends from a loss at trial by their own mutual insurance company is through discovery of the insurance information. The amount of the defendant's insurance may also be pertinent to a witness's possible bias, as it indicates the amount the insurer could be called to pay for the plaintiff's losses.

Thus, there is a chance the defendant's insurance information could be admissible to show bias or prejudice of other witnesses in the case, and since there is no way for the plaintiff to know whether the insurance information reveals a possible bias or prejudice without actually acquiring the evidence, in almost all instances, then, shouldn't the defendant's insurance information be deemed reasonably calculated to lead to the discovery of admissible evidence?

- **Discovery Sanctions**

William Griffin, Jr. v. Terrance Borum, et al., No. W2008-00725-COA-R3-CV, 2009 WL 1464145 (Tenn. Ct. App. May 27, 2009). Author: Judge J. Steven Stafford. Trial: Judge Roger A. Page.

Plaintiff failed to attend his deposition at a date and time agreed upon by counsel, and noticed by Defendant. Defendant moved for sanctions and dismissal, but the trial court simply ordered Plaintiff to appear for a deposition at a specific time. Plaintiff again did not appear, and on Defendant's motion, the trial court dismissed the case. The Court of Appeals affirmed the discovery sanction against Plaintiff.

- **Dismissals Without Prejudice**
- **Federal Removal and Remand**
- **Savings Statute**
- **Statutes of Limitations**

Marcus Willis v. Shelby County, Tennessee, et al, Nos. W2008-01487-COA-R3-CV and W2008-01558-COA-R3-CV, 2009 WL 1579248 (Tenn. Ct. App. June 8, 2009). Author: Judge David R. Farmer. Trial: Judge Karen R. Williams

Plaintiff sued Defendants alleging federal and state claims. Defendants removed the case to federal court under federal question jurisdiction. The District Court dismissed Plaintiff's federal claims with prejudice, and dismissed Plaintiff's state law claims without prejudice. Slightly less than a year later, Plaintiff filed a "motion to reassume jurisdiction" in the existing state court case, and out of an abundance of caution also filed a separate state case asserting the same state law claims against the same defendants. The trial court dismissed both cases based on the statute of limitations.

First, the Court of Appeals ruled that the trial court could not "reassume jurisdiction" in the first state case. If a federal court declines to exercise jurisdiction over supplemental state law claims, the federal court can either remand or dismiss the claims without prejudice. Based on 28 U.S.C. § 1446(d), once a case has been removed to federal court, the state court has no authority to exercise any control over the existing case unless it is remanded. Since these claims were dismissed, not remanded, the state court could not reassume jurisdiction in the case.

However, the Court of Appeals ruled that Plaintiff's re-filed second lawsuit was timely under the Tennessee savings statute. Defendants contended Plaintiff's re-filed state law claims had expired under 28 U.S.C. §1367(d), which tolls the statute of limitations for state claims "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." The Court of Appeals held that the Tennessee savings statute, Tenn. Code Ann. § 28-1-105, extended the period to one year to re-file state claims after a federal dismissal without prejudice.

- **Enforceability of Settlement Agreements Reached at Mediation**
- **Motions to Set Aside Judgments**

Lauren Diane Tew v. Daniel v. Turner, et al, No. E2007-02613-COA-R3-CV, 2009 WL 211927 (Tenn. Ct. App. Jan. 29, 2009). Author: Judge Charles D. Susano, Jr. Trial: Chancellor Telford E. Forgety, Jr.

This case is a lesson – even settlements at mediation that are reduced to an agreed judgment and entered by the trial court may later be attacked by one of the parties.

In their divorce, Husband and Wife divided their interests in two tracts of land on a farm. After the divorce, Husband and Wife held one-half interest in the tracts as equal tenants in common, and Husband's Brother owned the other one-half interest in the two tracts.

Later, Wife filed a complaint seeking to sell the property, and claiming it could not be partitioned. Brother responded, claiming the land could be partitioned. The trial court ordered the parties to mediation. The mediation appeared to have been successful as an agreed judgment was signed by the attorneys for all parties and entered by the trial court. Under the agreed judgment, Brother was awarded all of the interest in one of the tracts, and Husband and Wife would share the proceeds of the sale of the other tract.

Husband and Wife then jointly filed a motion to enforce the terms of the agreed judgment. Husband and Wife claimed that they had sold the tract in accordance with the judgment, but Brother refused to sign the sale documents.

Brother responded to the motion to enforce the terms of the agreed judgment and filed a Tenn. R. Civ. P. 60.02 motion seeking to set that judgment aside. Brother claimed that no agreement had been reached at the mediation, that he did not give his attorney authority to sign the judgment, and that he never received a copy of the judgment before it was signed and entered by the trial court. The trial court denied Brother's motion and ordered the property sold pursuant to the agreed judgment. Brother appealed.

After a lengthy recitation of the proof presented at the trial court, the Court of Appeals affirmed the trial court's conclusion that an agreement was reached at the mediation, and that the agreed judgment should not be set aside.

- **Amnesiac Presumption**

Hall v. The Town of Ashland City, No. M2008-01504-COA-R3-CV, 2009 WL 363166 (Tenn. Ct. App. Feb. 12, 2009). Author: Andy D. Bennett. Trial: Judge Larry J. Wallace.

This is yet another GTLA car wreck case where the governmental entity lost and appealed on the Court's 60%-40% allocation of fault. No big surprise here – the Trial Court's allocation of fault was affirmed.

The case is worthy of note for only two reasons. First, it references the amnesiac presumption, *i.e.,* a plaintiff who because of injuries received in the event has no memory of the event is presumed to have acted with due care. Note, however, that this presumption exists only in the absence of evidence to the contrary. *Jeffreys v. Louisville & N.R. Co., Inc*., 560 S.W.2d 920, 921 (Tenn. Ct. App. 1977).

The second reason is that Judge Bennett reveals his sense of humor in this opinion. Plaintiff basically argued that at the age of 80 she was too old to engage in risky behavior. Judge Bennett agreed, noting that "that may be how they reach the stage of being 80-year-old women." He then added "[w]e are not inclined, however, to think this possibility rises to the level of a legal presumption."

- **Motor Vehicle Accidents**
- **Evidence of Positive Drug Tests**

John C. Blair v. Robert Sullivan, Jr., et al., No. W2008-01649-COA-R3-CV, 2009 WL 2461166 (Tenn. Ct. App. Aug. 13, 2009). Author: Judge J. Steven Stafford. Trial: Judge D'Army Bailey.

Plaintiff argued that a post-accident drug test of Plaintiff, which was positive for marijuana, should have been excluded at trial under Tenn. R. Evid. 401, 402, and 403. The Court of Appeals rejected Plaintiff's arguments, finding the drug test relevant to causation for the accident, and that its probative value was not substantially outweighed by the danger of unfair prejudice.

- **Pleading Requirements**
- **Affirmative Defenses**
- **Service of Process**

William Allgood and Rose Allgood v. Gateway Health Systems d/b/a Gateway Medical Center and Dr. Christopher Hoffman**,** No. M2008-01779-COA-R3-CV, 2009 WL 3029593 (Tenn. Ct. App. Sept. 22, 2009). Author: Judge Holly M. Kirby. Trial: Judge Ross H. Hicks

This is an important case on the pleading standards for affirmative defenses. It arises out of the sufficiency of service of process on a doctor in a medical malpractice case - which has been fertile ground for appeal in recent years. The implications for any affirmative defenses, however, merit review by all litigators.

Plaintiffs served Defendant Doctor through a process server, who left the summons with a staff member at the hospital where Doctor worked. Doctor filed an answer, which also asked the trial court "pursuant to Tennessee Rule of Civil Procedure 12.02(5) to dismiss the complaint for insufficiency of service of process on grounds that the return certifying service of process on [Defendant] shows that he was served by the commissioner of insurance through the U.S. mail." The return on service of process was filed later, stating that it was served by the process server by delivery on the Hospital. Doctor responded to a contention interrogatory asking him to explain the bases for his affirmative defenses, and though he explained the grounds for his comparative fault defense, he did not mention the insufficiency of process defense.

Doctor later moved for summary judgment based on his service of process defense. Doctor asserted that the person at the Hospital with whom the summons was left was not authorized to accept service on his behalf.

Plaintiffs responded that Doctor waived the insufficiency of service of process defense because he failed to state the factual basis supporting the defense as required by Rule 8.03. Plaintiffs also contended that Doctor should be estopped from asserting the service of process defense because he did not list it in his interrogatory responses.

The trial court granted summary judgment, and Plaintiffs appealed.

The Court of Appeals reversed.

The court noted first that, in *Barker v. Heekin Can Co.*, 804 S.W.2d 442 (Tenn. 1991), the Supreme Court ruled a defendant "waived the defense of insufficiency of service of process by failing to include 'in its motion to dismiss a recitation of those facts, 'in short and plain terms,' upon which it was relying for dismissal' as required by Rule 8.03." Doctor attempted to distinguish *Barker* because the defendant in that case did not include any factual basis to support its service of process defense, despite knowing the supporting facts from the beginning. By contrast, Doctor included all the information available to him at the time he filed his answer, but ultimately relied on different facts discovered later. The Court of Appeals disagreed, suggesting Doctor should have amended his answer or otherwise corrected the misimpression created by his answer. The court reflected that, including incorrect facts was, from Plaintiffs' perspective, worse than having stated no facts at all, since it could have led Plaintiffs to conclude that the original service of process was in fact effective.

The court declined to rule on the other issues, but the editors would suggest that Plaintiffs' argument regarding Doctor's failure to accurately respond to Plaintiffs' contention interrogatories should also support the court's ruling in this case.

This decision is dead-on. Rule 8.03 is crystal-clear, and this decision says nothing more than a defendant who intends to rely on an affirmative-defense must follow it. Who can complaint about that?

Note to plaintiff's lawyers: do not forget to read the Answer.

- **References to Liability Insurance**

Emily Steward v. William F. Smith, III, a Minor, et al., No. M2009-00048-COA-R3-CV, 2009 WL 2951146 (Tenn. Ct. App. September 14, 2009). Author: Judge David R. Farmer. Trial: Judge Robert E. Birch.

This case reinforces the point that small references to insurance are not enough to demand a mistrial unless "an attorney willfully and voluntarily refers to liability insurance for the purpose of influencing a jury." *West End Recreation, Inc. v. Hodge*, 776 S.W.2d 101, 104 (Tenn. App. 1989) (citations omitted). The short version is that Plaintiff's counsel asked jurors in *voir dire* whether anyone they knew worked in insurance, and Plaintiff mentioned (apparently impromptu) that an auto insurer took photos in the case, and Plaintiff testified she did not obtain some medical care related to her injuries because of a lack of insurance. The trial court found Plaintiff's counsel did not intentionally refer to liability insurance to influence the jury, and gave a lengthy curative instruction acknowledging the practical reality that someone in the case probably had insurance. These references were not enough to mandate a mistrial in the case.

Defendant appealed a jury verdict in an automobile accident case with admitted liability, arguing that the trial court should have granted a mistrial based on repeated references to insurance. Defendant argued Plaintiff's counsel intentionally injected the possibility of insurance coverage by:

- Asking potential jurors during *voir dire* about their experience regarding settlement of automobile accident claims.

- Asking a potential juror during *voir dire* what they would do if they didn't have health insurance and the doctor ordered something.

- Asking during *voir dire* if any potential jurors or their families worked in the insurance industry.
- Asking during *voir dire* if any potential jurors were related to lawyers or paralegals that work for insurance companies.

- Asking Plaintiff if she took a picture, to which Plaintiff responded, "No, I think Allstate..." Plaintiff's counsel interrupted her, telling her to stop.

- Asking Plaintiff why she had gaps in her medical treatment, which Plaintiff explained was because she did not have health insurance.

The trial court gave the following curative instruction:

> Ladies and gentlemen, just before you were excused the witness made a reference to a particular insurance company. Now, we don't mention insurance during trial because it is not relevant.
>
> . . . you have enough intelligence to know that it is very likely tha[t] one or both of these drivers have insurance, most drivers have insurance, that is just common sense and everyday experience.
>
> So . . . nothing earth shaking has been told. The reason we don't discuss insurance is because it is not relevant. It has no bearing on any issue that comes before you. If you stop and think about it we are not trying liability in this case.
> . . . .
> Is a person more or less injured because they have insurance or don't? Again, it is just - - what is at issue is liability and what are the damages to the plaintiff, if anything, that are caused by this accident?
>
> And that inquiry is not aided one bit by the fact that one or both of these drivers had insurance. It is just simply not relevant. The fear is if somebody in the jury finds out that they have insurance that the jury will go wild and give thousands of dollars because there is insurance.

> . . . if you consider the fact that they have insurance in setting these damages you are violating your oath. If you even discuss insurance back in the jury room, you are violating your oath as a juror. I instruct you not to do that. Can you all do that? Thank you.

The Court of Appeals affirmed the trial court, finding it did not abuse its discretion in determining that Plaintiff's counsel did not intentionally insert the question of liability insurance into the proceedings for improper purpose.

- **Expert Witnesses**
- **Handwriting Experts**
- **Potentially Inflammatory Photographs**

***State v. Quartes Williams*,** No. W2008-01946-CCA-R3-CD, 2009 WL 2971046 (Tenn. Crim. App. Sept. 14, 2009). Author: Judge Alan E. Glenn. Trial: Judge Carolyn Wade Blackett.

Defendant challenged admission of testimony from a handwriting expert. The expert testified he began handwriting analysis in 1998 when he was chosen to attend the Secret Service's two-week academy, worked as an apprentice for a year under a handwriting expert, and had been analyzing handwritings for the past ten years. The expert stated that he received updates on new findings and opinions from the professional organizations he belonged to, and that he had to be re-certified every year through the organizations, which involved sending in his hours and number of cases worked. He said that he had been allowed to testify as an expert in the field of handwriting analysis in the courts of Tennessee on forty to fifty occasions and also in the federal courts. The Court of Appeals noted that it had previously affirmed the same expert in response to a challenge under *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), and affirmed admission of the expert's testimony in this case as well.

The Court of Criminal Appeals also affirmed the trial court's admission into evidence of potentially inflammatory autopsy photographs for the purpose of supporting the medical examiner's testimony as to how the victim died. The court rejected Defendant's Tenn. R. Evid. 403 argument.

GTLA

- **Premises Liability**
- **GTLA**
- **Summary Judgment**

Patty Brown v. Chester County School District, No. W2008-00035-COA-R3-CV, 2008 WL 5397532 (Tenn. Ct. App. Dec. 30, 2008). Author: Judge Holly M. Kirby. Trial: Judge Donald H. Allen.

Plaintiff was walking down the steps of the bleachers at a high school football game. It had been raining for some time. Plaintiff fell and injured her back. Afterward, Plaintiff saw the step on which she slipped had a "dip" or a "bow" in it. Plaintiff filed suit against Defendant School Board.

Defendant filed a motion for summary judgment. Defendant argued that it did not have actual or constructive notice of any dent in the bleachers before Plaintiff's injury, and that Defendant was immune from suit under the Governmental Tort Liability Act. The trial court granted the motion on both grounds, and Plaintiff appealed.

The Court of Appeals explained that Tenn. Code Ann. § 29-20-204 essentially codifies the common law of premises liability, permitting liability on a governmental entity if the plaintiff proves (1) that a dangerous or defective condition was caused or created by the owner, operator, or his agent, or (2) that the condition was created by a third party and the owner, operator, or agent had actual or constructive notice of the condition before the accident. A governmental entity will be charged with constructive notice of a fact or information, if the fact or information could have been discovered by reasonable diligence and the governmental entity had a duty to exercise reasonable diligence to inquire into the matter. *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 15 (Tenn. 1997)

In responding to the summary judgment motion, Plaintiff filed the deposition testimony of the maintenance supervisor for Defendant, stating that he inspected the bleachers before the game, that he did not see a dent or bend in the step in question, and that the steps were in the same condition after the game as before the game. Plaintiff filed deposition testimony of the principal of the school where Plaintiff was injured, who testified that the school had a duty to maintain the premises, and that the dented step was replaced over a year after the incident. Plaintiff also filed photographs of the bleachers taken approximately two months after the incident.

The Court of Appeals reversed, finding Plaintiff created a genuine issue of material fact regarding whether Defendant had actual or constructive notice of the dented step. The photos submitted by Plaintiff showed the step was dented. Plaintiff's testimony that she saw a dented step after falling supported an inference that the dent was there before she fell. The court also looked to the testimony submitted by Plaintiff from the maintenance supervisor and principal. In total, the court found a reasonable trier of fact could infer that the step was bent before the game, and that the maintenance supervisor had actual or constructive notice of the condition based on his inspection before the game.

The Court of Appeals also reversed the trial court's finding that Defendant was immune under the Governmental Tort Liability Act. Defendant's argument was premised on Tenn. Code Ann. § 29-20-205(4), which states that immunity is not removed if the injury arises out of "a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property..." In *Hawks v. City of Westmoreland*, the Tennessee Supreme Court ruled that this provision only applies when a governmental entity negligently fails to discharge an existing duty to inspect property not owned by the entity. *Id*. at 16. Tenn. Code Ann. § 29-20-204(b), on the other hand, applies when the property is owned and controlled by the governmental entity, and immunity is removed if the governmental entity would have known of the dangerous or defective condition had it conducted an adequate inspection. *Id.* Accordingly, the Court of Appeals in this case found Defendant was not immune from suit. The court reversed the grant of summary judgment and remanded for further proceedings.

The ruling on immunity is absolutely necessary to effectuate any premises liability under the GTLA.

- **No Defect**

Elizabeth Alice Champlin v. Metropolitan Government of Nashville, Davidson County, Tennessee, et al., No. M2007-02158-COA-R3-CV, 2009 WL 1065937 (Tenn. Ct. App. April 20, 2009). Author: Judge Richard H. Dinkins. Trial: Judge Barbara Haynes.

Plaintiff sued City for an allegedly defective condition in a sidewalk where Plaintiff fell while riding a bicycle. Plaintiff contended City had actual notice of the condition of the sidewalk based on a sidewalk inventory prepared for City to identify Americans with Disabilities Act violations. The trial court granted summary judgment, and the Court of Appeals affirmed, finding that the inventory did not detail that any sidewalk constituted a "defective, unsafe or dangerous condition" to hold City liable under the Governmental Tort Liability Act.

- **Governmental Tort Liability Act**
- **Comparative Fault**
- **Sudden Emergency – Medical Condition**

Ronald Timmons v. Metropolitan Government of Nashville and Davidson County, Tennessee, M208-01581-COA-R3-CV, 2009 WL 1684662 (Tenn. Ct. App. June 15, 2009). Author: Judge Frank G. Clement, Jr. Trial: Judge Thomas Brothers.

Plaintiff was driving while suffering from diabetic shock. He was involved in a motor vehicle accident, and Defendant's police officers responded. Plaintiff was unresponsive to the officers' questioning, and the officers believed him to be intoxicated. One officer believed Plaintiff was actively resisting arrest, and grabbed Plaintiff and placed him on the ground in a prone position. Plaintiff's right arm was fractured in the process, and Plaintiff later filed suit against Defendant under the Governmental Tort Liability Act. After a bench trial, the trial court found Defendant negligent, and Defendant appealed.

On appeal, Defendant contended that the police officers actually committed the intentional tort of battery, rather than a negligent act, and thus Defendant was immune under the GTLA. The Court of Appeals disagreed, noting that the trial court found Plaintiff's injuries were the result of the officer's negligent evaluation of the extent of Plaintiff's resistance to being arrested (rather than use of excessive force in making an arrest).

Defendant also contended that Plaintiff was at fault due to his decision to continue driving despite experiencing the symptoms of insulin shock. The Court of Appeals rejected this argument as well. The court found the facts analogous to *Mercer v. Vanderbilt*, 134 S.W.3d 121 (Tenn. 2004), in which the Supreme Court held that "a patient's negligent conduct that occurs prior to a health care provider's negligent treatment and provides only the occasion for the health care provider's subsequent negligence may not be compared to the negligence of the health care provider." *Id*. at 130. Based on *Mercer*, the Court of Appeals found that Plaintiff's medical condition, and his acts and omissions while essentially unconscious, could not constitute acts of negligence.

The Court of Appeals' rationale in applying *Mercer* to these circumstances is a bit confusing. Frankly, I don't see the connection between the *Mercer* holding and the Court of Appeals' rationale for rejecting comparative fault as a matter of law in this case. It may be clearer by taking the analogy in a slightly different direction…

Suppose Plaintiff was intoxicated rather than suffering from diabetic shock, and Plaintiff's intoxication was the sole factor in causing his motor vehicle accident. He would have been able to walk away from the accident uninjured. Once the police arrived at the scene of the accident, however, they committed a separate act of negligence that resulted in Plaintiff's broken arm. Thus, Plaintiff's conduct – driving negligently – led only to his motor vehicle accident; it was the subsequent arrest that caused his fractured arm. As in *Mercer*, Plaintiff's conduct would have only given rise to the occasion for the police to respond to the scene.

If that was the court's intent, however, the police officers' negligence would be more properly deemed a superseding cause. Because of the ambiguity, look for competing analyses of this opinion to pop up in briefs in all kinds of cases in the future.

- **GTLA Claims**
- **Dangerous Roadways**

Gary L. Watts and Janet Watts, Parents and Next Friends of Clinton D. Watts, Deceased v. Earnestine J. Morris, et al, No. W2008-00896-COA-R3-CV, 2009 WL 1228273 (Tenn. Ct. App. May 6, 2009). Author: Judge David R. Farmer. Trial: Judge John R. McCarroll, Jr.

This case merits two gavels for anyone handling a case with allegations that a roadway is dangerous. There is no new legal ground broken here, but the Court of Appeals analyzed the facts and the applicable law at length.

Decedent was a pedestrian crossing a five lane roadway maintained by the City of Memphis. Decedent was struck and killed by a motorist in the middle, turning lane. The trial court ruled that Plaintiffs failed to establish that City's immunity was removed under the Governmental Tort Liability Act in this case, and that Plaintiffs failed to prove City was negligent. Plaintiffs appealed.

The Court of Appeals affirmed the trial court's finding that City was not negligent. A municipality owes the public a duty of care to maintain the road in a proper, reasonably safe fashion. The court explained the framework for the fact-specific inquiry:

> Inquiry into whether a street is defective, unsafe, or dangerous should include the physical aspects of the roadway, the frequency of accidents in that specific location and the testimony of expert witnesses. *Id.* We should also consider "the physical aspects of a particular [location], together with its location, the volume of traffic, the type of traffic it accommodates, and the history of accidents occurring there." *Helton,* 922 S.W.2d. at 882 n. 10 (citing *Sweeney v. State*, 768 S.W.2d 253, 255 (Tenn. 1989)). Although the fact that accidents frequently occur at a particular location may indicate that a street or intersection is inherently dangerous, it is "only one element in the equation." *Id*. at 884. The scope of the City's duty to safely maintain the roads extends to protect travelers from *unreasonable* risks of harm. *Coln v. City of Savannah*, 966 S.W.2d 34, 39–40, 4 (Tenn. Ct. App. 1998) (*overruled on other grounds by Cross v. City of Memphis*, 20 S.W.3d 642, 643 (Tenn. 2000)). When determining the scope of a defendant's duty to a plaintiff, the court must first establish that the risk is foreseeable; then, it must apply a balancing test based upon principles of fairness to identify whether the risk was unreasonable. *Giggers v. Memphis Housing Auth.*, No. W2006-00304-SC-R11-CV, – S.W.3d –, 2009 WL 249742, at * 6 (Tenn. 2009).

In this case, Plaintiffs' expert opined that City should have conducted an engineering study of the area based on the number of past pedestrian accidents, but Plaintiffs' expert could not definitely say what safety measure the City should have installed. The Court of Appeals ruled that, assuming Plaintiffs established that the risk of pedestrian accidents was foreseeable, Plaintiffs still failed to establish by a preponderance of the evidence that the risk was unreasonable.

Moreover, the Court of Appeals noted Plaintiffs argument that installation of various additional crosswalks or a median would generally make the road "safer" failed to establish that the accident would not have occurred but for City's failure to install a specific traffic device. Lacking that critical proof, Plaintiffs failed to establish that any inaction by City was a cause in fact of Plaintiff's injury.

Finally, the Court of Appeals ruled that, even if City's failure to install additional safety devices was a cause in fact of this accident, it was not the legal cause of Decedent's injuries and death. Summarizing the pertinent facts, the court noted that Decedent was standing with an umbrella in the turning lane outside of any marked crosswalk when a driver was driving down the turning

lane, and without seeing Decedent at any point prior to impact, hit Decedent. The court concluded it could not say that any alleged inaction by City was a "substantial factor" in this accident.

Judge Kirby filed a concurring opinion noting she agreed with the legal logic of the opinion, but expressed her reluctance in doing so because the "decision will be a disincentive to the implementation of changes to make pedestrians safer when crossing Central Avenue to reach the University of Memphis campus." Judge Kirby noted numerous citizens and groups had highlighted their concerns about the roadway over the years, but nonetheless, "[t]he law requires that the plaintiff show specific action that should have been taken by the City, and that the failure of the City to take the specified action was a legal cause of Decedent's untimely death." Judge Kirby stated that was not done in this case.

- **GTLA**
- **Liability for Intentional Acts by Third Parties**

Ricky Lee Wilson and Kimberly Wilson, as guardians and next friends of Brandon Wilson, a minor v. The Metropolitan Government of Nashville and Davidson County, Tom Maddox, Timothy John McKnight, and Justin Lejuan Dunnigan**,** No. M2008-00327-COA-R3-CV, 2009 WL 196033 (Tenn. Ct. App. Jan. 27, 2009). Author: Judge Herschel Pickens Franks. Trial: Judge Thomas W. Brothers.

Read this opinion carefully if you are handling an assault case by one student against another. If not, move along, there's nothing to see here.

On a high school bus, a larger student taunted and threatened a smaller, weaker student for some period of time before assaulting him. The bus driver did not intervene. The parents of the victim sued the assailant, another student who helped the assailant, and the Metropolitan Government of Nashville and Davidson County ("Metro") as the bus driver's employer. After a bench trial, the trial court entered a verdict against all defendants. Metro appealed, asserting the trial court applied an incorrect standard for the foreseeability of the attack.

The Court of Appeals affirmed. The court distinguished cases holding that there is no foreseeability by the mere fact that school children tend to fight. The court stated that, in this case, there was a specific threat being made by the larger student against the smaller student for some period of time where the bus driver had a duty to intervene but did not do so. The court noted that, although the assailants had no prior history of violence, it was clear something was likely to happen based on the assailants' behavior under the circumstances, and therefore the assault was foreseeable.

- **Governmental Tort Liability Act**
- **Public Duty Doctrine**
- **Superseding, Intervening Causes**

Carol Turner v. City of Winchester, et al, No. M2008-00401-COA-R3-CV, 2009 WL 1037942 (Tenn. Ct. App. April 17, 2009). Author: Judge Donald P. Harris, Sr. Trial: Judge Buddy D. Perry.

Plaintiff called 911 to report her boyfriend had stolen her truck. Plaintiff had co-signed for the truck for her boyfriend's use in his work, but Plaintiff wanted the truck back because her boyfriend had fallen behind in payments. Two police officers, one from County and one from City, came to Plaintiff's residence, with one officer accompanying Plaintiff's boyfriend to the residence in Plaintiff's truck. The officers found Plaintiff and her family arguing heatedly with Plaintiff's boyfriend. According to Plaintiff, the officers ordered Plaintiff to ride with her boyfriend so he could remove his work tools from the truck before giving the truck back to Plaintiff, and one of the officers told Plaintiff he would arrest her if she did not get into the truck. Plaintiff's family testified they told the officers that the boyfriend would try to kill Plaintiff if he were left alone with her.

Plaintiff rode with her boyfriend for a lengthy ride with numerous necessary stops before the boyfriend removed his tools from the truck. Plaintiff testified that, at each of these stops, she could have exited the truck, but she did not do so because she wanted to make sure she got the truck back at the conclusion of the trip. After the boyfriend dropped off his tools, he drove at a high rate of speed, pushed Plaintiff out of the truck, and ran over Plaintiff.

Plaintiff sued County and City under the Governmental Tort Liability Act, alleging the two officers' actions in ordering Plaintiff to ride in the truck was the legal cause of Plaintiff's injuries. County and City were both granted summary judgment, and Plaintiff appealed.

The Court of Appeals ruled that the trial court improperly concluded that Plaintiff's claim was barred by the public duty doctrine. The court decided that the officers' affirmative action created a special relationship with Plaintiff, and therefore the special duty exception applied to Plaintiff's complaint.

However, the court ruled that Plaintiff's own actions in remaining in the truck at every instance where she could have exited were a superseding, intervening cause of her injuries. The court noted that Plaintiff did not state she remained in the truck because of the officers' orders to her; Plaintiff stated she did not exit the vehicle because she did not want to lose the truck. The court found Plaintiff's conduct satisfied each of the elements of a superseding, intervening cause: (1) it was sufficient by itself to cause the injury, (2) it was not reasonably foreseeable to the negligent actor, and (3) was not a normal response to the negligent actor's conduct.

In footnote 8, the Court of Appeals commented that the boyfriend's actions could not be a superseding cause "because it is well established that an intentional act which causes injury does not cut off the liability of a negligent party who has a duty to protect the injured party from the foreseeable risk of the intentional act." *See Turner v. Jordan*, 957 S.W.2d 815 (Tenn. 1997).

- **Damage Cap**

Faye Black v. City of Memphis, No. W2007-02562-COA-R3-CV, 2009 WL 2461816 (Tenn. Ct. App. Aug. 13, 2009). Author: Judge Holly M. Kirby. Trial: Judge Rita L. Stotts

The Tennessee Governmental Tort Liability Act precludes an award of discretionary costs against a municipality that would exceed the statutory damage cap, even if the governmental entity engages in conduct that prolongs the case and drives up costs.

- **Governmental Tort Liability Act**
- **Premises Liability**
- **Constructive Notice**
- **Spoliation**

Sharon E. Petty, et al v. The City of White House, Tennessee, No. M2008-02453-COA-R3-CV, 2009 WL 2767140 (Tenn. Ct. App. August 31, 2009). Author: Judge Richard H. Dinkins. Trial: Judge C. L. Rogers

Although the predominant part of this case deals with some fact-specific premises liability and GTLA issues, the last section on spoliation by a retained expert during an inspection applies to all litigators. What an expert can and cannot do during an inspection - and the ramifications for the party if the expert goes too far - are important questions all trial lawyers need to keep in mind.

This is a slip and fall at a "grass field ("Field"), upon which two sports fields, bleachers, and a concession stand were built." City owned the Field and allowed a local high school to hold football games there, with the high school selling admission tickets to the public. While walking to the admission table, Plaintiff stepped into a hole and suffered injuries. Plaintiff sued City under the Governmental Tort Liability Act. City appealed a bench verdict for Plaintiff.

The first issue of potential importance is the Court of Appeals' interpretation of whether the Field was a "public improvement" under Tenn. Code Ann. § 29-20-204. The Court of Appeals specifically noted that the parties in the case agreed to the definition of "public improvement":

> Black's Law Dictionary defines "improvement" as "[a]n addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance." Black's Law Dictionary (8th ed. 2004). In an advisory opinion, the Tennessee Attorney General stated that "[a] public improvement, as applied to a municipality, means generally an improvement upon the property of the municipality which furthers its operations and the interests and welfare of the public." Tenn. Op. Atty. Gen., 1995 WL 144718, at *2 (Tenn. A.G. 1995).

Based on this definition, the court found the Field to be a public improvement. Specifically, the court noted that City owned the Field and added bleachers, a parking lot, concession stands, and etceteras.

Notably, the court explicitly recognized the parties agreed upon the definition of "public improvement"; the court did not say whether it considered the definition correct.

City also contended it did not have constructive notice of the hole because "there had been no prior accidents at [the] particular location"; City "never received any complaints or requests for maintenance of the condition at issue"; there was "no proof that anyone had notified the [City] of the problem at issue"; "[t]here [wa]s no evidence to prove that the City 'constructed' or 'built' the Field in a defective or dangerous condition"; and "the hole was not easily observable." The Court of Appeals, however, ruled that City's assertions were more relevant to whether City had actual notice of the hole, not constructive notice as found by the trial court.

The Court of Appeals affirmed the trial court's finding of constructive notice. The court noted, without stating its agreement or disagreement, that Plaintiff claimed that:

> Tennessee courts have held that the accumulation of plant growth is sufficient to support a finding of constructive notice," *Crowell v. Hackett*, No. W1999-02747-COA-R3-CV, 2000 WL 633525, at *4 (Tenn. Ct. App. May 12, 2000) (upholding a trial court's finding of constructive notice because "in order for the tree limbs to have obscured the stop sign..., the condition must have been in existence for a substantial period of time before the...accident"), and consequently, that constructive notice should be imputed to the City because the hole into which Ms. Petty fell had been "filled with growing grass."

The Court of Appeals rejected City's argument that evidence obtained during an inspection of the Field by Plaintiff's expert ordered by the trial court should have been excluded for spoliation. City contended the evidence should have been excluded under Tenn. R. Civ. P. 37 for a violation of Tenn. R. Civ. P. 34A. The court ruled, however, that Rule 37 did not provide a mechanism for excluding evidence for spoliation or violation of Rule 34A, and that the proper sanction for intentional spoliation was a negative inference against the party who intentionally altered the evidence.

The court also disagreed with City that Plaintiff's expert had committed spoliation of the evidence. Plaintiff's expert filed an affidavit stating he re-dug the same hole at a spot indicated by Plaintiff, and City's employee testified that he had indeed filled the hole after Plaintiff's injury but before the inspection. The court found the expert did not "intentionally alter" the hole "for an improper purpose," *Bronson v. Umphries*, 138 S.W.3d 844, 854 (Tenn. Ct. App. 2003), and that Plaintiff did not attempt to "suppress the truth" or perform the inspection with "fraudulent intent." *McLean v. Bourget's Bike Works, Inc.*, No. M2003-01944-COA-R3-CV, 2005 WL 2493479, at *4 (Tenn. Ct. App. Oct. 7, 2005).

HOSPITAL LIENS

- **Hospital Liens**
- **Common Fund Doctrine**

Willie R. Breazeale v. Jason e. Hensley, et al., No. E2008-00234-COA-R3-CV, 2009 WL 196026 (Tenn. Ct. App. Jan 28, 2009). Author: Judge D. Michael Swinney. Trial: Judge Russell E. Simmons, Jr.

Let me start off by saving you some time: Don't read the whole opinion. All you really need to know is that a hospital lien is not reduced by a proportionate share of the plaintiff's attorney's fees.
Hospital filed a lien on Plaintiff's recovery in an automobile accident case. Plaintiff settled the claim against Defendant, and moved to quash or reduce Hospital's lien. The trial court granted Plaintiff's motion, reducing the lien amount by one-third, representing Hospital's share of Plaintiff's contingency attorney fee in obtaining the recovery. Hospital appealed.

The Court of Appeals reversed, holding that hospital liens under Tenn. Code Ann. §29-22-101 are not subject to reduction for a plaintiff's attorney's fees.

The Court of Appeals also rejected Plaintiff's argument that the lien should be eliminated or reduced because the hospital did not submit any proof as to the reasonableness of the medical bills. The court explained that Plaintiff had likewise not submitted any proof to refute the hospital's lien amount, and the trial court had implicitly found the charges reasonable and necessary when granting the lien. The Court of Appeals found the evidence did not preponderate against the trial court's decision.

- **Hospital Liens**
- **Medical Payments Coverage**

Shelby County Health Care Corporation, Inc., v. Nationwide Mutual Insurance Company, No W2008-01922-COA-R3-CV, 2009 WL 302261 (Tenn. Ct. App. Feb. 6, 2009). Author: Judge J. Steven Stafford. Trial: Judge Kay S. Robillo.

An individual was injured in an automobile accident and treated at Regional Medical Center ("The Med"), who filed a hospital lien in the amount of $33,823.02. The injured person had an automobile insurance policy through Nationwide Mutual Insurance Company with medical benefits coverage up to $5,000. Nationwide paid $1,290 to the ambulance service that transported the insured to The Med, and paid the remaining $3,710 of its medical benefits coverage to The Med.

The Med filed suit against Nationwide, asserting that Nationwide impaired The Med's hospital lien by paying benefits to Medic One. Both parties moved for summary judgment. The trial court granted summary judgment for The Med, awarding damages in the amount of the $5,000

medical benefits policy through Nationwide. The Med appealed the damage award, and Nationwide cross-appealed on liability.

The Court of Appeals began by looking to the hospital lien statute, Tenn. Code Ann. §29-22-101. Relying largely on its prior decision in *University of Tennessee v. Prudential Ins. Co.*, No. 03A01-9611-CV-00345, 1997 WL 119582 (Tenn. Ct. App. Mar. 18, 1997), *perm. app. denied* (Tenn. Dec. 22, 1997), the Court of Appeals concluded that The Med had a valid lien on "any payments made on behalf of Mr. Holt by Nationwide." The court rejected Nationwide's argument that the lien was only applicable to recovery for damages in an action in tort.

Turning to §29-22-104(b)(1), the Court of Appeals concluded that the trial court correctly found Nationwide impaired The Med's lien. The court explained: "Because Nationwide 'settled' a claim arising from Mr. Holt's accident (*i.e.*, made payment to Medic One) without a release or satisfaction of The Med's existing lien, under the plain language of Tenn. Code Ann. §29-22-104, it impaired that lien."

Finally, the Court of Appeals concluded that The Med was entitled to all of the reasonable costs of the hospital care it provided in the case, not just the total amount of Nationwide's medical benefits coverage. Therefore, the Court of Appeals modified the trial court's order to reflect a judgment in the full amount of the $33,823.02 lien.

***IN PERSONAM* JURISDICTION**

- ***In Personam* Jurisdiction**
- **Products Liability - Claims Against Seller**

***Smith v. Home Depot, Inc.*,** No. 07-6127, 294 Fed.Appx. 186, 2008 WL 4280124 (6th Cir. Sept. 17, 2008). Author: Judge Damon J. Keith.

The United States Court of Appeals for the Sixth Circuit has ruled that Home Depot, the seller of a product at issue in a products liability case, may be sued in Tennessee where one of the manufacturers of product was not subject to the jurisdiction of Tennessee courts. The opinion discusses Tenn. Code Ann. § 29-28-106(b), which allows suits against retailers where the manufacturer is not subject to personal jurisdiction in the state of Tennessee, and the law of *in personam* jurisdiction.

INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

- **Brief Writing Responsibilities**
- **Fiduciary Duty**
- **Intentional Interference with Contractual Relations**
- **Conspiracy**
- **Tennessee Consumer Protection Act**

Foster Business Park, LLC. v. Winfree, No. M2006-02340-COA-R3-CV, 2009 WL 113242 (Tenn. Ct. App. Jan. 15, 2009). Author: Judge Richard H. Dinkins. Trial: Chancellor Claudia Bonnyman.

How does one summarize almost nine pages of facts in a paragraph or two? The only answer is "poorly". The writer can either recite them in detail, which is not much of a summary, or he can offer a view at the 10,000 foot level, which by necessity will omit important stuff.

We choose the latter approach, knowing that those of you who care about this type of case will read the entire opinion, and those of you who do not do this type of work will not read a detailed summary anyway.

Thus, we will simply rely on the summary paragraph provided by the Court of Appeals, which does a fine job of saying a lot in a few words:

> Maker and guarantors of promissory note brought action against various parties including the maker's former loan officer, the former holder of the note, and the current holder of the note, alleging that defendants breached their fiduciary duty to the maker, tortiously interfered with the maker's negotiations to pay off the note at a discount and violated the Tennessee Consumer Protection Act.

One claim Plaintiff asserted is that Defendant Winfree breached a fiduciary duty owed to him. Problem: Winfree was a bank official, and Tenn. Code Ann. §45-1-127 says that "financial institutions and their officers cannot be 'deemed or implied to be acting as fiduciary or have a fiduciary obligation or responsibility to its customers or to other parties . . . unless there is a written agreement' to act in that capacity." Accordingly, that claim was properly dismissed on a Rule 12 motion because Plaintiffs did not allege that the necessary written agreement was in place.

However, the Chancellor found, and the Court of Appeals agreed, that Plaintiff could pursue a breach of fiduciary duty claim as to those actions of Winfree that were not part of his bank official responsibilities. This is a reasonable place to draw the line.

We will not burden you with a recitation of the summary judgment standard. Those of you don't pay attention to the law during football season should read *Martin v. Norfolk Southern Railway Co.*, No. E2006-01021-SC-R11-CV, 2008 WL 4890252, ___ S.W.3d ___ (Tenn. Nov. 14, 2008)

and *Hannan v. Alltel Publ'g Co.*, No. E2006-01353-SC-R11-CV, 2008 WL 4755788, ___ S.W.3d ___ (Tenn. Oct. 31, 2008) to get up-to-date.

What is interesting about this opinion for those of us who file or attempt to defeat summary judgment motions is the smack-down the court gives to Plaintiffs for failing to support their arguments with specific citations to the record.

Here is a brief summary of the law in the area:

> As the appellant, the Plaintiffs had the burden to make citations in their brief to appropriate authorities and reference the record to support their argument on appeal. Tenn. R. App. P. 27(a). While Plaintiffs' statement of the facts section provides some references to the record, the Plaintiffs' argument is wholly deficient of references to the record to support their assertions that there are genuine issues of material fact. Moreover, the Plaintiffs' argument contains little more than conclusory allegations, which are only supported by argument of their counsel, neither of which constitute evidence we can consider.

(case citations omitted).

The Court also cited to Rule 6(b) of the Rules of the Court of Appeals, which provides that "no assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded." The opinion gives citations to two decisions where appeals were dismissed for failure to follow this rule.

Ultimately, the court agreed to consider Plaintiff's brief on the summary judgment issues despite the failure of Plaintiff to comply with the rules of the court. But before you rely on the good graces of the Court of Appeals, I suggest you keep in mind these words of Harry Callahan: "I know what you're thinking. 'Did he fire six shots or only five?' Well, to tell you the truth, in all this excitement I kind of lost track myself. But being as this is a .44 Magnum, the most powerful handgun in the world, and would blow your head clean off, you've got to ask yourself one question: Do I feel lucky? Well, do ya, punk?"

Like the punk at the business end of Dirty Harry's .44, the Plaintiff got his answer to his appeal of the grant of summary judgment.

The trial court's grant of summary judgment on the breach of fiduciary duty claim against Winfree on his non-bank official actions was affirmed. The court found that "Mr. Winfree owed no duty to Mr. Surti because there was neither a legal, or *per se*, fiduciary relationship nor was there a confidential relationship."

The opinion contains a one and one-half page summary of the law of what constitutes a fiduciary relationship. This excerpt will give you a good feel for the law:

> Under Tennessee common law, there are two principal types of fiduciary status. The first category of common law fiduciary status consists of relationships that are fiduciary *per se*, sometimes referred to as a legal fiduciary, such as between a guardian and ward, an attorney and client, or conservator and incompetent.
>
> The second category consists of relationships that are not *per se* fiduciary in nature, but arise in situations where one party exercised "dominion and control over another." This relationship, often called a "confidential relationship," "is not merely a relationship of mutual trust and confidence", but rather it is one "where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with ability, because of that confidence, to influence and exercise dominion and control over the weaker or dominated party.'' The person upon whom the trust and confidence is imposed is under a duty to act for and to give advice for the benefit of the other person on matters within the scope of the relationship.

(citations and footnote omitted).

There is much, much more. If you are involved, or hope to be involved, in a case involving an asserted breach of fiduciary duty, I urge you to read this opinion. The opinion includes citations to cases from other states on the law of fiduciary duty in debtor-creditor relationships.

Plaintiffs also alleged that Defendant Lowe and his employer conspired with Winfree to breach his fiduciary duty.

Here is a quick summary of the law of civil conspiracy:

> The elements for civil conspiracy under Tennessee common law, therefore, are: (1) a common design between two or more persons; (2) to accomplish by concerted action an unlawful purpose, or a lawful purpose by unlawful means; (3) an overt act in furtherance of the conspiracy; and (4) injury to person or property resulting in attendant damage. In addition, civil conspiracy requires an underlying predicate tort allegedly committed pursuant to the conspiracy. … By participating in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.

(citations omitted).

Recall that the trial and appellate court agreed that Winfree did not have a fiduciary duty. If there was not a fiduciary duty it could not have been breached. If a duty could not have been breached, Lowe and his employer could not have conspired to breach it. Claim dismissed.

Plaintiffs tried to take another bite of the liability apple, this time alleging that Winfree and his company intentionally interfered with the relationship Plaintiffs had with their bank, and Lowe and his employer conspired to assist Winfree.

Both courts agreed that these claims should be dismissed as well. The multi-page discussion of the court goes into the underlying facts in great detail, but the bottom line is (1) Plaintiffs were unable to create a genuine issue of material fact on the issue of whether any conduct by Winfree caused Plaintiffs harm and (b) if there was no liability of Winfree there was no claim of a conspiracy against Lowe and his employer.

Finally, the Plaintiffs alleged that the Winfree Defendants violated the TCPA because the "Plaintiffs allegedly gave the Defendants 'confidential financial and business information' which was allegedly utilized for the Defendants' financial gain" and that Lowe defendants conspired with Winfree to violate the Act.

The opinion has a nice discussion on the definitions of and the differences between "unfair" and "deceptive" practices. Once again, however, Plaintiffs were found to have fallen short on the causation issue, and the grant of summary judgment was affirmed.

We apologize for the length of this summary. This is a 29-page opinion that presented multiple legal issues.

As indicated above, this opinion will be of interest to anyone who does commercial tort litigation. In additional, the section of the opinion dealing with the responsibility of a lawyer who is writing a brief to include citations to the record is an important for all of us who write appellate briefs.

- **Civil Conspiracy**
- **Tortious Interference with Contract**
- **Pleading Requirements**
- **Conversion**
- **Expert Testimony**
- **Valuation of Property Loss**
- **Judicial Estoppel**
- **Breach of Fiduciary Duty**
- **Malicious Prosecution**
- **Punitive Damages**

Michael Sanford v. Waugh & Company, Inc., et al, No. M2007-02528-COA-R3-CV, 2009 WL 1910957 (Tenn. Ct. App. June 20, 2009). Author: Judge Andy D. Bennett. Trial: Chancellor Ellen Hobbs Lyle.

The trial court dismissed Plaintiff's claim for civil conspiracy against Defendants, finding Plaintiff failed to sufficiently plead the underlying tort of interference with contract. The Court of Appeals defined the issue as "whether the underlying predicate tort required to support a claim

for civil conspiracy must be separately pled." The court stated that "a conspiracy claim is dependent upon a plaintiff's right of action, not the pleading of the action." The court noted that civil conspiracy claims are generally dismissed because the underlying bad acts are simply not actionable or dismissed on other grounds and no longer actionable under the circumstances. The court found Plaintiff alleged in short and plain language that Defendants intended to interfere with his contract and security interest, and therefore sufficiently pled the conspiracy claim based on it.

The Court of Appeals then turned to whether Plaintiff had a cognizable action for interference with contract against Defendants. In this case, Plaintiff alleged that the officers and directors of a corporation interfered with the corporation's contracts with Plaintiff. The court noted that "a corporate director, officer, or employee is not liable for tortiously interfering with a corporate contract, because he is considered a party to the contract, as long as he is acting to serve the corporate interests, or unless his activity involves individual separate tortious acts." (Citations omitted). However, a corporate director, officer, or employee may be held liable if he is "he is acting outside the scope of his authority, acting with malice, or acting to serve his own interests." (Citation omitted). The court found Plaintiff sufficiently alleged a claim against Defendants in this case.

The trial court granted summary judgment on Plaintiff's claim for conversion, finding that Plaintiff's valuations of the property were not competent evidence. Plaintiff was a former owner, officer, director, and employee of the corporation, and as part of his sale of the company, held a security interest in assets of the company. Defendants offered evidence as to the value of the assets allegedly converted in support of their summary judgment motion. Plaintiff responded with his own statement of the assets' value. The Court of Appeals noted that "a property owner may offer opinion testimony on the value of his property; otherwise, expert valuation testimony will be required." Citing *Sikora v. Vanderploeg*, 212 S.W.3d 277, 284 n.5 (Tenn. Ct. App. 2006); Tenn. R. Evid. 701(b). The court ruled that, because Plaintiff was a creditor with a secured interest, rather than the actual owner of the property, the trial court properly disregarded Plaintiff's evidence and granted summary judgment to Defendants based on the lack of competent valuation testimony.

Defendants moved for summary judgment as to some of Plaintiff's claims based on the doctrine of judicial estoppel. The Court of Appeals affirmed the trial court's denial of Defendants' motion. Judicial estoppel applies where a party gives statements under oath in former litigation and then attempts to deny them in subsequent litigation. The Court of Appeals stated that "the doctrine applies only where 'the previous statement was not only untrue but was willfully false in the sense of conscious and deliberate perjury.'" (Citation omitted). The court found Plaintiff's statements in prior litigation did not conflict with his statements in this case.

The trial court dismissed Plaintiff's claim for breach of fiduciary duty against the officers and directors of an insolvent corporation, finding that Plaintiff could not bring the claim as an individual creditor of the corporation, but would have to bring a derivative action on behalf of all creditors. On an issue of first impression, the Court of Appeals adopted the majority rule and held "that a creditor to an insolvent corporation or a corporation on the verge of insolvency may assert an action for breach of fiduciary duty against officers or directors who are also creditors to

the corporation when they have been given preference in their preexisting debt or have engaged in self-dealing conduct." The court elaborated, stating that "[t]he fiduciary duty of an insolvent corporation's directors and officers to preserve and protect the assets of the corporation does not extend beyond the prohibition against self-dealing or preferential treatment." (Citations omitted). The court therefore reversed the trial court's grant of summary judgment to Defendants on the claim.

The trial court denied directed verdict for Defendants on Plaintiff's malicious prosecution claim against them, but granted directed verdict as to punitive damages, finding Plaintiff failed to prove malice by clear and convincing evidence. The Court of Appeals affirmed the denial of directed verdict as to the malicious prosecution claim, but reversed the directed verdict as to punitive damages. The court found material evidence to support a finding by the jury by clear and convincing evidence that Defendants had filed a lawsuit against Plaintiff in bad faith.

- **Interference with Contract**

York v. Batson*,* No. M2007-02418-COA-R3-CV, 2008 WL 4254590 (Tenn. Ct. App. Sept. 16, 2008). Author: Judge J. Stephen Stafford. Trial: Judge Robert E. Lee Davies.

This decision reminds us that a traditional breach of contract claim can also give rise to a tort claim. Here, we have dueling intentional interference with contract claims. Undoubtedly, this has happened before, but we cannot remember seeing it before.

Even we intersection wreck lawyers know that there is something in the law that says contracts concerning real estate are supposed to be in writing. But Plaintiff doctor and Defendants cut an oral deal where Defendants would buy land from Third Party and then transfer that land to Plaintiff in exchange for some land owned by Plaintiff. Defendants got the land from Third Party, changed their mind and decided to keep that land, and Plaintiff got angry – and got a lawyer.

Plaintiff sued for breach of contract and tortious interference with contractual relations. Defendants counterclaimed for tortious interference, saying that Plaintiff's conduct resulted in an increase in the sales price with Third Party.

The Court of Appeals affirmed the trial judge's dismissal of Plaintiff's claims. The tort claim was dismissed because the Statute of Frauds barred the claim and the court held that the equitable estoppel exception was not applicable. Since there was no contract, Plaintiff could not assert an inducement to breach claim because the existence of a valid contract is an essential element of that claim.

Defendants tried to obtain summary judgment on their claim that Plaintiff's contact with Third Party after the contract was executed resulted in an increase of the purchase price of $10,000 and thus they were entitled to a judgment against Plaintiff.

The Court of Appeals disagreed, saying that although there was evidence of interference there was no evidence of malicious intent and no evidence of breach of contract (as opposed to a re-negotiation of terms).

This case is a nice reminder that a tortious interference case hinges on a valid contact: no contract, no tort.

It is hard to determine what is going to happen next in this case. Is Plaintiff going to obtain summary judgment on Defendant's counterclaim; *i.e.,* lack of malice as a matter of law? Lack of breach as a matter of law? It is a little surprising that Plaintiff did not file a motion for summary judgment on this claim.

INSURANCE

- **Insurance**

Booker T. Holloway and wife, Brenda Holloway v. James C. Purdy and Chris Purdy, No. W2007-02795-COA-R3-CV, 2009 WL 1362319 (Tenn. Ct. App. May 15, 2009). Author: Judge Holly M. Kirby. Trial: Judge James F. Russell.

Insured owned a wrecker service and held a garage owner's policy. The policy excluded uninsured motorist coverage while Insured was driving a vehicle that Insured did not own. While Insured was driving a customer's vehicle, Insured was involved in an accident with an uninsured driver. A coverage dispute arose between the insurer under Insured's garage-owner's policy and the insurer for Insured's personal vehicles. The Court of Appeals ruled that the exclusion in the garage-owner's policy was valid and not contrary to Tennessee statutes.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

- **Wiretapping and Electronic Surveillance Act**
- **Public Disclosure of Private Facts**
- **Outrageous Conduct (IIED)**
- **Qualified Immunity**
- **Summary Judgment**

F. Chris Cawood v. Linda Booth, No. E2007-02537-COA-R3-CV, 2008 WL 4998408 (Tenn. Ct. App. Nov. 25, 2008). Author: Judge Charles D. Susano, Jr. Trial: Judge Russell E. Simmons, Jr.

Plaintiff, an attorney, masturbated in front of Client in exchange for reducing her legal bills by $100 per episode. Client complained to a local judge and eventually was referred to the Roane County Sheriff's Department. The Department gave Client equipment to audiotape and videotape her next encounter with Plaintiff. Client returned to Plaintiff's office, where he masturbated while Client hit him on the buttocks with a belt and pinched his nipples. Plaintiff

reduced Client's bill by $100. The audio from the encounter worked, but the video did not function. Client returned to Plaintiff, essentially the same sexual activity occurred, and this time the video worked. Plaintiff was convicted of attempting to patronize prostitution, but the conviction was reversed.

This case, however, focused on disclosure of the videotape. Several people who worked at the Sheriff's Department but were not involved in the case, as well as a bail bondsman, were permitted to view the videotape.

Defendant Booth was an investigator with the Sheriff's Department who was assigned to investigate Client's complaint. Booth gave Client the equipment to record the sexual activity.

Defendant Worley was Client's uncle and also shared an office with Booth. Worley told Booth his family had asked if Client had done anything illegal, and Worley therefore asked Booth if Worley could view the videotape. Booth agreed and gave him the videotape even though Worley was not involved in the investigation. Worley took the videotape to the office of Defendants Scarborough and French to view it, and permitted "a few corrections officers and one bondsmen [to see] a portion of the videotape."

The bail bondsmen testified that he heard people in the hallway talking about it and when he walked down to the room, Worley, French and Scarborough and others were there viewing the tape. The bondsmen testified no one asked him to leave.

Plaintiff filed suit against Booth, Worley, French and Scarborough alleging violations of the Wiretapping and Electronic Surveillance Act of 1994, invasion of privacy, and outrageous conduct. The trial court granted summary judgment to all Defendants, and Plaintiff appealed.

Tenn. Code Ann. § 39-13-603 establishes a civil cause of action for violations of the Wiretapping and Electronic Surveillance Act at Tenn. Code Ann. § 39-13-601 *et seq*. and § 40-6-301 *et seq*. However, there is no cause of action if the defendant complied with Tenn. Code Ann. § 39-13-601(b)(4), which states:

> It is lawful under §§ 39-13-601 - 39-13-603 and title 40, chapter 6, part 3 for a person acting under the color of law to intercept a wire, oral or electronic communication, where the person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

In this case, the Court of Appeals found the undisputed material facts demonstrated that Client consented to the audiotape and the videotape, and therefore summary judgment was appropriate on this claim.

The Court of Appeals looked to the description of public disclosure of private facts in the Restatement (Second) of Torts, § 652D:

> Publicity Given To Private Life
> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public

Comment (a) to the Restatement explains that "publicity" is not the same as "publication" for defamation purposes:

> 'Publicity,' on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

In this case, the Court of Appeals affirmed summary judgment on the ground that the videotape was shown to a very limited number of people, and therefore it could not qualify as a public disclosure under the Restatement. The court noted that Plaintiff later issued a press release acknowledging his activities and a fax to several law enforcement agencies, various attorneys, and the news media discussing the Sheriff's Department taping masturbation.

The Court of Appeals set out the elements necessary for a claim of outrageous conduct or intentional infliction of emotional distress: "(1) the conduct complained of must be intentional or reckless; (2) the conduct must be so outrageous that it is not tolerated by civilized society; and (3) the conduct complained of must result in serious mental injury." *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn. 1997). In *Alexander v. Inman,* 825 S.W.2d 102, 104-05 (Tenn. Ct. App. 1991), the Court of Appeals quoted extensively from the description of outrageous conduct in the Restatement (Second) of Torts § 46 cmt. d (1964):

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortuous or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a decree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

In this case, the court said:

> Given (1) the potential impact of the dissemination of the contents of the videotape on the plaintiff's personal and professional well-being, and (2) the highly private and embarrassing nature of the contents of the videotape, we hold that there is a genuine issue of material fact as to whether the allowing of third parties not connected with the investigation to view the contents of the videotape amounts to 'intentional or reckless' conduct and whether it is outrageous in nature.

The Court of Appeals vacated summary judgment against Booth and Worley for permitting others not involved in the investigation to view the videotape. The court affirmed summary judgment for Scarborough and French, as the undisputed material facts showed they never possessed the videotape and did nothing but allow Worley to view the tape in their office.

The Court of Appeals stated that "a qualified immunity analysis is premised in large part on the reasonableness of the officer's actions." If Plaintiff successfully proved his outrageous conduct claim, then Defendants conduct necessarily was not reasonable. The court stated: "In the context of the facts of this case, reasonable conduct and outrageous conduct are mutually exclusive concepts." The court concluded Booth and Worley were not entitled to summary judgment on the defense of qualified immunity.

INTENTIONAL MISREPRESENTATION

- **Intentional Misrepresentation**
- **Expert Witnesses**

Michael Shropshire and wife Rebecca Shropshire v. Betty Roach, No M2007-02593-COA-R3-CV, 2009 WL 230236 (Tenn. Ct. App. Jan. 30, 2009). Author: Judge Patricia J. Cottrell. Trial: Judge Ross H. Hicks.

Lawyers in intentional misrepresentation cases may want to look to the Court of Appeals' handling of justifiable reliance in this case. The court only briefly discussed the substantive law of justifiable reliance, but if you are looking for specific factual examples of justifiable reliance, this case may be instructive.

Buyers sued the Seller for intentional misrepresentation regarding water problems in the home's basement. A jury returned a verdict for Buyers and awarded damages against Seller. Seller appealed. Seller argued that she should have been granted a new trial because there was no material evidence to support the verdict. Specifically, Seller claimed there was no justifiable reliance on Seller's statements regarding water in the basement, since Buyer's inspector did identify possible water problems in his report. The Court of Appeals disagreed, finding there was material evidence that Buyers relied on Seller's statements, and noting that the inspector's report did not check boxes that indicated "Major Water Problems," "Persistent Flooding Likely," "Persistent Minor Seepage Likely" and other types of water problems.

Seller also appealed the trial court's decision to admit testimony from the contractor who repaired the basement. Seller contended the testimony was improper expert opinion testimony. The Court of Appeals found Seller did not object to the testimony at trial, and even if she had, the trial court did not abuse its discretion in admitting the testimony.

- **Intentional Misrepresentation;**
- **Fraudulent Misrepresentation;**
- **Summary Judgment**

Robert H. Goodall, Jr. v. William B. Akers, No. M2008-01608-COA-R3-CV, 2009 WL 528784 (Tenn. Ct. App. Mar. 3, 2009). Author: Judge Andy D. Bennett. Trial: Chancellor Tom E. Gray.

This opinion has a lot of detail regarding reasonable reliance in the misrepresentation context, and it is worth reading if you are looking into that issue in a case. The opinion does not provide any new law on the subject, but it does give a good summary of existing law. Plus, in dealing with reasonableness of reliance, the factual circumstances of every case may be informative. In this particular case, the fact that the buyer was a real estate broker and developer led the Court of Appeals to reverse summary judgment in his favor, finding factual issues existed as to whether the buyer's expertise should have compelled him to further investigation on his own.

Buyer bought real property from Seller including a dammed lake. Before closing, Seller's neighbor told Buyer the dam had been condemned by the Army Corp of Engineers. Buyer thought that was strange, since he did not think the Corp of Engineers had jurisdiction. Before closing, Buyer talked to his attorney about the dam issue. Buyer's attorney contacted Seller's attorney, who reassured Buyer's attorney and agreed to an additional warranty in the sales contract stating Seller was not aware of any problems with the dam since it had been rebuilt more than thirty years earlier. Buyer later learned that Seller had several written and verbal notices from state agencies concerning the stability of the dam and leaking from it.

Buyer sued Seller for misrepresentation and breach of contract. Buyer moved for and was granted summary judgment. Seller appealed. The Court of Appeals reversed the trial court's grant of summary judgment, finding disputed issues of material fact.

First, Buyer contended he reasonably relied on his real estate attorney's statement that, based on the assurances of Seller and Seller's attorney regarding the dam, Buyer's real estate attorney saw no reason to check any other records. Seller, however, denied making the statement attributed to him by Buyer's real estate attorney. The Court of Appeals concluded:

> On remand, the trier of fact will have to consider whether, in light of [Buyer's] level of expertise in the real estate business, it was reasonable for him to place all of his trust in [Seller's] statements and make no effort to further evaluate the safety of the dam after having been alerted by [the neighbor] to possible problems. Was it reasonable, under the circumstances, for [Buyer] to forego any independent inspection or investigation concerning the dam?

Second, the Court of Appeals analyzed whether Seller had an affirmative duty to disclose the notices he had received regarding the dam. The court noted that a seller of real estate had a duty to disclose "material facts affecting the property's value known to the seller but not reasonably known to or discoverable by the buyer." *Justice v. Anderson County*, 955 S.W.2d 613, 617 (Tenn. Ct. App.1997). In this case, the existence of a duty to disclose hinged on whether, under the circumstances of this particular case, "the exercise of ordinary diligence" required Buyer to investigate the condition of the dam further. *Simmons v. Evans*, 206 S.W.2d 295, 296 (Tenn. 1947).

JUDICIAL ESTOPPEL

- **Judicial Estoppel**
- **Substitution of Parties**
- **Intervening Plaintiffs**
- **Claims by Debtors in Bankruptcy**

Kamarjah Gordon, Deceased, by and through her next of kin, Tosha Gordon and Tosha Gordon, Individually v. Jeffrey D. Draughn, M.D.; Tennessee Woman's Care, P.C.; and HCA Health Services of Tennessee d/b/a Centennial Medical Center, No. M2008-02224-COA-R10-CV, 2009 WL 1704470 (Tenn. Ct. App. June 16, 2009) Author: Judge Richard H. Dinkins. Trial: Judge Barbara N. Haynes.

If you are facing a possible judicial estoppel question, you really need to read this entire opinion to peruse all of the facts that the Court of Appeals considered in determining whether Plaintiff's omission of her medical malpractice lawsuit from a bankruptcy petition was willful or inadvertent.

Mother filed a medical malpractice suit individually and on behalf of her Child who died during childbirth. Between the time of the alleged malpractice and the time that Mother filed her lawsuit, Mother filed bankruptcy *pro se* and was granted a discharge. Mother did not list her possible medical malpractice claims on the bankruptcy application.

Defendants moved for summary judgment, asserting Mother lacked standing to pursue the claims since they were now owned by the bankruptcy Trustee, and that Mother was judicially estopped from asserting the claims by her failure to list them in her bankruptcy proceeding. Trustee moved for the bankruptcy case to be reopened, and the bankruptcy court entered an order authorizing Trustee to act as special counsel with respect to the medical malpractice lawsuit. Trustee filed, in the medical malpractice lawsuit, a motion to substitute Trustee as the proper Plaintiff. Father also filed a motion to substitute as Plaintiff in the case.

The trial court granted summary judgment to Defendants on Mother's individual claims. The trial court denied Father's motion to substitute on the ground that it was filed after the statute of limitations and statute of repose had expired on the original claim. The trial court granted Trustee's motion to substitute for the wrongful death claim on behalf of Child, but based on

judicial estoppel limited the amount of recoverable damages to $6,883.69, the total amount of the debts listed in the bankruptcy petition. Mother, Trustee, and Father appealed.

First, the Court of Appeals ruled that the trial court did not err in finding Mother lacked standing since her claims accrued prior to the filing of her bankruptcy petition, and therefore Trustee succeeded to all causes of action formerly held by Mother.

Next, the court turned to the doctrine of judicial estoppel. Under the doctrine, "a party will not be permitted to take a position that is directly contrary to or inconsistent with a position previously taken by the party where the party had or was chargeable with full knowledge of the facts and where the conduct would prejudice another." *Guzman v. Alvares*, 205 S.W.3d 375, 382 (Tenn. 2006) (citing *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn. 1999)). Judicial estoppel "precludes a party who has made a sworn statement – even in another litigation – from repudiating the same when he thinks it to his advantage to do so." *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 317-18 (Tenn. 1924). "If the party sought to be estopped can show that his previous statement under oath was made inadvertently or through mistake...he will not be precluded by his former statement." *Id.*

The Court of Appeals ruled that, while Mother's failure to include the medical malpractice claim in the bankruptcy petition could constitute a basis for applying judicial estoppel, there was no proof that the omission was "willfully false" or an act of "conscious and deliberate perjury." The court noted that Mother's affidavit filed in opposition to the summary judgment motion stated she did not believe that she had a viable cause of action and did not understand the need to include the medical malpractice claim in her bankruptcy petition. The Court of Appeals therefore reversed the trial court's application of judicial estoppel to the individual and wrongful death claims.

Finally, the Court of Appeals reversed the trial court's holding that Father's motion was untimely because it was time-barred by the statutes of limitations and repose. The court ruled that Father's interest was equal to that of Mother with respect to the wrongful death claim, and Father's interest was protected by the timely filing of Mother's lawsuit. However, the court noted that Father could not substitute as Plaintiff for the claim since his interest was equal to Mother's, and ordered that on remand Father be permitted to file a motion to intervene and intervening complaint.

JURY INSTRUCTIONS

- **Jury Instructions**
- **Damages**

Jordan v. Burlington Northern Santa Fe Railroad Company, No. W2007-00436-COA-R3-CV, 2009 WL 112561 (Tenn. Ct. App. Jan. 15, 2009) Author: Presiding Judge Alan E. Highers. Trial: Judge James F. Russell.

This FELA case arose in Shelby County. It resulted in a $5,000,000.00 verdict, but $1,000,000.00 was immediately lopped off the judgment because Plaintiffs only sued for $4,000,000.00.

This summary will not address the FELA and preemption issues in the case. This writer's experience is that FELA law is of relatively little interest to 99.9% of the Bar.

One issue on appeal involved the appropriateness of the jury instructions in the case. This gives us the opportunity to remind ourselves of the law of jury instructions.
Here is the law as summarized by the Court of Appeals:

> 'Jury instructions must be correct and fair as a whole, although they do not have to be perfect in every detail.' Jury instructions must be plain and understandable, and inform the jury of each applicable legal principle. On appeal, we review jury instructions in their entirety and in context of the entire charge. We will not invalidate a jury charge if, when read as a whole, it fairly defines the legal issues in the case and does not mislead the jury. 'The trial court should give requested special jury instructions when they are a correct statement of the law, embody the party's legal theory, and are supported by the proof.' 'However, the trial court may decline to give a special instruction when the substance of the instruction is covered in the general charge.' We will not reverse the denial of a special request for an additional jury instruction where the trial court fully and fairly charged the jury on the applicable law.

(citations omitted).

I will not review the challenges to the instructions themselves – each concern an aspect of FELA law. The above-cited language is what you need to know from the discussion.

The Court of Appeals concluded that the $4,000,000.00 award of damages was not excessive under the facts. To summarize, Plaintiff

> [S]uffered a significant trauma to the back of his head, a laceration to his scalp, loss of consciousness, amnesia, fractures at three different levels of his spine, which required the removal of bone from his hip area to be fused to the vertebra, in addition to the insertion of a metal rod and screws,

> a fracture of his left tibia and fibula, which led to the insertion of two screws below his left knee and another two screws above his ankle, a fracture of the left shoulder blade, an open wound on his right upper thigh area and a minor fracture in the upper part of the femur in the right hip, a lacerated spleen, and a collapsed lung.

Defendants complained of several acts of misconduct of counsel for Plaintiff at trial, but were deemed to have waived that argument because Defendants did not object to the conduct during trial.

One act they did offer a timely objection to was a statement by a witness that violated a court order not to mention prior accidents at the site pending a court ruling on whether the accidents were admissible. Counsel were instructed to advise their witnesses not to testify about the subject, but a witness called by Plaintiff's counsel did so in a question that "did not appear to be designed to elicit a response regarding prior accidents" and counsel promptly cut the witness off.

The Court of Appeals said that the questioning was not improper and that any prejudice was negated by a curative instruction.

This opinion is a must-read only for FELA lawyers. The other issues are adequately summarized above, although if you have a $4,000,000.00 verdict you are trying to uphold on appeal you will want to read and sleep with this opinion until you get a denial of a Rule 11 application in your case.

LEGAL MALPRACTICE

- **Legal Malpractice**
- **Statutes of Limitations**

Spydell Davidson v. Nader Baydoun, No. M2008-02746-COA-R3-CV, 2009 WL 2365563 (Tenn. Ct. App. July 31, 2009). Author: Judge Frank G. Clement, Jr. Trial: Judge Hamilton V. Gayden.

In a nutshell, this case comes down to one discrete legal principle: a claim that an attorney committed legal malpractice during a bench trial leading to a lesser verdict accrues when the trial court enters its final, written order, not when the trial court verbally announces its ruling.

Client accused Attorney of negligence during trial (as well as before the trial began). Client later sued Attorney, alleging that Attorney's legal malpractice resulted in a judgment for a lower amount at trial than the amount to which Client was entitled. Attorney moved to dismiss Client's legal malpractice claim, which the trial court granted on the basis of the statute of limitations.

The issue came down to when Client's claim accrued. Under Tenn. Code Ann. § 28-3-104(a)(2), a legal malpractice claim must be brought within one year from the date the cause of action

accrues. Client filed suit within one year of the trial court's entry of its Final Order of Judgment, but more than one year after the trial court announced its ruling from the bench.

The Court of Appeals reversed the trial court, ruling that Client had not suffered a legally cognizable loss until the trial court entered its written final order of judgment. The Court of Appeals looked to similar decisions from Indiana and Oregon appellate courts, which noted that the trial court's oral pronouncement was not final or binding, was not appealable, and the trial court could have changed its mind at any time before entry of a written order.

LIMITATION OF ACTIONS

- **Limitation of Actions**
- **Fraudulent Concealment**

C.S. v. The Diocese of Nashville, No. M2007-02076-COA-R3-CV, 2008 WL 4426891 (Tenn. Ct. App. Sept. 30, 2008). Author: Judge Patricia J. Cottrell. Trial: Judge Walter C. Kurtz.

Yet another sex abuse case against the Roman Catholic Church that is barred by the expiration of the statute of limitations. This time the Middle Section Court of Appeals found the fraudulent concealment doctrine did not apply.

MALICIOUS PROSECUTION

- **Malicious Prosecution**
- **Directed Verdict**

Wallace R. Cornett, Jr. v. Elizabeth Payne Burton, No. M2007-02422-COA-R3-CV, 2008 WL 4998396 (Tenn. Ct. App. Nov. 24, 2008). Author: Judge D. Michael Swiney. Trial: Judge Barbara N. Haynes.

Plaintiff sued Defendant, his ex-wife, for malicious prosecution. Defendant swore out a warrant that resulted in Plaintiff being arrested on domestic assault charges related to an alleged assault on the couple's child.

The case itself is extremely fact-specific. Indeed, the first twelve pages of the fifteen page opinion are devoted to a recitation of the proof at trial.

The Court of Appeals vacated directed verdict for Defendant, finding reasonable minds could disagree as to whether Plaintiff proved the essential element of lack of probable cause. Unless you're related to one of the parties or have a case with a profoundly similar set of facts, there's little use in reading this opinion.

MEDICAL EXPENSES

- **Medical Expenses**

Helen M. Borner, et al v. Danny R. Autry; No. W2007-007312-SC-R11-CV, 284 S.W.3d 216 (Tenn. May 26, 2009). Author: Chief Justice Janice M. Holder. Trial: Judge Donald H. Allen.

Tenn. Code Ann. § 24-5-113(a) creates a rebuttable presumption that medical bills itemized in and attached to the complaint are reasonable and necessary, but the total amount of the bills may not exceed $4,000.

In this case, two plaintiffs in a car accident attached medical bills showing slightly less than $4,000 in charges, and each plaintiff stated in the complaint that the plaintiff "incurred medical expenses which exceeded the statutory amount of $4,000." Defendant moved to strike the medical bills attached to the complaint, alleging that one doctor's bill to each plaintiff had been "whited out" from a total that exceeded $4,000 for each plaintiff. The trial court granted the motion, and Plaintiffs appealed. The Court of Appeals affirmed, and Plaintiffs made their way to the Tennessee Supreme Court.

After running through the history of the statute, the Supreme Court held that:

> [A] plaintiff may rely on the rebuttable presumption in Tennessee Code Annotated section 24-5-113(a) if the total amount of the medical bills itemized with copies attached to the complaint is $4,000 or less. A plaintiff may not rely on the presumption, however, if the medical bills itemized with copies attached to the complaint have been altered to reflect a total of $4,000 or less.

Since Plaintiffs in this case acknowledged redacting one doctor's bills, the Supreme Court affirmed the part of the ruling applicable to those bills, but reversed as to the other medical bills attached by Plaintiffs that did not, on their face, exceed $4,000.

Here's the amazing thing about this case to me ... it ended up in the Supreme Court over a $4,000 presumption for each plaintiff. Plaintiffs' alternative was simply to take the doctor's deposition testimony, or offer another competent expert, to testify that the bills were reasonable and necessary. The wreck occurred in 2003, and the lawsuit was filed in 2004. So Plaintiffs waited through five years of motion and appellate practice, and were saddled with the costs of those appeals, to avoid the time and expense of one deposition - a deposition they now have to take anyway.

MEDICAL MALPRACTICE

- **Medical Malpractice**

Debra M. Barkes, Individually and as Surviving Spouse of Jewell Wayne Barkes, Deceased v. River Park Hospital, Inc. and River Park Hospital (TN), No. M2006-01214-COA-R3-CV, 2008 WL 5423981 (Tenn. Ct. App. Dec. 29, 2008). Author: Judge Frank G. Clement, Jr. Trial: Judge Larry B. Stanley, Jr. Rule 11 Application Accepted.

Wayne Barkes went to the emergency room at River Park Hospital with complaints of pain in his forearm from his wrist to his elbow. Paramedic Jeff Jolly triaged Barkes and took his vital signs. Sherry Kinkade, a nurse practitioner, then examined Barkes.

Kinkade diagnosed Barkes with a strain of his left forearm due to overuse. Pursuant to protocol, Kinkade then consulted with Dr. Rosa Stone, an emergency room physician. They discussed Barkes' history and clinical presentation, her examination of him, her findings and impressions, her diagnosis, and her plan of treatment. During the consultation, Dr. Stone inquired of Kinkade to ensure that she had inquired into whether Barkes had shortness of breath or a previous cardiac history, to which Kinkade responded affirmatively. Dr. Stone agreed with the diagnosis and discharge plan and Mr. Barkes' chart.

Barkes was discharged to his home. While at home, Barkes apparently collapsed on the floor and was found by family members. Barkes was transported by ambulance to the emergency room at River Park Hospital. He arrived at the hospital in cardiac arrest and was subsequently pronounced dead.

Barkes' wife filed suit against River Park and numerous other defendants. Prior to trial, all of the defendants, with the exception of River Park Hospital, were voluntarily or involuntarily dismissed, leaving River Park Hospital as the only defendant at trial.

At trial, evidence was presented regarding two conflicting policies that were apparently in effect at the time of Barkes' death. One was a written 1997 policy stating that all patients presenting to the emergency room are to be assessed by a physician. The other policy was implemented in 1999, authorizing the utilization of nurse practitioners as "physician extenders," meaning they were health care providers under the indirect supervision of a physician.

When Barkes arrived at the emergency room, the hospital had not revised the 1997 written policy. The Court of Appeals stated that the record was replete with evidence that the 1997 written policy was impliedly amended by the adoption of the 1999 policy, and that the 1999 policy represented the protocol being followed by the hospital, the emergency room physicians, and the staff at the time of Barkes' treatment.

Two claims went to the jury: a negligence claim of corporate liability against River Park for the failure to enforce its written policy and a vicarious liability claim against River Park for the alleged negligence of Paramedic Jolly. The jury returned a verdict finding none of the individual health care providers at fault, including Kinkade and Dr. Stone, but finding River Park was 100%

at fault due to the hospital's failure to enforce the 1997 written policy that every patient presented to the emergency room would be seen by a physician. River Park filed various post-trial motions, which were denied by the trial court. River Park appealed.

The Court of Appeals first summarized the doctrine of corporate negligence, which was the basis for Plaintiff's claim of hospital negligence. Under this doctrine, hospitals owe to patients four types of duties:

> (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment;
> (2) a duty to select and retain only competent physicians;
> (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and
> (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.

Thompson v. Nason Hosp., 591 A.2d 703, 707 (Penn. 1991).

The Court of Appeals determined that the doctrine of corporate negligence had not been adopted in Tennessee. The court rejected Plaintiff's argument the doctrine of corporate negligence was adopted in *Bryant v. McCord*, No. 01A01-9801-CV-00046, 1999 WL 10085 (Tenn. Ct. App. Jan. 12, 1999), *aff'd on other grounds*, 15 S.W.3d 804 (Tenn. 2000). Moreover the court found that the Court of Appeals opinion in *Bryant* has no precedential value because the Tennessee Supreme Court affirmed on grounds other than corporate negligence. The court also distinguished two other appellate opinions, determining that those cases limit a hospital's direct duty to treatment of a patient's "known" conditions. *See O'Quin v. Baptist Memorial Hosp*., 201 S.W.2d 694 (Tenn. 1947); *Keeton v. Maury County Hosp*., 713 S.W.2d 314, 315 (Tenn. Ct. App. 1986).

After examining the laws of several states that recognize a claim of corporate negligence, the court turned to the Supreme Court of Maine's opinion in *Gafner v. Down East Community Hosp.*, 735 A.2d 969 (Me. 1999). In *Gafner*, the court refused to adopt the doctrine of corporate negligence. The *Gafner* court noted that "there exist serious and unanswered public policy questions regarding the wisdom of requiring hospitals to control the medical judgments and actions of independent physicians practicing within their facilities." *Id.* at 980. Based on the analysis and reasoning of *Gafner*, the court declined to adopt the doctrine of corporate negligence in Tennessee.

Without corporate negligence, the court found no basis for holding River Park directly liable in this case.

The Court of Appeals then addressed River Park's contention that the jury verdict must be set aside as inconsistent and irreconcilable, since the jury found River Park 100% at fault and all individual health care providers faultless.

In this case, Plaintiff contended the hospital breached a standard of care by allowing Barkes to be examined, treated and discharged by a nurse practitioner without requiring that he be "seen" by a physician. The Court of Appeals attacked Plaintiff's argument as fallacious for three reasons. One, hospitals may not control the "means and methods by which physicians render medical care and treatment to hospital patients." *Thomas v. Oldfield,* No. M2007-01693, 2008 WL 2278512, at * (Tenn. Ct. App. June 2, 2008) (citing Tenn. Code Ann. §§ 63-6-204(f)(1)(A) and 68-11-205(b)(1)(A)). Two, the nurse practitioner who saw Barkes and the emergency room physician with whom she consulted were not employees of River Park Hospital. Three, Kinkade was authorized to render health care services without being under the omnipresent supervision or direction of a physician.

The Court of Appeals looked to the rules and regulations governing nurse practitioners in Tennessee, finding they "expressly contemplate that the nurse practitioner function with a degree of autonomy." The court stated that, based on the regulations, "it is apparent the hospital has no direct role in establishing the required protocols related to health care services rendered by nurse practitioners and the hospital is not the supervisor of the nurse practitioner." The court also said, "[a]lthough a physician is required to serve as the supervisor of the nurse practitioner, the regulations do not require the supervising physician to be omnipresent." Several witnesses, including River Park's expert witness, testified that it was consistent with the applicable standard of care for a nurse practitioner in an emergency room in Tennessee to assess, diagnose, treat, and discharge a patient without a physician actually seeing the patient.

Although Plaintiff offered an expert witness who testified that the hospital had a written policy and breached that policy, the Court of Appeals ruled that "the written policy alone is not sufficient to establish a standard of care; and, even if the written policy was held to be the standard of care, the verdict is irreconcilable and inconsistent due to the jury's finding that each and every individual health care provider that Mr. Barkes came into contact with on the day of his death was not at fault."

Based on the court's finding that the doctrine of corporate negligence is not the law in Tennessee, and the jury's finding that the individual health care providers were not at fault, while holding River Park Hospital 100% at fault, the Court of Appeals determined that the jury verdict was irreconcilable and inconsistent. Accordingly, the court reversed the judgment and remanded for a new trial.

- **Medical Malpractice**
- **Expert Witnesses**
- **The Locality Rule**
- **Motions to Alter or Amend a Judgment**

Samantha Nabors v. William M. Adams, M.D., et al., No. W2008-02418-COA-R3-CV, 2009 WL 2182386 (Tenn. Ct. App. July 23, 2009). Author: Judge J. Steven Stafford. Trial: Judge John R. McCarroll, Jr.

This is the first of three significant appellate opinions on the locality rule in medical malpractice cases. If you handle medical malpractice cases, you will want to start with this one to build up your confidence before dipping your toes into either of the other two opinions.
Plaintiff's expert testified by deposition that he knew "nothing" about Defendants' medical community, did not know how many hospitals, colleges, or specialists in Defendants' field were in Defendants' community, and did not know any of that information for the expert's own community. Defendants moved for summary judgment on the ground that Plaintiff's expert did not demonstrate his community was similar to Defendants' community, and Plaintiff did not file a written response or affidavit. The trial court granted the summary judgment motion, and Plaintiff filed a motion to alter or amend supported by an affidavit of the expert comparing his community to Defendants' community. The trial court denied Plaintiff's motion to alter or amend, and Plaintiff appealed.

First, the Court of Appeals addressed the standard to be applied by the trial court under these circumstances. Generally, on a Tenn. R. Civ. P. 59.04 motion to alter or amend, the trial court is instructed to consider: "1) the movant's efforts to obtain evidence to respond to the motion for summary judgment; 2) the importance of the newly submitted evidence to the movant's case; 3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment; 4) the likelihood that the nonmoving party will suffer unfair prejudice; and 5) any other relevant factor." *Harris v. Chern*, 33 S.W.3d 741, 745 (Tenn. 2000). In cases like this one, the subsequently filed affidavit attempting to rehabilitate an expert under the locality rule can be considered by the trial court under the fifth factor. *Kenyon v. Handal*, 122 S.W.3d 743, 765 n. 23 (Tenn. Ct. App. 2003).

Second, the Court of Appeals explained the proof necessary for Plaintiff to carry her burden of establishing her expert's competence:

> To meet this burden, "a plaintiff's expert can establish that a community with which he or she is familiar is similar to that of the one in which the defendant practices based on a comparison of information such as the size, location, and presence of teaching hospitals in the two communities." *Travis v. Ferraraccio*, No. M2003-00916-COA-R3-CV, 2005 WL 2277589, at *11 (Tenn. Ct. App. Sept. 19, 2005). However,"[g]eneralizations regarding the similarity of the standards of professional care in two contiguous states are not specific enough information to demonstrate that a medical practitioner is qualified under the locality rule to render an opinion in a medical malpractice case." *Johnson v. Pratt*, No. W2003-02110-COA-R3-CV, 2005 WL 1364636, at *8 (Tenn. Ct. App. June 9, 2005).

In this case, the supplemental affidavit of Plaintiff's expert cited reference materials to demonstrate that the expert's community was similar to Defendants' community. The supplemental affidavit listed "the size of each city's population, the number of institutions of higher learning, and the number of hospitals in each city[,]" as well as noting "that there is a level one trauma center and an accredited medical center in both" cities. The Court of Appeals ruled that Plaintiff's expert relied on the information recommended in *Travis*, not the generalizations rejected in *Pratt*, and therefore the trial court erred in concluding Plaintiff's expert's supplemental affidavit failed under the locality rule.

- **Medical Malpractice**
- **Expert Witnesses**
- **The Locality Rule**
- **Motions to Alter or Amend a Judgment**

Nancy L. Lane v. Jodi D. McCartney, M.D., et al, No. E2008-02640-COA-R3-CV, 2009 WL 2341536 (Tenn. Ct. App. July 30, 2009). Author: Judge D. Michael Swiney. Trial: Judge Thomas J. Seeley, Jr.

This is the second locality rule case, and it primarily reiterates and buttresses the holding from *Nabors*, which becomes important as soon as we reach the next case, *Badgett*. Still, there is a subtle difference between *Lane* and *Nabors* that I will discuss at the end of the summary.

After Defendant moved for summary judgment, Plaintiff filed a first affidavit from Plaintiff's expert. The first affidavit stated that Plaintiff's expert was from Virginia, but was "familiar with the standard of care in Tennessee." In a deposition, however, the expert admitted he had never practiced in Tennessee or received any medical training in Tennessee, and was only vaguely familiar with demographic information about the state.

Plaintiff then filed a supplemental affidavit of the expert. The supplemental affidavit stated the expert was familiar with the standard of care in Harrisonburg, Virginia, where the expert actively practiced for years. The affidavit stated the expert had reviewed and compared population statistics and demographic profile highlights for the expert's community and the defendant's community, and that both communities were "small, but growing urban metropolitan areas located in larger rural areas in the Appalachian mountain chain[,]" and that the communities were similar "geographically" and in terms of "population and social characteristics." The expert mentioned that both communities were below the national average for high school graduates, but above the average for college graduates. The expert also equated the size of the hospitals in the communities. The expert mentioned he had reviewed other cases from East Tennessee, and had consulted with physicians from other states including Tennessee.

The trial court found Plaintiff's expert still did not satisfy the locality rule based on either affidavit, and Plaintiff filed a motion to rehear supported by a second supplemental affidavit of the same expert. The second supplemental affidavit included much of the same language from the supplemental affidavit. The second supplemental affidavit also added:

> I have a close personal friend and colleague who practices Gynecology in Chattanooga, Tennessee. I have visited him in Chattanooga, Tennessee on several occasions and we have discussed the practice of Obstetrics and Gynecology in our respective communities. [...] Prior to my deposition I consulted with the above mentioned Gynecologist who lives in Chattanooga, Tennessee regarding the standard of care as applied to the specific circumstances of this case. After this discussion, it is my opinion that the standard of care regarding the circumstances of this case is the same in Chattanooga, Tennessee as in Harrisonburg, Virginia. [...]
>
> Both hospitals are mid-size community hospitals. Johnson City Medical Center has 443 beds and Rockingham Memorial Hospital in Harrisonburg, Virginia has 270 beds. Both hospitals have helicopter service. Rockingham Memorial Hospital offers the same range of specialties and subspecialties regarding women's health as listed on Johnson City Medical Center's website. Gynecologic surgery, which is what is at issue here, is offered at both hospitals. Rockingham Memorial Hospital offers a Family Birth Center similar to that described on the Johnson City Medical Center's web site. [...]
>
> My residency training and Dr. Lauer-Silva's residency training were governed by the same set of standards as set forth by the Council on Resident Education on Obstetrics and Gynecology, a part of the American College of Obstetrics and Gynecology (ACOG). This body sets standards which are applicable in both communities. The American Board of Obstetrics and Gynecology (ABOG) is also authoritative on the standard of care in Gynecology and cannot be ignored.
>
> I have reviewed Dr. Lauer-Silva's deposition p. 58, ll. 17-25 and her testimony that the standard of care in Fremont, Nebraska is not different than Johnson City, Tennessee for evaluating the ureters supports what I have said above.

The trial court considered the second supplemental affidavit, but still found Plaintiff had not demonstrated that her expert complied with the locality rule, and therefore granted summary judgment to Defendants. Plaintiff appealed.

The Court of Appeals affirmed the trial court's finding that the original and first supplemental affidavits of Plaintiff's expert contained "insufficient facts and evidence to show that the two relevant communities are similar." However, the Court of Appeals reversed the trial court's exclusion of the expert's opinion based on the second supplemental affidavit. The court ruled that the trial court should have considered the second supplemental affidavit, and abused its discretion in declining to reverse its grant of summary judgment. The court noted its decision was largely compelled by the *Nabors* opinion.

As an aside, the court noted that Tenn. Code Ann. § 29-26-115 does not require the experts to themselves establish the similarity between communities; instead, a "plaintiff is free to introduce other evidence, including the testimony of other witnesses, in order to make the requisite showing that the two communities are similar."

The subtle difference I mentioned at the outset? Note that in *Lane*, the Court of Appeals found that the expert's original and first supplemental affidavits were both deficient, while the second supplemental affidavit laid a proper foundation under the locality rule. Thus, somewhere between the first supplemental affidavit and the second supplemental affidavit is the level of detail required by the Court of Appeals.

- **Medical Malpractice**
- **Expert Witnesses**
- **Locality Rule**

George H. Badgett, et al v. Adventist Health Systems Sunbelt, Inc., d/b/a Tennessee Christian Medical Center, No. M2007-02192-COA-R3-CV, 2009 WL 2365567 (Tenn. Ct. App. July 31, 2009). Author: Judge Patricia J. Cottrell. Trial: Judge Thomas W. Brothers.

This case is going to confound medical malpractice lawyers for years. Where *Nabors* and *Lane* offered some guidance for the future, *Badgett* takes a seemingly opposite stance on the exact same issue.

The Court of Appeals explained that, to meet the similar locality rule:

> 1) The expert must establish that the expert is in fact familiar with a standard of care in a specific medical community; and
> 2) It must be proven by that expert or through other proof that the medical community where the expert claims familiarity with the standard of care is similar to the defendant's medical community.

The Court of Appeals further stated that a comparison of the medical resources in the two communities is a threshold requirement to the similar community standard, but that exact knowledge of the medical statistics is not required. The Court of Appeals ultimately acknowledged that admitting an expert who relies on proof about medical resources and demographics is not an abuse of discretion, but in this case, the question was "whether knowledge of statistical information alone is enough and, if so, how much statistical information is necessary to show sufficient similarity between the communities to meet the statutory requirement."

Plaintiff's expert testified that he practiced in and was familiar with two communities that are like Defendant's community of Nashville. Plaintiff's expert explained that the communities all have a medical school, have smaller hospitals that feed to larger hospitals, and have similar population sizes. Based on this, the Court of Appeals stated that "the only proven similarities

between [the expert's community] and [Defendant's community] are population and the existence of smaller hospitals that feed larger ones."

Based on this, the Court of Appeals ruled that, while the Court of Appeals might have reached a different conclusion, the trial court did not abuse its discretion in excluding the expert's testimony. The Court of Appeals further explained that, "[i]n view of the absence of more definitive standards for applying the statutory test, [it could not] hold the trial court in error."

So, at the end of the day, what is the difference between *Nabors*, *Lane*, and *Badgett*? My guess is lawyers will be debating that point for years to come unless the Tennessee Supreme Court grants permission to appeal in one or more of the cases.

- **Medical Malpractice**
- **Nursing Home Claims**
- **Summary Judgment**
- **Ordinary Negligence v. Medical Malpractice**

Rose Johnsey, Widow of Frederick Johnsey v. Northbrooke Manor, Inc., et al, No. W2008-01118-COA-R3-CV, 2009 WL 1349202 (Tenn. Ct. App. May 14, 2009). Author: Judge Alan E. Highers. Trial: Judge Don Allen.

This is a medical malpractice case dealing with a fractured hip suffered by a patient allegedly during his stay at a nursing home. (The proof was disputed as to when and how the patient suffered the injury.) The trial court granted summary judgment to the nursing home, and Plaintiff appealed.

The Court of Appeals reversed summary judgment, finding Defendant did not affirmatively negate an essential element of Plaintiff's claim as required by *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008). In footnote 5, the court explained:

> Northbrooke submitted no evidence, from a medical expert or otherwise, affirmatively establishing that Mr. Johnsey's hip was *not* fractured due to the negligence of Northbrooke employees. Although Ms. Taylor testified by deposition that she never saw Mr. Johnsey fall or slip, she also stated that she could not remember whether she left the room to get help.
>
> With regard to the plaintiff's ability to prove her claim at trial, we are not aware of any scheduling orders entered by the trial court that would have limited the plaintiff's ability to identify additional witnesses.

Thus, under *Martin* and *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008), Defendant did not carry its burden because it did not conclusively negate an essential element of Plaintiff's claim, and there was no record of a scheduling order that barred Plaintiff from introducing additional evidence in the case at the time the summary judgment motion was granted.

Next, the Court of Appeals determined that Plaintiff's claim sounded in medical malpractice, rather than ordinary negligence, and should be treated as such on remand. The court quoted the distinction between malpractice and simple negligence from the Tennessee Supreme Court:

> [W]hen a claim alleges negligent conduct which constitutes or bears a substantial relationship to the rendition of medical treatment by a medical professional, the medical malpractice statute is applicable. Conversely, when the conduct alleged is not substantially related to the rendition of medical treatment by a medical professional, the medical malpractice statute does not apply.

Gunter v. Lab. Corp. of Am., 121 S.W.3d 636, 641 (Tenn. 2003).

The Court of Appeals noted that determining whether a complaint is properly a medical malpractice claim is a fact-sensitive inquiry. The court analyzed numerous prior cases. (Attorneys fretting over this issue would be well advised to read the complete opinion for a primer on the issue.) The court summarized Plaintiff's allegations of negligence: dropping the patient or failing to provide the necessary support to prevent the patient from falling; failing to provide adequate staff to support the patient; failing to provide adequate training for its staff to know how to support the patient and prevent him from falling; failing to report the hip injury to the patient's family; failing to report the hip injury to the patient's doctor; and failing to make a timely referral for medical diagnosis and care. Under the circumstances, the court concluded Plaintiff's claims were grounded in medical malpractice and required corresponding proof on remand.

- **Medical Malpractice**
- **Due Process**
- **Equal Protection**

Crespo v. McCullough*,* No. M2007-02601-COA-R3-CV, 2008 WL 4767060 (Tenn. Ct. App. Oct. 29, 2008). Author: Judge Charles D. Susano, Jr. Trial: Judge Hamilton V. Gayden, Jr.

The Eastern Section of our Court of Appeals has ruled that the application of the *Calloway* opinion (which held that the three year statute of repose in medical malpractice cases applied to minors who had not filed suit before the date of the *Calloway* opinion) violated the due process and equal protection rights of minors whose unfiled claims existed at the time the opinion was released but were barred as a result of it.

This is a very interesting opinion, but it has relatively little importance to those who do not have similarly situated plaintiffs or defendants. Moreover, the odds are that the Tennessee Supreme Court will grant a Rule 11 application in this case and, while I think it will affirm, we will await that occasion to give this case more space.

- **Medical Malpractice**
- **Expert Testimony**
- **Summary Judgment**

Tommy McDaniel, et al. v. Amal Rustom, M.D., et al., No. W2008-00674-COA-R3-CV, 2009 WL 1211335 (Tenn. Ct. App. May 5, 2009). Author: Judge Alan E. Highers. Trial: Judge Jerry Stokes.

This case includes a very lengthy discussion of Tennessee case law regarding the admissibility of expert testimony from a health care provider who practices in a specialty different from a defendant's specialty. In short, the law is that, if an expert has a sufficient basis on which to establish familiarity with the defendant's field of practice, the expert's testimony may be accepted as competent proof even though he or she specializes or practices in another field. However, an expert cannot simply testify as to the general standard of care expected of all physicians. Whether a particular expert is competent to testify in a case is a fact-specific determination, and the court aptly summarized many of the facts underlying prior appellate rulings on the issue.

In this particular case, Plaintiffs responded to a summary judgment motion with an expert affidavit from a doctor who purported to be "familiar with the acceptable standard of professional practice of physicians practicing in the emergency department in communities such as Hoover, Alabama and Birmingham, Alabama for patients with allergic reactions to antibiotics and symptoms such as those presented by [the patient]...." The expert acknowledged in his deposition, however, that he had not worked in an emergency room since a rotation during his residency, which ended in 1983, some twenty years prior to the treatment at issue in the case. The expert described his clinical practice in Alabama during the relevant period as "part-time medicine," in which he saw patients at a local clinic one day per week and when another physician was on vacation. The expert conceded he was not competent to testify about the standard of care of an emergency room physician, but insisted that "the standard of care is universal" for "all specialists" all across the country. The Court of Appeals affirmed exclusion of the expert's testimony on the ground that he failed to demonstrate any basis for knowing the standard of care of emergency room physicians.

One of the defendants named in the suit was actually certified in internal medicine, the same field practiced by Plaintiffs' expert. However, Defendant testified she practiced exclusively in an emergency room setting, and had not practiced internal medicine for years. The court ruled Plaintiffs' expert's testimony was properly excluded with regard to this defendant as well.

Of note, one of the defendants who moved for summary judgment did not file an affidavit stating she had complied with the applicable standard of professional practice. Plaintiffs argued this defendant was not entitled to summary judgment under *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76 (Tenn. 2008) because she had not affirmatively negated an essential element of Plaintiffs' claim. Nonetheless, because a scheduling order deadline had passed for Plaintiffs to disclose any expert witnesses, the Court of Appeals ruled summary judgment was properly granted for this defendant since Plaintiffs could no longer proffer additional expert testimony.

This opinion tells us that a "put up or shut up" motion for summary judgment will have legal traction if the plaintiff has not disclosed experts when required to do so under a reasonable deadline imposed by a Rule 16 scheduling order.

- **Medical Malpractice**
- **Expert Witnesses**
- **Summary Judgment**

Earnest Edwin Gilchrist v. Juan T. Aristorenas, M.D., No. W2007-01919-COA-R3-CV, 2008 WL 4981103 (Tenn. Ct. App. Nov. 24, 2008). Author: Judge Holly M. Kirby. Trial: Judge J. Weber McCraw.

In investigating a potential medical malpractice case, Plaintiff's attorney sent Plaintiff's medical records to Mark Miller, a Memphis general surgeon, for review. The surgeon reviewed the records and wrote a letter to Plaintiff's attorney identifying several problems in the treating physician's care of Plaintiff, and stating the physician's treatment fell "well below the required standard of care." After receiving Dr. Miller's opinion letter, Plaintiff filed suit against the treating physician.

Six and a half years later, Defendant's attorney deposed Dr. Miller as Plaintiff's expert witness. Dr. Miller's almost totally recanted the statements from his opinion letter. Dr. Miller testified he saw no problem with the same conduct he previously described as "well below the required standard of care." Dr. Miller's opinion letter stated that taking more than seven hours to perform the particular surgery in this case was "well outside the realm of the standard of care." In his deposition, however, Dr. Miller described the seven to eight hour duration of the surgery as "a judgment call."

Defendant filed a summary judgment motion the day after the deposition of Dr. Miller. Nearly four months later, Plaintiff filed a response, and a request for continuance of the motion under Tenn. R. Civ. P. 56.07, asking for ninety days to obtain a new expert witness based on Dr. Miller's change of opinion. The trial court denied Plaintiff's request for a continuance, finding Plaintiff had adequate time to obtain an expert witness in the nearly five months between the time of Dr. Miller's deposition and the motion hearing. The trial court therefore granted summary judgment, and Plaintiff appealed the denial of his request for a continuance.

The Court of Appeals affirmed based on the time between Dr. Miller's deposition and the summary judgment hearing. The court stated it could not ignore the fact that over seven years passed between the surgery and Dr. Miller's deposition, and therefore the trial court did not abuse its discretion in denying the request for a continuance.

In a footnote, the court related Dr. Miller's testimony regarding how he came to consult on the lawsuit. Plaintiff's attorney represented Dr. Miller in a contested partnership dissolution. Dr. Miller testified he was happy with Plaintiff's attorney when Dr. Miller agreed to consult in this case. Dr. Miller also testified, however, that at the time of his deposition Dr. Miller was not pleased with Plaintiff's attorney's representation of Dr. Miller.

- **Medical Malpractice**
- **Expert Witnesses**
- **Summary Judgment**

Melissa Michelle Cox v. M. A. Primary and Urgent Care Clinic and Austin Adams, No. M2007-01840-COA-R3-CV, 2009 WL 230242 (Tenn. Ct. App. Jan 29, 2009). Author: Judge D. Michael Swiney. Trial: Judge Thomas J. Seeley, Jr.

Plaintiff had several appointments over a three month period at Clinic. All of the appointments were handled by Michael Maddox, a physician's assistant. During the third month, Plaintiff sought medical attention for acute shortness of breath at a hospital emergency room. She was later diagnosed with a severe form of congestive heart failure, as a result of which she had a mitral valve replacement.

Plaintiff sued Clinic, Maddox, and Dr. Dustin Adams, the Clinic's Medical Director, alleging the failure to promptly evaluate and treat her symptoms caused unwarranted pain and suffering and worsened her condition. Defendants filed a summary judgment motion supported by affidavits of Maddox and Dr. Adams stating that they had not violated the standard of care, and that Plaintiff did not suffer any injury as a result of any act or omission by Defendants. Plaintiff responded with deposition testimony from Plaintiff's expert, a doctor, and also argued that Defendants had not complied with the statutory requirements for physician's assistants providing care. The trial court granted Defendants' summary judgment motion, and Plaintiff appealed.

The Court of Appeals first looked to whether Plaintiff's expert gave competent expert testimony. Defendants asserted that Plaintiff's expert's admission that he did not know the standard of care applicable to a physician assistant meant he could not testify. Plaintiff contended that Tenn. Code Ann. §63-19-106 "sets forth a vicarious standard based upon the supervision rendered by the primary care physician." In essence, she contends that the physician assistant, by virtue of §63-19-106, is held to the same standard of care as the supervising physician.

The Court of Appeals analyzed the Tennessee Physician Assistants Act, codified at Tenn. Code Ann. § 63-19-101, *et. seq.*, as well as Chapter 0880-3 of the Rules and Regulations of the Tennessee Board of Medical Examiners, titled "General Rules and Regulations Governing the Practice of a Physician Assistant." The Court of Appeals concluded:

> Pursuant to statute and applicable regulations, the services provided by a physician assistant are provided under the supervision of a licensed physician and within the scope of practice of that physician, who is responsible for the treatment rendered by the physician assistant. Consequently, the standard of care applicable to a physician assistant is that of the supervising physician in the community in which the supervising physician practices.

The Court of Appeals went on to find that, although Defendants' affidavits were sufficient to negate an essential element of Plaintiff's case, the deposition testimony of Plaintiff's expert filed

in response precluded summary judgment. The court therefore reversed summary judgment for Defendants and remanded for further proceedings.

- **Medical Malpractice**
- **Superseding Cause**
- **Original Tortfeasor Rule**

Doris G. Howell, as Next of Kin and as Guardian of Jessie J. Williams, a minor child of Ginger Williams, deceased, et al. v. David M. Turner, M.D., et al., No. M2008-01588-COA-R3-CV, 2009 WL 1422982 (Tenn. Ct. App. May 21, 2009). Author: Judge David R. Farmer. Trial: Judge Jim T. Hamilton.

Blood tests were ordered for Patient at Hospital, but Defendant Doctor discharged Patient without any blood tests being completed. Later that evening, an unidentified Hospital nurse canceled the order for Patient's blood tests. Patient died the following day. A jury returned a verdict for Plaintiff, finding Defendant Doctor, Hospital, and others liable for Patient's wrongful death. Defendant Doctor filed a motion for judgment notwithstanding the verdict and/or motion for new trial, which was denied, and Defendant Doctor appealed.

On appeal, Defendant Doctor contended that Hospital nurse's cancellation of the order for blood tests was a superseding cause that relieved Defendant Doctor of liability. The Court of Appeals explained that four elements are necessary for an intervening cause to become a superseding cause:

> The essential factors necessary to demonstrate a superseding *[sic]* cause are (1) the harmful effects of the superseding cause must have occurred after the original negligence; (2) the superseding cause must not have been brought about by the original negligence; (3) the superseding cause must actively work to bring about a result which would not have followed from the original negligence; and (4) the superseding cause must not have been reasonably foreseen by the original negligent party. *White v. Premier Med. Group*, 254 S.W.3d 411, 417 (Tenn. Ct. App. 2007).

Defendant Doctor contended that all four elements were present: (1) the cancellation occurred after Doctor's negligence; (2) Doctor's duty to evaluate and discharge Patient was separate from Hospital's duty not to cancel the blood test order; (3) had the blood tests been completed Patient would have lived; and (4) it was not foreseeable that a nurse would cancel an order for lab work, which would be an act of blatant malpractice.

The Court of Appeals rejected Doctor's contentions, finding foreseeability was the dispositive issue. The court explained:

> The law in Tennessee, however, has never been that it is unforeseeable, as a matter of law, that a medical practitioner commits malpractice. To the

> contrary, the general rule has been that "if one is injured by the negligence of another, and these injuries are aggravated by medical treatment (either prudent or negligent), negligence of the wrongdoer causing the original injury is regarded as the proximate cause of the damage subsequently flowing from the medical treatment." *Transports, Inc. v. Perry*, 414 S.W.2d 1, 4 (Tenn. 1967). When finding that this common law rule has survived Tennessee's adoption of the comparative fault, we explained that "[t]he rationale for this rule is that the tortfeasor whose negligence caused the injured party to require medical attention should bear all foreseeable risks resulting from the injury, including risks derived from the medical provider's human fallibility." *Atkinson v. Hemphill*, No. 01A01-9311-CV-00509, 1994 WL 456349, at *2 (Tenn. Ct. App. 1994). Thus, it may be foreseeable that a medical professional will act negligently, and we simply cannot agree with Dr. Turner's argument that blatant malpractice is never foreseeable as a matter of law.

The court therefore affirmed the denial of Defendant Doctor's post-trial motion.

- **Medical Malpractice**
- **Expert Witnesses**
- **Causation**
- **Cancellation Rule**

Beverly Lockard v. Christopher H. Bratton, M.D., et al., No. W2007-02820-COA-R3-CV, 2009 WL 275783 (Tenn. Ct. App. Feb. 4, 2009). Author: Judge Alan E. Highers. Trial: Judge Roger A. Page.

Like so many other medical malpractice plaintiffs, this plaintiff lost at summary judgment because her experts were deemed incompetent to testify to critical issues in the case.

First, the Court of Appeals affirmed the trial court's decision to exclude causation testimony from Plaintiff's expert. Plaintiff contended she was not pursuing a "loss of chance" claim, but a claim for a "severely diminished chance of future pregnancy;" *i.e.*, Plaintiff had more than a 50% chance of a favorable outcome before the negligent act or omission, and less than a 50% chance of a favorable outcome afterward. The court did not explicitly state it agreed this would qualify as a compensable loss, rather than a loss of chance claim for which Plaintiff would not be entitled to recover. The court did not have to; it found Plaintiff's expert doctor did not testify that Plaintiff had a greater than 50% chance of pregnancy before the negligence. Therefore, the testimony was properly excluded on that ground.

Likewise, the court affirmed exclusion of Plaintiff's expert standard of care testimony. Defendant doctor was a general surgeon, and the expert was a gynecologist. The Court of Appeals clarified that the expert's testimony should not be excluded merely because the expert did not practice in the same specialty as Defendant doctor. However, in this case, the expert "did not base his familiarity with the required standard of care on his knowledge of general surgery,

but rather by likening [Defendant doctor's] actions to that of a gynecologist[....]" Specifically, the expert testified that, although there were no gynecologists in Defendant doctor's community:

> If [Defendant doctor] did not consider himself a gynecologist for purposes of this case, then again, as I said, he would have immediately transferred her out to someone who could take care of the patient. [...] The fact that he did not do that indicates that he was holding himself out to everybody, including [the patient], that he was a gynecologic surgeon who could take care of this problem. So in that sense, he was a gynecologist.

The Court of Appeals also affirmed the trial court's decision not to consider an affidavit of the patient's treating physician stating that the patient more likely than not would have been able to get pregnant if her left fallopian tube had not been removed. The Court of Appeals found it was contradicted by the deposition testimony of the same treating physician stating that the physician could not fully assess or quantify the effect of the surgery on the patient's overall ability to become pregnant and deliver a live baby. Therefore, the cancellation rule applied.

- **Medical Malpractice**
- **Expert Witnesses**
- **Locality Rule**

Lynda Grisham v. Steven G. McLaughlin, M.D. and Premier Orthopaedic & Sports Medicine, PLC, No. M2008-00393-COA-R3-CV, 2009 WL 275667 (Tenn. Ct. App. Feb. 4, 2009). Author: Judge Andy D. Bennett. Trial: Judge Barbara Haynes.

If you don't touch medical malpractice cases, there is no reason for you to worry about this case. If you do, this is another example of the locality rule applied to a specific set of facts.

The Court of Appeals affirmed the trial court's striking of Plaintiff's standard of care expert witness based on the trial court's determination that the expert did not demonstrate sufficient familiarity with "the Skyline/Nashville" community to compare it to the expert's own community. With Plaintiff lacking an expert witness to establish a deviation from the standard of care, the Court of Appeals also affirmed summary judgment for Defendants.

The court summarized the expert's affidavit submitted to establish his competency under the locality rule:

> He worked with the faculty at Vanderbilt University Medical School and has "some personal knowledge of the community" from visits to Nashville. Dr. Thorpe's deposition indicates that he worked with Vanderbilt University for about three years "trying to get a Navy-funded grant to look at some techniques in arthroscopy surgery. . . ." He worked in the medical engineering program and never actually saw patients there. He never had any staff privileges at any hospital in Tennessee. Dr. Thorpe

> does not indicate what he did during his visits to Nashville that provided him with personal knowledge of the medical community.
>
> [... In addition, b]oth Nashville and Cape Girardeau are areas with multiple hospitals and both communities have numerous physicians who practice in the field of orthopedics and orthopedic surgery. Cape Girardeau, like Nashville, has multiple specialists in all the major fields of medicine. Both communities have a number of orthopedists who engage in procedures including total knee replacements.
>
> Dr. Thorpe relies on his knowledge of the hospitals where he had privileges in Cape Girardeau and website information of Skyline Medical Center to support his opinion of similarity between the Nashville, Tennessee and Cape Girardeau, Missouri medical communities. He notes that the "catchment area" of the hospitals in Cape Girardeau and Skyline are similar in population.

The Court of Appeals described the expert's statements as "so generic that they can apply to New York and Los Angeles as well as Cape Girardeau and Nashville."

- **Medical Malpractice**
- **GTLA**

Frederick Bertrand v. The Regional Medical Center at Memphis**,** No. W2008-00025-COA-R3-CV, 2008 WL 4334921 (Tenn. Ct. App. Sept. 23, 2008). Author: Judge David R. Farmer. Trial: Judge John R. McCarroll, Jr.

Plaintiff filed a medical malpractice action against The Regional Medical Center at Memphis ("the Med"), claiming he was injured in October 2002. Plaintiff filed his claim on October 17, 2003. On July 1, 2003, an amendment to Tenn. Code Ann. § 29-20-102(3)(B) became effective, which brought the Med into the purview of the Governmental Tort Liability Act. Plaintiff voluntarily non-suited, and then re-filed within a year relying on the savings statute at Tenn. Code Ann. § 28-1-105. The Med moved for summary judgment, asserting the claim was untimely since the savings statute does not apply to governmental entities. The trial court granted summary judgment, and Plaintiff appealed.

The Court of Appeals affirmed. The court rejected Plaintiff's argument that applying the amended act to his claim would be retroactive application of the statute. The court noted that Public Act 2003, ch. 321, which amended the GTLA to include the Med, in § 2(b) provided that it "shall apply to all claims filed on and after July 1, 2003 through June 30, 2006, even if the claims are filed subsequent to June 30, 2006." The court disagreed with Plaintiff that application of the statute to claims that accrued before it became effective impaired a vested right to bring an action against the Med, or that it otherwise offended any constitutional consideration in the case.

Other than attorneys in claims against the Med that arose before July 2003, there's little reason to read the full opinion.

- **Medical Malpractice**
- **Motions for Relief from a Final Judgment**

O. William Ferguson, Sr. v. J. Clifford Brown, D.C.**,** No. M2007-02590-COA-R3-CV, 291 S.W.3d 381 (Tenn. Ct. App. Oct. 21, 2008). Author: Judge Frank G. Clement, Jr. Trial: Judge C. L. Rogers.

Plaintiff's attorney admittedly missed a deadline for responding to a summary judgment motion and missed the hearing on the motion, which was granted. Within 30 days of the summary judgment motion being granted, Plaintiff filed a motion for relief from the judgment. Plaintiff's attorney filed an affidavit explaining that he missed the deadline and court appearance because he was distracted by caring for his brother and law partner who was diagnosed with and receiving treatment for a life-threatening cancer.

The Court of Appeals' opinion provides a good summary of the showing necessary for an attorney to establish excusable neglect sufficient to set aside a judgment. Excusable neglect may include omissions caused by a party's own carelessness. The court looked to the factors outlined in *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group,* 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001) for determining whether neglect is excusable:

> (1) the danger of prejudice to the party opposing the late filing, (2) the length of the delay and its potential impact on proceedings, (3) the reason why the filing was late and whether that reason or reasons were within the filer's reasonable control, and (4) the filer's good or bad faith. These circumstances must be weighed both with and against each other because, if considered separately, they may not all point in the same direction in a particular case.

The court discussed each of the factors in detail. The court found the trial court erroneously considered only the first factor – prejudice to the opposing party – and based its analysis of the prejudice factor on an incorrect legal standard. In particular, the court noted that the defendant opposing the motion for relief did not submit any affidavit or other evidence to establish that he would be materially prejudiced by reconsidering the motion. This opinion is a necessary read for any attorney in a case where excusable neglect is at issue.

- **Medical Malpractice**
- **Nursing Home Claims**
- **Negligence Compensatory Damages**
- **Punitive Damages**
- **Opening Statement**
- **Closing Argument**
- **Admissibility of Federal and State Regulations**
- **Expert Witness Testimony**
- **Spoliation**
- **Directed Verdict**
- **Discretionary Costs**

Christine Smartt and Ruby Kilgore as Co-Executors of the Estate of Cheatum Myers, Deceased v. NHC Healthcare/McMinnville, LLC, d/b/a NHC Healthcare, McMinnville; National Healthcare Corporation; and National Health Corporation**,** No. M2007-02026-COA-R3-CV, 2009 WL 482475 (Tenn. Ct. App. Feb. 24, 2009). Author: Judge Richard H. Dinkins. Trial: Judge Larry B. Stanley.

There is an awful lot in this opinion. Attorneys who handle medical malpractice cases should read it thoroughly. It deserves at least a skim by any tort lawyer due to the discussion of trial issues including the reasonableness of compensatory damage awards, allowing a jury to consider punitive damages after directed verdict has been granted, and potentially inflammatory closing arguments.

The case arises from a jury verdict for personal injuries and wrongful death against a nursing home ("Facility"). Patient was a resident of Facility. On admission, he had suffered from falling and wandering. His primary care physician at the facility ordered fall precautions, including lowering his bed closer to the floor, keeping his room well-lit, and removing clutter. Nonetheless, Facility was unable to prevent Patient from moving on his own, and he fell a number of times. Facility attached an alarm to alert the staff when he was getting out of bed, but Patient discovered how to disable the alarm.

At one point, Patient was found on the floor after a fall covered in his own feces, and was later diagnosed with a hip fracture as a result. An orthopaedic specialist wanted Myers to be non-weight bearing, however, Facility's certified nursing assistants (CNAs) were not informed of this restriction. Patient continued to walk on his injured hip until it eventually broke completely, and required hip replacement surgery.

Patient was then placed in a wing of Facility designated for residents needing the most care, because the surgery had left him immobile and in need of constant care. Patient needed help with custodial services, such as feeding, bathing, shaving, grooming, and turning and repositioning. Facility, however, was unable to perform these services as often as was required; for example, in lieu of a full bath, the CNAs would provide "spit baths" to the residents, which consisted of washing the face, underarms, and genital area. While visiting their father, Plaintiffs would find him to be unshaven, unbathed, and with long, dirty fingernails. Plaintiffs and several

CNAs testified that Mr. Myers would be left to sit in his own urine and feces so long that it would dry to his body and the bed linens.

Patient also suffered from a number of medical problems. Patient suffered pressure sores to his feet that could have been prevented by repositioning and by fitting him with "bunny boots" (a pressure relieving device). However, Patient would constantly be found without his bunny boots on. As a result, Patient suffered from a number of the pressure sores. Patient also suffered contractures to both legs that could have been prevented by range of motion exercises, which were not done. Lastly, Patient suffered from a urinary tract infection, the risk of which could have been reduced if the Foley catheter used after his hip surgery had been consistently cleaned.

Patient ultimately passed away.

Plaintiffs, members of Patient's family, sued various Defendants affiliated with Facility, alleging personal injuries and wrongful death. NHC Healthcare/McMinnville, LLC ("NHC/McMinnville") owns and operates Facility. National Healthcare Corp. ("NHC") is the parent corporation of NHC/McMinnville. National Health Corporation ("National") is a corporation that contracted with NHC to provide staff to Facility.

A jury awarded Plaintiffs compensatory damages for claims under the Tennessee Medical Malpractice Act as well as compensatory damages for ordinary negligence claims. The jury found Defendants were not liable for wrongful death. The trial court granted directed verdict to NHC and National for Plaintiffs' punitive damages claim, but allowed the jury to determine punitive damages as to all Defendants. The jury awarded punitive damages against all three Defendants. Defendants appealed.

The Court of Appeals first addressed whether the trial court erred in denying directed verdict to NHC and National based on Defendants' contention that they did not owe a direct duty to a patient at Facility. The Court of Appeals analyzed at length the proof regarding NHC's and National's relationship to Facility, finding "[t]he testimony of the Facility's administrators and staff demonstrate those defendants' control over the Facility." The Court of Appeals affirmed the denial of directed verdict on this issue.

The Court of Appeals also affirmed the trial court's decision not to deny Plaintiffs' ordinary negligence claims. The Court of Appeals stated that the distinction between ordinary negligence claims and those falling under the Tennessee Medical Malpractice Act depends, in part, on whether the task calls for the person to use medical expertise or knowledge (not just whether the person has medical expertise or knowledge). The court noted that some of the care Patient received included bathing, feeding, grooming, etc.; functions that Plaintiffs could have provided themselves. Other care Patient received included the "skilled nursing services" aimed at diagnosing, treating, and preventing injuries and illnesses; functions which require a degree of medical expertise. The Court of Appeals found reasonable minds could differ as to whether an action for ordinary negligence existed in this case.

The Court of Appeals also stated, in footnote 8, that the trial court properly instructed the jury on both ordinary negligence and medical malpractice claims using the following language:

> There is more than one claim in this lawsuit. You will decide each claim separately. Each claim is entitled to a fair and separate consideration. Unless you are instructed to the contrary, the instructions apply to the facts of each claim. […]
>
> [For the medical malpractice claim:]
>
> A nursing home must furnish with care, attention and protection reasonably required by the patient's known mental and physical condition. The amount of caution, attention and protection required is that generally used by nursing homes in the same or similar community and required by its express or implied contract with the patient.
>
> [For the ordinary negligence claim:]
>
> … fault has two parts: negligence and legal cause. Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under the circumstances similar to those shown in the evidence.

The Court of Appeals affirmed the trial court's decision to allow Plaintiffs to refer to the value of stock holdings in NHC and National held by the President of the companies as well as the number of affiliated entities held by NHC. Plaintiffs mentioned in opening statement that the President of NHC and National, who testified at trial, held stock in the companies worth between $50 and $60 million. The Court of Appeals affirmed admission of this evidence to show bias by the President by having a financial interest in outcome of the case. Plaintiffs also introduced evidence that NHC operated and managed 74 nursing home facilities through affiliated entities. The court affirmed this evidence as relevant to show the duty of care on the parent corporation under the instrumentality rule.

The Court of Appeals also ruled that the trial court did not abuse its discretion in admitting evidence of Facility employee CNAs' certification, training and performance evaluations. The court found the evidence was relevant to Plaintiffs' burden of proving both the medical malpractice claim and punitive damages.

The Court of Appeals affirmed the trial court's decision to allow Plaintiffs to introduce, as evidence, federal regulations regarding nursing home staffing. The court distinguished *Conley v. Life Care Centers of America, Inc.*, 26 S.W.3d 713 (Tenn. Ct. App. 2007). In *Conley*, the Court of Appeals rejected the plaintiff's contention that the federal regulations could form the basis for a negligence *per se* claim, finding the regulations too vague and general, and too akin to recognizing a national standard of care. *Id.* at 733-34. In this case, Plaintiffs were not asserting a claim for negligence *per se*, but instead Plaintiffs' otherwise competent expert witness "testified as to the factors he considered when forming his opinion regarding the community standard of care, and, pursuant to the decision in *Robinson* [*v. LeCorps*, 83 S.W.3d 718 (Tenn.

2002)], this testimony is not inadmissible simply because some of those factors included federal standards."

The Court of Appeals also affirmed the trial court's ruling regarding Defendants' use of Tennessee state regulations regarding staffing. Defendants did not claim that the Tennessee regulatory standards are the applicable standard of care, but contended that they should have been permitted to introduce the state standards to rebut Plaintiffs' use of the federal standards in order to provide the jury with all standards when determining what the standard of care should be. The Court of Appeals found Defendants were not prevented from introducing evidence of the Tennessee regulatory standards on staffing requirements to the jury. Defendants' expert was permitted to testify as to his opinion of how many nurses per patient should be provided at a nursing home facility under the applicable standard of care. The trial court refused to allow Defendants or their expert to mention that the standard articulated by the expert derived from Tennessee regulations. The Court of Appeals found the trial court did not abuse its discretion "in limiting the testimony by preventing the classification of the expert's standards as the Tennessee regulatory standards."

Next, Defendants asserted that the trial court erred in admitting evidence that Defendants destroyed Patient's Activities of Daily Living ("ADL") records. Plaintiffs' lawyers sent a request to Facility for copies of all of Patient's medical records. At the time the request was received, Facility had ADL records in existence and was continuing to generate new ADL records for Patient's care. Facility later shredded the ADL records before any were produced to Plaintiffs. A representative of facility testified at trial that Facility did not consider ADL records to be part of Patient's medical records, and destroyed the documents in accordance with Facility's record retention policy and applicable law. The Court of Appeals affirmed the trial court's decision to admit evidence that Facility destroyed the ADL records, and to give a spoliation instruction to the jury permitting the jury to draw inferences from Facility's destruction of the records.

Defendants also contended that two members of the professional staff at Facility should have been prohibited from providing what Defendants contended are expert opinions. Defendants contended the two individuals were fact witnesses and should not have been compelled to provide such opinions because they are experts "only by nature of their chosen field." The trial court ruled that "[w]itnesses of this type may testify as to their actions as well as what could and could not be done based on staffing in the facility, and the testimony of these witnesses did not exceed these bounds." The Court of Appeals affirmed the trial court's ruling.

Defendants also argued that some evidence should not have been admitted because Defendants contended Plaintiffs' claims sounded solely in medical malpractice, and not ordinary negligence. Because the Court of Appeals found the trial court did not err in permitting the ordinary negligence claim to go the jury, the court likewise affirmed these rulings.

Defendants contended Plaintiffs' counsel should not have been permitted to make a "Profits over People" argument during opening statement and closing argument because it was improper and the only purpose was to inflame the jury. However, during the trial, Plaintiffs introduced comparative income statements showing that, during Patient's residency, Defendants reduced the

number of staff members at Facility while increasing the number of residents admitted, leading to an increase in revenue and a decrease in the staffing levels. The trial court properly instructed the jury that "any questions, objections, statements, or arguments made by the attorneys during the trial are not evidence." The Court of Appeals ruled that the argument of Plaintiffs' counsel was supported by proof of an increase in revenue and a decrease in staffing levels, and the trial court did not err in allowing the argument.

Defendants also objected to use of the phrase "send a message" by Plaintiffs' counsel during closing argument. The Court of Appeals ruled Plaintiffs' argument was not improper because the jury was tasked with deciding "defendants' liability for the injuries suffered by [Patient] and whether defendants' conduct rose to the level of recklessness sufficient to justify an award of punitive damages."

The Court of Appeals' opinion includes a thorough analysis of the reasonableness of the compensatory damages awards by the jury. The most interesting aspect of the case is that the trial court and Court of Appeals found Plaintiffs were entitled to separate recoveries for damages under their ordinary negligence and medical malpractice theories. Beyond that, if you are contesting the reasonableness of a jury award for personal injury damages under either ordinary negligence or medical malpractice, the opinion is worth a thorough read. Otherwise, the reasonableness of a jury award for compensatory damages depends so heavily on the facts of a specific case that it may not be worth your time to focus on it until the issue arises.

In short summary, the Court of Appeals affirmed the jury's compensatory damages awards under Plaintiffs' ordinary negligence theory for loss of the ability to enjoy life ($275,000) and pain and suffering ($450,000). The court reversed the jury's award for disfigurement under the ordinary negligence theory ($75,000), finding no proof that Patient suffered a permanent disfigurement as a result of Facility's ordinary negligence. The Court of Appeals affirmed all compensatory damages awarded by the jury under Plaintiff's medical malpractice theory, including loss of the ability to enjoy life ($700,000), disfigurement ($500,000), and pain and suffering ($2,000,000).

Defendants contended the punitive damages award against NHC/McMinnville (the owner and operator of Facility) was not supported by clear and convincing evidence of recklessness. Looking to *Flax v. DaimlerChrysler Corp.*, No. M2005-01768-SC-R11-CV, 2008 WL 2831225 at *30 (Tenn. July 24, 2008), the Court of Appeals applied a two step process to review the punitive damage award. First, the court determined that there was material evidence in the record to support the jury's finding of recklessness. Specifically, the court noted that Plaintiffs proved:

> (1) the Facility was aware of the inadequate staffing, (2) the Facility knew that the understaffing would lead to decreased care for the residents, and (3) the Facility knew that less employees would lead to higher profits.

Second, the court determined whether the jury applied the law or their caprice in setting the amount of the award. Based on the proportion of the punitive damage award to the compensatory damage award ($163,402 in punitive damages and $4,102,298.86 in compensatory damages, or 4%), the court found "[a] punitive award of this proportion is not the product of the

jury's caprice." The court therefore affirmed the punitive damage award against NHC/McMinnville.

As to punitive damages against NHC and National, the trial court granted directed verdict to Defendants, but allowed the jury to consider the issue. The jury awarded punitive damages and assessed $1,000,000 in punitive damages against NHC and $28,635,000 in punitive damages against National. Plaintiffs appealed the directed verdict.

The Court of Appeals reversed the directed verdict for NHC and National on punitive damages. The Court of Appeals found the trial court applied an incorrect standard. The Court of Appeals stated that "[t]he trial court's language in granting the motion suggested that the decision was based on personal conclusions, rather than whether reasonable minds could differ as to the conclusions to be drawn from the evidence." The court quoted the trial court's ruling in that respect:

> ... I cannot find that their actions or inactions were reckless in what they did. They did meet the minimum state standards. I'm not sure that what they knew and what they didn't do because of it was grossly inadequate or reckless in the terminology that we are required to use.
>
> The people there at the facility, yes, I think the people - the manager there at the facility, yes, we can say that there is sufficient evidence to warrant punitive damages. I simply cannot find that there is clear and convincing evidence of reckless and/or gross deviations by the above corporations.

The Court of Appeals found in the record sufficient questions regarding Defendants' liability for punitive damages to warrant the issue being submitted to the jury. The Court of Appeals also ruled that directed verdict was improper because the jury could have found Defendants to be indirectly liable for punitive damages as principal and employer. The Court ultimately stated that Defendants were not entitled to directed verdict because: "(1) an incorrect analysis was used, (2) reasonable minds could differ as to recklessness of NHC and National's actions, and (3) liability could have been imposed indirectly upon the entities in their role as either principal or employer."

The Court of Appeals also ruled that the jury should not have been allowed to consider the issue of punitive damages once Defendants were granted directed verdict. At that point, there was no longer a "genuine and existing controversy" in the trial, and allowing the jury to consider it was "a violation of judicial procedure." The court ruled the jury's findings on punitive damages were therefore improper advisory opinions, and reversed and remanded for a rehearing on both phases of the bifurcated punitive damage trial.

We note that the trial judge was trying to do the right thing here – he did not think punitive damages were appropriate but thought that since the jury was there and had heard the evidence the opinion of the jury should be expressed. That's fine, but there is another way to skin that cat: take the Rule 50 motion under advisement, let the jury decide the issue, and then rule on the motion.

One juror, who stated in *voir dire* that his wife was a nurse, testified under Tenn. R. Evid. 606 that his wife gave her opinion on issues of the case during the proceedings. The juror stated that he did not repeat these statements to the rest of the jury, and said that when his wife would try to engage him in discussion, he refused to speak with her. The Court of Appeals found the juror's conduct did not prejudice deliberations, and the trial court properly denied Defendants' motion for a new trial on that ground.

The Court of Appeals agreed with Defendants that the trial court lacked authority to award discretionary costs for the preparation of the trial transcript of the appeal. Tenn. R. Civ. P. 54.04 covers discretionary costs available at trial, and does not include the cost of the transcript for appeal. Tenn. R. App. P. 40(c) provides for the costs of preparing a trial transcript for appeal to be recoverable by the successful party on appeal, not at trial. Finally, Tenn. R. Civ. P. 54.04 only provides for discretionary costs that the prevailing party has actually been charged, and since the preparation of trial transcripts for appeal cannot be completed until after the conclusion of the lower court's proceedings, these costs can never have been "actually charged" at the time a trial court considers a motion for costs. The Court of Appeals therefore remitted the discretionary costs award to exclude the cost of preparing the trial transcript.

- **Medical Malpractice**
- **Peer Review Immunity**
- **Negligent Credentialing**

Christy Leann Smith v. Leona M. Pratt, Executrix of the Estate of Stephen M. Pratt, M.D., Deceased, and HCA Health Services of Tennessee, Inc. d/b/a Centennial Medical Center, No. M2008-01540-COA-R9-CV, 2009 WL 1086953 (Tenn. Ct. App. April 22, 2009). Author: Judge Andy D. Bennett. Trial: Judge Barbara Haynes.

Plaintiff sued Surgeon and Hospital, alleging medical malpractice by Surgeon and negligent credentialing by Hospital. Hospital asserted it was entitled to qualified immunity under the Peer Review Law located at Tenn. Code Ann. § 63-6-219(d)(1). The trial court denied Hospital's summary judgment motion, finding the statute did not apply to Plaintiff's claim. Hospital was granted interlocutory appeal on the issue.

The Peer Review Law states:

> All state and local professional associations and societies and other organizations, institutions, foundations, entities and associated committees as identified in subsection (c), physicians, surgeons, registered nurses, hospital administrators and employees, members of boards of directors or trustees of any publicly supported or privately supported hospital or other such provider of health care, any person acting as a staff member of a medical review committee, any person under a contract or other formal agreement with a medical review committee, any person who participates with or assists a medical review committee with respect to its functions, or any other individual appointed to any committee, as such term is described

> in subsection (c), is immune from liability to any patient, individual or organization for furnishing information, data, reports or records to any such committee or for damages resulting from any decision, opinions, actions and proceedings rendered, entered or acted upon by such committees undertaken or performed within the scope or function of the duties of such committees, if made or taken in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist. Such immunity also shall extend to any such entity, committee, or individual listed in this subsection (d) when that entity, committee, or individual provides, or attempts to provide, assistance directly related to and including alcohol or drug counseling and intervention through an impaired professional program, or if none, through a requesting professional society, to any title 63 licensee, or applicant for license. Physicians health programs and physicians health peer review committees shall be immune from liability for providing intervention, referral, and other support services to the minor children or spouse or both of physicians.

The Court of Appeals stated:

> Although it is not a shining example of legislative drafting, the plain language of Tenn.Code Ann. § 63-6-219(d)(1) indicates that: (1) any of the entities or individuals mentioned (2) are immune from liability (3) to any patient, individual or organization (4) for damages (5) resulting from any decisions or proceedings (6) by peer review committees (7) within their scope of duties (8) made in good faith without malice (9) on the basis of facts reasonably known or reasonably believed to exist. These are the factors courts must examine to determine the applicability of the statutory qualified immunity.

In an issue of first impression, the Court of Appeals held "that the qualified immunity defense under Tenn. Code Ann. § 63-6-219(d)(1) is constitutional under the open courts clause of the Tennessee Constitution and available to a hospital when a patient sues the hospital for credentialing decisions made by a peer review committee." In a footnote, the court stated:

> Of course, the decision must be made in good faith, without malice, on the basis of facts reasonably known or reasonably believed to exist. If a committee made a decision without a good faith review, with malice, or on negligently assembled facts, the immunity would not apply. Tenn.Code Ann. § 63-6-219(d)(1).

The court went on to say that, "[a]s important as this holding is, just as important is what we do not hold." The court explained it did not reach the issue of whether Hospital was actually entitled to qualified immunity in the case because "[t] hat issue will require more proof from the hospital and is, therefore, remanded to the trial court for a determination of whether Centennial's

credentialing decision was made in good faith, without malice, on the basis of facts reasonably known or reasonably believed to exist."

Judge Clement filed a concurring opinion emphasizing the point, and suggesting that based on the current record the court would not be inclined to find in favor of Hospital based on qualified immunity in this particular case:

> Our decision is based in part on substantial evidence in the record-testimony of doctors and nurses who worked with Dr. Pratt at Centennial Medical Center-which indicates that Dr. Pratt, a plastic surgeon, was well known for an admitted emphasis on profits and revenues over patient care, a lack of postoperative follow-up care, and a complication rate that was significantly higher than all other surgeons practicing at Centennial Medical Center. Moreover, and significantly, the testimony in the record reveals that this information was well known by several physicians, nurses and administrators at Centennial Medical Center prior to the credentialing decision at issue.
>
> We fully acknowledge that the evidentiary glass may only be half full, meaning that there may be countervailing evidence that will establish that Dr. Pratt had many redeeming qualities as a physician and surgeon and, thus, support a finding that the decision by the peer review committee was made in good faith. For this reason, we make no ruling concerning whether the decision of the peer review committee was or was not made in good faith based upon facts reasonably known or reasonably believed to exist at the time the credentialing decision was made.

- **Medical Malpractice**
- **Expert Testimony**

Rebecca Mettes v. J. Thomas John, Jr., M.D., No. M2008-00901-COA-R3-CV, 2009 WL 1422987 (Tenn. Ct. App. May 20, 2009). Author: Judge Andy D. Bennett. Trial: Judge Thomas W. Brothers.

Defendant in a medical malpractice action filed a summary judgment motion supported by Defendant's affidavit stating Defendant complied with the applicable standard of care and that Plaintiff did not suffer any injuries as a result of Defendant's treatment of Plaintiff. Plaintiff responded with an affidavit of a physician that the trial court deemed insufficient to rebut Defendant's summary judgment motion. Plaintiff appealed, and the Court of Appeals affirmed. The court found that the affidavit filed by Plaintiff established Plaintiff's expert practiced in a different specialty from Defendant, but never stated that the standard of care for the two specialties was the same. Further, the affidavit did not state that Plaintiff's expert was licensed to practice in Tennessee or a bordering state at any time in the year preceding the alleged malpractice. Finally, the affidavit stated on its face that Defendant's alleged negligence "could

possibly have contributed to" Plaintiff's injury, rather than stating Defendant's actions more probably than not contributed to Plaintiff's injury.

- **Medical Malpractice**
- **Statute of Limitations**
- **Discovery Rule**

***Lou Ella Sherill, et al. v. Bob T. Souder, M.D., et al.*,** No. W2008-00741-COA-R3-CV, 2009 WL 499337 (Tenn. Ct. App. Feb. 27, 2009). Author: Judge J. Steven Stafford. Trial: Judge Donald H. Allen.

Plaintiff filed suit on behalf of her mother because her mother had executed a power of attorney naming the daughter. Plaintiff's claim was dismissed on summary judgment based on the statute of limitations. Plaintiff appealed, contending the discovery rule applied because neither Plaintiff nor her mother was aware of the nature of her condition more than a year before she filed suit. The Court of Appeals affirmed dismissal, noting that Plaintiff's own deposition testimony revealed she had been granted power of attorney over her mother more than a year before the lawsuit. Plaintiff testified she was granted power of attorney specifically because of the exact diagnosis Plaintiff now contended was unknown to Plaintiff and her mother.

Fair warning: The cancellation rule only works in court. Do not try this in arguments with your spouse.

- **Summary Judgment**
- **Medical Malpractice**
- **Tennessee Adult Protection Act**
- ***Res Ipsa Loquitur***

Eugene Cannon v. McKendree Village, Inc., No. M2008-00456-COA-R3-CV, ___S.W.3d ___, 2008 WL 5048250 (Tenn. Ct. App. Nov. 25, 2008). Author: Judge Sharon G. Lee. Trial: Judge Amanda McClendon.

This is yet another in a long line of cautionary tales for those considering lawsuits against health care providers.

Lou Cannon suffered from Alzheimer's and was admitted to McKendree Village nursing home. Cannon apparently fell out of her bed without suffering injury, and her doctor ordered her bed be set at the lowest mattress level and pushed against the wall and that a half side railing be raised on the bed to prevent falls. Less than two weeks later, Cannon was found by McKendree staff on the floor at the foot of her bed, with a cut over one eyebrow and bruising to her face as a result of the apparent fall from her bed.

Plaintiff filed suit against McKendree alleging negligence including negligent supervision and abuse or neglect as defined by the Tennessee Adult Protection Act, Tenn. Code Ann. § 71-6-101

et seq. McKendree filed a summary judgment motion supported by affidavits of nurses and a doctor employed by McKendree, each asserting that McKendree complied with the applicable standard of care for nursing home facilities in its care and treatment of Cannon. Plaintiff did not file an affidavit from any expert in response. The trial court granted summary judgment, and Plaintiff appealed.

Plaintiff argued that the case was not governed by the Tennessee Medical Malpractice Act, and thus Plaintiff was not required to respond with expert opinion testimony under Tenn. Code Ann. § 29-26-115. The Court of Appeals disagreed, ruling "the trial court correctly held that the act or omission complained of here, the decision not to restrain Ms. Cannon in her bed by physical or chemical means, was one that involves a matter of medical science or art requiring skills not ordinarily possessed by lay persons."

The Court of Appeals also ruled that the Tennessee Adult Protection Act did not change the result. Under Tenn. Code Ann. § 71-6-120(g), because the Tennessee Medical Malpractice Act applied, it provided Plaintiff's exclusive remedy and the Tennessee Adult Protection Act could not apply.

Finally, the Court of Appeals rejected Plaintiff's argument that the doctrine of *res ipsa loquitur* could save Plaintiff's case notwithstanding the absence of expert testimony. *Res ipsa loquitur*, both at common law and as codified by the Tennessee Medical Malpractice Act at Tenn. Code Ann. § 29-26-115(c), requires a demonstration by the plaintiff that, among other things, the injury was one which ordinarily does not occur in the absence of negligence. In this case, however, the court found no evidence that an elderly Alzheimer's patient would not be injured in the absence of negligence, and thus refused to apply *res ipsa loquitur.*

Under the 2008 amendments to the Tennessee Medical Malpractice Act, Plaintiff could have been hit with sanctions for filing a malpractice case without a competent expert, including, but not limited to, McKendree's attorney's fees and costs in the case. Tenn. Code Ann. § 29-26-122(d)(3).

- **Medical Malpractice**
- **Expert Witnesses**
- **Locality Rule**
- **Proof of Mailing**

***Robin Farley, et al v. Oak Ridge Medical Imaging, P.C., et al.*,** No. E2008-01731-COA-R3-CV, 2009 WL 2474742 (Tenn. Ct. App. Aug. 13, 2009). Author: Judge Charles D. Susano, Jr. Trial: Judge Donald R. Elledge.

This opinion is busting at the seams with legal issues, including a potential juror making possibly inflammatory statements to the remainder of the jury pool during *voir dire*, and the proper measure of damages for an injured plaintiff who is alive at the time of trial but whose injuries will likely result in a premature death. Our focus is on evidentiary rulings in this medical malpractice case alleging failure to diagnose breast cancer.

First, the Court of Appeals addressed whether an expert witness testifying as to the standard of care in a medical malpractice case must have first-hand knowledge from practicing in the particular community about which the expert is testifying. Defendants relied on *Eckler v. Allen*, 231 S.W.3d 379, 386-87 (Tenn. Ct. App. 2006) for the proposition that the expert claiming familiarity with the standard of care in a similar community must demonstrate that familiarity through personal, first-hand knowledge. In this case, the Court of Appeals stated:

> We do not believe *Eckler* went so far as to hold that the bridge of similarity from the community where the expert practices to the community where the defendant doctor practices, must all be built on personal, firsthand knowledge. There is just too much authority to the contrary that was not even discussed in *Eckler*.

After analyzing numerous appellate medical malpractice cases in which an expert was deemed competent to testify based on connections to a community (rather than a practice address actually within that community), the Court of Appeals explained:

> Based on the above review, we conclude that the holding in *Eckler* cannot be extrapolated to require that an expert's comparison of a standard of care in a community in a contiguous state to a standard of care in the community of the alleged malpractice be made solely on the basis of personal knowledge. If the expert is otherwise qualified, it is enough if he or she is actually practicing in some community in a contiguous state, and "connects the dots" between the standard in that community and the community where the alleged malpractice occurred. The fact that the dots must traverse from the community of practice through the similar community to the community of the alleged malpractice, such as from Kansas City, Missouri, through St. Joseph, Missouri, to Clarksville, Tennessee, will not defeat the connection. Referrals from and interaction with medical providers in neighboring communities, combined with "a comparison of information such as the size, location, and presence [or absence] of teaching hospitals in the two communities" should suffice. *See Travis*, 2005 WL 2277589 at *11 (*citing Roberts v. Bicknell*, 73 S.W.3d 106, 114 (Tenn. Ct. App. 2001)).

With this rationale, the Court of Appeals addressed Plaintiffs' experts, who Defendant characterized as "big city" doctors not competent to testify as to the standard of care in Oak Ridge, Tennessee or a similar community. One of Plaintiff's experts established familiarity with a community by reading mammograms from patients in that community, although the expert actually practiced somewhere else. The court analogized this to accepting referrals from a community. The same expert also demonstrated familiarity with the community because her medical partners maintained an office in the community, which the court was "inclined to believe" was "just as likely to impart information as attending seminars and accepting referrals and staying up through literature." Ultimately, the Court of Appeals affirmed the trial court's decision to admit testimony from each of Plaintiff's three expert witnesses.

The Court of Appeals rejected Defendants' argument that any causation expert in a medical malpractice case must also demonstrate familiarity with the standard of care to be qualified under Tenn. Code Ann. § 29-26-115. Defendants relied on *Payne v. Caldwell*, 796 S.W.2d 142 (Tenn.

1990), but the court reiterated its prior ruling in *Russell v. Pakkala*, No. 02A01-9703-CV-00053, 1998 WL 10212 (Tenn. Ct. App. Jan 14, 1998), that language from *Payne* should not be construed to go so far as to require a causation expert to be familiar with the standard of care.

Defendants contended Plaintiff's causation expert gave testimony about a "missed diagnosis" by one of the defendants and therefore gave "camouflaged" standard of care testimony. The expert admitted he was not familiar with the standard of care for the defendant because the expert did not practice in the same field. The court rejected this argument as well, noting the expert's only discussion of a "missed diagnosis" occurred during Defendants' cross-examination of him.
Defendants also argued Plaintiff failed to proffer evidence that each of Plaintiff's three expert witnesses practiced in a contiguous state in the year preceding the alleged malpractice as required by Tenn. Code Ann. § 29-26-115. The Court of Appeals found some evidence in the record to establish that each expert did practice in a contiguous state in the pertinent time period. For one of the experts, the court found proof of the expert's competency within an affidavit by the expert submitted in response to a motion by Defendants to exclude the expert's testimony. The Court of Appeals noted that, under Tenn. R. Evid. 104(a), the court is not bound by the rules of evidence in making rulings as to the qualification of a person to be a witness, and therefore could consider the expert's sworn statement.

Finally, Defendants asserted the trial court should have admitted into evidence a series of letters sent from Defendant to Plaintiff reminding Plaintiff to have annual breast exams. The Court of Appeals affirmed the trial court's ruling that Defendant did not lay a sufficient foundation for admission of the letters. Defendants' offer of proof was testimony by one of Defendants' employees that all mailings were deposited at the hospital (a non-party) with the expectation that they would be mailed, and that the hospital bills Defendants for the mailings. The employee also testified that some reminders had indeed been received by other patients over the years because those patients called to schedule appointments. The Court of Appeals found this employee did not have sufficient personal knowledge under Tenn. R. Evid. 602 to lay a foundation for admission of the letters.

The court rejected Defendants' argument that the mailing procedure was habit evidence under Tenn. R. Evid. 406. The court noted that, if it accepted Defendants' argument, any person could make proof of mailing by simply testifying, "I left it with someone dependable and expected her to mail it."

- **Medical Malpractice**
- **Summary Judgment**
- **Expert Witnesses**
- **Locality Rule**

Donna Faye Shipley, et al. v. Robin Williams, M.D., No. M2007-01217-COA-R3-CV, 2009 WL 2486199 (Tenn. Ct. App. Aug. 14, 2009). Author: Judge Patricia J. Cottrell. Trial: Judge Barbara N. Haynes

There are a couple of things to take away from this opinion. Firstly, if a party wins summary judgment relying on the testimony of an expert and then later in the case attacks that same expert's competency, summary judgment should be retroactively reversed. Secondly, the locality rule in Tennessee medical malpractice cases is a nightmare at this point.

The timeline is important in dealing with the first issue. Defendant first moved for and was granted summary judgment as to one of Plaintiff's claims, relying only on the testimony of Plaintiff's expert witnesses that Defendant did not deviate from the applicable standard of care. Later, Defendant moved for summary judgment as to the remaining claims by attacking the competency of Plaintiff's same expert witnesses that Defendant previously relied upon. The trial court ruled Plaintiff's experts were not competent, and the Court of Appeals affirmed.

Based upon the finding that Plaintiff's experts were not competent, and since that was the only testimony Defendant relied on in her first summary judgment motion, the Court of Appeals found that Defendant failed to provide proof to negate an essential element of Plaintiff's claim in that summary judgment. The court therefore reversed summary judgment on that claim.

The court also discussed the bases for finding Plaintiff's experts were not competent under Tenn. Code Ann. § 29-26-115. The Court of Appeals found the trial court did not abuse its discretion in finding that an emergency room physician did not practice in a similar enough specialty to that of Defendant, a surgeon, for that expert's testimony to be relevant to the standard of care.

Plaintiff's second expert was excluded on a finding that he was not competent under the locality rule. The Court of Appeals found the expert failed to prove that Defendant's community, Nashville, was similar to the expert's medical community, Asheville, North Carolina. The expert testified that Asheville "had acute beds and general surgeons and that the hospital where he practiced was a teaching hospital." However, the court found that:

> The agreed upon Statement of Facts showed the medical communities of Nashville and Asheville to be quite different. Nashville has more hospitals than Asheville and has medical schools which Asheville does not. Demographically, Asheville is much smaller. Based upon the discussion in *Badgett v. Adventist Health Systems Sunbelt, Inc.*, M2007-02192-COA-R3-CV, 2009 WL 2365567 (Tenn. Ct. App. July 31, 2009), we cannot conclude that the trial court abused its discretion in finding that [the expert] failed to prove that the medical communities of Asheville and Nashville are similar.

(I led off my discussion of *Badgett* last month by saying, "This case is going to confound medical malpractice lawyers for years.").

Finally, the Court of Appeals rejected Defendant's argument that, because the trial court granted summary judgment to an emergency room physician in the same case based on allegations similar to those against Defendant, that summary judgment necessarily precluded a recovery against Defendant. The court noted that the two doctors practiced in different specialties, saw the patient at different times, and therefore findings regarding the applicable standard of care in the emergency room physician's evaluation and treatment of the patient did not necessarily predispose of the same issues in the case against Defendant surgeon.

- **Motion Requirements**
- **Summary Judgment**
- **Medical Malpractice**
- **Experts**
- **Competency**

***Herb A. Harris v. Pradumna S. Jain, M.D.*,** No. E2008-01506-COA-R3-CV, 2009 WL 2734083 (Tenn. Ct. App. August 31, 2009). Author: Judge Charles D. Susano, Jr. Trial: Judge Dale C. Workman

There's something for everyone in this opinion. For all lawyers: an unequivocal statement that a summary judgment motion must, on its face, state the grounds for the motion. For medical malpractice lawyers: a nuanced discussion of admissions that will keep an expert from testifying about a standard of care outside their specialty.

First, the Court of Appeals agreed with Plaintiff that Defendant was required to include the grounds it asserted for summary judgment in the motion it filed with the trial court. The court noted that the Supreme Court has held an accompanying memorandum of law does not satisfy the requirement that the grounds be set forth in the motion with particularity. *Willis v. Tenn. Dept. of Correction*, 113 S.W.3d 706, 709 n.2 (Tenn. 2003). The Court of Appeals concluded Defendant's motion, without the memorandum, did not clearly state that Defendant was challenging the competency of Plaintiff's expert, and that Defendant's citation to "a statute as broad as Tenn. Code Ann. § 29-26-115" did not satisfy the particularity required by Tenn. R. Civ. P. 7.02 (1).

In the interest of judicial economy, however, the court looked to the merits of the motion, noting that Plaintiff acknowledged at the summary judgment hearing he understood the basis for Defendant's motion, and that the parties and the trial court discussed the merits extensively.

Turning to the merits, the Court of Appeals affirmed the trial court's finding that Plaintiff's expert did not know the standard of care for pediatric psychiatrists practicing in Knoxville or a similar community. The court summarized repeated testimony from the expert that he would "defer to a pediatric psychiatrist," and that he would not normally treat patients with this condition. The

court stated that "[t]he closest [Plaintiff's expert] came to articulating a standard of care was 'the standard of basic common sense that any physician who practices medicine in this country would know.'"

The Court of Appeals explained that testimony of a general standard of care applicable to all doctors will not satisfy the statutory burden. *Cardwell v. Bechtol*, 724 S.W.2d 739, 754 (Tenn. 1987). The court further explained that, "[s]imilarly, generalized statements concerning a deviation from the way medical professionals practice has been held insufficient to counter a motion for summary judgment when the expert admitted not knowing the standard for the specialty at issue in the case." *Goodman v. Phythyon*, 803 S.W.2d 697, 700 (Tenn. Ct. App. 1990). Finally, the court noted that it recently held the same expert was not competent to testify as to the standard of care for an emergency room physician, for largely the same legal rationale. *McDaniel v. Rustom*, No. W2008-00674-COA-R3-CV, 2009 WL 1211335 at * 9-12 (Tenn. Ct. App. filed May 5, 2009).

- **Medical Malpractice**
- **Expert Witnesses**
- **Locality Rule**

Sarah Elizabeth Plunkett, et al v. Bradley-Polk OB/GYN Services, et al., No. E2008-00774-COA-R3-CV, 2009 WL 3126265 (Tenn. Ct. App. September 30, 2009). Author: Judge Charles D. Susano, Jr. Trial: Judge Ginger Wilson Buchanan.

In this case, the Eastern Section Court of Appeals again dissects the "similar community" standard for the locality rule in medical malpractice cases. As it did in *Farley v. Oak Ridge Med. Imaging, P.C.*, the Eastern Section interprets the locality rule as a generous standard so long as the expert witness demonstrates a reasonable basis for comparison between the expert's and the defendant's communities. In this case, the Court of Appeals reiterated part of its holding from *Farley*:

> If the expert is otherwise qualified, it is enough if he or she is actually practicing in some community in a contiguous state, and "connects the dots" between the standard in that community and the community where the alleged malpractice occurred. The fact that the dots must traverse from the community of practice through the similar community to the community of the alleged malpractice, such as from Kansas City, Missouri, through St. Joseph, Missouri, to Clarksville, Tennessee, will not defeat the connection.

The court also echoed its analysis from *Farley* of prior locality rule cases, noting that experts have been qualified under the similar community standard "in a variety of ways with a variety of information." Both the *Farley* and *Plunkett* opinions suggest that parties are not required to qualify their experts under the similar community standard through means and data that have already been tested in the appellate courts. Instead, an expert may be qualified so long as a rational basis is put forward for comparing the expert's and the defendant's community, and

regardless of whether that basis has been approved for another expert in a past case. A trial court abuses its discretion, however, if the bases for the expert's qualifications are similar to those of an expert who has been deemed qualified under the locality rule in a past appellate case.

In this case, the trial court ruled that the expert was not qualified under the similar community standard, and the Court of Appeals reversed. If you're only interested in the big picture, you can move on to the next opinion. But if you deal with medical malpractice cases and need to know the factual underpinnings of the expert's qualifications in this case for comparison to experts in your own cases, read on.

The court summarized the materials the expert reviewed to familiarize himself with the case and Defendants' community: (a) the patient in the case's medical records; (b) deposition transcripts of the patient and Defendant Doctor; (c) a U.S. Census Bureau profile of demographic characteristics for Defendants' county; (d) a Tennessee Chamber of Commerce economic report from Defendants' city; (e) a map of hospitals in Defendants' county; and (f) website pages and publications from the hospital where the alleged negligence occurred. The expert had never been licensed in Tennessee and had never practiced in Defendants' city or county. The expert was aware of the number of beds at the hospital where the alleged negligence occurred, the approximate number of registered nurses and nursing staff size, that the hospital was accredited by the JCAHO, and was equipped to and regularly provided obstetrical services, which was the type of care at issue in the case.

The expert testified that the vast majority of his practice was in Fairfax Virginia, which was "not readily comparable" to Defendants' communities of Cleveland and Bradley County, Tennessee because of size. The expert also testified, however, that he had some involvement with obstetric services in McLean, Virginia and Warren County, Point Royal, Virginia, which compared favorably to Cleveland and Bradley County. On cross-examination, the expert admitted he had never delivered babies in Warren County and that he had previously testified that he had never practiced outside the Washington D.C. Metropolitan area, which included Fairfax. On redirect, the expert testified that although the smaller communities are within the greater metropolitan area of Washington, D.C., they are also separate and distinct communities comparable to Cleveland and Bradley County being within the metropolitan area of Chattanooga, Tennessee, but separate and distinct.

The trial court disqualified the expert because the trial court found the expert's community was much larger and dissimilar to Defendants' city or county. The Court of Appeals reversed, explaining:

> The fundamental problem we have with the trial court's ruling is that upon hearing that the smaller communities of McLean and Point Royal, Virginia, were within the realm of a large metropolitan area, the trial court considered only the larger community and refused to consider the smaller communities and their similarities that Dr. Ross identified. Certainly the case law does not support the proposition that an expert with a practice centered in a large metropolitan area is disqualified to talk about a small community in Tennessee despite his involvement in similar small

> communities that are in or near his primary practice community. To the contrary, experts who practice in large cities have been allowed to testify that smaller satellite communities are similar to small Tennessee communities, including Cleveland.

The Court of Appeals also found that the record did not support the trial court's analysis because the expert testified "that McLean, Virginia and Warren County, Point Royal, Virginia, are distinct communities with a separate identity despite their proximity within the Washington D.C. metropolitan area." Specifically, the expert "identified similarities including population, medical facilities, medical personnel, and proximity to larger medical communities." The court restated its prior observation "that similarity is all that is required as no two communities will be identical[,]" citing *Lane v. McCartney*, No. E2008-02640-COA-R3-CV, 2009 WL 2341536 (Tenn. Ct. App., E.S., filed July 30, 2009).

MISREPRESENTATION

- **Fraud**
- **Tennessee Consumer Protection Act**
- **Reliance**

Mark Bradley v. All American Classics of Tennessee, Inc. d/b/a Classic Cars Southeast, No. M2008-01738-COA-R3-CV, 2009 WL 1034797 (Tenn. Ct. App. April 16, 2009). Author: Judge Andy D. Bennett. Trial: Judge John D. Wooten, Jr.

This case is worth reading because of its potential impact on fraud or deception claims involving sales over the internet. Plaintiff bought a classic car advertised on the internet as "all original" and "rust free." (You can probably see where this is going…) Plaintiff alleged that, soon after the car was delivered, Plaintiff noticed numerous obvious defects that Defendant had not revealed in the ad or Plaintiff's communications with Defendant.

Plaintiff sued alleging fraud and Tennessee Consumer Protection Act violations. The trial court granted directed verdict to Defendant, finding Plaintiff could not succeed on his claims because "common observance" would have revealed the problems if Plaintiff had inspected the vehicle.

The Court of Appeals reversed. First, under Plaintiff's fraud theory, the court found a question of fact as to whether Plaintiff reasonably relied on Defendant's alleged misrepresentations. The court explained at length the significance of a sale through an internet ad in the context of a fraud claim:

> From the facts of this case, one could certainly find that the representations and actions of All American Classics of Tennessee were "calculated to lull the suspicions of a careful man into a complete reliance thereon." *Pakrul,* 631 S.W.2d at 438. In our opinion, under these facts, it is too simplistic merely to say that Bradley should have examined the car or hired someone to inspect it. Our rules of conduct are based primarily

> on the face-to-face transaction, historically the most common mode of conducting commerce. That is why the opportunity to inspect is given such importance: even if the seller lies to the buyer, the buyer can view and examine what he is buying. In the last decade, the internet has revolutionized commerce. In this case prospective purchasers all over the world can look at All American Classics' web site. While it may be reasonable for a prospective buyer in Nashville, Charlotte, Jackson or even Memphis to make the pilgrimage to Lebanon to examine the car personally, it may not be reasonable for someone farther away to do so.
>
> Ownership of a web site is not a license to lie. When considering the reasonableness of Bradley's reliance, we cannot lose sight of the representations All American Classics made and the actions it took to induce his reliance. All American Classics made a number of bold, unequivocal statements on its web site about the condition of the car body, the engine, the transmission and the brakes that, according to Bradley's proof, are false. The pictures sent to Bradley were taken in a way that would not reveal these and other problems. One cannot be permitted to fill a web site with misrepresentations designed to induce a buyer to purchase an item in reliance thereon and remain immune from liability based on the simple fact that the buyer did not inspect the item before purchase. The reasonableness of Bradley's reliance on All American Classics' misrepresentations must be determined objectively in light of the totality of the circumstances surrounding the transaction, including, but not limited to, whether All American Classics intended that Bradley rely upon its misrepresentations and act or not act in reliance on those representations. *See* 8 T.P.I. - Civil 8.36 (8th ed. 2008).

The Court of Appeals also found Plaintiff made a *prima facie* claim for an unfair practice and a deceptive practice.

The Court of Appeals' decision is good for honest sellers and ordinary consumers. It is bad for sellers who choose to lie. Enough said.

- **Fraudulent Misrepresentation**

Joyann E. Butler v. James Michael Butler, No. W2007-01257-COA-R3-CV, 2008 WL 5396019 (Tenn. Ct. App. Dec. 23, 2008). Author: Judge David R. Farmer. Trial: Chancellor Jerry Stokes.

Wife filed a motion to enforce a marital dissolution agreement against Husband. Husband's response brief asserted that Wife committed fraud in inducing Husband to sign the agreement, in that Wife had secretly destroyed much of the personal property Husband was to receive under the agreement. The trial court denied Wife's motion, and Wife appealed.

On appeal, Wife asserted that Tenn. R. Civ. P. 9.02 required Husband to plead the fraud with particularity in his response brief. The Court of Appeals assumed, *arguendo*, that Rule 9.02 applied to the brief. The court noted that Rule 9.02 requires the party pleading fraud to, at a minimum, identify the person who made the false statement and describe the substance of the statement. The court found Husband's response brief did so in this case.

- **Fraudulent Misrepresentation**
- **Home Defects**

Goodman v. Jones, No. E2006-02678-COA-R3-CV, 2009 WL 103504 (Tenn. Ct. App. Jan. 12, 2009). Author: Judge Charles D. Susano, Jr. Trial: Judge E. Russell Simmons, Jr.

There is a lot of this home defect litigation going around. This one concerns problems with a septic system and resulted in the Goodmans suing the property seller Jones for fraud, negligent misrepresentation, breach of contract, and a TCPA violation. The Goodmans lost at trial, and filed an appeal.

The Goodmans first complained that the trial judge only charged the jury on the theory of intentional misrepresentation requiring rescission under the Tennessee Residential Property Disclosure Act, Tenn. Code Ann. § 66-5-201, and not under the common law theory, saying that they did not sue under the Act. The appellate court found that Plaintiffs did not object to the charge as given by the judge at trial and, more importantly, that the charge given was essentially the charge under the common law.

The trial judge charged that intentional misrepresentation must be proved by clear and convincing evidence. This is partially correct, because the one remedy sought was rescission, which requires a higher burden of proof. Thus, the appellate court concluded that the trial judge correctly charged the jury on this issue.

However, the trial judge erred by not charging the jury on breach of contract and negligent misrepresentation. A judge has a duty to charge on each theory of the parties supported by the evidence, and the record contained evidence on these issues. The case was remanded for a new trial on those issues.

The Trial Judge required the Goodmans to choose rescission or damages under the intentional misrepresentation theory, and the Goodman's did not challenge that determination.

As to the other causes of action, the appellate court explained that the Goodmans were not required to elect a remedy before trial. Indeed, the Court explained that

> [A] judgment for rescission and damages is not necessarily inconsistent. To guard against an inconsistent verdict, the trial court on remand, with the assistance of the parties, should prepare and submit to the jury specific questions in order to guard against 'a double recovery for a single wrong.'

(citation omitted).

So, this is the procedure at the next trial:

> [W]hat remains are the Buyers' claims based upon breach of contract and negligent misrepresentation. If the Buyers choose to proceed on remand both as to the remedy of rescission and restitution on the one hand and damages on the other, no election of remedies shall be required prior to the jury's verdict. To the extent the Buyers are seeking rescission and restitution, the burden of proof is clear and convincing evidence. On their suit for damages, the burden is preponderance of the evidence. If the Buyers continue to disaffirm the sale of the property to them and seek restitution, any damage award must be consistent with the disaffirming of the transaction. If the jury's verdict results in 'a double recovery for a single wrong,' there must be an election by the Buyers. The Court, with the assistance of the parties, should craft special interrogatories.

Complicated stuff. What are the odds that this case can be tried again without error?

- **Misrepresentation**

Rural Developments, LLC. v. Tucker, No. M2008-00172-COA-R3-CV, 2009 WL 112541 (Tenn. Ct. App. Jan. 14, 2009). Author: Special Judge Walter H. Kurtz. Trial: Chancellor C. K. Smith.

This is another commercial tort case, this one arising out of the sale of commercial property. Buyers/Plaintiffs said that Sellers/Defendants misrepresented the amount of water that was produced by a spring on the property. Plaintiffs asserted a laundry list of causes of action, seeking rescission and/or damages.

The Court of Appeals agreed with the trial judge that Buyers could not maintain a misrepresentation claim because they could not establish that they "reasonably relied" on the representations of Sellers. The Court explained that "'generally, a party dealing on equal terms with another is not justified in relying upon representations where the means of knowledge are readily within his reach.'" (Citation omitted). Here, Buyer had the opportunity but "failed to closely inspect (the spring) or measure its output."

I respectfully disagree with this portion of the decision. I think the question of reasonable reliance is almost always a question of fact that goes to the jury. This is particularly true in a negligent misrepresentation case, where the question of reasonable reliance is inexorably linked to the comparative fault of the plaintiff.

Those of you who do commercial torts will find a nice summary of the law of "frustration of purpose" in this opinion. Because the application of the doctrine is rare, the discussion will not be repeated herein.

There is one last subject of interest. Appellants, and the Court of Appeals, were critical of the Chancellor's decision to call witnesses and examine them as part of the summary judgment hearing. The appellate court said this was "irregular" but not unheard of. Most importantly for readers of this newsletter, the reviewing court found that Appellants could not complain of the Chancellor's conduct because they did not object to it.

- **Misrepresentation**
- **Fraud**
- **Residential Properties Disclosure Act**
- **Burden of Proof**
- **Election of Remedies**
- **Jury Charges**

Goodman v. Kelly, No. E2006-2678-COA-R3-CV, 2008 WL 4756872 (Tenn. Ct. App. Oct. 30, 2008). Author: Judge Charles D. Susano, Jr. Trial: Judge Russell E. Simmons, Jr.

Yet another case where a purchaser of a home ended up with a septic tank problem.

The jury found for Seller, but the Court of Appeals remanded the case because of the failure of the trial judge to charge the jury on several causes of action and the failure to appropriately charge the jury on the burden of proof.

More specifically, the court held that there was material evidence to support the jury's verdict that Seller did not intentionally misrepresent the condition of the property to Buyer. The appellate court did not comment on that portion of the charge that required Buyer to prove this theory by "clear and convincing evidence," a burden higher than the preponderance of the evidence standard I believe the law requires.

Second, the court ruled that the trial judge failed to charge the jury on the theories of breach of contract and negligent misrepresentation. Because a judge has a duty to charge each theory raised by the pleadings and supported by the proof, the court remanded the case for a new trial on those theories.

Third, the court explained that the trial judge inappropriately required Buyers to elect their theory of recovery before submitting the case to the jury. This was error – the Tennessee Supreme Court's opinion in Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901 (Tenn. 1999) held just the opposite. The opinion does a nice job of reminding us about the law of how one should instruct a jury when there are multiple theories of liability.

Finally, the court reminded the trial judge that the jury should be charged with the "preponderance of the evidence" standard when the case is re-tried.

This case should be read by those who (a) litigate "bad house" cases as a part of their practice, or (b) have a pending jury case where there are multiple theories of recovery. There is no new law

in this opinion, but it does a nice job summarizing the law of jury charges in multiple-theory cases.

- **Misrepresentation**
- **Fraud**
- **Expert Witnesses**
- **Pleadings - TRCP Rule 8.05**

Kevin Orndorff v. Edward Ron Calahan, No. M2007-02060-COA-R3-CV, 2008 WL 4613546 (Tenn. Ct. App. Oct. 9, 2008). Author: Judge Andy D. Bennett. Trial: Chancellor Claudia C. Bonnyman

Lawsuits by home buyers against home sellers for misrepresentation are the 21st century, urban equivalent of boundary litigation in the country: to say that emotions run high is an understatement. Indeed, perhaps the only civil cases where emotion runs higher are divorce cases where husband takes up with wife's younger, more attractive sister.

This is the classic "We-bought-your-house-and-you-did-not-tell-us-the-truth-on-the-disclosure-form" case.

First, Judge Bennett does a nice job of discussing the law of reasonable reliance. The real estate contract signed by the buyers said that they did not rely on any representations, but Judge Bennett explained that the Tennessee Residential Property Disclosure Form, Tenn. Code Ann. § 66-5-201 *et seq.* was not trumped by the language in the contract.

Second, the court held that the fact that the buyers had the house inspected by their own home inspector did not relieve the sellers of responsibility for the misrepresentations.

Third, the court ruled that the trial court did not err in considering the testimony of Plaintiff's expert witness on the problems with the home – despite the fact that he was not a licensed contractor, electrician or plumber. The opinion reminds us that Tennessee courts evaluate the qualifications of experts as gatekeepers, not storm troopers.

Fourth, the court elevated substance over form by affirming the Chancellor's decision to permit the buyers to prove violations of the local building code even though the same were not specifically plead in the complaint as required by Rule 8.05 of the Tennessee Rules of Civil Procedure. Note, however, that Plaintiffs went to great lengths to advise the sellers of the applicable code sections before trial, so the court excused that lack of compliance with Rule 8.05.

- **Misrepresentation**

Dale and Lauren Stafford v. Robert Emberton, No. M2008-02250-COA-R3-CV, 2009 WL 2960391 (Tenn. Ct. App. September 15, 2009) Author: Judge Patricia J. Cottrell. Trial: Chancellor Laurence M. McMillan.

The Court of Appeals affirmed summary judgment for Seller of a home on a misrepresentation claim by Buyers. Seller filed an affidavit stating he was not aware of any defects in the home, which was sufficient to affirmatively negate the element of knowledge by Seller. Buyers responded only by referencing the complaint and an affidavit by one of the Buyers. The court did not summarize the assertions in Buyer's affidavit, but found it was not sufficient to rebut Seller's affidavit. Alternatively, the court found an exculpatory clause in an agreement between Buyers and Seller designating the sale "as is" also negated the essential element of reliance by Buyers.

MOTOR VEHICLE

- **Motor Vehicle Case**
- **Expert Testimony**

Stricklan v. Patterson, No. E2008-00203-COA-R3-CV, 2008 WL 4791485 (Tenn. Ct. App. Nov. 4, 2008). Author: Herschel Pickens Franks. Trial: Judge John B. Hagler.

The Eastern Section has affirmed a verdict for Plaintiff in a motor vehicle wreck case. It held it was not error to admit the expert testimony of a doctor who had not seen Plaintiff for three years.

- **Summary Judgment**
- **Railroad Crossings**
- **Automobile Accidents**
- **Comparative Fault**
- **Subsequent Remedial Measures**

Martin v. Norfolk Southern Rwy. Co., No. E2006-01021-SC-R11-CV, 271 S.W.3d 76 (Tenn. Nov. 14, 2008). Author: Chief Justice Janice M. Holder. Author of Concurring Opinion: Justice William C. Koch. Trial: Judge Donald Ray Elledge.

Decedent died from injuries suffered when struck by a train at a railroad crossing. The evidence showed Decedent was familiar with the crossing. While Decedent was at a complete stop at the crossing, a train was approaching from her right. The train's conductor testified he saw Decedent's car when the train was approximately 400 feet from the crossing. At some point after that, Decedent began to move her car into the railroad crossing, was hit by the train, and suffered fatal injuries. Decedent's family sued the railroad and the train's engineer. The trial court granted summary judgment to both Defendants, finding no reasonable jury could conclude Decedent was less than 50% at fault, and a divided Court of Appeals affirmed.

This is the first case applying the summary judgment standard explicitly articulated in *Hannan v. Alltel* (see page 4 for a discussion of the *Hannan* opinion). If you are drafting a brief or new opinion and are looking for a succinct statement of the summary judgment standard in Tennessee, this case should be a solid resource to avoid reinventing the wheel.

Defendants argued, based on *Tenn. Cent. Ry. Co. v. Hayes*, 9 Tenn. App. 116 (1928), that railroad companies do not have a duty to ensure that railroad crossings provide a reasonable degree of visibility to motorists. The Supreme Court rejected this argument, ruling that railroads have a duty to maintain adequate crossings for public highways, including "a duty to ensure that vegetation on the railroad's right-of-way does not unreasonably interfere with motorists' ability to perceive an oncoming train." "Accordingly, an injured party may recover for a claim based solely on a railroad's breach of its duty to ensure that vegetation on its right-of-way does not unreasonably obstruct motorists' view of approaching trains."

In footnote 2, the Supreme Court explained the bounds of its holding in order to avoid any preemption argument. Federal regulations address the maintenance of vegetation "on or immediately adjacent to roadbed" and therefore preempt state efforts to regulate the maintenance of vegetation in that area. 49 C.F.R. § 213.37 (2007). The court explained that the duty recognized in *Martin* extends only to vegetation that is on the railroad's right-of-way but not on or immediately adjacent to the roadbed.

The Supreme Court concluded that Defendants effectively negated liability and causation with affirmative proof, shifting the burden to Plaintiffs to respond. The court found Plaintiffs adequately responded, however, to create four genuine issues of material fact.

First, the court found a genuine issue as to whether Decedent could see the train before leaving her initial stopped position. The court pointed to testimony from the train's conductor that he could see the car's front bumper and hood when it was 400 feet away, as well as testimony from Plaintiffs' expert who testified that Decedent would have been able to see only 300 feet in the direction of the train.

Second, the court found a genuine issue as to whether Decedent stopped a second time while crossing the tracks. The court found it noteworthy that the train's conductor filled out an initial written statement after the accident, checking a box indicating that Decedent "Stopped, then Proceeded" rather than a box for "Other" to describe Decedent stopping a second time.
Next, the court found a genuine issue as to whether Decedent had sufficient time to see the train, react, and bring her vehicle to a stop in a safe location. The court found that the facts in the record did not provide "any concrete answers" as to when Decedent could or should have seen the train, and therefore various inferences could reasonably be drawn. Viewing the facts in the light most favorable to Plaintiffs and affording Plaintiffs the benefit of all reasonable inferences, the court concluded a reasonable jury could accredit Plaintiffs' expert's testimony on the subject.

Finally, the court found a genuine issue as to whether the train's engineer sounded the train's whistle. Under Tennessee law, Defendants had a statutory duty to blow the whistle before reaching a crossing. *See* Tenn. Code Ann. § 65-12-108(2). Defendants presented the testimony of the train's engineer that he repeatedly blew the whistle as he approached the crossing, and

affidavits from two witnesses that they heard the whistle around that time. Plaintiffs responded with testimony from another motorist who said he was in a position to hear the whistle but did not hear it. The court concluded the evidence presented by Plaintiffs was sufficient to create a genuine issue of material fact.

In a footnote, the court noted that Defendants moved to supplement the record with testimony that the witness who did not hear a whistle from the train was, in fact, hearing impaired. The court, however, ruled the evidence was not properly in the record and the court would not consider it for the first time on appeal. Significantly, the court stated that the fact that the witness was hearing impaired would go only to the weight of the evidence, an issue normally reserved for the trier of fact.

The Supreme Court did not address whether Decedent would be barred from recovery as 50% or more at fault as a matter of law if the train's whistle had definitely blown within range of her hearing.

Defendants moved under Tenn. R. Evid. 407 to exclude evidence that they cleared vegetation at the crossing thirty-one months after the accident. Plaintiffs contended that clearing the vegetation was not remedial because it was carried out in accordance with Railroad's internal policies rather than with the intent of remedying the condition that allegedly lead to the accident. The Supreme Court rejected Plaintiffs' argument, stating that clearing the vegetation was remedial because it corrected an allegedly dangerous condition and made the crossing safer for future motorists, and the fact that it was done per company policy did not change its remedial nature.

The Supreme Court recognized "that other jurisdictions have held that subsequent remedial actions will not be excluded if the implementation of the remedy began before the accident but was not completed until after the accident." The court distinguished these cases, however, stating: "Although [Railroad] had a policy of clearing vegetation from crossings prior to the collision, there is no evidence that [Railroad] had made a decision to clear the vegetation at this particular crossing prior to the accident." The court expressed no opinion regarding the adoption of the logic from other jurisdictions.

The Supreme Court also rejected Plaintiffs' contention that exclusion of subsequent remedial measures was unnecessary because Railroad was required to do so by Tenn. Code Ann. § 65-6-132(a). The Court noted that statute is limited to clearing trees "which are six (6) or more inches in a diameter two feet (2') above the ground and of sufficient height to reach the roadbed if they should fall." Because trees and other vegetation smaller than those implicated by the statute could just as easily obscure a motorist's view of a train, the court stated that "compliance with the statute alone is insufficient to encourage railroad companies to remedy dangerous crossings." The court therefore affirmed exclusion of evidence that Railroad cleared vegetation afterwards under Tenn. R. Evid. 407.

Justice Koch concurred, agreeing there was a genuine issue of material fact as to whether the train's conductor sounded the whistle before reaching the railroad crossing. He did not state his reason for filing a separate concurrence, but he did refrain from addressing the other three factual

disputes identified by the majority: whether Decedent could see the train before leaving her initial stopped position; whether Decedent stopped a second time while crossing the tracks; and whether Decedent had sufficient time to see the train, react, and bring her vehicle to a stop in a safe location.

NEGLIGENCE

- **Negligence**
- **Duty to Preserve Evidence for Third Parties**

Graco Children's Products, Inc., et al. v. Shelter Mutual Insurance Company, Inc., et al., No. W2008-01915-COA-R3-CV, 2009 WL 1765692 (Tenn. Ct. App. June 23, 2009). Author: Judge J. Steven Stafford. Trial: Judge Charles Creed McGinley.

A driver and passenger in a vehicle were injured in a motor vehicle accident. They settled their property damage claim with the other driver's Insurer, transferring title in their vehicle to Insurer. Insurer also told the accident victims they should consult with an attorney to see if any they had any claims related to the accident. Insurer then sold the vehicle for salvage. Two weeks later, an attorney on behalf of the accident victims sent a letter to Insurer requesting the vehicle be stored for investigation of the accident. The accident victims later filed suit against Company (apparently a products liability suit related to the accident), and ultimately settled their lawsuit against Company.

Company sued Insurer asserting common law negligence for destroying the vehicle. Company contended Insurer deprived potential litigants of a piece of evidence.

The trial court granted summary judgment to Insurer, and the Court of Appeals affirmed, ruling Insurer owed no duty under the circumstances. The court noted that, at the time the vehicle was sold for salvage, no employee of Insurer was aware of any litigation or investigation. The court found Insurer's statement that the accident victims should speak with a lawyer did not show it was foreseeable to Insurer that destroying the vehicle would create an unreasonable risk of harm. The court also noted that to hold otherwise would require insurers to store at their expense damaged vehicles indefinitely to prevent any harm "to a vast and unknown array of potential litigants."

So does this mean that Insurer *could* have owed a duty to potential defendants if Insurer received a request to preserve the vehicle from the accident victims' attorney before the vehicle was sold for salvage? If so, does that mean that any request from a tort victim to an insurer to preserve evidence creates a duty on the insurer to all potential defendants in the underlying lawsuit? In *Trumbo, Inc. v. Witco Corp.*, No. W2002-01186-COA-R3-CV, 2003 WL 21946734 (Tenn. Ct. App. Aug. 11, 2003), the Court of Appeals was asked to recognize an independent cause of action for spoliation of evidence, but did not address the issue because it found no causation under the circumstances of the case. Between *Trumbo* and *Graco*, it looks like Tennessee appellate courts might recognize a cause of action for spoliation under the right set of facts.

- **Negligence**
- **Wrongful Death**
- **Duty**
- **Summary Judgment**

Cheryl Brown Giggers et al v. Memphis Housing Authority et al, No. W2006-00304-SC-R11-CV, 277 S.W.3d 359 (Tenn. Feb. 3, 2009). Author: Justice Gary R. Wade. Concurring and Dissention Opinion Author: Justice Janice M. Holder. Trial: Judge Kay S. Robilio.

L.C. Miller was a tenant in Jefferson Square, a housing project owned by the Memphis Housing Authority ("MHA"). Miller engaged in an argument with the housing project's security guard, fired shots in the direction of his office, and struck and killed Charles Cornelius Brown, Sr., another tenant at the facility who happened to be in the office area at that time. Brown was not involved in the argument.

When Miller filed an application to reside in the apartment complex seven years before the shooting, MHA investigated his credit history and performed a home visit. Records in the department of security head's office indicated that MHA asked the Sheriff's Department to conduct a background check on Miller. The investigation extended over the three years prior to the application, and did not "uncover information that prohibit[ed] his . . . being housed . . . pursuant to MHA admission policies."

Well after Miller had taken occupancy of an apartment unit, he inflicted a pocket knife wound upon another tenant after a verbal exchange. A report filed with MHA indicated that Miller, agitated by another tenant, threatened to kill the tenant unless he "stop[ped] singing in my ear." Shortly thereafter, Miller "jumped out of some bushes swinging a knife, scratching [the tenant] on the arm." The report established that the other tenant originally declined to press charges, but did so afterwards when Miller continued to make verbal threats. Miller was arrested for aggravated assault as a result of the incident and a second report was filed by MHA. MHA placed Miller on probationary status for one year, warning that future violations would be basis for a termination of his lease.

The head of MHA's department of security testified that he had no recollection of the incident, but acknowledged that MHA had a "one-strike" policy in effect at that time, calling for eviction for the first instance of disruptive behavior. He explained that the operations manager for MHA had the responsibility of determining whether to evict based upon the report filed. He further testified that, if MHA knew it had a tenant who had assaulted another tenant with a knife, "[t]he tenant's lease should be terminated."

Brown's heirs filed a wrongful death suit against MHA and the City of Memphis, alleging negligence and breach of contract. Plaintiffs contended that Defendants were negligent by failing to adequately investigate Miller's background prior to allowing him to lease a unit; by failing to enforce internal policies which would have affected Miller's status as a tenant; by allowing Miller to possess a rifle on the premises; and by failing to properly assess the risk Miller presented to the other tenants on the property. Plaintiffs also asserted that Defendants had breached a contractual obligation within their lease agreement by failing to maintain a safe

premises. The trial court dismissed the claims against the City. After MHA answered the complaint, Plaintiffs added the private company which provided security at the time of the shooting. MHA filed a motion to dismiss, or alternatively for summary judgment.

Plaintiffs responded with exhibits establishing that, on two occasions more than fifteen years before applying to live at Jefferson Square, Miller had been charged with aggravated assault and had pled guilty to firing a weapon within the city limits. There was no indication that MHA was aware of either incident. Plaintiffs also provided documentation of the altercation that resulted in the charge of aggravated assault against Miller while at Jefferson Square. They also alleged that there had been between ten and twenty shooting incidents on the various MHA properties and numerous other assaults prior to the murder of Charles Cornelius Brown, Sr. Based upon the incident at Jefferson Square, the Plaintiffs argued that MHA had notice of Miller's propensity for violence and reiterated their contention that MHA had failed to maintain a safe premises. Plaintiffs asserted that MHA had failed to observe its own internal policies which were designed to prevent violence on the part of its tenants.

The trial court granted summary judgment to MHA, finding no duty to Plaintiffs under the circumstances. The Court of Appeals affirmed. The Supreme Court of Tennessee granted permission to appeal to consider the propriety of the negligence claim and specifically whether MHA, having knowledge of Miller's prior act of violence at the apartments, owed a duty to the decedent.

Stating that duty was the dispositive element for this case, the Supreme Court analyzed the development of duty in negligence cases in Tennessee. The court noted that, at common law, courts were reluctant to impose liability for nonfeasance, a course of inaction, as opposed to an act risking harm to others. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS§ 56, at 373 (5th ed. 1984). Exceptions have been created for circumstances in which the defendant has a special relationship with either the individual who is the source of the danger or the person who is at risk. The court explained:

> The relationship between a landlord and a tenant is one of those relationships deemed special, placing an obligation on landlords to use reasonable care to protect tenants against unreasonable risk of foreseeable harm. *See Speaker v. Cates Co.*, 879 S.W.2d 811, 814-15 (Tenn. 1994); *Tedder v. Raskin*, 728 S.W.2d 343, 347 (Tenn. Ct. App. 1987); *cf. Doe v. Linder Constr. Co.*, 845 S.W.2d 173, 177-78 (Tenn. 1992); *Biscan v. Brown*, 160 S.W.3d 462, 478-79 (Tenn. 2005). This relationship creates an affirmative charge to either control the source of the danger or to protect an endangered tenant. *See* RESTATEMENT (SECOND) OF TORTS §§ 314A(1)(a), 314A(2) & 315(b). Thus, a landlord, while not an insurer, owes a tenant the duty "to take reasonable precautions to protect [his or her] tenants from criminal acts of third parties on the leased premises," among other foreseeable dangers. *Tedder*, 728 S.W.2d at 347; *see also Linder Constr. Co*., 845 S.W.2d at 177-78.

The majority stated that, "[t]raditionally, the question of whether a defendant owes a duty of care to the plaintiff is a question of law to be determined by the courts." (citations omitted). In *McClung v. Delta Square Ltd. P'ship.*, in what the Supreme Court described as "circumstances comparable to these," the court "impose[d] a duty upon businesses to take reasonable measures to protect their customers from foreseeable criminal attacks." 937 S.W.2d 891, 899 (Tenn. 1996). The majority explained:

> In order to determine whether a duty is owed in a particular circumstance, courts must first establish that the risk is foreseeable, and, if so, must then apply a balancing test based upon principles of fairness to identify whether the risk was unreasonable. *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 366 (Tenn. 2008). That is, in consideration of, among other things, the presence or absence of prior similar incidents, and other circumstances, does the foreseeability of the harm outweigh the burden of the duty imposed? (citations omitted).

Quoting *Satterfield*, the majority stated that "foreseeability alone 'is not, in and of itself, sufficient to create a duty'[,]" but instead "courts must engage in 'an analysis of the relevant public policy considerations[.]'" *Satterfield*, 266 S.W.3d at 364-66. The majority quoted the following list of non-exclusive factors from *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995):

> [T]he foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct.

The majority further explained its view of the role of the court and of the jury in determining duty:

> When and if the trial court determines that the foreseeability of the harm and its particular gravity outweigh the burden of taking reasonable protective measures, the question "of duty and of whether defendants have breached that duty . . . is one for the jury to determine based upon proof presented at trial." *McClung*, 937 S.W.2d at 904. As previously stated, whether a defendant owed a duty of care is a question of law for the court to decide. *West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005]; *Stewart v. State*, 33 S.W.3d 785, 793 (Tenn. 2000). Nevertheless, courts should take precautions to avoid any invasion of the province of the jury. *Satterfield*, 266 S.W.3d at 367-68.

Looking to the facts of this case, the court found "the risk of violent attack at a housing project is nothing new." (citing cases from other jurisdictions involving assaults at housing projects). The court stated, however, that "[b]ecause of competing social concerns, the application of the

balancing test to determine whether a duty existed presents a particularly difficult question in this instance." The court addressed each of the *McCall* factors in turn.

The court found the first factor, specific foreseeability, favored Plaintiffs because MHA was aware of Miller's past assault on another tenant. The court found the second factor also supported the existence of a duty on MHA, because a "violent act by the use of a weapon obviously presents a risk of significant injury."

The court found the third factor weighed heavily in favor of MHA because "[t]he importance of the social value of affordable public housing in Tennessee cannot be overstated." The court noted "much truth in the trial judge's observation that the exclusion of those with prior records of criminal conduct from federal housing would create a 'massive underclass [of the] . . . homeless.'" The court summarized population, poverty, and crime statistics supporting this conclusion.

The court found the fourth factor, the usefulness of stricter, alternative conduct, neutral because more careful scrutiny of potential tenants might limit the risk of harm, but also might deny housing to individuals who might never harm anyone.

The court found the fifth factor favored imposition of a duty on MHA, because "[a]lthough some preventive policies might be expensive and onerous, simply evicting Miller following the knife attack would undoubtedly have been feasible."

The court found the seventh and eighth factors, the usefulness and safety of the alternative conduct, did not strongly favor either conclusion. While evictions after violations confrontations may increase safety, they may "simply export risk from one place to another." The court also found that, "on balance, closely monitoring tenants with prior criminal records or subjecting tenants to a re-certification process […] to ascertain violent propensities does not appear to be overly burdensome."

The Supreme Court reversed summary judgment for MHA. The court found that, "[a]t this stage in the proceedings, MHA has offered no explanation why a duty to act with reasonable care to reduce its tenants' unreasonable risk of physically injurious attack would have an impermissible adverse effect on its ability to provide affordable housing to low income tenants." The court further explained that, with respect to landlords of both public and private housing, "the question of what steps, if any, are required by the duty of reasonable care will inevitably depend on the facts of individual cases and should be left to the finder of fact, not the courts."

Chief Justice Janice M. Holder filed a concurring and dissenting opinion. Justice Holder reiterated her dissent from the *Satterfield* case, stating she would hold that "'[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.'" *Satterfield*, at 377 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(a) (Proposed Final Draft No. 1, 2005)). As in *Satterfield*, Justice Holder stated that she would leave the question of foreseeability to the trier-of-fact in determining whether a defendant breached its duty of care to a plaintiff, but would not include foreseeability in the legal analysis by the trial court as to whether duty exists as a matter of law. Justice Holder explained:

> Under this framework, a no-duty rule is appropriate when we can "promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases." [RESTATEMENT (THIRD) OF TORTS § 7(b)] cmt. a. The commentary to RESTATEMENT (THIRD) OF TORTS goes on to provide that these no-duty rules "should be articulated directly without obscuring references to foreseeability." *Id.* cmt. j. While I am amenable to engaging in an analysis to determine if a bright-line rule should be recognized, I cannot concur in a balancing test that obscures these policy determinations.

Outside of the applicability to other cases involving assaults by third parties, three important points warrant highlighting in the Supreme Court's opinion.

The first is the struggle over the policy implications of concluding MHA could face liability in this case. Both the trial court and the Court of Appeals sided with MHA, with the Court of Appeals stating that "numerous public policy considerations dissuade[d]" the court from establishing an affirmative duty on landlords to evict or monitor tenants with known criminal histories. The Supreme Court, on the other hand, determined that the sum total of the policy considerations militated in favor of permitting Plaintiffs to pursue their negligence claim beyond the summary judgment stage. The Supreme Court's holding does not mean landlords are *per se* liable under any circumstance for failing to evict or take other action against a tenant with a history of violence. Instead, the Supreme Court recognized that, in some situations, it is unreasonable for a landlord to continue to rent or lease housing to a tenant who poses a risk of serious harm to other tenants.

(The opinion may also suggest a duty to deny housing to potentially dangerous tenants, although it is not squarely addressed under the circumstances.)

Second, there may be some debate regarding whether constructive knowledge of the tenant's violent history is sufficient, or if actual knowledge is required (as MHA had in this case). The Supreme Court noted that it took up the case to determine "specifically whether MHA, *having knowledge of Miller's prior act of violence at the apartments*, owed a duty to" the decedent. (emphasis added). However, the majority concluded that "closely monitoring tenants with prior criminal records or subjecting tenants to a re-certification process […] *to ascertain violent propensities* does not appear to be overly burdensome." (emphasis added). A fair reading of the opinion suggests that, although MHA had actual notice in this case, constructive notice of a tenant's violent tendencies would suffice.

Finally, all tort lawyers should take note of Justice Holder's concurring and dissenting opinion. The majority retains the view that foreseeability is part of the determination as to whether Defendant owed any duty as a matter of law. Justice Holder, on the other hand, continues to assert her belief that foreseeability should be excluded from the legal analysis as to whether a duty exists, and left to the trier-of-fact in determining whether Defendant actually breached a duty and caused a foreseeable injury. (*See also* her concurring and dissenting opinions in *Satterfield* and *Hale v. Ostrow*, 166 S.W.3d 713 (Tenn. 2005), and her concurring opinion in *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83 (Tenn. 2000)).

The primary benefits of Justice Holder's approach are the elimination of a largely redundant and confusing analysis from the elements of negligence, and a clearer separation between the role of the court and that of the jury. As Justice Holder explained in *Satterfield,* "the existence of duty is determined by courts as a matter of law while breach of duty and proximate cause are fact-based inquiries to be determined by juries." "General foreseeability" is relevant to the existence of a duty, *i.e.*, was there a foreseeable threat of harm to others generally – while "specific foreseeability" is relevant to breach of duty or legal cause, *i.e.*, was the specific harm to the injured person foreseeable. *See Satterfield*, at 376-77 (J. Holder, concurring and dissenting). As Justice Holder asserted in *Satterfield,* the two concepts are intrinsically tied, and asking trial courts to decide the first question of "general foreseeability" necessarily moves trial judges toward making "factual determinations relevant to breach of duty." *Id*. at 377 (J. Holder, concurring and dissenting).

Removing foreseeability from the duty question would simplify the analysis for trial courts addressing dispositive motions, as well as clarify for all persons the duties they owe and can expect based on their relationships to others. At the same time, it would retain the same safeguards against recovery for unforeseeable harms because foreseeability remains an essential part of breach of duty and causation. The result should ultimately be the same in any individual case – if an injury is unforeseeable, the plaintiff will not be entitled to recover. The chief difference is that legal decisions regarding duty would more broadly guide other persons in similar relationships, and other courts weighing the responsibilities of persons in those relationships.

- **Summary Judgment**
- **Exculpatory Clauses**
- **Gross Negligence**

Holly Thrasher v. Riverbend Stables, LLC, et al, No. M2008-02698-COA-RM-CV, 2009 WL 275767 (Tenn. Ct. App. Feb. 5, 2009). Author: Judge Frank G. Clement, Jr. Trial: Judge Walter Kurtz.

This is the third appellate opinion related to a horse named Lola. In case you're keeping score at home, Lola now appears as prominently in Tennessee jurisprudence as the collateral source rule.

Lola died while exercising on a "hot walker" at Defendants' facility. Plaintiff sued Defendants alleging negligence and gross negligence. Defendants were granted summary judgment on all claims by the trial court, affirmed by the Court of Appeals, reversed by the Tennessee Supreme Court and remanded for reconsideration under the summary judgment standard articulated in *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008).

Plaintiff contended that the exculpatory clause of the agreement she signed was void as against public policy because Defendants were professionals. The Court of Appeals rejected this argument, finding that Defendants' specialized knowledge was not equivalent to the public duties owed by a doctor or lawyer. The Court of Appeals therefore affirmed the trial court's decision that Plaintiff's negligence claim was barred by the exculpatory clause.

The Court of Appeals reconsidered Plaintiff's claim for gross negligence under *Hannan*. The court found Defendants did not submit evidence that would affirmatively negate an essential element of Plaintiff's gross negligence claim, and therefore the burden was not shifted to Plaintiff to respond. The court therefore reversed summary judgment on the gross negligence claim and remanded to the trial court.

Lola's case thus returns to the trial court for another lap.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

- **Negligent Infliction of Emotional Distress**
- **Expert Witnesses**
- **Summary Judgment**

Sonja Filson, et al v. Seton Corporation d/b/a Baptist Hospital, et al, No. M2006-02301-COA-R9-CV, 2009 WL 196048 (Tenn. Ct. App. Jan 27, 2009). Author: Judge Patricia J. Cotrell. Trial: Judge Marietta Shipley.

Baptist Hospital employees mistakenly delivered the wrong newborn to Mother. After attempting to nurse the newborn, Mother compared the numbers on her armband to the newborn's armband, and realized the baby was not her child. Mother jumped out of bed, allegedly injuring the area of her caesarian section incision. Mother was concerned that the hospital still might not have given her the right baby, so she requested a DNA test. It took ten days for the results, which confirmed the baby was hers.

Mother and Father sued Baptist Hospital, claiming Mother suffered physical injuries when she jumped out of bed, as well as emotional distress damages for both parents. Defendant filed a summary judgment motion. Defendant's Statement of Undisputed Material Facts, citing to the parents' deposition testimony, stated:

> Neither of the Filsons sought professional help for the injuries they claim in this action, and no doctor or psychologist has said that either of them suffered "serious mental injury" as a result of the incident.

Plaintiffs contended that because of Mother's alleged physical injury from jumping out of bed, they did not need expert medical testimony to support their claim for emotional distress. Plaintiffs also filed the affidavit of a psychiatrist who performed an evaluation of Mother after the summary judgment motion was filed. The psychiatrist opined that Mother "suffers or suffered from the serious emotional/psychiatric condition of dysthymia" that was caused by the incident at issue. The psychiatrist described "dysthymia" as a "chronic low-grade depressive syndrome." Mother also filed an affidavit describing her immediate reaction to the incident and the ten days awaiting the DNA test results.

The trial court ruled that Plaintiffs were entitled to pursue their emotional distress claim, but limited the period to the ten day period Plaintiffs awaited DNA test results. The trial court also allowed Mother's physical injury claim to stand. Plaintiffs filed an interlocutory appeal.

The Court of Appeals discussed the standards for claims of negligent infliction of emotional distress in Tennessee. A "stand-alone" NIED claim is one that seeks solely emotional distress injuries, as opposed to a "parasitic" claim that seeks emotional damages as a consequence of negligent conduct that results in multiple types of damages.

> [I]n order to state a prima facie case for a stand-alone claim of negligent infliction of emotion distress, the plaintiff must prove by medical expert or scientific proof that the emotional injury is so onerous as to render a reasonable person, normally constituted, "unable to cope with the mental stress caused by the negligence." *Flax [v. Daimler Chrysler Corp*., ___S.W.3d ___], 2008 WL 2831225, at * 4 [(Tenn. July 24, 2008)]. In other words, there must be expert proof that the emotional injury was such that would, in essence, disable a reasonable person. […]

The Court of Appeals analyzed the distinction between a parasitic and a stand-alone negligent infliction of emotional distress claim when the plaintiff does claim a separate physical injury:

> [I]n order to avoid the special proof requirements for a claim for emotional injury on the basis of an additional allegation of physical injury, the plaintiff must show that the emotional injury is parasitic to, or flows from, the alleged physical injury. Under the rationale of *Amos [v. Vanderbilt University*, 62 S.W.3d 133 (Tenn. 2001)] and *Flax*, an allegation of nominal physical injury that is unrelated to the alleged emotional injury is not sufficient to eliminate the special proof requirements […].

Turning to the facts of this case, the Court of Appeals found in footnote 10 that Plaintiffs were pursuing stand-alone negligent infliction of emotional distress claims, explaining:

> The Filsons argue that since Ms. Filson allegedly suffered physical injury when she got out of the bed, then under Amos she need not present the special expert proof of emotional injury […]. The physical injury to which Ms. Filson is alluding is the strain on her cesarean surgery incision, which she alleges caused her brief pain but no other consequences. At most, Ms. Filson was given additional pain medication for 24 hours. Ms. Filson required no treatment or other medical attention for this strain on her incision. Ms. Filson's claim of personal injury that she strained her incision does not relieve her of the special proof requirements […]. Applying the rationale discussed in *Amos* and *Flax*, her claim for emotional injury is not a "parasitic" consequence of negligent conduct that results in multiple types of damages. She has alleged that her emotional injury arose from her fear that she took home the wrong baby. There is no

> allegation that she suffered any emotional injury traceable to her alleged minor physical injury.

The court found Plaintiffs had not submitted the necessary proof to maintain a stand-alone claim. The court found Mother's affidavit did not describe a debilitating emotional condition, and more importantly did not constitute expert proof. The court further found that the psychiatrist's affidavit submitted by Plaintiffs was not sufficient, stating:

> Further, the expert testimony offered by the Filsons does not establish a serious or severe emotional injury, measured by the required legal standard, either during the ten day period or later. Dr. Arney's affidavit does not say that the incident that occurred herein would render a reasonable person, normally constituted, unable to adequately cope with the mental stress caused by the negligence, nor does he reach a similar conclusion stated differently. Dr. Arney opines that Ms. Filson "suffers or has suffered from" mild depression. That is simply not sufficient. Not only does the affidavit fail to show that Ms. Filson herself suffered a serious or severe emotional injury that made her incapable of coping, it does not address the required standard, *i.e.*, the likely disabling effect on a reasonably constituted person. Emotional distress or injury alone is not sufficient injury to recover for negligent infliction of emotional distress - the injury must render a normally constituted person unable to cope.

The court then turned to whether Defendant's summary judgment motion submitted sufficient evidence to negate an essential element of Plaintiffs' claims in order to trigger a duty on Plaintiffs to respond with competent proof under the summary judgment standard dictated in *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008). Defendant did not submit any evidence regarding the seriousness or lack thereof of Plaintiffs' claimed emotional injuries. Instead, Defendant relied upon Plaintiffs' deposition testimony to indicate that Plaintiffs were not able to make out a *prima facie* case. The Court of Appeals looked to the Tennessee Supreme Court's statements directing courts to apply, at an early stage, the expert proof requirements in negligent infliction of emotional distress cases to safeguard against frivolous claims. The Court of Appeals ruled:

> Although, as a general rule, a defendant moving for summary judgment must do more than point out the insufficiency of the plaintiff's proof, we must reconcile that general rule with precedent regarding the requirements for establishing a *prima facie* case for this particular cause of action. Additionally, the Filsons did not argue they need not come forward at the summary judgment stage with the required proof; instead, they submitted additional affidavits, which also failed to meet the requirements […].

Accordingly, the Court of Appeals reversed the trial court's decision to permit damages for the ten day period while awaiting DNA test results, and ruled that Plaintiffs were not entitled to any claim for emotional distress damages as a result of being delivered the wrong baby.

Although the Court of Appeals expressed some reticence with Mother's claim for personal injury while jumping out of bed, the Court did not issue any ruling on the personal injury claim during this interlocutory appeal.

At first blush, it may seem that the Court of Appeals took a step backward from the summary judgment standard articulated in *Hannan* by putting the onus on a plaintiff to submit competent expert proof despite the lack of countervailing proof by the defendant. However, there is a critical piece of the *Hannan* decision that backs up this result. In *Hannan,* the majority held that summary judgment is appropriate if the moving party shows "that the nonmoving party cannot prove an essential element of the claim at trial." Thus, the lack of required expert or medical proof can still be fatal to the nonmoving party, even if the moving party does not proffer their own proof on the issue.

Nevertheless, I do have some concern with the Court of Appeals' approach in this case. First, the timing of the ruling is a problem. The opinion does not say there was any scheduling order, Local Rule, or other trial court ruling requiring Plaintiffs to submit all expert or medical proof by this time. Indeed, the trial court accepted Plaintiff's psychiatrist affidavit, and does not appear to have expressed any demand for additional proof on the issue. The record was not closed, and therefore Plaintiffs could have proffered additional medical or expert proof of a serious emotional injury through the same psychiatrist or another competent witness.

As the Court of Appeals noted, it may be difficult to prove the existence or extent of Plaintiffs' emotional injuries years after the injuries have purportedly subsided. Difficulty, however, is not akin to impossibility. Plaintiffs should be permitted time to identify a competent medical or expert witness to testify regarding Plaintiffs' emotional losses. If Plaintiffs cannot do so after a definite, appropriate period of time has elapsed, then they cannot maintain a stand-alone claim. It does not appear from the information in the opinion that Plaintiffs had that opportunity.

Finally, it is worth noting that dysthymia should not be viewed, as a matter of law, as so mild that it could not be compensable in an NIED lawsuit. The DSM-IV standards for diagnosing dysthymia require an adult to have suffered most days over a period of at least two years, and, among other things, to have sustained clinically significant distress or impairment in social, occupational, academic, or other major areas of functioning. It is not a matter of a person feeling a little irritable. It is a chronic depressive condition that generally requires psychological or psychiatric help for the patient to cope. A jury should be permitted to conclude that this rises to the level of "serious" or "severe" injury.

NUISANCE

- **Nuisance**
- **Statute of Limitations**

Leggett v. Dorris, No. M2008-00363-COA-R3-CV, 2009 WL 302290 (Tenn. Ct. App. Feb. 6, 2009). Author: Judge J. Steven Stafford. Trial: Chancellor Tom E. Gray.

Plaintiff alleged that grading on her neighbor's property was a nuisance that caused flooding on Plaintiff's property.

The sole issue on appeal was whether Plaintiff's claim was barred by the statute of limitations, and that issue turned on whether the nuisance was permanent or temporary. Why?

Because a permanent nuisance, *i.e*. a nuisance presumed to continue indefinitely, and is at once productive of all the damage which can ever result from it...,"is subject to a three-year statute of limitations that begins to run from the time of the creation of the nuisance." On the other hand, "when the damages resulting from the nuisance are due to the fact that the defendant is 'negligently operating its property so as to unnecessarily create the damage' and it is within the defendant's power to operate in a non-negligent manner" by the expenditure of labor and money (a "temporary nuisance"), the continuation of the nuisance results in the continued right to bring suit, even though more than three years elapsed since the creation of the nuisance.

The trial court was reversed because it assumed that the nuisance was a permanent nuisance. The Court of Appeals held that there was a genuine issue of material fact on what type of nuisance existed, and thus the claim was not necessarily barred by the statute of limitations.

Read this opinion as a greater refresher on the law of nuisance.

NURSING HOME

- **Nursing Home Claims**
- **Arbitration Agreements**

Lovie Mitchell, as Executrix of the Estate of Mack Mitchell, Deceased v. Kindred Healthcare Operating, Inc., et al., No. W2008-00378-COA-R3-CV, 2008 WL 4936505 (Tenn. Ct. App. Nov. 19, 2008). Author: Judge J. Steven Stafford. Trial: Judge D'Army Bailey.

Husband was diagnosed with Alzheimer's disease and admitted to a nursing home owned and operated by Defendants. A day or two later, Wife went to the nursing home to visit Husband. At that time, Wife met with the nursing home's admissions counselor. Because Husband was not competent to sign his own admissions papers, Wife was presented with the papers. Wife provided a power of attorney that gave her authority to make health care decisions for Husband. The nursing home admissions counselor presented Wife with several documents to sign, including an arbitration agreement for any claims against the nursing home. At the time she

signed arbitration agreement, Wife was undergoing chemotherapy treatment for Stage 3 cancer, but did not inform the nursing home of her own condition.

Husband passed away at the nursing home, and Wife filed suit against Defendants for wrongful death. Defendants filed a motion to compel arbitration, and the parties conducted discovery regarding enforceability of the agreement. After discovery, the trial court denied the motion on the ground that Wife "lacked the capacity to execute the ADR Agreement because she was experiencing harmful side effects (blurry vision and poor concentration) resulting from chemotherapy and other medical treatments." Defendants appealed.

The Court of Appeals first determined that the power of attorney that Wife presented to the nursing home properly gave her authority to enter the arbitration agreement on Husband's behalf, since both parties agreed Husband was incapacitated when she executed the agreement.

Next, the court ruled that there was not sufficient evidence in the record to support a finding of unconscionability. (The court noted this point was not explicitly addressed by the trial court, presumably because the trial court denied the motion to compel arbitration on another ground). The court found the arbitration agreement was not a contract of adhesion. The court noted Wife did not have to sign agreement for Husband to receive care; in fact, when Wife signed agreement, Husband was already receiving care at the nursing home. In light of the entire record, the court concluded the agreement was not unconscionable.

Finally, the court addressed the trial court's decision that Wife's own medical condition prevented her from being capable of executing the arbitration agreement. The court reiterated that Wife did not tell the nursing home admissions counselor about her condition. The court stated that the only evidence of Wife's incapacity was Wife's own testimony, which the Court of Appeals described as "riddled with contradictions and memory lapses." The court found Wife did not meet her burden of demonstrating she was incompetent. The Court of Appeals therefore reversed and remanded for entry of an order compelling arbitration.

I have one major question about this case: In deciding whether Wife had the mental capacity to execute the arbitration agreement, what does it matter if Wife told the admissions counselor about her condition? If Wife informed the admissions counselor that she was unable to read and understand the contract, but the nursing home insisted she sign it anyway, certainly that would raise a host of additional issues (and likely additional claims). If she was incompetent to form a contract, then it is irrelevant whether the other side knows about her condition – the contract is simply void.

- **Nursing Home Claims**
- **Arbitration Agreements**

Deborah Mitchell, as Executrix of Gaynell Metts, Deceased, v. Kindred Healthcare Operating, Inc., et al., No. W2008-01643-COA-R3-CV, 2009 WL 1684647 (Tenn. Ct. App. June 17, 2009). Author: Judge Alan E. Highers. Trial: Judge Kay S. Robilio.

In a fact-specific case, the Court of Appeals affirmed the trial court's denial of Nursing Home's motion to enforce an arbitration agreement signed by Daughter on behalf of Decedent at admission. The Court of Appeals agreed with the trial court that Daughter lacked authority to sign for Decedent.

- **Nursing Home Claims**
- **Arbitration Agreements**

Rheaetta F. Wilson, et al v. Americare Systems, Inc., et al, No. M2008-00419-COA-R3-CV, 2009 WL 890870 (Tenn. Ct. App. Mar. 31, 2009). Author: Judge Donald P. Harris. Trial: Judge Lee Russell.

Plaintiffs filed suit against Defendants, owners and operators of a nursing home, for wrongful death of their mother. Defendants moved to compel arbitration based on arbitration agreements signed by one Plaintiff on her mother's behalf. Plaintiffs filed a response to the motion. Defendants withdrew the motion to compel arbitration, and the case proceeded in pretrial litigation for nearly three years. The case was ultimately set for a jury trial by agreement of the parties.

Defendants then filed a renewed motion to compel arbitration based on the then recent Tennessee Supreme Court decision in *Owens v. National Health Corp.*, 263 S.W.3d 876 (Tenn. 2007). Plaintiffs responded, arguing the arbitration agreement was unenforceable and that Defendants nonetheless waived its enforcement by participating in the lawsuit. The trial court denied the motion on both grounds advocated by Plaintiffs, and Defendants appealed.

The Court of Appeals affirmed the trial court's finding that Defendants failed to present sufficient evidence to establish they were entitled to arbitration. Plaintiffs' mother had executed a power of attorney authorizing her daughter to make health care decisions for her in the event she became incompetent or incapable of doing so herself, and the daughter executed the arbitration agreements with Defendants. However, the Court of Appeals found Defendants had not produced sufficient evidence to establish that Plaintiffs' mother was incompetent or incapacitated at the time the daughter executed the arbitration agreements.

The Court of Appeals reversed the trial court's finding that Defendants had waived the arbitration agreement by participating in the litigation, however. The trial court based its finding on the fact that "the parties have already exchanged written discovery, eleven (11) depositions have been taken in total, with ten (10) having taken place prior to the filing of this Motion[.]" The Court of Appeals, however, noted that the only evidence in the record of this procedural

posture came from the arguments of counsel, and statements and arguments of counsel at a hearing are not evidence. Therefore, the only evidence in the record relating to the waiver issue was the passage of time between withdrawal of Defendants' original motion to compel arbitration and the filing of the renewed motion. The Court of Appeals stated it was "unwilling to base a finding of waiver on the mere passage of time," and therefore reversed the finding of waiver and instructed the trial court to conduct an evidentiary hearing on the issue if it became relevant to the proceedings.

- **Nursing Home Claims**
- **Arbitration Agreements**

Merry LeShane v. Quince Nursing and Rehabilitation Center, LLC*,* No. W2007-01484-COA-R3-CV, 2008 WL 4613585 (Tenn. Ct. App. Oct. 14, 2008). Author: Judge David R. Farmer. Trial: Judge John R. McCarroll, Jr.

Yet another nursing home case with the enforceability of an arbitration provision at issue. This case was remanded to determine whether the daughter had the authority to execute the agreement on behalf of her mother, the actual resident of the nursing home. The enforceability of the agreement was challenged on other grounds, but those grounds were not discussed in this Rule 10 opinion.

- **Nursing Home Claims**
- **Arbitration Agreements**
- **Tennessee Health Care Decisions Act**

Barbee v. Kindred Healthcare Operating Inc.**,** No. W2007-00517-COA-R3-CV, 2008 WL 4615858 (Tenn. Ct. App. Oct. 20, 2008). Author: Judge Holly M. Kirby. Trial: Judge Joseph H. Walker, III.

In the case, the nursing home resident's son signed the documents admitting the patient to the nursing home, including the arbitration agreement. The patient later died, and the son filed suit. Defendants sought to enforce the arbitration agreement, and the trial court dismissed the complaint and compelled arbitration. The trial court found that "exigent circumstances" vested the patient's son with apparent authority to execute the arbitration agreement.

First, the Court of Appeals approved of the trial court's finding that the nursing home patient was incompetent at the time she was admitted, in part based on Plaintiff's own allegations in his complaint that the patient was "of unsound mind" and "unable to attend to her affairs." Thus, although the trial court did not have any expert medical testimony to support the conclusion that the decedent was incompetent at the time, Plaintiff's allegations and other admissions by Plaintiff sufficiently supported a finding that the patient was incompetent.

Next, the court questioned how the patient's son could have been acting as her agent in executing the arbitration agreement. The court noted that there was no durable power of attorney or other

document vesting the son with actual authority, and the proper inquiry was whether the son had apparent authority under the circumstances. The Court of Appeals found the son did not. As the nursing home argued, the patient no longer possessed "her mental faculties" at the time of admission. According to the court: "If the Decedent could no longer 'act on her own behalf,' how could she have 'clothed [her son] with the appearance of authority' to act on her behalf?"

Defendants in the case argued, and the trial court agreed, that "exigent circumstances" created the son's apparent authority. The Court of Appeals noted the phrase "exigent circumstances" apparently came from the court's prior decision in *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.,* No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003). In *Raiteri,* the court stated: "The record is also devoid of any exigent circumstances that would clothe [the person who signed the arbitration agreement] with apparent authority to bind his wife to the admission agreement, particularly the alternative dispute resolution provisions." In this case, the court explained that *Raiteri* did not state that exigent circumstances actually could create an agency relationship, and that the court found no authority to support the proposition. Regardless, under the circumstances presented in this case, the court found no apparent agency relationship.

Turning to the Tennessee Health Care Decisions Act, the court outlined in detail the practical steps necessary under the Act to appoint a surrogate to make health care decisions for an adult who lacks the capacity to do so themselves. Importantly, the Act requires the patient's supervising health care provider to determine that the patient lacks capacity, and to document in the patient's chart the identity of the surrogate who will make decisions for the patient. The court determined that execution of the nursing home admission documents, including the arbitration agreement, was a health care decision covered by the Act. However, the court found no evidence in the record that any physician identified the son as a surrogate in the patient's chart, and therefore the son did not have authority under the Act either.

Finding Defendants did not carry their burden of establishing the son had authority to execute the arbitration agreement for the patient, the Court of Appeals reversed and remanded back to the trial court.

For further reading on the Tennessee Health Care Decisions Act, *see McKey v. National Healthcare Corp.,* No. M2007-02341-COA-R3-CV, 2008 WL 3733714 (Tenn. Ct. App. Aug. 15, 2008).

PIERCING THE CORPORATE VEIL

- **Piercing the Corporate Veil**

Ampharm, Inc. v. Eastland Pharmacy Services, LLC v. American Health Centers, Inc., No. M2006-01334-COA-R3-CV, 2008 WL 4830803 (Tenn. Ct. App. Nov. 5, 2008). Author: Judge Andy D. Bennett. Trial: Judge Russ Heldman.

This contract law decision of the Middle Section Court of Appeals includes a discussion of the law of piercing the corporate veil. The opinion explains that the corporate veil should be pierced with great caution and only when a sham exists. The relevant factors for piercing the veil are listed.

- **Piercing the Corporate Veil**

Marshall v. Jackson, No. M2007-01764-COA-R3-CV, 2008 WL 5156312 (Tenn. Ct. App. Dec. 8, 2008). Author: Judge Holly M. Kirby. Trial: Judge Robert E. Corlew, III.

It is necessary, from time to time, to look beyond the corporate (or other entity) status of an alleged wrongdoer and attempt to impose liability on either its parent company or its shareholders. This effort is called an attempt to "pierce the corporate veil."

This is not a tort case, but because these cases rarely find their way to appellate courts, every such opinion is important to tort lawyers of all stripes.

Plaintiff was in the retail gas business and had a contract with corporation ABC to provide him gasoline. ABC breached the agreement; Plaintiff sued, and received a judgment.

Guess what happened next? ABC could not satisfy the judgment, so Plaintiff sued DEF, the parent corporation of ABC, and Jones and Jackson, DEF's shareholders, and attempted to pierce a double corporate veil to collect the judgment.

The trial court gave Plaintiff half of what he wanted, which resulted in all of nothing. Stated differently and in a way that makes sense, the trial judge held that the veil between ABC and DEF should be disregarded, making DEF liable for ABC's obligation to Plaintiff. However, the court refused to pierce the veil between DEF and its shareholders. This left Plaintiff with a hollow victory because (surprise!) DEF was judgment-proof too.

The Court of Appeals affirmed after reviewing the fact-findings of the trial judge with a presumption of correctness. The court does a nice job reviewing the law in this area, which is best summarized by what are known as the *Allen* factors:

> (1) whether there was a failure to collect paid in capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of stock certificates; (4) the sole ownership of stock by one individual; (5) the use

> of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among related entities.

Federal Deposit Ins. Corp. v. Allen, 584 F.Supp. 386, 397 (E.D. Tenn. 1984).

As indicated above, this opinion does a fine job collecting the law in this area and it should be the first case you turn to for researching current law in Tennessee in this field.

Those who want to find the law most favorable to those attempting to pierce the corporate veil should do research on cases across the nation arising in products liability and cases arising from on-the-job injuries. Why? Because some of the most pro-plaintiff law has been made by those who are typically defendants in products cases.

Say what? Yep. There are lots and lots of very smart lawyers who defend corporations in products suits who have made pro-plaintiff law in this area. These lawyers argue that their corporate client should be dismissed from the case because it is the mere alter-ego of the plaintiff's employer and thus it should get the benefit of the worker's compensation exclusivity doctrine. Use of this law (and the types of facts they develop in scorched-earth discovery) has helped my clients recover money (and helped me earn one-third of it).

PLEADING REQUIREMENTS

- **Pleading Requirements**
- **Motions to Dismiss**

***Indiana State District Council of Laborers and HOD Carriers Pension Fund v. Gary Brukardt, et al*,** No. M2007-02271-COA-R3-CV, 2009 WL 426237 (Tenn. Ct. App. Feb. 19, 2009). Author: Judge Walter C. Kurtz. Trial: Chancellor Carol McCoy.

Just a quick note: the Court of Appeals says Tennessee has not adopted the pleading requirements set out by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, ____ U.S. _____, 127 S.Ct. 1955 (2007), and that the Court of Appeals was not in a position to adopt the stricter *Twombly* standard. That being said, those who are doing complex commercial litigation would be well-advised to fully understand *Twombly* and plead with that decision in mind.

PREMISES LIABILITY

- **Premises Liability**
- **Admissibility of Expert Testimony**

Michelle Blakely v. Nashville Machine Elevator Co., Inc., No. M2008-00070-COA-R3-CV, 2008 WL 5048255 (Tenn. Ct. App. Nov. 25, 2008). Author: Judge Charles D. Susano, Jr. Trial: Judge Robert L. Jones.

Here's a tip on the front end of this case: If you think you've won a critical issue, make certain there's a record of it in the court file.

Plaintiff alleged injuries due to a rapid drop in an elevator. Defendants filed a summary judgment motion supported by the deposition testimony of one Defendant's employee, an elevator technician, stating that the elevator was properly maintained and performed as designed. The technician testified that Plaintiff was in the elevator when the elevator went through a safe "resynching" process, which the elevator was designed to do when the two jacks that control the elevator are not in alignment. Plaintiff responded with affidavit of an expert stating that the elevator was not reasonably reliable, that Defendants were aware or should have been aware of this based on numerous problems with the elevator discovered before Plaintiff's incident, and that better due diligence by Defendants would more likely than not have identified problems and prevented Plaintiff's incident. The trial court granted summary judgment to Defendants, and Plaintiff appealed.

The key issue on appeal was the exclusion of Plaintiff's expert's opinion. Although Defendants argued that the trial court properly excluded the expert's affidavit, the Court of Appeals found the record did not reflect that the trial court actually excluded the expert's opinion, and noted that the trial court's final judgment did not mention the expert's affidavit at all. The Court of Appeals stated: "We think if the trial court actually excluded consideration of such a key piece of evidence when ruling on the motion, the final judgment would so reflect and explain why the affidavit was excluded." Accordingly, the Court of Appeals deferred to the trial court's apparent decision to admit the expert's opinion, and treated Defendants as challenging that ruling rather than seeking to have exclusion of the opinion affirmed.

Defendants attacked Plaintiff's expert based on whether his opinions were specific enough, but did not question whether he was qualified to provide those opinions. The Court of Appeals concluded the trial court did not abuse its discretion in considering the expert's opinion.

The Court of Appeals did, however, determine that the trial court erred in granting summary judgment to Defendants. Considering the expert's testimony under the standard articulated in *Martin v. Norfolk Southern Railway, Co.*, ___ S.W.3d ___, 2008 WL 4890252 (Tenn. 2008), the Court of Appeals ruled that a jury could reasonably conclude Defendants were negligent, and reversed summary judgment.

Remember when I said that the *Norfolk Southern* opinion was a good source for future discussions of the standard for summary judgment in Tennessee after *Hannan v. Alltell Publ'g*

Co., ___ S.W.3d ___ , 2008 WL 4790535 (Tenn. Oct. 31, 2008)? Bingo. The Court of Appeals quoted liberally from *Norfolk Southern's* summary of *Hannan* and other summary judgment opinions.

This case demonstrates the importance of who wins at the trial court level on an evidentiary or other discretionary ruling. *De novo* review is one thing. Abuse of discretion, on the other hand, is the judicial equivalent of an NFL replay.

- **Premises Liability**

Leitha C. Perkins and Robert L. Perkins v. Big Lots Stores, Inc., No. W2007-02809-COA-R3-CV, 2009 WL 1409706 (Tenn. Ct. App. May 20, 2009). Author: Judge Holly M. Kirby. Trial: Judge Rita L. Stotts

Plaintiff slipped and fell on a mat in Defendant's store. Defendant's store surveillance video showed another customer inadvertently furling over a corner of the mat twenty-one seconds before Plaintiff tripped on the furled corner. Under the circumstances, the Court of Appeals found no material evidence to support a jury verdict for Plaintiff based on either actual or constructive notice of the furled mat to Defendant.

- **Premises Liability**
- **Comparative Fault**
- **Summary Judgment**

Edith L. Freemon v. Logan's Roadhouse, Inc., No. M2007-01796-COA-R3-CV, 2009 WL 499471 (Tenn. Ct. App. Feb. 25, 2009). Author: Judge Richard H. Dinkins. Trial: Judge Walter Kurtz.

This is a pretty standard slip and fall case. It's worth reading, though, if you're looking at claims based on the method of a company's operations or claims based on "open and obvious" dangers.

Plaintiff slipped on the floor at a Logan's Roadhouse restaurant and sued the company. Plaintiff contended the floor was in "a defective or inherently dangerous condition" due to the company's practice of encouraging customers to discard peanut shells onto the floor. The trial court granted summary judgment to Defendant, finding that Defendant did not owe a duty to Plaintiff regarding the peanut shells and peanuts on the floor, and that Plaintiff was at least 50% at fault for her own injuries. Plaintiff appealed.

The Court of Appeals first analyzed whether Defendant owed a duty to Plaintiff under the circumstances, focusing on whether the discarded peanut shells created a foreseeable and unreasonable danger. In determining whether a duty exists, the court's role "is limited to assessing whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it." *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008).

Interestingly, the Court of Appeals looked to Justice Holder's concurring and dissenting opinion in *Satterfield*, stating "the court is required to draw a 'razor thin' distinction between the legal determination of foreseeability and factual determinations relevant to the breach of such duty as may be found." *Id.* at 377 (Holder, J., concurring in part and dissenting in part). *Editor's Note:* Take a look at last month's Trial Law Report for a discussion of Justice Holder's view on foreseeability in the duty context.

The Court of Appeals found there was a disputed issue of material fact as to whether Defendant owed Plaintiff a duty. Defendant supported its summary judgment motion with an affidavit by its store manager stating that Defendant provides free peanuts to all of its customers and encourages them to discard the peanuts on the floor as a way to set the company apart from other restaurants. The manager's affidavit also stated that the peanuts are not oily and their shells do not have an oily residue. The manager went on to say he inspected the floor after Plaintiff's fall and found it dry with no slick spots. Plaintiff responded with her own affidavit stating the floor was slippery due to peanuts, peanut shells, and/or peanut oil. Plaintiff also said the floor was oily and Plaintiff observed "shiny" oil on the floor after her fall. The Court of Appeals found this was sufficient to create a disputed issue of material fact. The court likewise found that, although the existence of peanuts on the floor may have been an open and obvious condition, that did not dictate a finding that Plaintiff was 50% or more at fault, citing to RESTATEMENT (SECOND) OF TORTS, § 343A cmt. f. The court therefore reversed summary judgment and remanded to the trial court.

On a side note, the editors would note that Logan's yeast rolls are outstanding. You would have to be nuts not to love 'em.

- **Premises Liability**
- **Duty**
- **Protection from Criminal Conduct by Third-Parties**

Maggie Ann Barron, et al. v. Emerson Russell Maintenance Company, d/b/a ERMC II, L.P., et al., No. W2008-01409-COA-R3-CV, 2009 WL 2340990 (Tenn. Ct. App. July 30, 2009). Author: Judge Alan E. Highers. Trial: Judge Roy Morgan.

Read this case closely if you're pondering anything related to a claim for failure to protect the plaintiff from an assault by a third-party, or if you're looking to any case where a defendant may have undertaken a duty based on a contract with someone else. In a broad sense, we see the Court of Appeals adopted a common sense rule: if A owes a duty to C, and A contracts with B for B to perform the duty, then B can be liable to C for negligence in performing the duty. More narrowly, we learn that a premises owner is not necessarily the only person who owes a duty to protect visitors from foreseeable, criminal attacks.

Plaintiff was abducted and threatened while leaving the mall where she worked, and filed suit against Defendant security company for failing to maintain adequate security on the premises. Defendant was granted summary judgment by the trial court, and Plaintiff appealed.

The Court of Appeals first rejected Defendant's contention that it could not be liable for negligent security because it was a third-party contractor, and only the owner of the premises owes a duty to maintain adequate security. The Court of Appeals noted that, in *Staples v. CBL & Associates, Inc*., 15 S.W.3d 83 (Tenn. 2000), summary judgment was reversed as to the same security company in this case in another case of a mall parking lot abduction. Although the Supreme Court did not address the same issue present here - whether anyone other than the premises owner owes a duty - the Court of Appeals found implicit in the Supreme Court's ruling in *Staples* that the security company owed some duty under the circumstances. The Court of Appeals suggested the duty could arise under RESTATEMENT (SECOND) OF TORTS § 324A(B), which imposes a duty on one who has gratuitously or for compensation "undertaken to perform a duty owed by the other to the third person[.]"

The Court of Appeals then turned to Defendant's argument that its duty, if any existed, was limited to following the directives of the premises owner. The Court of Appeals found Defendant simply had not put forth sufficient evidence to conclusively establish the point for purposes of a summary judgment motion, and reversed on this ground as well.

- **Premises Liability**
- **Summary Judgment**
- **Negligence *Per Se***

***Meldric Jones v. Michael and Pamela Jenkins*,** No. M2008-01911-COA-R3-CV, 2009 WL 1871868 (Tenn. Ct. App. June 29, 2009). Author: Judge Richard H. Dinkins. Trial: Judge J. Mark Rogers.

Tenant sued Landlord for injuries suffered when Tenant fell off the stairs in an apartment complex. At the spot where Tenant fell, one side of the stairway was open and had no handrails. The trial court granted summary judgment to Landlord, and the Court of Appeals affirmed.

The court ruled that Landlord owed no duty to Tenant under the circumstances because the condition of the stairway was open and obvious. A landlord is not liable if both landlord and invitee are "equally aware of the dangerous condition and the invitee voluntarily exposes himself to the hazard." *Stillwell ex rel. Stillwell v. Hackney*, 2006 WL 3813631, at *5 (Tenn. Ct. App. Dec. 27, 2006) (quoting *Couture v. Oak Hill Rentals, Ltd.*, 2004 WL 2334149, at *3 (Ohio Ct. App. Sept. 24, 2004)). Because the evidence showed Tenant had been up and down the stairway "a dozen times" before her injury, the Court of Appeals found Landlord owed no duty to Tenant with regard to the stairway.

Tenant also contended that Landlord was negligent *per se* for violating provisions of the National Safety Code and the Standard Building Code. However, the Court of Appeals found no proof in the record that the local municipality had adopted either of those codes as a "statute or ordinance," and therefore rejected Tenant's claim of negligence *per se*.

One fact in the case makes summary judgment against Tenant hard to stomach: she was moving in at the time of her injury. If she was an established tenant who had internalized the ins and

outs of her home, ruling that she was on equal footing with the landlord would feel more equitable. But when moving into a new home, it takes time for a person to familiarize themselves with their surroundings. It takes time to learn where all the light switches are for each room, any quirks with the water pressure, any slippery spots on the floor that need a rug, and etceteras. It seems harsh to state that, as a matter of law for summary judgment purposes, the tenant is aware of hazards like falling down a potentially dangerous stairway while she is still learning her way around the entire building.

- **Premises Liability**
- **Criminal Acts of Third Parties**

Latoya Keaton v. Wal-Mart Stores East, L.P., and Doyle Ray Atkins*,* No. E2008-00118-COA-R3-CV, 2009 WL 17853 (Tenn. Ct. App. Jan. 2, 2009).

Plaintiff was robbed at knife-point in the parking lot at the Tazewell Wal-Mart. For you city slickers, Tazewell is just south of Bacchus on Highway 25E.

Plaintiff sued Wal-Mart for failure to maintain a parking lot safe for her use, and Wal-Mart filed (surprise!) a motion for summary judgment. The basis of the motion? There was not enough crime to give rise to a duty to prevent the crime committed on Plaintiff.

Wal-Mart informed the court that in the two years before the incident involving Plaintiff there were but two assaults and a mixture of six other incidents such as theft, vandalism, and indecent exposure (a woman was spotted wearing a Vanderbilt sweatshirt). Plaintiff did not disagree with these statistics, but introduced proof that there were 664 police calls in the immediate vicinity and thus the robbery was foreseeable.

You recall, of course, that *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891 (Tenn. 1996) is the leading case on point. The court reminded us that

> [T]o demonstrate that Wal-Mart owed [Ms. McClung] a duty of care to protect her from the criminal acts of third parties, plaintiff was required to show that Wal-Mart knew or had reason to know, 'either from what has been or should have been observed from past experience, that criminal acts against the customers on its premises are reasonably foreseeable'.

Id. at 902.

What does that mean? The court explained that

> [T]he proof "will almost always require that prior instances of crime have occurred on or in the immediate vicinity of the defendant's premises. Courts must consider the location, nature, and extent of previous criminal activities and their similarity, proximity, or other relationship to the crime

> giving rise to the cause of action. To hold otherwise would impose an undue burden upon merchants."

Id.

Here are the stats from other cases the court used in determining whether a duty was present: *McClung***:** 164 incidents in or near the parking lot in the prior 17 months. *Staples v. CBL & Associates, Inc.*, 15 S.W.3d 83 (Tenn. 2000): 286 criminal incidents in 14 months, including a warning to security personnel that patron plaintiff was being stalked. Query: is it fair to compare these two cases, which arose in Memphis, to a case arising in Tazewell?

The court affirmed the dismissal of the case, saying that there was not enough crime to give rise to a duty on Wal-Mart. The court said that that the trial judge did not abuse his discretion in refusing to consider crimes at a local trailer park, saying that it was "some distance away" and therefore "not in the immediate vicinity." The court also commented that the "trailer park is a distinctly different operation from a retail market" (but did not explain the significance of that comment).

How much crime is enough? What radius constitutes "immediate?" Every appellate court decision gives us more information, but much uncertainty exists.

I am troubled by the court's comment that the trailer park was a different type of operation than a Wal-Mart. I do not believe that should make any difference. If a retail store's parking lot is adjacent to a trailer park or housing project that has a high crime rate it is reasonable to assume that the crime will spill-over to the parking lot. To be sure, as the distance between the high crime area and the parking lot increases the likelihood of crime decreases, but in my opinion the mere fact that they are different types of enterprises is immaterial in the analysis of whether a duty exists.

Readers who intend to file a premises liability case for injuries or death arising out of the criminal act of a third-party should read this opinion (and the decisions cited therein).

- **Premises Liability**
- **Duty**
- **Injuries to Independent Contractors**

Johnny R. Ownby, et al. v. Tennessee Farmers Cooperative Corporation, U.S.A., No. M2008-00878-COA-R3-CV, 2009 WL 1392574 (Tenn. Ct. App. May 18, 2009). Author: Judge Andy D. Bennett. Trial: Judge Don R. Ash.

Decedent's family filed suit after he passed away due to injuries on a job site. Decedent's company was hired by Defendant to coat the roof of Defendant's facility, install skylights and gutters, and assist with the jib crane. Defendant moved for directed verdict, asserting it owed no duty to Decedent to avoid this type of injury. The trial court denied the motion, and Defendant ultimately appealed the denial of Defendant's motion.

Under Tennessee law, a property owner has a general duty to independent contractors to provide a reasonably safe place to work, including removing or warning of latent defects. However, there is an exception to that rule where the risks arise from, or are intimately connected with, defects which the contractor has undertaken to repair.

The Court of Appeals found the exception applied to this case. The court found Decedent's company was hired to check the condition of the skylights, to repair them as needed, and to navigate around them in order to do the guttering and coating. Under these circumstances, the Court of Appeals found the risks of falling through the skylights were intimately connected to the defects Decedent's company were hired to repair.

The court also stated in a footnote that experts should not have been permitted to testify regarding the applicability of OSHA regulations to the case, because the interpretation of federal regulations is a legal question.

- **Premises Liability**
- **Summary Judgment**

Deborrah Brownlee v. Gastrointestinal Specialist, P.C., No. W2008-02340-COA-R3-CV, 2009 WL 2601323 (Tenn. Ct. App. Aug. 25, 2009). Author: Judge J. Steven Stafford. Trial: Judge Kay S. Robilio

The trial court granted summary judgment to Defendant in this slip-and-fall case based on Defendant's argument that Plaintiff could not establish two elements of her claim: the existence of a defective or dangerous condition, and actual or constructive knowledge by Defendant. The Court of Appeals reversed under the summary judgment standard in *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008), noting Defendant was required to affirmatively negate an essential element of Plaintiff's claim rather than merely attacking Plaintiff's ability to later prove her case.

- **Summary Judgment**
- **Premises Liability**

Victoria Masters and Michael Masters, Husband v. Wal-Mart Stores East, L.P.**,** No. M2008-02752-COA-R3-CV, 2009 WL 2868750 (Tenn. Ct. App. September 1, 2009) Author: Judge Herschel Pickens Franks. Trial: Judge John D. Wootten, Jr.

Plaintiff sued Defendant store for a slip and fall on a wet floor. Defendant was granted summary judgment based on an affidavit of its manager stating that a "Caution - Wet Floor" sign was placed close to the wet flooring, and Plaintiff would have had to pass by it before crossing the wet floor surface. The Court of Appeals reversed, noting the store manager who provided the affidavit was not present when Plaintiff passed through the area or when she fell, so he had no way of knowing if the warning sign was plainly visible to Plaintiff just before the fall. The appellate court did not state whether it found that Defendant failed to affirmatively negate an essential element of Plaintiff's case, or whether Defendant effectively did so and Plaintiff

rebutted. Given the court's explanation that the store manager's affidavit fell short, one can assume that it was Defendant's proof that was insufficient, and therefore Defendant did not negate an essential element.

PRODUCTS LIABILITY

- **Products Liability Preemption**

Wyeth v. Levine, 555 U.S. S.Ct. L. Ed. 2d ----, No. 06-1249 (Mar. 4, 2009).

Levine was given Phenergan by the "IV-push" method. The drug entered Levine's artery, she developed gangrene, and doctors amputated her forearm. Levine sued Wyeth, the manufacturer of the drug, alleging that it had failed to provide an adequate warning about the significant risks of administering Phenergan by the IV-push method. The Vermont jury determined that Levine's injury would not have occurred if Phenergan's label included an adequate warning, and it awarded damages. The trial court rejected Wyeth's argument that Levine's failure-to-warn claims were preempted by federal law because Phenergan's labeling had been approved by the FDA. The Vermont Supreme Court affirmed. The United States Supreme Court affirmed, holding that Federal law does not preempt Levine's claim that Phenergan's label did not contain an adequate warning about the IV-push method of administration.

Read this case only if you plan to file a products liability claim against a drug manufacturer. Be sure to study it before you go to the bank and take out a second mortgage on your home to finance the litigation. If you are defending such a case, read this case while relaxing on the beach in front of your new second home, courtesy of the drug manufacturer.

- **Products Liability**
- **Punitive Damages**
- **Wrongful Death Damages**
- **Other Similar Incidents**
- **Expert Testimony**
- **Misconduct of Counsel**

Gilbert Mohr v. DaimlerChrysler Corporation, No. W2006-01382-COA-R3-CV, 2008 WL 4613584 (Tenn. Ct. App. Oct. 14, 2008). Author: Special Judge Ben H. Cantrell. Trial: Judge Robert Childers.

If you are DaimlerChrylser ("DC"), the good news is that the Western Section Court of Appeals cut an adverse jury verdict by over $35,000,000. The bad news for DC is that Plaintiffs are going to get a check for almost $20,000,000 if the Tennessee and United States Supreme Courts allow this verdict to stand.

The Basic Facts

Plaintiffs filed wrongful death cases on behalf of the driver and front seat passenger of a Dodge Caravan who died after a head-on collision caused by another driver. Plaintiffs alleged the passenger died because of a defective seatbelt and the driver because of a lack of crashworthiness of the Caravan. DC was found 55% at fault for the passenger's death and 46% at fault for the driver's death. The compensatory damage awards were $7.0 million and $2.0 million, respectively. Claims filed by two other passengers were rejected.

The jury also found reckless conduct by DC on the crashworthiness claim and set punitive damages at $48,778,000. The trial judge approved the verdict.

Products Liability Issue

The Court of Appeals reviewed the evidence and handily found that it supported the liability findings on the seatbelt claim and the crashworthiness claim. Recall that the test is whether there is any material evidence to the support the jury's decision. The opinion summarized the evidence that supports the award.

DC criticized the inability of Plaintiff's expert to say why the seatbelt released. In perhaps the most interesting statement of the opinion, the court said "[w]hile expert testimony may be required to prove causation in 'technically complex' cases, the issue of causation is ultimately one for the jury to determine, and 'this Court has noted that a jury may infer a causal connection through the use of circumstantial evidence, expert testimony or both.'" (citations omitted).

There are so few products liability opinions in Tennessee that lawyers handling products cases should read every one of them. This opinion does a nice job summarizing the law of "defective condition."

Wrongful Death Award

The compensatory damages award to the passenger ($2.0 million) was apparently not challenged on appeal. The award to the driver ($7.5 million) was challenged. The driver was married, the mother of a ten-year old, and had a loss of earning capacity of between $500,000 and $1,000,000. There was evidence of some pain and suffering before her death. The award was affirmed, mentioning the great weight that appellate courts should give trial judge-approved jury verdicts.

The approval of a $7,500,000 verdict for the death of a wife and mother probably has the most significance for tort lawyers regardless of their practice area. I believe (but I may be wrong) that this is a record jury verdict for a wrongful death case in Tennessee.

Punitive Damages

On the punitive damages issue, the court reviewed the evidence and found a factual basis for punitive damages on the crashworthiness claim, saying that the arguments asserted by DC on

appeal were rejected by the jury. This statement by the court says it all: "For this court to say that the jury should have been persuaded by this proof to find that DC did not act recklessly would amount to a substitution of our judgment for that of the jury about the weight of the evidence. All of our precedents prevent us from doing that."

Next, the court reviewed the state of punitive damages law after *Flax v. DaimlerChrysler Corp.,* ____ S.W.3d ___ 2008 WL 2831225 (Tenn. July 24, 2008) and determined that the requisite level of reprehensibility did not exist to justify a $50 million punitive award and ratio of 4:1 was the maximum punitive award. It then cut the punitive damages to $13,800,000.

Does the change really result in a 4:1 ratio? Yes, because the compensatory damages of $7.5 million were reduced by the fault of the other driver. DC's fault was only 46% and therefore the compensatory damages for wrongful death were reduced by 46% from the $7,500,000 gross amount.

Are punitive damages DC has to pay reduced by the other driver's fault? No, the punitive damages were awarded against DC for its conduct and its conduct alone and therefore the fault of others does not reduce the amount of punitive damages as determined by the jury.

The USSC has the Oregon punitive damages case of *Williams v. Phillip Morris Incorporated* under consideration right now. It is set for oral argument on December 3, 2008. In addition, a motion for reconsideration has been filed in *Flax* and if it is unsuccessful (and I predict it will be) a petition for *cert* will be filed with the United States Supreme Court. The disposition of these cases will impact the disposition of the Rule 11 application that will undoubtedly be filed in this case.

A Laundry List of Other Issues

There is still more. The court (a) rejected the notion that punitive damages could not be awarded for breach of warranty; (b) held that an amendment of the *ad damnum* clause during trial to increase the amount of punitive damages sought was not an abuse of discretion; (c) upheld the admission of the expert testimony of Paul Sheridan, a former DC employee and a thorn in their side (he testified for the plaintiffs in *Flax,* too); (d) rejected the claim that Plaintiffs should not have been permitted to talk about other vehicles that were defective that also managed to meet federal safety standards (remember that under Tennessee law compliance with government standards gives rise to a rebuttable presumption of lack of defect); (e) refused to set aside the verdicts because of alleged inappropriate arguments of counsel; and (f) approved the introduction into evidence of post-sale other similar incidents (OSIs).

- Products Liability
- Economic Loss Rule

***Lincoln General Insurance Company v. Detroit Diesel Corporation, et al.*,** No. M2008-01427-SC-R23-CQ, ___ S.W.3d ___, 2009 WL 2568190 (Tenn. Aug. 21, 2009). Author: Chief Justice Janice M. Holder. Trial: Judge Aleta A. Trauger.

On a certified question, the Tennessee Supreme Court adopted a bright-line economic loss rule for products liability cases. Adopting the logic of the U.S. Supreme Court from *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), the Tennessee Supreme Court ruled that recovery in tort is precluded when a product damages itself without causing personal injury or damage to other property. In other words, if a product damages only itself, then the claim must be based in contract; a strict products liability action in tort is not available.

The Tennessee Supreme Court acknowledged the logic of the U.S. Supreme Court in *East River*, noting that the reasons for imposing tort liability are not present when a product damages only itself, as that loss can be allocated by the parties to the contract and by acquiring insurance, as opposed to when a product causes harm to persons or other property. The Tennessee Supreme Court also looked to the definition of "harm to persons or property" within Section 21 of the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY.

The court rejected Plaintiff's proposed "intermediate approach," which would have permitted recovery for purely economic loss if the loss occurred because of an unreasonably dangerous product that damaged itself in a sudden, calamitous event. The court felt that imposing strict liability for loss of the product under such circumstances was not necessary to protect Tennessee consumers from harm, as manufacturers must consider liability under Tennessee law if their products do injure a person or property other than the product itself.

The court also rejected Plaintiff's argument that the *East River* approach was inconsistent with the legislature's intent in passing the Tennessee Products Liability Act. The court concluded that the applicability of the Products Liability Act in Tenn. Code Ann. § 29-28-102(6) to "actions brought for or on account of personal injury, death, or property damage" meant damage to property other than the defective product itself.

PUNITIVE DAMAGES

- Punitive Damages
- Motions *in Limine*

Elishea D. Fisher v. Christina M. Johnson, No. W2008-02165-COA-R3-CV, 2009 WL 2588906 (Tenn. Ct. App. Aug. 24, 2009). Author: Judge Alan E. Highers. Trial: Judge William B. Acree, Jr.

Plaintiff and Defendant were involved in an automobile accident. Defendant left the scene of the accident, and later admitted that she had consumed two beers before the accident despite being underage.

Plaintiff's claim for punitive damages based on Defendant's consumption of alcohol was dismissed by the trial court. The Court of Appeals affirmed the dismissal under the summary judgment standard because Defendant's motion was supported by the affidavit of the officer who arrested her that evening. The officer's affidavit stated he was familiar with how to conduct field sobriety tests, and based on Defendant's performance of the test that evening, the officer opined that she could operate a motor vehicle safely that evening. The Court of Appeals ruled this affidavit affirmatively negated the essential element of recklessness in Plaintiff's punitive damages claim. Because Plaintiff did not respond with contrary evidence, summary judgment was appropriate.

The Court of Appeals also affirmed the trial court's exclusion of evidence that Defendant had been drinking, and that Defendant left the scene of the accident. The court found that, because Defendant ultimately admitted liability for the accident, the only remaining issue was the Plaintiff's damages. Defendant's consumption of alcohol and leaving the scene were not relevant to Plaintiff's damages, and thus were properly excluded.

RETALIATORY DISCHARGE

- **Retaliatory Discharge**

Kinsler v. Berkline, LLC., No. E2007-02602-COA-R3-CV, 2008 WL 4735310 (Tenn. Ct. App. Oct. 27, 2008). Author: Charles D. Susano, Jr. Trial: Judge Thomas J. Wright.

The Eastern Section of the Court of Appeals has reversed summary judgment in favor of an employer in a retaliatory discharge case.

Employee said he was fired for making (and not settling) a worker's compensation claim. Employer said Employee was filed because he lacked the physical ability to do the work. Employee was fired three days after he rejected a settlement of his worker's compensation case.

The court held that "proof of close proximity in time between an employee's exercise of a protected right under the workers' compensation statutes and a materially adverse employment action is sufficient to establish a *prima facie* case of causation."

The opinion also explains that once a *prima facie* case of retaliatory discharge is established, "the next inquiry is whether the Employer has shown 'a legitimate, non-pretextual reason for the employee's discharge.'" (citation omitted).

Finally, the court concluded that there was a genuine issue of material fact on the duties required of Employee and whether he was able to perform them.

This is a must-read opinion for those who have filed or who are contemplating filing a retaliatory discharge case. The causation discussion represents new law in Tennessee, and looks to a case interpreting the Tennessee Human Rights Act for support. Finally, Judge Susano does a wonderful job explaining how a judge should view evidence when ruling on a summary judgment motion.

SANCTIONS

Jane Chera v. Indymac, Inc. et al., No. M2007-00043-COA-R3-CV, 2008 WL 4657825 (Tenn. Ct. App. Oct. 21, 2008). Author: Judge Andy D. Bennett. Trial: Chancellor Claudia Bonnyman.

As a sanction for Plaintiff's failure to comply with court orders, including orders compelling Plaintiff to appear for a deposition, the trial court dismissed Plaintiff's case with prejudice. Plaintiff filed a motion to alter or amend the dismissal under Tenn. R. Civ. P. 59 or alternatively for relief from a final judgment under Tenn. R. Civ. P. 60.02. The trial court denied the motions, and Plaintiff appealed.

The Court of Appeals found no evidence that the trial court applied an incorrect rule of law or reached an illogical decision. In discussing whether Defendants were prejudiced, the court mentioned briefly that "[u]ndue delay in actions involving real property can affect the value of the property and the use and enjoyment of the property." Other than that, the opinion is fairly fact specific and offers little guidance for litigants in other cases.

SAVINGS STATUTE

- **Savings Statute**
- **Notice of Entry of Order**

Williams v. Cliburn, No. M2007-01763-COA-R3-CV, 2008 WL 5070047 (Tenn. Ct. App. Dec. 1, 2008). Author: Judge Richard H. Dinkins. Trial: Judge John Wooten.

Plaintiff took a Tenn. R. Civ. P. 41 voluntary dismissal of his General Sessions suit. A fax copy of the order of dismissal was signed by the court on January 21 and entered by the clerk on January 23. (Apparently the order was faxed because the dismissal was taken very close to the trial date.) The original of the order was signed by the court on January 27 and entered by the clerk on January 30.

Plaintiff requested that he be given notice of the entry of the order, but he was given notice of entry only of the January 30 order. He was not given notice of the entry of the January 23 order.

About one year later, he filed a second complaint on – you guessed it – a date smack-dab in the middle of the entry of the two orders. Defendant moved to dismiss, claiming the first order was valid, it triggered the savings statute, and the one-year filing window was closed.

The court agreed that the fax copy of the order was a valid order (submission of orders by fax is permitted in General Sessions Court but is not permissible in Circuit or Chancery Courts – see Tenn. R. Civ. P. Rule 5A). Thus, the action was filed more than one year later and in ordinary circumstances would have been barred.

However, the court noted that Plaintiff's lawyer was not given notice of entry of first judgment as requested, and thus granted relief under Tenn. R. Civ. P. 60.02 because of the clerk's error.

Lesson: this lawyer has undoubtedly lost a good deal of sleep in the twenty months since the motion to dismiss was filed. He clearly had a right to rely on the clerk to give him notice of entry of judgment, and I do not fault him for that. But this opinion shows the danger of waiting until the last minute for anything. Statutes of limitations are drop-dead deadlines. Flirting with them is as risky as flirting with a stripper on pay day after you have had five Bombay Sapphire martinis (on the rocks, two olives).

SERVICE OF PROCESS

- **Service of Process**

Watson v. Garza, No. W2007-02480-COA-R3-CV, 2008 WL 4831300 (Tenn. Ct. App. Nov. 7, 2008). Author: Judge Alan E. Highers. Trial: Judge Clayburn Peeples.

This case reminds us of the law of service of process – and the hazards of not achieving proper service.

Plaintiff sued Garza and Harper. A sheriff's deputy served process on Harper for himself and also left Garza's process with Harper. The deputy erroneously reported that he had served the papers on Garza. Harper did not have authority to accept process for Garza. The papers eventually found their way to Garza, but he contested proper service of process and moved to dismiss.

The Court of Appeals affirmed dismissal of the action. Although the deputy's statement that he served Garza is *prima facie* evidence that service on Garza was accomplished through service on Harper, Garza was permitted to disprove that he had not appointed Harper as his agent for service of process and could do so through the use of interested witnesses. The court found that Garza met his burden and that Harper did not have permission to accept service on Garza's behalf.

Likewise, the fact that Harper's wife passed the process onto Garza did not result in proper service of Garza. The court held that actual knowledge of the lawsuit does not equate with proper service of process necessary to invoke the jurisdiction of the court.

Finally, the court held that Garza was not estopped from arguing the lack of service of process defense. The court noted that Garza did not participate in discovery and did not file any papers for 18 months and the first paper he filed challenged the sufficiency of process.

The lesson here? You cannot always trust a deputy's notes about service on the return. If you are unsure that service has been achieved, re-serve the defendant. If you believe service is appropriate but an answer is not received in 30 days, promptly move for default and force the issue. And, if you have problems with your local sheriff's office, consider using a private process server.

This opinion is filled with law in this area and will avoid – or cause – one or more sleepless nights.

- **Service of Process**

Billie Gail Hall, as Surviving Spouse of Billy R. Hall v. Douglas B. Haynes, Jr., M.D. and MedSouth Healthcare, P.C., No. W2007-02611-COA-R9-CV, 2009 WL 782761 (Tenn. Ct. App. Mar. 26, 2009). Author: Judge Holly M. Kirby. Trial: Judge R. Lee Moore, Jr.

Believe it or not, this is a *concise* summary of a lengthy opinion (sixteen pages) by the Court of Appeals on a service of process issue. The case boils down to three primary issues: (1) whether in-person service was effective against a defendant doctor when accepted by an employee of the doctor's medical group and actually delivered to the doctor; (2) whether in-person service was effective against the medical group when signed for by an employee of the group and actually delivered to the responsible persons at the group; and (3) whether service by certified mail was effective against both the doctor and the group when it was signed for by a person authorized to sign for certified mail.

Plaintiff timely sued Defendant Doctor and Defendant Medical Group, the employer of Defendant Doctor. Plaintiff had summons issued for Defendant Doctor in his name, and for Defendant Medical Group in the name of another doctor who was registered agent for the group. Within a week, Plaintiff served Doctor through a customer service representative for Medical Group, who placed the complaint in Doctor's mailbox. Doctor received the complaint. Another customer service representative for Medical Group accepted service of process on Medical Group, placed it in the mailbox of the Group's registered agent, and he likewise received the complaint.

Three weeks later, Plaintiff filed an Amended Complaint and had a second set of summonses issued for Defendants. Plaintiff served both Defendants by certified mail. An employee of Medical Group who worked in the administrative office as an accounts payable and payroll clerk signed the return receipt for both Defendants. (The opinion does not state whether either Defendant acknowledged ultimately receiving a copy of the Amended Complaint served by certified mail.)

Both Defendants asserted insufficiency of service of process in their answer, and moved for summary judgment seven months after the one year anniversary of the filing of the lawsuit. Discovery was conducted as to whether the customer service representatives who accepted personal service and the clerk who signed for service by certified mail were authorized by Defendants to accept service of process. The trial court denied Defendants' summary judgment motion, finding each of the three people who signed for service was authorized to do so. Defendants were granted interlocutory appeal.

In-Person Service on the Doctor

The Court of Appeals first addressed in-person service on Defendant Doctor through the customer service representative. Under Tenn. R. Civ. P. 4.04(1), service on an individual is effective "by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served." Both Defendant Doctor and the customer service representative submitted affidavits stating that the customer service representative was not authorized to accept service of process on Doctor's behalf. The Court of Appeals also stated that "nothing in the record indicates that acceptance of service of process on behalf of [Doctor] was incidental and necessary to [the representative's] job duties as a customer service representative for [Medical Group], which included checking in patients, assisting patients with billing issues, and handling requests for medical records." Accordingly, the court found no implied authority existed either. The Court of Appeals concluded that Plaintiff's service of process on Doctor through the customer service representative did not comply with Rule 4.04(1).

In-Person Service on the Corporation

The court next turned to in-person service on Defendant Medical Group through the other customer service representative. Under Tenn. R. Civ. P. 4.04(4), a corporation can be served "by delivering a copy of the summons and of the complaint to an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the copies to any other agent authorized by appointment or by law to receive service on behalf of the

corporation." In this case, neither Medical Group's registered agent nor its administrator were personally served, so the question was again whether the customer service representative was an "agent authorized by appointment or by law to receive service[.]" Affidavits were submitted by Medical Group's administrator and the customer service representative stating she was not authorized to accept service on behalf of the corporation, and the same evidence regarding the representative's role with Group was introduced as with the representative who signed for Doctor. The Court of Appeals found the customer service representative lacked actual or apparent authority to accept service on behalf of Medical Group.

The Court of Appeals then looked to whether the signature of the customer service representative was sufficient under Rule 4.04(4) as "an officer or managing agent [of the corporation], or . . . the chief agent in the county wherein the action is brought."

Plaintiff relied chiefly on *Garland v. Seaboard Coastline Railroad Co.*, 658 S.W.2d 528 (Tenn. 1983), which dealt with the substantially equivalent Rule 4.04(3). In *Garland*, the Tennessee Supreme Court rejected the defendant's argument that Rule 4.04 requires service on someone who is an officer, executive, or managing agent of a business organization. *Id.* at 529-30. Instead, the Supreme Court ruled that the purpose of Rule 4.04 is "to insure that process is served in a manner reasonably calculated to give a party defendant adequate notice of the pending judicial proceedings." *Id*. at 531 (internal citations omitted). Thus, in *Garland*, service on a freight agent who was the "chief agent" in charge of the defendant's activities in the county was effective service because the freight agent "stood in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service of process on behalf of the unincorporated association pursuant to" Rule 4.04. *Id.* at 531.

The Court of Appeals, however, distinguished *Garland*, as the customer service representative was not "the highest ranking agent" for Medical Group in the county. The court noted, with "neither approval nor disapproval[,]" opinions from other jurisdictions finding a secretary or receptionist to have sufficient authority to accept service on behalf of a corporation. In this case, the customer service representative testified that the only things she signed for as part of her job were requests for medical records; she did not sign for the company's mail. Under the circumstances, the Court of Appeals ruled the representative was not in a position to qualify her to accept service of process on the corporation under Rule 4.04(4).

Accordingly, the court ruled that in-person service of process on Medical Group through the customer service representative was not effective.

Service by Certified Mail

The Court of Appeals next addressed whether service by certified mail was effective as to either Defendant. Tenn. R. Civ. P. 4.04(10) allows service by certified mail. "If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph." Rule 4.04(10). The court analyzed numerous cases, including a federal district court applying Tennessee law and courts from other jurisdictions applying their own law. The Court of Appeals stated:

> Reading Rule 4.04(10) in the context of the entirety of Rule 4.04 and the other rules pertaining to service of process, we must conclude that Rule 4.04(10) is intended to provide plaintiffs with an alternate means of effectuating service, but is not intended to expand the class of persons who are authorized to accept service of process under Rules 4.04(1) and 4.04(4).

Plaintiffs and the trial court relied significantly on *Boles v. Tennessee Farmers Mutual Insurance Co.*, No. M1999-00727-COA-R3-CV, 2000 WL 1030837 (Tenn. Ct. App. July 27, 2000). In *Boles*, the plaintiff addressed summons to the defendant insurer in the name of the insurer's district claims manager in the county where the claim arose. *Id.* at *1. After an initial denial, the district claims manager eventually admitted that, in that role, he had responsibility for an eight county area that included the county at issue, and that he was the insurer's highest ranking official in the county. *Id*. at *2. The certified letter enclosing the summons was signed for by a direct service representative, who the insurer averred was not authorized to accept service of process on behalf of its managing agent (and that the managing agent had never authorized anyone to accept service of process on his behalf). *Id*. at *1. The plaintiffs in the *Boles* case filed the deposition testimony of the direct service representative who signed for the certified mail, in which she testified that any of the clerical staff or other direct service representatives could sign for certified mail, and that certified mail was usually signed for by any person who was "handy." *Id*. at *2. The district claims manager also admitted that the representative was authorized to sign for certified mail addressed to him and other employees of the insurer, although the managing agent denied the representative was authorized to sign for certified mail specifically for him. *Id.*

After thoroughly reviewing the *Boles* case and cases from other jurisdictions relied upon in *Boles,* the Court of Appeals concluded:

> Authority to sign for certified mail may be a factor in determining whether the person who signs the return receipt is "authorized by appointment . . . to receive service" on behalf of the defendant or whether the person is "an individual who stands in such a position as to render it fair reasonable and just to imply the authority on his part to receive services." However, to the extent that *Boles* may be read as holding that the ability to sign for certified mail, in and of itself, equates to authority to receive service of process, we find that its analysis was erroneous.

In this case, the Court of Appeals found nothing in the record to suggest the accounts payable and payroll clerk who signed the certified mail return receipt had actual or implied authority to accept service of process for either Defendant Doctor or Defendant Medical Group. Thus, although she was authorized to accept certified mail for them, the Court of Appeals found service on Defendants through certified mail signed for by her was not effective.

The Court of Appeals therefore reversed the trial court and remanded for entry of summary judgment for both Defendants on the basis of insufficient service of process.

Commentary

First, note that the opinion does not mention when Defendants first filed their answer asserting a service of process defense. If Defendants did not timely raise the issue, as a matter of policy it should be deemed waived. Defendants knew all facts supporting their affirmative defense at the outset of the lawsuit – who signed for each summons and those persons' relationship to Defendants. If Defendants raised the issue from the start, Plaintiff could have had alias summons issued and re-served Defendants through other means.

Second, Defendants' argument in this case puts them in a truly unfortunate position for future litigation. Service by certified mail is a privilege for both sides – it is more convenient for plaintiffs, and it is less intrusive for defendants. By disputing the adequacy of service by certified mail (especially when service is actually received by the defendant), health care providers can expect to be accosted by process servers to ensure personal service at their home, work, child's school, or anywhere else in public. The group in this case named one of its doctors as its registered agent, and the group's position in this case assures that the doctor will be personally sought out and served for any claims against the group in the future. Rather than being dealt with nicely and professionally in the future, both the individual doctor and the group's registered agent can expect to begin any litigation by being tracked down and forced to accept service of process in front of their patients, friends, family, and coworkers. It is the definition of cutting off your nose to spite your face.

If a defendant is upset at being personally served in the future, hand them a copy of this opinion, point out the defendants' contentions in the case, and let them know where they can direct their anger.

- **Service of Process**
- **Medical Malpractice**

Debra J. Eaton v. Stephen G. Portera, M.D., No. W2007-02720-COA-R3-CV, 2008 WL 4963512 (Tenn. Ct. App. Nov. 21, 2008). Author: Judge J. Steven Stafford. Trial: Judge Rita L. Stotts.

Plaintiff filed suit against Defendant doctor alleging medical malpractice. A deputy sheriff attempted to serve Defendant, and the return indicated that the complaint and summons were served on "Lamonda Robinson, pt care ast." Defendant filed an answer asserting a service of process defense. Almost ten months later, Defendant filed a summary judgment motion. Defendant asserted summary judgment should be granted based on inadequate service of process, and based on Defendant's affidavit that he complied with the applicable standard of care. Plaintiff did not file an expert affidavit in response to the summary judgment motion. The trial court granted the motion on both grounds, and Plaintiff appealed.

Plaintiff first argued that the service of process defense was waived under Tenn. R. Civ. P. 12.02 by failure to include the affirmative defense in Defendant's answer. The Court of Appeals disagreed, finding Defendant's answer stated he "asserts the defense of insufficiency of process

and insufficiency of service of process in that he was never served with the Complaint pursuant to the Rules of Civil Procedure and Tennessee law." Once raised, continuing participation in the lawsuit does not waive the defense.

The Court of Appeals also rejected Plaintiff's argument that Defendant was required to come forward with a disinterested witness or corroborating proof in order to impeach the deputy sheriff's return on service. The court distinguished *Eluhu v. Richards,* No M2005-00922-COA-R3-CV, 2006 WL 1521158 (Tenn. Ct. App. June 2, 2006), *perm. app. denied* (Tenn. Nov. 6, 2006), because the return in *Eluhu* indicated that process was actually served on the named defendant. The court stated:

> In the absence of evidence to support a finding that [Defendant] attempted to evade service and, in the absence of proof that Ms. Robinson was authorized to act as [Defendant's] agent, the burden does not shift to [Defendant] to bring forth the type of evidence contemplated in *Eluhu.*

The Court of Appeals affirmed the ruling based on inadequacy of service of process, and also stated it would affirm for the failure of Plaintiff to produce the affidavit of a competent expert witness under Tenn. Code Ann. § 29-26-115 as well.

STATUTE OF LIMITATIONS

- **Statute of Limitations**
- **Legal Malpractice**

David Arnold Ferrell v. Fletcher Long, No. M2008-02232-COA-R3-CV, 2009 WL 1362321 (Tenn. Ct. App. May 14, 2009). Author: Judge Andy D. Bennett. Trial: Chancellor Larry Barton Stanley, Jr.

Plaintiff filed a *pro se* legal malpractice claim more than a year after the alleged breach by Defendant. The Court of Appeals ruled that Plaintiff's claim was barred by the one-year statute of limitations for tort claims, even though Plaintiff attempted to title it as a breach of contract claim.

- **Statute of Limitations**
- **Savings Statute**
- **Excusable Neglect**

Randy J. Maness, Jr., et al v. Kurt S. Garbes, No. M2008-00797-COA-R3-CV, 2009 WL 837707 (Tenn. Ct. App. Mar. 26, 2009). Author: Judge Frank G. Clement, Jr. Trial: Judge C. L. Rogers.

Plaintiffs timely filed a lawsuit against Defendants. Summons was issued for Defendants, but Defendants were never served. Plaintiffs parted ways with their attorney, and retained a new

lawyer to represent them. Approximately one month before the one year anniversary of Plaintiffs filing suit, Plaintiffs' new lawyer mailed a Notice of Appearance and alias summons to the court clerk along with a letter asking the clerk to issue the alias summons. The envelope containing the Notice of Appearance and alias summons was not received by the court clerk for another four months, and the alias summons was therefore not issued until more than a year after the lawsuit was initially filed and summons issued. Defendants were served with the alias summons, and timely filed a motion to dismiss based on the expiration of the statute of limitations under Tenn. R. Civ. P. 3. The trial court granted the Defendants' motion to dismiss, and Plaintiffs appealed.

Plaintiffs argued on appeal that their failure to reissue summons within one year of the initial filing of the lawsuit was the result of excusable neglect under Tenn. R. Civ. P. 6.02. Plaintiffs' argument was based on the undisputed fact that their attorney mailed the alias summons to the court clerk more than a month before the summons was required to be reissued. Plaintiffs insisted the delay in mailing was not their fault because the mail delivery was beyond their control after the envelope was mailed.

The Court of Appeals affirmed, finding that the trial court did not abuse its discretion in denying Plaintiffs' motion under Rule 6.02. The Court of Appeals first noted that a trial court has the discretion to extend a deadline under Rule 6.02 if the request is made before the expiration of the deadline. In this case, Plaintiffs did not file a motion to extend the deadline under Rule 6.02. However, the court stated that Plaintiffs' response to Defendants' motion to dismiss, which explained the circumstances, could be construed as requesting relief under Rule 6.02. Nonetheless, the Court of Appeals found no basis for concluding the trial court abused its discretion in denying the motion.

It may be important to note that the Court of Appeals did not rule the trial court was correct, as a matter of law, in denying Plaintiffs' request for an extension of time; the Court of Appeals only affirmed that the trial court did not abuse its discretion. Put another way, it is possible a trial court could grant additional time after the fact based on a delivery delay, but according to this opinion, that's no guarantee.

So what should lawyers take away from the case? The mailbox rule does not apply to court documents sent to the court clerk to comply with a deadline by statute or Rule of Civil Procedure. If you are sending something by mail for filing by a certain deadline, request a return acknowledgement or receipt from the court clerk, and take other steps if the deadline is approaching before you receive delivery confirmation. If you're at all close to the deadline, deliver it personally or by fax (if permitted) so you will have an instantaneous delivery confirmation.

STATUTE OF REPOSE

- **Statutes of Repose**
- **Construction Defects**
- **Negligent Misrepresentation**
- **Wrongful Concealment**

Ron Henry, et al v. Cherokee Construction and Supply Company, Inc., No. E2008-01655-COA-R3-CV, 2009 WL 792829 (Tenn. Ct. App. Mar. 26, 2009). Author: Judge D. Michael Swiney. Trial: Judge O. Duane Sloane.

This case merits review solely because it discusses the statute of repose for improvements to real property. Cases addressing the construction statute of repose are few and far between.

Plaintiffs contracted with Defendant to build a house on Plaintiffs' land. Defendant filed a Notice of Completion for Plaintiffs' house in November 1995. Eight years later, in August 2003, a wall in Plaintiffs' house collapsed after a heavy downpour of rain.

Plaintiffs filed suit against Defendant. Plaintiffs alleged in their complaint that Defendant falsely filed the Notice of Completion because the house's foundation was not actually completed at that time since it had not been waterproofed.

Defendant was granted summary judgment under the statute of repose for improvements to real property at Tenn. Code Ann. § 28-3-201 *et seq*. Plaintiffs argued that the statute of repose was not applicable to their claims because Plaintiffs case was for negligent misrepresentation, not a construction defect. The Court of Appeals disagreed, finding "[t]he material substantive allegations" of Plaintiffs' complaint related to alleged negligence in construction of the house.

Plaintiffs also contended that the wrongful concealment exception at Tenn. Code Ann. § 28-3-205(b) should protect their claim. The Court of Appeals rejected Plaintiffs' argument, noting: "The concealment referred to in the statute is not concealment in the original construction, but rather a concealment by defendant of plaintiff's cause of action once it arises." *Register v. Goad*, 1985 Tenn. App. LEXIS 3104, at *9 (Tenn. Ct. App. Aug. 23, 1985), *no appl. perm. appeal filed*. Further, Plaintiffs did not accuse Defendant of doing anything intentionally, only negligently, and the wrongful concealment exception requires an alleged overt act or intentional misrepresentation.

Accordingly, the Court of Appeals affirmed summary judgment for Defendant.

TENNESSEE CONSUMER PROTECTION ACT

- **Tennessee Consumer Protection Act**

Mills v. Partin, No. M2008-00136-COA-R3-CV, 2008 WL 4809135 (Tenn. Ct. App. Nov. 4, 2008). Author: Judge J. Steven Stafford. Trial: Chancellor James B. Cox.

The Middle Section has affirmed a finding of unfair or deceptive conduct by the manufacturer of a modular home. It also affirmed an award of treble damages.

In an issue of first impression, it also held that the TCPA was applicable to manufacturers of modular homes.

TENNESSEE PEER REVIEW ACT

- **Tennessee Peer Review Act**
- **Discovery**

Powell v. Community Health Systems, Inc., No. E2008-00535-COA-R9-CV, 2009 WL 17850 (Tenn. Ct. App. Jan. 2, 2009). Author: Presiding Judge Herschel Pickens Franks. Dissent: Judge Charles D. Susano, Jr. Trial: Chancellor Jerri S. Bryant.

In this employment suit against a hospital, a doctor and others, Plaintiff sought to depose a hospital employee (Sexton) about the hospital's investigation of an increased rate of infection in the post-op area. The hospital claimed that the information was not discoverable because of the Tennessee Peer Review Act, Tenn. Code Ann. §63-6-219. Plaintiff argued that she should be able to discover the information as part of her effort to prove damages against the doctor. She believed that the doctor was the source of the post-operative infections, and one of her claims included the assertion that she suffered emotional distress about getting infection after the doctor ejaculated on her arm.

This is second alleged professional masturbation (or, should I say, masturbation by a licensed professional) claim arising in the East Tennessee appellate courts in the past quarter. The last case was *F. Chris Caywood v. Linda Booth*, No. E2007-02537-COA-R3-CV (Tenn. Ct. App. Nov. 25, 2008).

Plaintiff argued that Nurse Sexton, the infection control nurse, should have to testify about the results of her efforts because her work was part of her ordinary job duties and the fact that the results were reported to a peer review committee did not prohibit discovery of the nurse as an "original source." Sexton claimed that "normal" infections were part of her ordinary job, but work in a targeted area such as the post-op infection issue was part of a quality review project and thus protected.

After reviewing the statute and relevant case law, a 2-1 majority of the Court of Appeals held that some of the information was discoverable. Specifically, the Court said:

> [I]t is clear that any documents in the possession of the committee would not be discoverable, but that any documents or information retained by Ms. Sexton would be discoverable, as these would be records she made in conjunction with the regular course of business of the hospital. Likewise, any records that are available from an "original source" (such as Ms. Sexton, if the record was made by her) are likewise discoverable. The fact that such records or the information was provided to the peer review committee would not prevent its discovery.

In dissent, Judge Susano disagreed. He believes that Ms. Sexton's report is protected because it was prepared at the direction of the infection control committee, not withstanding her regular duties as the infection control nurse.

In addition, Judge Susano believed that the majority

> [C]onstrue[d] the "original source" exception as including hospital employees who prepare reports for a peer review committee of information *obtained from other sources* … create[s] a broad exception to the privilege that has the potential of eviscerating the privilege.

(emphasis in original).

Do not be surprised to see this case accepted for appellate review by the Tennessee Supreme Court. The court decided *Stratienko v. Chattanooga-Hamilton County Hospital Auth.*, 226 S.W.3d 280 (Tenn. 2007) just over a year ago, and my guess is that the court will accept this case to shed further light on the meaning of the peer review statute.

UNINSURED MOTORIST

- **Uninsured / Underinsured Motorist Coverage**

Andrea S. Martin v. Patricia L. Williams, et al., No. W2008-01509-COA-R3-CV, 2009 WL 2264339 (Tenn. Ct. App. July 30, 2009). Author: Judge Alan E. Highers. Trial: Judge Karen R. Williams.

Here's what you need to take away from this case: An auto insurance policy may exclude UM coverage for passengers who are not covered under the liability portion of the policy, but if UM coverage is provided to passengers under the policy, it will be primary ahead of the passengers' own UM policies. The rest just explains how the Court of Appeals reached that result.

Plaintiff was a minor riding as passenger in a vehicle being driven by someone outside her family. (From the Court of Appeals' description, it sounds like a friend, although that's not critical to the outcome of the case.) The vehicle was covered by a UM policy from Shelter, while Plaintiff herself had a UM policy from MetLife through her parents. The trial court

granted summary judgment to MetLife, finding that Plaintiff was covered under the Shelter policy and that policy was primary.

The Court of Appeals first construed the Shelter policy's own language. The Shelter policy provided coverage for "you," a "relative," an "additional listed insured," or any other "person using the described auto." The court agreed with Shelter that Plaintiff was not covered under the express policy language.

Next, the court looked to whether Shelter was required to provide UM coverage to Plaintiff under Tenn. Code Ann. § 56-7-1201(a). Under § 56-7-1201(a), "[e]very automobile liability insurance policy . . . shall include uninsured motorist coverage . . . for the protection of persons insured thereunder." MetLife contended that, because Plaintiff was covered under the Medical Payments provision of the Shelter policy, Shelter was also required to extend UM coverage to Plaintiff. The Court of Appeals disagreed, noting that § 56-7-1201(a) prescribes it applies to "automobile *liability* insurance" policies.

The Court of Appeals likewise rejected MetLife's contention that Shelter was required to provide coverage under Tenn. Code Ann. § 56-7-1201(b)(3). The court construed that section as dictating that a UM policy on the vehicle is primary to a UM policy on the person, but ruled that section did not create a right to a UM policy on the vehicle for all vehicle occupants.

Lastly, MetLife argued that it was against public policy for an insurer to write their policies to exclude UM coverage for occupants of covered vehicles. The Court of Appeals rejected this argument as well, stating:

> As we see it, the purpose of the UM Statute is to protect those who purchase liability insurance from those who do not. It requires insurance carriers to offer UM coverage to its insureds, but does not mandate that UM coverage be extended to those who have not purchased such a benefit.

The Court of Appeals therefore reversed summary judgment and remanded for entry of summary judgment in favor of Shelter.

- **Uninsured Motorist**
- **Service of Process**

Lucy C. Kirby, et al v. Robert P. Wooley, No. E2008-00916-COA-R3-CV, 2009 WL 499539 (Tenn. Ct. App. Feb. 27, 2009). Author: Judge Charles D. Susano, Jr. Trial: Judge Dale C. Workman.

If you handle auto accident cases, you need to take note of this opinion dealing with claims against uninsured motorist carriers when the tortfeasor is unable to be located or served. In a nutshell, the Court of Appeals held that a plaintiff who exercises due diligence to attempt service on the tortfeasor but is unable to do so can maintain a claim against the plaintiff's UM carrier without reissuing and attempting service on the tortfeasor each year.

Plaintiffs filed suit based on an automobile accident within one year of the accident. Plaintiffs' uninsured motorist coverage exceeded Defendant's liability coverage, and Plaintiffs timely served their UM carrier, Prudential.

Within a month, the Secretary of State returned the summons unserved at the out-of-state Defendant's home address. Plaintiffs then attempted to locate Defendant by phone, using the Internet, and by contacting Defendant's insurer, State Farm. State Farm's attorney wrote Plaintiffs' attorney saying that State Farm had no idea as to Defendant's whereabouts, and the address that Plaintiffs used to attempt service was the last known address State Farm had. State Farm took the position that, in the absence of an express waiver by its insured, it could not waive service on him.

Almost two years later, Plaintiffs had process issued against another person with the same name as Defendant in another city, but it was not actually Defendant.

Plaintiffs then learned that Defendant was dead and successfully served Administratrix of Defendant's estate. The trial court allowed Plaintiffs to amend and substitute Administratrix as a party defendant. One year later, at the trial court's request, Plaintiffs had Defendant's estate reopened so Plaintiffs could serve process on the estate even though Administratrix had already been served. Because Administratrix had been discharged, the out-of-state court appointed an Administrator *ad litem*.

Two and a half years later (and six and a half years after the original auto accident), Administrator and Plaintiffs' UM carrier filed motions for summary judgment. Defendant and UM insurer contended that Plaintiffs' suit was barred under Tenn. R. Civ. P. 3 because Plaintiffs did not re-issue process within one year after the original summons was issued. The trial court agreed and granted the motions, and Plaintiffs appealed.

The Court of Appeals ruled that proceedings to recover under UM policies under Tenn. Code Ann. § 56-7-1201(d) are not governed by the one year requirement of reissuing service. The court quoted from *Lady v. Kriegger*, 747 S.W.2d 342, 345 (Tenn. Ct. App. 1987), stating: "Suspension of the . . . Rule 3 requirement, that alias process be issued every [year...] during the subsection (d) proceeding, is consistent with the legislative intent to provide an efficient procedure."

The Court of Appeals distinguished its earlier opinion in *Webb v. Werner*, 163 S.W.3d 716 (Tenn. Ct. App. 2004), noting that Tenn. Code Ann. § 56-7-1201(d) requires a plaintiff to exercise due diligence in attempting service at a defendant's last known address, but that does not equate to the same due diligence required of a plaintiff to re-issue and re-attempt service of process yearly under Tenn. R. Civ. P. 3.

- **Automobile Accidents**
- **Uninsured/Underinsured Motorist Coverage**
- **Prejudgment Interest**

Roy B. Parsons, Jr., Individually, and as next kin of Emma Jean Parsons, deceased v. Darla Jane Newton, No. E2008-00287-COA-R3-CV, 2009 WL 837719 (Tenn. Ct. App. Mar. 30, 2009). Author: Judge Herschel Pickens Franks. Trial: Chancellor Kindall T. Lawson.

Here's the take away from this case before you read any further: (1) a UM policy exclusion for insureds driving other vehicles owned by the insured is valid as to the named insured and all other insureds under the policy; and (2) prejudgment interest cannot increase a UM carrier's liability beyond the contractual policy limits.

Decedent passed away due to injuries suffered in an automobile accident. Decedent was a passenger in a vehicle she owned at the time of the accident. Decedent's husband filed suit on Decedent's behalf.

There were two uninsured / underinsured motorist (UM) policies at issue in the case. The first policy, from GMAC, named Decedent as the insured and listed the vehicle she was in at the time of the wreck. The second policy, from State Farm, provided greater UM limits and thus would be required to contribute if applicable to the claim. The second policy listed Decedent's husband (Plaintiff in the suit) as a named insured, but did not list Decedent as a named insured on the policy and did not list the vehicle she was in as included under the policy.

Plaintiff and State Farm filed cross motions for summary judgment based on the applicability of the State Farm policy to the claim. The trial court denied State Farm's motion, granted Plaintiff's motion, and also granted prejudgment interest against State Farm to Plaintiff. State Farm appealed.

State Farm first contended the trial court erred in granting summary judgment to Plaintiff against State Farm. The State Farm policy specifically excluded coverage when an insured was injured while in a vehicle owned by that individual, but not insured by State Farm's policy. Plaintiff argued that the exclusion did not apply because Decedent was not a named insured. The Court of Appeals rejected Plaintiff's argument, noting that the exclusion in the policy used the term "insured" rather than "named insured," and both the named insured and his spouse (Decedent) were "insured" under the policy.

Plaintiff also argued that enforcing the exclusion in this manner would be invalid as against public policy since the UM statutes were intended to provide broad coverage for the protection of persons. The Court of Appeals disagreed, noting Tennessee case law has upheld similar exclusions and recognized the legislative purpose behind the uninsured motorist statutes was to provide "less than broad coverage." *Hill v. Nationwide Mutual Insurance Co.*, 535 S.W.2d 327 (Tenn. 1976).

The Court of Appeals also ruled that the trial court erred in granting prejudgment interest against State Farm. The court reiterated its prior holdings that "prejudgment interest cannot be imposed if it would raise the contractual policy limits, as in this case."

- **Uninsured Motorist Insurance**
- **Post Judgment Interest**

Clark v. Shoaf*,* No. W2008-00617-COA-R3-CV, 2008 WL 5206441 (Tenn. Ct. App. Dec. 15, 2008). Author: Judge David R. Farmer. Trial: Judge Karen R. Williams.

Clark and his wife sued Shoaf, the driver of a vehicle which hit Clark's vehicle, causing Clark's injuries. Clark was awarded $20,000.00 at trial; his wife received a loss of consortium award of $30,000.00. (Strange, but true).

Shoaf had $25,000.00 in available coverage through Shelter. The Clark's had $50,000.00 in available coverage through Tennessee Farmers Mutual Insurance Company ("Tennessee Farmers"). Tennessee Farmers appealed the jury verdict in the underlying case, and during that appeal Shelter was declared insolvent.

Tennessee Farmers said its liability was limited to $25,000.00 because of the Shelter policy. The Clarks said the insolvency of Shelter put Tennessee Farmers on the hook for the entire amount of the judgment ($50,000.00). Tennessee Farmers said that it was entitled to credit for monies that would be paid for Shelter by the Tennessee Insurance Guaranty Association ("TIGA"). TIGA said that it was the payor of last resort and Tennessee Farmers had to pay the $50,000.00.

The Court of Appeals affirmed the trial court's decision to hold Tennessee Farmers responsible for the entire $50,000.00. In a decision that does a nice job of summarizing the law of uninsured motorist coverage, the court said that

> [d]espite the presumed availability of the Shoafs' liability coverage amounts to offset Tennessee Farmers' liability under the Clarks' policy of insurance when this matter was tried by the jury in the trial court, those offset amounts became uncollectible when the Shoafs' liability carrier becameinsolvent during the pendency of Tennessee Farmers' appeal.

The Court of Appeals also ruled that it was appropriate that Tennessee Farmers pay post-judgment interest. Why? Under Tenn. Code Ann. § 47-14-122, post-judgment interest is mandatory from the day of the jury's verdict. While Tennessee Farmers was entitled to avoid interest on the $25,000.00 it tendered after the original appeal (remember, it admitted it owed $25,000.00 and it was required to pay interest on the first $25,000.00 of the judgment until it made the tender) it was required to pay interest on the other $25,000 which accrued from the date of the original jury verdict some four years earlier.

I have a major concern about the post-judgment interest portion of the opinion. When Tennessee Farmers tendered the $25,000.00, it did so saying that it was offered in full satisfaction of the

entire claim. That should not cut off post-judgment interest on the $25,000.00. Why? Because if the Clarks would have taken it they would have had to give up two years of post-judgment interest on the $25,000.00 which Tennessee Farmers admitted it owed and a right to fight about the other $25,000.00 and the four years' interest on that. That would be fundamentally unfair.

A judgment debtor should not be able to avoid one penny's worth of post-judgment interest by making a partial payment linked to a waiver of the right of the judgment creditor to receive that to which he or she is entitled under the original judgment. If Tennessee Farmers had made an unconditional tender of $25,000.00, the Clarks had the obligation to take it and when they did (or even if they did not) Tennessee Farmers should have been relieved of the obligation to pay interest on that portion of the award from that day forward. However, it still would have had the obligation to pay interest on the first $25,000.00 of the judgment from the date of the jury verdict until the date of the unconditional tender and interest on the "second" $25,000.00 from the day of the jury verdict until the date paid. The court's decision cost the Clarks over $5,000.00 in interest and I would urge them to file a motion to reconsider and, if that is unsuccessful, a Rule 11 application.

- **Uninsured Motorist Claims**
- **Prejudgment Interest**
- **Postjudgment Interest**

James L. Ferguson, et al v. John F. Jenkins, No. E2007-02501-COA-R3-CV, 2008 WL 4949233 (Tenn. Ct. App. Nov. 20, 2008). Author: Judge Sharon G. Lee. Trial: Judge Jean A. Stanley.

Plaintiff successfully pursued a claim against his uninsured motorist carrier ("UM Carrier") for the full UM limits available under the policy. Plaintiff also requested prejudgment interest, which the trial court granted. UM Carrier appealed the award of prejudgment interest since it would expose UM Carrier to damages beyond the policy limits.

The UM policy stated "[t]he most we will pay for all damages resulting from any one 'accident' is the limit of Uninsured Motorists Coverage shown in the Schedule." (emphasis added). The Court of Appeals looked to *Malone v. Maddox*, No. E2002-01403-COA-R3-CV, 2003 WL 465668 (Tenn. Ct. App. Feb. 25, 2003) and *Thurman v. Harkins*, No. W2004-01023-COA-R3-CV, 2005 WL 1215959 (Tenn. Ct. App. May 25, 2005), and found them both binding precedent on the facts of this case. In *Malone*, the Eastern Section Court of Appeals noted that prejudgment interest is defined at Tenn. Code Ann. § 47-14-123 as "an element of, or in the nature of, damages[....]" *Id*. at 5. Like the policies in *Malone* and *Thurman*, the UM policy in this case provided a cap for "all damages." Because prejudgment interest is an element of damages, the Court of Appeals ruled the trial court erred in granting prejudgment interest that would result in a judgment in excess of the policy limits.

The court specifically distinguished postjudgment interest, which is mandatory on every judgment and is not an element of damages. The court therefore affirmed the award of postjudgment interest in the case.

In terms of both policy and practicality, prejudgment interest makes sense in almost every circumstance. Without the possibility of prejudgment interest, defendants sit on the possible damages award with the ability to earn interest on the funds while the case meanders through the pretrial process. This gives defendants a financial incentive to avoid a final judgment on the merits. By contrast, the plaintiff is left waiting for judgment day with damages that have already accrued. The plaintiff has not only already suffered the financial loss, but likely faces growing interest on the debts that the plaintiff has incurred as a result. For example, a plaintiff may owe significant deductible amounts to health care providers, and may run up substantial credit card debt on living expenses while unable to work due to injuries. Prejudgment interest may not make up for those losses, but it would at least assuage some of them.

So why do I say it makes sense in almost every – but not every – circumstance? Because some plaintiffs are dilatory, and some plaintiffs' lawyers are dilatory notwithstanding their clients' continuing economic hardship. If the plaintiff or the plaintiff's attorney cannot demonstrate diligence in seeing the case moved to its ultimate resolution, they must bear the lost time-value of the money; prejudgment interest shouldn't be an offset for their own sloth.

- **Uninsured Motorist Claims**
- **Service of Process**

Fagg v. Buettner, No. M2007-02748-COA-R3-CV, 2008 WL 4876535 (Tenn. Ct. App. Nov. 10, 2008). Author: Judge Frank G. Clement, Jr. Trial: Judge Barbara N. Haynes.

Plaintiff filed a complaint for an automobile accident against Defendant. Plaintiff contemporaneously had a summons issued for and served on Plaintiff's Uninsured Motorist insurer.

The county sheriff attempted service on Defendant at the address identified on the police report, but returned the summons unserved with a notation that Defendant was "not to be found in my county." Less than a month later, Plaintiff issued an alias summons for Defendant to be served at a different address identified by the Tennessee Department of Safety. The alias summons was also returned unserved with a notation that Defendant was "not to be found in my county. Does not reside." One year later, Plaintiff issued a pluries summons for Defendant at the same address provided by the Department of Safety. A private process server returned the summons unserved again, with a notation that Defendant had not lived at the address for two and a half years.

A year later, and three days before the trial was scheduled to begin, Plaintiff's UM Insurer amended its answer to assert a statute of limitations defense based on Plaintiff's failure to reissue an additional pluries summons for Defendant within one year. UM Insurer then filed a motion to dismiss on the same ground, which was granted by the trial court, and Plaintiff appealed.

The Court of Appeals ruled Plaintiff's case should not have been dismissed, and Plaintiff was entitled to proceed against UM Insurer under Tenn. Code Ann. § 56-7-1206(d). The court pointed to its prior holding that "[s]uspension of the T.R.C.P. Rule 3 requirement, that alias process be issued every six months or that the action be filed yearly, during the subsection (d)

proceeding, is consistent with the legislative intent to provide an efficient procedure." *Lady v. Kregger*, 747 S.W.2d 342, 345 (Tenn. Ct. App. 1987). Likewise, in *Little v. State Farm Mut. Ins. Co.*, 784 S.W.2d 928, 929 (Tenn. Ct. App. 1989), the court had explained that requiring the plaintiff to obtain service on the uninsured motorist or "reissuing process from time to time indefinitely" was "not the intention of the legislature." The court ruled that Plaintiff was not required to continue her attempts to serve process when previous dutiful attempts were returned "not to be found."

The court rejected UM Insurer's contention that Plaintiff had a never ending duty to continue her efforts to serve Defendant. The court distinguished three prior cases relied on by UM Insurer. In the first case, the plaintiff failed to establish that the tortfeasor was uninsured, and the court found the fact that the plaintiff did not serve the uninsured motorist carrier for more than one year indicated he did not intend to rely on uninsured motorist coverage when he filed the initial lawsuit. *See Ballard v. Ardenhani,* 901 S.W.2d 369 (Tenn. Ct. App. 1995). In the second case, the plaintiff only attempted to serve a deceased tortfeasor through the attorney for the estate's executor; she did not attempt to serve the actual responsible party at his last known address. *See Winters v. Jones*, 932 S.W.2d 464, 465-66 (Tenn. Ct. App. 1996). Finally, in the third case, there was no evidence that the plaintiff made any effort to obtain service of process on the tortfeasor's last known address in Switzerland. *See Webb v. Werner,* 163 S.W.3d 716, 717-21 (Tenn. Ct. App. 2004). The court found each of these cases distinct because Plaintiff in the present case made three diligent efforts to serve the uninsured motorist, each of which was returned with a notation to the effect of "not to be found." The court therefore reversed dismissal of UM Insurer and remanded for further proceedings.

This case is mandatory reading for anyone prosecuting or defending a claim an uninsured motorist claim. It also illustrates that it is a good idea for any plaintiff in an automobile accident case to serve his or her uninsured / underinsured motorist carrier at the outset of the case, regardless of whether it appears there may be a coverage issue.

- **Uninsured Motorist Insurance**

Gary W. Hannah and Janet Hannah v. Kenny K. Wang and Hartford Insurance Company, No. M2006-00943-COA-R3-CV, 2008 WL 5330426 (Tenn. Ct. App. Dec. 19, 2008). Author: Judge D. Michael Swiney. Trial: Judge J. Mark Rogers.

Plaintiff was a passenger on a school bus struck by another driver, Kenny Wang. Wang admitted being 100% at fault for the accident. Plaintiff served the school board's uninsured / underinsured motorist carrier ("UM carrier"). UM carrier filed a motion for summary judgment on the ground that the UM coverage available under the policy was less than Wang's liability insurance limits. Plaintiff argued that the statutory procedure for accepting a lower UM limit had not been followed, and therefore the UM limits should be equal to the school board's liability insurance limit of $1,000,000. The trial court granted the motion, and Plaintiff appealed.

Defendant introduced a UM rejection form signed by the school superintendent rejecting coverage equal to the liability limits, and instead accepting $60,000 in UM coverage. Plaintiff

argued that the school superintendent did not have the school board's authority to sign the rejection form. The Court of Appeals disagreed. The court noted that after the superintendent signed the rejection form and a policy was issued with the reduced UM coverage, the school board unanimously voted to approve the policy as issued, and renewed the policy twice. Accordingly, the Court of Appeals affirmed the trial court's decision.

- **UM/UIM Policies**
- **Subrogation**

Mark Bayless, et al v. Richardson Pieper, et al., No. M2008-01073-COA-R3-CV, 2009 WL 2632763 (Tenn. Ct. App. Aug. 26, 2009). Author: Judge Andy D. Bennett. Trial: Judge Amanda Jane McClendon.

In a nutshell, the Court of Appeals ruled that a UM carrier is not entitled to an offset for liability insurance proceeds to the extent those proceeds are used to pay off a workers' compensation lien.

Plaintiff was injured in an automobile accident for which the other driver's insurance carrier paid their liability policy limits of $100,000. Because Plaintiff was on the job at the time of the accident, Plaintiff also recovered from his workers' compensation carrier in the amount of $84,937.65. Plaintiff repaid his workers' compensation carrier $67,000 to satisfy the lien. Plaintiff then sought recovery from his own uninsured / underinsured motorist carrier. Plaintiff and his UM carrier stipulated that Plaintiff's damages totaled $225,000. UM carrier sought an offset based on the total payment by the liability carrier as well as the total payment by the workers' compensation carrier. Plaintiff argued that UM carrier could not offset for the portion of the workers' compensation payment that Plaintiff was required to pay back as a lien ($67,000). The trial court ruled that the UM carrier was entitled to an offset in the total amount of the workers' compensation payment, and Plaintiff appealed.

The Court of Appeals reversed. The court ruled that UM carrier's argument was foreclosed by the court's prior holding in *Boyce v. Geary,* No. 01-A-01-9409-CV-00410, 1995 WL 245389, at *3 (Tenn. Ct. App. Apr. 28, 1995). In *Boyce*, the court held that a UM insurer could reduce its obligation by payments made by those legally responsible for the loss "but only where such a reduction 'avoid[s] duplication of insurance and other benefits.'" *Id*. at 3. The Court of Appeals explained in this case that UM carrier is "not entitled to an offset for liability insurance proceeds that were used to satisfy the workers' compensation subrogation interest."

Since Plaintiff paid the workers' compensation subrogation lien with liability insurance proceeds, he received a net benefit of $33,000 from the liability insurance payment. The court found "no possibility that he will receive a duplication of benefits or a duplication in payments." Therefore, the Court of Appeals reversed and ruled Plaintiff entitled "entitled to a judgment in the amount of $107,062.35 which represents total damages of $225,000 less offsets in the amounts of $84,937.65 for workers' compensation benefits and $33,000 for the [Plaintiff's] net liability recovery."

- **Uninsured / Underinsured Motorist Coverage**

Julia Fisher, et al. v. Ashley Revell, et al., No. W2008-02546-COA-R3-CV, 2009 WL 3103796 (Tenn. Ct. App. September 30, 2009). Author: Judge J. Steven Stafford. Trial: Judge William B. Acree.

This case presents an insurance coverage question as to the relationship between "per person" and "per occurrence" coverage limits. Plaintiffs' underinsured motorist policy provided $100,000 coverage per person, and $300,000 per occurrence. The "Limits of Liability" section of the policy provided:

> a. We will pay compensatory damages for bodily injury up to the Limit of Liability stated in the Declarations as follows:
> (1) The limit stated for "each person" is the amount of coverage and the most we will pay for all compensatory damages because of or arising out of bodily injury to one person in any one occurrence.
> (2) The limit stated for "each occurrence" is the total amount of coverage and the most we will pay, subject to 4.a.(1) above, for all compensatory damages because of or arising out of bodily injury of two or more persons in any one occurrence.

Plaintiffs contended that "two or more persons" language in the clause regarding "each occurrence" could and should be construed to provide a total of $300,000 coverage when two people were injured in the same event. Under Plaintiffs' interpretation, the policy would provide $150,000 to each person despite the limitation in the clause regarding "each person."

The Court of Appeals rejected Plaintiffs' argument, affirming the trial court's finding that the policy was unambiguous. The court acknowledged "that the policy's use of 'two or more persons' in section 4.a.(2) is imprecise and awkwardly drafted." However, the court found Plaintiffs' interpretation was not reasonable. Since Plaintiffs did not offer a reasonable alternative to Insurer's interpretation of the policy, the court found no ambiguity in the policy.

Judge Highers wrote a separate concurring opinion in which he clarified that, if the phrase "subject to 4.a.(1) above" was not in the explanation of the "each occurrence" limit, the policy would be ambiguous. Because the "each occurrence" section specifically references and incorporates the "each person" section, however, Judge Highers found Plaintiffs' construction of the policy "both strained and unreasonable."

Judge Kirby also wrote a separate concurring opinion. She stated that she would find the contract ambiguous. Judge Kirby disagreed with the majority, stating that Plaintiffs' interpretation of the policy did not ignore the "subject to" language, but merely came to a different interpretation of the policy. Although ambiguous contracts are normally construed against the drafter, Judge Kirby stated she would still affirm the result because Plaintiffs' interpretation led to an anomalous result - if there was one injured person, they could recover up to $100,000; if there were two injured persons, they could each recover up to $150,000; and if there were three or more injured persons, they could each recover no more than $100,000.

WORKERS' COMPENSATION - SUBROGATION

- **Worker's Compensation Subrogation**
- **Attorney's Fees**

Sircy v. Wilson, No. M2007-01589-COA-R3-CV, 2008 WL 4830806 (Tenn. Ct. App. Nov. 5, 2008). Author: Judge Richard H. Dinkins. Trial: Judge Clara Byrd.

The Middle Section of the Court of Appeals has upheld the award of one-third of a settlement with a third-party for monies due to a worker's compensation insurer that had a subrogation interest in the recovery.

The court found that the efforts of the employee's lawyer produced the settlement and that the attorney for the worker's compensation insurer did little to produce or contribute to the settlement.

Plaintiff's lawyers: put this decision in your quiver for resolving fee disputes with worker's compensation insurers.

- **Workers' Compensation Liens**

Gary Harris v. Alcoa, Inc., et al., No. E2008-02166-COA-R3-CV, 2009 WL 1470632 (Tenn. Ct. App. May 27, 2009). Author: Judge Charles D. Susano, Jr. Trial: Chancellor Michael W. Moyers.

Plaintiff settled a claim with a third-party, then put a portion of the settlement funds in escrow pending resolution of Employer's workers' compensation lien on the recovery. Plaintiff contended that, although Employer paid for a prosthetic arm for Plaintiff, Plaintiff never received it from the health care provider. Plaintiff therefore argued that he was not required to repay that sum back to the employer since the prosthetic was never "furnished" under Tenn. Code Ann. § 50-6-204(a)(1). The trial court granted a judgment on the pleadings for Employer, and the Court of Appeals reversed. The court ruled that Plaintiff could present a case that he was never furnished the prosthetic, and therefore Employer did not have a lien on Plaintiff's recovery.

Although the facts are unique, the case deserves two gavels because the "shall furnish" to the employee language from § 50-6-204(a)(1) also applies to all other payments for an employee's medical expenses. In other words, the ruling is likely not limited to prosthetics, but instead could apply to any and all medical expenses. Thus, to assert a workers' compensation lien, it might not be enough for an employer to merely state that the employer cut a check for medical treatment for the employee. Instead, the employer may have to show the employee actually received the treatment.

Ninety-nine times out of a hundred, this will make no difference at all. The employer pays for treatment as the employee receives it. But in that 1 in a 100 case where an employer pays and the employee does not receive the benefit of that payment, this ruling makes sure the employer is

the one to seek reimbursement from the health care provider (rather than requiring the injured employee to repay the funds to the employer and figure out why the treatment was never delivered).

WRONGFUL DEATH

- **Wrongful Death**
- **Common Fund Doctrine**
- **Reasonableness of Attorneys' Fees**

Fred A. Shamblin, et al v. Joshua D. Sylvester, No. E2008-01440-COA-R3-CV, 2009 WL 981700 (Tenn. Ct. App. Apr. 13, 2009). Author: Judge D. Michael Swiney. Trial: Judge Lawrence H. Puckett.

Read this opinion in detail if you want to see some of the information a trial court may consider in determining whether an attorney's fee is reasonable, especially a contingency fee.

Decedent died due to injuries in an automobile accident. Decedent's heirs were her Father and Mother. Two weeks after Decedent's death, Father filed a wrongful death lawsuit against the driver of the vehicle Decedent was riding in. Father entered a contingency fee agreement for his attorney to receive one-third of any recovery. The case settled quickly, with two insurance companies paying policy limits totaling $300,000. Decedent's Mother did not participate in the lawsuit or its settlement. Under Tennessee wrongful death law, however, Father and Mother shared equally in the settlement proceeds.

After receiving the settlement proceeds, Father's attorney sought a one-third fee based on the total recovery, including Mother's portion. Mother refused to pay Father's attorney. Father's attorney disbursed $100,000 each to Father and Mother, held the remaining $100,000 in escrow, and moved the trial court to approve his attorney fee.

Father's attorney supported his motion to approve the fee with affidavits from two local attorneys who asserted that, given the uncertainties of receiving any payment for representing a plaintiff in a contingency fee arrangement, the one-third fee was reasonable under the circumstances. Mother responded with affidavits from two other attorneys who opined that the one-third fee was not reasonable under the circumstances, and that a fee based on Father's attorney's hourly rate would be reasonable. At the hearing on the motion to approve the fee, Father's attorney argued that one reason he pushed for a quick settlement was uncertainty given the then-unreleased results of drug tests on Decedent and Defendant.

The trial court ruled that Father's attorney was entitled to a fee under the common fund doctrine, and that the one-third fee was reasonable under the circumstances. Mother appealed.

The Court of Appeals affirmed. First, the Court of Appeals quoted at length from *Kline v. Eyrich*, 69 S.W.3d 197 (Tenn. 2002), in which the Tennessee Supreme Court recognized that a trial court's "application of the common fund doctrine in the wrongful death context will rarely

be inappropriate." *Kline* at 206. The Court of Appeals found "[t]his was not one of those rare cases[,]" and applied the common fund doctrine.

Next, the court turned to whether Father's attorney's fee was reasonable in this particular case. The court again quoted from *Kline* for the factors applicable to determining whether a fee is reasonable:

> The *Connors* guidelines include the time devoted to performing the legal service; the time limitations imposed by the circumstances; the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; and the experience, reputation, and ability of the lawyer performing the legal service. *See* 594 S.W.2d at 676.
>
> Tennessee Supreme Court Rule 8, DR 2-106(B) contains similar, though not identical, factors, including (1) "The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly"; (2) "The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer"; (3) "The fee customarily charged in the locality for similar legal services"; (4) "The amount involved and the results obtained"; (5) "The time limitations imposed by the client or by the circumstances"; (6) "The nature and length of the professional relationship with the client"; (7) "The experience, reputation, and ability of the lawyer or lawyers performing the services"; and (8) "Whether the fee is fixed or contingent."

Kline at 209 n. 11 (citing *Connors v. Connors*, 594 S.W.2d 672 (Tenn. 1980)).

In this case, based on the record before it, the Court of Appeals found the trial court did not err in applying incorrect law, and did not abuse its discretion in awarding the one-third contingency fee.