TORT AND COMPARATIVE FAULT LAW UPDATE 2010

Presenter: JOHN A. DAY

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

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CAUSATION:

- **Summary Judgment**
- **Causation**

Wanda F. Dykes, et al v. The City of Oneida, et al, No. E2009-00717-COA-R3-CV (Tenn. Ct. App. February 26, 2010). Author: Judge Charles D. Susano, Jr. Trial: Judge John D. McAfee.

There is nothing to see here if you understand the law of summary judgment practice in Tennessee. Plaintiff's causation expert did not say that, more likely than not, the outcome would have been more favorable absent Defendant's alleged negligence. However, because there was no scheduling order requiring Plaintiff to disclose all expert testimony, and Defendant did not offer any contrary expert testimony, summary judgment was improperly granted to Defendant.

Plaintiff sued for the wrongful death of her husband, alleging Defendant's police officers left Decedent asleep and unresponsive without calling for medical assistance. Defendant moved for summary judgment asserting, among other things, that Plaintiff could not prove causation. The trial court continued the summary judgment hearing four times to allow Plaintiff to produce expert testimony on causation. Plaintiff finally offered an affidavit and deposition testimony of a doctor who stated that Defendant's failure to seek medical assistance "may have allowed" Decedent's condition to worsen, but the doctor could not say if Decedent would have survived with proper treatment. The trial court granted summary judgment, and Plaintiff appealed.

The Court of Appeals reversed, finding Defendant had not affirmatively negated an essential element of Plaintiff's claim since Defendant offered no expert testimony that Decedent would have died regardless of Defendant's alleged negligence. Moreover, there was no scheduling order in place requiring Plaintiff to offer any and all expert testimony, and thus the Court of Appeals ruled that Defendant's summary judgment motion amounted to a "put up or shut up" motion contrary to *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). The Court of Appeals aptly ruled that the equivocal testimony offered through Plaintiff's expert doctor did not negate the causation element in Defendant's favor; it merely failed to support a finding of causation in Plaintiff's favor.

- **Causation**

Effie Rivers v. Northwest Tennessee Human Resource Agency, No. W2009-01454-COA-R3-CV (Tenn. Ct. App. April 19, 2010). Author: Judge Holly M. Kirby. Trial: Judge Donald E. Parish.

Plaintiff and Defendant introduced conflicting testimony of doctors as to whether Plaintiff's injuries and surgery were caused by an automobile accident with Defendant. The trial court ruled in Plaintiff's favor, and the Court of Appeals affirmed. There were no legal issues involved; the only issue was whether Plaintiff's purported failure to report pre-accident symptoms to Plaintiff's doctor undermined the doctor's causation testimony. The opinion really is only useful towards sustaining a verdict with conflicting causation testimony from experts, and

towards convincing a trial court that one omission in a plaintiff's medical history does not mean the plaintiff cannot prove causation or damages.

CLAIMS AGAINST STATE:

- **Claims Commission**
- **Sovereign Immunity**

Candace Mullins v. State of Tennessee, No. M2008-01674-SC-R11-CV (Tenn. September 17, 2010). Author: Justice Sharon G. Lee. Trial: Commissioner Stephanie R. Reevers.

Plaintiff's children were removed from her home based on a DCS investigation. Plaintiff requested that the children be placed with Plaintiff's aunt, and DCS performed a background check of the aunt. Afterward, DCS concurred with Plaintiff's request and recommended to juvenile court that the children be placed in the temporary custody of Plaintiff's aunt. The juvenile court awarded temporary custody to the aunt, and DCS closed its file.

Less than a month later, Plaintiff called the DCS case manager with concerns about the care and home environment of the children. Plaintiff reported that the aunt was away from the home for much of the day, and the children were in the care of the aunt's mentally challenged nineteen-year-old daughter. Plaintiff reported that one of her children had suffered a burn injury. In response to an official referral to DCS requested by Plaintiff, the DCS case manager went to the home to investigate, finding scarring and bite and burn marks on Plaintiff's five-year-old son. Based on the DCS employee's total investigation, however, she concluded there was no evidence of neglect or abuse or an immediate risk of harm.

Nine days after DCS closed its investigation, the five-year-old was admitted to the hospital with serious injuries that ultimately led to his death a day later. The nineteen-year-old daughter of Plaintiff's aunt was charged with first degree murder and aggravated child abuse as a result.

Plaintiff filed suit in the Claims Commission against the State, alleging the Tennessee Department of Children's Services was negligent after the child was placed in the temporary care of the aunt. Plaintiff alleged the State was liable under Tenn. Code Ann. § 9-8-307(a)(1)(E), which authorizes claims against the State for the "[n]egligent care, custody and control of persons." The Claims Commissioner ruled that it lacked subject matter jurisdiction because the child was not in the care, custody, or control of DCS at the time the child was abused, and the Court of Appeals affirmed.

Importantly, Plaintiff did not, on appeal, challenge the State's actions before the child was placed in the aunt's custody, or in placing the child in the temporary custody of the aunt. Thus, the critical issue was whether DCS's actions after the child was placed in the temporary care of a third party by court order constituted negligent care, custody, or control of persons such that the State's sovereign immunity would be waived by statute.

The Supreme Court first noted that, during this time period, the State did not have legal or physical custody of the child. The Court explained:

> The concept of "custody" is closely intertwined with the concepts of responsibility for "care" and "control." Our legislature has defined "custody" as meaning "the control of actual physical care of the child and includes the right and responsibility to provide for the physical, mental, moral and emotional well-being of the child." Tenn. Code Ann. § 37-1-102(b)(8) (2005 & Supp. 2009). Furthermore, Tennessee Code Annotated section 37-1-140(a) (2005) provides for the following rights and attendant responsibilities of a legal custodian:
>
> > A custodian to whom legal custody has been given by the court under this part has the right to the physical custody of the child, the right to determine the nature of the care and treatment of the child, including ordinary medical care and the right and duty to provide for the care, protection, training and education, and the physical, mental and moral welfare of the child, subject to the conditions and limitations of the order and to the remaining rights and duties of the child's parents or guardian.

The Court noted that, in *Stewart v. State*, 33 S.W.3d 785, 794 (Tenn. 2000), the Court interpreted "care, custody, and control" in the disjunctive, stating in *Stewart* that "it is difficult to conceive that the legislature intended to deny jurisdiction in cases where negligent control of a person by a state employee resulted in injury, even though the injured person was not actually within the care or custody of the state employee." *Id.* Thus, Plaintiff argued that the State should be liable for negligent control even though the child was in the custody and care of Plaintiff's aunt. The Supreme Court, however, ruled that once the child was placed in temporary custody, the aunt "was the only one who had custody of [the child] and thus the responsibility and obligation to provide care for him and control over him."

Plaintiff argued that two statutes created a duty by DCS to provide for the "control" of a child who is the subject of a referral for possible child abuse. Tenn. Code Ann. 37-1-406 requires DCS to "make a thorough investigation" after receiving a report of harm, and Tenn. Code Ann. 37-1-113(a)(3) permits DCS to take a child into custody if there are reasonable grounds to believe the child is being abused or neglected. Plaintiff also argued that the DCS voluntarily assumed a duty to control the child by way of the DCS case manager's testimony that it was her responsibility to protect the child from any danger to his safety she found during her investigation.

However, the Supreme Court agreed with two unreported Court of Appeals opinions holding "that the Claims Commission did not have jurisdiction of a claim for negligent investigation of a referral for possible child abuse." The Court thus construed Plaintiff's claim as one for "negligent investigation," rather than negligent control, and thus not subject to the waiver of sovereign immunity in Tenn. Code Ann. 9-8-307(1)(E). Accordingly, the Court affirmed the Claims Commissioner's ruling that the Claims Commission lacked subject matter jurisdiction to hear Plaintiff's claim.

COMPARATIVE FAULT:

- **Comparative Fault**
- **Several Liability**
- **Original Tortfeasor Doctrine**
- **Medical Malpractice**

Alice J. Banks v. Elks Club Pride of Tennessee 1102, et al., No. M2008-01894-SC-S09-CV (Tenn. January 13, 2010). Author: Justice William C. Koch, Jr. Trial: Judge Thomas W. Brothers

In this case, the Tennessee Supreme Court sets the post-*McIntyre* standard for an original tortfeasor's liability for enhanced harm caused by a subsequent tortfeasor. At a minimum, you need to know two basic parts of the court's ruling. First, an original tortfeasor is liable for any enhanced harm the victim suffers "due to the efforts of third persons to render aid reasonably required by the other's injury, as long as the enhanced harm arises from a risk that inheres in the effort to render aid." Second, the original and subsequent tortfeasors are severally liable for the enhanced harm.

So, in a nutshell, where there is an allegation that a subsequent tortfeasor's negligence increased the plaintiff's damages, the fact-finder will first have to determine what amount of damages the plaintiff would have suffered if the subsequent tortfeasor had not been negligent. The original tortfeasor is liable for all of those damages. The factfinder also must determine the amount of damages the plaintiff suffered due to the "enhanced harm" caused by the subsequent tortfeasor. The original tortfeasor and the subsequent tortfeasor are severally liable for that amount. And, if there are multiple original tortfeasors, such as in a car accident, and multiple subsequent tortfeasors, such as in a hospital setting where the patient is treated by numerous health care providers with similar responsibilities, then apportionment of fault is going to look like a CPA exam.

The court's opinion traces in some detail the history of several liability versus joint and several liability in the eighteen years since *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). The court concludes that its post-*McIntyre* opinions on several liability have "repeatedly emphasized four core principles of the comparative fault regime" …

> (1) that when "the separate, independent negligent acts of more than one tortfeasor combine to cause a single, indivisible injury, all tortfeasors must be joined in the same action, unless joinder is specifically prohibited by law"; (2) that when "the separate, independent negligent acts of more than one tortfeasor combine to cause a single, indivisible injury, each tortfeasor will be liable only for that proportion of the damages attributed to its fault"; (3) that the goal of linking liability with fault is not furthered by a rule that allows a defendant's liability to be determined by the happenstance of the financial wherewithall of the other defendants; and (4) that the purpose of the comparative fault regime is to prevent fortuitously imposing a degree of liability that is out of all proportion to fault.

(internal footnotes omitted).

The Supreme Court specifically disapproved of the Court of Appeals' prior holdings preserving the original tortfeasor rule in *Atkinson v. Hemphill*, No. 01A01-9311-CV-00509, 1994 WL 456349, at *2 (Tenn. Ct. App. Aug. 24, 1994) (No TENN. R. APP. P. 11 application filed), *Troy v. Herndon*, No. 03A01-9707-CV-00271, 1998 WL 820698, at *1-2 (Tenn. Ct. App. Nov. 24, 1998) (No TENN. R. APP. P. 11 application filed), and *Jackson v. Hamilton*, No. W2000-01992-COA-R3-CV, 2003 WL 22718386, at *5-6 (Tenn. Ct. App. May 21, 2003), *perm. app. denied, designated not for citation* (Tenn. May 10, 2004).

The court noted that, if a defendant files an answer blaming a contributing tortfeasor, the burden will be on the defendant who raised the comparative fault defense to make the case. In a footnote, the court recognized that a motion for directed verdict based on the fault of a defendant who is added under TENN. CODE ANN. § 20-1-119 should not be heard until after all the proof has been entered in order to consider any evidence or argument by the defendant who asserted the comparative fault defense. The court also noted that, under TENN. CODE ANN. § 29-26-122(b), within thirty days of filing the answer asserting comparative fault of a health care provider, the original tortfeasor is required to file a certificate of good faith stating the defendant has a written statement from a competent expert to support the defense.

In footnote 15, the court also stated, unequivocally, that a plaintiff who brings in a health care provider under TENN. CODE ANN. § 20-1-119 is not required to file a certificate of good faith.

Finally, the court rejected Defendant's argument that the original tortfeasor rule was incompatible with *Mercer v. Vanderbilt University, Inc*, 134 S.W.3d 121 (Tenn. 2004). In *Mercer*, the court ruled that a health care provider generally cannot reduce their liability by asserting the comparative fault of the patient. The court distinguished *Mercer* because: (1) *Mercer* was necessary to avoid a complete bar to patient's recovery where the patient's fault caused the need for medical treatment; and (2) as opposed to the *Mercer* ruling, dropping the original tortfeasor rule "would be contrary to the basic tenets of Tennessee tort law, more than one century of Tennessee common-law precedents, and the general principles of liability reflected in the RESTATEMENT OF TORTS."

This decision represents a policy shift for Tennessee appellate courts. In the months and years after *McIntyre*, the intermediate courts ruled that the initial tortfeasor was 100% liable for any medical negligence that occurred during the treatment of the initial injuries. Now, the application of comparative fault and several liability to this situation increases the incentive for the original defendant to blame the plaintiff's health care providers for enhancing the injuries, potentially driving a wedge between the plaintiff/patient and the providers.

Will there be a flood of cases where defendants assert fault against a plaintiff's health care providers? No. To be sure, in the beginning there will be some. But, the burden of the certificate of good faith and the risk of sanctions will chill defendants just like it chills plaintiffs and plaintiffs' lawyers. Some doctors who are wrongfully charged with malpractice by defendants may retaliate against the defendant by offering even stronger testimony of behalf of plaintiffs on the issues of permanency, pain and suffering. Finally, defendants will quickly

figure out that it actually costs money to determine whether there is a valid medical malpractice case – and even more to actually prove one.

However, the problem is that the plaintiff is going to be tied up in protracted litigation. A relatively simple car wreck case could turn into a medical malpractice case where the defendants fight over who pays what, and the plaintiff is denied a trial date while the fight drags on. To be sure, this problem can be solved by a trial judge who establishes and enforces scheduling orders.

Two last comments. I must admit that it will be sort of fun to watch my brothers and sisters of the auto and premises liability defense bar bear the burden of proof in a medical malpractice case.

Second, to the extent that there was ever any doubt of the effect of a summary judgment for a defendant on the ability of a party to assert the fault of that defendant at trial that doubt is now eliminated. A defendant who blames a co-defendant or non-party bears the burden of proof on that defense. Thus, when a defendant files a properly-founded motion for summary judgment, all those in the case who have asserted or want to assert the fault of the movant better oppose the motion or timely file a Rule 56.07 motion. If not, a grant of summary judgment will forever close the door on evidence of fault of that party unless the motion was based on (a) the expiration of the statute of limitations; (b) the expiration of the statute of repose; or (c) the movant's immunity from suit.

- **Automobile Accidents**
- **Comparative Fault**

Pamela C. Bess v. Properties, L.P., et al., No. M2008-01691-COA-R3-CV (Tenn. Ct. App. June 11, 2010). Author: Judge Andy D. Bennett. Trial: Judge Buddy D. Perry.

The Court of Appeals reversed a bench verdict for Plaintiff. The trial court found that Plaintiff was 25% at fault for turning left in front of police car attempting to pass her on a two-lane two-way road with its lights and siren on. Plaintiff testified that the police car was one-half to one car length behind her when Plaintiff began to turn left. The Court of Appeals recited undisputed testimony that the police car left skid marks greater than that length in the lane of oncoming traffic. The Court of Appeals ruled that only one conclusion could be drawn from the physical facts – that the police car was greater than one car length behind Plaintiff when Plaintiff began to turn – and therefore Plaintiff was at least 50% at fault for the accident.

- **Premises Liability**
- **Comparative Fault**
- **Summary Judgment**

William W. Reed v. Bill McDaniel and Ahmad Elsebae, No. W2009-01348-COA-R3-CV (Tenn. Ct. App. February 23, 2010). Author: Judge J. Steven Stafford. Trial: Judge Roy B. Morgan, Jr.

Trial court granted summary judgment to Defendants in premises liability case, finding Plaintiff was at least 50% at fault for his own injuries. The Court of Appeals affirmed, reciting Plaintiff's deposition testimony that he was aware of and was being cautious because of the rotting condition of the flooring in Defendants' building. Under the circumstances, the Court of Appeals agreed with the trial court that any reasonable juror would conclude Plaintiff was at least 50% at fault by assuming the risk of injury.

- **Excited Utterance Hearsay Exception**

State v. Willie Hall, No. W2008-01875-CCA-R3-CD (Tenn. Crim. App. February 18, 2010). Author: Judge Alan E. Glenn. Trial: Judge James J. Lammey, Jr.

Trial court did not err in admitting a 911 call made while Defendant was breaking into house and attacking the victim, and continuing after Defendant left the house. The 911 tape was admissible under the excited utterance hearsay exception at TENN. R. EVID. 803(2). The Court of Criminal Appeals rejected Defendant's argument that the portion of the tape recorded after Defendant left the house was not covered by the exception, noting "there is no requirement that the cause of the startling event still be present or that the startling event still be ongoing – only that the declarant still be under the stress or excitement from the event."

I would like to meet the Zen master whose heart rate instantly returns to normal the moment an assailant stops an attack and walks away.

- **Road Construction Claims**
- **Expert Testimony**
- **Claims against the State**

Reginald Denard Usher, son of Reginald Smith, deceased v. Charles Blalock & Sons, Inc. et al., No. E2009-00658-COA-R3-CV (Tenn. Ct. App. June 30, 2010). Author: Judge Charles D. Susano, Jr. Trial: Judge Dale C. Workman.

This case is full of legal and factual issues. The most important legal rulings are: (1) a contractor working for the State (or presumably any sovereign entity) is not relieved from responsibility for the contractor's own negligence merely because it is following the instructions or directions of the State; (2) a contractor may argue factually that the State's directions, instructions, or approval of the contractor's work indicates the contractor's work was not negligent; and (3) expert

testimony is not necessarily required to prove liability in a road construction case if the proof is otherwise sufficient to establish the defendant's conduct was unreasonable under the circumstances. The rest of the opinion is an advanced course in civil procedure, with the judge serving as trier of fact for one defendant, and the jury serving as trier of fact on the same issues with respect to another defendant.

Plaintiff sued Contractor and the State of Tennessee for negligence in placing a crash cushion at the end of a series of concrete barriers without a "transition panel." Transition panels are designed to cover the otherwise exposed edge of the metal crash cushion and prevent vehicles from snagging the exposed edge. This crash cushion was in a highway construction zone.

Decedent was driving a tractor-trailer at night, and there was some question as to the degree of fog in the area at the time. Decedent was speeding, with experts estimating his speed at between 63 and 86 mph on a 55 mph road. There were no eyewitnesses to the accident, in which the exposed metal edge of the crash cushion penetrated the window of Decedent's cab and killed him.

The case was tried to a jury, who apportioned fault 25% to the Decedent, 37.5% to the State, and 37.5% to Contractor. The trial judge, acting as Claims Commissioner, went against the advice of the jury and dismissed the claims against the State. Later, the trial judge granted Contractor a new trial. Plaintiff appealed the dismissal of the claims against the State and the award of a new trial to Contractor.

The first issue that the Court of Appeals addressed was whether the trial court erred in ruling that Contractor could not be liable because it was taking directions from the State. The State's employee testified that he discussed moving the crash cushion with Contractor's employee. Contractor's employee asked the State's employee if the State wanted the transition panel installed. The State's employee testified, "I said we would come in the next day and move it, and I made a field judgment." The State's employee further testified that he does not have the authority to give orders to Contractor, only to make suggestions that Contractor can choose whether to follow. The State's employee acknowledged that he believed that if he had wanted something else done with the crash cushion, Contractor would have done it.

The trial court also heard testimony from an employee of Contractor who was not part of the crew that installed the crash cushion involved in the accident. Contractor's employee testified that he had never allowed a crash cushion to be installed without the transition panel, and that even if the State gave him permission to leave the panel off, he would take the extra step of installing one. Contractor's employee testified that he would certainly voice his concern if instructed or permitted to leave the panel off. Nonetheless, Contractor's employee testified it was reasonable for Contractor to follow the direction of the State's employee under these circumstances.

The Court of Appeals ruled that there was material evidence to support a verdict in Plaintiff's favor on this point, so factually the trial court's ruling was in error. The Court of Appeals also ruled that the trial court's legal conclusion was incorrect, and that *Johnson v. Oman Const. Co.*, 519 S.W.2d 782 (Tenn. 1975) controlled the correct result. In *Johnson*, the Tennessee Supreme

Court held that a contractor's negligence was not excused merely because the resulting work was ultimately accepted by the project owner. The Court of Appeals explained:

> [I]f the final inspection and acceptance of work by a sovereign owner is not enough to absolve a contractor of liability, it would not be logical to hold that an aberrant "order," given as a matter of "field judgment" on the spur of the moment, that creates a condition the contractor should have known was dangerous, would be given greater deference. The fact that the sovereign accepted or approved of or ordered the condition is not irrelevant.

The Court of Appeals did note that the inspection and acceptance of the completed work may be considered to determine the reasonableness of the contractor's work, but does not excuse any negligence outright. Thus, it appears the Court of Appeals did not mean that the acceptance, approval, or order by the State is "irrelevant," but instead that it is not dispositive.

The Court of Appeals next held that the trial court erred in holding that Plaintiff's claim against Contractor required expert testimony. The Court of Appeals ruled that the proof in the record from employees of Contractor and State "was sufficient to allow the jury to understand the risk of injury posed to the Decedent from leaving the transition panel off the crash cushion, versus the burden and risk of installing the panel."

Then, the Court of Appeals ruled that the trial court erred when it rejected the jury's verdict and found that no reasonable jury could conclude Decedent was less than 50% at fault. The Court of Appeals found there was material evidence to support the jury's verdict, and that a reasonable juror could find Decedent's fault was less than 50%.

However, the Court of Appeals emphasized that while there was evidence to support Plaintiff's case, the evidence regarding Decedent's fault did not preponderate against the trial court's finding that Decedent was at least 50% at fault. In other words, a reasonable finder of fact could have concluded either way. For the claim against the State, the trial judge sat as the finder of fact, separate and apart from the jury on the claim against Contractor. Because the evidence did not preponderate against the trial judge's findings, the Court of Appeals affirmed the trial court's dismissal of Plaintiff's claim against the State.

For Plaintiff's claim against Contractor, the Court of Appeals remanded for a new trial notwithstanding its reversal of the trial court's directed verdict in favor of Contractor. The Court of Appeals pointed out that the trial court's decision effectively concluded that the trial judge did not approve of the jury's verdict in the trial judge's role as 13th juror.

The Court of Appeals did not explain what will happen with the comparative fault issues on remand, but they should play out with a new jury hearing Plaintiff's claim against Contractor. If either Plaintiff or Contractor continue to allege the fault of the State (which will almost certainly happen), the jury will be asked to apportion fault to Plaintiff, Contractor, and the State. Any damages for fault apportioned to the State will not be recoverable (but will reduce the likelihood of Plaintiff being deemed more than 50% at fault). If Plaintiff does not allege the fault of the State but Contractor does, the burden will be on Contractor to prove the State's fault.

DAMAGES:

- **Damages**

Bobby Gerald Riley, and wife, Tanya Riley, Individually and as next of kin for Hunter Riley v. James Orr, No. M2009-01215-COA-R3-CV (Tenn. Ct. App. June 11, 2010). Author: Judge Holly M. Kirby. Trial: Judge Lee Russell.

Father and Son were hunting in the same general vicinity as Defendant, who was also hunting. Defendant fired his shotgun at what he believed to be a turkey, hitting Father with several pellets. Son was not hit, but some pellets came close.

Father and Mother filed suit against Defendant. Father sought damages for medical expenses, loss of earnings, pain and suffering, mental anguish, and physical disfigurement. Mother sought loss of consortium damages. They also sued on behalf of Son for negligent infliction of emotional distress. Defendant admitted liability.

Defendant challenged the verdict form as inconsistent with the jury instructions. Specifically, the jury was instructed as to the basis for Father's mental pain and suffering damages, but was not given an instruction as to the basis for Father's emotional injury damages. The verdict form, however, included separate line items for pain and suffering and for emotional injury, and the jury awarded Father damages under both categories. The Court of Appeals found no reversible error because the jury was separately instructed on emotional injury damages in reference to Son's claim, and therefore received appropriate instructions as to both types of damages.

The Court of Appeals agreed with Defendant that there was no material evidence in the record to support the jury's award of $8,000 for Father's future medical expenses. The surgeon who treated Father testified that removal of additional shotgun pellets from Father would cost between $1,825 to $2,250. A counselor who examined Plaintiffs before trial testified that Father had a "significant impairment" and that the counselor charges $75/hour for counseling, but the Court of Appeals found no testimony from the counselor in the record that Father needed further counseling. Therefore, the Court of Appeals agreed that the only future medical expenses supported by the material evidence were for the $2,250 or less described by the surgeon.

The Court of Appeals rejected Defendant's contention that Father's past lost earning capacity damages were not supported by material evidence because Father testified he did not lose any income due to the incident, but instead used accrued vacation time to avoid missing a paycheck. The Court of Appeals agreed with Father that "testimony regarding the physical limitations that the incident imposed on him supports the award." The court emphasized that "[d]amages for lost earning capacity are measured not by the amount of the plaintiff's lost wages but by the extent of impairment to the plaintiff's ability to earn a living." *Graves v. Jeter*, No. W2003-02871-COA-COA-R3-CV, 2004 WL 3008871, at *4 (Tenn. Ct. App. Oct. 11, 2004) (citations omitted).

The Court of Appeals likewise rejected Defendant's request for a remittitur as to Father's award of $50,000 for past loss of enjoyment of life damages, finding material evidence to support the verdict and that the award was within "the upper limit of the range of reasonableness."

The Court of Appeals did grant a remittitur as to Father's emotional injury damages. The court explained:

> "'[S]erious' or 'severe' emotional injury occurs 'where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " *Id.* (citing *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983); *Plaisance v. Texaco, Inc*., 937 F.2d 1004, 1010 (5th Cir.1991); *Prosser and Keeton on the Law of Torts* § 54, at 364-65, n. 60).

In this case, the counselor who examined Father testified he did not meet the criteria for a diagnosis under the DSM-IV, but did say Father exhibited stress and anxiety that was a "significant impairment." The Court of Appeals found the testimony did "not rise to the level of evidence demonstrating a 'severe' or 'serious' emotional injury." The court found the jury's award of $50,000 was not within the range of reasonableness, and that the evidence supported an award of no greater than $5,000.

Finally, the Court of Appeals reversed Son's award for emotional injury because Son was not actually stricken by the pellets, did not suffer any physical injury, and did not introduce the requisite proof through an expert that he had suffered a severe emotional injury.

The Court of Appeals remanded to the trial court to determine whether Plaintiffs would accept the suggested remittitur amounts for Father's emotional injury and future medical expenses awards.

- **Damages**

Bobby Steve Simmons and Jeannie L. Simmons v. City Murfreesboro, et al., No. M2008-00868-COA-R3-CV (Tenn. Ct. App. December 9, 2009). Author: Judge Alan E. Highers. Trial: Judge Robert E. Corlew.

This is all you need to know: Whether under a negligence or breach of contract theory, the proper measure of damages for injury to real property is the lesser of either (1) the difference in reasonable market value of the premises immediately prior to and immediately after the injury, or (2) the cost of repairing the injury. The court may also consider reasonable restoration costs.

- **Potentially Inflammatory Photographs**

State v. Genaro Edgar Espinosa Dorantes, No. M2007-01918-CCA-R3-CD (Tenn. Crim. App. November 30, 2009). Author: Judge Camille R. McMullen. Trial: Judge Steve R. Dozier.

Trial court did not err in admitting 13 of 39 autopsy photographs of child murder victim when medical examiner testified they were necessary to explain her medical testimony.

- **Damages**
- **Wrongful Death**
- **Comparative Fault**

Laura Wilburn, as the Personal Representative of Son Jones, Deceased v. City of Memphis**,** No. W2009-00923-COA-R3-CV (Tenn. Ct. App. April 9, 2010). Author: Judge Alan E. Highers. Trial: Judge Charles McPherson.

The trial court entered a bench verdict for Plaintiff of $7,500 for the wrongful death of her son, and Plaintiff appealed the amount of the verdict. Because the trial court did not enter any findings of fact, the Court of Appeals reviewed the case *de novo*. The Court of Appeals affirmed, finding a basis for comparative fault against Decedent. The Court of Appeals did not apportion specific percentages of fault between Plaintiff and Defendant, and did not decide a specific amount of total damages. Instead, the court affirmed the trial court's final award of $7,500 given some reduction for Decedent's fault and some starting dollar figure for the pecuniary value of the life of Decedent.

The Court of Appeals rejected any award for Plaintiff's claimed $3,300 in funeral and burial expenses, stating Plaintiff "failed to substantiate her claims…." Specifically, the court said that no documentation was presented to confirm the amounts. In a footnote, the court noted that Plaintiff's interrogatory responses stated that Plaintiff paid some unspecified part of the funeral and burial costs, and the remainder was paid by others.

I am not aware of a rule requiring a plaintiff to submit documentation to support a claimed payment for funeral or burial expenses. Certainly, these expenses might be excluded as a discovery sanction if a plaintiff fails to produce records of the expense that the plaintiff has in his or her possession, but otherwise I do not see the ground for excluding expenses merely because there was no documentation of them.

DEFAMATION:

- **Defamation**
- **Judgment Notwithstanding the Verdict**

Betty Brasfield v. Raymond C. Dyer, et al., No. E2008-01774-COA-R3-CV (Tenn. Ct. App. January 12, 2010). Author: Judge D. Michael Swiney. Trial: Judge Dale C. Workman

After a trial verdict for Plaintiff, the trial court granted Defendants' motion for a judgment notwithstanding the verdict. The Court of Appeals affirmed, finding primarily that Plaintiff did not offer any proof of damages caused by Defendants' alleged defamatory statements. First, Plaintiff's only proof that her reputation was injured was evidence that she could not get a job with an employer. However, Plaintiff did not introduce any evidence showing why the employer refused to hire Plaintiff. Second, even if Plaintiff had shown her reputation was injured, Plaintiff did not show it was Defendants' fault, because the record established that sixteen other people made similar statements about Plaintiff.

- **False Light Invasion of Privacy**
- **Defamation**

***Teresa Gard v. Dennis Harris, M.D., et al*,** No. E2008-01939-COA-R3-CV (Tenn. Ct. App. March 11, 2010). Author: Judge John W. McClarty. Trial: Judge Wheeler Rosenblum.

Defendant Doctor was treating Plaintiff for a work-related back injury. Plaintiff signed a consent form for Defendant to release protected health information as part of her treatment. Later, Defendant Doctor sent a letter to Plaintiff stating he would no longer treat her, and sent copies to the companies that managed Plaintiff's worker's compensation benefits as well as the doctor who originally referred Plaintiff to Defendant. Plaintiff sued Defendant Doctor for false light invasion of privacy and defamation. The trial court ruled that Doctor's letter was covered by the consent form, and the Court of Appeals affirmed.

- **Defamation**
- **False Light Invasion of Privacy**

Secured Financial Solutions, LLC, et al v. Peter Winer, No. M2009-00885-COA-R3-CV (Tenn. Ct. App. January 28, 2010). Author: Judge Andy D. Bennett. Trial: Judge Robbie T. Beal.

This is a claim for defamation and false light invasion of privacy that was dismissed on summary judgment. The Court of Appeals' opinion turns on two core issues: whether Defendant's statement could be perceived as defamatory; and whether Defendant's statement by email could be considered "publicity" for invasion of privacy purposes. Other than those two points, there is not much meat in this case.

Defendant previously did business with Plaintiff. After hearing from a contact that Plaintiff was in some kind of trouble and at risk of being shut down, Defendant sent an email to a former coworker stating:

> I heard through the grapevine that Anil was "getting shut down." The person said something was going down with regulators, but I have no idea. Sure hope its *[sic]* true. I would love to know. If you can confirm ANYTHING . . . on the record . . . off the record . . . hint at something . . . I sure would be appreciative.

The Court of Appeals stated that a defamatory statement may be couched in the form of a question. However, the court explained:

> To be defamatory, "a question must be reasonably read as an assertion of a false fact; inquiry itself, however embarrassing or unpleasant to its subject, is not accusation." 50 AM. JUR. 2D *Libel and Slander* § 154 (2006) (citing *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1094 (4 Cir. 1993)). A question is not defamatory if it reflects "a genuine effort to obtain information." Robert D. Sack, SACK ON DEFAMATION § 2.4.8 (3d. ed. 1999).

In this case, the court affirmed the trial court's finding that no reasonable juror could conclude Defendant's email was defamatory, but instead was Defendant's legitimate effort to determine the truth of the information Defendant had heard.

On the false light invasion of privacy claim, the court looked to the explanation in Comment *a* to Section 652D of the RESTATEMENT (SECOND) OF TORTS:

> "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "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. Thus it is not an invasion of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.

In this case, the proof showed at most that Defendant sent the email to one person and possibly also verbally asked one other person. The Court of Appeals affirmed the trial court's finding that this was not sufficient for "publicity."

- **Defamation**

Amanda Steele, et al. v. Michael Ritz, No. W2008-02125-COA-R3-CV (Tenn. Ct. App. December 16, 2009). Author: Judge David R. Farmer. Trial: Judge Kay S. Robilio.

This is an excellent opinion to read if you are pursuing any defamation claim, but is imperative to read where the allegedly defamatory statement refers to a group (rather than the individual plaintiff).

Plaintiffs, an adult cabaret and three female employees of adult entertainment businesses and cabarets, filed suit against a County Commissioner for defamation. The Commissioner was quoted as saying "almost without exception, these girls were sexually abused by a family member . . . and have an addiction to drugs or alcohol . . . these clubs feed on that. It is a vicious cycle."

The Court of Appeals noted that a plaintiff must "allege and prove that the defaming party communicated a false or defamatory statement concerning the plaintiff." The court explained:

> This requirement – often referred to as the "of and concerning" requirement – confines actionable defamation to statements made against an "ascertained or ascertainable person, and that person must be the plaintiff."4 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 35 (2005) (citing cases). A plaintiff may not

> support a claim for defamation based on an alleged defamatory statement made "of and concerning" a third party. *Id.* (citing *QSP, Inc. v. Aetna Cas. and Sur. Co.*, 773 A.2d 906 (Conn. 2001)); Dan B. Dobbs, *The Law of Torts* § 405, at 1134-35 (2000) (citing *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Tex. Ct. App. 1993)). A claim for defamation based on an alleged statement that does not expressly designate its subject will survive a motion to dismiss only if it is alleged that the statement was made "of and concerning" the plaintiff or referred to the plaintiff by reasonable implication. See *Yow v. National Enquirer, Inc.*, 550 F. Supp. 2d 1179, 1187 (E.D. Cal. 2008) (citation omitted) (applying California law).

The court clarified an important point in a footnote:

> We do not imply that the alleged defamatory statement must individually name the plaintiff. Statements that do not specifically name a plaintiff are capable of a defamatory meaning if the plaintiff alleges and establishes extrinsic facts to show that the statement was made "of and concerning" the plaintiff. *See Tompkins v. Wisener*, 33 Tenn. (1 Snead) 458, 460-61 (1853); *Stones River Motors, Inc. v. Mid-South Publ'g Co.*, 651 S.W.2d 713, 717-18 (Tenn. Ct. App. 1983); *see also* 16B Am. Jur. Pleading and Practice Forms, *Libel and Slander*, § 3, at 116 (rev. ed. 2000) ("Where the alleged defamatory statement does not contain any direct reference to the plaintiff, the complaint must contain appropriate allegations to show such application. This allegation is commonly known as the colloquium.").

The court found Plaintiffs in this case failed to actually allege that "these girls" or "these clubs" referred to Plaintiffs in this case. Because Plaintiffs did not allege that Defendant's statement actually was a reference to them, the Court of Appeals affirmed dismissal of Plaintiffs' complaint.

- **Litigation Privilege**
- **Inducement of Breach of Contract**

Unarco Material Handling, Inc. v. William Liberato, et al., No. M2009-01603-COA-R3-CV (Tenn. Ct. App. March 2, 2010). Author: Judge Frank G. Clement, Jr. Trial: Chancellor Laurence M. McMillan, Jr.

Read this case. It applies to every lawyer. In it, the Court of Appeals holds that the litigation privilege protects more than just statements; it also provides immunity for actual conduct. The Court of Appeals also holds that litigation privilege covers pre-litigation conduct. However, the court sets out parameters for the privilege's application to pre-litigation conduct, and gives a stern reminder that the litigation privilege does not shield a lawyer from sanctions under the Rules of Professional Conduct independent from a civil lawsuit against the attorney.

Unarco, Plaintiff company in this case, entered a settlement agreement in an earlier lawsuit with another company, Kerry Steel. Plaintiff's president retired after the settlement, and entered a

retirement agreement that included "generous compensation" and "far-reaching confidentiality provisions." Later, Kerry Steel became suspicious that Plaintiff had provided inaccurate information to induce Kerry Steel to enter into the settlement agreement. Kerry Steel and its attorney, Defendant, asked Plaintiff's former president to provide a sworn statement concerning the negotiations and the settlement. Kerry Steel agreed to indemnify Plaintiff's former president if the sworn statement constituted a breach of the confidentiality agreement, and the former president gave a sworn statement on the issue. When Plaintiff learned that its former president had provided information to Kerry Steel, Plaintiff sued Kerry Steel, Defendant (Kerry Steel's attorney), Plaintiff's former president, and Kerry Steel's president. The trial court granted summary judgment to Defendant on the basis of the litigation privilege, and Plaintiff appealed.

The Court of Appeals defined the issue as whether Defendant's conduct, negotiating the indemnity agreement between Kerry Steel and Plaintiff's former president and questioning the former president during the sworn statement, was privileged conduct under the litigation privilege.

The Court of Appeals held that:

> [T]he litigation privilege in Tennessee applies to an attorney's conduct prior to the commencement of litigation if (1) the attorney was acting in the capacity of counsel for a client or identifiable prospective client when the conduct occurred, (2) the attorney was acting in good faith for the benefit of and on behalf of the client or prospective client, not for the attorney's self interest, (3) the conduct was related to the subject matter of proposed litigation that was under serious consideration by the attorney, and (4) there was a real nexus between the attorney's conduct and litigation under consideration.

The court based its holding first on the Tennessee Supreme Court's holding in *Simpson Strong-Tie Company, Inc. v. Stewart*, 232 S.W.3d 18, 22 (Tenn. 2007) that the litigation privilege applies to pre-litigation statements by an attorney if:

> (1) the communication was made by an attorney acting in the capacity of counsel, (2) the communication was related to the subject matter of the proposed litigation, (3) the proposed proceeding must be under serious consideration by the attorney acting in good faith, and (4) the attorney must have a client or identifiable prospective client at the time the communication is published.

Id. at 24.

The Court of Appeals also looked to other jurisdictions to conclude that, in addition to allegedly defamatory statements by an attorney, the litigation privilege protects conduct by an attorney. The court looked favorably to two other claims against attorneys for allegedly interfering with business relations, *Kahala v. Royal Corporation, Inc. v. Goodsill Anderson Quinn & Stifel, LLP*, 151 P.3d 732 (Haw. 2007), and *Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co.*, 931 S.W.2d 166 (Mo. Ct. App. 1996). Ultimately, the Court of Appeals concluded that, although the

litigation privilege is an absolute privilege in Tennessee, it applies only if the alleged conduct or statement by the attorney falls within the "parameters of the privilege."

The Court of Appeals further explained:

> In the context of conduct of an attorney that is alleged to constitute tortious interference with contractual rights of a client's adversary or potential adversary, the conduct shall not be privileged if the attorney employed wrongful means. In this context, wrongful means includes, *inter alia*, fraud, trespass, threats, violence, or other criminal conduct.

(Internal citations omitted).

Although it affirmed summary judgment for Defendant, the Court of Appeals nonetheless issued a sharply worded warning to all lawyers regarding their obligations under the Tennessee Rules of Professional Conduct. The court noted that a violation of the Rules does not give rise to a cause of action, and thus civil liability is precluded, but does subject the attorney to sanctions. The court specifically acknowledged that Rule 4.2 states: "In communicating with a current or former agent or employee of an organization, *a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization*." (emphasis in opinion). The Court of Appeals' message to all lawyers should be abundantly clear: The litigation privilege may protect from a separate lawsuit, but not from the imposition of sanctions on an officer of the court.

DRAM SHOP ACT:

- **Dram Shop Cases**
- **Cancellation Rule**
- **Summary Judgment**

Edward P. Landry, et al v. South Cumberland Amoco, et al., No. E2009-01354-COA-R3-CV (Tenn. Ct. App. March 10, 2010). Author: Judge Herschel Pickens Franks. Trial: Judge Kindall Lawson.

There are two points of law to take away from this case. First, the cancellation rule does not apply where the person explains why they made an erroneous statement at one point – even if the person was willfully false at the time – or where one version of the person's statement is corroborated by other competent evidence. Second, a trial court must give a plaintiff the chance to take discovery from the defendant to prove the defendant's knowledge of a fact before concluding on summary judgment that the plaintiff will never be able to prove what the defendant knew.

In this dram shop case, Driver gave contradictory statements regarding his birth date. The trial court ruled these statements cancelled each other out, and therefore Plaintiffs could not prove an

essential element of their claim – that Driver was underage when he purchased alcohol from Defendants.

The Court of Appeals ruled the trial court erred in making this determination. First, the cancellation rule only applies if the contradictory statements are unexplained and neither statement can be corroborated by competent evidence. *Church v. Perales*, 39 S.W.3d 149 (Tenn. Ct. App. 2000). In this case, Driver explained that he originally stated he was older to avoid legal trouble as an illegal immigrant. In addition, Driver's statement that he was underage when he purchased alcohol was corroborated by his Mexican birth certificate. Second, Driver's contradictory statements did not mean that the issue was affirmatively decided for Defendants as a matter of law on the summary judgment motion. In other words, even if Plaintiffs could not introduce evidence to establish that Driver was underage at the summary judgment stage, that did not equate to Defendants affirmatively negating the essential element of Plaintiffs' case as required by the summary judgment standard.

Instead, it meant that a jury would later need to resolve the contradiction.

In addition, the Court of Appeals ruled that the trial court erred in not allowing Plaintiffs to conduct any discovery from Defendants to establish that Defendants' employee who sold Driver the alcohol was aware that Driver was underage. The Court of Appeals acknowledged that the Tennessee Supreme Court held in *Worley v. Weigels, Inc.*, 919 S.W.2d 589 (Tenn. 1996), that TENN. CODE ANN. § 57-10-102(1) requires Plaintiffs to prove beyond a reasonable doubt that Defendants' employee had actual (not just constructive) knowledge that Driver was a minor but sold alcohol to him anyway. However, Defendants refused to respond to Plaintiffs' discovery requests and refused to identify their store clerks or allow them to be deposed. Plaintiffs filed a TENN. R. CIV. P. 56.07 motion and a motion to compel the discovery, but the trial court granted Defendants' summary judgment motion anyway. For this reason, the Court of Appeals reversed the trial court's finding that Plaintiffs could not prove Defendants' employee who sold the alcohol had actual knowledge that Driver was underage.

EXPERTS:

- **Claims Commission**
- **Failure to Prevent Suicide**
- **Expert Testimony**

Shirley Ann Atkinson, Administrator of the Estate of Robert Lee Pattee, Jr., Deceased v. State of Tennessee, No. M2009-02587-COA-R3-CV (Tenn. Ct. App. July 9, 2010). Author: Judge David R. Farmer. Trial: Commissioner Stephanie R. Reevers.

This is a lengthy and extremely fact specific case, but there is one bit to take away: in any case where expert testimony is required to establish the standard of care, it is not sufficient to simply state that something more should have been done under the circumstances and to identify one acceptable option; the expert must state that the conduct of the defendant was unreasonable given the standard of care.

Decedent was a prisoner serving a life sentence in an open wing of a mental health facility. Because of concerns about dissent over Decedent's "close" relationship with a correctional officer in the open wing, prison officials transferred Decedent to a restricted wing for chronically depressed inmates. Within a week, Decedent committed suicide. Claimant sued the State of Tennessee, alleging negligence in the care, custody, or control of persons under TENN. CODE ANN. § 9-8-307(a)(1)(E). After a hearing, the Claims Commissioner ruled for the State, finding Claimant failed to proffer necessary expert testimony. Claimant appealed.

The Court of Appeals affirmed. The Court of Appeals found the case controlled by *Cockrum v. State*, 843 S.W.2d 433, 436 (Tenn. Ct. App. 1992), *perm. app. denied* (Tenn. Dec. 7, 1992), another prison inmate suicide case. In *Cockrun*, the Court of Appeals explained that "expert proof delineating the precise scope of the staff's duty and evaluating the adequacy of the staff's conduct was necessary." *Id.* at 438.

In this case, Claimant offered only the testimony of an adult psychiatric nurse who worked at the facility where Decedent was housed, and had interacted with Decedent. The nurse testified that it would have been reasonable to place Decedent on suicide watch under the circumstances, but did not "establish the standards of care by which to evaluate the treatment team's decision, address whether other alternatives were available and appropriate, or examine the reasonableness of the treatment team's actions in light of prison procedures and policies." The nurse testified that "something more should have been done" and that suicide watch would have been within the standard of care. However, the nurse apparently did not state that the standard of care specifically required Decedent to be placed on suicide watch. Claimant acknowledged at oral argument that there were "a hundred ways" Defendant could have prevented Decedent's suicide. Accordingly, the Court of Appeals ruled Claimant did not submit proof concerning the criteria for determining when suicide precautions should be used, and whether Defendant acted unreasonably by not imposing any of those restraints under the circumstances.

- **Expert Testimony**
- **Causation**

Excel Polymers, LLC v. Richard Broyles**,** No. E2008-00823-SC-WCM-WC (Tenn. December 22, 2009). Author: Justice Sharon G. Lee. Trial: Judge Thomas J. Seeley, Jr.

This Tennessee Supreme Court case deals with admissibility of causation testimony, which is somewhat rare in Tennessee appellate opinions. There really isn't anything new here for tort lawyers, however. The most you should take away from it is that the standard for admissibility of expert testimony in *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997) and *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268 (Tenn. 2005) does not require that medical literature fully support an expert's causation testimony.

The Supreme Court affirmed the trial court's decision to admit expert causation testimony of a doctor introduced by Plaintiff in a workers' compensation case. Defendant in the case attacked the reliability and trustworthiness of the expert's opinion under TENN. R. EVID. 702 and 703 for a number of reasons, but the crux of Defendant's position was that the medical community

"predominately" considers Plaintiff's medical condition to be idiopathic (without a known cause). Plaintiff's expert agreed, but did refer to one article linking Plaintiff's condition to exposure to the substance present in his workplace. The Supreme Court agreed with the trial court that Defendant's arguments went to the weight of the expert's testimony rather than its admissibility. Again, given the result in the case, the decision presents no change in the view of the court concerning the admissibility of expert testimony. Indeed, the decision re-affirms the philosophy of the court that juries have the ability to weigh expert testimony and that judges should be gatekeepers, not storm-troopers, on issues of admissibility of such testimony.

- **Lay Witness Opinions**
- **Expert Witness Disclosures**

Jean Hensley v. Robert Cerza, et al., No. M2009-01860-COA-R3-CV (Tenn. Ct. App. August 25, 2010). Author: Judge Andy D. Bennett. Trial: Judge John J. Maddux, Jr.

There are two rulings by the Court of Appeals in this opinion that are worth having in a tort lawyer's quiver, simply because they so rarely appear in civil appellate opinions: (1) finding error in excluding opinion testimony by lay witnesses; and (2) finding error in permitting expert witnesses to testify beyond the scope of their disclosures, at least while an order is in place limiting the experts to their disclosed testimony. Because the analysis is so fact-specific, however, you probably do not need to delve further right now unless you're keenly focused on a similar issue already.

The trial court excluded testimony of two members of the surgical team that Defendant encountered resistance while inserting the tube into Plaintiff's trachea, and that Defendant shoved or rammed the tube down forcefully. The trial court did not specify the evidentiary rule it was relying on to exclude the testimony, but stated the witnesses could not give expert testimony. Plaintiff did not designate or attempt to qualify the two surgical team members as expert witnesses. Therefore, the Court of Appeals found the relevant evidentiary rule was TENN. R. EVID. 701, governing opinion testimony by lay witnesses:

> If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are
> (1) rationally based on the perception of the witness and
> (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

The Court of Appeals ruled that the trial court erred in excluding the testimony. The court explained that the witnesses had seen many other intubations, and were therefore able to compare the amount of force applied by Defendant to that used by other anesthesiologists. The court noted that the lay witnesses should not be allowed to give testimony that the force appeared "excessive" or "improper," because that would be expert testimony as to the standard of care. The court found the trial court's exclusion was harmless error because Plaintiff was otherwise able to present evidence that Defendant used much force in the process through other testimony.

For the same reasons, the Court of Appeals also ruled that the trial court erred in prohibiting Plaintiff's counsel from characterizing the lay witness's testimony as indicating that Defendant encountered resistance and forced the tube during the procedure. Again, however, the court found the error was harmless.

Judge Clement entered a concurring opinion, stating that he did not believe the trial court erred in excluding the witnesses' testimony. Judge Clement concluded that reasonable minds could differ as to whether the excluded testimony would have actually helped the jury understand the testimony or a fact in issue, given the other testimony that the trial court admitted. Finding that the trial court did not necessarily apply an incorrect legal standard and reached a conclusion that was reasonable, Judge Clement stated he would not find error on this point.

The Court of Appeals also ruled that the trial court erred in finding that Defendant had properly disclosed the scope of his expert witnesses' testimony. The trial court had entered an agreed order expressly limiting the experts to the scope of their disclosures and any discovery deposition testimony, although no discovery depositions were taken. Defendant provided disclosures of his experts' anticipated testimony in response to interrogatories as required by TENN. R. CIV. P. 26.02(4). The disclosures stated that the experts found nothing to indicate that Plaintiff's trachea was narrower than normal. In opening statement, however, Defendant's attorney stated that the experts would testify that Plaintiff's trachea was narrow. Before the experts took the stand, Plaintiff objected to the anticipated testimony.

The Court of Appeals rejected Defendant's argument that Plaintiff waived the objection to the testimony by failing to object when defense counsel referenced the testimony during opening statement. The Court of Appeals explained that it found the argument "unconvincing since [Plaintiff's] objection was not to the opening arguments themselves but to anticipated testimony described therein […]."

Note that, although there was an agreed order in place limiting the experts to the scope of their Rule 26 disclosures, the Court of Appeals' analysis does not appear to hinge on the existence of a binding order. Indeed, the Court of Appeals specifically noted that the same standard of review – abuse of discretion – applies regardless of whether Defendant was alleged to have breached the supplementation requirements of the Rules of Civil Procedure or a prior trial court order. Finally, in construing the issue, the Court of Appeals looked exclusively to the requirements of TENN. R. CIV. P. 26.02(4) and 26.02(5), not the language of the trial court's order.

The Court of Appeals found this error harmless as well. The court noted that the deposition of a surgeon who repaired Plaintiff's injury was read to the jury at trial, and included testimony that Plaintiff's trachea was smaller than normal. The Court of Appeals stated that this testimony gave Plaintiff "notice that the size of her trachea was a potential issue in the case." Plaintiff's expert testified that, given the surgeon's testimony regarding a narrow trachea, Plaintiff's expert had changed his opinion about the standard of care and determined that Defendant did breach it by applying too much force. Finally, Plaintiff called his expert during rebuttal to clarify that, if the trachea were as narrow as Defendants' experts contended during their trial testimony, Defendant breached the standard of care by using too much force.

I respectfully disagree with the Court of Appeals' reliance on the surgeon's testimony that Plaintiff's trachea was smaller than normal as a basis for finding the error harmless. In the course of a medical malpractice case, many issues arise but are left to the wayside as immaterial or not really in dispute between the parties. Non-party witnesses often articulate opinions that are not shared by the parties in the case, and thus get left in the scrap heap before trial. Litigants need to be able to rely on their opponents' expert witness disclosures so they can prepare for the actual issues to be tried. Allowing parties to ignore their obligation to supplement expert witness disclosures and contention interrogatory responses invites over-litigation and waste of the judicial process, as the parties have no way to know which abandoned issues might arise at trial. This is exactly why the Rules of Civil Procedure were adopted in the first place, and why they need to be enforced accordingly.

- **Expert Testimony**
- **Hearsay**

James Q. Holder, et al v. Westgate Resorts Ltd., a Florida Limited Partnership d/b/a Westgate Smoky Mountain Resort at Gatlinburg, No. E2009-01312-COA-R3-CV (Tenn. Ct. App. July 23, 2010). Author: Judge Herschel Pickens Franks. Trial: Judge Richard R. Vance.

Read this opinion and Judge Susano's concurrence. In my opinion, the majority throws a wrench in the spokes of all expert testimony, but better to know it now than when your opponent uses it in the midst of trial.

The parties offered competing expert testimony as to whether the area where Plaintiff was injured complied with the building code. Plaintiff's expert testified that the code required a minimum clearance of 44" for such areas. Defendant's expert testified that Plaintiff's expert had misinterpreted the code, and that the building code required only 36" of clearance, and that, based on measurements taken by Defendant's expert, the area complied with the code. On rebuttal, Plaintiff's expert agreed that the minimum clearance under the code was 36", but Plaintiff's expert stated that based on his own measurements the area violated the code's clearance requirements.

The jury found for Plaintiff, and Defendant appealed the trial court's exclusion of part of Defendant's expert's testimony. During direct examination of Defendant's expert, the expert testified:

> Q. Now, Mr. Horner, did you consult any professional resources available to the building code inspectors to assist you in your evaluation of this?
>
> A. To be perfectly honest with you, I felt that I was correct in my reading of it, but I did call the International Code Council, and I spoke with them.

Plaintiff objected, and the trial court excluded the testimony as hearsay. Defendant summarized the excluded testimony in an offer of proof:

> The proof that would have been offered during the direct examination of Mr. Jay Horner. The proof was excluded following a sustained hearsay objection by Mr. Ripley. The proof that would have been offered through Mr. Horner was that Mr. Horner consulted certain professional resources available to building code inspectors to assist him in making the determinations that he made and for which he testified. He would have testified that he consulted professional representatives of the International Code Council, Birmingham, Alabama. He would have testified that he regarded this resource as authoritative and reliable in his field in that the International Code Council is responsible for drafting the building codes pertinent to the issues in this case, as well as the commentary to those codes. He would have testified that the consultation he would have received from that resource is something that he regularly does. From time to time he requires assistance, as do other members of his profession. He would have testified that information he would have received from this resource is of a type reasonably relied upon by members in his particular field in forming opinions regarding the proper interpretation of the standard building code. He would have testified that after making that contact, the manner by which he evaluated this landing area and the manner by which he measured this landing area, he received instruction on how to do that from this resource, and the way he did it conformed to the instruction on received from the ICC, which drafted the code and content.

The majority of the Court of Appeals ruled the trial court erred in excluding the Defendant's expert's testimony, but that the error was harmless. The Court of Appeals agreed with the trial court that testimony regarding what the International Code Council ("ICC") told Defendant's expert would be hearsay, but the majority found it nonetheless admissible under TENN. R. EVID. 703. The Court of Appeals added numbering to Rule 703 to break it into essential elements:

> [1] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. [2] If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. [3] 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. [4] The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

The majority first ruled that the statements from the ICC to the expert were "facts or data" subject to Rule 703. The majority rejected Plaintiff's argument that the ICC personnel's statements were actually opinions. The majority stated:

> However, there is nothing in the offer of proof regarding an opinion from the official, but rather the offer simply states that Mr. Horner received instructions regarding the method of measuring the area from the official. Instructions regarding measurement based on a building code is factual rather than opinion.

> Defendant sought to introduce, through the testimony of Mr. Horner, information he gained from another that would support his reliance on certain parts of the building code when he conducted measurements and formed his opinion.

As to the second requirement for admissibility of hearsay under Rule 703, the majority found that the offer of proof stated that Defendant's expert considered ICC officials as "authoritative and reliable in his field," and that ICC official's interpretations are reasonably relied upon by experts within the field.

On the third requirement, the majority found the probative value clearly outweighed the prejudicial effect because, at the time the testimony was offered, there was a dispute between the experts as to the proper measurement of the clearance required under the building code. The majority explained:

> If the information or instructions from the building code Mr. Horner received from the ICC official could resolve this discrepancy, the information would have been helpful to the fact finder. Hearsay evidence is generally thought to be prejudicial to the party not offering it because the declarant is unavailable at trial for cross-examination. Plaintiff's counsel, could have cross-examined Mr. Horner as to the conversation and also could have elicited testimony from his own expert about the validity of the hearsay evidence. On balance, the probative value of the testimony to the fact finder outweighs the prejudice to plaintiff.

Finally, the majority found that the testimony met the fourth requirement of Rule 703, that it indicated trustworthiness, because it came from the drafter of the building code. The majority said that "Plaintiffs neither presented evidence that the information would not be trustworthy nor did they raise any objection to the reliability of the source of the information."

The majority briefly noted that, in *Willamette Industries, Inc. v. Tennessee Assessment Appeals Com'n*, 11 S.W.3d 142, 150 (Tenn. Ct. App. 1999), a real estate appraisal expert was allowed to provide an opinion on property value based, in part, on conversations with buyers and sellers of comparable properties, and was allowed to recite those conversations during his testimony.

The majority distinguished *Godbee v. Dimick*, 213 S.W.3d 865 (Tenn. Ct. App. 2006), in which the Court of Appeals reversed the trial court's decision to allow a defendant in a medical malpractice case to read from a letter from another health care provider stating that they would have done the same thing as the defendant. The majority distinguished *Godbee* on the ground that the *Godbee* court did not discuss whether testimony regarding the letter would have been admissible under TENN. R. EVID. 703.

The majority ruled that excluding the testimony was harmless error because Plaintiff's expert ultimately agreed with Defendant's expert about the proper measurement of the area at issue, but offered additional criticisms of the area that Defendant's expert did not address. Thus, there was unchallenged testimony from which the jury could find the area dangerous.

Judge Susano entered a concurring and dissenting opinion in which he disagreed with the majority's ruling that the excluded testimony should have been allowed into evidence. Judge Susano explained that, at the time the testimony regarding Defendant's expert's call with the ICC was offered, there was a sharp disagreement between the experts as to the proper interpretation of the building code. Judge Susano summarized the effect of the excluded testimony:

> "I'm an expert and I have talked to John Doe, who is a super expert, and we both agree as to how this should be done and here is how it should be done." It goes without saying that the "super expert" would not have been available at trial for cross examination.

Judge Susano further stated that he believed the words "facts or data" within Rule 703 to be carefully selected, excluding "opinions." Judge Susano characterized the ICC's statements to Defendant's expert as opinions, explaining:

> The law has always recognized a dichotomy between a "fact" and an "opinion." Sometimes, admittedly, it is difficult to discern whether something is a fact or an opinion; but when two experts cannot agree on the proper methodology for applying a code provision to a factual scenario, I do not see how testimony on the subject can be categorized as a "fact[] or data." In my judgment, such testimony is clearly an opinion and not covered by Rule 703.

I cannot see how the majority reached its ruling in this case, and believe that it opens a Pandora's Box for inadmissible hearsay to be submitted to the jury with a false scepter of authority.

First, like Judge Susano explained in his separate opinion, where two experts disagree on the interpretation of a rule, any interpretation of that rule is inherently an opinion, not a fact. That the opinion purportedly came from a person affiliated with the drafter of the rule does not change it from an opinion to a fact – it merely may affects the weight afforded to the opinion. The judiciary does not call the legislature for a definitive explanation of the intent behind a statute subject to multiple interpretations; nor would a single legislative aide's statements regarding the intent be definitive anyway. Where multiple interpretations are available, expert opinion as to the correct field interpretation is all the more important.

Second, the fact that experts within the field sometimes rely upon the drafters does not lean in favor of admitting the hearsay evidence under Rule 703 – that is necessary just to let the testifying expert *rely upon* the inadmissible evidence under 703. There is a difference between: (1) that part of Rule 703 that allows an expert to testify about an opinion, even if the expert relied on some inadmissible data to form the opinion; and (2) that part of Rule 703 that allows the otherwise inadmissible data to be introduced because the data is so relevant and trustworthy. In other words, the fact that building experts sometimes call the ICC for their take on the building code just means that a building expert's testimony should not be excluded outright merely because it relies, in part, on inadmissible conversations with the ICC. That the experts sometimes rely on hearsay is not, however, a factor that weighs in favor of admitting the hearsay conversations.

The majority concludes that the probative value of the ICC official's statements is there because it could resolve the battle of the experts for the finder of fact. In other words, having another expert who is unidentified and whose qualifications are unavailable, but who is assumed to be more familiar with the code than either expert in the courtroom, could trump the live testimony of the experts in the case and break the tie. Though the majority notes that Plaintiff could have cross-examined Defendant's expert about the conversations with the ICC, that is not at all the same as having the opportunity to cross-examine the ICC person who offered these out-of-court opinions. Here, what the majority refers to as the probative value of the testimony – an extra expert on Defendant's behalf who is immune from cross examination or impeachment – is actually the prejudicial effect of the hearsay testimony.

Why does all of this matter? Imagine how many times an expert might say, "I called somebody from the department and he agreed with me." Or even, "I called the author of the book and he agreed with me." Without any opportunity to subject the out-of-court opinion testimony to "the crucible of cross-examination", as the Supreme Court described it in *McDaniel v. CSX Trans., Inc.*, 955 S.W.2d 257 (Tenn. 1997), opinions that are granted the aura of absolute authority are thrown in the jury's lap. Keep in mind we practice in a state where an authoritative treatise is not even admissible as substantive evidence because it might sway jurors more than the experts who are willing to come into court and offer their opinions. With this ruling, it is entirely possible for an unscrupulous expert to say that he or she called someone at the highest organization within the field and they completely agreed with the expert's take – even if it's the after-hours answering service that picks up the phone at the time.

I respectfully hope that this opinion is designated not for publication to avoid such an unjust impact on complex litigation, including medical malpractice, products liability, and other cases.

- **Expert Witnesses**
- **Cross-examination of Expert Witnesses**
- **Motions for New Trial**

***Laura Jan Melton v. BNSF Railway Company*, No.** W2009-00283-COA-R3-CV (Tenn. Ct. App. February 22, 2010). Author: Judge J. Steven Stafford. Trial: Judge Kay S. Robilio.

Note: Because of my involvement as appellate counsel in the case, I will refrain from all commentary on the opinion.

During Plaintiff's cross-examination of a defense expert, Plaintiff read from and referred to the deposition of a different expert hired by Defendant to conduct a post-accident investigation. The Court of Appeals stated in a footnote that it was unclear whether the deposition of the non-testifying defense expert was an evidentiary or discovery deposition. Plaintiff argued that use of the non-testifying expert's deposition was an appropriate subject for cross-examination under *Steele v. Ft. Sanders Anesthesia Group P.C.*, 897 S.W.2d 270 (Tenn. Ct. App. 1994), which held that cross examination of an expert on a non-testifying expert's deposition was proper because the expert had to rely on the deposition at issue for the "facts and data upon which he based his opinion." *Id.* at 275. In *Steele*, the Court of Appeals held that the testifying expert's testimony

that he had had read but did not rely on the withdrawn expert's deposition testimony cannot and should not curtail cross-examination using the deposition.

The Court of Appeals in this case distinguished *Steele*, finding first that the testifying expert acknowledged that she had read the withdrawn expert's deposition, but stated she did not rely on it and that she received it after she issued her written report in the case. The expert in the *Steele* case testified that he did not rely on the withdrawn expert's deposition because he rejected it. The Court of Appeals further found that the subject of the testifying expert's testimony was not directly related to the facts within the non-testifying expert's testimony. The Court of Appeals stated it did "not want to create a situation where an expert may simply deny that he relied on material provided to him in forming his opinion in order to curtail cross-examination[.]" However, "there must be some indication that the material upon which cross-examination is sought provides, at least in part, the underlying facts and data upon which the expert's opinion is based."

The Court of Appeals also distinguished *Steele* on the ground that the plaintiff in *Steele* was using the non-testifying expert's deposition testimony to impeach the testifying expert. In this case, the Court of Appeals stated it appeared "abundantly clear" that Plaintiff's counsel was not attempting to impeach the testifying expert, but instead was attempting to utilize the testifying expert to present the non-testifying expert's testimony to the jury. In particular, the non-testifying expert's testimony dealt with the railroad car's speed at the time of impact in the wrongful death case involving the death of a railroad worker who was hit by a railroad car. The testifying expert stated that she had no opinion as to the car's speed. The Court of Appeals ruled that "[b]ecause this line of questioning was not impeachment and because the [non-testifying expert's] deposition had not been entered into evidence, this line of questioning was improper."

Finally, the Court of Appeals distinguished *Steele* because the non-testifying expert's testimony in *Steele* was deemed immaterial, as the testimony "was only heard for a short period of time during a two and a half week trial, was only used for impeachment after a strong cautionary instruction was given to the jury, was cumulative to direct evidence in the record, and it was not referenced during closing arguments." Conversely, in this case, the Court of Appeals noted Plaintiff's cross-examination using the non-testifying expert's testimony spanned approximately one hundred pages in the transcript, was not limited to impeachment but was used to place the non-testifying expert's testimony into the record, was not subject to a limiting instruction, and the evidence of speed was referenced in closing argument although it appeared nowhere in the record other than the non-testifying expert's testimony.

The Court of Appeals found the trial court erred in not granting a new trial based on introduction and use of the non-testifying expert's testimony.

The Court of Appeals also found the trial court should have granted a new trial based on improper questions and comments by Plaintiff's counsel related to Defendant's post-accident investigation and certain discovery disputes and deficiencies, and that the trial court's statements when denying Defendant's motion for new trial were also a cause for concern. The Court of Appeals' ruling regarding improper questions and comments is highly fact intensive. . With regard to the latter ground, the court stated:

> Further and more importantly, as this Court has previously stated, "[i]n deciding a motion for new trial, the . . . judge is not bound to give any reasons, any more than the jury itself is bound to do so." *Bellamny v. Cracker Barrel Old Country Store*, No. M2008-00294-COA-R3-CV, 2008 WL 5424015 at *3 (Tenn. Ct. App. 2008)(rev'd on other grounds) (citations omitted). If the trial judge makes no comments, we must assume that the trial judge properly performed her role. *Id.* For these reasons, we suggest, as we have previously, that "when a trial judge overrules a motion for new trial, ...[she] simply state that [she] has reviewed the evidence relevant to the issues and approves the verdict. Anything more unnecessarily runs the risk of an unwanted new trial." *Id.* In the unfortunate circumstance that the trial judge fails to follow our advice, and makes comments concerning the ruling on a motion for new trial, this Court is forced to consider those comments and determine whether the trial judge was satisfied with the verdict. *Id.* "If it appears from any reasons assigned or statements made in passing on a motion for new trial that the judge was not actually satisfied with the verdict, it is the duty of the appellate courts to grant a new trial...." *Id.* (citations omitted).

In this case, the trial judge denied the motion for new trial and then proceeded to explain why she was denying the motion. The trial judge first explained her rationale, "that the jurors most likely felt there was a cover up by the railroad that there was some cover up by the railroad, their processing of that information," without questions or comments from counsel. When asked for clarification for the record, the following occurred:

> Mr. Wheeler (counsel for BNSF): Just so the record is clear we've been ready to argue all of the motions before the Court. We understand and accept the Court's rulings. As I understand the Court has ruled on our Rule 50 Motion for a Judgment Notwithstanding a Verdict?
> The Court: That's exactly right.
> Mr. Wheeler: And has ruled on the Rule 59 Motion for A New Trial.
> The Court: That's right, denying those motions.
> Mr. Wheeler: On the basis that the Court has given in the record[] today?
> The Court: Right, there was a cover up by the railroad.

It appears to this Court from the comments by the trial judge, that the trial judge firmly believed that the jury's verdict was based on its belief that BNSF was involved in a conspiracy and coverup to hide the truth. In reviewing the trial court's decision, this Court must consider her comments. Because of her belief that the jury's verdict was based on a conspiracy or coverup by BNSF, the trial judge should not have been satisfied with the verdict and should have granted a new trial. The theory that questions and comments by Mrs. Melton's counsel suggested that BNSF conspired to coverup the truth or hide evidence was a basis for BNSF's motion for new trial and subsequent appeal. The trial court apparently agreed, yet denied the motion for new trial. After reviewing the record, we find that the numerous questions and comments by counsel for Mrs. Melton referring to hidden evidence; an investigation by BNSF, which the trial court had already ruled inadmissible as work product; and other suggestions of coverup and concealment by BNSF, support the trial court's belief. In considering the totality of the circumstances, we find that there were numerous inappropriate questions and comments by

counsel for Mrs. Melton, and that these questions continued despite objections from BNSF and in some instances after the trial court sustained the objections and warned counsel. Also, we find that there were few curative instructions to the jury. Finally, we find that the questions and comments regarding hidden evidence and an investigation by BNSF had absolutely no relevance to the issues before the jury, and the trial judge found that the jury believed BNSF had conspired and attempted to coverup. Consequently, we find there is a reasonable probability the verdict was influenced by improper questions and comments, and that the trial court abused her discretion in not granting a new trial after finding that the jury's verdict was based on its belief that BNSF was involved in a conspiracy and coverup. Accordingly, BNSF is entitled to a new trial.

- **Expert Testimony**

State v. Hollena Arlene West, No. M2008-02200-CCA-R3-CD (Tenn. Crim. App. July 13, 2010). Author: Judge Thomas T. Woodall. Trial: Judge Leon Burns.

Defendant appealed the trial court's admission of testimony by a TBI agent about the synergistic effect of Soma and Lortab taken together. Defendant contended the testimony was outside the witness's area of expertise.

The agent testified that she had previously been admitted as an expert toxicologist after obtaining a Bachelor of Science degree from Belmont University and working as a forensic scientist for the TBI for fourteen years. Defendant did not object to the witness's qualifications in this regard, but solely objected to the witness's testimony about the synergistic effect of the two drugs.

The Court of Criminal Appeals affirmed admission of the testimony. The question about the synergistic effect of the two drugs was first asked by Defendant during cross-examination of the witness:

> [DEFENSE COUNSEL]: And, you don't really have any way to determine how [the drugs] interact with each other? Is that right? Because you're not a doctor, and you're not a pharmacist. Right?
>
> [AGENT SWINEY]: I can tell you what I've read in reference materials.

The Court of Criminal Appeals ruled that, on redirect examination, it was appropriate for the State to clarify the witness's opinions about the synergistic effect of the two drugs. The court noted that the witness, as an expert in toxicology, could testify about the effects of drugs on an individual.

FRAUD:

- **Summary Judgment**
- **Fraudulent Concealment**

Robin Lee Stanfill, et al v. John T. Mountain, et al, No. M2006-01072-SC-R11-CV (Tenn. December 3, 2009). Author: Justice Sharon G. Lee. Trial: Judge Stella L. Hargrove.

Read this opinion carefully if you are looking at the summary judgment standard for knowledge of falsity on a misrepresentation or fraudulent concealment claim. Otherwise, for a seventeen-page Supreme Court opinion with a separate concurring and dissenting opinion, this is a pretty fact-specific case that has relatively little general interest to litigators. The crux of the case is essentially just reversing summary judgment as to a number of claims under the standard articulated in *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008), and affirming summary judgment as to other claims under the same standard. In a nutshell, the Supreme Court parsed out for each of several claims against three Defendants whether: (1) a Defendant's summary judgment on a claim was improperly granted because the Defendant did not sufficiently put forth evidence to affirmatively negate an essential element of Plaintiffs' claim; (2) a Defendant's summary judgment on a claim was improperly granted because Plaintiffs responded with evidence that created a genuine issue of material fact; or (3) a Defendant was properly granted summary judgment on a claim because the Defendant shifted the burden to Plaintiffs and Plaintiffs failed to respond with evidence.

The only real point of interest comes in a disagreement among the Supreme Court as to what evidence should be necessary to affirmatively negate the essential element of knowledge of falsity on a fraudulent concealment claim. The majority affirmed summary judgment for all Defendants on one of Plaintiffs' fraudulent concealment claims. Defendants each filed their own affidavit stating: "[a]t the time of sale [of a home to Plaintiffs], I had no actual knowledge of the presence of any type of mold in the residence or any of the other buildings located on the property."

The majority found, without elaboration, that Defendants' affidavits effectively negated the element of knowledge. Justice Holder, in a concurring and dissenting opinion, disagreed, noting that the affidavits: (1) were conclusory, and merely denied the allegations of the complaint; (2) denied only "actual knowledge" without addressing constructive knowledge; and (3) denied knowledge at the time of sale, but did not address any time prior to the sale date. Justice Holder explained that if the affidavits instead stated, "At no time from the date of purchase of the property to the date of sale was I aware or made aware of any type of mold in the residence or any of the other buildings located on the property," she would agree that Defendants satisfied their burden of production.

GENERAL TORT AND TORT CASE STUFF:

- **Discovery Sanctions**

Ty Amanns, et al v. Jeff Grissom, et al., No. E2009-00802-COA-R3-CV (Tenn. Ct. App. June 30, 2010). Author: Judge D. Michael Swiney. Trial: Judge Dale C. Workman.

This is a mold case, but the value of the case is for citation of an example where two different discovery sanctions are appropriate: monetary sanctions against a party who costs the other side legal time and expense in responding to frivolous discovery attempts; and striking of a complaint or answer against a party who misrepresents facts to the court in an effort to evade discovery obligations.

The first penalty, a monetary sanction of $11,555, was issued against Plaintiffs for payment to Defendants for Plaintiffs' repeated attempts to disclose additional experts after being admonished not to do so by the trial court.

At a hearing on Defendants' motion to exclude Plaintiffs' expert, the trial court ruled that the court would hold a jury-out hearing on the expert's qualifications before permitting the expert to testify. When the court announced its ruling, Plaintiffs immediately made an oral request to continue the trial. At that time, the case had been pending in some form or another for more than a decade. The trial court granted the request for a continuance, but specifically stated: "We won't start all over again." Plaintiffs assured the trial court that they would go forward with the experts they had already disclosed, and would not "go with a new array of witnesses."

Nonetheless, a month after the hearing, Plaintiffs disclosed ten new experts. Defendants moved to exclude the new experts, and the trial court granted the motion. Two months later, Plaintiffs filed a motion seeking to add another expert witness to their disclosure list, which the trial court denied. A month later, Plaintiffs supplemented their expert disclosures to add new opinions for two of Plaintiffs' existing experts.

Defendants moved to exclude the newly disclosed expert opinions, and for sanctions. The trial court found that Plaintiffs had "repeatedly disregarded" the court's orders and directives regarding the limited continuance of the case, and had required Defendants' counsel to spend significant time in responding. The court therefore ordered Plaintiffs to pay Defendants $11,555. The Court of Appeals affirmed the trial court's discretionary decision.

The Court of Appeals also affirmed the second discovery sanction entered against Plaintiffs – dismissal of Plaintiffs' case. The court noted "that the extremely voluminous record on appeal reveals patterns of behavior on the part of Plaintiffs which can only be described as contumacious or for purposes of delay."

During discovery, Plaintiffs filed a motion to quash Defendants' subpoena for a deposition of the grandmother of one Plaintiff. Plaintiffs' motion alleged that the grandmother "is 91 years of age, in failing health and is believed to suffer from mild dementia." After further legal maneuvering, the trial court granted Defendants permission to depose the grandmother and ordered Plaintiffs to

provide Defendants with copies of her medical records. The Court of Appeals explained that it was "clear from reading her deposition testimony that [the grandmother] does not, and never has, suffered from dementia." The Court of Appeals rejected Plaintiffs' argument that Plaintiffs never represented the grandmother had dementia, only that Plaintiffs "believed" it to be so.

Plaintiffs also had stated in interrogatory responses that Plaintiffs had no photographs of the personal property they claimed to have lost, because any photographs or other documentary evidence of the contents of their home had been destroyed because the evidence itself was contaminated by mold in the home. Plaintiffs instead offered to provide photographs of the items they had purchased to replace their former possessions. The trial court later entered an order ruling that the measure of Plaintiffs' damages was based on the diminution in fair market value of the personal property based on mold, not the replacement value.

The following month, Plaintiffs produced supplemental discovery responses including more than 150 pages of copies of receipts as much as 15 years old, and more than 375 pages of photographs of the personal items claimed by Plaintiffs. One Plaintiff later filed an affidavit stating that Plaintiffs' counsel had instructed Plaintiffs to search for anything that might show the personal items Plaintiffs were claiming, and that "[it] was apparent to [Plaintiffs] at that point that the photographs in the possession of [Plaintiffs' prior attorneys] had not been physically turned over" to Plaintiffs' current attorney. In response, Plaintiffs searched an old storage building "and, much to [Plaintiffs'] surprise," Plaintiffs found copies of photographs allegedly turned over to their former counsel.

Based on the totality of the circumstances, the Court of Appeals affirmed the dismissal of Plaintiffs' case as a sanction for their discovery abuses.

Although it is a last resort, trial courts must have the ability to strike a complaint or answer for rampant discovery abuses. Unethical parties need to worry about the possibility of a total loss – or worse –if they attempt to cheat the system.

- **Summary Judgment**
- **Affidavits**

Mary Jane Bridgewater v. Robert S. Adamczyk, et al., No. M2009-01582-COA-R3-CV (Tenn. Ct. App. April 1, 2010). Author: Judge Frank G. Clement, Jr. Trial: Chancellor C. K. Smith.

There is one very simple, but important bit of information to take away from this case: an affidavit that is not based on personal knowledge of the affiant will not support a summary judgment motion. The Court of Appeals looked to the *Black's Law Dictionary* definition of "personal knowledge" – "knowledge gained through firsthand observation or experience, as distinguished from belief based on what someone else has said."

In this case, the Court of Appeals reversed summary judgment for Plaintiff because Plaintiff's affidavit was "replete with hearsay and conclusions." For example, Plaintiff in this real estate action stated in her 2007 affidavit that her great-grandfather, who died in 1902, died intestate.

The Court of Appeals expressed doubt at the possibility that Plaintiff really had personal knowledge of that fact.

This case is worth keeping around as a citation to move to strike an affidavit (or part of it) that logically could not be based on the affiant's personal knowledge. The court did not explicitly state whether it rejected the affidavit because the affidavit did not state, on its face, that it was based on personal knowledge, or if instead the court rejected the affidavit because logically it could not have been based on personal knowledge.

- **Powerpoint**
- **Closing Argument**

Cathy L. Chapman, et al. v. James V. Lewis, M.D., et al., No. E2009-01496-COA-R9-CV (Tenn. Ct. App. July 28, 2010). Author: Judge Charles D. Susano, Jr. Trial: Chancellor E. G. Moody.

This one is brief, but worthy of inclusion in a string cite if anyone objects to the use of a video summary of testimony from an uncertified trial transcript during closing argument. The Court of Appeals ruled that the trial court correctly permitted Defendants, over Plaintiff's objection, to display excerpts of trial testimony from the court reporter's transcript during closing argument. The Court of Appeals stated that the issue had already been addressed in *Stanfield v. Neblett*, No. W2009-01891-COA-R3-CV, 2010 WL 2219660 (Tenn. Ct. App. July 23, 2010), in which the Court of Appeals ruled that displaying trial transcript testimony, even if it is not the final and certified record, is acceptable.

I would note one difference between *Stanfield* and this case that was not addressed by the Court of Appeals. In *Stanfield*, the Court of Appeals noted that any party can summarize their own memory of the testimony and other evidence, and using the "Q and A" format of the trial testimony does not make it more prejudicial than any other party's closing summation. In this case, however, defense counsel made the following argument to the jury before introducing the trial testimony during summation:

> I submit to you that all the testimony is being recorded. All of it's here. If [counsel for the plaintiff] wanted to bring you something up that was so critical, so crucial to your decision from Dr. Enderson, he could have brought it up here and put it right here on the screen and said, "There it is. There's where Dr. Enderson said that Dr. Testerman or Dr. Lewis breached the standard of care. There it is right there." That's not what he's done. What he's done is tell you what he says that testimony was.
>
> But let's look at what the actual proof is . . .

Thus, defense counsel did not merely use the "Q and A" format of the trial testimony, but emphasized that the uncertified transcript was more accurate than Plaintiff's counsel's summarized recollection of the trial evidence. I do not mean to suggest that this argument should

be permissible or impermissible, in referring to a transcript that may have errors the court reporter will correct before certifying the record. It merely means this case is one step removed from *Stanfield*.

The biggest problem with this argument is that can only be made by those with the financial resources to order daily or real-time transcript. Daily transcript costs $7.50 per page. Real-time transcript charges $8.50 per page, plus the cost of specialized software to receive the data. This isn't an unfair advantage by itself, but when you suggest your opposing counsel has not been truthful with the jury because he or she did not have the resources to present the "real" testimony, the playing field has become unfair.

A possible result? A lawyer can only make the argument that the transcript of the testimony is more accurate if the lawyer is intentionally, and in good faith, arguing that his or her opponent has misstated or mischaracterized the testimony. In other words, it's not enough to simply say you disagree as to the conclusions to be drawn from the evidence. You must, in good faith and as an officer of the court, be standing in open court to say that your opponent is taking liberties with the evidence, and that is why the jury should put more weight on the transcript than opposing counsel's summation. I would suggest that the circumstances are few and far between when any lawyer should be willing to question his or her opponent's honesty in front of judge and jury.

On July 23, 2010, the Court of Appeals re-issued its *Stanfield* opinion without identifying it as a corrected opinion or modified opinion. The only difference in the re-issued *Stanfield* opinion appears to be the Court of Appeals' correction of its confusion over the contiguous state rule and locality rule in medical malpractice expert competency issues.

- **Workers' Compensation Exclusivity of Remedies**
- **Course and Scope of Employment**

Michael Clawson et al v. Michael L. Burrow, et al., No. E2008-02412-COA-R3-CV (Tenn. Ct. App. April 30, 2010). Author: Judge Charles D. Susano, Jr. Trial: Judge Jean A. Stanley.

This opinion is important because it explores the extent to which an employee's time after finishing work and after clocking out can be deemed to be in the course and scope of employment. It arises in the context of an employer asserting a workers' compensation exclusiveness of remedy defense to a tort claim, but obviously it can also impact claims of vicarious liability or workers' compensation itself.

Decedent was killed on her Employer's premises by a driver who veered off the highway. Decedent sued Employer and others. Employer was granted summary judgment on the ground that workers' compensation was Decedent's exclusive remedy under TENN. CODE ANN. § 50-6-108(a). The dispositive issue was whether Decedent's death arose out of the course and scope of her employment.

Decedent was standing behind her own, personally-owned vehicle visiting with co-workers and talking on a cell phone. Decedent was a construction zone flagger for Employer. Employer's employees often spent time on the premises after work. During this time, employees often engaged in activities such as putting away tools and equipment and visiting with co-workers. Employer acquiesced to its employees doing so to the extent the activity was a regular incident of employment. After its employees were released from their duties, Employer paid its employees for more time until the top or bottom of the hour. Plaintiff had already removed her work vest and put away her tools before the accident. The accident occurred less than 30 minutes after Decedent concluded her job duties, and close to a minute after Employer stopped paying for Decedent's time.

The Court of Appeals looked to *Carter v. Volunteer Apparel, Inc.*, 833 S.W.2d 492, 494 (Tenn. 1992), in which the Supreme Court held an employee is still in the course of employment "a reasonable interval before and after official working hours while the employee is on the premises engaged in preparatory or incidental acts." The *Carter* court reasoned that talking with co-employees during a post-work break was comparable to "eating, drinking, smoking, seeking toilet facilities, seeking fresh air, coolness or warmth", and all of which are "incidental acts."

The Court of Appeals affirmed the trial court's finding that Decedent was in the course of employment, and thus could not pursue a tort claim against Employer. The court noted that the "incidental act," such as talking with co-workers or smoking, does not have to benefit the employer to satisfy *Carter*'s "circumstances" requirement. The place was Employer's premises, so there was no dispute that was covered. And the court found the time of the accident was reasonably close to both Decedent's job duties and when Employer stopped paying Decedent for her time. The court rejected Plaintiff's argument that the *Carter* holding was limited to employees who actually clock in and out of work, like plant workers.

- **Appeals from General Sessions**

James Crowley, et al v. Wendy Thomas, No. M2009-01336-COA-R3-CV (Tenn. Ct. App. January 27, 2010). Author: Judge Frank G. Clement, Jr. Trial: Judge Joe P. Binkley, Jr.

Plaintiff won a trial against Defendant in general sessions court, which Defendant appealed to circuit court. In the circuit court, Plaintiff added a number of new claims, including a cause of action for loss of consortium for his wife. Defendant then dismissed the appeal. Plaintiff argued that Defendant could not dismiss the appeal once there were new claims. The trial court disagreed, and the Court of Appeals affirmed, ruling that a defendant who appeals to circuit court has the authority to dismiss the case in its entirety.

Note that a voluntary dismissal of the appeal technically would not preclude a plaintiff from re-filing any new claims, since there is no final adjudication of the newly added claims. Given Tennessee's short statutes of limitations, however, in most instances it will be too late for the plaintiff to re-file.

- **Default Judgments**
- **Motions to Set Aside a Judgment**

Discover Bank v. Joy A. Morgan, No. E2009-01337-COA-R3-CV (Tenn. Ct. App. May 19, 2010). Author: Judge D. Michael Swiney. Trial: Judge Richard R. Vance.

This case is just a reminder of what to do if you miss a deadline to answer a complaint and a default judgment motion is filed.

Bank sued Cardholder. Cardholder filed an answer and counterclaim. Cardholder granted an extension to Bank to answer the counterclaim. When Bank did not answer within the extended deadline, Cardholder sent Bank a letter notifying Bank that Cardholder would seek a default judgment if no answer was filed. Bank still did not answer, and Cardholder moved for default judgment. Bank did not respond to the motion, and Bank's attorney did not attend the hearing. The trial court granted a default judgment for Cardholder.

Two weeks later, Bank filed a motion under TENN. R. CIV. P. 60.02 seeking to set aside the judgment for excusable neglect. Bank's motion stated that its attorney calendared the wrong hearing date. Eight months later, and a year after the counterclaim was filed, Bank filed an answer to the counterclaim along with an amended motion to set aside the judgment stating facts in support of its defense to the counterclaim. Neither Bank's first motion nor its amended motion included an affidavit to support its excusable neglect argument.

The trial court denied Bank's motion to set aside the judgment, and the Court of Appeals affirmed. The Court of Appeals noted Bank had the burden, as the movant, to show it was entitled to relief, and did not file any affidavit in support of its motion. In addition, the Court of Appeals noted that a calendaring error could explain the failure to respond to and appear at the motion for default judgment, but could not explain why Bank did not answer the counterclaim for a year.

The lesson? Answer in time. Respond to a motion for default judgment in time. If the first two fail, fix the problem as quickly as you can, and attach an affidavit to your motion to set aside the judgment.

- **Motions for New Trial**
- **Juror Misconduct**

Linda Kay Gaines, et ux. v. Leslie McCarter Tenney, et al., No. E2008-02323-COA-R3-CV (Tenn. Ct. App. January 21, 2010). Author: Judge John W. McClarty. Trial: Judge Richard R. Vance.

After a jury verdict, Plaintiffs filed a motion for new trial supported by deposition testimony of one juror. The juror stated that she was fearful of one other juror, who became verbally hostile toward her about the time frame that the jurors could be deliberating. The juror deponent further explained that she feared for her safety if she did not acquiesce, and it affected her verdict in the

case. The juror deponent also testified that the hostile man was "cussing and swearing" and "leaned across the table ... and then threw paper at" the deponent. The juror deponent noted there were other jurors on the panel who were "quite angry" with the deponent.

The trial court granted a new trial based on the juror's deposition testimony. Although the trial court ruled that the deponent's statements did not describe improper outside pressure under TENN. R. EVID. 606, the chilling effect of "the violent encounter" between the juror deponent and the hostile juror very likely intimated other jurors on the panel and limited the free exchange of ideas. After the second jury trial, Defendants appealed the trial court's grant of a new trial.

The Court of Appeals reversed. First, the court noted that TENN. R. EVID. 606(b) provides for only three questions about which a juror may testify:

> [1.] whether extraneous prejudicial information was improperly brought to the jury's attention,
> [2.] whether any outside influence was improperly brought to bear upon any juror, or
> [3.] whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion. . . .

By contrast, "[i]nternal matters, including 'intra-jury pressure or intimidation,' 'do not involve extraneous information or outside influence.'" *Gibson v. Chrysler Corp.*, No. W2002-03134-COA-R3-CV, 2004 WL 1918725, at *5 (Tenn. Ct. App., Aug. 26, 2004) (citing *State v. Hailey*, 658 S.W.2d 547, 553 (Tenn. Ct. App. 1983)). The Court of Appeals declined to add a new exception to the list in Rule 606(b) based on internal intimidation among jurors. The court ruled that 606(b) is set to protect jurors' free exchange of ideas from fear of later scrutiny by others so long as the verdict is not tainted by outside influence.

Of course, no one wants to peer too deeply into the deliberative process - that is not and should not be the role of the court. At least in theory, however, explicit threats of criminal violence against a juror during deliberation could undermine a verdict. According to Rule 606, the Court should not consider such threats in deciding whether to award a new trial unless the threats came from someone outside the jury pool.

- **Service of Process**

Billie Gail Hall, as Surviving Spouse and Administratrix of the Estate of Billy R. Hall, Deceased v. Douglas B. Haynes, Jr., M.D., et al., No. W2007-02611-SC-R11-CV (Tenn. August 26, 2010). Author: Justice Cornelia A. Clark. Trial: Judge Lee Moore.

This is an extremely detailed Supreme Court opinion on service of process. In a nutshell, you need to know that: (1) the person who signs for service on an individual or corporate defendant must be expressly or impliedly authorized to accept service, not just accept important legal papers; (2) a person with authority to sign for certified mail generally does not automatically also have authority to accept service of process; and (3) so long as a service of process defense is

raised in the answer, a defendant can actively participate in litigation for more than a year without filing a dispositive motion on the service issue, waiting until the statute of limitations has actually expired.

Before getting into the case itself, there are a few notes for practitioners. Defendants need to raise the service of process defense at the outset, and under TENN. R. CIV. P. 8.03 and *Allgood*, they must state the factual bases for arguing inadequate service of process. Plaintiffs who see a service of process defense raised in an answer need to promptly take steps to resolve the issue. Depending on the circumstances, that can include sending a contention interrogatory asking the defendant to explain the factual bases for the defense, re-issuing and re-attempting service, and/or filing a motion to dispose of the defense if it is not meritorious.

Finally, if a plaintiff's lawyer calls and asks, defense lawyers should be willing to accept service of process for their clients. Accepting service of process merely helps the defendant avoid the embarrassment of personal service at their place of business or in front of dinner guests at their home or their children's soccer games. Service by certified mail is or through a defendant's lawyer is, more than anything else, a matter of politeness and professional courtesy to the defendant.

Turning to the facts, Plaintiff first attempted to serve process on Defendants personally. A Constable went to MedSouth's clinic, which was also Doctor's place of business. One customer service agent signed the summons addressed to Doctor, and another customer service agent signed the summons addressed to MedSouth's registered agent. Plaintiff then amended her complaint and attempted to serve the amended complaint on Defendants by certified mail at the clinic location, again addressed to Doctor individually and MedSouth through its registered agent. The return receipts for both summonses sent by certified mail were signed by an accounts payable clerk, who then delivered them to the inboxes for Doctor and MedSouth's registered agent.

There was no dispute that both Doctor and MedSouth received notice of the lawsuit against them, and that both Doctor and MedSouth ultimately obtained both sets of summonses and complaints against them. Defendants filed an answer, asserting improper and insufficient process as an affirmative defense. Plaintiff did not re-issue summonses or re-attempt service. Approximately eighteen months later, Defendants moved for summary judgment based on the statute of limitations because Defendants had not been timely served under TENN. R. CIV. P. 3 and 4. The trial court denied the motion, but the Court of Appeals reversed, and Plaintiff appealed to the Tennessee Supreme Court.

The Supreme Court affirmed summary judgment for both Defendants, addressing each attempted service of process in turn.

Personal Service on Individual Defendant

First, on the attempted personal service on Doctor by the Constable, the Supreme Court noted the service was governed by TENN. R. CIV. P. 4.04(1). Under 4.04(1), the preferred method of personal service is delivery to the defendant individually, but service may also be effected by

delivery to a properly authorized agent. The question in this case was whether the customer service agent who signed for the personal service on Doctor was "an agent authorized by appointment or by law to receive service on behalf of" Doctor.

The Supreme Court first stated that, "[i]n the workplace context, service is not effective when another employee whom the individual defendant has not appointed as an agent for service of process nonetheless accepts process on the defendant's behalf." The Supreme Court summarized the law of express or implied authority to accept service of process:

> The phrasing of the rule in Tennessee and other jurisdictions "was intended to cover the situation where an individual actually appoints an agent for the purpose of receiving service." […] A principal may expressly give actual authority to the agent in direct terms, either orally or in writing. […] Implied authority, by contrast, "embraces all powers which are necessary to carry into effect the granted power, in order to make effectual the purposes of the agency." […] Implied authority that the principal has actually conferred on the agent can be circumstantially established through conduct or a course of dealing between the principal and agent. […] Implied authority must be predicated "'on some act or acquiescence of the principal,'" rather than the actions of the agent. *Id.* In the context of serving process, the record must contain "evidence that the defendant intended to confer upon [the] agent the specific authority to receive and accept service of process for the defendant." […] Acting as the defendant's agent for some other purpose does not make the person an agent for receiving service of process. *Id.* Nor is the mere fact of acceptance of process sufficient to establish agency by appointment. […]

(Internal citations omitted).

In this case, the evidence established that Doctor did not expressly authorize that the customer service agent who signed for the personal service to accept service on his behalf. The customer service agent was authorized to and did sign for subpoenas for medical records, but testified that she did not know what she was signing and would not have signed the summons if she had known what it was because she "wouldn't have known what to do with" it without calling her supervisor. Plaintiff argued that the customer service agent's custom and practice of "handling important papers" granted her the implied authority to sign on Doctor's behalf. However, the Supreme Court found this did not extend any implied authority to cover accepting service of process.

Personal Service on Corporate Defendant

Next, the Court looked to service on MedSouth under TENN. R. CIV. P. 404(4), which provides for personal service to "an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or […] other agent authorized by appointment or by law to receive service on behalf of the corporation." In this case, the only question was whether the customer service agent who signed the summons from the Constable to MedSouth was an agent authorized to do so.

The customer service agent who signed the MedSouth summons, like the one who signed the Doctor summons, testified that she did not know what she was signing for at the time. She also testified that she occasionally placed mail in MedSouth's registered agent's inbox, but did not ordinarily sign for mail. The registered agent testified that, "to his understanding, customer service agents had signed for lawsuits against MedSouth during his tenure as registered agent, but he could not even identify which individuals worked in the customer service department." The customer service agent's supervisor testified that customer service agents would sign a summons only if they were not fully aware of what it was. Again, the Supreme Court found this customer service agent was not expressly or impliedly authorized to accept service of process.

Service by Mail to Individual Defendant

Third, the Supreme Court addressed the attempted service on Doctor by certified mail addressed to him under TENN. R. CIV. P. 4.04(10). The Supreme Court interpreted Rule 4.04 as a whole to permit service by certified mail so long as the person who signs the return receipt is either the named defendant or a person authorized to accept service of process for the defendant. As with the personal service issues, the dispositive question was whether the person who signed the return receipt – an accounts payable clerk – was authorized by Doctor to receive service for Doctor.

Doctor submitted an affidavit and the deposition testimony of the accounts payable clerk stating that the clerk was not authorized to receive process for Doctor. Plaintiff contended the clerk was authorized because "she was authorized to receive and sign for certified mail addressed to MedSouth's employees, including physicians such as [Doctor] who worked at the Dyersburg clinic." The clerk testified that she was one of at least four employees in the clinic's administration department who regularly signed for certified mail, and that her supervisor was aware of this.

The Supreme Court agreed with the Court of Appeals that the authority to sign for certified mail does not equate to the authority to accept service of process under Rule 4.04. The Supreme Court held "that a person with the authority to sign for and receive certified mail does not, without more, qualify as an agent authorized by appointment to receive service of process on behalf of an individual defendant." Therefore, the Supreme Court affirmed summary judgment, finding that service by certified mail on Doctor signed for by an accounts payable clerk was not sufficient.

The Supreme Court emphasized that "plaintiff may avoid the predicament in this case by restricting delivery to a specific person," such as by using restricted certified mail requiring delivery to the addressee only. The Court also noted that a plaintiff "is not limited to one bite at the apple," but can make multiple attempts at service of process if delivery by certified mail fails the first time.

Service by Mail to Corporate Defendant

As with service by mail on Doctor, the dispositive question for service by mail on MedSouth turned on whether the accounts payable clerk who signed the summons was an authorized person under TENN. R. CIV. P. 4.04(4) and (10). The Supreme Court again held "that a corporate agent with the authority to sign for and receive the corporation's certified mail does not, without more, qualify as an agent authorized by appointment to receive service of process on behalf of a corporate defendant." Based on the same evidence described for the individual doctor, the Supreme Court affirmed summary judgment for MedSouth, finding the accounts payable clerk was not authorized to accept service of process for the defendant.

Sufficiency of Service on a Defendant Attempting to Evade

Throughout the case, the Supreme Court several times noted that some courts have relaxed the rule on agent authorization to find service on a receptionist sufficient where the individual defendant evaded or resisted service, citing *Frank Keevan & Son, Inc. v. Callier Steel Pipe & Tube, Inc.*, 107 F.R.D. 665, 671 (S.D. Fla. 1985), but noted there was no claim or evidence of evasion of service of process in this case. From this, it sounds like the Court would be willing to entertain such an argument in the right case in the future.

Waiver by Participation

Although the issue was not properly before the Supreme Court since it had not been previously raised in the case, the Supreme Court rejected Plaintiff's argument that Defendants waived the service of process defense by participating in the lawsuit for eighteen months before filing a summary judgment motion on the issue. The Court noted that Defendants' initial answer specifically pled the service of process defense under TENN. R. CIV. P. 8.03. The Court characterized Plaintiff's argument as invit[ing the] court to force Defendants' hand by requiring Defendants to file the dispositive motion on a properly pled defense earlier—namely, before the expiration of the statute of limitations."

- ***Pro Se* Defendants**

Carolyn Huddleston, et al v. James Clyde Norton, III, et al, No. M2008-01638-COA-R3-CV (Tenn. Ct. App. December 8, 2009). Author: Judge D. Michael Swiney. Trial: Judge Clara Byrd.

Under the facts and circumstances of this case, the trial court erred in denying an incarcerated civil defendant's motion to appear at trial by telephone.

- **Motions to Dismiss**
- **Quasi-Judicial Immunity**

Charles E. Jackson, III v. Metropolitan Government of Nashville et al., No. M2009-01970-COA-R3-CV (Tenn. Ct. App. June 7, 2010). Author: Judge Frank G. Clement, Jr. Trial: Judge Barbara N. Haynes.

Plaintiff sued Defendant, Plaintiff's probation officer, alleging Defendant negligently failed to recall a probation violation warrant. Plaintiff claimed that he completed the public service requirement of his probation after the warrant was issued but before it was served on him. Plaintiff alleged that Defendant had a duty to withdraw the warrant once Plaintiff performed his public service, but Defendant's failure to do so caused Plaintiff to be arrested. The Court of Appeals affirmed dismissal of the complaint based on quasi-judicial immunity.

The court first explained that, although a court is required to accept all of a plaintiff's factual allegations as true in ruling on a motion to dismiss under TENN. R. CIV. P. 12, the Rule does not extend to legal conclusions stated in the complaint. Accordingly, the court stated that Plaintiff's allegation that Defendant had control to have Plaintiff arrested was a legal conclusion, and an erroneous one that the court did not have to accept as true. Instead, the court noted that only a trial judge has the power to recall a probation violation warrant or to issue an arrest warrant.

Turning to whether Defendant was entitled to quasi-judicial immunity, the court looked to two prior opinions finding quasi-judicial immunity under similar circumstances. In *Haynie v. State,* No. M2009-01340-COA-R2-CV, 2010 WL 366689, at *3 (Tenn. Ct. App. Feb. 2, 2010), the court ruled that a probation officer who was allegedly negligent in obtaining a probation violation warrant was entitled to immunity. Likewise, in *Chapman v. Kelley*, M2001-00928-COA-R3-CV, 2002 WL 1974136, at *5 (Tenn. Ct. App. Aug. 28, 2002), the court determined that court clerks who negligently failed to inform the court of an improperly issued warrant were entitled to immunity.

The court distinguished *Miller v. Niblack*, 942 S.W.2d 533 (Tenn. Ct. App. 1996), in which it held that employees of an independent laboratory that performed paternity tests for a juvenile court did not have quasi-judicial immunity. The court noted that the laboratory's contract with the juvenile court left "no modicum of official discretion," and discretion is required for quasi-judicial immunity. By contrast, the court found (without explanation) that whether to recall a probation violation warrant is a discretionary function, and therefore Defendant was entitled to quasi-judicial immunity.

- **Service of Process**

Stephanie Jones and Howard Jones v. Renga I. Vasu, M.D., the Neurology Clinic, and Methodist Lebonheur Hospital, No. W2009-01873-COA-R10-CV (Tenn. Ct. App. April 22, 2010). Author: Judge Holly M. Kirby. Trial: Judge Kay S. Robilio.

The Court of Appeals ruled that a plaintiff who intentionally delays service of process, even for a reasonable purpose, cannot rely on the date the complaint was filed for the purpose of the statute of limitations.

Plaintiffs filed suit just under one year after Defendants' alleged negligence occurred. Plaintiffs did not have any summonses issued at the time they filed their complaint. Plaintiffs intentionally waited to have summonses issued and served after Plaintiffs located a competent expert to testify against Defendants. Around eleven months after filing the lawsuit, Plaintiffs had summonses issued and served.

The Court of Appeals ruled the trial court should have dismissed Plaintiffs' complaint based on the statute of limitations. The court ruled that TENN. R. CIV. P. 4.01 dictates that a plaintiff who intentionally delays service of process cannot rely on the filing date for the purpose of complying with the statute of limitations, even if the plaintiff had a reasonable purpose for delaying service of process.

Remember this simple rule: If you're going to sue them, serve them.

- **Discovery Sanctions**
- **Sanctions for Oral Misrepresentations to Court**

Teresa Jones v. Illinois Central Railroad Company, Nos. 09-5504/5528 (6th Cir. August 24, 2010). Author: Judge Karen Nelson Moore. Trial: Judge Bernice B. Donald.

Defendant found itself in the hot water of sanctions for two reasons: (1) Defendant unreasonably objected to producing materials which were not arguably privileged; and (2) Defendant's counsel recklessly made false statements to the Federal District Court regarding Defendant's paying for a hotel room for a witness during trial and asking the witness to show up a day earlier than Plaintiff planned to call the witness. In both instances, Plaintiff was forced to divert legal time and expense to obtain court relief for Defendant's conduct.

The Sixth Circuit affirmed sanctions against Defendant for "vexatious and unreasonable" conduct in objecting to production of materials from Defendant's internal investigation of a train accident. The materials "consisted of a post-it note with the phrase 'Tom Martin's notes – talking to conductor of train in siding,' and a single page of handwritten notes listing the names and phone numbers of McKissick, Wood, and a third person; a website address; the name of a highway; and the words 'Huddson Scrapes.'" Defendant objected based on attorney-client privilege and work product. The Sixth Circuit agreed with the District Court that there was no colorable argument of privilege here. The Sixth Circuit recognized that these file materials were

essentially notes identifying witnesses who would have to be disclosed under FED. R. CIV. P. 26 anyway, and distinguished cases in which the file materials include actual statements by witnesses.

The Sixth Circuit did reverse the District Court's award of sanctions under FED. R. CIV. P. 11, noting that Rule 11(d) explicitly states that Rule 11 sanctions do not apply to discovery under FED. R. CIV. P. 26 through 37. However, the Sixth Circuit explained that remand was not necessary, because the sanctions entered by the District Court were also sustainable as a discovery sanction under FED. R. CIV. P. 26(g).

The Sixth Circuit specifically rejected Defendant's argument that it was concerned about being accused of "selective waiver" if Defendant produced the materials voluntarily, thereby opening the door to further production. The Sixth Circuit noted that Defendant claimed it did not have any other such documents, and therefore could not be concerned about waiving privilege over them.

The Sixth Circuit also affirmed sanctions against Defendant based on the District Court's inherent power and under 28 U.S.C. § 1927 for statements made to the Court regarding a trial witness. During the trial, Plaintiff called a witness who Plaintiff expected to testify consistently with his deposition testimony. The witness arrived at trial a day earlier than Plaintiff expected to call him. The witness testified substantially differently than he had by deposition.

At a side bar afterward, Defendant's counsel told the District Court that Defendant's counsel had not instructed the witness to come to trial a day early, and denied Plaintiff's accusation that Defendant had paid for a hotel room for the witness for the night. On the witness stand, however, the witness testified that Defendant's counsel had, in fact, asked the witness to appear in court that day. The witness denied that Defendant had paid for a hotel room for him.

Later that afternoon, Defendant's counsel told the District Court that she had just learned a member of her staff did, without the knowledge of Defendant's counsel, pay for a hotel room for the witness. The District Court recalled the witness outside the presence of the jury, and the witness acknowledged that he had lied about staying in the hotel, and said he did so because someone representing Defendant had told the witness not to say anything about it. The Sixth Circuit affirmed the District Court's sanctions against Defendant based on recklessly making false representations to the court.

- **Summary Judgment**
- **Governmental Tort Liability Act**
- **Foreseeability**

Sean Lanier, Individually and as Mother and Next of Kin of Jane Doe, A Minor v. City of Dyersburg, et al., No. W2009-00162-COA-R3-CV (Tenn. Ct. App. December 9, 2009). Author: Judge Alan E. Highers. Trial: Judge William B. Acree, Jr.

This is a sad case where a special needs student was sexually assaulted in a bathroom, and Plaintiff lost on summary judgment for failure to file competent evidence into the record.

Plaintiff alleged that the school district was responsible for failure to supervise two students in the bathroom after gym class, in which one of the female students sexually assaulted a special needs female student. The trial court granted summary judgment for Defendants, and the Court of Appeals affirmed. The Court noted that, although some jurisdictions hold that student misconduct is to be expected, "Tennessee follows [a] more conservative foreseeability approach that student misconduct is not to be anticipated absent proof of prior misconduct." *Mason ex rel. Mason v. Metro. Gov't of Nashville & Davidson County*, 189 S.W.3d 217, 222 (Tenn. Ct. App. 2005).

Plaintiff argued there was a genuine issue of material fact as to whether it was foreseeable that the assailant would assault the victim if left unsupervised. First, Plaintiff argued that the assailant was a special education student with a history of being abused herself. The Court of Appeals rejected the argument that such information made a sexual assault against another student foreseeable. The court noted that the victim herself was a special needs student with a history of abuse but Plaintiff acknowledged she did not need adult supervision in the bathroom. Second, Plaintiff argued that the school district was on notice that the assailant had previously sexually assaulted another child, and that was sufficient to put Defendants on notice. However, Defendants submitted affidavits contradicting Plaintiff's assertion that they were aware of a prior sexual assault. Plaintiff responded by citing only to pages of her own deposition testimony, but those pages were not actually included in the record. Because Plaintiff did not file anything in the record to support her assertion, the Court of Appeals affirmed the trial court's decision that there was no genuine issue of material fact, and Defendants were entitled to summary judgment on the ground that the assualt was not foreseeable.

Even if Plaintiff had submitted her own testimony into the record, she would have had a hard time surviving summary judgment. The Court of Appeals explained in a footnote that the proof Plaintiff failed to include in the record was her own testimony "that she was told by the DCS Investigator that Defendants were aware of the prior incident." Since the DCS Investigator's statement to Plaintiff would be inadmissible hearsay, Plaintiff really needed to marshal this proof from an admissible source to get past summary judgment (assuming, of course, that the DCS Investigator was not an employee of the City of Dyersburg whose out of court statement might be construed as an admission of a party opponent).

- **Dismissal for Failure to Respond to Discovery**
- **Dismissal for Failure to Prosecute**

Ronald Langlois v. Energy Automation Systems, et al., No. M2009-00225-COA-R3-CV (Tenn. Ct. App. December 21, 2009). Author: Judge David R. Farmer. Trial: Judge C. L. Rogers.

The Court of Appeals affirmed dismissal under TENN. R. CIV. P. 37.01 of Plaintiff's case as a sanction for failure to attend several depositions of Plaintiff noticed by Defendant in an original case and a re-filed case under the savings statute. The court rejected Plaintiff's argument that the trial court abused its discretion under Rule 37.01 since Plaintiff had never been sanctioned previously, and because Plaintiff did not violate any court order compelling his attendance.

The Court of Appeals reversed the trial court's dismissal of the case for failure to prosecute under TENN. R. CIV. P. 41.02, however. The court noted that Plaintiff re-filed his case in October 2006 and the case was set for trial in November 2008, but the trial court dismissed it in September 2008. Defendant argued that Plaintiff took no action to prosecute the case, did not serve any discovery, and did not seek any depositions, but only responded to written discovery served by the defense. The Court of Appeals stated, however, "once a party files a complaint and the cause of action is at issue, that party's only requirement is to respond to discovery requests from the opposing party. A party is not required to initiate its own discovery."

- **Mediation**
- **Settlement Agreements**

Rob Matlock d/b/a Rob Matlock Construction v. Regina M. Rourk, No. M2009-01109-COA-R3-CV (Tenn. Ct. App. July 20, 2010). Author: Judge Richard H. Dinkins. Trial: Judge J. Curtis Smith.

Just a friendly reminder that a settlement reached at mediation is enforceable if reduced to writing and signed by all parties; if not, the settlement is unenforceable.

- **Closing Argument**
- **Reopening Proof**

Duane McCrory v. Anthony Tribble and Cynthia Tribble, No. W2009-00792-COA-R3-CV (Tenn. Ct. App. April 22, 2010). Author: Judge Holly M. Kirby. Trial: Judge Kay S. Robilio.

There is not much in this opinion, but there are a couple of brief trial procedure issues arising in a tort case.

Plaintiff did not introduce Defendant's deposition testimony during the trial, but attempted to read from it during closing argument. The Court of Appeals affirmed the trial court's decision not to allow Plaintiff to read from evidence that was not in the record. Of course this is the law and it is difficult to understand why anyone would think to the contrary.

In addition, during closing argument, Defendants pointed out that the earliest record of treatment contained in the record occurred more than 2 weeks after the date of Plaintiff's alleged injury. While the jury was deliberating, Plaintiff obtained a copy of a record from a medical facility who had produced records to trial in response to a subpoena, but who apparently inadvertently omitted the medical record from the date of Plaintiff's injury. Again, while the jury was deliberating, Plaintiff asked the trial court to reopen the proof so Plaintiff could introduce this medical record. The trial court denied Plaintiff's request. The Court of Appeals affirmed, noting it was unaware of any case where a party was allowed to reopen the proof after the jury had already taken the case under advisement. The court also noted that Plaintiff could have reviewed the medical records during trial, before closing argument, and realized that the record from the date of injury was missing.

The lesson on this second point: know your file.

- **Judicial Notice of Rules and Regulations**

Noel Montepeque, et al v. Patricia Claire Adevai, Executrix of the Estate of Joseph Adevai, No. E2009-01871-COA-R3-CV (Tenn. Ct. App. August 4, 2010). Author: Judge John W. McClarty. Trial: Chancellor Thomas R. Frierson, II.

The takeaway from this case is relatively straightforward: in order to request judicial notice of rules or regulations (or any of the other categories of materials under TENN. R. EVID. 202(b)), a party must do more than attach the materials to their pleadings and incorporate them by reference in the pleadings.

Defendant attached Tennessee Department of Health regulations to its answer / counterclaim.

Defendant later explained that Defendant did so to inform Plaintiffs of Defendant's planned reliance at trial on Plaintiffs' alleged non-compliance. The Court of Appeals first noted the requirements of TENN. R. EVID. 202(b) for judicial notice of state rules and regulations:

> Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all other duly adopted federal and state rules of court, (2) all duly published regulations of federal and state agencies and proclamations of the Tennessee Wildlife Resources Agency, (3) all duly enacted ordinances of municipalities or other governmental subdivisions, (4) any matter of law which would fall within the scope of this subsection or subsection (a) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) treaties, conventions, the laws of foreign countries, international law, and maritime law.

TENN. R. EVID. 202(b).

The Court of Appeals noted that TENN. R. EVID. 202(b) gives trial courts the power to take judicial notice of state rules and regulations, but does not require the trial court to do so. Two

criteria must be met before a trial court takes judicial notice of a state rule or regulation: (1) a party must request the trial court do so; and (2) the party must give reasonable notice to the adverse party. At that point, the trial court has the discretion to decide whether the requesting party has given "reasonable notice," and then also has the discretion to decide whether to take judicial notice of the rule or regulation.

The Court of Appeals explained:

> "Merely attaching a document to a pleading does not place that document in evidence." *Pinney v. Tarpley*, 686 S.W.2d 574, 579 (Tenn. Ct. App. 1984). Even if the trial court had taken judicial notice of the Rules, it was not required to admit them into evidence. *State v. Zelek, II*, No. M2007-01776-CCA-R3-CD, 2009 WL 890904, at *7 (Tenn. Crim. App. Apr. 3, 2009).

The Court of Appeals found no error "[b]ecause the Rules did not come into play in the trial court's negligence analysis, [and] the content of the Rules lacked relevance to the issue before the court."

- **Default Judgment**
- **Motions to Set Aside a Judgment**

Stephen S. Patterson, II v. Suntrust Bank, No. E2009-01947-COA-R3-CV (Tenn. Ct. App. April 30, 2010). Author: Judge Charles D. Susano, Jr. Trial: Judge W. Dale Young.

If you accidentally drop the ball in filing an answer and need to set aside a default judgment, this is the case for you. Note that I said "accidentally," because that is the key – willful failure to respond is not sufficient, while negligent failure to respond is.

The trial court granted a default judgment to Plaintiff based on Defendant's failure to file an answer within 30 days. Defendant filed an answer five weeks after the answer was due, and just before the hearing on Plaintiff's default judgment motion. The Court of Appeals affirmed the trial court's grant of default judgment.

The Court of Appeals, however, reversed the trial court's denial of Defendant's motion to set aside the judgment for excusable neglect. Defendant asserted that its in-house counsel, before leaving for vacation, asked her assistant to fax a copy of Plaintiff's complaint to Defendant's outside counsel to begin work on the case. Defendant's in-house counsel stated she did not learn that her assistant had failed to do so until she saw Plaintiff's default judgment motion. At that point, Defendant set out to oppose the default judgment motion, and then to file its own motion to set aside the default judgment. The Court of Appeals considered Defendant's inaction negligent, not willful, and ruled Defendant's motion to set aside should have been granted under TENN. R. CIV. P. 60.02. The court relied on *Skipper v. State* for the proposition that "mere negligence" and "carelessness" are possible bases for relief under TENN. R. CIV. P. 60.02(1). M2009-00022-COA-R3-CV, 2009 WL 2365580, at 5-7 (Tenn. Ct. App. M.S., filed July 31, 2009).

- **Negligence**
- **Summary Judgment**

Danny J. Phillips v. William T. Mullins, No. E2009-01930-COA-R3-CV (Tenn. Ct. App. April 26, 2010). Author: Judge D. Michael Swiney. Trial: Judge Donald R. Elledge.

The Court of Appeals reversed summary judgment for Defendant in a case involving a collision between Defendant's truck and Plaintiff on a bicycle. Plaintiff had no memory of the accident. The Court of Appeals found disputed issues of material fact, including Defendant's speed and whether Defendant kept a proper lookout. There is no law here, but plaintiffs' lawyers fighting summary judgment motions – especially in car accident cases – may want to look to the opinion for examples of evidence that the Court of Appeals considers to create disputed issues of material fact.

One side note: because Plaintiff had no memory of the incident due to his injuries, Plaintiff may be afforded a presumption of due care. *Jeffreys v. Louisville & NR Co.*, 560 SW 2d 920, 921 (Tenn. Ct. App. 1977). That presumption fails if there is evidence to the contrary, and from the sounds of it in this case, Defendant may have some evidence to that effect.

- **Motions to Dismiss**
- **Subject Matter Jurisdiction**
- **Ecclesiastical Abstention Doctrine**
- **Statutes of Limitations**
- **Fraudulent Concealment**
- **Discovery Rule**

Norman Redwing v. The Catholic Bishop for the Diocese of Memphis, No. W2009-00986-COA-R10-CV (Tenn. Ct. App. May 27, 2010). Author: Judge David R. Farmer. Trial: Judge D'Army Bailey.

This is a case against the Catholic Bishop for the Diocese of Memphis alleging negligent hiring, retention, and supervision of a priest who allegedly sexually abused Plaintiff when Plaintiff was a minor. When Plaintiff filed this lawsuit, he was more than thirty years older than the age of majority. The trial court denied Diocese's motion to dismiss, and the Court of Appeals accepted an extraordinary appeal of that decision.

The Court of Appeals determined whether the case should be dismissed for lack of subject matter jurisdiction under the doctrine of ecclesiastical abstention. Based on the First and Fourteenth Amendments to the U.S. Constitution, the doctrine of ecclesiastical abstention prohibits a court from adjudicating disputes that require extensive inquiry into matters of "ecclesiastical cognizance." *Anderson v. Watchtower Bible and Tract Soc'y of New York, Inc.*, No. M2004-01066-COA-R9-CV, 2007 WL 161035, *5 (Tenn. Ct. App. Jan. 19, 2007).

The Court of Appeals first addressed Plaintiff's claims for negligent hiring and retention, distinguishing those claims from Plaintiff's claim for negligent supervision. The court

recognized a split of authority in other jurisdictions on the issue. The Court of Appeals sided with those jurisdictions holding that the ecclesiastical abstention doctrine prohibits inquiry into a religious organization's hiring and retention practices. The court held "that the exercise of jurisdiction over matters pertaining to its decision of whom to hire and retain as a priest or clergyman would require an extensive entanglement into matters of religious doctrine or polity." Therefore, the Court of Appeals reversed the trial court's decision on this issue, and dismissed Plaintiff's negligent hiring and retention claims for lack of subject matter jurisdiction.

Turning to Plaintiff's negligent supervision claim, the court noted that sexual abuse of minors is not a part of Church doctrine or policy, and the Church has adopted policies and procedures to specifically address it. Diocese argued that the negligent supervision claim nonetheless should be barred by the ecclesiastical abstention doctrine because it would require the courts to dictate the standard of care applicable to a Bishop in supervising priests. The Court of Appeals agreed with Plaintiff that neutral, secular legal standards could and should be used. The court noted the lawsuit had nothing to do with religious doctrine, theology, or internal administration, but was only about the Diocese's duty to safeguard the physical safety of children in its care. The Court of Appeals explained:

> Although the Diocese may hire and retain whomever it chooses as a priest, forgive whatever sins or shortcomings that priest may have, and supervise a priest's duties insofar as doctrinal or theological matters are concerned in whatever manner it chooses, it may not hide behind the First and Fourteenth Amendments to avoid imposition of a civil duty of care to safeguard children against sexual abuse by its employees, including its priests.

The court also stated that, even if the negligent supervision claim did interfere with conduct motivated by religious doctrine, the state's compelling interest in the protection of children against sexual abuse would still permit the case to proceed. Thus, the Court of Appeals affirmed the trial court's decision to deny Diocese's motion to dismiss the negligent supervision claim based on the ecclesiastical abstention doctrine.

The Court of Appeals next addressed whether Plaintiff's claims were barred by the one year statute of limitations after Plaintiff had reached the age of majority. Plaintiff argued that his claims were tolled by the doctrines of fraudulent concealment, the discovery rule, and equitable estoppel. Plaintiff argued that he had no basis for his claim against Diocese until he had information concerning the Diocese's knowledge of the alleged abuser's propensities, and had no means to discover the information at any earlier point in time. Plaintiff alleged in his complaint that he had undergone diligent inquiry, but had only recently learned that Diocese's negligence caused Plaintiff's abuse. Plaintiff's complaint also alleged that Diocese had taken steps to purposefully conceal from Plaintiff and his family Diocese's knowledge of other sexual abuse allegations against the priest who abused Plaintiff.

The Court of Appeals reversed the trial court, ruling that the case should have been dismissed based on the statute of limitations. As in *Doe v. Catholic Bishop for the Diocese of Memphis*, No. W2007-01575-COA-R9-CV, ---- S.W.3d ----, 2008 WL 4253628 (Tenn. Ct. App. 2008), *perm. app. denied* (Tenn. Mar. 16, 2009), the court found that Plaintiff's central claim was based

on the sexual abuse allegedly committed on him by a priest. Plaintiff was aware of all necessary facts to support a claim against the priest for the alleged sexual abuse when Plaintiff reached the age of majority 30 years before filing this lawsuit. Discovery in that case could have revealed information concerning Diocese's alleged negligence in supervising the priest.

The Court of Appeals rejected Plaintiff's argument that Diocese and the Church as a whole had engaged in a systematic concealment of abuse by priests, and that because of that concealment, discovery in a claim against this priest would not likely have resulted in information that would support Plaintiff's negligent supervision claim against Diocese.

Judge Kirby filed a partial dissent. She agreed with the majority on all points except for the dismissal of the case based on the statute of limitations. Judge Kirby noted that Plaintiff had alleged in his complaint the Diocese's and Church's concealment of child sexual abuse generally, and that the Diocese had misled Plaintiff and his family specifically as to the Diocese's knowledge of other allegations against this particular priest. Judge Kirby found that, if Plaintiff's allegations in his complaint regarding concealment by the Diocese were true, there was a substantial possibility that Plaintiff would not have discovered information to support a negligent supervision claim even if Plaintiff had sued the individual priest. Judge Kirby explained that, taking Plaintiff's complaint as true as required for a motion to dismiss under TENN. R. CIV. P. 12, Plaintiff should be permitted to proceed in the case and conduct discovery. Plaintiff's allegations regarding concealment might not be sustainable at the summary judgment stage after discovery, but were at least sufficient to survive a motion to dismiss.

- **Equine Activities Act Immunity**

Lowell Smith, et al. v. Stephen Douglas Phillips, et al., No. M2009-00104-COA-R3-CV (Tenn. Ct. App. March 29, 2010). Author: Judge Patricia J. Cottrell. Trial: Judge Amy Hollars.

This case is a painful exercise in statutory construction, with the Court of Appeals forced to address the (at best) internally inconsistent Equine Activities Act. The Act uses the same material phrases to mean different things in different sections, different subsections, and sometimes within the same sentence. Courts and lawyers may find the case a useful guide for tackling other confusing riddles of legislation. For those dealing with immunity under the Equine Activities Act itself, this is a key case to remember.

Plaintiff and Defendant were friends who went horseback riding together. Plaintiff and Defendant each owned and rode their own horses. While stopped, Defendant's horse lunged at Plaintiff's horse and bit Plaintiff's arm. Plaintiff sued Defendant.

Defendant argued he was immune from liability under the Equine Services Act at TENN. CODE ANN. § 44-20-101 *et seq.* TENN. CODE ANN. § 44-20-103 sets out the scope of immunity:

> Except as provided in § 44-20-104, an equine activity sponsor, an equine professional, or any other person, which shall include a corporation or partnership, shall not be liable for an injury to or the death of a participant

> resulting from the inherent risks of equine activities. Except as provided in § 44-20-104, no participant or participant's representative shall make any claim against, maintain an action against, or recover from an equine activity sponsor, an equine professional, or any other person for injury, loss, damage, or death of the participant resulting from any of the inherent risks of equine activities.

The Court of Appeals explained that the question in this case was "whether the legislature intended the immunities provided by the Equine Activities Act to extend to injuries arising out of completely informal, social recreational activities involving horses or other equines."

The definition of an "equine activity" is found at TENN. CODE ANN. § 44-20-102(3). The court ruled that five of the subsections could not possibly cover this case, and focused its attention on § 44-20-102(3)(E). § 44-20-102(3)(E) defines equine activity to include "[r]ides, trips, hunts, or other equine activities of any type, however informal or impromptu, that are sponsored by an equine activity sponsor[...]." The Court of Appeals acknowledged that "the self-referring phrase 'other equine activities of any type'" confuses subsection (E), but found that did not matter in this case.

The court noted that all of the activities listed in subsection (E) are only included in the definition of an "equine activity" if they "are sponsored by an equine activity sponsor[...]." TENN. CODE ANN. § 44-20-102(3)(E). TENN. CODE ANN. § 44-20-101(4) defines an "equine activity sponsor" as:

> … an individual, group, club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, that sponsors, organizes, or provides the facilities for an equine activity, including, but not limited to, pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college-sponsored classes, programs and activities, therapeutic riding programs, and operators, instructors, and promoters of equine facilities, including, but not limited to, stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

The court ruled Defendant in this case did not fall within the definition of an "equine activity sponsor," thus the activities in which Plaintiff and Defendant were participating at the time of Plaintiff's injuries were not "equine activities" within the meaning of the Equine Services Act's immunity section, and thus Defendant was not immune from liability for Plaintiff's injuries.

Further confusing the issue, TENN. CODE ANN. § 44-20-102 contains a definition of "engages in an equine activity" separate and apart from the definition of an "equine activity." The Court of Appeals noted that § 44-20-102(1) defines "engages in an equine activity" broader than the definition of "equine activity" standing alone. For example, § 44-20-102(1)(A) includes "riding, training, assisting in medical treatment of, driving, or being a passenger upon an equine, whether mounted or unmounted or any person assisting a participant or show management."

However, the Court of Appeals noted that the immunity from liability contained within TENN. CODE ANN.§ 44-20-103 refers to "inherent risks of equine activities," not "inherent risks of engaging in equine activities." Consequently, the statutory definition of "equine activities" is the

one for which immunity exists, and the broader definition of "engages in equine activities" does not apply.

- **Savings Statute**
- **Substitution of Deceased Defendant**

Michael Sowell v. Estate of James W. Davis, No. W2009-00571-COa-R3-CV (Tenn. Ct. App. December 21, 2009). Author: Judge Holly M. Kirby. Trial: Judge Clayburn Peeples.

This case may be factually unique, but just in case you come across the issue, it is worth noting.

Plaintiff sued Defendant. While suit was pending, Defendant died, and a suggestion of death was filed. Plaintiff never substituted the proper party under TENN. R. CIV. P. 25.01. Estate of Defendant filed a motion to dismiss for failure to substitute the proper party. On the trial court's suggestion, the *pro se* plaintiff moved to voluntarily dismiss the case, which the trial court granted. There was no appeal of the voluntary dismissal.

Plaintiff re-filed the case within one year under the savings statute at TENN. CODE ANN. § 28-1-105, and in the re-filed case sued the Estate of Defendant. Estate of Defendant moved to dismiss for failure to substitute the Estate in the original case, and the trial court granted the motion.

The Court of Appeals reversed. The court first found that since the original suit was voluntarily dismissed, rather than dismissed for failure to substitute, and since no appeal was taken, the savings statute was available to Plaintiff to re-file the case.

The court also concluded, on an issue of first impression, that Defendant and the Estate of Defendant were identical parties for purposes of re-filing under the savings statute. The court ruled that, since the motion to dismiss for failure to substitute the proper party was never ruled upon in the first case, the circumstances were the same as if Defendant died *after* the case was voluntarily dismissed. Under those circumstances, Plaintiff would have no choice but to re-file the lawsuit against the Estate, and to rule that Defendant and the Estate of Defendant were not identical parties would deprive Plaintiff of the benefit of the savings statute.

Note that this auto accident case was originally filed in 1999. That's right: this car accident case has been pending in one form or another for more than a decade. When this case was first filed, Bill Clinton was President, the Sopranos and Britney Spears made their debuts, and the Tennessee Volunteers were national champions in football.

In other words, it was filed a long time ago.

- **Opening Statements**
- **Closing Arguments**
- **Expert Disclosures**
- **Impeachment with Learned Treatises**
- **Comparative Fault**
- **Medical Malpractice**
- **Locality Rule**

Teresa Lynn Stanfield, et al. v. John Neblett, Jr., M.D., et al., No. W2009-01891-COA-R3-CV (Tenn. Ct. App. June 4, 2010). Author: Judge J. Steven Stafford. Trial: Judge Roger A. Page.

Everyone who tries cases of any type should read this opinion. At the very least, tead this summary of the Court of Appeals' opinion. In it, we have rulings on: (1) a defendant's burden to introduce material evidence in support of a defense of the comparative fault of a non-party; (2) the adequacy of expert disclosures to fairly summarize their expected trial testimony, and potential exclusion for failure to do so; (3) the use of PowerPoint presentations during opening and closing; (4) displaying a trial transcript to the jury during closing; (5) impeaching an expert witness using a learned treatise; (6) impeaching an expert witness by inquiring about the existence of learned treatises that contradict the expert's opinion, though the treatises are not specifically referenced; and (7) a loosening of the Western Section's standard for the locality rule. Told you these issues would apply to your practice in some way, shape or form.

This is a medical malpractice case in which the jury returned a defense verdict, finding Defendant doctor deviated from the standard of care but did not cause Plaintiff's injury. Fortunately, the facts are not necessary for us to understand the court's rulings.

The Court of Appeals affirmed the trial court's denial of Plaintiff's directed verdict on Defendant's comparative fault allegation against the hospital and nurses. The court noted that the burden was on Defendant to establish all of the necessary facts to support its allegation, but found ample material evidence of a breach of duty and causation in the record.

The Court of Appeals also affirmed the trial court's decision to allow Defendant's experts to testify to issues that Plaintiff claimed were not included in Defendant's TENN. R. CIV. P. 26 disclosures. The court noted that an expert's testimony may be excluded under TENN. R. CIV. P. 37.03, but that "[e]xclusion is proper only if the disclosures failed to give the opposing side reasonable notice of the opinions such that, without exclusion, there would be unfair surprise or trial by ambush." *Watkins v. Affiliated Internists, P.C.,* No. M2008-01205-COA-R3-CV, 2009 WL 5173716, *20 (Tenn. Ct. App. Dec. 29, 2009) (citations omitted). In this case, the trial court granted a pre-trial motion *in limine* to limit the expert's to the opinions contained in their disclosures, but specifically stated the experts would not be required to testify from their reports.

Comparing the expert's disclosures with their testimony, the court found the experts' opinions were adequately disclosed. In addition to finding statements in the experts' disclosures specifically addressing the issues of which Plaintiff complained, the court also noted Defendant's expert disclosures stated that they "may be called upon to respond to specific criticisms levied by the experts disclosed by [Plaintiff] or to specific testimony elicited from other witnesses at trial."

The court specifically stated that this language was not required to be included in the disclosures. The court then found that Plaintiff had elicited testimony of Defendant and Plaintiff's own experts on the issues Plaintiff complained were not in Defendant's expert disclosures, and that also opened the door to Defendant's expert's testimony.

Plaintiff also appealed the trial court's decision to allow Defendant to cross-examine one of Plaintiff's experts using a version of ATLS guidelines that was not in effect at the time of the treatment at issue. The Court of Appeals rejected Plaintiff's argument because Plaintiff's expert testified that there was very little change from the version in effect at the time of the treatment at issue and the updated version, and that there were no material changes.

Plaintiff also challenged the trial court allowing Defendant to cross-examine one of Plaintiff's experts about medical literature that had not been established as reliable, and thus was not admissible under TENN. R. EVID. 618. Defendant did not introduce or refer to any specific literature, but asked Plaintiff's expert if there was any medical literature that contradicted the expert's opinions. The expert acknowledged there was. The Court of Appeals affirmed the trial court, ruling that Defendant's reference to medical literature was not the type of impeachment by learned treatise contemplated by TENN. R. EVID. 618, and that "it was entirely appropriate for counsel to ask about the existence of, and [the expert's] knowledge of, literature supporting opinions contrary to those of" the expert.

The Court of Appeals also affirmed the trial court's decision to allow Defendant to display a page from medical literature on an overhead projector while cross-examining one of Plaintiff's experts about the literature. The court noted that the literature, ATLS guidelines, were established as reliable, and the page was not read to the jury or admitted into evidence. The court ruled that displaying the page as an aid while cross-examining the expert was not improper, and the trial court did not abuse its discretion in permitting it.

Plaintiff's counsel also objected to Defendant's use of PowerPoint presentations during opening and closing.

At the pretrial conference, the trial court ruled that parties could use PowerPoint presentations during their opening statements, but asked the parties to exchange information and raise any issues for consideration before the trial began. Defendant's counsel specifically stated that she would not use anything in her opening that she did not intend to introduce as evidence at trial. The Court of Appeals noted that the record indicated Plaintiff had approximately twenty minutes before opening to review the slides, and lodged no objection. The court found no error in allowing the use of a PowerPoint presentation during opening.

Plaintiff objected to Defendant's display during closing argument of portions of the trial transcript on a projection screen. The court rejected this argument, noting there was nothing in the record to suggest Defendant displayed excluded evidence, or that the transcript was given to the jury to take during deliberations.

The Court of Appeals also rejected Plaintiff's argument that displaying the trial transcript to the jury was improper because it had not yet been authenticated by the court reporter. The court

noted Plaintiff did not object at trial to any part of the transcript as being inaccurate, and did not cite anything in her appellate brief as being inaccurate.

Finally, Plaintiff objected to the display of trial testimony because Plaintiff contended the testimony was taken out of context. Again, the Court of Appeals rejected Plaintiff's argument, noting that closing argument is a tool for counsel to summarize their side of the case and to emphasize their points for the jury. Opposing counsel has the opportunity in their own closing argument or rebuttal to point out omissions or contradictions, and the display of trial testimony does not change this.

Frankly, I can perceive of no reason to bar the use of PowerPoint or other effective display aids during opening statement, closing argument, or most other parts of the trial. If counsel does display inadmissible evidence or improper argument to the jury, opposing counsel should object and the trial judge should take strong action to correct any harm. Likewise, the display of trial testimony to the jury during closing argument is no different than a lawyer's own verbal recitation and summary of the testimony. The fact that it has the potential to be more persuasive does not change any of that – it just makes it a useful tool for all sides.

Plaintiff also challenged the experts' qualifications under TENN. CODE ANN. § 29-26-115. The Court of Appeals stated that Plaintiff's brief sounded like Plaintiff was confusing the locality rule with the requirement that the expert be sufficiently familiar with the standard of care required of Defendant. The court found the experts qualified under what it described as the locality rule because the experts were all practicing in a contiguous state in a relevant specialty in the year preceding the alleged injury.

With all due respect to the court, it sounds like Plaintiff was correct in distinguishing between the contiguous state rule and the locality rule, and the Court of Appeals confused the terminology. The contiguous state rule is what requires the expert to have practiced in Tennessee or a border state in the year preceding the injury, and solely exists for a cost-saving purpose – to avoid parties paying for depositions and trial testimony of medical experts from all over the United States. The locality rule, on the other hand, is the separate requirement that the expert be familiar with the standard of care in the defendant's community or a similar community. I am not aware of any prior opinion or commentary suggesting that the locality rule is anything other than the "similar community" standard.

In this case, as in all locality rule opinions, it is necessary to look at all of the evidence introduced to establish the similarities between the experts' communities and Defendant's community of Jackson, Tennessee. The first expert testifying on behalf of Defendant was Dr. Samuels.

> Dr. Samuels is a physician licensed in Georgia, board certified in neurology, and at the time of trial, he was serving as the director of neurological care at Emory University School of Medicine. Dr. Samuels admitted that he does not treat patients in Tennessee, but had spoken at Vanderbilt Medical School several times. Dr. Samuels stated that he knew the hospital at issue had about six hundred beds, making it a large hospital, and that it had multiple sub-specialities, an active

> neurosurgery service, five or six neurosurgeons, and a large catchment area of five hundred thousand people. He testified that this was similar to Emory, the hospital he practiced at. He explained that the hospital in Jackson has a full scope trauma service. According to Dr. Samuels, the level of trauma service and the intensive care unit for head trauma at the Jackson hospital is similar to Emory. Dr. Samuels carefully explained the equipment and services available at the hospital in question. He explained that all of the medical specialities needed for the treatment of an injury like [Plaintiff's] are available in Jackson. He further explained that this is similar to Emory. Dr. Samuels testified that the hospital had a neurological intensive care unit and a neurology floor, active operating rooms capable of doing whatever needed to be done, and a "full gamut" of radiological services. He testified that these factors make the hospital similar to Emory. Dr. Samuels expressed that he understood the nursing flow sheets, methods of monitoring and treatment modalities used at the hospital in question. According to Dr. Samuels, the nursing flow sheets used at the hospital are similar to the ones he uses at Emory. He testified that the monitoring of Ms. Greene, as evident from the medical records, is similar to the method of monitoring provided at Emory. Dr. Samuels testified that there were two hospitals in Jackson, with about three hundred doctors. He further testified that the hospital at issue and Emory are similar as far as the treatment of closed head injuries like Ms. Greene's. On cross examination he admitted that Jackson and Atlanta are not similar communities. However, on re-direct examination, Dr. Samuels testified that the medical communities are similar.

The Court of Appeals ruled the trial court did not abuse its discretion in admitting the expert testimony of Dr. Samuels, and found Dr. Samuels provided sufficient facts to establish he was familiar with the standard of care in a community similar to Defendant's.

Note one part about expert witness Dr. Samuels – on cross-examination, he explicitly admitted that Jackson and Atlanta are not similar communities. On re-direct, he testified that they were similar. This is yet another case that demonstrates with expert competency under the locality rule, in the words of Yogi Berra, "it ain't over till it's over."

I would also suggest that an expert medical witness is not being introduced as an expert on comparing communities. Thus, even if the expert's testimony fails to demonstrate that his or her community is similar to a defendant's community (or even if the expert explicitly says the two communities are dissimilar), if other evidence suggests the two communities are sufficiently similar, the trial court should still admit the expert's testimony under TENN. R. EVID. 104(a).

The second of Defendant's expert witnesses was Dr. Miller.

> Dr. Miller testified that he was the medical director of the trauma unit at Vanderbilt University Medical Center in Nashville. He testified that he was certified to teach the ATLS course in his region. Dr. Miller testified that he was familiar with the medical community in Jackson and the standard of care for a patient with an injury like [Plaintiff's] at the Jackson hospital in 2005. His

> familiarity with Jackson comes in part because he treats patients referred from that area and also because he is actively involved in the trauma system for the State. He testified that the City of Jackson had a population of about sixty thousand and the area had a population of about one-hundred-and-forty thousand. He testified that he often interacts with physicians in Jackson when discussing whether to transfer a patient to Nashville. He testified that there are two hospitals in Jackson and that the hospital at issue has approximately six hundred beds. Dr. Miller testified that the hospital has a neurological intensive care unit and also a step-down unit on the same floor. He testified that he was familiar with the standard of care for the treatment of a patient like [Plaintiff] at Vanderbilt, and that the standard of care was similar to the standard of care in Jackson. He then directly testified that he was familiar with the standard of care in Jackson.
>
> Dr. Miller also provided sufficient support for his assertion that he was familiar with the standard of care in Jackson and similar communities. He did not simply make a bare assertion, but instead provided the trial court with an adequate basis for his assertion that he was familiar with the standard of care in Jackson. He testified that he is involved in the trauma system throughout the State, which includes working with patients and doctors in Jackson. He teaches the ATLS course in the region, which includes Jackson, demonstrating his knowledge of the standard of care expected of doctors treating trauma patients such as [Plaintiff] in Jackson. He has also treated patients referred from Jackson, indicating his knowledge of what to expect from doctors in that area. Further, unlike the experts in *Ayers [v. Rutherford Hosp. Inc,* 689 S.W.2d 155 (Tenn. Ct. App. 1984)] and *Mabon* [*v. Jackson-Madison County General Hospital*, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997)], he had detailed knowledge of Jackson and the medical resources available in Jackson, indicating knowledge of the level of care which could be expected in that community. Further, [Plaintiff] did not cross examine Dr. Miller on his assertion that he was familiar with the standard of care in Jackson. Based upon the record in this case, we find that the trial court did not abuse its discretion holding that Dr. Miller provided sufficient facts to support his assertion that he was familiar with the standard of care in Jackson.

The third and final expert from Defendant was Dr. Weiss.

> Dr. Weiss testified that he was a neurosurgeon currently practicing at several hospitals in Nashville, Tennessee. Dr Weiss testified that he was familiar with the standard of care in Jackson. He said that he had treated patients referred from communities like Jackson. He expressed knowledge of numerous details about the hospital at issue in Jackson; specifically, that it had six or seven hundred beds, had a catchment of about five hundred thousand patients, had six practicing neurosurgeons, had both a neurological floor and intensive care unit, had about twenty operating rooms, and CT scans were readily available. Dr. Weiss also testified about the treatment modalities and nursing flow sheets used by the hospital in Jackson. He further testified that the hospital in Jackson practiced differential diagnosis. He testified that he knew Jackson had a population of about

> sixty or seventy thousand people and that there were two hospitals in Jackson. Dr. Weiss testified that he was familiar with the standard of care that would apply to a neurosurgeon like [Defendant] in the care of a patient like [Plaintiff] in 2005.
>
> Finally, we find that Dr. Weiss also provided sufficient support for his assertion that he was familiar with the standard of care in Jackson. Like the other experts, he also did not simply make a bare assertion of familiarity without providing the court with a basis for his assertion. Like Dr. Miller, Dr. Weiss has treated patients referred from Jackson, indicating his knowledge of the standard of care to be expected from physicians in Jackson. He also demonstrated a detailed knowledge of Jackson and the medical facilities and resources available in that community, which would affect the standard of care to be expected. He also testified about the resources available, the treatment modalities and method of diagnosis, indicating an understanding and experience with the level of care provided in Jackson. Further, [Plaintiff] did not cross examine Dr. Weiss on his assertion that he was familiar with the standard of care in Jackson. Based upon the record in this case, we find that the trial court did not abuse its discretion in holding that Dr. Weiss provided sufficient facts to support his assertion that he was familiar with the standard of care in Jackson.

This is an important ruling. The Western Section Court of Appeals specifically ruled that Dr. Miller and Dr. Weiss were competent to testify to the standard of care *in Defendant's community*, not just that the experts' community of Nashville was similar to Defendant's community of Jackson. In *Allen v. Methodist Healthcare*, 237 SW 3d 293 (Tenn. Ct. App. 2007), the same Court of Appeals ruled that another Vanderbilt doctor should have been excluded from testifying regarding the standard of care in Memphis, although the doctor taught courses on the medical issues in the case in Memphis and interacted with doctors and nurses as part of those courses. The only smidgen of evidence that distinguishes Dr. Miller's qualifications from that of the expert in *Allen* is that Dr. Miller stated he had treated patients "from" Jackson, and that he was "involved in the trauma system throughout the State, which includes working with patients and doctors in Jackson." It is unclear what the court was referring to when it described Dr. Miller as working *with* patients and doctors *in* Jackson. Dr. Weiss had even less basis for stating he was familiar with the standard of care in Jackson, asserting only that his community was similar to Jackson and that he had treated patients "from" Jackson. This opinion appears to move the court away from the requirement in *Allen v. Methodist Healthcare* and *Eckler v. Allen*, 231 S.W.3d 379 (Tenn. Ct. App. 2006) that an expert must have firsthand knowledge of the community by personally practicing there.

The Court of Appeals also rejected Plaintiff's challenge to the experts' qualifications based on two of the experts practicing in specialty different from Defendant. The court found the experts had knowledge that was relevant to the standard of care issues in the case, notwithstanding their practice in different specialties.

- **Juror Questions**

State v. Darrell Anderson, No. W2008-00188-CCA-R3-CD (Tenn. Crim. App. April 9, 2010). Author: Judge Camille R. McMullen. Trial: Judge Lee V. Coffee.

During deliberations, a juror submitted a question to the court about autopsy photos that were not in evidence. The trial judge recalled the jury and counsel into the court as required by the law, and held a bench conference. As agreed by the parties, the judge then instructed the jury that the judge could not answer questions about the photos because they were not in evidence, and the jury received all of the evidence it need to properly consider the case. The judge added, however, that there was no question that the homicide victim "was killed or that the death was absolutely tragically horrific" and that "the prejudicial value of the condition of that body may be so horrific for some folks that it might influence your verdict in this case and that's why those photographs have not been admitted and the court would not allow those photographs to be admitted." The Court of Criminal Appeals rejected Defendant's appeal that the trial judge's additional statements prejudiced the jury, finding no prejudice to Defendant. The court did caution that trial judges are best advised to avoid providing an in-depth explanation for denying a jury's request.

- **Hearsay**
- **Excited Utterance Exception**

State v. Terry Lynn Craft, No. W2009-02049-CCA-R3-CD (Tenn. Crim. App. August 26, 2010). Author: Judge David H. Welles. Trial: Judge Roger Page.

Keep this in mind when debating the admissibility of a 911 call. A recording of a 911 call by a witness reporting an automobile accident was properly admitted under the hearsay exception for excited utterances at TENN. R. EVID. 803(2). The Court of Criminal Appeals stated that the witness's observation of the automobile crash qualified as a startling event to trigger the exception, and the Court's review of the 911 recording demonstrated the witness's distress during the call.

- **Potentially Inflammatory Evidence**

State v. Joseph Maine, No. E2008-02132-CCA-R3-CD (Tenn. Crim. App. June 3, 2010). Author: Judge D. Kelly Thomas, Jr. Trial: Judge Rex Henry Ogle.

Trial court did not err, under TENN. R. EVID. 403, by allowing forensic pathologist to use victim's actual skull as a demonstrative aid at trial to describe his findings. That's right folks – the actual skull at trial. The skull was cleansed and was not passed to the jury. Nonetheless, put this in your pocket as an extreme example that potentially inflammatory evidence can be shown to the jury.

- ***Batson* Challenges**

State v. Craig O. Majors, No. M2009-00483-CCA-R3-CD (Tenn. Crim. App. June 21, 2010). Author: Judge D. Kelly Thomas, Jr. Trial: Judge Michael R. Jones.

The Court of Criminal Appeals affirmed the trial court's overruling of challenges by Defendant under *Batson v. Kentucky*, 476 U.S. 79 (1986) to the State's use of peremptory challenges on two African-American jurors. The State's race-neutral explanation, accepted by the trial court and the Court of Criminal Appeals, follows:

> Relative to potential juror Johnson, the prosecutor explained that she "failed to maintain eye contact with me as I posed questions . . . she did have eye contact with [defense counsel] . . .which indicates an affinity for the Defense Counsel . . . [which] would affect her ability to sit as a fair and impartial juror in this case." Relative to potential juror Williams, who during *voir dire* expressed some equivocation regarding his ability to "pass judgment" on another individual given his admitted dalliances with crime as a younger man, the prosecutor explained that "I think the record reflects equivocation as to an essential quality, and that is sitting in judgement of these individuals" and "the intimations are that he had been in trouble before." The prosecutor also noted that although the State had exercised two peremptory challenges against African-Americans, "there are three blacks that are in the panel now and they have not been challenged."

- **Potentially Inflammatory Evidence**

State v. Andy B. Mcamis, No. M2007-02643-CCA-R3-CD (Tenn. Crim. App. June 4, 2010). Author: Judge Jerry L. Smith. Trial: Judge Larry B. Stanley.

Trial court did not err, under TENN. R. EVID. 403, in admitting one photograph of aggravated assault victim's injuries to establish serious bodily injury, and photographs of the crime scene that included blood on a couch.

- **Conduct Probative of Witness's Untruthfulness**

State v. Samuel Armod Winkfield, No. W2008-01347-CCA-R3-CD (Tenn. Crim. App. March 9, 2010). Author: Judge Jerry L. Smith. Trial: Judge Donald H. Allen.

Defendant attempted to use a witness' MySpace page to impeach the witness. The MySpace page contained a picture of the witness with the caption "armed and dangerous … I repeat armed and dangerous." At a jury-out hearing under TENN. R. EVID. 608(b), the witness stated that he was not armed and dangerous but was only trying to further his career as a rap artist. The trial court excluded the evidence, finding its probative value did not outweigh its prejudicial effect.

The Court of Criminal Appeals affirmed, finding the trial court followed the proper procedure and did not abuse its discretion.

- **Discretionary Costs**

Ella G. Alexander Wade v. Felice A. Vabnick, M.D., No. W2009-02273-COA-R3-CV (Tenn. Ct. App. May 24, 2010). Author: Judge J. Steven Stafford. Trial: Judge James F. Russell.

The Court of Appeals reversed a substantial award of discretionary costs because it found the court reporter fees and expert witness fees were either not recoverable, or were not sufficiently proven to be recoverable. The short version is that court reporter fees are only recoverable for depositions and trial, not for court hearings related to depositions. Likewise, expert witness fees are only recoverable for actual depositions and trial, not preparation for depositions or trial. If the party moving for expert fees to be awarded as discretionary costs does not introduce evidence to establish that the fees were for the expert's actual testimony, the party is not entitled to any discretionary costs for expert witness fees.

The Court of Appeals ruled that court reporter fees for hearings on issues related to depositions are not recoverable as discretionary costs under TENN. R. CIV. P. 54.04. Court reporter fees for trials and for depositions are expressly covered by the Rule, but pretrial hearings are not, and the Court ruled the fact that the hearings were related to deposition issues did not change this. The Court of Appeals therefore vacated that portion of the trial court's order awarding discretionary costs for court reporter fees.

The Court of Appeals also reversed the trial court's decision to award expert witness fees. Defense counsel's affidavit in support of the application for expert witness listed Defendant's expert witnesses, and the amounts billed and to be paid to each expert. One of the experts listed was described in the affidavit as a "non-testifying consultant." At the hearing on the motion for discretionary costs, defense counsel explained to the trial court that some of the fees were for assisting counsel with preparing for depositions or trial. The Court of Appeals held that expert fees for preparing for depositions and trial and for reviewing medical records are not recoverable as discretionary costs. Because Defendant did not carry its burden of establishing that the total amounts of the expert witness charges sought were for actual testimony as would be permitted under TENN. R. CIV. P. 54.04, the Court of Appeals reversed the award of $27,362.49 in discretionary costs for expert witness fees.

GTLA:

- **Constitutionality of Retrospective Laws**
- **GTLA**

Estate of Joyce Bell et al. v. Shelby County Health Care Corporation D/B/A The Regional Medical Center, No. W2008-02213-SC-S09-CV (Tenn. June 24, 2010). Author: Justice William C. Koch, Jr. Trial: Judge Rita L. Stotts.

I cannot envision this case directly impacting many pending or future lawsuits. It really only involves claims against the Med that arose prior to July 1, 2003. Nonetheless, when the Tennessee Supreme Court pronounces a law that limits the recovery of a class of plaintiffs as unconstitutional, it merits attention.

Plaintiffs alleged wrongful death and a separate injury occurring to patients at Regional Medical Center ("the Med") in 2002. At the time, the Med was a private charitable institution that was not considered to by a governmental entity. Approximately five months later, the Tennessee General Assembly amended the Tennessee Governmental Liability Act to transform the Med into a governmental entity for all claims filed or arising between July 1, 2003 and June 30, 2006. Plaintiffs filed suit in December 2003.

In 2008, the Med moved for partial summary judgment, requesting the trial court find that the Med was a governmental entity covered by the GTLA. The trial court granted the Med's motion over Plaintiffs' objection that the 2003 amendment could not be constitutionally applied to their lawsuit, and granted interlocutory appeal because it at "substantial reservations" about the ruling. The Court of Appeals denied interlocutory appeal, but the Tennessee Supreme Court granted Plaintiffs permission to appeal.

The Supreme Court found that applying the 2003 amendment to Plaintiffs' claim violated Article I, Section 20 of the Tennessee Constitution, which guarantees "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made."

The court noted that Article I, Section 20 does not prohibit the retrospective application of remedial or procedural laws, unless the application of these laws impairs a vested right or contractual obligation. However, in this case all parties conceded the 2003 amendment was a substantive change in Tennessee law. The court noted that "for more than three decades Tennessee's appellate courts have consistently ruled that a change to the law that alters the amount of damages constitutes a substantive, as opposed to a procedural or remedial, change."

In this case, the issue was whether the 2003 amendment was a prospective or a retrospective change in the law. The Med contended the change was prospective because Plaintiffs had not filed their lawsuit before the amendment was enacted and became effective. The court explained otherwise:

> Distilled to its essence, the question is whether the Bell plaintiffs' right to seek damages, unlimited by the GTLA's cap, vested when the Med's tortious conduct

> and the Bell plaintiffs' injuries occurred. We conclude that the Bell plaintiffs' right of action to pursue damages without the GTLA's cap on damages vested prior to the General Assembly's approval of the 2003 amendment. […]
>
> When applying Article I, Section 20 to tort cases, this Court has long recognized that "[t]he rights of the parties [are] fixed under the law as it existed at the time of the injury complained of, and any law which undertook to change those rights would be retrospective and void." [Citations omitted]

Reviewing decisions from Tennessee and other jurisdictions with constitutional prohibitions against retrospective application of law, the court concluded that applying the 2003 amendments to Plaintiffs' claims would be unconstitutional.

- **Governmental Tort Liability Act**
- **Premises Liability**
- **Dangerous Roads**
- **Constructive Notice**

Jennifer Bivins, et al. v. City of Murfreesboro, No. M2009-01590-COA-R3-CV (Tenn. Ct. App. July 9, 2010). Author: Judge Andy D. Bennett. Trial: Chancellor Robert E. Corlew, III.

This case is about constructive notice. Although it arises in the statutory GTLA context, the Court of Appeals' logic in finding notice in this case should apply equally to common law claims. The trial court focused on whether Defendant had notice of a dangerous condition at the exact location where the accident at issue in the case occurred. The Court of Appeals reversed, ruling this view was too restrictive, and finding that notice of problems throughout the length of the road was sufficient to demonstrate notice of a problem at this location.

City annexed a road with an "S" curve, but City's street department did not realize it and therefore did no maintenance inspections from the annexation in 1996 until late 2004. Decedent was driving on the road in July 2005 when it was wet from rain. Decedent lost control of his vehicle and crossed the center line, resulting in a three vehicle crash in which Decedent died. Decedent's family sued City under the GTLA, specifically TENN. CODE ANN. § 29-20-203(a), which removes sovereign immunity for actual or constructive notice or a defective, unsafe, or dangerous condition of a road. The trial court found that City did not have notice of an unsafe or dangerous condition at the spot where Decedent's accident occurred. The opinion is not clear about the procedural context in which the trial court entered its ruling, but because the Court of Appeals applied a presumption of correctness to the trial court's factual findings, it appears to have been either a directed verdict or final verdict at the conclusion of a bench trial. Decedent's family appealed the ruling.

The Court of Appeals reversed, finding City did have constructive notice. The Court of Appeals held that the trial court incorrectly focused on whether City had notice of a condition at the exact location of Decedent's accident, rather than a condition that existed on the road generally. The court noted that City was aware of over 20 reported accidents on the road in the three years

before Decedent's accident, most of which also involved wet pavement. Because of the number of accidents, police had decided to show a presence on the road when it rained in order to slow down traffic. City also received a report from an engineering company indicating that super elevation was lacking throughout the road.

- **Course and Scope of Employment**
- **Governmental Tort Liability Act**
- **Assault**

Dalton Reb Hughes and wife, Sandra Hines Hughes v. The Metropolitan Government of Nashville and Davidson County, Tennessee**,** No. M2008-02060-COA-R3-CV (Tenn. Ct. App. February 4, 2010). Author: Judge Alan E. Highers. Trial: Judge Thomas W. Brothers.

There are two primary reasons to consider this opinion. First, the Court of Appeals addresses the fact-specific inquiry of determining whether an employee is acting within the course and scope of employment when the employee engages in horseplay while on the job. The answer is a strong "maybe." Second, the Court of Appeals holds that intent to cause fear of harm is not sufficient for an assault claim; the tortfeasor must actually intend to cause harm.

Employee was driving a front end loader on an access road he was required to use as part of his job for Defendant Governmental Entity. Employee was driving at the loaders top speed of 6-8 mph when he moved to the left. Employee stated he was attempting to avoid two pedestrians. The loader hit a pothole, the bucket on the front end loader bounced and made a loud noise. Plaintiff was ahead, and jumped a guardrail out of fear, falling and suffering injuries. There was some dispute as to whether Employee was trying to startle Plaintiff.

The parties cited several opposing cases to address whether, assuming Employee was engaged in horseplay in trying to startle Plaintiff, Employee's actions were within the course and scope of employment. The Court of Appeals recited the facts and holdings of each of those cases, ultimately concluding that this was a closer case than any of those cited by the parties. The court found the evidence did not preponderate against the trial court's finding that Employee was within the course and scope of his employment regardless of whether he was engaged in horseplay at the time.

However, the Court of Appeals ruled that Defendant Governmental Entity's sovereign immunity would only be removed under the Governmental Tort Liability Act for negligent use of the front end loader, disagreeing with the trial court's statement that intentional acts involving a motor vehicle would also be covered by TENN. CODE ANN. § 29-20-202. Because the trial court ruled Plaintiff did not establish any negligent supervision of Employee, Plaintiff could not rely on TENN. CODE ANN. § 29-20-205's removal of sovereign immunity for negligence that leads to an intentional assault. Thus, the Court of Appeals looked to whether Employee's conduct was negligent or intentional as dispositive of the case.

The Court of Appeals held that the intentional tort of assault and battery requires intent to harm the tort victim, rather than intent to frighten. The trial court found sufficient evidence to establish

Employee intended to frighten Plaintiff, but did not find intent to actually harm Plaintiff. The Court of Appeals held that, for a claim of assault, "[t]he tortfeasor must intend harm, however, the plaintiff may recover if he is injured *or* if he reasonably apprehends physical harm." The court rejected the approach set out in the RESTATEMENT (SECOND) OF TORTS § 21, which imposes liability for assault on a defendant if "(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (b) the other is thereby put in such imminent apprehension."

Finding no intent to harm Plaintiff, the Court of Appeals affirmed the trial court's ruling.

- **GTLA**
- **Recusal**
- **Negligent Supervision**

Christopher Jones v. Bedford County, Tennessee, No. M2009-01108-COA-R3-CV (Tenn. Ct. App. December 15, 2009). Author: Judge Frank G. Clement, Jr. Trial: Judge F. Lee Russell.

In this case, the Court of Appeals affirmed a bench verdict finding Defendant County was not liable for negligently supervising an officer who was alleged to have sexually assaulted an inmate on multiple occasions. Although it is a fact specific case, the details may be relevant to analogize in other cases where a defendant is alleged to have failed to recognize dangerous propensities of the defendant's employee (or other person the defendant is responsible for supervising) who ultimately assaults another individual.

The Court of Appeals affirmed the trial court's denial of a motion to recuse the trial judge, finding Plaintiff's only asserted basis for recusal was that the trial judge had twice ruled against him in the same case on different dispositive issues. The Court of Appeals found no abuse of discretion in this ruling.

Plaintiff's claim for negligent supervision turned on whether the alleged assailant's supervising officer "could foresee or through the exercise of reasonable diligence should have foreseen the general manner in which Plaintiff was injured." The evidence showed that the alleged assailant and several inmates often made vulgar remarks, but the court explained that witnesses testified "that this form of communication came with the territory, so-to-speak." The evidence also showed that, on one incident in which an inmate smeared feces on himself and his cell floor, the alleged assailant told the inmate to "wash good, even Mr. Winky." The supervising officer testified that the unique circumstances did not give him cause for concern that the alleged assailant would sexually assault an inmate.

The Court of Appeals acknowledged that one incident the supervisor was aware of before Plaintiff was allegedly assaulted "require[d the Court of Appeals'] examination." The supervising officer overhead a conversation which suggested that the alleged assailant had pulled down a male inmate's pants. The supervisor asked the alleged assailant about the incident, and he denied it had happened. The Court of Appeals stated that "[t]he better part of discretion would

have been for [the supervisor] to inquire with the inmate who may have been the subject of this alleged incident," but the supervisor did not.

The Court of Appeals ultimately found that no single incident nor the cumulative effect of all incidents were sufficient to cause the supervising officer or any reasonable person in a supervisory role to suspect that the alleged assailant would sexually assault an inmate, and affirmed the trial court's verdict.

It is important to note that this was a bench trial, not a summary judgment motion. The Court of Appeals found the evidence did not preponderate against the trial court's decision; not that there was no evidence sufficient to create a genuine issue of material fact for trial.

- **GTLA**
- **Statutes of Limitations**
- **Pleading Requirements**

Tim E. Shaw v. Cleveland Utilities Water Division, et al, No. E2009-00627-COA-R3-CV (Tenn. Ct. App. November 30, 2009). Author: Judge Charles D. Susano, Jr. Trial: Judge Michael Sharp.

Read this opinion in detail if you have a case where a private entity allegedly negligently performed work for a governmental entity. The primary rulings to take away from the opinion are: (1) the governmental entity is not liable for the negligent acts or omissions of employees of the private entity, even if those persons were acting as agents of the governmental entity; and (2) the private entity is not entitled to the same defenses that the governmental entity would have held, even if those persons were acting as agents of the governmental entity at the time. In other words, both claims and defenses under the GTLA are only applicable if the defendant is an employee of a governmental entity; acting as an agent of the entity is not enough for a claim or defense to be viable.

Under the GTLA, a governmental entity can be liable only for the negligence of its employees. A governmental entity cannot be liable for alleged negligence by non-employees, even if they are acting as agents of the governmental entity. Since the only alleged negligence of actual employees of the governmental entity (as opposed to alleged agents of the entity) occurred more than one year before Plaintiff filed his complaint, Plaintiff's claims against a city utility company were time-barred under the statute of limitations at TENN. CODE ANN. § 29-20-305(b).

The Court of Appeals reversed the trial court's dismissal of Plaintiff's claims based on the GTLA statute of limitations against two private companies with whom the City contracted to provide services to Plaintiff. The Court of Appeals explained its holding that GTLA defenses could not be extended to private companies that contract with a governmental entity:

> The GTLA shows a legislative intent that the benefits of the Act not extend beyond defined "Governmental entit[ies]" and defined "employees." *See, e.g.*, TENN. CODE ANN. §§ 29-20-202 (entity liable for negligent operation of vehicle

> by employee); 29-20-205 (entity liable for negligent acts of employee); 29-20-313 (if trier of fact determines that defendant claiming benefit of GTLA is not an employee "the lawsuit as to that defendant shall proceed like any other civil case"). In fact, governmental entities are prohibited from extending the benefits of the GTLA "to independent contractors or other persons or entities by contract, agreement or other means . . . ." TENN. CODE ANN. § 29-20-107(c)(2000 & Supp. 2009).

The Court of Appeals specifically rejected one Defendant's argument that an Alabama case, *Housing Authority of Huntsville v. Hartford Accident and Indemnity Co.*, 954 So.2d 577, 580 (Ala. 2006), established a rule that "an agent may always assert any statute of limitations available to its principal, even if the principal is a governmental entity."

The Court of Appeals affirmed dismissal of one private Defendant because Plaintiff included that Defendant's name in the caption, but apparently did not assert in the body of the complaint that Defendant actually committed any negligent act or omission.

INDEPENDENT CONTRACTORS:

- **Employees v. Independent Contractors**
- **Vicarious Liability**

***Cason D. McInturff v. Battle Ground Academy of Franklin Tennessee, et al.*,** No. M2009-00504-COA-R3-CV (Tenn. Ct. App. December 16, 2009). Author: Judge Andy D. Bennett. Trial: Judge Randy Kennedy.

All you need to know about the opinion is contained in this summary; there is no reason to read the complete opinion. There are two main points to take away: (1) the majority's factual explanation as to what does not count as "control of the means and method" of work for purposes of vicarious liability; and (2) Judge Cottrell's concurring opinion saying under the circumstances the relationship between the alleged agent in the case and the actual Defendant was even less than an independent contractor relationship.

Plaintiff alleged that high school baseball umpires were agents of Defendant, the Tennessee Secondary Schools Athletic Association, and thus Defendant was liable for alleged negligence by an umpire in officiating a high school baseball game. The Court of Appeals summarized the facts regarding whether Defendant had the "right of control" the umpire's conduct sufficient to deem the umpires agents of Defendant:

> TSSAA provides registered umpires with some instruction via rules meetings, a rule book, insurance benefits while officiating a game between TSSAA schools, and the opportunity to officiate baseball games between TSSAA schools. In return, the umpires agree to officiate according to the rule book when they are assigned to a TSSAA game by a local officials' association. In other words, the umpires agree to abide by, and ensure the participants abide by, the regulatory

> framework (rules) established by the NFSHSA for baseball games played between TSSAA member schools.
>
> The TSSAA deals with umpires to achieve a result – uniform rules for all baseball games played between TSSAA member schools. The TSSAA does not supervise regular season games. It does not tell an official how to conduct the game beyond the framework established by the rules. The TSSAA does not, in the vernacular of the case law, control the means and method by which the umpires work.
>
> In addition, other factors point to the umpires being independent contractors. The officials are paid by the schools for officiating regular season games. The fact that the TSSAA Board of Control sets the per game fee amount each umpire is paid is merely part of the officiating framework which keeps umpires independent – no TSSAA school pays an umpire more than any other TSSAA school. The umpires provide their own uniforms. They are free to work for schools and organizations not affiliated with the TSSAA.

Under the circumstances, the Court of Appeals affirmed summary judgment for Defendant, finding no vicarious liability existed over the umpire's acts or omissions. Although Defendant in the case took the position that the umpire was an independent contractor of Defendant, Judge Cottrell wrote separately to say she did not "believe that the umpires are either employees or independent contractors." Judge Cotrrell's concurrence merely highlights the extremely limited relationship she found between Defendant and the umpire under these facts.

***IN PERSONAM* JURISDICTION:**

- **Personal Jurisdiction**

***Kamarjah Gordon, et al v. Greenview Hospital, Inc., d/b/a Greenview Regional Hospital*,** No. M2007-00633-SC-R11-CV (Tenn. December 17, 2009). Author: Justice William C. Koch, Jr. Trial: Judge Barbara N. Haynes.

This opinion from the Tennessee Supreme Court provides a thorough analysis of the requisites for personal jurisdiction over a defendant in Tennessee. Because that issue does not come up very often, it's worth remembering this opinion is out there. By the same token, it's probably not worth delving deeply into the law or facts addressed in the opinion unless you are actually facing a potential challenge to personal jurisdiction.

The Supreme Court summarized the facts pertinent to Defendant's contacts with the State of Tennessee:

> Greenview Hospital, Inc. ("Greenview") is a Kentucky corporation that owns and operates the Greenview Regional Hospital in Bowling Green, Kentucky. Greenview has no physical facilities in Tennessee, and it does not provide hospital or other healthcare services in Tennessee. In addition, Greenview owns

> no property in Tennessee, is not registered to do business in Tennessee, and has no registered agent for service of process in Tennessee.
>
> Greenview is a subsidiary of the TriStar Health System ("TriStar"), which is, in turn, a subsidiary of Hospital Corporation of America, Inc. ("HCA"). The principal offices of TriStar and the legal department of HCA are located in Tennessee. TriStar operates fourteen facilities in Tennessee and Kentucky, including Greenview Regional Hospital. TriStar's website, which provides a physician referral service in Tennessee and south central Kentucky, contains information about Greenview Regional Hospital.

The trial court granted summary judgment to Defendant for lack of personal jurisdiction, and the Court of Appeals affirmed, although it found the motion was properly a motion to dismiss. The Supreme Court affirmed as well.

First, the Supreme Court agreed that Defendant's motion to dismiss for failure to state a claim remained a motion to dismiss under TENN. R. CIV. P. 12.02(2), despite the addition of evidence into the record. Unlike Rule 12.02(6) motions for failure to state a claim that are supported or opposed by matters outside the pleadings and TENN. R. CIV. P. 12.03 motions for judgment on the pleadings, TENN. R. CIV. P. 12.02(2) motions are not converted to motions for summary judgment when either or both parties submit matters outside the pleadings either in support of or in opposition to the motion. *See Chenault v. Walker*, 36 S.W.3d 45, 55 (Tenn. 2001).

Next, the Supreme Court asserted its agreement with the Court of Appeals' conclusion in *Mfrs. Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 855 (Tenn. Ct. App. 2000), that the 1992 enactments of statutes regarding personal jurisdiction at TENN. CODE ANN. §§ 20-2-221 -225 did not change 1972 amendment to Tennessee's long arm statute found at § 29-2-214(a), which "permits the courts of this state to exercise jurisdiction upon, *inter alia*, '[a]ny basis not inconsistent with the constitution of this state or of the United States.'" Put simply, Tennessee's long arm statute continues to provide any basis for personal jurisdiction that is consistent with the U.S. Constitution. Moreover, the Supreme Court stated in its opinion "that the due process requirements of the Constitution of Tennessee are co-extensive with those of the United States Constitution." *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003); *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994).

Accordingly, the Supreme Court then looked to whether the exercise of jurisdiction over Defendant was consistent with the due process requirements of the U.S. Constitution.

The Supreme Court distinguished between specific jurisdiction – which may be asserted when the plaintiff's cause of action arises from or is related to the nonresident defendant's activities in or contacts with the forum state – and general jurisdiction – which may be asserted when the plaintiff's cause of action does not arise out of and is not related to the nonresident defendant's activities in the forum state. For general jurisdiction, the nonresident defendant's contacts with the forum state must be sufficiently continuous and systematic to justify asserting jurisdiction over the defendant based on activities that did not occur in the forum state.

In this case, Plaintiff conceded at oral argument that her claim did not arise out of and was not related to Defendant's contacts with Tennessee, and thus Plaintiff was required to establish general jurisdiction over Defendant in Tennessee.

Plaintiff argued that general jurisdiction was justified based on: (1) the fact that Defendant's officers and directors maintain offices in Nashville; (2) the fact that Defendant's annual reports filed with Kentucky's Secretary of State lists its principal office address as "% HCA Legal Dept, P.O. Box 750, Nashville, TN"; and (3) the fact that two of Defendant's parent companies are located in Tennessee.

Rejecting Plaintiff's first argument, the Supreme Court found that Plaintiff failed to demonstrate the extent to which Defendant's officers and directors were conducting the corporation's day-to-day business operations from their offices in Tennessee. The Court ruled that their mere presence in Tennessee could not automatically be attributed to Defendant.

On Plaintiff's second argument, the Supreme Court stated it was "reasonable to infer that [Defendant] listed the HCA Legal Department as its principal office solely to assure that all legal notices relating to its corporate status and affairs would be received by the lawyers of its parent corporation." The Court found that listing the parent corporation's legal department as its principal address on corporate regulatory filings did not amount to the sort of continuous and systematic contacts that provide the basis for asserting general jurisdiction over a nonresident defendant.

Turning to Plaintiff's third argument, the Supreme Court concluded that, for Plaintiff to establish general jurisdiction over the subsidiary corporation based on its parents' existence in Tennessee, Plaintiff needed to demonstrate sufficient facts to disregard the presumption of corporate form. The Court explained that Plaintiff could do so either by demonstrating: (1) that the subsidiary corporation is a sham or dummy; (2) that the two corporations are, in fact, identical and indistinguishable; or (3) that the subsidiary corporation is merely an instrumentality, agent, conduit, or adjunct of the parent corporation. The Court stated that Plaintiff had neither alleged nor presented evidence to disregard the corporate form in this case.

The Supreme Court concluded that the three bases for general jurisdiction asserted by Plaintiff, "taken alone or together, do not embody the kind of systematic and continuous contacts which would allow Tennessee to exercise personal jurisdiction over" Defendant.

This decision means that the plaintiff's recovery, if any, against the remaining defendants will be reduced by the percentage of fault assessed against Greenview multiplied times the plaintiff's proven damages. The remaining defendants will have the opportunity to try the "empty chair," and plaintiff will be forced to defend the empty chair.

The Court's view of jurisdiction as expressed in this opinion should be considered by all plaintiff's lawyers in determining whether they want to get involved in a case where a potential at-fault party is not subject to the jurisdiction of a Tennessee court. In such circumstances, counsel may be forced to try two cases, not one, and the results in the two cases could be very different (because in the second trial the Tennessee defendants will likely be "empty chair"

defendants). Obviously, this decision has special significance for those who live in communities that border other states (Memphis, Clarksville, Chattanooga, etc.) but has increasing relevance to places like Nashville (because of the tentacles of Vanderbilt and St. Thomas).

INVASION OF PRIVACY:

- **Invasion of Privacy**
- **Interference with human remains**
- **Reckless infliction of emotional distress**

Debbie Harris, individually and as next of kin to her son Jeremy Wooten; Christopher Harris, individually and as next of kin to his brother, Jeremy Wooten; Chasity Brown, individually and as next of kin to her brother Jeremy Wooten v. Don Horton and Robertson County, No. M2008-02142-COA-R3-CV. Author: Judge Holly M. Kirby. Trial: Judge Ross H. Hicks.

In the case, the Court of Appeals discusses the requirements for several torts that are rarely addressed in appellate opinions: interference with human remains, invasion of privacy, and reckless infliction of emotional distress. If you are looking at a case for interference with or mishandling of human remains, you should know this case requires some physical contact with the corpse to state a claim against a defendant. If invasion of privacy is on the radar in any of your cases, read this opinion thoroughly for its analysis of several provisions of the RESTATEMENT (SECOND) OF TORTS. Even if the RESTATEMENT sections at issue in this case are not directly on point for your own, this opinion suggests the appellate courts in Tennessee will look very favorably toward the RESTATEMENT's treatment of invasion of privacy claims.

Plaintiffs sued Defendants for displaying accident scene photos of Plaintiffs' deceased relative, who died in a motor vehicle accident, to a driver's education class of Decedent's classmates. Plaintiffs themselves did not view the photos, but were informed through students at the school that the photos were displayed.

The Court of Appeals affirmed dismissal of Plaintiffs' claim for interference with and mishandling of human remains. The trial court ruled Plaintiffs failed to state a claim under TENN. CODE ANN. § 39-17-312. Plaintiffs contended their claim was grounded in common law based on *Crawford v. J. Avery Bryan Funeral Home, Inc.*, 253 S.W.3d 149, 157 (Tenn. Ct. App. 2007), *perm. app. denied* Apr. 7, 2008, and *Hill v. Travelers' Ins. Co.*, 294 S.W. 1097, 1098-99 (Tenn. 1927). The Court of Appeals distinguished those cases, finding they require "some quantum of physical contact with the corpse in order to state a claim for interference with and mishandling of human remains." The court also distinguished a Kentucky case, *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912), in which the Kentucky court recognized a claim against a photographer for exceeding parents' authority to use photographs of their deceased twins. The Court of Appeals noted that the *Douglas* case was not premised on disturbing or mishandling remains, but on exceeding parents' authority to use the photos.

The Court of Appeals noted that Plaintiffs could not pursue a claim for invasion of Decedent's privacy, because "the right to privacy is personal and cannot be asserted 'by a member of the

individual's family, even if brought after the death of the individual.'" *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) (citing RESTATEMENT (SECOND) OF TORTS § 652I cmt. a-c (1977)).

Plaintiffs' claim, however, centered on the invasion of their own privacy by displaying photographs of their deceased relative.

Plaintiffs first argued that Defendants invaded their right to privacy by intruding upon their seclusion or private affairs. The Court of Appeals held that "the tort of invasion of privacy by intrusion upon seclusion requires intent," citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977). Because there was no evidence in the record to establish that Defendants were aware the photo albums contained photos of Decedent's body, the court affirmed summary judgment. The court also affirmed summary judgment because the photos were originally taken in a public place, and found the circumstances could not be deemed an "intrusion" into Plaintiffs' "seclusion" or private affairs.

Plaintiffs also argued Defendants invaded their right to privacy by giving publicity to private facts. The Court of Appeals looked to the description of the tort in the RESTATEMENT (SECOND) OF TORTS § 652D (1977), which states:

> 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.

The Court of Appeals agreed with Plaintiffs that relatives of a decedent may have a protectable privacy interest in photographs of their deceased relative, and analogized it to the protectable interests of a decedent's family members recognized in the *Hill* and *Crawford* cases. The court also looked to the Washington Supreme Court's recognition of a similar right in *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998).

Looking to RESTATEMENT (SECOND) OF TORTS § 652D (1977), however, the Court of Appeals found summary judgment was appropriate in this case. Under § 652D cmt b., "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye." Looking to comment d to § 652D, the Court of Appeals further stated that, "even if the matters that are publicized are 'private' and even if the publicity would be 'highly offensive to a reasonable person,' the claim may not be actionable where the matter publicized is a matter of legitimate public concern" The court found that, as a result of Decedent's tragic involvement in a fatal vehicular accident, he became an involuntary public figure, and thus Plaintiffs could not recover for invasion of privacy by publicity given to a private fact.

The Court of Appeals also affirmed summary judgment as to Plaintiffs' claim for reckless infliction of emotional distress, finding Defendants' testimony that he was not aware that photos of the body were in the albums displayed to the driver's education class was not contradicted by any other testimony. The court found, therefore, that Defendants had affirmatively negated the

element of reckless conduct, and that Plaintiffs had not offered any evidence to rebut Defendants' testimony to create a genuine issue of material fact.

MALICIOUS PROSECUTION:

- **Malicious Prosecution**
- **Abuse of Process**
- **False Imprisonment**
- **Outrageous Conduct**
- **GTLA Claims**

Thomas E. Crowe, Jr. v. Bradley Equipment Rentals & Sales Inc., et al., No. E2008-02744-COA-R3-CV (Tenn. Ct. App. March 31, 2010). Author: Judge John W. McClarty. Trial: Chancellor Jerri S. Bryant.

Plaintiff in this case brought a number of claims, all of which failed on dispositive motions. There is little to take away from the case, other than a reminder of what essential elements are necessary for the various claims filed by Plaintiff.

City and Police Officer were immune from claims of false imprisonment, false arrest, malicious prosecution, abuse of process, and outrageous conduct under TENN. CODE ANN. § 29-20-205(2).

Malicious prosecution requires: (1) a prior suit or judicial proceeding was instituted without probable cause; (2) defendant brought such prior action with malice; and (3) the prior action was finally terminated in plaintiff's favor. Citing *Parks v. City of Chattanooga*, No. 1:02-CV-116, 2003 WL 23717092, *4 (E.D. Tenn. Dec. 15, 2003), the Court of Appeals stated that the fact that Plaintiff was indicted by a grand jury in the underlying cases equated to a finding of probable cause, precluding a malicious prosecution claim.

Abuse of process requires: (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge. In this case, Plaintiff did not respond to Defendants' statement of undisputed material facts, and thus there was no evidence that Defendant misused the judicial process in any of the underlying charges. The Court of Appeals affirmed summary judgment on this claim as well.

Plaintiff's claim for false imprisonment failed because of the one year statute of limitations at TENN. CODE ANN. § 28-3-104(a)(1). Plaintiff argued that, because he was indicted and arrested on three separate occasions, and the most recent of those charges was not dismissed until within one year of filing this lawsuit, he was within the one year statute of limitations. The Court of Appeals disagreed, first noting that each indictment was separately issued and separately dismissed, and thus were not "serial charges" constituting one long string before the statute of limitations began to run. Second, the court noted that the cause of action accrued at the time of Plaintiff's arrest, not at the time of dismissal of the charge. The court affirmed summary judgment on the false imprisonment claim.

Finally, the court affirmed summary judgment on Plaintiff's outrageous conduct claim because Defendants established that Plaintiff could not prove an essential element at trial – that Plaintiff had suffered a severe emotional injury.

The court did not explain how Defendants affirmatively introduced evidence that established Plaintiff could not prove a severe emotional injury. That might ordinarily run afoul of the summary judgment standard in *Hannan v. Alltel*. In this case, however, since Plaintiff did not respond to Defendant's statement of undisputed material facts, there may have been a statement in there that amounted to an admission of no emotional injury.

- **Malicious Prosecution**
- **Intentional Infliction of Emotional Distress**
- **Pleading Requirements**

Jack Lane v. Jerrold L. Becker, et al., No. E2008-02776-COA-R3-CV (Tenn. Ct. App. February 25, 2010). Author: Judge John W. McClarty. Trial: Judge W. Dale Young.

There are a couple of points to take away from this case. First, a malicious prosecution claim will fail if the underlying lawsuit was voluntarily dismissed, since the voluntary dismissal does not reflect on the merits. Second, filing a lawsuit and deposing someone is not "outrageous conduct" to support an intentional infliction of emotional distress claim.

Plaintiff in the case sued Defendants, an attorney and his clients, for deposing Plaintiff in a defamation case and then suing Plaintiff in the defamation case. Plaintiff filed a motion to dismiss in the defamation case, and Defendants then filed an order of voluntary dismissal of the claims against Plaintiff. The trial court entered an order of dismissal with prejudice. In Plaintiff's subsequent claim against Defendants arising out of the lawsuit filed against him, the trial court dismissed all of Plaintiff's claims, and Plaintiff appealed.

On the malicious prosecution claim, the Court of Appeals affirmed because the underlying case was voluntarily dismissed. The court looked to the elements of a malicious prosecution claim as detailed in *Parrish v. Marquis*, 172 S.W.3d 526, 530 (Tenn. 2005):

> To prevail in a claim for malicious prosecution, "[a] plaintiff must show (a) that a prior lawsuit or judicial proceeding was brought against the plaintiff without probable cause, (b) that the prior lawsuit or judicial proceeding was brought against the plaintiff with malice, and (c) that the prior lawsuit or judicial proceeding terminated in the plaintiff's favor."

Id. (citation omitted). In *Parrish*, the Supreme Court reconsidered its prior finding in *Christian v. Lapidus*, 833 S.W.2d 71 (Tenn. 1992), and held that "dismissal of a complaint on procedural grounds that do[es] not reflect on the merits" is insufficient to establish termination in the plaintiff's favor. *Parrish* at 532. Last year, the Court of Appeals concluded in *Roberts v. Champs-Elysees, Inc.*, No. M2008-01577-COA-R3-CV, 2009 WL 1507670 (Tenn. Ct. App. M.S., May 28, 2009), that notwithstanding the Supreme Court's earlier decision in *Christrian*,

Parrish requires termination of the underlying suit in a manner that "reflects on the merits" of the action. The *Parrish* Court also quoted from *Siliski v. Allstate Ins. Co.*, 811 A.2d 148, 151-52 (Vt. 2002):

> [I]f the manner of termination, including dismissal, reflects negatively on the merits of the case, it will be considered favorable to the defendant. . . . More specifically, if the dismissal somehow indicates that the defendant is innocent of wrongdoing, it will be considered a favorable termination. . . . On the other hand, if the reason for dismissal is "not inconsistent" with a defendant's wrongdoing, it will not be considered a favorable termination. . . . If the circumstances surrounding dismissal are ambiguous on this point, the determination should be left for trial.

Parish at 531.

The Court of Appeals ruled that the voluntary dismissal of the underlying lawsuit in this case clearly did not reflect on the merits, and therefore could not support a malicious prosecution claim.

Turning to the intentional infliction of emotional distress claim, the Court of Appeals noted that Tennessee has adopted the standard articulated in the RESTATEMENT (SECOND) OF TORTS. In *Bain v. Wells*, 936 S.W.2d 618, 623 (Tenn. 1997), the Tennessee Supreme Court quoted the standard from the RESTATEMENT (SECOND) OF TORTS, § 46, comment d (1965):

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree as to go beyond all 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!"

The Court of Appeals looked to the RESTATEMENT (SECOND) OF TORTS, § 46, comment h in ruling that the trial court determines, "in the first instance, whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." In this case, the Court of Appeals affirmed the trial court's finding that taking a deposition of Plaintiff and filing a lawsuit against him did not rise to the level of "outrageous conduct," even if it did cause Plaintiff emotional distress.

MEDICAL MALPRACTICE:

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

Rufus R. Clifford, III and wife Carrie C. Clifford v. Layda Tacogue, M.D., St. Thomas Hospital, and St. Jude Medical, S.C., Inc., No. M2009-01703-COA-R3-CV (Tenn. Ct. App. July 8, 2010). Author: Judge Richard H. Dinkins. Trial: Judge Barbara N. Haynes.

The Court of Appeals affirmed summary judgment for Defendants on Plaintiffs' medical malpractice and medical battery claims, finding affidavits submitted by Defendants in support of their summary judgment motions affirmatively negated the essential element of causation. In a lengthy opinion, the Court of Appeals detailed the evidence submitted by Plaintiffs to establish causation, but found that some of Plaintiffs' experts were not qualified to testify under TENN. CODE ANN. § 29-26-115 because they had never practiced in Tennessee or a contiguous state, and that all three of Plaintiffs' experts acknowledged that they could not say whether Defendants' conduct more probably than not caused an injury.

The Court of Appeals noted that one of Plaintiffs' proffered experts, a treating physician, testified that he was not testifying as an expert witness. I do not believe this should have any bearing on whether the witness's testimony was admissible or sufficient as expert testimony. Medical experts, and particularly treating physicians, are not experts on expert qualifications or admissibility of testimony. If the witness's testimony otherwise demonstrates competency on the issue, then the witness's statement that he or she does not consider themselves an expert at most goes to the weight of the testimony at trial. In this case, the witness testified that he could not say whether Defendants' conduct more probably than not caused Plaintiff to suffer any injury that would not have otherwise occurred, so it did not matter. Nonetheless, the mere fact that a witness is not intimately familiar with TENN. R. CIV. P. 26, TENN. R. EVID. 701-705, or TENN. CODE ANN. § 29-26-115 should not make any difference to their testimony. The witness's job is to establish the facts and the witness's opinions; not to ably distinguish between what is a "fact" and what is an "opinion" for evidentiary purposes.

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

Melissa Michelle Cox v. M.A. Primary and Urgent Care Clinic et al., No. M2007-01840-SC-R11-CV (Tenn. June 21, 2010). Author: Justice Cornelia A. Clark. Trial: Judge Royce Taylor.

Basically, all you need to know from this case is that a doctor is vicariously liable for the negligence of a physician assistant under the doctor's supervision, and that a physician assistant is not held to the same standard of care as the supervising doctor. The rest just traces the logic that the Tennessee Supreme Court follows to reach these holdings.

Plaintiff sued Doctor and Clinic claiming negligence by Physician Assistant who worked at Clinic under the supervision of Doctor. Defendants moved for summary judgment supported by their own affidavits. Plaintiff responded with one expert, the cardiologist who subsequently treated her. Plaintiff's expert testified that Doctor complied with the standard of care for a primary care physician, but that Physician Assistant did not comply with the standard of care for a primary care physician. Plaintiff's expert testified he had never worked with physician assistants, did not know the responsibility of a physician supervising physician assistants, and was not in a position to testify about the standard of acceptable professional practice of a physician assistant.

The trial court granted Defendants' summary judgment motion, finding Plaintiff had not responded with competent expert testimony. The Court of Appeals reversed, holding that the standard of care applicable to a physician assistant is that of the supervising physician. The Tennessee Supreme Court reversed the Court of Appeals' ruling.

The court first traced the history of profession in the United States – the growth of the profession, its role in permitting doctors to delegate tasks to physician assistants, and society's view that physician assistants are subordinate to physicians.

The court then looked to Tennessee statutes and regulations governing physician assistants. The Court explained that the Physician Assistants Act, TENN. CODE ANN. §§ 63-19-101 -115, recognizes "that physician assistants and medical doctors are members of distinct professions." Physician assistants must be licensed, but licensure permits physician assistants to perform only selected medical services listed in TENN. CODE ANN. § 63-19-106(a), (b). The court found it significant that the regulations application to physician assistants in Tennessee determine whether to discipline a physician assistant "by reference to the practice of physician assistants and not by reference to the practice of physicians." In addition, the court noted that Tennessee regulations governing the practice of medicine include a section dealing with supervision of physician assistants, including the requirement of written protocols to "outline and cover the applicable standard of care" and the supervising physician's responsibility "for ensuring compliance with the applicable standard of care."

The court held that a supervising physician is vicariously liable for the acts or omissions of a physician assistant "in providing authorized medical services within the scope of the parties' joint protocol." The court based its ruling on Tennessee statutes and regulations describing the relationship, including TENN. CODE ANN. § 63-19-106(b), which states: "[a] physician assistant shall function only under the *control and responsibility* of a licensed physician" and that "[t]here shall, at all times, be a physician who *is answerable for the actions of the physician assistant*." (Emphasis in court's opinion.)

Turning to the question of whether a physician assistant should be held to the same standard of care as the supervising physician, the court looked to opinions from other jurisdictions. The court quoted from *Bradford v. Alexander*, in which the Texas Court of Appeals held a physician assistant was not competent to testify about the standard of care for a medical doctor:

> It would indeed lead to incongruity if we permitted a subordinate to testify as an expert concerning the standard of care to which we hold his or her supervisor, who has greater knowledge and training than the subordinate. We do not allow paralegals to testify about the standard of care a licensed attorney owes his client; a physician's assistant should not be treated with greater deference.

886 S.W.2d 394, 397 (Tex. Ct. App. 1994).

The court acknowledged that a "few jurisdictions" have held physician assistants to the same standard of care as that of medical doctors

Ultimately, the court held that Tennessee's statutes indicate the legislature did not intend to hold physician assistants to the same standard of care as physicians.

- **Medical Malpractice**
- ***Res Ipsa Loquitur***
- **Common Knowledge exception**

Lorraine Deuel, Individually and as Administratrix of the Estate of Clyde Deuel, deceased v. The Surgical Clinic, PLLC and Richard J. Geer, M.D., No. M2009-01551-COA-R3-CV (Tenn. Ct. App. August 16, 2010). Author: Judge Holly M. Kirby. Trial: Judge Joe P. Binkley, Jr.

This is a critical case for medical malpractice lawyers, and part of it applies to all tort lawyers. On the medical malpractice side, the Court of Appeals held that a claim against a surgeon for a retained sponge is subject to the common knowledge exception, even if the surgeon submits expert testimony that the surgeon complied with the standard of care. All tort lawyers should take note of the Court of Appeals' holding that the "exclusive control" requirement for *res ipsa loquitur* is not a stringent standard, and that *res ipsa loquitur* can apply even where others also had some control over the instrumentality that injured the plaintiff.

In addition, all lawyers should be aware of the Court of Appeals' ruling that *res ipsa loquitur* creates an inference of negligence that, in most instances, effectively eliminates the possibility of summary judgment or directed verdict for either the plaintiff or the defendant. *Res ipsa loquitur* means there is evidence for the jury to rely on to find negligence despite expert affidavits from the defense stating the defendant was not negligent. On the other hand, *res ipsa loquitur* does not require the jury to find the defendant negligent, and therefore will not, on its own, entitle the plaintiff to judgment as a matter of law against the defendant. In essence, if *res ipsa loquitur* applies, the issue of fault is probably going to the trier of fact.

In this case, Doctor admitted a sponge was left in Patient's abdomen and that surgeons remove sponges from a surgical field during surgery. However, Doctor contended that the sponge was left "through no fault, negligence or error" by Doctor, but that Doctor relied on Nurses' erroneous sponge count. Plaintiff settled with Nurses, and continued to pursue the claim against Doctor. Doctor was awarded summary judgment because Plaintiff stated she would not call an

expert witness at trial, and the trial court found that neither the common knowledge exception nor *res ipsa loquitur* applied to save Plaintiff's claim. Plaintiff appealed.

Common Knowledge Exception

The Court of Appeals first addressed the applicability of the common knowledge exception to the typical requirement of expert testimony in medical malpractice cases. The Court noted that Plaintiff cited several Tennessee opinions that refer to a retained sponge as a "classic example" of the common knowledge exception: *Seavers v. Methodist Med. Ctr. of Oak Ridge*, 9 S.W.3d 86, 92 (Tenn. 1999); *McConkey v. State*, 128 S.W.3d 656, 660 (Tenn. Ct. App. 2003); *Murphy v. Schwartz*, 739 S.W.2d 777, 778 (Tenn. Ct. App. 1986); *German v. Nichopoulos*, 577 S.W.2d 197, 202-03 (Tenn. Ct. App. 1978) *overruled on other grounds by Seavers*, 9 S.W.3d at 96. The Court also noted that the common knowledge exception was applied under similar facts by a federal court applying Tennessee law and by at least one state court in another jurisdiction, even with expert testimony that the standard of care permitted the surgeon to rely on the nurses' count. *See Carver v. United States*, Nos. 3:04-0234, 3:04-0991, 2005 WL 2230025, at *9-10 (M.D. Tenn. Aug. 30, 2005); *Breaux v. Thurston*, 888 So.2d 1208, 1217 (Ala. 2003). The Court of Appeals recognized that affidavits by medical experts may be considered where the common knowledge exception applies, but affidavits are not conclusive.

The Court of Appeals rejected Defendants' argument that the common knowledge exception "applies only to factual circumstances where the alleged negligence is wholly unrelated to the instrumentality that caused the harm." The Court of Appeals noted that the cases cited by Defendants in support of their argument did not contain any language imposing such a restriction on the common knowledge exception, and that Defendants had not cited any cases from any jurisdiction rejecting the common knowledge exception under similar facts.

The Court of Appeals therefore reversed the trial court's finding that the common knowledge exception did not apply. The court's decision implicitly holds that the common knowledge exception applies in any retained object case.

Res Ipsa Loquitur

The Court of Appeals next turned to the applicability of *res ipsa loquitur* to the case. TENN. CODE ANN. § 29-26-115(c) codified the rule in medical malpractice cases:

> In a malpractice action as described in subsection (a), there shall be no presumption of negligence on the part of the defendant; provided, there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence.

The Court of Appeals acknowledged the distinction between the permissible inference of negligence created by the common law *res ipsa loquitur*, which does not compel a finding of

negligence but allows the jury to reach that conclusion without proof of negligence, and the statutory "rebuttable presumption" version of *res ipsa loquitur* in medical malpractice cases. Doctor argued that *res ipsa loquitur* could not apply to this case because Nurses admitted they also had control over the sponge, and Doctor argued that multiple persons cannot have "exclusive control" of an object.

The Court of Appeals rejected Doctor's argument. The court noted that TENN. CODE ANN. § 29-26-115(c) specifically refers to "the defendant's *(or defendants')* exclusive control." (Emphasis in Court of Appeals opinion.)

The court also elaborated on the "exclusive control" requirement of common law negligence:

> "The 'exclusive control' element of the res ipsa loquitur doctrine, if read too literally, is overly restrictive." [Citation omitted.] The "exclusive control" element serves the purpose of demonstrating that the causal negligence was probably the defendant's, *i.e.*, that the defendant is responsible for the plaintiff's injury. [Citation omitted.] Exclusive control is sufficient for this purpose but is not the only way to show the defendant's responsibility for the injury; therefore, exclusive control is not indispensable to the application of *res ipsa loquitur*. [Citations omitted.]
>
> A comment to Section 328D of the *Second Restatement of Torts* explains the "exclusive control" element of *res ipsa loquitur* as follows:
>
> > The plaintiff may sustain this burden of proof . . . [by] showing that the defendant is responsible for all reasonably probable causes to which the event can be attributed. Usually this is done by showing that a specific instrumentality which has caused the event . . . [was] under the exclusive control of the defendant. Thus, the responsibility of the defendant is proved by eliminating that of any other person.
> >
> > It is not, however, necessary to the inference that the defendant have such exclusive control; and exclusive control is merely one way of proving his responsibility. He may be responsible, and the inference may be drawn against him, where he shares the control with another . . . [or] where he is under a duty to the plaintiff which he cannot delegate to another . . . . [I]f it [the responsibility of the defendant] can be established otherwise, exclusive control is not essential to a res ipsa loquitur case.
>
> RESTATEMENT (SECOND) OF TORTS § 328D cmt. g (1965). […] The *Restatement* offers the following illustration to this comment:
>
> > A undergoes an operation. B, the surgeon performing the operation, leaves it to C, a nurse, to count the sponges used in the course of it. B is under a legal duty to A to exercise reasonable care to supervise the conduct of C in this task. After the

> operation a sponge is left in A's abdomen. It can be inferred that this is due to the negligence of both B and C.
>
> RESTATEMENT (SECOND) OF TORTS § 328D cmt. g, illus. 9 (1965).

The court rejected Doctor's analogy to *Callins v. Baptist Mem'l Hosp. - Union City*, No. 02A01-9403-CV-00051, 1995 WL 48499 (Tenn. Ct. App. Feb. 7, 1995), *no perm. app*. In *Callins,* the plaintiff claimed that she suffered an injury as a result of her body's positioning while under general anesthesia for surgery. The affidavits in *Callins* established that the defendant doctor had no responsibility for positioning of the patient's body. In this case, on the other hand, there was no question that Doctor was responsible for removing the sponges.

The Court of Appeals determined that Plaintiff did establish the requisite elements for *res ipsa loquitur* to apply. The court did not address whether it was relevant that the other persons who had control over the sponge – Nurses – were at one time also defendants in the case. From the court's analysis of the "exclusive control" element generally, it does not appear that the result would be different if Nurses had never been sued in the case.

The Court of Appeals then addressed Doctor's contention that expert affidavits by Doctor and an expert witness hired by Doctor sufficiently rebutted the *res ipsa loquitur* presumption to entitle Doctor to summary judgment. The court noted the parties did not cite any Tennessee cases squarely addressing the question of whether an expert affidavit stating a defendant surgeon was not negligent entitles the doctor to summary judgment in a retained sponge case. The Court of Appeals, however, noted that *Tutton v. Patterson*, 714 S.W.2d 268, 270 (Tenn. 1986), cited nearly a dozen cases holding that "reliance on a sponge count does not, as a matter of law, relieve a doctor from liability for leaving a sponge in a patient."

The Court of Appeals agreed with those opinions from other jurisdictions, and concluded that Plaintiff was not required to submit expert testimony on Doctor's negligence, in response to the expert testimony submitted by Doctor, in order to present the issue to the jury. The court quoted from the Indiana Supreme Court, explaining: "The inference of breach of duty confronts medical opinion of no breach of duty. Justice thus requires a trial." *Chi Yun Ho v. Frye*, 880 N.E.2d 1192, 1199 (Ind. 2008) (internal citation omitted).

The Court of Appeals next rejected Plaintiff's argument that Plaintiff was entitled to summary judgment based on the rebuttable presumption created by the codified *res ipsa loquitur* of TENN. CODE ANN. § 29-26-115(c). The court ruled that "[a]s with the inference raised under the common law doctrine of *res ipsa loquitur*, proof of such a retained sponge 'permits, but does not compel, a jury to infer negligence.'" (Citation omitted).

- **Medical Malpractice**
- **Scheduling Orders**
- **Expert Witnesses**

Alvin Flatt, Attorney in Fact and Next of Kin of Decedent Falnetta Nobel v. Claiborne County Hospital and Nursing Home, No. E2008-01341-COA-R3-CV (Tenn. Ct. App. April 8, 2010). Author: Judge Herschel Pickens Franks. Trial: Judge Walter C. Kurtz.

This case includes a good tip from the trial court and Court of Appeals on a provision to consider including in scheduling orders and pretrial briefing orders.

First, the Court of Appeals mentioned that the trial court ruled, during trial, that Defendant's expert was not qualified to testify. The trial court specifically noted this was permissible because there was no order requiring objections to experts' qualifications to be raised by pretrial motion. Given the cost of losing an expert in the middle of trial – both legally and economically – lawyers and judges may want to think about entering a scheduling order that includes a provision to avoid this possibility.

Second, the Court of Appeals affirmed the trial court's bench verdict for the defense. The Court of Appeals found no abuse of discretion in the trial court's evaluation of the expert testimony to conclude that Defendant did not deviate from the standard of care. Interestingly, the trial court struck Defendant's expert witness, and Defendant herself was not specifically asked about what the standard of care required. Thus, the only testimony on the record explicitly stating what the standard of care required came from Plaintiff's expert. Nonetheless, the Court of Appeals affirmed the trial court's inference that Defendant's description of what she did in this case was also what Defendant thought the standard of care required.

The only problem I have with the case is that last part – nobody testified that the standard of care required anything other than what Plaintiff's expert said it was. Defendant did not say anything to the contrary. The Southwest Reporter is riddled with Tennessee cases where a plaintiff's expert's testimony was excluded for saying only what the expert personally did with their own patients under the circumstances, and not explicitly stating that the standard of care required such treatment. I see no difference between testimony from a defendant about what he or she did in a particular case and testimony from a plaintiff's expert as to what he or she does under similar circumstances. Neither actually sets out that it constitutes the standard of care. If the trial court found Plaintiff's expert in this case credible at all, the absence of any contrary evidence should have made the standard of care conclusively decided by Plaintiff's proof.

- **Statutes of Limitations**
- **Savings Statute**
- **Pleading Standards**
- **Notice of Medical Malpractice Claim**
- **Motions to Dismiss**
- **Motions for Summary Judgment**

***Shawn Howell, Individually and as Administrator for the Estate of Jesse Franklin Browning, Jr. v. Claiborne and Hughes Health Center*,** No. M2009-01683-COA-R3-CV (Tenn. Ct. App. June 24, 2010). Author: Judge J. Steven Stafford. Trial: Judge Timothy L. Easter.

This lengthy case can be boiled down to a few important aspects of law. Because the procedural posture giving rise to these legal issues necessitated a 23-page opinion, we will lead you off with the law first and you can decide whether to wade into the circumstances below.

First, the savings statute applies to a voluntarily dismissed claim even if both the original and re-filed complaints name an improper party plaintiff, such as the wrong person to bring a wrongful death claim. Second, a trial court should not dismiss a complaint based on the statute of limitations for failure to plead facts invoking the savings statute if there is other evidence in the record that demonstrates the plaintiff complied with the one year savings statute. However, the safe course of action is for a plaintiff to reference the original filing and dismissal and to cite the savings statute. Third, a plaintiff need not reference specific times and acts constituting negligence in the complaint, even in a medical malpractice case. Finally, for lawsuits filed before the 2008 amendments to the medical malpractice act, which established the pre-suit notice requirement for malpractice cases, if the suit was voluntarily dismissed before the 2008 amendment and re-filed after the notice requirement went into effect, compliance with the notice requirement may be excused based on "extraordinary cause."

Savings statute

Plaintiff originally filed their wrongful death claim in the name of the Estate of Decedent, although no estate had been established and there was no administrator to name as a proper party plaintiff. On this basis, Defendant filed a motion to dismiss or for a more particular statement. The trial court gave Plaintiff time to amend the complaint. Before that deadline expired, Plaintiff non-suited the claim.

Plaintiff re-filed the claim slightly less than one year after the voluntary dismissal was entered, again naming the Estate of Decedent, and without referencing the prior lawsuit or otherwise invoking facts to trigger the savings statute at TENN. CODE ANN. § 28-1-105. Defendant moved to dismiss the complaint as again filed by an improper party, as well as based on the expiration of the one year statute of limitations without any facts in the complaint to trigger the savings statute. The trial court allowed Plaintiff to amend her complaint twice more in response to Defendant's motions to dismiss, with Plaintiff ultimately naming a proper party as the plaintiff – the administrator of an estate established for Decedent.

The trial court dismissed Plaintiff's complaint for failure to plead any facts or cite to the savings statute, ruling that on its face Plaintiff's complaint demonstrated the claim was barred by the statute of limitations.

The Court of Appeals reversed. The Court of Appeals first ruled that Plaintiff's original lawsuit did effectively commence the claim under TENN. R. CIV. P. 3, which does not specify that a complaint filed in the wrong name prevents it from being deemed "commencement of an action" under Rule 3. The court found this case "strikingly similar" to *Foster v. St. Joseph Hospital*, 158 S.W.3d 418 (Tenn. Ct. App. 2004), in that the original wrongful death case was not filed in the name of a proper party plaintiff. In *Foster*, the Court of Appeals ruled that filing of the first complaint did commence the action for purposes of the savings statute, even though it was filed under an incorrect name.

The Court of Appeals noted that in *Foster*, the defendant never objected to the original complaint, while Defendant in this case did file a motion to dismiss based on the improperly named plaintiff. However, the Court of Appeals ruled that did not prevent Plaintiff's re-filed suit from being viable under the savings statute. The court explained that the savings statute confers on a plaintiff, who voluntarily non-suits a prior action, the same procedural and substantive benefits that were available to the plaintiff in the first action. *Parnell v. APCOM, Inc.*, No. M2003-00178-COA-R3-CV, 2004 WL 2964723, at*5 (Tenn. Ct. App. Dec. 21, 2004) (citing *Dukes v. Montgomery County Nursing Home*, 639 S.W.2d 910, 913 (Tenn. 1982). In this case, the trial court in the originally filed action had granted Plaintiff time to amend her complaint to name a proper party plaintiff. Therefore, the Court of Appeals ruled that naming an incorrect party plaintiff in both the first lawsuit as well as in the re-filed lawsuit did not affect the viability of the savings statute.

The Court of Appeals reversed the trial court's decision to grant Defendant's motion to dismiss based on the expiration of the statute of limitations. The Court of Appeals ruled that the trial court should have reviewed Defendant's motion to dismiss under the summary judgment standard of TENN. R. CIV. P. 56. Defendant attached a copy of Plaintiff's original complaint to one of Defendant's court filings in support of Defendant's motion to dismiss. The Court of Appeals found no dispute as to when the original action was filed or dismissed or when it was re-filed. Therefore, the court found it undisputed that Defendant's motion to dismiss should have been denied based on Plaintiff's full compliance with the savings statute.

Pleading Specific Facts

The Court of Appeals reversed the trial court's dismissal of Plaintiff's complaint based on failure "to state with particularity the specific acts of negligence, with dates, as required by the [trial court's] previous order...." The Court of Appeals recited the liberal standard for pleadings, stating:

> "'A complaint "need not contain in minute detail the facts that give rise to the claim," so long as the complaint does "contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial."'" *Givens v. Mullikin,* 75 S.W.3d 383, 399 (Tenn.

> 2002)(quoting *White,* 33 S.W.3d at 725 (quoting *Donaldson v. Donaldson*, 557 S.W.2d 60, 61(Tenn. 1977)). Further, averments of time and place are not required if they are unnecessary to give the defendants notice of the claim. *Taylor v. Lakeside Behavioral Health System*, No. W2009-00914-COA-R3-CV, 2010 WL 891879, *11 (Tenn. Ct. App. March 15, 2010).

In this case, the court found Plaintiff's complaint pled sufficient facts to give notice to Defendant of the claims against it, and that the trial court erred in dismissing the complaint on this basis.

Medical Malpractice Notice Requirement

Finally, the Court of Appeals ruled that the trial court erred in dismissing Plaintiff's complaint for failure to provide notice to Defendant as required by the 2008 amendments to the medical malpractice act at TENN. CODE ANN. § 29-26-121. The court noted that Plaintiff's original complaint was filed before the notice requirement went into effect, and that the notice provisions actually took effect only days before Plaintiff re-filed her claim. The Court of Appeals ruled that under the "unique circumstances of this case," the trial court erred by not excusing Plaintiff's complaint for "extraordinary cause shown" as permitted by TENN. CODE ANN. § 29-26-121.

- **Expert Testimony**
- **Summary Judgment**
- **Cancellation Rule**

Vickie P. Jacobs, Surviving Spouse of Harris N. Jacobs, Deceased; and for the benefit of herself and the minor children of Harris N. Jacobs, Deceased v. Nashville Ear, Nose & Throat Clinic et al., No. M2009-01594-COA-R3-CV (Tenn. Ct. App. July 15, 2010). Author: Judge Charles D. Susano, Jr. Trial: Judge Barbara N. Haynes.

The summary of this opinion will probably suffice for most judges and lawyers to make them aware of the standards for exclusion of expert testimony on grounds other than competence. The trial court excluded expert affidavits and testimony submitted by Plaintiff in response to a summary judgment motion for several reasons. The Court of Appeals almost summarily rejected the various grounds, ruling that the trial court erred by: (1) excluding former testimony of an expert by finding it was "superseded" by a subsequent deposition; (2) excluding testimony of an expert as too speculative for giving some vague statements about probability versus possibility in the causation context, when other parts of the expert's testimony did sufficiently articulate the "more probable than not" standard; (3) excluding experts' testimony under the cancellation rule when the Court of Appeals found no inconsistency in the testimony; and (4) excluding one expert's affidavit as being "untimely," though it was filed within the timeframe set by TENN. R. CIV. P. 56.04.

Plaintiff argued that Defendants could not have affirmatively negated the essential element of causation by putting forth evidence that Decedent's cancer was inoperable. The Court of Appeals rejected two arguments by Plaintiff that bear mentioning briefly.

First, Plaintiff argued that it was unfair for Defendants to take the position that Decedent did not have cancer at the time Defendants treated him, yet to proffer expert testimony that the cancer Decedent had was inoperable at that time. The Court of Appeals explained that a defendant is entitled to make alternative arguments, and is allowed to file summary judgment motions attacking one element of a claim while assuming that the plaintiff would be successful on the other elements.

Second, Plaintiff argued that Defendants' expert testimony should have been excluded because it was based, in part, on testimony by one of Plaintiff's experts that the trial court ordered stricken. The Court of Appeals distinguished *Shipley v. Williams*, No. M2007-01217-COA-R3-CV, 2009 WL 2486199 (Tenn. Ct. App. Aug. 14, 2009), *perm. appeal granted* (Feb. 22, 2010), noting that in *Shipley* the stricken testimony could not be relied upon for any purpose because the trial court ruled the stricken expert was not competent to give opinions in the case. In this case, however, the trial court did not strike the expert's testimony based on a lack of qualifications, but excluded it on procedural grounds. Thus, other experts were free to rely on the testimony to form their own opinions.

The Court of Appeals then turned to whether Plaintiff proffered sufficient expert testimony to create a genuine issue of material fact as to causation. The Court of Appeals did an excellent job of analyzing each of the trial court's bases for excluding the opinions of Plaintiff's three expert witnesses.

The trial court excluded affidavits from two of Plaintiffs' experts because the experts gave depositions after signing the affidavits. The trial court ruled that the subsequent deposition "superseded" the affidavit. The Court of Appeals rejected this argument, stating it knew of no rule of law that existed or should exist to support the trial court's ruling.

However, the Court of Appeals did rule that one of the experts essentially abandoned the opinion in their earlier affidavit through his deposition testimony. Essentially, the expert's original affidavit stated that Plaintiff would likely have recovered if treated surgically, but the expert testified by deposition that he did not have an opinion if the cancer were curable at that point. The Court of Appeals explained that it disagreed with the terminology used by the trial court – characterizing the subsequent deposition testimony as "superseding" the prior affidavit – but agreed that the expert's testimony was not sufficient as to causation given his changed testimony.

The next basis for the trial court to strike Plaintiffs' experts' causation testimony was the trial court's view that the testimony was too speculative. The Court of Appeals looked to *Kilpatrick v. Bryant*, 868 S.W.2d 594 (Tenn. 1993) for the standard to apply in a failure to diagnose and treat case. In *Kilpatrick*, the Tennessee Supreme Court ruled that Tennessee does not recognize claims for loss of chance. The Court of Appeals in this case explained:

> Another way of stating the Court's principal holding [in *Kikpatrick*] – one that has direct application to the present case – is by saying that "recovery is disallowed unless it can be shown . . . that it is more probable than not (greater than 50 percent) that but for the negligence of the defendant the plaintiff would have recovered or survived." *Id.* at 601.

The Court of Appeals disagreed with the trial court and Defendants on this ground, and found that Plaintiffs' experts demonstrated they were sufficiently reliable and based on sufficiently reliable facts and methodology.

In a footnote, the Court of Appeals explained that the *McDaniel* factors do not have to be applied under circumstances such as these, stating:

> Since the instant case does not involve an untested or novel approach to treating sinus cancer, we see no need to work through the factors set forth in *McDaniel v. CSXTransp., Inc.*, 955 S.W.2d. 257, 263 (Tenn. 1997). *See Brown v. Crown Equip. Corp.* , 181 S.W.3d 268, 272 (Tenn. 2005)(courts are not always required to consider the factors). The *McDaniel* factors are: (1) whether scientific evidence has been tested and the methodology with which it has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether, as formerly required by *Frye [v. United States*, 293 F. 1013 (D. C. Cir.1923)], the evidence is generally accepted in the scientific community; and (5) whether the expert's research in the field has been conducted independent of litigation. *McDaniel*, 955 S.W.2d at 265 (bracketed material added).

Next, the Court of Appeals analyzed whether Plaintiffs' experts' testimony should be excluded at the summary judgment stage based on the cancellation rule set out in *Church v. Perales*, 39 S.W.3d 149 (Tenn. Ct. App. 2000). The court found no inconsistencies in the testimony of either of Plaintiffs' experts who Defendants attacked on this basis.

In the last matter dealing with experts, the Court of Appeals ruled that the trial court abused its discretion in excluding an affidavit of one of Plaintiffs' experts on the ground that the affidavit was untimely filed. The trial court explained in its order that "This affidavit was filed on 3/27/2009 less than 30 days before trial and more than 3 years after [the expert's] discovery deposition was taken on 1/11/2006." The Court of Appeals noted that the affidavit was filed on that date in response to Defendants' summary judgment motions filed on February 13, 2009, and in line with the timing permitted by TENN. R. CIV. P. 56.04. The Court of Appeals noted it would normally "accord considerable deference" to a trial court's exclusion of "untimely" evidence, but found the trial court abused its discretion in this instance.

Lastly, the Court of Appeals ruled the trial court erred by entering an order in 2004 permitting Defendants to have *ex parte* communications with Decedent's treating physicians in violation of *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002). After the trial court's order in this case was entered, the Court of Appeals decided *Alsip v. Johnson City Medical Center*, No E2004-00831-COA-R9-CV, 2005 WL 1536192 (Tenn. Ct. App. June 30, 2005), which stated unequivocally that the trial court had no authority to enter such an order. The Court of Appeals stated that, because it was reversing summary judgment against Plaintiff, it was not aware of anything in the record to show Plaintiff was somehow prejudiced by Defendants' communications with Decedent's treating physicians, and left that issue to the trial court on remand.

- **Medical Malpractice**
- **Locality Rule**
- **Directed Verdict**

Tina Johnson, et al v. David J. Richardson, M.D., No. W2009-02626-COA-R3-CV (Tenn. Ct. App. August 12, 2010). Author: Judge J. Steven Stafford. Trial: Judge Karen R. Williams.

Plaintiff's expert testified that he was familiar with the standard of care in Springfield, Missouri, and that it was similar to Defendant's community of Memphis, Tennessee. Plaintiff's expert did not testify that he was familiar with the standard of care in Memphis.

Plaintiff's expert testified:

- The hospital in which Plaintiff's expert practiced in Springfield, Missouri provides community tertiary care;
- The number of beds and annual number of patients at the expert's hospital;
- That Defendant's community includes St. Jude's Hospital, "which of course, is famous[…]."
- That the expert sends patients to and receives patients from St. Jude "all the time."
- That Defendant's community includes two "big" hospitals, the Baptist and the Med, which are both like the expert's hospital in that they have multiple outlying hospitals.
- That Defendant's community includes a medical school.
- That Defendant's community includes a "big" trauma center and a burn center "much like Springfield."
- That both communities have the same sort of medical specialties.
- That the expert has reviewed multiple cases from Memphis and from Tennessee, and that is "another good way to see what kind of care is done in a community" and shows it is "very similar to the sorts of things that" are done in the expert's community.
- That the only medical specialty not done in a hospital or client within the expert's community is a transplant service.
- That the population of the expert's city is about 800,000.
- That the drawing area for the expert's community includes the surrounding area, and pulls from a population of close to 2 million.

When Defendant moved to disqualify the expert, Defendant provided the trial court with U.S. census records showing "that in 1999 Springfield's population was 42,669 while in Memphis the population was 606,109; and in 2006 Springfield's population was 153,449, while the population of Memphis was 676,548."

The Court of Appeals affirmed, finding the trial court did not abuse its discretion in excluding the expert's testimony. The Court of Appeals noted the expert was incorrect as to population, and that the population of the two communities was "anything but similar." The court stated that the expert's testimony regarding medical specialties within the communities was too vague to be

sufficient. The court stated that "the mere fact that both communities had outlying hospitals is insufficient on its own" to establish similarity.

The Court of Appeals distinguished *Stovall v. Clarke*, 113 S.W.3d 715 (Tenn. 2003), in which the Tennessee Supreme Court ruled that the plaintiff's expert was competent to testify under the locality rule. The Court of Appeals first noted that, in *Stovall*, the expert testified that he was familiar with the standard of care in the defendant's community; not that his community was similar to the defendant's community. Second, the Court of Appeals stated that the expert's affidavit in *Stovall* "explained that he often treats patients referred from the defendant's community for cardiology problems, which was the area of medicine at issue...", that he had reviewed over twenty medical charts and testified in three malpractice cases from Tennessee, and he had reviewed information about the defendant's hospital and community. Third, the Court of Appeals stated that, unlike the expert in this case, the expert in *Stovall* "explained in detail the medical records reviewed and the knowledge gained" in other cases that informed the expert of the standard of care. Finally, the Court of Appeals distinguished *Stovall* on the ground that it arose at the summary judgment stage, rather than on directed verdict, and there the plaintiff only needed to create a question of material fact.

Plaintiff in this case also argued that the trial court should not have excluded Plaintiff's expert based on the timing of Defendant's challenge to the expert's competency. Plaintiff's expert's proof deposition was taken three years before the trial. The Court of Appeals explained in a footnote that the record was unclear as to what point during the trial Defendant challenged the expert's competency, and Defendant's brief said it was at the close of Plaintiff's proof while Plaintiff's brief said it was at the conclusion of the viewing of the expert's videotaped deposition. The Court of Appeals stated it could find nothing in the record or the law requiring Defendant to challenge the expert's qualifications before trial, and the record being unclear as to what point in the trial Defendant challenged the expert's competency, the Court of Appeals rejected Plaintiff's argument.

Justice Kirby entered a concurring opinion noting that experts are not experts on demographics, and "[t]o the extent that the similarity of medical communities is established through demographic information, this can be introduced into evidence by means other than the physician expert's testimony, so long as the physician expert puts the demographic information into context, such as explaining why the availability of certain medical specialties in the compared communities may be significant in a given case." Justice Kirby noted that, in this case, however, Plaintiff chose to introduce the demographic information solely through the expert's testimony, and she agreed with the majority that the evidence in the record did not show a sufficient similarity between the expert's community of Springfield, Missouri and Defendant's community of Memphis, Tennessee.

There are a few aspects of this opinion that should trouble lawyers who handle medical malpractice cases.

As to the timing of Defendant's challenge to Plaintiff's expert qualifications, it is unclear from the opinion whether Defendant made a timely challenge. Defendant needed to object *during the deposition* to Plaintiff's expert providing any testimony for which Defendant did not believe

there was a sufficient foundation laid. That is an evidentiary issue which may be addressed at the time of the deposition, and therefore unless the parties stipulated that any such objections would be reserved for trial, any objection to the expert's competency was waived. It is possible the Court of Appeals simply did not mention that Defendant properly preserved objections to the expert's standard of care testimony during the deposition, but it is not clear from the opinion.

Moreover, if Defendant waited until the close of Plaintiff's proof to object to the expert's qualifications, as the Court of Appeals recites in a footnote is Defendant's position on the timing of the objection, then the objection was clearly untimely. A party cannot allow testimony to be presented into the record without objection, then later complain that it was introduced without a sufficient evidentiary foundation. Again, the Court of Appeals says this was unclear from the record, but it bears reminding that timing of an evidentiary objection is critical.

Most concerning is that this case emphasizes the moving target that the locality rule has become. The Court of Appeals distinguished *Stovall* because the Court of Appeals says that the expert in *Stovall* was testifying about the standard of care in the defendant's own community, not the expert's community. First, the *Stovall* opinion suggests, if anything, that the expert in that case was testifying his own community was similar to the defendant's community. Indeed, the expert's supplemental affidavit, cited by the Court of Appeals here, said: "*I consider Franklin, Tennessee to be a similar community to Marshall, Missouri, as it pertains to the facts and circumstances of this case.*" (Emphasis in *Stovall*).

Second, under the Court of Appeals' prior holdings in *Eckler v. Allen*, 231 S.W.3d 379 (Tenn. Ct. App. 2006), and *Allen v. Methodist Healthcare Memphis Hosps.*, 237 S.W.3d 293 (Tenn. Ct. App. 2007), neither the *Stovall* expert nor Plaintiff's expert in this case would ever be competent to testify that they were familiar with the standard of care in the defendants' communities. In both *Eckler* and *Allen*, the Court of Appeals ruled that an expert cannot testify about the standard of care in a community unless the expert has personally practiced in that community. Both the *Stovall* expert and Plaintiff's expert in this case testified they had never practiced in the respective defendants' communities. Thus, under the Court of Appeals' analyses in *Eckler* and *Allen*, the expert that the Supreme Court identified as competent in *Stovall* was not competent because he was testifying about the standard of care in a community in which he had never personally practiced.

The Court of Appeals has since moved away from the personal practice requirement of *Eckler* and *Allen* – but that logic was still very much in play when the expert's proof deposition in this case was taken in 2006. TENN. CODE ANN. § 29-26-115, setting out the locality rule, has not changed in forty years. Litigants should not constantly wonder whether an expert will satisfy the latest interpretation of that forty-year-old rule. If an expert's qualifications are borderline, the expert can be subjected to cross-examination going to the weight of their testimony. Outright exclusion of necessary testimony on grounds that are ever-changing, however, serves no purpose but to frustrate the judicial system and its participants.

- **Peer Review Law**
- **Statutory Construction**

Lee Medical, Inc. v. Paula Beecher et al., No. M2008-02496-SC-S09-CV (Tenn. May 24, 2010). Author: Justice William C. Koch, Jr. Trial: Judge Jeffrey S. Bivins.

You really only need to read this opinion if you deal with peer review privilege in discovery, which is common in medical malpractice cases. Otherwise, if you have a novel issue of interpreting a dense and ambiguous statute, it provides a very detailed framework for attacking the issue from multiple angles.

The short version of the majority's holding is that the peer review privilege at "TENN. CODE ANN. § 63-6-219(e) applies only to peer review proceedings before a peer review committee as defined in TENN. CODE ANN. § 63-6-219(c) that involve a physician's conduct, competence, or ability to practice medicine."

Plaintiff company provided vascular access services to patients at a hospital group. The hospital group performed an audit of the vascular access services in which it was assisted by the manufacturer of the catheters used for the services and by the staffing company that provided nurses to the group. As part of the audit, the manufacturer provided the hospital group with a report regarding the quality and/or cost effectiveness of Plaintiff's services. When the audit was complete, the various hospitals within the group began cancelling their outsourcing contracts with Plaintiff and providing vascular access services using the nurses provided through the staffing company.

Plaintiff sued the manufacturer of the catheters used for vascular access services, the company that staffed nurses at the hospitals, and the chief nursing officer at one of the hospitals. Plaintiff alleged that Defendants made defamatory remarks about Plaintiff's vascular access services during the audit in an effort to obtain their own contracts to provide vascular access services to the hospital group. Plaintiff sought discovery of various records related to the audit, and in particular the catheter manufacturer's report, which the trial court ruled were covered by the privilege in the Tennessee Peer Review Law, TENN. CODE ANN. § 63-6-219. Plaintiff appealed the discovery decision.

The Supreme Court explained that, besides the peer review privilege, there were several other legal principles particularly applicable to claims of privilege in civil cases. First, Tennessee's discovery and evidentiary rules reflect a broad policy favoring discovery of all relevant, non-privileged information. Second, privileges present obstacles to the search for truth based on interests and relationships which are regarded to be of sufficient social importance to justify some sacrifice of the availability of evidence. Third, the rules of evidence disfavor privileges in civil cases because they are in derogation of the search for truth.

The Court also explained that the eleven amendments to the Peer Review Law since it was first enacted in 1967 have "broadened the application of the statute at the expense of its clarity."

The Court summarized at length the general rules of statutory construction, and any judge or lawyer needing to interpret a potentially ambiguous statute should look directly to this opinion for guidance as to those broad principles. Although these rules are familiar, Justice Koch's majority opinion provides an excellent resource for someone looking for a concise but extensive outline of the law.

The Court then succinctly ran through the Peer Review Law and the problems it presents for interpretation:

> In its current form, TENN. CODE ANN. § 63-6-219 contains six sections. The first section, TENN. CODE ANN. § 63-6-219(a), which was added in 1992, provides the popular name of the statute. The second section, TENN. CODE ANN. § 63-6-219(b), is the operative section that defines the purpose and application of the statute. It was also enacted in 1992 and has never been amended. The third section, TENN. CODE ANN. § 63-6-219(c), is the definitional section that consists of a single 248-word sentence. The fourth section, TENN. CODE ANN. § 63-6-219(d), contains the immunity provisions of the statute that date back to its original enactment in 1967. This section has been amended six times and currently bears little resemblance to the original immunity provision. The fifth section, TENN. CODE ANN. § 63-6-219(e), contains the privilege provision that was first enacted in 1975. This section has been amended three times. The sixth section, TENN. CODE ANN. § 63-6-219(f), added in 1999, is simply a codified severability clause.

The Court explained the internal inconsistencies within the statute. The first two sentences of subsection (e) and "the open-ended definition of 'peer review committee'" in subsection (c) suggest that any record provided to a committee is privileged. On the other hand, the last sentence of subsection (e) could reasonably be interpreted to exclude any record made in the regular course of a hospital's business, even if it was submitted to a committee. Amendments to the definition of a committee in subsection (c) give the impression that the General Assembly intended to expand the scope of the privilege, making the definition of committee a critical issue in the case. The Court also stated that any "[d]ecisions regarding the application of the privilege must take into account: (1) the subject matter of the proceeding, (2) the nature and source of the particular record being sought, and (3) the person or entity from whom the record is being sought."

Looking to the statute as a whole to interpret the scope of the privilege, the Court first noted that it "must presume the General Assembly chose the term 'peer review' carefully and deliberately in 1992" when it amended the statute. The 1992 amendment added the name of the statute in subsection (a) – the "Tennessee Peer Review Law of 1967." It added the stated purpose in subsection (b)(1), to "encourage committees made up of Tennessee's licensed physicians to candidly, conscientiously, and objectively evaluate and review their peers' professional conduct, competence, and ability to practice medicine." The Court found that the word "peers" in this context refers to other licensed physicians. The Court noted that the remainder of the statute repeatedly referenced its application to "physicians" in subsections (b)(2), (d)(1), and (d)(2).

Turning to the definition of a "peer review committee" within subsection (c) of the statute, the Court noted that the statute uses the terms "peer review committee" and "medical review committee" interchangeably. The Court also noted that the history of amendments to the definition, including additional groups and organizations in repeated amendments, reflected the General Assembly's purpose to define the terms as broadly as possible. The Court construed these amendments as an effort by the General Assembly to broaden the definition of "peer review committee" to include more groups, but not to broaden the scope of the privilege in subsection (b).

The Court then looked outside the statute for guidance. First, the Court noted that the Peer Review Law is codified in Chapter 6 of Title 63, and thus grouped with statutes that govern only the practice of medicine and surgery. Second, the Court noted that the General Assembly had separately enacted other peer review immunity and privilege laws for other professional groups, such as chiropractors and dentists, indicating it did not intend the Peer Review Law to be a "one-size-fits-all privilege" for all health care providers. Third, the legislative debates surrounding the enactment of the original Act in 1967 and each of its subsequent amendments focused on discussions about physicians. Fourth, the Court found that the history of the use of "peer review" within the health care community was consistently focused on physicians. Fifth, the Court stated that peer review statutes enacted in other jurisdictions was similarly focused on physicians.

The Court next turned back to the initial conflict noted by the Court between giving effect to statutory privileges, on the one hand, and avoiding unnecessarily depriving litigants, courts, and fact-finders of relevant facts, on the other hand. The Court rejected Defendants' proposed interpretation of the peer review privilege, stating Defendants' interpretation "knows no reasonable bounds." The Court then announced its own interpretation:

> Consistent with TENN. CODE ANN. § 63-6-219(b), the privilege in TENN. CODE ANN. § 63-6-219(e) applies only to peer review proceedings involving a physician's professional conduct, competence, or ability to practice medicine. It covers records possessed by entities that qualify as "peer review committees" under TENN. CODE ANN. § 63-6-219(c), but only when these entities are performing a peer review function. It does not apply to records kept by a hospital in the regular course of its business unrelated to a peer review committee conducting a proceeding involving a physician's professional conduct, competence, or ability to practice medicine. Likewise, it does not apply to records in the custody of original sources who did not prepare the record for use by a peer review committee in a peer review proceeding.

The Court instructed lower courts analyzing an asserted peer review privilege to "determine whether the records sought to be discovered arose from a peer review proceeding to which the privilege applies," which the Court explained was "a proceeding involving a physician's professional conduct, competence, or ability to practice medicine."

The Court explained that whether a particular committee falls within the definition of a "peer review committee" depends on its purpose, not its name. A committee may be categorized as a peer review committee even if it calls itself something else.

The Court concluded that the hospital group's internal committees and hospital's internal committees were all peer review committees, explaining "[i]t is difficult to imagine any committee created by a hospital whose functions do not include evaluating and improving the quality of care provided to patients at the hospital." However, the Court went on to state that a particular committee may play more than one institutional role, and thus courts must also determine whether a committee was engaged in a peer review function at the time it received allegedly privileged records.

In this case, because the three committees at issue were each considering whether to stop outsourcing vascular access services, and none involved a physician's professional conduct, competence, or ability to practice medicine, the Court ruled that none of the three committees were peer review committees under the statute at the time they received the audit report.

Justice Wade filed a dissenting opinion, with which Justice Holder joined.

First, the dissent disagreed with the majority's interpretation of the statute that a committee must be performing a "peer review proceeding" at the time it receives a record in order for the privilege to apply. The dissent found nothing in the statute to limit the definition of a peer review committee to one specifically serving in a function related to a physician's conduct, competence, or ability to practice medicine at the time a record is received. Second, the dissent rejected the majority's concern about a hospital shielding any undesirable records from discovery just by placing all of its regular business functions under the umbrella of a peer review committee. The dissent explained that such a hypothetical abuse of power was not before the Court, and was not contemplated by the statute.

The dissent contended that, if a limitation should be placed on the function being served by a committee at the time it receives a particular record, it should come from the definition of a peer review committee within TENN. CODE ANN. § 63-6-219(c):

> [(1)] to evaluate and improve the quality of health care rendered by providers of health care service to provide intervention, support, or rehabilitative referrals or services, or
> [(2)] to determine that health care services rendered were professionally indicated, or were performed in compliance with the applicable standard of care, or that the cost of health care rendered was considered reasonable by the providers of professional health care services in the area . . . [or]
> [(3)] a committee functioning as a utilization review committee . . . or as a utilization and quality control peer review organization . . . or a similar committee or a committee of similar purpose, to evaluate or review the diagnosis or treatment or the performance or rendition of medical or hospital services that are performed under public medical programs of either state or federal design[.]

- **Medical Malpractice v. Simple Negligence**

Melinda Long, as Administrator of the Estate of Opal Hughes v. Hillcrest Healthcare - West, et al, No. E2009-01405-COA-R3-CV (Tenn. Ct. App. April 16, 2010). Author: Judge Herschel Pickens Franks. Trial: Judge Wheeler Rosenblum.

Read on if you deal with cases that are borderline malpractice versus simple negligence.

Plaintiff did not comply with the pre-suit notice period for a medical malpractice case, and the trial court dismissed Plaintiff's case as a result. On appeal, Plaintiff argued that Plaintiff's complaint was for common law negligence, and thus the Tennessee Medical Malpractice Act did not apply.

Decedent was a resident at Defendant nursing home. Plaintiff alleged that Defendants posted a sign outside Decedent's door in the nursing home stating a special lift had to be used to move Decedent and a special chair/wheelchair had to be employed. Plaintiff alleged that, despite this, Defendants' employee moved Decedent without a lift, special wheelchair, or shower chair, and dropped Decedent during a shower.

The majority of the Court of Appeals agreed with Defendants that this case was similar to *Johnsey v. Northbrooke Manor, Inc., et al.,* No. W2008-01118-COA-R3-CV, 2009 WL 1349202 (Tenn. Ct. App. May 14, 2009). In *Johnsey*, the plaintiff claimed that the decedent was dropped or allowed to fall while bathing, and the Court of Appeals construed that as a medical malpractice claim. The *Johnsey* court went on to state that "[w]e cannot say that the proper method of transporting and bathing a patient suffering from Parkinson's Disease and dementia, who, consequently, requires antipsychotic medication, may become combative, and has difficulty standing, can be assessed 'based on common everyday experiences.'" The majority concluded that "[t]he act of 'dropping' someone when considered in isolation could be simple negligence, but when the duty of care and well-being of the patient arises from professional care standards the violation of that duty is medical malpractice."

Judge Susano issued a concurring and dissenting opinion. Judge Susano agreed that Plaintiff's complaint was properly dismissed for failure to comply with pre-suit notice requirements to the extent that it was a medical malpractice case. However, Judge Susano found that Plaintiff's complaint did not sound in malpractice, but in simple negligence. Judge Susano pointed out that Plaintiff alleged that a sign was on the door to Decedent's room stating that a special chair/wheelchair had to be used to transport her, and that was not done. Judge Susano stated that:

> [T]he staff member's conduct can be evaluated by a fact-finder as to whether the staff member acted appropriately in ignoring the sign or in how he attempted to carry the decedent. I do not believe that such an assessment requires any specialized medical knowledge. A lay person can make this call.

If you are unsure whether a health care provider's acts are simple negligence or medical malpractice, you should always give notice as required by T.C.A. §29-26-121. Why? Because

giving proper notice is a condition precedent to maintaining a malpractice claim, and even if the claim is determined not to be a malpractice claim your action will be deemed timely filed under T.C.A. §29-26-121(e) if it is filed within 90 days of the expiration of the original medical malpractice statute of limitations.

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

Lula McGregor, et al. v. Christian Care Center of Springfield, L.L.C., No. M2009-01008-COA-R3-CV (Tenn. Ct. App. April 29, 2010). Author: Judge Patricia J. Cottrell. Trial: Judge Ross H. Hicks.

Read this opinion if you litigate over whether arbitration agreements are unenforceable. Otherwise, it will have little impact on your practice. The high points: (1) a statement in an arbitration agreement implying that a nursing home patient will not be granted admission may be sufficient to construe it as a contract of adhesion; (2) a statement in an arbitration agreement that it is revocable within 30 days is not sufficient to avoid construing it as a contract of adhesion; and (3) a provision giving the party who drafted the arbitration agreement the possibility of pursuing its own claims in a court of law may lead to the agreement being construed as unconscionable.

The Court of Appeals first affirmed the trial court's finding that the arbitration agreement was a contract of adhesion, essentially a standardized form "take it or leave it" contract requiring Plaintiff to sign it in order to be admitted. The court noted that, although Plaintiff was not explicitly told the arbitration agreement was mandatory for admission, it included a clause implying as much by stating:

> "If you do not believe binding arbitration is the right choice for you, we will, upon written request, reasonably assist you in finding other nursing facilities in the area or other long term care options such as home care or assisted living facilities."

The court described this provision as "at best a hollow promise, and at worse a veiled threat."

The court also noted that Plaintiff had limited options in choosing a nursing home because she was a Medicare and Medicaid patient, and that Plaintiff had already been denied admission to the only other nursing home in her county that accepted such patients. Further, Plaintiff was in pain from surgery at the time of her admission, and wanted to get the process over so she could lie down and take some pain medication.

The court rejected, without comment, Defendant's argument that the arbitration agreement was not a contract of adhesion because it included a right for Plaintiff to revoke the agreement within 30 days.

The Court of Appeals next looked to whether the contract was unconscionable, which would make it unenforceable. The court explained that the contract could be procedurally unconscionable, meaning unfairness in the formation of the contract deprived one party of meaningful choice, or substantively unconscionable, meaning its terms are unreasonably favorable to the one party.

The court agreed with Plaintiff that the contract was substantively unconscionable because it gave Defendant access to a forum for claims against Plaintiff while depriving Plaintiff of access to that same forum for her claims against Defendant. The arbitration agreement required all claims to be submitted to arbitration, and specifically any claims regarding the quality of care Plaintiff received. However, it included an express exception that any claim regarding nonpayment by Plaintiff to Defendant could be litigated in a court of law. The court determined this provision made the agreement substantively unconscionable, and therefore did not address any procedural unconscionability.

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

Allison J. Person, as Administratrix of the Estate of Effie J. Wooten, Deceased, et al. v. Kindred Healthcare, Inc., d/b/a Primacy Healthcare and Rehabilitation Center, et al., No. W2009-01918-COA-R3-CV (Tenn. Ct. App. May 7, 2010). Author: Judge David R. Farmer. Trial: Judge Karen R. Williams.

Defendant nursing home moved for summary judgment on the basis of an alternative dispute resolution agreement with Decedent, and moved to stay all proceedings other than discovery related to the enforceability of the agreement. When the trial court ultimately denied the summary judgment motion, Defendant appealed. The Court of Appeals noted that, under TENN. CODE ANN. § 29-5-303, Defendant would have had an automatic right to appeal a denial of a motion to compel arbitration. However, Defendant never filed a motion to compel arbitration, instead moving solely for summary judgment. The Court of Appeals ruled it did not have subject matter jurisdiction to hear Defendant's appeal since no motion to compel arbitration was filed.

Lesson for all defendants out there: do not style a motion to compel arbitration as a summary judgment motion or a motion to dismiss. The law is that the case is only supposed to be stayed pending the results of arbitration. There is no judgment as a matter of law, so the case is not supposed to be dismissed.

- **Peer Review Privilege**

Kimberly Powell v. Community Health Systems, Inc. et al., No. E2008-00535-SC-R11-CV (Tenn. May 24, 2010). Author: Justice William C. Koch, Jr. Trial: Chancellor Jerri S. Bryant.

Read this companion to the *Lee Medical* case only if you deal with peer review privilege issues. Otherwise, the case will have little bearing on your life.

Plaintiff sued Hospital and Doctor, alleging Doctor had sexually harassed her and engaged in unwanted sexual contact. Plaintiff alleged she was concerned that she might have contracted hepatitis from Doctor. Plaintiff sought a deposition of Hospital's infection control director, Sexton. Hospital asserted the peer review privilege. The trial court found Sexton's information was not privileged, and Hospital appealed the denial of its motion for a protective order.

The majority of the Supreme Court, Justices Koch and Clark, outlined a two-step analysis based on the *Lee Medical* case to determine the threshold question of whether the subject matter of the underlying proceeding is within the subject matter covered by the statute:

> With specific regard to the privilege in TENN. CODE ANN. § 63-6-219(e), the first step is to determine whether the subject matter of the underlying proceeding is within the subject matter covered by the statute. The second step is to determine whether the person or entity from whom the information is sought is a person or entity protected by the statute. If the answer to either question is "no," the information being sought is not privileged, and the court should deny the invocation of the privilege and permit the discovery of the information being sought.

First, the Court analyzed whether Hospital's Quality Review Committee was a peer review committee covered by the statute. Sexton explained the purposes of the Quality Review Committee:

> [O]ne of the committee's duties was to track the infection rate at the hospital and to direct and oversee the hospital's efforts to minimize the incidence of infections. Ms. Sexton explained that the "[q]uality review committee as I understand it, is a committee that is designed specifically to allow for identification of areas that could become problematic and to allow internal review and peer evaluation to correct problems or correct areas that could become problematic." She also stated that the committee was "a protected forum so that the hospital can look at and fix things that could become a problem later on down the road."

Sexton testified her work was related to the work of Hospital's Quality Review Committee. Sexton testified that, when Hospital staff notified her that an infection had occurred, Sexton would (1) examine the patient's chart, (2) possibly interview the patient, (3) read the physician's notes, and (4) interview the staff. In addition, Sexton performed five or sex targeted investigations to identify the source of an infection by (1) reviewing charts, (2) interviewing patients and staff, (3) culturing equipment and staff members, and (4) tracking patients.

Sexton was responsible for collecting information regarding infections from various hospital sources and providing a monthly report to the committee. The report characterized infections as either community-acquired or hospital-acquired, but did not identify the physicians treating infected patients. Sexton destroyed her work papers after completing the report each month.

The Court found the evidence showed that some, but not all, of the Quality Review Committee's functions were peer review proceedings. Specifically, "the committee's investigation of the role, if any, that the medical staff might have played in the increased rate of postoperative nosocomial infections in late 2004 was just such a proceeding."

Next, the Court found the essentially undisputed evidence established that the hospital's Quality Review Committee was a "peer review committee" under TENN. CODE ANN. § 63-6-219(c). The evidence showed that one of the Committee's functions was to evaluate and improve the quality of the health care provided at the hospital.

The Court rejected Plaintiff's argument that a committee performing infection control functions should not be viewed as a peer review committee, finding the majority rule in other jurisdictions is that an infection control committee is a peer review committee when it is engaging in activities aimed at improving the quality of health care.

The Court also rejected Plaintiff's argument that, because the hospital was required to have a peer review committee, any records generated by the committee were inherently "records made in the regular course of business by a hospital" and thus exempted from the peer review privilege by the last sentence of TENN. CODE ANN. § 63-6-219(e). The Court held "that the exception for records made in the regular course of the hospital's business applies only to records that exist independently of the peer review process."

The Court next rejected Plaintiff's argument that, because Sexton was the creator of the records, any records she generated in her role on the peer review committee were not privileged under the exception in § 63-6-219(e) for "records otherwise available from original sources." The Court held "that persons acting on behalf of or at the request or direction of a peer review committee performing its peer review functions are not 'original sources' from whom the information prepared for the committee's use can be discovered." In addition, because Sexton created her reports based on information provided to her by others at Hospital, she was not the "original source" of the information. The information would be discoverable from those sources if they were prepared independently of the peer review process, but not from Sexton.

Lastly, the Court held that a participant in a peer review committee could not waive the privilege for the committee. Plaintiff argued that one Quality Review Committee member's general testimony about the infection control investigation waived the privilege as to all testimony about the investigation. The Supreme Court noted that other jurisdictions without express waiver provisions within their peer review statutes have likewise concluded that judicially-created waivers are inappropriate. The Court explained:

> While we are not unmindful that declining to engraft a waiver provision onto TENN. CODE ANN. § 63-6-219(e) could enable some parties to engage in strategic

> behavior, we have concluded that the proper course is to defer to the General Assembly, as the author of the peer review privilege, to determine if and under what circumstances the privilege may be waived.

Concluding that the infection investigations were covered by the peer review privilege, the Supreme Court reversed the trial court's denial of Hospital's motion for protective order and remanded.

Justice Wade entered a concurring opinion, reiterating his split from the majority in *Lee Medical*, with which Justice Holder again joined. Justice Lee did not participate.

- **Qualified Immunities**
- **Duty to Warn**
- **Claims against Mental Health Care Providers**
- **Causation**

Melissa A. Stewart et al. v. A.K.M. Fakhruddin, M.D. et al., No. M2009-02010-COA-R3-CV (Tenn. Ct. App. May 26, 2010). Author: Judge Andy D. Bennett. Trial: Judge Thomas W. Brothers.

Defendant psychiatrist was treating James Stewart since 1989. After a domestic violence incident in 2001, James Stewart received inpatient treatment. He continued to receive outpatient treatment thereafter until 2005, when he shot and killed his wife, Deloris Stewart, and himself. At the time of the shooting, Melissa Stewart, their adult daughter, was in the home, and Deloris Stewart was holding Melissa Stewart's infant child.

Melissa Stewart filed suit against Defendant for the wrongful deaths of James and Deloris Stewart, and for reckless or negligent intentional infliction of emotional distress for herself. Defendant moved for summary judgment with affidavits from Defendant and two other psychiatrists, and Plaintiff responded with the affidavit of another psychiatrist. The trial court denied summary judgment on the claim for the wrongful death of James Stewart, but granted summary judgment for the claims of Deloris Stewart and Melissa Stewart. Plaintiff appealed.

In a footnote, the Court of Appeals noted the claims of Deloris and Melissa Stewart were for negligence, not medical malpractice, since they were not filed on behalf of the patient, but still required expert medical proof.

The Court of Appeals analyzed whether the trial court properly granted summary judgment to Defendant based on immunity under TENN. CODE ANN. § 33-3-206, which states:

> IF AND ONLY IF
> (1) a service recipient has communicated to a qualified mental health professional or behavior analyst an actual threat of bodily harm against a clearly identified victim, AND

> (2) the professional, using the reasonable skill, knowledge, and care ordinarily possessed and exercised by the professional's specialty under similar circumstances, has determined or reasonably should have determined that the service recipient has the apparent ability to commit such an act and is likely to carry out the threat unless prevented from doing so,
> THEN
> (3) the professional shall take reasonable care to predict, warn of, or take precautions to protect the identified victim from the service recipient's violent behavior.

TENN. CODE ANN. § 33-3-209 gives a professional who has satisfied his or her duty under § 33-3-206 immunity from any cause of action for "not predicting, warning of, or taking precautions to provide protection from violent behavior" by the patient.

Defendant argued that TENN. CODE ANN. § 33-3-206 precludes any duty because there was no evidence that Mr. Stewart communicated to Defendant any threat to harm Deloris or Melissa Stewart. The Court of Appeals agreed that the statutory duty to protect under § 33-3-206 only arises in the context of an actual threat of bodily harm to a specific victim. However, the Court of Appeals held that the statute did not eliminate any other type of common law duty that a psychiatrist might have to a non-patient.

The court looked to *Turner v. Jordan*, 957 S.W.2d 815 (Tenn. 1997), in which the Tennessee Supreme Court held that "a duty of care may exist where a psychiatrist, in accordance with professional standards, knows or reasonably should know that a patient poses an unreasonable risk of harm to a foreseeable, readily identifiable third person." *Id.* at 820-21. In *Turner*, the Supreme Court found a psychiatrist did owe a duty to a hospital nurse to use reasonable care in treating the psychiatrist's hospitalized mentally ill patient.

The court rejected Defendant's attempt to distinguish *Turner* on the basis that Defendant was providing outpatient care, not inpatient care, to Mr. Stewart. Defendant pointed to a footnote in *Turner* distinguishing cases in other jurisdictions finding no duty existed where the patient was receiving outpatient treatment. The Court of Appeals, however, ruled that the footnote from *Turner* did not preclude a duty with respect to victims of violence by outpatient mental health patients. Instead, *Turner* indicates that the absence of a specific threat and outpatient status are factors to be considered in determining whether a duty exists.

The Court of Appeals emphasized that Plaintiff's negligence allegations were not premised solely on a duty to warn, but also on a failure to provide appropriate psychiatric care to Mr. Stewart. The court noted the distinction drawn by the drafters of the RESTATEMENT (THIRD) OF TORTS between a duty of care arising out of § 315 of the RESTATEMENT (SECOND) OF TORTS and a duty to use reasonable care in treatment. RESTATEMENT (THIRD) OF TORTS § 42 cmt. g (Tentative Draft No. 4, 2004). The court did not affirm summary judgment as to any duty to warn, and did not state whether its decision would have been different if Plaintiff had not coupled a duty to warn claim with a negligent treatment claim. The court ultimately concluded that TENN. CODE ANN. § 33-3-206 did not apply in this case, and reversed summary judgment on this basis.

The Court of Appeals also found Plaintiff had established a genuine issue of material fact on the element of causation. Defendant argued that Plaintiff could not establish causation because both Deloris and Melissa Stewart were already aware of Mr. Stewart's violent tendencies. The court pointed to the affidavit of Plaintiff's expert stating that Defendant's "derelictions of [ ] duties caused damages–Ms. Stewart's homicide and Mr. Stewart's suicide." Based on this affidavit, the court found a genuine issue of material fact on the element of causation.

- **Motions to Dismiss**
- **Summary Judgment**
- **Medical Malpractice**
- **Wrongful Death**

Tina Taylor, et al. v. Lakeside Behavioral Health System, No. W2009-00914-COA-R3-CV (Tenn. Ct. App. March 15, 2010). Author: Judge J. Steven Stafford. Trial: Judge Charles O. McPherson.

In an extremely lengthy and fact-specific case, the Court of Appeals reversed the trial court's granting of a motion to dismiss by Defendant. The trial court stated in its order that Plaintiff's amended complaint contained "allegations that are not supported by the proof and were never alleged in Plaintiff's answers to discovery, expert witness affidavits, or discovery depositions of Plaintiff's experts." Based on this, the Court of Appeals determined that the trial court should have treated Defendant's motion to dismiss as a summary judgment motion. Reviewing the procedural posture, the Court of Appeals ruled the trial court should not have granted Defendant's motion under either standard.

- **Medical Malpractice**
- **Statutes of Repose**
- **Fraudulent Concealment**
- **Summary Judgment**

Harrison Kerr Tigrett v. John E. Linn, M.D., et al., No. W2009-00205-COA-R9-CV (Tenn. Ct. App. March 31, 2010). Author: Judge J. Steven Stafford. Trial: Judge Kay S. Robilio.

This is a medical malpractice case hinging on the fraudulent concealment exception to the statute of repose. The crux of the case is that the fraudulent concealment exception requires proof the defendant had actual knowledge of the facts withheld from the plaintiff; proof that the defendant should have known of the facts is not sufficient. However, at the summary judgment stage, a plaintiff may respond to a defendant's affidavit denying knowledge of the pertinent facts with expert testimony establishing that the defendant either violated the standard of care by failing to detect the facts, or did detect the facts and failed to disclose them to the plaintiff. For the plaintiff to be successful at trial on this issue, the plaintiff must persuade the jury that the defendant did in fact detect the facts and did not reveal them to the plaintiff.

First, the Court of Appeals noted a plaintiff must prove the defendant had actual knowledge of the concealed facts, but may do so based on circumstantial evidence. A defendant's affidavit that the defendant was not aware of the facts does not automatically entitle the defendant to summary judgment.

In this case, Plaintiff's expert opined that Defendants either violated the standard of care by failing to properly recognize Plaintiff's condition, or were aware of Plaintiff's condition and failed to inform Plaintiff of it. The Court of Appeals ruled that the first alternative (failing to recognize Plaintiff's condition) would not be fraudulent concealment, but the latter alternative (recognizing it but failing to inform Plaintiff of it) would be fraudulent concealment. The court found that the jury could conclude, based on Plaintiff's expert opinions, that the latter alternative was correct and Defendants did fraudulently conceal Plaintiff's condition from him. Accordingly, the court affirmed denial of Defendants' summary judgment motions, finding a dispute of material fact on the issue of fraudulent concealment.

The Court of Appeals vacated the trial court's decision to the extent it affirmatively found fraudulent concealment. The court did not elaborate on this part of its opinion. Presumably, it was due to the contrary evidence on that point (Defendants' affidavits stating they were not aware of Plaintiff's condition and Plaintiff's expert testimony that it was possible Defendants violated the standard of care by not recognizing the condition). Moreover, procedurally, this was Defendants' summary judgment motion, meaning under *Hannan* a finding that Defendants had not introduce sufficient evidence to entitle them to summary judgment does not equate to an affirmative finding that summary judgment against Defendants on the issue is appropriate.

- **Medical Malpractice**
- **Locality Rule**
- **Competency of Experts**
- **Disclosure of Experts' Opinions**
- **Negligence *Per Se***

John Mark Watkins, Surviving Spouse of Amy Rose Watkins, Deceased v. Affiliated Internists, P.C. and Travis K. Pardue, M.D., No. M2008-01205-COA-R3-CV (Tenn. Ct. App. December 29, 2009). Author: Judge Holly M. Kirby. Trial: Judge Barbara N. Haynes.

If you do not touch medical malpractice cases, you can likely skip to the discussion below about negligence *per se* claims. The court's examination of the viability of a negligence *per se* claim in this case sets out a framework that may apply to any other potential regulatory violation by a defendant. For medical malpractice lawyers, this thirty-three page opinion is a must read in its entirety. The court's analysis of expert competency and disclosure requirements applies almost across the board in medical malpractice cases.

In the first twelve and a half pages of the opinion, the Court of Appeals traced the facts and a torturous litigation history in the case. To briefly summarize the issues discussed here: the trial court excluded two experts for Plaintiff on competency grounds; several opinions Plaintiff sought to introduce through experts on the basis of inadequate disclosures; and denied a motion

to amend by Plaintiff to add negligence *per se* claims based on regulatory violations by Defendant Doctor.

Competency of Plaintiff's Expert Doctor to Testify Regarding the Standard of Care of a Physician Assistant and a Physician Supervising a Physician Assistant

Plaintiff sought to introduce testimony from his expert regarding the standard of care applicable to a physician assistant (a "PA") as well as a physician supervising a PA. The trial court ultimately excluded the testimony, finding the expert lacked sufficient knowledge of the standard of care applicable in the case. Plaintiff argued the expert was familiar with the applicable standard of care because:

> [H]e employed physician assistants for several years in Muskegon, Michigan, and because he taught physician assistants in classes and seminars in Nashville at Vanderbilt University, Lipscomb University, and Travecca [sic] Nazarene University. [The expert] also considered hiring physician assistants in his Nashville practice, and consequently he reviewed applicable regulations and statutes related to the use of physician assistants. [...]
>
> [H]e was familiar with the standard of care in Nashville by virtue of his discussions with Nashville area physicians, his research, his inquiries made of Nashville physicians prior to interviewing physician assistants, and the classes and lectures he gave to physician assistants on the subject of pain management. [The expert] admitted in his deposition, however, that, after moving to Tennessee, he did not work with physician assistants. Though he worked with nurse practitioners in Tennessee, he could not describe the difference between what a nurse practitioner is permitted to do versus a physician assistant, except that he thought "that training and licensure are a little bit different." [The expert] could not answer questions about what tests were required for physician assistants in either Michigan or Tennessee. He had reviewed the applicable Tennessee statutes and regulations for physician assistants, but he had never seen a written protocol of the type that would purportedly comply with Tennessee law.

Under the circumstances, the Court of Appeals found the trial court did not abuse its discretion in excluding the expert on the standard of care for a PA or a physician supervising a PA. In a footnote, the court noted that the expert was not saying he knew the standard of care in Muskegon, Michigan (where he did supervise PAs) and comparing that community to Nashville. The court noted it would reject a comparison between Muskegon and Nashville, as the undisputed evidence showed Muskegon was a much smaller community than Nashville.

Defendants argued that the expert's knowledge of how PAs in Tennessee operated and were supervised was not "the type of required personal/'first hand' knowledge that is required to establish competency," citing *Allen v. Methodist Heathcare of Memphis Hospitals*, 237 S.W.3d 293 (Tenn. Ct. App. 2007) and *Eckler v. Allen*, 231 S.W.3d 379 (Tenn. Ct. App. 2006). The Court of Appeals based its analysis on that argument.

Note that *Allen* and *Eckler* have recently been distinguished on that exact point by the Eastern Section Court of Appeals in *Farley v. Oak Ridge Medical Imaging,* No. E2008-01731-COA-R3-CV, 2009 WL 2474742 (Tenn. Ct. App., Aug. 13, 2009). The Court of Appeals might have chosen to reach the same result – that the expert was not competent to testify – based on a lack of overall experience in dealing with PAs under circumstances similar to this case, rather than a lack of first-hand knowledge in the particular community the expert was discussing. Whether the court would have reached the result regardless of *Allen* and *Eckler* is not clear, however.

The Correct "Community" for the Locality Rule

Plaintiff also appealed the exclusion of testimony from another of Plaintiff's experts, a PA. The expert's affidavit discussed his familiarity with the Nashville community, but did not state that he was familiar with the standard of care in Nashville or a similar community. Instead, the expert stated he was familiar with the standard of care in Hermitage, Tennessee and similar communities.

The Court of Appeals found that, although the treatment at issue occurred in Hermitage, Tennessee, the trial court did not err in ruling that the relevant medical community was the greater metropolitan area of Nashville, which includes Hermitage. Since the expert's affidavit did not establish familiarity with the standard of care in the Nashville metropolitan area or a similar community, the Court of Appeals rejected Plaintiff's appeal of the trial court's exclusion of the expert's standard of care testimony.

At first blush, this appears to be a novel and interesting ruling. There are very few appellate opinions in Tennessee discussing what constitutes the correct medical community. Most of those reject a statewide community (*i.e.*, Tennessee is similar to Georgia) or a regional community (*i.e.*, Middle Tennessee is similar to Middle Georgia), although there are some conflicting cases on that point. To my knowledge, never before has an appellate court ruled that a plaintiff defined the defendant's community too precisely (*i.e.*, Hermitage instead of all of metropolitan Nashville). However, it appears that Hermitage is merely a section of Nashville / Davidson County, without any distinct government. Narrowing down the community to an area that is not recognized by law may be pushing the limits a bit.

On the other hand, if a court construes the applicable community differently than the party offering an expert (plaintiff or defense), the party needs the opportunity for a second bite at the apple. The term "community" is completely undefined in the statute, and as mentioned, barely touched upon in appellate case law. A party's or an expert's incorrect guesstimate as to what the court might term the applicable "community" should not automatically disqualify that particular expert, or the party's ability to introduce a different expert on the subject. In this case, the issue of the correct community had previously arisen on a motion to exclude another expert of Plaintiff, and the trial court had already ruled in open court that Nashville, rather than Hermitage, was correct.

Insufficient Disclosure of Expert Opinions

The Court of Appeals affirmed the trial court's exclusion of testimony by Plaintiff's experts that, in addition to negligently supervising a PA, Defendant Doctor was independently negligent. The court looked in detail at the expert disclosures and at the testimony attempted to be offered, finding the trial court did not abuse its discretion in ruling the opinions had not been disclosed. The Court of Appeals stated:

> Where a party asserts that an opposing party's Rule 26 expert's disclosures did not disclose an opinion (or that there was not a proper supplementation of opinion pursuant to Rule 26.05), a court may exclude the expert's testimony pursuant to Rule 37.03 of the Tennessee Rules of Civil Procedure. Exclusion is proper only if the disclosures failed to give the opposing side reasonable notice of the opinions such that, without exclusion, there would be unfair surprise or trial by ambush. *Robinson v. Baptist Mem. Hosp.-Lauderdale*, No. W2006-01404-COA-R3-CV, 2007 WL 2318185, at *4 (Tenn. Ct. App. Aug. 15, 2007). The trial court has broad discretion over whether to exclude testimony pursuant to Rule 37.03, and decisions on such matters are, therefore, reviewed for an abuse of that discretion. *Id.*

With due respect to the Court of Appeals, Rule 37.03 is stronger than that. The rules says as follows: "(1) A party who without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 *is not permitted*, unless such failure is harmless, to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed." (Emphasis added). Exclusion is the default rule, and the Court of Appeals should have said so. To be sure, the trial court may impose a sanction other than exclusion, but the trial court should look at the facts and determine why the evidence should not be excluded, not why it should be excluded.

Negligence *Per Se* by Regulatory Violations

Plaintiff also appealed the denial of Plaintiff's motion to amend the complaint to allege negligence *per se* against Defendant Doctor for violations of Tennessee regulations applicable to physicians who supervise physician assistants.

The Court of Appeals engaged in an elaborate analysis of the applicability of negligence *per se*, looking to Tennessee case law, case law from other jurisdictions, and the RESTATEMENT (THIRD) OF TORTS. Any lawyer wrestling with whether a statute or regulation gives rise to a claim for negligence *per se* should look closely at pages 23 through 28 of the opinion, as the court's discussion is too lengthy and detailed to be summarized briefly here. In short, the Court of Appeals concluded that the regulations could support a claim for negligence *per se* if: (1) "they set out a standard of care, as opposed to a mere administrative requirement[;]" and (2) "Decedent falls within the protection of the regulations and was intended to be benefitted by them." *King v. Danek Med., Inc.*, 37 S.W.3d 429, 460 (Tenn. Ct. App. 2000). The Court of Appeals noted that "violation of a statute by a physician could form the basis of a negligence *per se* claim if the

statute sets out a standard of care," citing *Vickroy v. Pathways, Inc.*, 2004 WL 3048972 (Tenn. Ct. App. Dec. 30, 2004).

In this case, the Court of Appeals affirmed the trial court's decision to deny Plaintiff's motion to amend to state a claim for negligence *per se* based on violation of a regulation requiring the supervising physician to establish written protocols for PAs to follow. The Court of Appeals reversed the trial court's decision to deny Plaintiff's motion to amend to state another negligence *per se* claim, however. The Court of Appeals ruled that the regulation requiring that the supervising physician personally review the patient's data within ten days after an examination of a patient for whom a controlled drug is prescribed was substantive, rather than administrative, and thus could support a negligence *per se* claim.

The Court of Appeals noted that Plaintiff still must prove the regulation violation was the proximate cause of Decedent's death in the case, and explained that it required "proof that, had [Defendant Doctor] timely conducted an independent personal review of the Decedent's data and chart, actions would have been taken that would have prevented the Decedent's death."

The Court of Appeals may have oversimplified this last point. Proof of causation under these circumstances does not require proof that actions *would* have been taken that would have prevented Decedent's death. Instead, proof needs to be submitted that actions *should* have been taken. In other words, just because Defendant Doctor might say he would have not have changed anything with a review does preclude Plaintiff from proving causation. If Plaintiff presents evidence that Defendant Doctor *should* have done something that would have prevented Decedent's death (meaning the standard of care required a doctor to do something under the circumstances), that should prove causation.

MOTOR VEHICLE:

- **Uninsured/Underinsured Motorist Coverage**

Randall D. Kiser v. Ian J. Wolfe & Consumers Insurance Company, No. E2009-01529-COA-R9-CV (Tenn. Ct. App. May 28, 2010). Author: Judge John W. McClarty. Trial: Judge Lawrence Puckett.

In a nutshell, this case holds that if an insured signs an application for coverage that lists UM/UIM coverage less than the liability limits but who does not fill in checkboxes on the application acknowledging the acceptance of reduced UM/UIM limits, the reduced UM/UIM limits are effective.

Insured signed an auto insurance application whose first page listed $1,000,000 in liability coverage, but a reduction to $60,000 for UM/UIM coverage. Under the signature line were three boxes for Insured to check to acknowledge Insured was accepting less UM/UIM coverage than the liability coverage on the policy.

The Court of Appeals first held that Insured's signature on the application was sufficient to select less UM/UIM coverage less than the liability limits under TENN. CODE ANN. § 56-7-1201(a)(2), despite the fact that Insured did not check any of the boxes to confirm acceptance of reduced UM/UIM limits. The court noted it reached the same result previously in the unreported case of *Peak v. Travelers Indemnity Co.*, No. M2001-03047-COA-R3-CV, 2002 WL 31890892, at *5 (Tenn. Ct. App. Dec. 31, 2002). The court noted that, in *Peak*, there was also testimony in the record that the insured in that case requested lower UM/UIM limits. In this case, there was no evidence in the record of Insured's intent in signing the application, but held that no such evidence was necessary to prove selection of the lower policy limits.

The Court of Appeals also held that an insurer has the burden of proving rejecting of UM/UIM coverage or selection of UM/UIM coverage less than the liability limits. The court ruled that Insurer had met its burden under the statute by showing that Insured voluntarily signed an insurance contract application that contained a written uninsured motorist coverage limit lower than the bodily injury liability coverage in the same contract. The court noted that, if Insured had alleged fraud in obtaining his signature, then Insured would have the burden of proving that matter, but there was no such allegation in this case.

- **Vicarious Liability**
- **Family Purpose Doctrine**
- **Automobile Accidents**
- **Summary Judgment**

Robert Strine, et al v. Joshua Walton, et al, No. E2009-00431-COA-R3-CV(Tenn. Ct. App. April 15, 2010). Author: Judge D. Michael Swiney. Trial: Judge Rex Henry Ogle.

There are two important lessons from this case, one on negligent entrustment, and the other on vicarious liability of the owner of an automobile for another person driving the car.

First, a negligent entrustment claim requires that the person who causes the harm is the person to whom the vehicle (or other item) was actually entrusted. If A negligently entrusts B with a car, and then B negligently entrusts the car to C, and C is the one who actually gets in an accident, then A is not liable for negligent entrustment. Instead, A can only be liable for negligently entrusting the car to B if B is the one driving it at the time of the accident. One caveat that was not before the Court: if the vehicle owner negligently entrusts the vehicle to someone who the owner has reason to know is likely to let someone else drive the car, then there might be a basis for a negligent entrustment claim against the owner. For example, if a parent lets their college-aged son drive a car, and the parent knows that the son frequently lets fraternity brothers drive home the car after drinking for a night, then the owner should be liable for negligent entrustment, even if the owner did not know specifically who would be operating the vehicle.

On the second issue, the Court of Appeals took a close look at the limits of the statutory presumptions regarding vicarious liability of the owner of an automobile, particularly with respect to the family purpose doctrine. Father bought a car, and gave it to Son. Son initially testified that he had no memory of any conversations with Father about the car. Son later

testified that Father told him several times not to let anyone else drive the car. Son let Driver use the car, and Driver was involved in an accident with Plaintiff. Plaintiff sued Driver for negligence, and sued Father for vicarious liability under the family purpose doctrine.

The Court of Appeals affirmed summary judgment for Father. The court started by looking at the statutory presumptions regarding vicarious liability of an automobile owner.

TENN. CODE ANN. § 55-10-311 creates a presumption that a vehicle was being operated with the authority, knowledge, and consent of the owner. In *Godfrey v. Ruiz*, 90 S.W.3d 692 (Tenn. 2002), the Tennessee Supreme Court held that, for summary judgment or directed verdict purposes, the owner of a vehicle cannot overcome the statutory presumption with the owner's own self-serving statement that the driver of the vehicle did not have permission.

In this case, the Court of Appeals ruled that the statutory presumption is not, however, sufficient to create proof that the vehicle owner is liable under the family purpose doctrine. The court distinguished *Godfrey* on the ground that *Godfrey* involved allegations of a *respondeat superior* relationship between the driver and the vehicle owner, while in this case Plaintiff did not allege that Driver was the employee/agent of Father. Therefore, Plaintiff could not rely on TENN. CODE ANN. § 55-10-311's companion statute at TENN. CODE ANN. § 55-10-312, which establishes *prima facie* evidence of an agency relationship.

Instead, Plaintiff's claim under the family purpose doctrine required evidence that Driver was engaged in Father's business at the time of the accident. The Court of Appeals affirmed summary judgment for Father, finding the evidence unequivocal that Driver was not engaged in any business on behalf of Father. At least for summary judgment purposes, the outcome might have been different if Plaintiff had alleged an agency relationship between Father and Driver, which would have triggered the statutory presumption of TENN. CODE ANN. § 55-10-312. (Of course, surviving summary judgment and directed verdict does not mean a judge or jury would actually let Plaintiff recover from Father if the evidence proved no agency relationship existed.)

NEGLIGENCE:

- **Workers' Compensation Exclusivity of Remedies**

Mary Coleman, et al. v. St. Thomas Hospital, No. M2009-02526-COA-R10-CV (Tenn. Ct. App. August 4, 2010). Author: Judge Alan E. Highers. Trial: Judge Hamilton Gayden.

The Court of Appeals in this case reversed the trial court's denial of summary judgment based on the exclusive remedy provision of workers' compensation. Plaintiffs in the case were employees of a credit union, and alleged that they suffered inhalation injuries due to carbon monoxide from a gas water heater in the basement that was improperly ventilated.

Lawyers are encouraged to read the Court of Appeals' three-page summary of the "arising out of and in the course of employment" requirement for an injury to be considered the exclusive province of workers' compensation law, which is replete with citations and quotations from past

opinions. After stating the basic tenets of the law, however, the Court of Appeals went on to acknowledge that case law on the subject is overwhelming, and seemingly contradictory when looking at various factual circumstances. Borrowing from a 1954 dissent, the Court of Appeals stated that "counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute." *Jackson v. Clark & Fay, Inc.*, 270 S.W.2d 389, 395 (Tenn. 1954) (J.Burnett and J.Prewitt, dissenting). The Court of Appeals explained that:

> "'[E]ach case must be decided with respect to its own attendant circumstances and not by resort to some formula.'" […] As a result, "the standards employed by [the] Court in deciding whether accidents arise out of employment have led to diverse results."

(Citations omitted).

In this case, Plaintiffs agreed their injuries occurred "in the course of" employment, but disputed that their injuries arose out of the employment. The Court of Appeals summarized the "arising out of" requirement (with citations omitted):

> [T]he "arising out of" requirement refers to the injury's cause or origin.[…] An injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. […] In sum, an injury generally arises out of and is in the course of employment if it has a rational connection to the work and occurs while the employee is engaged in the duties of his employment.
>
> Our Supreme Court has often stated that an injury "must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work" in order to be compensable. […] Accordingly, an injury that is purely coincidental, contemporaneous, or collateral with the employment will not be considered as arising out of the employment. […] For example, an employee may not recover for an injury that occurs while simply walking unless there is an employment hazard, such as a puddle of water or a step, in addition to the injured employee's ambulation. […] Courts have reasoned that such an injury would have occurred whether the employee happened to be at work or at another location. […] Likewise, injuries from assaults occurring in the workplace but originating from inherently private disputes, such as domestic disputes, are not compensable. […] Compensation has also been denied where an employee choked on a piece of chewing gum while at work, […] and where an employee injured her knee while using the restroom at work, […]. Because there was no causal connection between these injuries and the conditions under which the work was required to be performed, the injuries did not "arise out of" the employment. […] Again, "[i]t is not enough that the injury coincidentally occurred at work; rather, it must in some way be caused by or related to the working environment or conditions of the employment." […] "The mere presence of an employee at the place of his

> employment will not alone result in the injury being considered as arising out of the employment." […]

Plaintiffs argued that carbon monoxide was not a risk inherent in a credit union, and not a peculiar danger to credit union employees. The Court of Appeals found it was nonetheless a risk or hazard of these Plaintiffs' employment due to their proximity to the gas water heater in the basement. The court analogized it to cases finding bees or spiders risks attendant to particular factories. *See Electro-Voice v. O'Dell, Inc.*, 519 S.W.2d 395, 397 (Tenn. 1975) (bees near an assembly line); *Atkins v. Wozniak Indus., Inc.*, No. W2000-00665-WC-R3-CV, 2001 WL 101799, at *1-2 (Tenn. Workers' Comp. Panel Feb. 7, 2001) (involving a spider bite at a plant).

Plaintiffs attempted to distinguish these two insect cases on the ground that the insects were known hazards at the factories, while carbon monoxide was not a risk known to Plaintiffs. The Court of Appeals rejected the "lack of knowledge of the hazard" distinction, noting that foreseeability is not the test in workers' compensation cases.

The Court of Appeals analogized the case to *International Yarn Corporation v. Casson*, 541 S.W.2d 150, 151 (Tenn. 1976), where an employee was injured when the roof of the building where she worked collapsed during a rainstorm. The Supreme Court in that case said that the plaintiff's [presence in a building that could not withstand the force of ordinary rainfall was a circumstance directly related to the employment." In this case, the Court of Appeals agreed with Defendant that the carbon monoxide was a potential hazard of this particular employment because of the particular physical environment of Plaintiffs' workplace, whether Plaintiffs knew it or not.

- **Duty**
- **Common Carriers**

LaFrancine Gibson, as Surviving Relative and Next Friend of Georgia Jones, Deceased v. Metro Community Care Home, Inc., et al., No. W2008-02417-COA-R3-CV (Tenn. Ct. App. December 15, 2009). Author: Judge David R. Farmer. Trial: Judge Rita L. Stotts.

In a nutshell, a common carrier owes a higher standard of care to an infirmed passenger if the carrier is on actual or constructive notice of the passenger's disability, but the burden is on the plaintiff to prove notice of the disability.

A social worker contacted Defendant taxi cab company to transport Decedent from a hospital to a nursing home. The social worker gave Defendant's cab driver employee the address to take Decedent. Decedent, however, told the cab driver to take her to a house where she had lived years before. The cab driver dropped Decedent off at that address, and drove away after seeing a child answer the door. Decedent was later found on the front porch of the house, dead of cardiac arrest.

Suit was filed against Defendant cab company on behalf of Decedent alleging Defendant owed a duty as a common carrier, under the circumstances, to deliver Decedent to the original address

specified by the social worker. The trial court granted summary judgment, and the Court of Appeals affirmed, finding Defendant breached no duty under the circumstances.

The Court of Appeals held that, in the absence of notice that the passenger was in an impaired condition, a common carrier does not have a duty to engage in an independent assessment requiring specialized skill or experience in order to discover a latent, non-apparent infirmity. The court noted that common carriers are held to a higher standard of care with regard to aged or infirm passengers whose age or infirmity is apparent from their appearance. *White v. Metro. Gov't of Nashville and Davidson County*, 860 S.W.2d 49, 52 (Tenn. Ct. App. 1993). Also, although not controlling, company rules are admissible to ascertain what the company's employees should have done in a particular situation. *Id.* In this case, the court found no evidence sufficient to create a genuine issue of material fact as to whether the taxi cab driver should have known of Decedent's infirmity, and found no company policy on point.

- **Protection from Harm Caused by Third Parties**
- **Duty**
- **Summary Judgment**

Corey Greene, et al v. Yaseen Kamleh Titi d/b/a Crush Night Club, et al., No. M2008-02788-COA-R3-CV (Tenn. Ct. App. January 11, 2010). Author: Judge John W. McClarty. Trial: Judge Thomas Brothers.

Because of a split decision on the duty question in this case, I'm not sure how much to take away from this one. The opinion deals with a contractual limitation on the scope of a defendant's duty. Even without the dissenting opinion to call it into question, however, the majority opinion may be distinguishable on the facts enough to restrict its application to other cases.

Plaintiff was shot by an unidentified person at Club. Plaintiff sued several defendants, including Club and Security Company hired by Club. According to the agreement between Club and Security Company, Security Company was to provide qualified security agents to pat down Club patrons for weapons. Security Company's form agreement had spaces for Security Company to provide a posted unarmed officer and/or a posted armed officer, but Club elected against any such services. Security Company testified that they also provided as many security agents as were requested by Club at any time, and that Security Company did not have authority to provide any more agents than requested by Club. Finally, the agreement between Club and Security Company stated that Club would indemnify Security Company for any negligence, but not for gross negligence or willful and wanton conduct.

The majority of the court ruled that the agreement limited Security Company's duty to Club patrons to only refrain from gross negligence or willful and wanton conduct. The majority concluded that Security Company did not have a special relationship with Club patrons that would require Security Company to exercise reasonable care to protect them from harm, and did not have the means and ability to control third parties under the circumstances, since the scope of Security Company's services was limited by its agreement with Club. The majority also viewed the indemnity provision as "helpful" to establishing Security Company's limited duty.

Judge Swiney concurred in part, but dissented to state he did not agree that Security Company's duty to Club patrons was limited to refraining from gross negligence or willful and wanton conduct. He pointed out that the trial court did not decide the case on these grounds, and that he did not believe it necessary to eliminate the possibility of liability for negligence to conclude that Security Company had affirmatively negated any breach of duty in the case.

We agree with Judge Swiney's dissent that it was not necessary for the court to determine that Security Company could only be liable for gross negligence or willful and wanton conduct. Moreover, we are not aware of any other opinion that suggests that, through a contract, a party can completely eliminate its duty to a third party to exercise reasonable care. There is a fundamental difference between interpreting a contract that sets out the scope of a party's duties (as in *Piana v. Old Town of Jackson, Inc.*, -- S.W.3d. --, W200702832COAR3CV, 2009 WL 302273 (Tenn. Ct. App. Feb. 6, 2009) *appeal denied* (Sept. 28, 2009)) and interpreting an indemnity provision in such a way as to wipe out the existence of a duty to refrain from negligent conduct.

- **Reasonable Care Standard**
- **Summary Judgment**

Sandra Yevette Turner as next friend, next of kin, natural mother & personal representative of Jessica Jovan Turner, deceased v. Steriltek, Inc., et al., No. M2009-00325-COA-R3-CV (Tenn. Ct. App. March 3, 2010). Author: Judge Andy D. Bennett. Trial: Judge Barbara N. Haynes.

This is a great case to cite for the classic common law rule that an industry standard is not *per se* reasonable, and compliance with an industry-wide standard may still be negligent conduct. Put another way, the defense of "but everybody else is doing it" is even less effective in the courtroom than it was in elementary school.

For brief background, this is the second summary judgment appeal of a claim for a hospital-acquired infection. Plaintiff sued Defendant Hospital as well as Defendant Company that provided sterilization services for Defendant Hospital.

First, the Court of Appeals reversed summary judgment on an ordinary negligence claim against Defendant Hospital. Defendant Hospital had submitted an expert affidavit stating that "standard procedure" did not require what Plaintiff claimed to be Defendant Hospital's duty. Moreover, the expert stated that he knew "of no other medical facility that upholds a policy or procedure" as advocated by Plaintiff. The Court of Appeals found this was not sufficient. The court noted that if this was a medical malpractice case, Defendant Hospital's argument "would likely have merit" under TENN. CODE ANN. § 29-26-115. In an ordinary negligence case such as this, however, the court stated that the relevant question was whether Defendant Hospital's conduct constituted reasonable care under the circumstances.

The Court of Appeals identified several bits of evidence that were not in the record that might have affirmatively negated Plaintiff's claim: statistical probabilities of infection using the current protocol, or the relative costs and benefits of the method for avoiding infection as advocated by

Plaintiff. With Defendant Hospital's proof based solely on the industry standard practice, the Court of Appeals ruled Defendant Hospital had not affirmatively negated any essential element of Plaintiff's claim, and reversed.

Second, the court affirmed summary judgment for Defendant Company. Plaintiff claimed Defendant Company had a duty to warn Defendant Hospital of the risk of contamination to surgical instruments. However, proof in the record established that Defendant Hospital was already aware of the risk. The Court of Appeals stated it was aware "of no authority or reasoning that would require someone to warn another of a risk about which the other was already aware."

While I agree with the result, I think the rationale for affirming the ruling as to Defendant Company is a little off. The court seems to have found no duty to warn based on the fact that Defendant Hospital was aware of the risk. However, how can a person know whether another is aware of a risk of harm unless the person actually warns them? That seems to be more properly a question of causation – *i.e.*, regardless of whether a duty exists, failing to warn cannot cause any harm if the recipient is already equally aware of the danger.

I say "equally aware" because it should not be sufficient that the intended recipient of the warning is marginally aware of a problem if he or she does not fully appreciate the likelihood or magnitude of the danger. In other words, it is one thing to know that a firework could accidentally detonate; it is another to learn that a particular model of firework has a hair-trigger and the explosive power to level a small garage. Unless the recipient already has a thorough understanding of the harm faced, a warning still may be required to satisfy the reasonable person standard.

All that said, in this case it appears that Defendant Hospital understood the danger of infection under the circumstances, and thus a warning from Defendant Company would be unlikely to change the outcome.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS:

- **Damages**
- **Negligent Infliction of Emotional Distress**
- **Jury Instructions**
- **Verdict Forms**
- **Emotional Injuries**
- **Loss of Earning Capacity**
- **Future Medical Expenses**

Bobby Gerald Riley, and wife, Tanya Riley, individually and as next of kin for Hunter Riley v. James Orr, No. M2009-01215-COA-R3-CV (Tenn. Ct. App. April 19, 2010). Author: Judge Holly M. Kirby. Trial: Judge Lee Russell.

Read at least the summary of this opinion. Thorough discussions of the elements of tort damages are few and far between in Tennessee law, and this case offers rare perspectives on emotional injury claims and loss of earning capacity claims.

In an admitted liability case, Defendant appealed the jury verdict based on the jury instructions and verdict form, as well as the amounts awarded under various damages categories. While Father and Son were hunting, Defendant negligently shot Father. Son witnessed the incident. Father sued Defendant for personal injuries, and Son sued Defendant for negligent infliction of emotional distress.

Defendant's first issue dealt with a perceived conflict between the jury instructions and the verdict form. The trial court instructed the jury on the meaning of mental pain and suffering, stating "[m]ental or emotional pain and suffering encompasses anguish, distress, fear, humiliation, grief, shame or worry." Referring to Son's emotional injury claim, the trial court instructed the jury that "[a] serious or severe emotional injury occurs when a reasonable person, normally constituted, would be unable to adequately cope with the mental stress caused and brought about by the circumstances of the case." The verdict form for Father's damages included a line for "pain and suffering" as well as a line for "emotional injury," and the jury awarded damages under both categories. Defendant contended on appeal that the verdict form conflicted with the jury instructions, leading to duplicative damages. The Court of Appeals found the verdict form was "not ideal," but ruled there was no reversible error because jury instructions must be read in their entirety and need not be perfect in every detail.

I guess that is the right result, but I encourage judges and lawyers to pay attention to jury instructions and the verdict form. There was no reason – none whatsoever – to have a separate line for emotional injuries on this verdict form. The emotional injuries suffered was covered under the "pain and suffering" line on the verdict form.

Defendant then challenged Father's award for emotional injury, asserting there was no proof of "serious" or "severe" emotional injury. Father pointed to Wife's and Son's testimony that Father had withdrawn from family activities, and the counselor's testimony that Father exhibits symptoms of stress and anxiety and suffers from "significant impairments" in his daily life. However, the counselor also testified that Father did not meet the criteria for any condition under the Diagnostic Statistical Manual (DSM-IV).

The Court of Appeals described "emotional injury" damages:

> Recovery for emotional injury may be awarded when the emotional injury is "serious" or "severe." *Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996) (citing *Burgess v. Superior Court*, 831 P.2d 1197, 1200 (Cal. 1992); *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 653 (Tex. 1987)). " '[S]erious' or 'severe' emotional injury occurs 'where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " *Id.* (citing *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Ohio 1983); *Plaisance v. Texaco, Inc*., 937 F.2d 1004, 1010 (5th Cir.1991); *Prosser and Keeton on the Law of Torts* § 54, at 364-65, n. 60).

The Court of Appeals concluded there was no material evidence of a "severe" or "serious" emotional injury, and reversed the emotional injury award.

This is potentially a subtle but important limitation on prior law. In *Flax v. DaimlerChrysler Corp*, 272 S.W.3d 521, 527-31 (Tenn. 2008), the Supreme Court explained that a plaintiff who has suffered physical injuries in a case has a "parasitic" claim for emotional injury. By contrast, a plaintiff who merely witnessed someone else being injured can make a "stand-alone" claim for emotional injury. In *Flax*, the Supreme Court restated prior law that a "stand-alone" claim requires special proof – expert testimony that the plaintiff suffered a serious or severe emotional injury. For a parasitic claim, however, the heightened proof requirements are inapplicable.

In this case, Father claimed and proved physical injuries. Any emotional injury claim was parasitic of the physical injuries, and the heightened proof requirements for "stand-alone" claims were inapplicable. Thus, the counselor's testimony was not necessary for Father to succeed on his emotional injury claim; testimony from Father and his family would be enough. However, the Court of Appeals ruled that the family's testimony was not sufficient because it did not establish Father suffered from any "serious" or "severe" emotional injury.

It is respectfully submitted that this portion of the opinion is inconsistent with current Tennessee law. There is no case that requires that a claim for mental suffering that accompanies a physical injury be "serious" or "severe." None. The "serious" or "severe" requirement applies only to stand-alone claims, and was made a part of the law because of the desire to avoid claims for minor injuries when creating a new tort of negligent infliction of emotional distress. I hope that Plaintiff seeks permission to appeal on this issue and the Supreme Court accepts review. There is no reason to raise the proof hurdle on claims for emotional injuries that accompany physical injuries.

The Court of Appeals next looked to the *Flax* case in evaluating the damages award to Son for negligent infliction of emotional distress. The court noted that, because Son did not suffer any physical injury, he was required to submit expert proof on the subject. Because he did not do so, the court reversed the judgment for Son. This result is consistent with current Tennessee law.

Defendant also challenged the amount of the award for Father's future medical expenses. The jury awarded $8,000. Father presented evidence that a surgeon would charge between $1,825 and $2,250 for a future surgery. Father presented no proof of any other expenses for the surgery, such as hospitalization. Father contended that a counselor testified that counseling would help Father cope, and that the counselor charged $75 per hour for her services. The Court of Appeals, however, found no testimony in the record that Father would benefit from counseling, and instead noted that the counselor specifically declined to say how much counseling would help Father if he wanted it. The Court of Appeals concluded that the evidence supported no more than $2,250 for future medical expenses, the high end of the amount that the surgeon testified he would charge for surgery in the future.

Defendant challenged an award of $1,000 to Father for past lost earning capacity. The Court of Appeals agreed with Father "that a loss of earning capacity does not necessarily equate to a loss of wages[,]" "but by the extent of impairment to the plaintiff's ability to earn a living." The court found Father's testimony about the physician limitations imposed on him because of his injuries supported the jury's award of past lost earning capacity.

OUTRAGEOUS CONDUCT:

- **Outrageous Conduct**
- **Negligent Misrepresentation**
- **Duty to Warn**
- **Motions to Dismiss**

Charles McBee v. Patricia Anne Greer, et al., No. E2009-01760-COA-R3-CV (Tenn. Ct. App. June 8, 2010). Author: Judge Herschel Pickens Franks. Trial: Judge Dale Workman.

Plaintiff was a process server hired by Defendants' law firm to serve a divorce complaint. Plaintiff alleged that when Defendants' law firm contacted Plaintiff about serving the summons, they informed him to "be forewarned, he's an ex-cop with anger issues." Plaintiff alleged that a similar note was on the papers to be served. Plaintiff alleged that he read the divorce complaint, but it did not say anything about the man having violent tendencies. Nonetheless, Plaintiff alleged he was attacked by the man and severely beaten. Plaintiff alleged that he later learned the man had killed an individual while on duty and there were three orders of protection issued against him the week before the attack.

The trial court dismissed Plaintiff's complaint for failure to state a claim upon which relief could be granted under TENN. R. CIV. P. 12.02(6), and the Court of Appeals addressed each of Plaintiff's claims in turn.

First, Plaintiff claimed Defendants were liable for intentional infliction of emotional distress / outrageous conduct. The court summarized the law, explaining that Plaintiff would need to allege that 1) Defendants acted intentionally or recklessly, 2) the conduct was so outrageous that it is not tolerated by civilized society, and 3) the conduct resulted in serious mental injury to plaintiff. Tennessee has adopted RESTATEMENT (SECOND) OF TORTS § 46, which sets a high threshold for outrageous conduct claims. Comment d to the RESTATEMENT explains that liability generally requires conduct "so outrageous in character, and so extreme in degree as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." In this case, the court found no allegation of conduct that would be so extreme as to qualify as outrageous conduct, and affirm dismissal of the outrageous conduct claim.

Second, the Court of Appeals affirmed dismissal of Plaintiff's negligent misrepresentation claim, finding no allegation that any false information was supplied to Plaintiff. Although Plaintiff claimed that an omission of necessary information should also qualify as negligent misrepresentation, the court noted that Plaintiff was told to be "forewarned."

Finally, Plaintiff claimed negligence. Defendants conceded they had a duty to warn Plaintiff of the foreseeable risk of harm, but argued that they adequately warned Plaintiff. The court, however, noted that Plaintiff alleged Defendants knew or should have known about the three orders of protection issued against the assailant in the week before the attack, and that the assailant had previously been convicted of domestic violence. Based on these allegations, the Court of Appeals reversed dismissal of Plaintiff's negligence claim, and explained that the court

could not say Plaintiff could not prove a set of facts to support his negligence claim against Defendants.

PREMISES LIABILITY:

- **Premises Liability**
- **Duty**
- **Summary Judgment**
- **Subsequent Intervening Causes**

Elizabeth Burks v. The Kroger Company, et al, No. M2008-02667-COA-R3-CV (Tenn. Ct. App. November 23, 2009). Author: Judge Frank G. Clement, Jr. Trial: Judge Ross H. Hicks.

Here's the takeaway: Where one company contracts with another to handle safety issues for customers, both owe duties to the customers and the scope of those duties are likely going to be questions of fact. If you have a case where parties have contracted (and especially if they have further subcontracted with others) to handle some parts of safety concerns for customers, then you should take a look at this case to see the limited likelihood of summary judgment on the scope of the duty owed by each company. In a nutshell, it's probably going to be a question of fact for the jury.

Kroger contracted with Roof Management, Inc. for Roof Management to periodically inspect its stores and respond to "Leak Repair Notices" by Kroger employees in the event of a problem with a particular store. Roof Management would submit recommendations to Kroger regarding the conditions of its stores' roofs, and would either repair them or facilitate the work approved by Kroger to another contractor.

Village Roofing, Inc. was an approved contractor to work on the roof at the Clarksville store where Plaintiff was injured. Village Roofing responded to a number of calls regarding leaks, and had recommended to Kroger that the roof needed to be replaced and that it needed "extensive repairs" for a 70' "split" in the roof. Kroger informed Village Roofing that it did not have the money to replace the roof. Neither Kroger nor Roof Management responded to the recommendation for extensive repairs, and Village Roofing did not believe it was authorized to make extensive repairs without express authorization.

By the time Plaintiff slipped and fell on a pool of water at the Kroger store, as many as forty roof leaks had occurred following rains at this store.

The trial court granted summary judgment to both Roof Management and Village Roofing, finding neither owed a duty to Plaintiff, and even if they did, no breach by either Defendant was the proximate cause of Plaintiff's injuries.

The Court of Appeals reversed. The court found both Defendants had undertaken a duty to Kroger's customers under RESTATEMENT (SECOND) OF TORTS § 324A. The court ruled there were genuine issues of material fact as to the scope of the duties owed by the two Defendants. In

a footnote, the court also rejected Roof Management's contention that Kroger's action in disregarding recommendations for repair or replacement of the roof was a subsequent intervening cause, noting that would also be a question of fact for the jury to decide.

PRODUCTS LIABILITY:

- **Products liability**
- **Superseding cause**
- **Alteration / Misuse of a Product**
- **Criminal Acts of Third Parties**

Richard P. Alexander et al v. Antonio Zamperela, et al., No. E2009-01049-COA-R3-CV (Tenn. Ct. App. August 27, 2010). Author: Judge John W. McClarty. Trial: Judge Rex Henry Ogle.

Here's the brief takeaway: (1) because a criminal act of a third-party can be reasonably foreseeable under certain circumstances, it does not *per se* give rise to a superseding cause defense; (2) because a criminal act of a third-party can be reasonably foreseeable under certain circumstances, it does not *per se* give rise to a misuse/alteration defense in a products liability action; but (3) because the criminal act in this case (rewiring an amusement park ride to override the safety shutoff) was not reasonably foreseeable, Defendants were entitled to summary judgment based on superseding cause and misuse/alteration defenses.
Defendants manufactured and sold an amusement ride called "the Hawk" to Amusement Park. Defendants' employee supervised the installation and operation training on the Hawk. Amusement Park's general manager was responsible for maintenance afterward. Defendants' employee returned twice to address service issues with the Hawk.

The Hawk's safety system required three steel rods to lock into place around each passenger before the Hawk would operate. Each of the steel rods was strong enough to hold a passenger in place on its own.

Some time after Defendants' employee last visited for a service issue, Amusement Park's general manager intentionally and purposefully rewired the Hawk's control panel to bypass the Hawk's safety system. The general manager cut insulation on wires within the control panel and attached jumper wires to them with alligator clips. The general manager did this so that the ride would continue to operate even if one of the steel rods was not properly locked around a passenger.

Five years after sale of the Hawk and three years after Defendants' last contact with Amusement Park, the harness of a rider on the Hawk opened while he was upside down. The rider managed to brace himself and avoid falling, but reported the incident to Amusement Park. Amusement Park told the rider that the Hawk would not be used again until it was inspected by someone from Italy, where Defendants were located. However, Amusement Park's general manager did not notify Defendants or request an inspection, and instead continued to operate the Hawk.

Eight months later, Decedent was riding on the Hawk. Decedent called out that she was not secure in her seat and that her restraining device was not functioning, but there was no response.

Decedent was ejected at about 60 to 70 feet in the air, and she fell to her death. Amusement Park's general manager was convicted of reckless homicide.

Plaintiffs pursued a wrongful death claim against Defendants for products liability in the manufacture and sale of the Hawk. Defendants were granted summary judgment on the grounds of superseding cause and significant alteration. Plaintiffs appealed.

The Court of Appeals first addressed the superseding cause argument. The Court of Appeals agreed with Plaintiffs that a reasonably foreseeable criminal act of a third person is not a superseding cause of the injury and does not break the chain of causation to relieve the defendant of liability. The court rejected Defendants' contention that products manufacturers are *per se* exculpated by criminal acts of third parties as being necessarily superseding causes.

In this case, however, the Court of Appeals found the conduct by Amusement Park's general manager was not reasonably foreseeable. The court noted that the general manager had an excellent reputation, and thus there was no reason for Defendants to believe this general manager in particular was likely to criminally bypass safety systems. In addition, Defendants introduced expert testimony that the expert had never seen anything like this in 37 years in the industry.

The Court of Appeals disagreed with Plaintiffs' characterization of the safety systems as "easily negated," as the general manager had technical knowledge from years in the U.S. Air Force working on ballistic missiles and post-military experience working on nuclear reactors. The Court of Appeals stated that "[s]uch highly specialized technical expertise undoubtedly contributed to his ability to intentionally bypass the relatively complex wiring of the ride's safety system." The Court of Appeals also looked to evidence that Plaintiff's experts found the Hawk's safety system worked as it was designed to, and complied with the state of the art and all industry standards.

Viewing all of the evidence, the Court of Appeals found that Plaintiffs failed to offer any proof that Defendants should have reasonably foreseen anyone, especially Amusement Park's manager, would have gone to such lengths to bypass the safety system.

Likewise, the Court of Appeals found that the alteration to the safety system was not foreseeable by Defendants, and therefore constituted a defense under TENN. CODE ANN. § 29-28-108 of the Tennessee Products Liability Act. The Court of Appeals applied the same reasons and rationale to its analysis of the "misuse or alteration" defense as it did to the superseding cause defense.

- **Preemption**
- **Directed Verdict**
- **Products Liability**

Clifton Lake, et al. v. The Memphis Landsmen, L.L.C., et al., No. W2009-00526-COA-R3-CV (Tenn. Ct. App. March 15, 2010). Author: Judge J. Steven Stafford. Trial: Judge John R. McCarroll, Jr.

Plaintiff was a passenger in a bus when it collided with another vehicle, ejecting Plaintiff and causing him serious injuries. Plaintiff sued the manufacturer and owner of the bus for products liability claims, alleging the bus was unreasonably dangerous because it did not have seatbelts, had tempered glass windows, and used perimeter seating (seats facing the center of the bus). A jury found no liability on Defendants, and Plaintiff appealed. Defendants cross-appealed a number of rulings by the trial court.

The Court of Appeals first addressed whether Plaintiff's claims based on lack of seatbelts and use of tempered glass windows were preempted by Federal Motor Vehicle Safety Standards (FMVSS) promulgated by the U.S. Department of Transportation. The Court of Appeals stated that Plaintiff's claims were not expressly preempted by the regulations, and it appeared that Congress did not intend to preempt the entire automotive products liability field through the FMVSS. The question before the court, then, was whether there was an actual conflict between state law and the federal regulations. *Schneidewind v. ANR Pipeline Co.,* 485 U.S. 293, 300 (1988). The court noted that the U.S. Supreme Court determined a claim for a defect based on the lack of an air bag was preempted by FMVSS 208 in *Geier v. American Honda Motor Company,Inc*., 529 U.S. 861, 866 (2000).

On Plaintiff's tempered glass claim, it was undisputed that the windows of the bus complied with FMVSS 205. 49 C.F.R. § 571.205. Plaintiff contended that FMVSS 205 sets a minimum standard and, therefore, a state law tort claim is not preempted. The Court of Appeals looked to the stated purpose of NHTSA regulation, including "to minimize the possibility of occupants being thrown through the vehicle windows in collisions." 49 C.F.R. § 571.205 S2. The court acknowledged a split of authority between two other courts that had addressed preemption of a tempered glass claim, *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007) (ruling tempered glass claim not preempted by FMVSS 205), and *Morgan v. Ford Motor Company*, 680 S.E.2d 77 (W.Va. 2009) (ruling FMVSS 205 preempted tempered glass claim).

The Court of Appeals concluded the tempered glass claim was preempted. The court noted that FMVSS 205 adopts ANSI standards for windows, and the ANSI standards state that choosing one type of window might better protect against one safety hazard at the expense of poorer protection against a different safety hazard. For example, laminated glass may protect against ejection, but it increases the risk of neck injury from impact with the window; tempered glass better protects against neck injuries from impact, but increases the risk of ejection.

The Court of Appeals then turned to whether Plaintiff's claims for the lack of seatbelts was preempted by FMVSS 208. 49 C.F.R. § 571.208. FMVSS 208 does not require seatbelts for passengers on buses with a gross vehicle weight of 10,000 pounds or more, such as this one, but

does require seatbelts for buses smaller than 10,000 pounds. As with the tempered glass claim, the Court of Appeals found a split of authority among other courts on the issue. The Court of Appeals concluded Plaintiff's seatbelt claim was also preempted by the FMVSS.

The court then *sua sponte* decided the trial court should have granted directed verdict to Defendants on Plaintiff's remaining claim for the use of perimeter seating. Specifically, the Court of Appeals found Plaintiff submitted no evidence that Plaintiff was seated, as opposed to standing and holding a rail in the bus's aisle.

Look for a Rule 11 application in this case, and my guess is it will be granted.

PUNITIVE DAMAGES:

- **Wrongful Repossession**
- **Punitive Damages**

Wilhelmena Scott v. James E. Houston, Individually and dba Shallowford Auto Sales, Inc., et al., No. E2009-01118-COA-R3-CV (Tenn. Ct. App. February 26, 2010). Author: Judge Charles D. Susano, Jr. Trial: Chancellor Jerri S. Bryant.

There is only one legal issue of note in this case: the Court of Appeals held that the law allows punitive damages for a wrongful repossession. So long as the plaintiff establishes "tortious conduct" by clear and convincing evidence to be intentional, fraudulent, malicious, or reckless, punitive damages are available.

The facts of the case are interesting, but extraordinarily unique. Plaintiff bought a car from Defendant, her employer, who was running a multi-state gambling and money laundering operation. Defendant's car lot did not actually sell any cars to the public, only extremely favorable deals to Defendant's employees. Plaintiff assisted the FBI in prosecuting Defendant, including a raid of virtually all of Defendant's locations. After Defendant found out about Plaintiff's cooperation with the FBI, Defendant took actions to repossess the car for late payments.

I'm going out on a limb here and saying you will probably not encounter this fact pattern in your own practice.

STATUTE OF LIMITATIONS:

- **Statute of Limitations**
- **Discovery Rule**

Victoria Dutton, et al. v. Farmers Group, Inc., et al., No. E2009-00746-COA-R3-CV (Tenn. Ct. App. June 22, 2010). Author: Judge John W. McClarty. Trial: Judge Wheeler A. Rosenbalm.

Plaintiffs filed a claim for personal injuries due to alleged toxic mold in their home. Plaintiffs first discovered mold in the home in 2002. After remediation of the mold in their home, Plaintiffs returned home in March 2002. Shortly afterward, Plaintiffs began experiencing flu-like symptoms. Plaintiffs filed suit in October 2005. Defendants contended that a reasonable person in Plaintiffs' position would have connected their illnesses to the mold contamination at that time. The trial court agreed, and dismissed Plaintiffs' complaint based on the one year personal injury statute of limitations.

The Court of Appeals reversed, noting that Plaintiffs filed an affidavit stating they were unaware of the cause of their illnesses until a doctor told them in November 2004 that their living environment was a possible cause. The court found that the record did not demonstrate Plaintiffs had sufficient facts to trigger a duty to investigate until the doctor's statement in November 2004, and therefore Plaintiffs timely filed their suit.

Judge Susano filed a separate concurrence to emphasize that there was a genuine issue of material fact as to whether Plaintiffs exercised reasonable diligence in investigating the source of their illnesses, and therefore the applicability of the discovery rule remained a question for the trier-of-fact.

SUBROGATION – MEDICARE:

- **Subrogation – Medicare**

Carvondella Bradley, et al. v. Kathleen Sebelius, No. 07-01690-CV-ORL-31GJK (11th Cir. Sept. 29, 2010).

The United States Court of Appeals for the Eleventh Circuit has ruled that Medicare is not entitled to rely on its field manual and argue that a subrogation interest be reduced under a "made whole" type of analysis only if a judgment is entered in the case.

In *Bradley v. Selbelius*, plaintiff settled a wrongful death case for policy limits, $52,500, and put Medicare on notice of the settlement. Medicare asserted a $38,000+ lien, less procurement costs. Plaintiff filed suit in the probate court and asked the court to determine the value of the case and the amount that needed to be re-paid to Medicare. Medicare refused to participate.
The trial judge ruled that the value of the case exceeded $2,500,000 and that Medicare's reimbursement should be cut to $787.50. Medicare refused to recognize the probate court's decision, saying that its field manual provided that it need not rely on a court order allocating proceedings unless the court order was based on the merits of the controversy. The estate paid Medicare under protest, exhausted its administrative remedies, and then filed suit in federal court.

The 11th circuit upheld the reduced subrogation amount. Here are some key quotes from the opinion:

> Counsel for the survivors and the estate acted sensibly, in a cost-effective manner. The nursing home neglect claim was settled for the full value of the available insurance. Clearly, if the language of the field manual applied, in practice, it would lead to an absurd Catch-22 result. Forcing counsel to file a lawsuit would incur additional costs, further diminishing the already paltry sum available for settlement. This flies in the face of judicial and public policy.
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> The Secretary's position is unsupported by the statutory language of the MSP and its attending regulations. The Secretary's *ipse dixit* contained in the field manual does not control the law. The district court also erred in relying upon the advisory language contained in a field manual as the rationale for its opinion upholding the actions of the Secretary.
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> The Secretary's position would have a chilling effect on settlement. The Secretary's position compels plaintiffs to force their tort claims to trial, burdening the court system. It is a financial disincentive to accept otherwise reasonable settlement offers. It would allow tortfeasors to escape responsibility.

You can read this wonderful opinion at 2010 WL 3769132 (11th Cir. Sept. 29, 2010). Be sure to read the dissent.

One last point. There is some great lawyering by the plaintiffs in this case. Note the (a) plaintiff received and documented receipt of policy limits; (b) plaintiff proved the value of the case in probate court; (c) plaintiff gave Medicare the opportunity to participate in the probate court hearing, thus removing the right of Medicare to complain about the potential for its rights being affecting at a hearing it did not have notice of; (d) plaintiff exhausted administrative remedies before filing suit in federal court, thus removing a technical arrow from Medicare's quiver; and (e) plaintiff did not keep the money pending litigation but instead paid Medicare under protest. Good job.

Thanks to my friend John Wood for alerting me about it.

SUBROGATION – WORKER'S COMPENSATION:

- **Workers' Compensation Liens**
- **Common Fund Doctrine**

James Erwin v. Travelers Property Casualty Company of America, No. E2009-01288-COA-R3-CV (Tenn. Ct. App. June 28, 2010). Author: Judge Herschel Pickens Franks. Trial: Judge John S. McLellan, III.

Workers' compensation liens on tort recoveries are quite common, and this case explores the bases for a reasonable reduction to the lien for attorneys' fees and expenses incurred by the plaintiff in pursuing the claim.

Plaintiff appealed the trial court's apportionment of attorney's fees and litigation expenses for the recovery of Insurer's workers' compensation subrogation lien on Plaintiff's case for medical malpractice and medical battery.

A jury awarded Plaintiff damages of $75,000 and awarded Insurer $181,859 for medical expenses paid by Insurer. Under TENN. CODE ANN. §50-6-112(b), Plaintiff moved the court for a reduction to Insurer's award based on the fees and expenses incurred by Plaintiff in obtaining the award. Plaintiff requested a 1/3 reduction for attorney's fees and a percentage of litigation expenses to be paid from Insurer's award. Plaintiff's attorney submitted his 1/3 contingency fee agreement with Plaintiff.

The Court of Appeals looked to *Sircy v. Wilson*, No. M2007-01589-COA-R3-CV, 2008 WL 4830806 (Tenn. Ct. App. Nov. 5, 2008), in which the court stated that "the role of the Court is to apportion the fee produced in accordance with the efforts expended by counsel in producing the fee – not in pursuing every aspect of the case. The Court's inquiry is essentially limited to determining who did what to produce the fee."

Plaintiff's attorney claimed that almost all of his time was spent in pursuing the subrogation award, but the trial court found that most of the attorney's time "was spent in pursuing a malpractice award for his client[.]" The trial court found that awarding a 1/3 contingency fee to Plaintiff from Insurer's subrogation award would be unreasonable.

Plaintiff's counsel had submitted time records showing 835 hours of attorney time and 124 hours of staff time on the case, and stated that 829 hours of attorney time and 123 hours of staff time were spent working on the subrogation recovery. The trial court found that the interests of Plaintiff and Insurer were at times inconsistent, and therefore Insurer had to hire its own counsel to protect its subrogation interest. The trial court found that the time and effort of Plaintiff's counsel in proving causation and reasonableness of medical expenses was necessary to both Plaintiff's and Insurer's claims, and therefore allocated the percentage of time Plaintiff's counsel spent on the issues. The trial court approximated that Plaintiff's counsel spent about 12.8% of his total time pursuing Insurer's subrogation interest, and found that would be 107 hours of work.

The trial court noted that Insurer suggested that Plaintiff should receive $33,741 as a reasonable amount of attorneys' fees and expenses. The trial court also noted that Insurer had paid its attorney $27,192 for 210 hours of work as reasonable and necessary fees in the case. The trial court stated that Insurer's counsel did not actively participate in discovery or the trial, "but was present at the pre-trial hearing and for most of the trial." The trial court found Insurer's suggestion was reasonable, and awarded a reduction of $33,741.68 for attorneys' fees and litigation expenses.

The Court of Appeals affirmed, finding the trial court considered all of the relevant facts, was in the best position to evaluate the issue, and did not abuse its discretion.

With all due respect, I disagree with the decisions of the trial court and the Court of Appeals in this case.

First, nothing in the opinion suggests that the defendants in the underlying medical malpractice case admitted liability. Thus, Plaintiff and his counsel had to prove liability for either Plaintiff or Insurer to obtain any recovery whatsoever. Proving liability is particularly difficult and uncertain in a medical malpractice case. The trial and appellate courts' focus on the time spent specifically pursuing Insurer's subrogation interest ignores the fact that virtually all of Plaintiff's efforts in the case would benefit Insurer, except for the time and energy spent trying to negotiate a reasonable reduction with Insurer itself.

Second, and equally important, Plaintiff's counsel undertook all of these efforts with a contingency fee on the recovery. With the complex nature of medical malpractice litigation, along with the exorbitant time and expense of pursuing a malpractice claim, the fact that Plaintiff's counsel was working on a contingent basis should be a huge factor in determining a reduction from Insurer's subrogation interest. Instead, the courts overlooked the contingency fee arrangement and based the reduction solely on a percentage of time basis. The reduction to Insurer's subrogation interest should take into account the fact that Plaintiff's counsel undertook representation with the possibility of zero pay, and Insurer received a benefit as a result.

Indeed, both the trial and appellate courts noted that Insurer's attorney did not actively participate in discovery or trial, but just showed up to the pre-trial hearing and "most of" the trial. Insurer clearly rode the coattails of Plaintiff's efforts without making any material contribution to the prosecution of the malpractice claim. Insurer's technical "participation" in the case should not outweigh the substantial efforts of Plaintiff's counsel, who advanced the ball in the case while accepting the risk of zero pay under his contingency fee agreement with his client. Under those circumstances, Plaintiff should receive a reduction at or very close to a 1/3 contingency fee reduction for attorney's fees, as well as a *pro rata* share of litigation expenses based on the total gross amounts awarded to Plaintiff and Insurer.

- **Motions to Intervene**
- **Workers' Compensation Liens**

Eduardo Santander, American Home Assurance Co. v. Oscar R. Lopez, No. M2009-01210-COA-R3-CV (Tenn. Ct. App. March 24, 2010). Author: Judge Herschel Pickens Franks. Trial: Judge J. Mark Rogers.

Read this case thoroughly if you have any question about the timeliness of a motion to intervene by a party with a statutory right to intervene. Otherwise, there is very little to see here.

Based on an auto accident, Plaintiff filed a tort suit against Defendant, and a separate workers' compensation suit against Plaintiff's Employer. After approximately a year of litigation in the workers' compensation suit, Plaintiff settled his claims against Employer. Employer sent Plaintiff a letter asserting Employer's workers' compensation lien on any recovery in the tort action, and shortly thereafter the workers' compensation settlement was approved.

Although the timing is a bit unclear from the opinion, apparently soon after settlement of the workers' compensation case, Plaintiff also settled his claim against Defendant for payment from uninsured / underinsured motorist coverage. Plaintiff then sent a letter to Employer stating that Plaintiff disputed the validity of the workers' compensation lien on Plaintiff's tort recovery.

Employer filed a motion to intervene in the tort case to assert its lien, which Plaintiff and UM carrier opposed. The trial court denied Employer's motion to intervene as untimely, and Employer appealed.

The Court of Appeals looked to the factors a court should consider on a TENN. R. CIV. P. 24 motion to intervene as stated in *American Materials Technologies, LLC v. City of Chattanooga,* 42 S.W.3d 914, 916 (Tenn. Ct. App. 2000):

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

In this case, the Court of Appeals found the trial court erred in denying the motion to intervene based on each of these five factors.

On the first factor, the point to which the suit had progressed, the Court of Appeals noted that the case had not yet been tried and had not reached a final judgment. The court also noted that, although Plaintiff and UM/UIM carrier stated they had reached a settlement, "no order approving the settlement had been entered nor had the parties even filed a motion for such an order."

I do not see anything in the case that would suggest a motion to approve the tort settlement would be necessary in any way. The opinion does not state Plaintiff's age, so it is possible that he was a minor and thus court approval would be required. However, Plaintiff was apparently on the job driving a car at the time of the original accident, and given the two years that passed between the time of the accident and the hearing on the motion to intervene, it seems doubtful Plaintiff would have been under eighteen years of age.

Also, I disagree that a motion to intervene should be deemed timely just because the case had not yet been tried to a final judgment. The tort suit had been underway for roughly two years by the time the motion to intervene was filed, and was set for a trial at that time but for the settlement. Presumably then the parties had gone through written discovery, party depositions, any non-party depositions, expert witness disclosures and depositions, treating doctors' depositions, and any dispositive motions. In terms of the progression of the case – the factor trial courts are instructed to consider – that is about as far out of the station as the train can get without actually reaching its destination. After a trial and final judgment, there really is nothing left in which to intervene. It should not take progressing to that end point before this factor weighs against allowing the intervention.

On the second factor, the purpose behind the intervention was protection of Employer's workers' compensation lien on the recovery. The Court of Appeals found this factor also weighed in favor of allowing the intervention once Employer was notified by Plaintiff that Plaintiff disputed the validity of Employer's lien.

On the third factor, the length of time the proposed intervenor knew or should have known of its interest in the tort case, the Court of Appeals found the trial court and Plaintiff failed to explain how earlier intervention would have changed the course of the litigation. The Court of Appeals noted Employer could not have negotiated the extent of its lien until the workers' compensation suit was settled.

As to the fourth factor, prejudice to the existing parties, the Court of Appeals found none. The court stated that, if the intervention had been denied and the settlement between Plaintiff and UM/UIM carrier had been approved, Employer would have filed a separate lawsuit to enforce its lien on the settlement, and the parties would have litigated the same issues in that suit.

Finally, on the fifth factor, the Court of Appeals found no unusual circumstances militating for or against the intervention.

Based on its finding, the court reversed the denial of Employer's motion to intervene, and remanded for further proceedings.

T.C.P.A.:

- **Motions for New Trial**
- **Election of Contract or Tort Damages**
- **Bad Faith**
- **Attorneys' Fees Under T.C.P.A.**

State Automobile Insurance Company v. Jones Stone Company, Inc., No. M2009-00049-COA-R3-CV (Tenn. Ct. App. December 15, 2009). Author: Judge Richard H. Dinkins. Trial: Chancellor Ellen Hobbs Lyle.

This is a complicated mess of a case, but a number of rulings merit attention. Insured and Insurer filed cross-claims against one another based on Insurer's refusal to pay, under an insurance contract, for Insurer's settlement of an underlying lawsuit. What you need to know from the opinion is: (1) there are some directed verdict rulings that must be challenged in a motion for new trial to be preserved for appeal; (2) there are some directed verdict rulings that do not have to be challenged in a motion for new trial to be preserved for appeal; (3) election of contract v. tort damages is an even trickier subject than you might think, and the timing and manner of the choice may be critical; and (4) the amount of attorney's fees awarded for statutory violations, when other claims are also brought in the same case, must be parsed out from fees incurred in pursuing the other claims.

Insurer asked the Court of Appeals to reverse the *denial* of a motion by Insurer for directed verdict on one of Insured's claims. The Court of Appeals found the issue was waived by the failure of Insurer to file a motion for new trial under TENN. R. APP. P. 3(e).

By contrast, the Court of Appeals found Insured did not waive the right to appeal the trial court's decision to *grant* Insurer a directed verdict on other issues, as TENN. R. CIV. P. 50.05 states "it shall not be necessary for the party against whom the verdict was directed to file a motion for a new trial to obtain appellate review of the action of the court."

The Court of Appeals nonetheless denied Insured's appeal of the trial court's grant of directed verdict on Insured's tort claims for misrepresentation and bad faith under the insurance agreement. The court noted that, after the trial court granted directed verdict on the tort claims, the jury awarded Insured damages for breach of contract. The court stated that the jury's breach of contract award barred Insured's pursuit of damages under the tort claims. The court also said that Insured did not argue that it should be allowed to try the tort claims in order to elect between contract and tort remedies, but that Insured argued it should be permitted to pursue the tort claim to obtain an award in addition to the contract damages. The Court of Appeals found the issue moot since Insured was precluded from doing so by receiving a judgment for contract damages. The Court of Appeals further explained that directed verdict on punitive damages for Insurer would not reversed since Insured recovered under a breach of contract theory, not under Insured's tort theories.

What exactly did Insured say that led the Court of Appeals to conclude Insured did not even want to elect between contract and tort damages on a retrial? Insured's tort claims included a

request for punitive damages, meaning the tort damages could certainly exceed the contract damages. Unless Insured very explicitly stated that it would prefer not to retry the tort case rather than have to choose between Insured's existing judgment for contract damages and a possible judgment for tort damages, it seems harsh to read into Insured's request for "additional damages" that Insured was throwing away any possibility of a recovery for punitive damages.

The Court of Appeals also reversed the trial court's award of "double damages" under the Tennessee Consumer Protection Act, finding under the circumstances that the evidence preponderated against the trial court's finding of a willful violation of the TCPA. The Court of Appeals found no evidence in the record that Insurer's refusal to accept coverage of or indemnify Insured in the underlying lawsuit adversely affected the representation that Insured received in defending the case. (There was some disagreement as to whether the trial court meant to grant "double damages" or "treble damages," but it was moot by the Court of Appeals' reversal of enhanced damages generally.)

The Court of Appeals reversed the attorney's fee awarded to Insured by the trial court for Insurer's TCPA violation and remanded for recalculation of an appropriate fee. The Court of Appeals ruled that the trial court erred in granting Insured its entire attorney's fees in the case, rather than a portion of the fees based on the time spent on the TCPA claim as opposed to all other claims. The Court of Appeals distinguished *Lowe v. Johnson County*, No. 03A01-9309-CH-00321, 1995 WL 306166 (Tenn. Ct. App. May 19, 1995). The court noted that *Lowe* involved a claim for violations of the Tennessee Human Rights Act based on several different factual allegations, for which the Court of Appeals affirmed an award of the total attorneys' fee in the case since the plaintiff's claims were based on a "common core of facts." In this case, however, the Court noted that "*Lowe* did not extend a right to recover attorneys' fees to *any* claim that shared a common core of facts with a claim that possessed a statutory right to recover fees, only those brought pursuant to the same statute."

Finally, the Court of Appeals ruled that, although Insured was successful on some claims on appeal, it could not recover its attorney's fees incurred during the appeal because the issues under the TCPA (for which attorney's fees were available) were resolved against Insured.