

# Tennessee Tort Law Letter

A monthly analysis of  
Tennessee tort law  
developments

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## No Liability for Defendant After Injury on Ice Slide

### Lawyer's Toolkit

This case illustrates that sometimes an expert is just not enough, especially under the new (old) summary judgment standard.

### Background

Tony Hall filed a personal injury action against Gaylord Entertainment Company, which was not a party to the appeal, and International Specialist Attractions, Ltd. (ISA), for injuries he sustained at Gaylord's annual ICE! exhibit at Opryland Hotel. He slipped and fell at the top of one of the exhibit's ice slides and required surgery to repair a torn rotator cuff as a result.

The plans for the exhibit were provided by Gaylord. ISA evaluated the feasibility and structural integrity of Gaylord's design and produced blueprints and engineering drawings. ISA also constructed the exhibit and provided limited services to Gaylord during its operation. Gaylord was responsible for staffing the exhibit and for the construction and placement of all information, warnings, and safety signs. During the exhibit, ISA was required to have an on-site representative conduct a walk-through both before it opened and at three-hour intervals and report any safety concerns to Gaylord.

Hall filed suit in December 2011, asserting that his injuries were caused by a defective or dangerous condition on the upper landing of one of the slides. The complaint failed to specify the exact nature of the dangerous condition but asserted that the defendants' negligent design and construction, operation, failure to warn, and postconstruction inspection of the exhibit were the cause of his injuries. He subsequently filed a motion to amend his complaint seeking to assert an additional claim that the operation of the ice slide was an ultrahazardous activity and the defendants were therefore strictly liable. His motion to amend was denied.

The defendants filed motions for summary judgment on the claims against them. ISA moved for summary judgment on the claim of negligent design and construction on the basis that the undisputed facts demonstrated that the ice slide was constructed in accordance with the requisite standard of professional care. In support of that argument, ISA provided affidavits from a certified amusement ride inspector and the production manager for the Opryland Hotel exhibit, who stated their conduct was in compliance with safety standards. ISA also argued that Hall

failed to identify an aspect of the exhibit that was negligently designed or constructed.

ISA moved for summary judgment on the claims of negligent operation, maintenance, and failure to warn based on its contract with Gaylord, which delegated those duties to Gaylord. Finally, ISA moved for summary judgment on the claim of negligent postconstruction operation of the exhibit, arguing that it inspected and maintained the slide in conformance with the terms of its agreement with Gaylord.

Hall conceded that ISA was entitled to summary judgment on the claims of negligent operation, failure to warn, and postconstruction operation of the exhibit. Although he conceded that the ice slide was constructed in accordance with design specifications, he contended that there was a defective and dangerous condition inherent in the design, which precluded ISA from obtaining summary judgment on the claim of negligent design. He also contended that the design failed to comply with the applicable standards and state laws on amusement devices and submitted an affidavit from a professional engineer specializing in project design, ride and equipment design, water parks, and project management for theme parks, family entertainment centers, and other attractions.

Hall asserted that the construction of the ice slide breached the standards of ASTM International, which apply to amusement devices like the ice slide. Specifically, according to the engineer who provided the affidavit, the Opryland Hotel exhibit was deficient because the ice slide did not have a horizontal hood or guardrail and there were no horizontal handrails to assist guests in the transition from standing to sitting. In a second affidavit filed in response to ISA's contention that the ASTM standards were not applicable to the ice slide, the engineer opined that the entire exhibit constituted an amusement device and therefore was governed by the ASTM standards.

The trial court held that ISA was entitled to judgment as a matter of law and should be granted summary judgment. The

### IN THE SPOTLIGHT

In this month's "Spotlight," we examine the real impact of *Smith v. UHS of Lakeside, Inc.*, 1½ years after the Tennessee Supreme Court's ruling on the summary judgment procedure for trial courts (pg. 10).

court found that the ASTM standards were inapplicable because the ice slide did not meet the statutory definition of “amusement device.” The court went on to find that other than citing the inapplicable standards, Hall failed to demonstrate how ISA was negligent in designing the slide or its handrails.

The trial court denied Gaylord’s motion for summary judgment, finding that reasonable minds could conclude that Gaylord was negligent in failing to warn or instruct Hall prior to his fall. Hall and Gaylord settled after the trial court’s ruling. Hall then filed a timely appeal of the trial court’s grant of summary judgment to ISA.

### Ruling

The two issues on appeal were whether the trial court erred in granting summary judgment to ISA on the claim of negligent design and whether the trial court erred in denying Hall’s motion to amend his complaint. The Court of Appeals held that ISA affirmatively showed that there was no evidence in the record to support a judgment in favor of Hall on his negligent design claim. ISA relied on Hall’s deposition and answers to interrogatories to make its case.

For example, in response to an interrogatory asking him to identify and describe in detail all actions or specific conduct by ISA that was negligent, Hall responded that the attendant was not paying attention, the attendant’s back was turned to the slide, and no directions or instructions were given to riders. The Court found that this evidence related to the negligent operation claim but in no way supported a claim of negligent design. Therefore, the burden shifted to Hall to demonstrate the existence of specific facts that could lead a rational trier of fact to find in his favor on the negligent design claim.

The Court next held that the ASTM standards relied on by Hall’s engineer were inapplicable to the ice slide because the title of the standards “plainly” indicates that they are applicable only to playground equipment and the scope of the standards themselves is limited to public playground equipment for children. The Court also noted that the engineer did not cite any other standards, rules, or regulations in support of his assertion that the ice slide was negligently designed. Therefore, the Court held that there was no evidence in the record that ISA breached an applicable standard of care in designing the ice slide, a required element for a claim of negligent design.

### CALL THE EDITOR FOR YOUR TORT QUESTIONS

*Tennessee Tort Law Letter* is adding a new feature for its valued subscribers. Your editor, Donald Capparella, is available—at no charge—to discuss any questions you might have about tort law. I have had the privilege of working on the newsletter for over 20 years, meaning that I have read and written about nearly every tort case issued in Tennessee since this newsletter was first published in 1995. Although I won’t be able to answer every possible question, I might be able to help some of you get the answers you need to better represent your clients. You can reach me in my office at 615-254-2291.

The Court affirmed the trial court’s denial of Hall’s motion to amend his complaint, finding that the amendment was futile and the trial court therefore did not abuse its discretion. The Court held that an ice slide does not present “an abnormal risk of injury” similar to the risk posed by other actions that have been held to constitute an ultrahazardous activity such as storing explosives or harboring wild animals.

### Commentary

This case provides a good example of the new (or old) summary judgment analysis following the Tennessee Supreme Court’s decision in *Rye v. Women’s Care Ctr.* Although the plaintiff submitted evidence in response to the burden shifting by the defendant, his sole reliance on standards that were ultimately ruled inapplicable was fatal to his case. Interestingly, the Court’s opinion included a comment that the plaintiff had “adequate time” to present evidence of a breach of an applicable standard of care, perhaps signaling that the engineer could have presented more than one set of inapplicable standards in two affidavits.

*Hall v. Gaylord Entertainment Co.*, 40 TAM 51-4 (CA MS, 11/17/15), Goldin, 13 pp.

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## Monitor of Offender’s Ankle Bracelet Immune from Suit

### Lawyer’s Toolkit

This case offers an analysis of quasi-judicial immunity—a type of absolute immunity that applies in certain circumstances to judicial staff or officers who are not judges.

### Background

Theodore Franklin Davis received probation in Knox County and was ordered by the sentencing judge to be placed on a secure continuous remote alcohol monitoring (SCRAM) device for six months. A SCRAM bracelet is worn snugly on the ankle and detects the presence of alcohol in the wearer’s bloodstream through sensors that touch the skin.

Davis, who is diabetic, experienced inordinate discomfort when he was wearing the SCRAM bracelet. He asked to have it removed, but Knox County Pretrial Services, which monitored the device, refused to remove it. Pretrial Services did move the device to his other leg, but it continued to bother him.

After Davis produced a letter from his primary care physician indicating that the device should be removed from his leg, Pretrial Services officers removed it. Davis later filed a lawsuit alleging that he suffered injuries as a result of negligent supervision by Pretrial Services and that Pretrial Services breached a duty of care it owed to him.

Davis filed his complaint under the Governmental Tort Liability Act (GTLA), naming Knox County as the sole defendant. Knox County raised the defense of quasi-judicial immunity in its motion to dismiss. The trial court denied the motion despite finding that Pretrial Services acted pursuant to a court order when it placed the SCRAM device on the plaintiff’s leg. Knox County was granted permission to file a Rule 9 interlocutory appeal.

### Ruling

The issue before the Court was whether quasi-judicial immunity applied in this case and precluded judgment against Pretrial Services. The question for review before the Court was:

Does Tenn. Code Ann. § 29-20-206 permit municipalities and counties to raise absolute quasi-judicial immunity as a substantive tort law defense in GTLA cases where sovereign immunity has been waived pursuant to Tenn. Code Ann. § 29-20-205?

Tenn. Code Ann. § 29-20-206 provides that when immunity is removed under the GTLA, as it was in this case, “liability of the governmental entity shall be determined as if the governmental entity were a private person.”

The plaintiff conceded in his appeal that Knox County should be entitled to raise that defense under Tenn. Code Ann. § 29-20-206. The Court of Appeals agreed, concluding that if they were sued individually, Pretrial Services officers would be entitled to assert the defense under Tenn. Code Ann. § 29-20-206. Thus, the question that remained was whether the circumstances of the case warranted the application of quasi-judicial immunity to Knox County.

Quasi-judicial immunity relates to the immunity afforded to judges, who are absolutely immune from suit for the acts they perform in the exercise of their judicial functions. Quasi-judicial immunity is an absolute immunity that extends to individuals who are not judges but whose functions are an integral part of or intimately related to the judicial process. This type of immunity has been extended to individuals such as clerks, guardians *ad litem*, court-appointed special advocate volunteers, and mediators.

In this case, the acts and omissions of Pretrial Services with regard to Davis’ SCRAM device were performed in an effort to enforce a court order. The court ordered Davis to “comply with all Pretrial Services requirements.” Given the wording of the court order and the nature of the services provided under its contract with Knox County, Pretrial Services’ actions were found to be judicial in nature, rather than “administrative,” because they required a level of discretion in how to carry out a judicial function. The exercise of discretion is necessary for quasi-judicial immunity to apply, and as a result, such immunity applied in this case and provided a defense to Knox County. Because Knox County was immune from suit under a theory of quasi-judicial immunity, the Court dismissed Davis’ complaint.

### Commentary

A lawsuit against a party associated with any sort of governmental function always raises some immunity issues. Lots of courthouse staff carry out court orders and judicial functions—for example, clerks, probation officers, sheriff’s officers, bailiffs, court-appointed guardians, and court-appointed mental health evaluators. Any of those individuals may be shielded from liability under quasi-judicial immunity when they are carrying out their jobs.

But what if the ankle device had seriously injured the plaintiff’s leg because of a defect? Would that be a wrong without a remedy?

*Davis v. Knox County*, 40 TAM 52-7 (CA ES, 11/30/15), Susano, 10 pp.

## Summary Judgment on Comparative Fault Upheld

### Lawyer’s Toolkit

It is hard to argue your way around clear video footage depicting the alleged tort at issue in a lawsuit.

### Background

This case involves a car collision that occurred on November 3, 2009, on the U.S. Highway 45 bypass in Jackson. The plaintiffs are the family of Vaal Hall, who was driving southbound toward the intersection on the day in question.

Hall accelerated into the intersection to turn left despite a red left-turn traffic signal facing him. As he attempted to turn left, he was struck by a truck traveling northbound into the intersection. The truck, which was a fully loaded tractor trailer owned by Delta Beverage Group, Inc., was driven by Charles Owens. The light facing Owens was green as he approached the intersection.

Owens applied the brakes but was unable to avoid hitting Hall’s car. The truck collided with the passenger side of the car, causing Hall serious injuries. Two traffic cameras at the intersection captured video footage of the collision.

Hall’s family filed a lawsuit alleging that Owens’ negligence was the proximate cause of the collision and the injuries Hall suffered as a result and that Owens’ employer was vicariously liable for the injuries he caused. They sought damages of \$10 million.

Delta and Owens filed a motion for summary judgment arguing that no reasonable fact-finder could determine that Hall was less than 50% at fault for the collision. In support of their motion, the defendants relied heavily on the video footage from the traffic camera. In addition, the defendants submitted affidavits from two expert witnesses who opined that based on the video, Owens’ truck was traveling 52 miles per hour before braking.

The defendants also filed a motion *in limine* to exclude the testimony of Thomas Langley, the plaintiffs’ accident reconstruction expert. Langley offered testimony during a deposition indicating that Owens was traveling 60 to 65 miles per hour, in excess of the posted 55-mile-per-hour speed limit. Langley opined that Owens had six to nine seconds to react to Hall’s car, which, if he had been paying attention, would have been sufficient time to apply the brakes and avoid the collision.

Summary judgment was ultimately granted. The court concluded that reasonable minds could not find, based on the video footage, that Hall was less than 50% at fault for the accident. The trial court also concluded that Langley’s opinion about the speed of Owens’ truck prior to the accident was inadmissible because it was “fundamentally flawed.” Significantly, the court noted that there was no dispute among the parties that Hall was the driver who set the accident in motion and the driver with the last opportunity to avoid the collision.

The Halls appealed the grant of summary judgment.

### Ruling

The Court of Appeals did not spend any time reviewing the trial court's ruling that the plaintiffs' expert testimony was inadmissible. Unfortunately for the plaintiffs, the Court found the video evidence especially convincing. The Court was also persuaded by the following undisputed facts:

- The traffic signal facing Hall was red at the time he entered the intersection.
- Hall made an illegal left turn into the path of oncoming traffic.
- The light facing Owens was green as he entered the intersection.
- The plaintiffs' own expert testified that Hall was the driver who set the accident in motion and the driver with the last opportunity to avoid the collision.

Taking all of the Halls' evidence, including the testimony of their expert, as true and viewing the evidence in the light most favorable to them, the Court concluded that a reasonable juror could not find that Owens was at least 50% at fault for the accident. Accordingly, the trial court's grant of summary judgment was affirmed.

### Commentary

The Court noted that the issue of comparative fault is typically a question for the trier of fact and is usually unsuited for summary judgment. In this case, however, the video evidence was overwhelming and confirmed that Hall's fault allocation would have to be greater than 50%.

This is a bitter pill for the plaintiffs to swallow, no doubt, because it appears that Hall was severely injured in the accident. The extent of his injuries was not detailed in the opinion, but because \$10 million in damages were sought and the claims were brought by a conservator, he appears to be in bad shape. This is a sad situation, but the absence of a dispute over the fact that Hall ran a red light and made an illegal turn makes it impossible for him to get his case to a jury.

*Hall v. Owens*, 40 TAM 52-9 (CA WS, 11/20/15), Goldin, 8 pp.

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## TCPA Claim Over \$20 Late Fee Results in Big Attorneys' Fee Award

### Lawyer's Toolkit

A lawsuit over \$20 will never be a rational economic decision. That is especially true when a statutory attorneys' fee provision comes into play.

### Background

Michael David Martin was renting an apartment in Franklin in September 2013. His lease required him to establish an account with Water Systems Incorporated (WSI), which provided billing services for certain utilities. In his first two months in

the apartment, he was late paying his utilities. As a result, he incurred two \$10 late fees.

Martin, acting *pro se* (although, as we learn from a footnote in the opinion, he was actually a law student at the time), filed a lawsuit against his landlord and WSI alleging that the \$10 late fee was excessive, unreasonable, and exploitative and therefore violated the Tennessee Consumer Protection Act (TCPA). Unsurprisingly, the case was dismissed pursuant to Rule 12.02(6).

WSI then filed three motions seeking sanctions against Martin and moved for attorneys' fees under the TCPA. The plaintiff, for his part, filed two motions for sanctions against WSI. All the sanctions motions were denied, but WSI's motion for attorneys' fees was granted, and WSI was awarded a judgment of \$8,032.50.

Martin appealed the award of attorneys' fees. WSI cross-appealed the trial court's denial of fees and expenses based on Martin's violations of Tenn. R. Civ. P. 11 and argued that it was entitled to recover fees and expenses on appeal because the appeal was frivolous.

### Ruling

The TCPA specifically provides that "upon finding that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may require the person instituting the action to indemnify the defendant for any damages incurred, including reasonable [attorneys'] fees and costs." Tenn. Code Ann. § 47-18-109(e)(2). A trial court's decision to award attorneys' fees is entirely discretionary. Thus, the trial court's decision will be upheld absent an abuse of discretion.

Because the plaintiff failed to address the manner in which the trial court supposedly abused its discretion and because the Court of Appeals could not discern any abuse of discretion in its review of the record, the Court concluded that the trial court acted within its discretion in awarding attorneys' fees.

In arguing that Rule 11 sanctions were warranted, WSI essentially posited that the grant of its Rule 12.02(6) motion meant that there were no grounds for the lawsuit and that Martin should be sanctioned under Rule 11 for filing his complaint. The Court concluded that those two inquiries are different: Rule 12 tests the sufficiency of a complaint, while Rule 11 prescribes standards to be followed in preparing and filing pleadings and permits the imposition of sanctions. Thus, the plaintiff was entitled to have his complaint—however inartfully worded—tested by Rule 12.

The complaint's failure to survive the Rule 12 test did not mean that it rose to the level of "abuse in the litigation process." Thus, it was not error for the trial court to deny the motion for sanctions filed in response to the plaintiff's filing of a complaint.

In addition, WSI's two other sanctions motions had not been served at least 21 days before they were filed as required under the safe-harbor provision of Rule 11.03(1)(a). Accordingly, sanctions would not have been appropriate in response to those two motions, and the denial of sanctions by the trial court was affirmed.

The Court then addressed WSI's request to recover its fees and expenses incurred in defending the appeal, as permitted under the TCPA, based on its contention that the appeal was

frivolous. The Court concluded that “for the same reason that WSI is entitled to its [attorneys’] fees incurred in the trial court pursuant to the TCPA,” it is entitled to attorneys’ fees and costs incurred in defending the appeal. Accordingly, the case was remanded to the trial court for a determination of the amount of attorneys’ fees incurred by WSI on appeal.

### Commentary

What a rough start to a legal career! This law student learned very personally and very quickly how expensive litigation can be. A lawsuit over \$20 in late fees turned into a judgment against him to the tune of \$8,032.50.

*Martin v. Franklin Cool Springs Corp.*, 40 TAM 51-8 (CA MS, 11/10/15), Dinkins, 12 pp.

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## Unfounded Report of Discrimination No Basis for Malicious Prosecution Claim

### Lawyer’s Toolkit

The analysis in this case focused on when a judicial proceeding is “instituted” by a person for the purpose of a malicious prosecution claim.

### Background

The plaintiff, Randall Thompson, was an employee of the city of Memphis for more than four years. The city received numerous complaints alleging that Thompson engaged in racially discriminatory practices against African Americans. One complaint was initiated by the defendant, Herbert Hamm, who provided an affidavit detailing instances of race discrimination in the hiring processes in Thompson’s office.

As a consequence of Hamm’s allegations, the city conducted an independent investigation and ultimately found that there was sufficient evidence to charge Thompson with various violations of city policies. Thompson’s employment was ultimately terminated.

Thompson appealed the termination of his employment to the Memphis Civil Service Commission. Evidentiary hearings before the commission revealed that there were preexisting tensions between Thompson and Hamm, and two witnesses testified that Thompson had not acted in a discriminatory manner toward anyone. The termination was overturned. On a further appeal, the Chancery Court for Shelby County affirmed the commission’s decision to set aside the termination. The court ordered that Thompson be reinstated and awarded him back pay with interest.

Thompson then filed a lawsuit against Hamm in general sessions court, and the matter ended up in circuit court. The lawsuit amounted to a claim for malicious prosecution. Thompson’s claim was ultimately dismissed at the summary judgment stage on the grounds that the city, not Hamm, initiated the proceedings against him and Hamm’s involvement was limited to providing information to the city. Thompson appealed.

### Ruling

To prove a claim of malicious prosecution, a plaintiff must establish the following elements:

- (1) A previous suit or judicial proceeding was instituted without probable cause.
- (2) The defendant brought the previous action with malice.
- (3) The previous action was terminated in the plaintiff’s favor.

On appeal, Hamm made three arguments: (1) The process that resulted in Thompson’s termination was not a “suit or judicial proceeding,” (2) he did not initiate the proceedings against Thompson, and (3) he did not act with malice.

The Court seized on the second argument, noting that a third party who causes a wrongful prosecution to be instituted can be liable on a claim of malicious prosecution to the same extent as the person who actually instituted the proceedings. At the same time, however, to be liable on a claim of malicious prosecution, a person must do more than just provide information that assists in the action—he must take an active role in instigating or encouraging the prosecution.

The Court reviewed the record and concluded that Hamm’s involvement was limited to providing information. After that, the city hired an outside firm to conduct an independent investigation of the claims in his affidavit. Without any evidence that Hamm urged or encouraged the city to investigate Thompson and given the proof that the city made the decision to terminate Thompson after its own independent inquiry, the Court determined that the summary judgment ruling should be affirmed.

In concluding its opinion, the Court observed that malicious prosecution claims have the potential to create a chilling effect on the right to access the courts. Observing that a broader definition of “malicious prosecution” might deter employees from making reports like Hamm’s, the Court declined to broaden the tort of malicious prosecution.

### Commentary

The Court drew very fine distinctions with previous case law to say that the defendant in this case had not instituted a judicial proceeding. For instance, the Court looked at *Kaufmann v. A.H. Robins Co.*, 448 S.W.2d 400 (Tenn. 1969), a case in which this element was satisfied because the defendant filed a complaint about the plaintiff with the Tennessee Board of Pharmacy.

I think the real saving grace for Hamm was that an outside law firm investigated his claims before recommending the plaintiff’s termination. The independent inquiry put Hamm one step away from the decision to terminate Thompson.

*Thompson v. Hamm*, 40 TAM 52-8 (CA WS, 11/17/15), Stafford, 11 pp.

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## Another Med-Mal Claim Dismissed

### Lawyer’s Toolkit

The certificate of good faith is a mandatory requirement in healthcare liability actions and cannot be met through substantial compliance. Failure to meet the requirement will result in a swift dismissal of a lawsuit.

### Background

On September 24, 2014, Corey McKinnie filed a notice of claim with the Tennessee Division of Claims Administration. In the notice, he alleged that he had received negligent medical care while he was a patient in a state mental health facility.

In a letter dated October 9, 2014, the Attorney General's Office informed McKinnie that it would defend the claim and that he had 30 days from the date the claim was transferred to the claims commission to file his complaint. The letter notified McKinnie of the 60-day presuit notice and certificate of good faith requirements under Tenn. Code Ann. §§ 29-26-121, 122.

McKinnie timely filed his complaint, which essentially restated the allegations he had made in his notice of claim, and attached a number of records and a Health Insurance Portability and Accountability Act (HIPAA) release form. However, he failed to file a certificate of good faith with his complaint, and the state filed a motion to dismiss.

The claims commission granted the motion based on Tenn. Code Ann. § 29-26-122(c) and dismissed McKinnie's medical malpractice claim. McKinnie appealed.

### Ruling

The only issue on appeal was whether the claims commission erred in dismissing McKinnie's claim based on his failure to file a certificate of good faith. The Court excerpted the relevant statutory language from Tenn. Code Ann. § 29-26-122, including the following:

In any [healthcare] liability action in which expert testimony is required by § 29-26-115, the plaintiff or plaintiff's counsel shall file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint shall be dismissed.

The certificate of good faith requirement cannot be satisfied by substantial compliance and is therefore mandatory. Under the statute, a failure to comply with the requirement subjects the complaint to dismissal. Accordingly, the trial court did not err in granting the state's motion to dismiss. The decision of the claims commission was affirmed.

### Commentary

Even good lawyers have a hard time getting a healthcare liability action filed properly. It's hard to see a *pro se* party ever getting one of these cases off the ground.

*McKinnie v. State*, 40 TAM 52-6 (CA WS, 12/3/15), Armstrong, 6 pp.

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## Storage Company All Wet in Property Damage Appeal

### Lawyer's Toolkit

A defendant's knowledge of past flooding appears to be the key in a successful claim for gross negligence arising out of flooding that destroyed personal property in a rental unit.

### Background

Kenneth and Teresa Kuhn had personal property in a storage unit owned by Pam Panter d/b/a Valley Mini Storage. Kenneth had entered into a rental agreement with Valley in January 2011. The rental agreement contained an exculpatory clause stating that the tenant assumed responsibility for any loss or damage to the property and releasing management from any losses or damages caused by fire, theft, water, rainstorms, tornadoes, or anything else.

In May 2013, the Kuhns discovered that their storage unit had flooded and all of their property was destroyed. The personal property included family photographs, a family Bible, clothing, and furniture.

The Kuhns filed suit against Valley in general sessions court and received a judgment for \$2,000. Valley appealed to the circuit court, and a bench trial was held on the claims for negligence and gross negligence. At trial, the proof established that the Kuhns' personal property was stored in a building other than the main storage facility site that had drainage issues during its construction, had never received a final inspection, and had never received a certificate of occupancy. Moreover, Valley had advertised its storage facility as "clean and dry."

The trial court entered an order in favor of the Kuhns and awarded a judgment of \$17,925.49 in damages. The trial court specifically held that the exculpatory clause was void because it was against public policy. Valley appealed.

### Ruling

The issues on appeal were whether the trial court erred in finding that Valley's actions constituted gross negligence, whether the trial court erred in concluding that the exculpatory clause did not bar recovery, whether the trial court used the correct measure of damages, and whether Valley should be awarded its costs in defending the action.

The Court of Appeals affirmed the trial court's holding of gross negligence. In support of its ruling, the Court noted that neither Valley nor its owners ever obtained a certificate of occupancy and that the unit had flooded on a previous occasion. The Court ruled that was sufficient to find the "callous indifference to consequences" required for gross negligence. The Court then held that the exculpatory clause did not operate to excuse gross negligence. In Tennessee, a contract against liability does not protect a party who is guilty of gross negligence.

The Court of Appeals affirmed the award of damages over Valley's contention that the damages were excessive and against the weight of the evidence. Valley argued that the Kuhns failed to put forth evidence establishing the difference in the value of their property immediately before and after the flooding. The Court held that while the record was sparse, the Kuhns had testified regarding the value of the items and introduced a list of their damages as an exhibit. The Court noted that Valley had not introduced any contradictory evidence. Because Valley submitted only a statement of the evidence and not a transcript, the Court was required to take the statement of evidence as true.

Finally, the Court rejected Valley's claim for attorneys' fees and costs under the rental agreement, holding that according to the plain language of the contract, Valley was entitled to fees

only if it attempted to enforce a provision of the rental agreement. In this case, the Kuhns brought an action for damages; therefore, the attorneys' fees provision was inapplicable.

### Commentary

This relatively simple case, while interesting, has few take-aways. Perhaps the most important aspect to note is that if you are litigating a contract that contains an exculpatory clause, asserting a claim for gross negligence may be your only shot. The big question is, why did Valley appeal after losing just \$2,000 in general sessions court?

*Kuhn v. Panter*, 40 TAM 52-11 (CA WS at Nashville, 11/25/15), Armstrong, 7 pp.

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## Plaintiff Gets New Trial Because Jury's Damages Were Too Low

### Lawyer's Toolkit

Use this case for that rare situation in which a jury's award of damages is so wrong that you get a new trial.

### Background

This action arose from an automobile accident in Shelby County. Khadijeh Naraghian was driving north on a parkway toward an intersection when her vehicle was struck from behind by Darryle K. Wilson. Naraghian filed suit against Wilson, claiming that he failed to maintain his vehicle under reasonable control and his negligence was a direct and proximate cause of the accident.

Wilson answered by asserting that Naraghian's actions were the cause of the accident. Specifically, he alleged that the accident was a result of her decision to drive away from a complete stop at a red light and then suddenly stop without any justification. He contended that her claim was barred by her comparative fault.

A jury trial occurred. Naraghian testified that she was driving to a friend's house when the traffic light in front of her turned red. She came to a complete stop and was struck from behind by Wilson. She further testified that as a result, she experienced dizziness and pain that required treatment by a chiropractor.

The chiropractor, Dr. Glen Burford, testified that Naraghian suffered a whiplash injury, her preexisting arthritis had left her spine in a weakened state, and she had weakness in her neck muscles. Dr. Burford provided a course of treatment involving adjustments and rehab therapy. The total charges for the treatment amounted to \$13,440. The defendant presented no evidence that controverted the reasonableness of the charges or rebutted the medical opinions offered by Dr. Burford.

Wilson testified that he was approaching the red light and Naraghian's car when the light turned green. He claimed that Naraghian began to drive off, but her car suddenly stopped and his car bumped the rear of her vehicle.

The jury found in favor of Naraghian and concluded that her total damages were \$7,831.67. The jury found that

Wilson was responsible for the accident and that Naraghian was 44.58% at fault. The trial court reduced the award of damages to \$4,340.31 based on the percentage of Naraghian's comparative fault.

Naraghian filed a motion for a new trial alleging several errors related to the trial proceedings and the resulting jury verdict. She contended that the jury erred in its assessment of damages and its comparative fault finding and that the trial court erred in failing to give a curative instruction about a line of questioning by the defense counsel that suggested she had been previously arrested. The trial court denied her motion for a new trial, and Naraghian filed a timely appeal.

### Ruling

On appeal, the Court held that there were three primary issues: (1) whether the damages awarded by the jury were disproportionate to the amount of damages proven at trial, (2) whether the jury's comparative fault findings could not be sustained by the evidence presented at trial, and (3) whether the defense counsel's questioning about an alleged prior arrest resulted in prejudice for which a curative instruction should have been given. The Court held that the first issue was dispositive. Therefore, it addressed only the issue of damages.

Naraghian contended that the jury's arbitrary reduction of her damages, which were uncontradicted at trial, was not supported by the evidence. The Court held that there was no material evidence to support an award of damages as low as the jury awarded because there was not a serious challenge to the charges billed or the necessity of the treatment. The Court therefore vacated the judgment and remanded the case for a new trial on all the issues.

The Court noted that although it had the authority to remand the case solely on the issue of damages, the jury's apportionment of 44.58% of the fault to the plaintiff demonstrated that the issue of liability was close and may be evidence that the result was reached as "some type of compromise."

### Commentary

Comparative fault of 44.58%? The jury must have had a very finely tuned scale! The plaintiff was successful in her argument that the jury's award of damages was unsupported by the evidence in the record. However, she has a tough case on remand in this tort-reformed world we now live in.

*Naraghian v. Wilson*, 40 TAM 49-10 (CA WS, 11/12/15), Goldin, 9 pp.

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## Summary Judgment Proper Because Plaintiff Never Responded to Motion

### Lawyer's Toolkit

I'm not sure you need this case in your toolkit; you must respond to a dispositive motion!

### Background

On August 5, 2012, Teresa Patterson slipped on orange liquid on the floor of a Walmart store. She brought a premises liability action in the General Sessions Court for Shelby County. After judgment in favor of Walmart was entered in general sessions court, she appealed to circuit court.

At that stage, Walmart moved for summary judgment, relying on Patterson's testimony from the general sessions trial and an affidavit from the comanager of the store. Walmart properly filed a statement of undisputed facts with the motion. Patterson did not respond to the motion or the statement of undisputed facts.

The trial court concluded that the undisputed facts showed that Walmart did not have actual or constructive notice of the allegedly dangerous condition that caused Patterson to fall. Patterson appealed.

### Ruling

The only issue on appeal was whether summary judgment was properly granted in favor of Walmart. In reviewing the issue, the Court of Appeals began with a brief summary of the basics of premises liability law. Because such claims are based on the property owner's superior knowledge of the property, the plaintiff must prove that the defendant had either actual or constructive notice of the injury-causing condition. The notice may be shown if the defendant caused or created the condition or the dangerous condition existed for so long that the defendant should have known about it.

The crux of the analysis in this case, however, is really procedural. Because Patterson failed to respond to the motion for summary judgment and the statement of undisputed facts, she was properly deemed to have admitted the facts asserted by Walmart for the purposes of summary judgment. In reviewing the undisputed facts asserted by Walmart, the Court determined that the facts established that Patterson had no evidence to show how long the orange liquid had been on the floor. Further, the affidavit of the comanager established that a Walmart employee did not create the allegedly dangerous condition.

Patterson's failure to provide an affidavit or other evidence meant that she could not establish a dispute of material fact. Thus, Walmart was properly granted summary judgment.

### Commentary

While the analysis in this case is narrow in scope, it is interesting because it is one of the first opinions to cite the *Rye* case, which clarified the application of the summary judgment standard in Tennessee in October 2015. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, \_\_\_ S.W.3d \_\_\_, 2015 WL 6457768 (Tenn., Oct. 26, 2015). The statutory summary judgment standard under Tenn. Code Ann. § 20-16-101, which became effective July 1, 2011, applied to this case. Nonetheless, the Court recognized that the *Rye* case is instructive because it amounts to a judicial adoption of the summary judgment standard "parallel to the statutory version adopted in Tenn. Code Ann. § 20-16-101."

*Patterson v. Wal-Mart Stores East LP*, 40 TAM 52-10 (CA WS, 11/30/15), Stafford, 8 pp.

## Texas Statute Helps Plaintiff Get Coverage in UM Case

### Lawyer's Toolkit

This case provides a good example of how courts analyze insurance policies and their endorsements.

### Background

This action arises from an automobile accident. Gunnar Skarbrevik, a resident of Texas, was in a car accident on Interstate 240 in Shelby County. The other driver was Carolyn Brown, who was intoxicated and under the influence of drugs and caused the accident by speeding while driving on the wrong side of the interstate. Brown was killed in the accident. Skarbrevik suffered serious injuries.

At the time of the accident, Skarbrevik was driving an automobile owned and titled to his wife and was traveling on business for his employer, LifeTouch, Inc. The Skarbreviks filed suit against Brown's estate to recover for their injuries and damages. Brown was uninsured at the time of the accident. Therefore, service was made on Zurich American Insurance Company, which was LifeTouch's business automobile insurance provider. The policy with Zurich included uninsured motorist (UM) coverage.

Zurich filed an answer, followed by a motion for summary judgment, contending that because Skarbrevik was not driving an automobile owned by LifeTouch at the time of the accident, he was not entitled to UM coverage. The trial court denied the motion.

The Skarbreviks moved for partial summary judgment, contending that an "Employees as Insureds" endorsement to the business automobile policy provided additional nonowned automobile liability coverage, which triggered a Texas statute, Texas Ins. Code Ann. § 1952.101, imposing UM coverage by operation of law.

The trial court granted the motion and entered judgment in favor of the Skarbreviks on the claim of coverage. The trial court held that the endorsement, construed with the business auto coverage form in the policy, resulted in "any" employee being an insured while using a covered auto when LifeTouch did not own, hire, or borrow the vehicle in its business or personal affairs. Zurich appealed.

### Ruling

The sole issue on appeal was whether Skarbrevik was entitled to UM coverage under the policy issued by Zurich to LifeTouch. On appeal, Zurich contended that UM coverage was not available because Skarbrevik was not driving a "covered auto," meaning one owned by LifeTouch, and that the endorsement applied only to liability coverage, not UM coverage.

The Court applied the rules of construction of contracts and found that the policy's language in the endorsement included Skarbrevik in the class of persons insured by the Zurich policy for liability purposes while he was driving his wife's vehicle. The Court then applied the Texas statute and held that it mandated that a liability insurance policy provide UM coverage that protects insureds who are legally entitled to recover from owners of uninsured motor vehicles.



### Commentary

This ruling depended in part on a Texas statute. Let this be a lesson to check whether the laws of other states might help you in car accident cases.

*Skarbrevik v. Personal Representative of Estate of Brown*, 40 TAM 52-12 (CA WS, 11/16/15), Dinkins, 10 pp.

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## Late-Filed Notice of Appeal Dooms Case

### Lawyer's Toolkit

This case explains appellate jurisdiction and procedure, and it should serve as an important lesson for attorneys to make sure the notice of appeal has been filed before the 30-day deadline.

### Background

Virginia Louise Burke filed a complaint on November 13, 2012, against Huntsville NH Operations LLC d/b/a Huntsville Manor asserting a premises liability claim arising from a slip and fall inside the entrance of Huntsville Manor. Burke's mother was a resident at the nursing home. Burke's husband later joined in the action, seeking damages for loss of consortium.

Huntsville Manor moved for summary judgment, asserting that the Burkes could not establish the element of actual or constructive notice of a dangerous condition. The Burkes responded with affidavits from Huntsville Manor employees who stated there were frequently puddles or spills on the floor. The Burkes also provided the testimony of a nursing home expert who opined that Huntsville Manor was understaffed and the nursing home's policies on housekeeping were deficient and demonstrated a lack of regard for visitor safety. The trial court granted Huntsville Manor's motion for summary judgment on June 17, 2014.

The Burkes filed a motion to alter or amend, which was denied by an order entered on September 17, 2014. They then filed a notice of appeal mailed by their counsel, which the trial court clerk entered as received on October 20, rendering the notice untimely.

On October 27, the Court of Appeals entered an order noting the untimeliness of the appeal and permitting the Burkes until November 12 to show why the appeal should not be dismissed for lack of jurisdiction. The Burkes responded by seeking an extension to show cause, which was supported by an affidavit from their counsel stating that relief would be sought in the trial court pursuant to Tenn. R. Civ. P. 60.01 based on a "likely clerical error" in the filing of the notice of appeal.

The Burkes also sought relief from the Court of Appeals to alter or amend the trial court record pursuant to Rule 60.01. The Court of Appeals granted the request for an extension but denied the request to amend the trial court record.

Meanwhile, the Burkes filed a motion for relief in the trial court based on Rule 60.01. The motion was supported by an affidavit from their counsel's paralegal, who stated that she mailed the notice of appeal on October 10, including copies to

the Burkes and the Court of Appeals. The Court of Appeals received a copy on October 15, and the Burkes received their copy no later than October 14. An affidavit from the Scott County clerk stated that the county's copy was stamped "filed" on October 20, and the office had not retained the envelope. The clerk had no explanation for the delay in the receipt and filing of the notice of appeal.

Based on that information, the trial court entered an order granting the Burkes' Rule 60.01 motion and ordered the record be supplemented with the affidavit from the trial court clerk. The trial court further ordered that the notice of appeal filed on October 20 be stricken from the record and replaced with a notice of appeal dated October 15.

Huntsville Manor filed a motion to dismiss for lack of jurisdiction with the Court of Appeals contending that the trial court had abused its discretion by granting the Burkes' Rule 60.01 motion. The Court of Appeals issued an order stating that it would not dismiss the appeal and the action would proceed to briefing. However, the order directed the parties to brief the issue of whether the trial court had the authority to grant relief under Rule 60.01 in the form of an alteration of the filing date of the notice of appeal.

### Ruling

The Court of Appeals held that the dispositive issue was whether the trial court erred in granting relief to the Burkes under Tenn. R. Civ. P. 60.01 by ordering that the filing date on the notice of appeal be changed to a date establishing a timely appeal. The Court found that it was an abuse of discretion for the trial court to grant such relief.

The Court began its analysis by reviewing the language of Tennessee Rule of Appellate Procedure 4, which states that the notice of appeal required by Tennessee Rule of Appellate Procedure 3 "shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from." The Court noted that the advisory commission comments indicate there is nothing in the rule or another rule that permits an extension of the 30-day deadline except for possible relief from an untimely appeal pursuant to Tenn. R. Civ. P. 60.02.

Rule 60.02 can provide relief for certain enumerated reasons, including excusable neglect. The Court noted one case in which relief granted under Rule 60.02 for an untimely appeal was overturned when the appellant's attorney mailed the notice of appeal only two days before the 30-day deadline.

In this case, the Court noted that the Burkes had not sought relief pursuant to Rule 60.02 but had sought relief under Rule 60.01, which governs clerical mistakes. The Court held that the application of Rule 60.01 to the facts of this case was an abuse of discretion, and it found no authority under Tennessee or federal law interpreting the nearly identical rule that would permit a court to alter an untimely notice of appeal.

The Court also noted that as of October 23, 2014, the date on which it received the notice of appeal from the trial court, the action was docketed in the Court of Appeals, and the Court therefore had jurisdiction. Thus, the Court held that to seek any type of relief from the trial court, the Burkes were required to seek leave from the Court of Appeals. The Court stated that it

denied leave based on its rejection of the Burkes' request to alter or amend the record.

The Court of Appeals held that the trial court was without the authority to act once the notice of appeal was received and docketed. The Court therefore dismissed the appeal as untimely.

### Commentary

This case demonstrates the harsh results that can arise from a failure to adhere to the deadlines and language in the Rules of Civil and Appellate Procedure. Interestingly, the Court focused first on the issue of relief sought under Rule 60.01 rather than 60.02 instead of simply addressing the jurisdictional issue directly. The Court's opinion seems to serve as a warning to attorneys that it is incumbent upon them to make sure the notice of appeal has been received and filed before the expiration of the 30-day deadline or the Court will have no sympathy.

*Burke v. Huntsville NH Operations LLC*, 40 TAM 52-22 (CA ES, 11/30/15), Frierson, 13 pp.

## IN THE SPOTLIGHT

### *Smith v. UHS of Lakeside's* Impact on Summary Judgment Jurisprudence

In July 2014, the Tennessee Supreme Court issued its opinion in *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303 (2014). The opinion addressed the correct procedure for a trial court to rule on summary judgment motions. In beginning its analysis, the Supreme Court noted that the appeal required it to address three important procedural principles:

- (1) The principle reflected in Tenn. R. Civ. P. 56.04 that a trial court *must state* the grounds upon which it denies or grants the motion for summary judgment, which will be included in the order reflecting the court's ruling;
- (2) The principle that after it decides the summary judgment ruling, the trial court may authorize counsel to prepare and submit a proposed order for its consideration; and
- (3) The principle that courts speak through their orders, judgments, and minute entries.

*Id.* at 312.

The Court noted that Rule 56.04 was amended in 2002 and 2007 to permit a party to ask the trial court to state the legal grounds for its decision and to require the trial court to state the legal grounds in both the grant and denial of a motion for summary judgment. *Id.* at 313. The Court emphasized that the failure to adhere to the rule complicates the ability of the appellate courts to review the trial court's decision. *Id.*

The Court went on to address the practice of trial courts requesting and considering proposed orders prepared by the prevailing party. *Id.* at 316. The Court held that Rule 56.04 requires a trial court, upon granting or denying a motion for summary judgment, to state the grounds for its decision *before* it invites or asks the prevailing party to draft a proposed order. *Id.*

What is the impact of this opinion almost a year and a half later? The case has been cited 28 times following its entry. To put that number into context, between July 1, 2013, and June 30, 2014, the last time such data were provided on the Administrative Office of the Courts' website, the Tennessee Court of Appeals issued approximately 687 opinions. The previous year, the Court of Appeals issued 776 opinions.

While the statistics do not include the number of opinions that involved a ruling on summary judgment, the number of citations to *Smith v. UHS of Lakeside* is not overwhelming. Thus, if we were to answer the question based solely on the number of times the case has been discussed in subsequent Court of Appeals opinions, the answer might be that *Smith* has had little impact on summary judgment jurisprudence.

However, when we look at the cases that have cited the *Smith* opinion, it becomes evident how important the opinion is and how critical it is for trial courts to abide by its instructions. It also becomes clear that lawyers should work to ensure that trial courts are abiding by the instructions in *Smith* and Rule 56.04.

For example, in *McEarl v. City of Brownsville*, No. W2015-00077-COA-R3-CV, 2015 WL 6773544 (Nov. 6, 2015), a case discussed in the December 2015 issue of *Tennessee Tort Law Letter*, the Court of Appeals vacated the order of the trial court granting summary judgment. The Court noted that although the *Smith* decision had been issued shortly after the hearing on the motion for summary judgment in that case, it was required to apply *Smith*. The Court found that the trial court made no factual findings and stated no legal grounds for its decision that the defendant was not responsible and that the parties admitted at oral argument that the trial court requested proposed orders from them and ultimately chose to use the proposed order submitted by the defendant, which contained detailed legal findings that were not issued by the trial court during its oral ruling.

Likewise, in *Hardy v. Tennessee State Univ.*, No. M2013-02103-COA-R3-CV, 2014 WL 4181024, at \*2 (Tenn. Ct. App., Aug. 22, 2014), the Court of Appeals vacated the trial court's order granting summary judgment, finding that the order did not state the legal grounds for the grant of summary judgment or provide any factual findings relative to the various causes of action asserted by the plaintiff and the defenses raised by the defendants. The same result was seen in *Potter's Shopping Ctr., Inc. v. Szekely*, 461 S.W.3d 68, 72 (Tenn. Ct. App., 2014), in which the Court of Appeals vacated the judgment at issue because the record did not include a transcript, the filings indicated several disputed facts, the action involved questions of law that required analysis and explanation, and the trial court's order did not state the legal grounds or cite any evidence or argument considered in granting summary judgment.

The true impact of *Smith v. UHS of Lakeside* may not be seen in appellate court arguments, but in courtrooms across the state. Trial judges have been reminded of the proper procedure to follow when granting or denying summary judgment, which requires them to fully state the basis for their ruling, including the legal basis and factual findings they considered. Attorneys should be aware of the opinions issued by the Court of Appeals and avoid taking part in the preparation of submitted orders that may result in a vacated judgment. Trial judges must perform their own adjudicative functions and cannot delegate them to the lawyers for the "winning" side.

### Briefly Noted

#### Hospital Fall Really Healthcare Liability Case

This case demonstrates the impact of the Tennessee Supreme Court's recent decision in *Ellithorpe v. Weismark*, \_\_\_ S.W.3d \_\_\_, No. M2014-00279-SC-R11-CV, 2015 WL 5853873 (Tenn., Oct. 8, 2015). The plaintiffs, a husband and wife, filed an ordinary negligence claim and a derivative loss-of-consortium claim against St. Thomas Hospital for damages from injuries sustained by the wife when hospital employees failed to properly support her as she was transferred from a bariatric stretcher to her automobile.

St. Thomas moved to dismiss the claims on the grounds that the plaintiffs failed to comply with the presuit notice and good-faith certificate filing requirements under the healthcare liability statute, Tenn. Code Ann. §§ 29-26-121, 122. The plaintiffs responded that the claims were grounded in ordinary negligence, not healthcare liability. The trial court granted St. Thomas' motion to dismiss. The plaintiffs appealed.

The Court of Appeals held that the precise issue on appeal, whether the Tennessee Supreme Court's decision in *Estate of French* was abrogated by the enactment of Tenn. Code Ann. § 29-26-101, was addressed in the Supreme Court's decision in *Ellithorpe*, which answered that question in the affirmative.

The Court went on to apply the clear language of the Tennessee Health Care Liability Act (HCLA), finding that the allegations in the complaint fell within its purview. The action asserted a claim against a healthcare provider for injuries stemming from the "positioning" of the plaintiff related to hospital employees' failure to properly support her while she was being transferred from a stretcher to her automobile. Thus, the Court held that the presuit notice and certificate of good faith requirements of the HCLA applied, and it affirmed the trial court's dismissal with prejudice.

*Estate of Thibodeau v. St. Thomas Hospital*, 40 TAM 47-6 (CA MS, 10/29/15), Clement, 11 pp.

#### Statute of Limitations Missed in Inverse Condemnation Case

This action involved the demolition of a home located in Jackson. The home was originally owned by Dorothy Lipson. During the course of the litigation, Lipson, via her grandson as her attorney-in-fact, transferred ownership of the home to Cameo Bobo, her granddaughter. Bobo was not added as a party to the demolition proceedings.

The home was demolished by the city sometime in April 2013 following an appeal of an order by the city's environmental court and proceedings in circuit court. Bobo became aware of the demolition on April 25, 2013. On April 22, 2014, she brought an action against the city of Jackson for trespass and inverse condemnation.

The city filed an answer asserting several defenses, including the statute of limitations and governmental immunity. The city then moved for summary judgment, contending that the action was barred by the statute of limitations, Bobo could not make a *prima facie* case for inverse condemnation, and it had

immunity from the trespass claim. The trial court granted summary judgment in favor of the city. The court held that the city retained immunity under the GTLA for the trespass claim and that the inverse condemnation claim was barred by the statute of limitations.

Bobo's appellate brief did not challenge the grant of summary judgment on the trespass claim, and the Court of Appeals therefore found the issue was waived. The Court affirmed the trial court's dismissal of the inverse condemnation claim based on the fact that the plaintiff had knowledge of the circuit court proceedings.

*Bobo v. City of Jackson*, 40 TAM 52-14 (CA WS, 12/4/15), Goldin, 14 pp.

#### Bad HIPAA Release Causes Dismissal of Healthcare Liability Case

Deborah Bray filed a healthcare liability action against Dr. Radwan Khuri, a licensed physician specializing in psychiatry, based on alleged medical negligence arising from his treatment of her spouse. Bray's husband was treated for the effects of drug detoxification and major depression and committed suicide at St. Francis Hospital in Memphis while he was under the care of Dr. Khuri.

Bray initially filed suit on March 11, 2004, but voluntarily dismissed the action in May 2010. She then mailed a "Notice for Potential Claim for Medical Malpractice" and "Authorization to Disclose Health Information" to Dr. Khuri on May 2, 2011, in accordance with Tenn. Code Ann. § 29-26-121. The action was refiled on September 2, 2011. An initial motion to dismiss the suit on the grounds that Tenn. Code Ann. § 29-26-121 does not extend the time for a plaintiff to refile under the Savings Statute, Tenn. Code Ann. § 28-1-105, was denied by the trial court.

Dr. Khuri filed a second motion to dismiss, arguing that Bray did not substantially comply with the healthcare liability statute because she failed to provide a HIPAA-compliant medical authorization as mandated by Tenn. Code Ann. § 29-26-121(a)(2)(E). Dr. Khuri contended that the form was deficient because it did not include a description of the information to be used and failed to identify which healthcare providers were authorized to make the requested disclosures. The trial court granted the dismissal, and Bray appealed.

The Court of Appeals rejected the argument that a HIPAA-compliant authorization is not required when only one medical provider is receiving the notice. The Court noted that without the HIPAA-compliant authorization form, the doctor, even though he has possession of the medical records, could not review them with his attorney to evaluate the substantive merits of the claim.

The Court also held that the form was deficient because it "left blank a core element" of the authorization form and the accompanying notice letter did not explicitly authorize Dr. Khuri to fill in the blanks with the necessary information. Even if the letter had granted such authorization, it was Bray's duty as the plaintiff to comply with the requirements of Tenn. Code Ann. § 29-26-121(a)(2)(E).

*Bray v. Khuri*, 40 TAM 52-5 (CA WS, 12/3/15), Gibson, 7 pp.

## Tort Cases Before Supreme Court

The following is a list of the tort cases pending before the Supreme Court. Entries with an asterisk (\*) are new to the list.

1. *Borne v. Celadon Trucking Services Inc.*, 39 TAM 35-5 (CA 7/31/14), appeal granted 12/18/14 (in case in which plaintiff suffered “classic muscle, tendon, ligament injury” to his neck and permanent spinal disc herniation in accident involving three tractor-trailer trucks, jury returned itemized verdict of \$3,705,000 for plaintiff, and trial court suggested remittitur of \$1,605,000, for total award of \$2,100,000, total award of \$2,105,000 is approved; when there was no basis for straying from lost earnings figure suggested by vocational economic analyst, who opined that plaintiff’s limited credentials essentially leave him unable to compete for jobs which he can physically perform, evidence preponderated against \$355,000 reduction suggested by trial court, and jury’s award of \$1,455,000 for loss of earning capacity is reinstated; evidence did not preponderate against trial court’s remittitur of pain and suffering and mental anguish award to \$500,000; evidence did not preponderate against \$100,000 award for permanent injury, as remitted by trial court, to 30-year-old plaintiff who suffered permanent injury to his spinal disc; even with trial court’s suggested remittitur, award of loss of enjoyment of life remains excessive and against preponderance of evidence, and award is reduced to \$50,000)
2. *Circle C Construction LLC v. Nilsen*, 39 TAM 36-8 (CA 7/29/14), appeal granted 11/20/14 (in legal malpractice action, tolling agreement between parties precluded application of saving statute set forth in TCA 28-1-105(a); by its terms, TCA 28-1-105(a) applies to periods of limitation established by “rule or statute of limitation,” and applicable time limitation was established by contract not by “rule or statute of limitation”)
3. *First Community Bank N.A. v. First Tennessee Bank N.A.*, 39 TAM 42-5 (CA 8/20/14), appeal granted 1/15/15 (in case, which was remanded by Tennessee Supreme Court for reconsideration, in which plaintiff alleged claims arising out of purchase of asset-backed securities that were later deemed unmarketable, trial court erred in dismissing, for failure to state claim, claims for fraud, constructive fraud, negligent misrepresentation, civil conspiracy, unjust enrichment, and violations of Tennessee Securities Act)
4. *In re Estate of McRedmond*, 40 TAM 1-19 (CA 11/14/14), appeal granted 5/14/15 (when siblings agreed to dissolve corporation that operated family business and sell its assets, receiver was appointed, three defendant siblings placed highest bid for assets, trial court approved sale to three siblings, prior to closing of sale, three siblings formed new corporation and assigned their right to purchase assets to newly formed corporation, receiver conveyed assets directly to new corporation, which began conducting business just as family business had done in past, one of plaintiff siblings formed another corporation and went into direct competition with corporation that had purchased assets of family business, three individual siblings filed counterclaim against competing sibling, alleging intentional interference with business relations, breach of fiduciary duty, and that they lost benefit of their bargain, three individual siblings also sought injunctive relief against competing sibling, against competing sibling, and neither of new corporations was made party to proceedings, all of claims asserted by three individual siblings attempt to recover for harm suffered by corporate entities, and hence, they lack standing to assert these claims)
5. *Martin v. Powers*, 40 TAM 13-8 (CA 2/27/15), appeal granted 8/13/15 (in case in which plaintiff, holder of automobile liability insurance policy, was injured after being struck by driver in rental vehicle and sought coverage under uninsured motorist coverage provision of his policy, trial court properly held that rental car agency was self-insurer under Tennessee law, and hence, that vehicle was not “uninsured motor vehicle” when policy stated that “uninsured motor vehicle” did not include vehicle that is “owned or operated by a self-insurer under any applicable motor vehicle law”; construing TCA 56-7-1202(a)(2)(C) and 55-12-111 together, there is no inconsistency, but, rather, both policy and statute exclude from definition of “uninsured motor vehicle” those vehicles owned by persons who have obtained Certificate of Self-Insurance)