



TBA LITIGATION SECTION APRIL 2012 NEWSLETTER
SUMMARY OF CASES

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Civil Procedure

Lind v. Beaman Dodge, Inc. et al., 356 S.W.3d 889 (Tenn. 2011).

- Under the Tennessee Products Liability Act, plaintiff could rely upon the declaration of insolvency of a manufacturer to maintain a cause of action against seller under a theory of strict liability even though more than a year had passed from the entry of a voluntary non-suit because plaintiff's strict liability claim against seller did not accrue until after manufacturer was declared insolvent. However, plaintiff's negligence claim against seller in subsequent lawsuit was time barred because plaintiff could have maintained that claim in the initial lawsuit.

Sheila Brown v. Rico Roland, 357 S.W.3d 614 (Tenn. 2012).

- Holding that plaintiff was bound by the damages alleged in her civil warrant where plaintiff failed to amend complaint to increase alleged damages after perfecting appeal to Circuit Court.

Walker v. Garabeian, No. W2010-02645-COA-R3CV, 2011 WL 7423779, at *1 (Tenn. Ct. App. Dec. 28, 2011).

- Vacating order excluding testimony of medical expert in light of the Tennessee Supreme Court's recent decision in *Shiple v. Williams*, 350 S.W.3d 527 (Tenn. 2011), that set forth a new standard in assessing whether a medical expert has satisfied the locality rule.

Crawford v. Kavanaugh, No. E2011-00696-COA-R3-CV, 2011 WL 5829602, at *1 (Tenn. Ct. App. Nov. 21, 2011).

- Affirming dismissal of medical malpractice action where plaintiffs failed to file certificate of good faith in accordance with recent amendments to the Medical Malpractice Act.

Morgan Keegan & Company, Inc. v. Smythe, No. W2010-01339-COA-R3CV, 2011 WL 5517036 (Tenn. Ct. App. November 14, 2011).

- A trial court's order vacating an arbitration award *and directing rehearing* is not subject to appellate review under Tennessee Code Annotated § 29-5-319.

Breach of Contract

84 Lumber Company v. R. Bryan Smith, 356 S.W.3d 380 (Tenn. 2011).

- In action to enforce a personal guaranty, Tennessee Supreme Court held that commercial credit application contained explicit language to bind president of a company as personal guarantor of the company's debts.

Civil Procedure

***Lind v. Beaman Dodge, Inc. et al.*, 356 S.W.3d 889 (Tenn. 2011).** At issue in this products liability case was whether plaintiff's claims for negligence and strict liability were time barred against the seller of an automobile where those claims were brought more than a year after the entry of a voluntary non-suit but less than a year from the date the manufacturer was declared insolvent. In *Lind*, the plaintiff originally brought suit against both the seller and manufacturer under theories of negligence and strict liability. On December 21, 2007, plaintiff entered a voluntary non-suit as to the seller of the automobile, but continued to litigate against the manufacturer. On April 30, 2009, the manufacturer filed a voluntary bankruptcy petition and was thereby declared insolvent. When plaintiff re-filed suit against the seller on August 17, 2009, defendant moved to dismiss the action because it was filed more than a year after the entry of the voluntary non-suit. Plaintiff argued, however, that his claims against the seller were not time barred because, under the Tennessee Products Liability Act, his cause of action against the seller accrued when the manufacturer was declared insolvent. In its analysis, the Tennessee Supreme Court first held that plaintiff's strict liability claim was not barred because that cause of action did not accrue until after the manufacturer was declared insolvent. The court opined that because a judicial declaration of a manufacturer's insolvency is one of the limited and exclusive circumstances set forth in Tennessee Code Annotated 29-28-106(b) in which a seller may be liable under a theory of strict liability in tort, plaintiff's cause of action could not have accrued prior to the manufacturer's bankruptcy petition. However, the court held that plaintiff's negligence claims were barred because, unlike the strict liability claim, the negligence claim could have been asserted against the seller in the initial lawsuit. Thus, because more than one year had passed since the entry of the voluntary non-suit, the court opined that the negligence claim was filed beyond the savings period.

***Sheila Brown v. Rico Roland*, 357 S.W.3d 614 (Tenn. 2012).** In this General Sessions appeal, the Tennessee Supreme Court affirmed the trial court's judgment that plaintiff was bound by the amount stated in her civil warrant. Plaintiff originally brought suit in the General Sessions Court of Davidson County and alleged damages against a negligent driver and her insurance carrier for damages under \$25,000. Plaintiff took a voluntary non-suit in General Sessions and then perfected a de novo appeal to the Circuit Court of Davidson County. Plaintiff then settled her claim against the driver for \$25,000 but proceeded against the insurance carrier on an underinsured motorist claim. Though she offered to settle her underinsured motorist claim for \$120,000, she never amended her civil warrant/complaint to increase her alleged damages. Accordingly, because plaintiff failed to amend her complaint, the court opined that she was bound by the amount specified therein. Thus, the court affirmed the trial court's dismissal of plaintiff's claims against the insurance carrier because she had fully recovered her alleged damages in her settlement.

***Walker v. Garabeian*, No. W2010-02645-COA-R3CV, 2011 WL 7423779, at *1 (Tenn. Ct. App. Dec. 28, 2011).** At issue in this medical malpractice action was the applicability of the locality rule found in Tennessee Code Annotated § 29-26-115(a) in light of the Tennessee Supreme Court's recent decision in *Shiple v. Williams*, 350 S.W.3d 527 (Tenn. 2011). In *Walker*, the trial court excluded plaintiff's proffered medical expert because he failed to comply with the locality rule. The trial court gave little weight to the expert's assertion that the Virginia hospitals in which he practiced were similar to those in Gibson County and excluded his testimony because he espoused a national, as opposed to a local, standard of care. However, recognizing that the standard to be utilized in assessing whether a medical expert's testimony has satisfied the locality rule had shifted under *Shiple*, the Tennessee Court of Appeals remanded the trial court's order which had been rendered prior to *Shiple*. In its analysis, the court first noted that *Shiple* rejected the requirement that a medical expert have "personal, firsthand, [or] direct knowledge" of the local standard of care and further opined that an expert that testifies as to a national standard of care should not be *per se* disqualified from offering his opinion. Accordingly, in light of the considerations set forth in *Shiple*, the court vacated the trial court's judgment and remanded the case for further consideration.

***Crawford v. Kavanaugh*, No. E2011-00696-COA-R3-CV, 2011 WL 5829602, at *1 (Tenn. Ct. App. Nov. 21, 2011).** In this medical malpractice action, the Tennessee Court of Appeals affirmed the trial court's dismissal of plaintiff's complaint for failing to file a certificate of good faith in accordance with Tennessee Code Annotated § 29-26-122. Plaintiffs originally filed this action in 2006. Before the case went to trial, the legislature amended the Medical Malpractice Act to require the filing of a certificate of good faith from a medical expert certifying that there is a good faith basis to maintain the action consistent with the Act. Plaintiffs subsequently entered a voluntary non-suit and then re-filed suit more than a year after the effective date of the amendment. However, plaintiffs failed to supply a certificate of good standing, so the trial court dismissed the complaint. In affirming

that dismissal, the Tennessee Court of Appeals held that plaintiffs were required to comply with the filing requirements that existed at the time of the filing of their second complaint and further held that plaintiffs were not protected by the fact that their initial lawsuit was filed before the amendment was enacted.

***Morgan Keegan & Company, Inc. v. Smythe*, No. W2010-01339-COA-R3CV, 2011 WL 5517036 (Tenn. Ct. App. November 14, 2011).** In a matter of first impression in Tennessee, the Tennessee Supreme Court held that a trial court's order vacating an arbitration award *and directing rehearing* is not subject to appellate review under Tennessee Code Annotated § 29-5-319. The defendant appealed the trial court's order vacating an arbitration award and directing rehearing and argued that jurisdiction was proper under Tenn. Code Ann. § 29-5-319(a)(3). That statute provides that an "an order confirming or denying confirmation of an award" is appealable. The court held, however, that Tenn. Code Ann. § 29-5-319(a)(3) was inapplicable because the trial court's order directed rehearing and was therefore not a final and appealable order. The court opined that the plain language of Tenn. Code Ann. 29-5-319(a)(5), which states that an appeal may be taken from "an order vacating an award *without rehearing*," indicates that an order vacating an arbitration award and remanding for rehearing is not appealable because it is not final. Moreover, though the court found that the Federal Arbitration Act applied to the substantive issues of the case, it opined that the provisions in Tenn. Code Ann. § 29-5-319(a)(3) were procedural and were not preempted by federal law. Accordingly, the appeal was dismissed for lack of subject matter jurisdiction.

Breach of Contract

***84 Lumber Company v. R. Bryan Smith*, 356 S.W.3d 380 (Tenn. 2011).** At issue in this breach of contract case was whether a president of a company agreed to personally guarantee the debts of his company when he signed a commercial credit application that contained a guaranty provision. In *84 Lumber*, the commercial credit application contained only one signature line for the "Applicant" that was located below a guaranty provision. "Applicant" was identified at the top of the commercial credit application as the company seeking the commercial credit. The president of the company signed the commercial credit application on the Applicant signature line as "R. Bryan Smith, President." The Tennessee Court of Appeals held that the president's signature did not sufficiently indicate that he would answer for the debt of the company and further held that he would have had to execute the agreement a second time in order to be liable as guarantor. However, the Tennessee Supreme Court reversed and held that the commercial credit application contained explicit language that bound the president as personal guarantor of the company's debts because the signature line appeared directly below the guaranty provision. Thus, the court opined that the clear and unambiguous language reflected that the president signed both in his representative capacity and as a personal guarantor.

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