Litigation Law Section Newsletter
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Tennessee Supreme Court Adopts
Strict Pleading Rule Regarding Causation Proof
By John B. Bennett

In the years since the landmark case of McIntyre v. Ballentine1 and the adoption of a modified comparative fault rule in this state, the Tennessee Supreme Court has issued several decisions which provide practitioners and the lower courts guidance on how to apply the standard to various situations. The Court recently adopted, in the case of George v. Alexander,2 a strict reading of the affirmative defense pleading requirement found in Rule 8.03 of the Tennessee Rules of Civil Procedure. George held that evidence offered by the defendant of an alternative cause necessitates an affirmative defense allegation in the defendant's Answer. The practical effect of George is that a defendant must trigger Tennessee Code Annotated §20-1-119, which would then permit a plaintiff to file suit against the non-party even if the statute of limitations had run as to that party.3 The defendant may allege an alternative cause of injury only if the plaintiff is also given an opportunity to pursue a cause of action against that third party.

Following McIntyre, Rule 8.03 was amended to require that a party who wishes to allege that the fault of a non-party reduced its liability for damages must identify in an answer or amended answer the contributing tortfeasor. This amendment, however, appeared to apply only when the non-party was a "tortfeasor."4 This led to the problem faced by the defendant of whether a specific affirmative defense was required when the defendant alleges that the cause or partial cause of the plaintiff's injury was someone else's non-negligent conduct.

The Tennessee Supreme Court reacted to this quandary in George.5 The Court set forth a bright-line rule that a defendant must plead in an answer or amended answer if she intends to offer evidence that another person caused or contributed to the alleged injury. This requirement applies whether or not the defendant alleges that the non-party was negligent. The basis for this decision, wrote the Court, is that such causal evidence effectively shifts blame for the injuries to another person. Because blame is shifted, the evidence falls into the category of a comparative fault affirmative defense and, therefore, pursuant to the pleading rules for an affirmative defense, the answer must identify the non-party. The Supreme Court was not persuaded by the fact that the defendants were not asserting, nor wished to assert, that another party was negligent, and had offered the evidence only to negate an element of the plaintiff's prima facie case - causation.

George was filed as a medical malpractice lawsuit. In October 1989, Ms. Ethel George underwent gynecological surgery performed by Dr. James Daniell, Jr. Dr.

Daniell ordered local anesthesia, to be delivered through an epidural catheter. Two anesthesiologists, the defendants, were involved in placing the epidural. After delivery of the anesthesia, the plaintiff was placed on her back with her feet supported by stirrups - the lithotomy position - at the direction of Dr. Daniell.
In October 1990, the plaintiff sued the anesthesiologists, but not the surgeon. The plaintiff alleged permanent damage to two nerve roots caused by the administration of the anesthesia. The defendants denied the plaintiff's allegations and reserved affirmative defenses. The defendants did not assert in their Answer the name of any other party who contributed to the plaintiff's injuries.

The case was set for trial in November 1993. A month before trial, the plaintiff took the deposition of a subsequent treating physician, neurosurgeon Vaughn Allen, M.D. Plaintiff's attorney asked Dr. Allen's opinion on causation. Dr. Allen gave two possible causes of the plaintiff's alleged injuries, one unlikely and the other the probable cause of injuries. The unlikely cause was inappropriate insertion of the needle used to administer anesthesia. The probable cause was improper positioning of Ms. George for the surgery. The surgeon, according to Dr. Allen, was "primarily responsible" for proper positioning. Following the deposition, the defendants gave notice that they intended to introduce Dr. Allen's deposition at trial.

The plaintiff, prior to trial, moved that Dr. Allen's deposition testimony be excluded. Although the plaintiff learned of Dr. Allen's opinions the same time that the defendants did, the plaintiff argued that the defendants should be barred from offering the opinions because they did not assert as an affirmative defense that Dr. Daniell was at fault. The defendants responded to this argument that they were not asserting that the surgeon was negligent in causing the plaintiff's injury, but that the required positioning was the cause of any alleged injury. The testimony was limited only to defeating the prima facie element of causation. The defendants did not seek to have Dr. Daniell's name listed on the jury form as someone to whom the jury should attribute fault.

The trial court denied plaintiff's motion and admitted Dr. Allen's testimony into evidence. The jury returned a verdict for the defendants. The plaintiff appealed and the intermediate appellate court affirmed. The Tennessee Supreme Court then granted the plaintiff's application to appeal.

The plaintiff argued before the Court, as she had earlier, that the trial court permitted the defendants to shift blame to Dr. Daniell at trial and that this result was synonymous with a comparative fault affirmative defense. Because the defendants had failed to assert that Dr. Daniell was at fault in their pleadings, plaintiff argued, they should have been barred from putting on the testimony from Dr. Allen that the plaintiff had obtained. The defendants again submitted that they were not asserting that Dr. Daniell was negligent. Their purpose was to establish only that they were not the cause of injury. Therefore, the pleading rules regarding an affirmative defense never came into play.

In coming to the conclusion that the defendants should have named Dr. Daniell in a comparative fault affirmative defense, the Court analyzed the requirements of Tennessee Rules of Civil Procedure 8.03. In pertinent part, Rule 8.03 reads:

In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction, arbitration and award, assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasors)...

The advisory commission explained that this rule applied only to tortfeasors:

"Comparative fault" is substituted for "contributory negligence" in light of McIntyre v. Ballentine, 833 S.W.2d 52 (Tenn. 1992). Note that the defendant must identify or describe other alleged tortfeasors who should share fault, or else the defendant normally would be barred from shifting blame to others at trial.

In McIntyre, however, the distinction between asserting another is at fault and another is a cause, negligent or not, was obscured:

Fourth, fairness and efficiency require that defendants called upon to answer allegations in negligence be permitted to allege, as an affirmative defense, that a nonparty caused or contributed to the injury or damage for which recovery is sought. In cases where such a defense is raised, the trial court shall instruct the jury to assign this nonparty the percentage of the total negligence for which he is responsible.6

This passage mentions only causation, not causation plus negligence, as the "affirmative defense." Therefore, asserting someone caused or contributed to an injury became synonymous with saying the cause was the product of negligence. After McIntyre, the state legislature passed a comparative fault statute, Tennessee Code Annotated §20-1-119, to permit suing the nonparty named in an answer or amended answer regardless of whether a statute of limitations otherwise would bar suit. In harmony with the above-quoted language from McIntyre, the legislature omitted language that the defendant had to allege that another person was negligent in addition to causing injury. That provision, in pertinent part, states:

20-1-119. Comparative fault - Joinder of third party defendants. (a) In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against such person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may within ninety (90) days of the filing of the first answer or first amended answer alleging such person's fault, either: (1) Amend

the complaint to add such person as a defendant pursuant to Rule 15 of the Tennessee Rules of Civil Procedure and cause process to be issued for that person; or (2) Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an "original complaint initiating the suit" or "an amended complaint" for purposes of this subsection.
(b) A cause of action brought within ninety (90) days pursuant to subsection (a) shall not be barred by any statute of limitations. This section shall not extend any applicable statute of repose, nor shall this section permit the plaintiff to maintain an action against a person when such an action is barred by an applicable statute of repose.
. . . .
(e) This section shall not limit the right of any defendant to allege in an answer or amended answer that a person not a party to the suit caused or contributed to the injury for which the plaintiff seeks recovery.

In George, the Supreme Court reasoned that offering causation evidence was "effectively" shifting blame despite the defendant not offering evidence that the cause was the product of negligence. Although the defendants were not asking that fault be assigned to another, only to find that the anesthesiologists were not the cause of injury, the Court decided that the result was shifting blame and would be "totally surprising" to the plaintiff. The problem with this reasoning is two-fold: (1) blame is not shifted, effectively or otherwise, when the defendant offers evidence only to defeat the prima facie element of causation, and (2) the plaintiff could not be surprised when she obtained, in advance of trial, the evidence later used by the defendants.

Attacking the plaintiff's prima facie case is not synonymous with asserting an affirmative defense. "[M]atter that merely contradicts the plaintiff's prima facie case is a negative defense. A true affirmative defense, which is avoiding in nature, raises matter outside the scope of the plaintiff's prima facie case."7 The defendants were attacking the plaintiff's prima facie case by negating causation. The defendants were not asserting that the negligence of another was the cause of injury. Therefore, the proof offered by the defendants was not an affirmative defense requiring the same to be pleaded. The plaintiff was protected by the fact that the defendants were the only ones that the jury could hold responsible if the plaintiff proved her case. No other defendant was listed on the jury form.

The Tennessee Supreme Court, however, found that the jury will step outside these parameters and "effectively" shift blame to non-parties if the defendant proves that the plaintiff has failed to carry her burden of proof. Although a plaintiff should be protected from a surprise that actually shifts blame by proof of another's negligence that caused injury, it does not follow that a plaintiff needs to be protected from a failure of proof in her prima facie case.

On its facts, George was not the case to establish this broad rule. The plaintiff received notice of the non-party causation at the same time as the defendants. The plaintiff obviously was not surprised at trial by the testimony. Additionally, even if the defendants had amended their Answer to conform with what they had learned during Dr. Allen's deposition and alleged that Dr. Daniell caused the injuries, the statute of repose would have barred any claim against the surgeon. To sidestep these arguments, the Court stated in its opinion that it is adopting a "prophylactic" rule "that must be strictly adhered to if it is to achieve its purpose."8 The Court will not review the merits of the case to analyze whether the error was harmless. Despite its shortcomings, there is a sense of practical reasoning in George that benefits both defendants and plaintiffs. The pleading standards are set when causation proof is at issue. The Court established that the plaintiff at all times should be given the opportunity to benefit from Tennessee Code Annotated §20-1-119 and to pursue a negligence case against all those who are alleged to be a cause of injury. Otherwise, defendants could escape liability by proving that another caused an injury. The plaintiff subsequently would have only 20/20 hindsight about who should have been sued and held responsible for an injury. Although the defense must make this pleading allegation, it remains incumbent on the plaintiff to prove a case against the third party.

Regardless of whether this was the case that should have resulted in this new law, the bright-line rule established in George provides guidance to all involved. Attorneys should reexamine their pleadings and draft answers with the George holding in mind. With this "prophylactic" rule, all attorneys should not be "surprised" by rulings on causation evidence that is subject to the George holding.

FOOTNOTES

1. 833 S.W.2d 52 (Tenn. 1992).

2. 931 S.W.2d 517 (Tenn. 1996).

3. Counsel should be aware that this statutory provision does not extend a statute of repose.

4. Tenn. R. Civ. P. 8.03.

5. 931 S.W.2d 517 (Tenn. 1996).

6. McIntyre, 833 S.W.2d at 58.

7. 2A Moore's Federal Practice, 2nd Ed., § 8.27[4].

8. George, 931 S.W.2d at 522.

Ten reasons to read
The Life of the Law
By Pamela L. Reeves & Charles W. Swanson

A very special aspect of engaging in the practice of law involves being part of a long-often distinguished line of professional advocates who have toiled in the trenches to develop and secure individual rights and to resolve important disputes in a mostly civilized, non-violent manner. Many of us have only a vague, somewhat intuitive perception of our connection to our historical predecessors. Even the history majors among us often can not remember (or never knew) where the concept of "due process" originated or how the notion of stare decisis has become such a prominent factor in modern law. Good news for all of us! Our own colleague, Alfred Knight of Nashville, has written a truly informative and yet very readable book, The Life of the Law. The book is full of interesting historical vignettes which serve to illuminate the source of many of the most fundamental legal concepts upon which we rely every day in our practice. Knight's book is surprisingly short, only 266 pages, and almost completely free of the formal citations which would otherwise bog down a pleasant read.

We know how difficult it is to convince a lawyer to take time away from billable hours to read a history of the law and legal system or for that matter to even read a book review. With that thought in mind, we decided to tempt you by simply listing ten of the many good reasons why every practicing lawyer should read this book.

1. You will learn a lot you never knew about the history and tradition of our system and our profession. Even those of you who were history majors and thought you knew all there was about the common law traditions of our system may be surprised to know that there was a lot they never taught you in Western Civilization or American History 1010. For instance, did you know that the organized "Bar" got its start when King Edward I issued a simple order in 1291 that a certain number of the "better, worthier, and more promising...attorneys and apprentices should be ordained to follow the court and take part in its business, and no other"? We bet you never knew you owed that license on your wall to Edward I.

2. You will learn that the Magna Carta really is not all that it has been cracked up to be. At one time or another, many of us have been on the receiving end of a passionate closing argument where the Magna Carta has been described as the source of all that is good and wonderful about the American way. Al Knight's book may not provide you with a passionate response to this type of argument, but at least you will learn that, in fact, the Magna Carta was merely just a "tenant's relief act." Even the requirement that no action shall be taken against a person "except by the lawful judgment of his peers..." does not mean exactly what we have all been taught it means. Knight goes so far as to declare that "most of the other claimed constitutional offspring of the charter are equally illegitimate."

3. You will learn that the concept of stare decisis had its origin in an exasperated comment from an English judge during a tedious oral argument in 1454. What is more amazing is that you will learn how that concept has been used and abused in the American legal system to provide Supreme Court justices with ways to leap from Plessy v. Ferguson to Brown v. Board of Education. As Knight points out, these precedents become important "about once in every generation, [when] a constitutional whale surfaces in the American judicial sea," but it is helpful to see the development of these concepts. The potential impact of these judicial leaps is further illustrated in Knight's discussion of the Supreme Court's decision in Casey v. Planned Parenthood.

4. You will learn what John Scopes had in common with Thomas More. Anyone who has ever had the opportunity to sit at counsel's table in the old courtroom in Dayton has felt the ghosts of Clarence Darrow and William Jennings Bryant looming over our shoulder. If you read this book, you will find yourself looking for Thomas More as well. Knight points out that the role of the martyr against the state has always been important in developing legal principles, but adds that the advent of modern media helps compress "a generation of struggle into an instantly decisive event." Knight then looks at the civil rights arena and demonstrates that the techniques used by the marchers in Birmingham in the 1960s were actually techniques used many years earlier in Dayton, Tennessee.

5. In a time when the concept of judicial independence and accountability is being hotly debated, you will learn exactly where the concept of judicial review arose. Contrary to the belief of many that it developed from John Marshall's famous decision in Marbury v. Madison ("That is like saying Macy's invented Christmas."), Knight explains that Lord Coke created the concept of judicial review to overturn an act of Parliament simply by finding that the act was "against common right and reason," "repugnant," and "impossible to be performed." Accordingly, the act of Parliament was deemed "utterly void." The mere fact that he had no precedent whatsoever to support this type of ruling did not seem to bother Lord Coke, whom Knight describes as follows: "If being an effective judge means making the undisciplined exercise of power palatable by garnishing it with rhetoric and massive learning, Coke was a Hall of Famer."

6. Speaking of Lord Coke, you will learn that Sir Walter Raleigh was really just out on bail when he came to Virginia to help the settlers conquer the new world. Lord Coke was actually the one who prosecuted Raleigh and ultimately claimed Raleigh's head. What is more important for those of us in the legal community is the fact that the charges and conviction against Raleigh were based entirely on blatant hearsay. Knight calls the rule against hearsay "the foot soldier of due process" and points out that contrary to common practice, law students should bless hearsay ("Raleigh most certainly would have."), not curse it.

7. You will learn that the genesis of the freedom of speech was in the prosecution of an immigrant printer named John Peter Zenger. Zenger was a nice guy who must

have considered himself a “Gary Trudeau” of his time because he ran cartoons of various government officials depicted as animals. Zenger was defended by Alexander Hamilton, who must have been the Johnnie Cochran of his time, because Hamilton took the position in his closing argument that “the question before...you...is of no small or private concern; it is not the cause of a poor printer, nor of New York alone which you are trying.” Hamilton’s client was acquitted, and freedom of the press took a giant leap forward.

8. You will learn about the lives of the people behind the cases that are important in our history. Unfortunately for those of us condemned to reading case summaries and advance sheets, most of our exposure to the people who starred in these important cases is very limited. Al Knight goes beyond the basics, and we actually learn about the people who were the stars — even those who lost their cases, but ultimately won their causes. You will learn how Margaret Douglas’ simple attempt to teach a barber’s children to read led to her arrest and conviction for “teaching colored children to read and to write.” You will learn more about Rosa Parks and Susan B. Anthony and realize that the causes they fought for were revolutionary in their time, even though today their actions seem quite tame. In fact, Knight makes you realize that a lot we take for granted today was very revolutionary not so very long ago.

9. You will learn that the untimely death of Chief Justice Fred Vinson was really the reason that desegregation was struck down in Brown v. Board of Education. You will also see how that change on the Supreme Court led the Court to become much more confident and assertive during the Warren era. Most lawyers have strong opinions on the role the Supreme Court should play in our society and in our system. The Life of the Law provides real insight into how the Court’s current role has developed. As Knight points out, the end result is that we are now at a point in time where society perceives that “everything desirable” is a “right” and Americans strive “to be members of an injured class.”

10. You will laugh a lot while you are learning this wealth of information. It is easy for lawyers and judges to become so cocky about our perceived importance in the world that we lose our sense of humor. Al Knight will make you laugh, even as you learn about our profession and our legal system.

Take the time to read and enjoy this book. It is better bedtime reading than depositions or Barney books. Even better, bring it with you to the TBA’s Annual Meeting at the Sandestin Hilton in Destin, Florida, from July 13-18. It will make a great beach book.

We bet you never knew you owed that license on your wall to Edward I.