Litigation Letter — March 2002

From the Chair

Happy New Year to all of the Tennessee Bar Association's Litigation Section members. The Litigation Section is one of the strongest and largest sections in our bar association. Our current membership is in excess of 500 members.

The purposes of our section are:

• To provide a forum to address the problems of the trial practitioner who specializes in litigation, without limitation to a particular substantive area.

• To ensure the freedom of the adversary process.

• To support and inspire the art of trial and appellate advocacy.

• To generally promote and further the interests of the profession within the field of litigation.

Continuing in the tradition of the section and to fulfill our stated purposes, we are pleased to provide you with this most current issue of the section's newsletter. We hope you will find the substantive and practical articles in the newsletter to be of aid to you in your daily practice of law and work for the enhancement of our profession.

Doug Janney, of Manier & Herod, is serving as the section's newsletter editor. Members are invited to submit articles for publication in future section newsletters. Information concerning submission of articles is available at the end of this newsletter.

The Litigation Section strives to provide our membership with CLE of superior quality. Overton Thomas III of Bass, Berry & Sims PLC has volunteered his time and talent to organize and schedule the Litigation Section's 2002 CLE

offerings.

The section will continue the tradition of providing our membership with a series of Litigation Review Seminars in the coming year. The seminars provide professional education in a wide variety of litigation practice areas. The seminars have been scheduled in Knoxville on May 9, in Nashville on May 16 and in Memphis on May 23. This series of Litigation Review Seminars will culminate with a presentation of the seminar at the Tennessee Bar Association's 121st annual TBA convention. The convention will be held on June 13 and 14 at the Chattanooga Marriott. Please watch for future section newsletters and regularly visit the Tennessee Bar Association's web site for more information about the convention and other CLE programs.

Mark June 13 and 14, 2002 on your calendars. During the convention the Litigation Section will hold its annual meeting and our section should strive to be the best attended section of the convention. Without the volunteered time and talent of our membership, the work of the section would not be possible. Come to the convention and increase your level of involvement in your section, build richer professional relationships with your colleagues and generally have a good time. Also, urge your other litigators to join the Tennessee Bar Association Litigation Section and become involved in its professional activities. Litigators can join our section on-line by visiting the Tennessee Bar Association's web page, www.tba.org.

J. Steven Collins
2001-2002 Chair

John Steven (Steve) Collins is a partner with Arnett, Draper & Hagood in Knoxville, where his primary areas of practice are workers' compensation, employment law and civil litigation.

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Workers' Compensation Alert: 'Willful Failure to Use a Safety Appliance' as a Defense

By John A. Willis

Justice Frank F. Drowota, III of the Tennessee Supreme Court recently authored an opinion for the Special Workers' Compensation Appeals Panel clarifying the circumstances under which Tenn. Code Ann. §50-6-110(a) will provide a complete defense to a workers' compensation claim for the employee's "willful failure or refusal to use a safety appliance." See Nance v. State Industries, Inc. and ITT Hartford Ins. Co., No. M1999-02262-WC-R3-CV (Tenn. Sp. Work. Comp. Panel, Dec. 27, 2000, aff'd and adopted). The court's holding will also presumably apply to cases involving willful failure to follow safety rules. The Tennessee Supreme Court has approved and adopted Drowota's opinion. Because the opinion was authored by Drowota, it is anticipated that the full supreme court will accord it more persuasive authority than an opinion written by a special judge.

Section 50-6-110(a) provides as follows:
No compensation shall be allowed for an injury or death due to the employee's willful misconduct or intentional self-inflicted injury, or due to intoxication or illegal drugs, or willful failure or refusal to use a safety appliance or perform a duty required by law.

Decisions prior to Nance did not provide concrete rules but instead made vague pronouncements about the proof required to succeed on the willful failure to use a safety device or follow a safety rule defense. While employers were at times able to prevail using the defense, the courts' considerable discretion in interpreting the statute made the defense a moving target. The new rule announced in Nance provides specific guidelines within which the courts must apply the defense. Moreover, the rule gives employers guidance in instituting policies for safety appliances before injuries occur.

The burden of proof remains with the employer, and it is a "tough row to hoe" unless the employer adopts clear rules, ensures that employees are aware of such rules, and consistently enforces such rules. Indeed, Nance emphasizes that employers must have well-publicized safety rules that are actually enforced to prevail on the willful failure or refusal to use a safety appliance defense. The elements of the defense are:

1. At the time of the injury, the employer had in effect a policy requiring the employee's use of a particular safety appliance;

2. The employer carried out strict, continuous and bona fide enforcement of the policy;

3. The employee had actual knowledge of the policy, including a knowledge of the danger involved in its violation, through training provided by the employer; and

4. The employee willfully and intentionally failed or refused to follow the established policy requiring use of the safety appliance.

Significantly, Justice Drowota stated that "constructive notice" of safety rules, such as posting the rules in the workplace, is not enough for the employer to prove "actual knowledge." Rather, the employee must be instructed on the safety rules and policies.

Courts are construing the elements of the willful failure to use a safety appliance defense narrowly. For example, in Nalls v. E. I. Dupont De Nemours Co., No. M1999-00375-SC-WCM-CV (Jan. 9, 2001, aff'd and adopted), the Special Workers' Compensation Appeals Panel refused to apply the defense to a claimant who was injured while inspecting a rail tank car before she began to unload it. The tank contained sulfuric acid.

During the inspection, the acid sprayed on the employee, causing serious injury.
The employer in Nalls had rules in place requiring employees to wear protective suits and equipment while unloading tank cars containing hazardous material. The proof showed that these rules were regularly reviewed by the employee and strictly enforced. The Appeals Panel held that the defense did not apply, however, because the rules addressed unloading the tank cars rather than inspecting them.

Thus, employers should create comprehensive rules that specifically apply to any known or foreseeable hazards that employees may encounter on the job. If employers instruct their employees about such rules and consistently enforce them, the chances of avoiding liability using the willful failure to use a safety appliance defense are enhanced given the recent holding in Nance.

John A. Willis is an associate at Arnett, Draper & Hagood in Knoxville, where his primary area of practice is civil litigation, including matters involving workers' compensation, insurance defense, construction law, products liability and health care law.

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Arbitrarily Terminated Teacher Aids Have No Expectation of Continued Employment, No Entitlement to Back Pay Beyond Contract Term

By Douglas B. Janney III

The Tennessee Supreme Court recently held that non-certified, non-tenured teacher aids are not entitled to back pay and benefits beyond the expiration of their written employment contracts where they do not have a reasonable expectation of continued employment beyond the term of such contracts. Cantrell v. Knox County Board of Education, 53 S.W.3d 659 (Tenn. Aug. 23, 2001). The plaintiffs were five teacher aids who had refused to attend a training session on inserting catheters into children with neurogenic bladders. Following individual conferences with the teacher aids, the school board defendants scheduled another training session for the teacher aids. The Board also advised the teacher aids that failure to attend would result in the Superintendent recommending their termination for insubordination.

The teacher aids again refused to attend the training session. The Board advised each by letter that the Superintendent would recommend termination at an upcoming hearing before the Board. Following the hearing, the Board voted to terminate the teacher aids' contracts based on insubordination.

The teacher aids filed a petition for certiorari in the circuit court. That court held that the Board's decision to terminate the contracts was "arbitrary" in light of its policy providing that teacher aids did not have to perform the catheterization procedure if they were uncomfortable doing so. The trial court awarded the teacher aids back pay and benefits for the remainder of their contract period, along with pre-judgment interest.

The Court of Appeals affirmed the trial court's decision as to "arbitrariness," but held that the teacher aids may have had a reasonable expectation of continued employment beyond the term of their contracts. Thus, the court concluded

that the teacher aids may have been entitled to back pay beyond the contractual period, and remanded the case. Both parties filed applications for permission to appeal to the supreme court.

The supreme court granted the Board's application to determine the correct measure of damages for the arbitrarily terminated contracts. The court recognized that the proper measure of damages for breach of an employment contract is "the salary that would have been earned had the contract not been breached, less any amount the employee earned or should have earned in the exercise of reasonable diligence in some other employment during the unexpired contract term." Cantrell, 53 S.W.3d at 662. The court observed that upholding an award of damages beyond the term of the contracts would place the teacher aids in a better position than they would have been in had the contracts been performed.

The court reasoned that neither Tennessee statutory law nor the Board's charter afforded the non-certified, non-tenured teacher aids a reasonable expectation or assurance of continued employment beyond the term of their contracts. Rather, the Teacher Tenure Act indicates that teacher aids do not perform the same functions as certified teachers and are thus not afforded tenure. Similarly, the charter listed several categories of school employees who may attain tenure, but conspicuously omitted teacher aids.

Accordingly, the court reversed the Court of Appeals' finding that the teacher aids may have been entitled to back pay and benefits beyond the term of their contracts. The court affirmed the trial court's holding that the teacher aids were only entitled to the salary that they would have earned but for the breach, less any amount that they earned or should have earned through other employment before the contracts expired.

Douglas B. Janney III is an associate at Manier & Herod in Nashville. He concentrates on commercial, business and tort litigation, as well as employment law.

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Liability of a Municipality for Injuries to a Passenger in a Fleeing Vehicle in a High Speed Police Chase

By Bill Bates

In Richard Fawcett, et al. v. Jarrod C. Adreon, et al., No. M2000-00940-COA-R3-CV, filed August 21, 2001, the Middle Section Court of Appeals held that a law enforcement officer owed no duty of care to a passenger in a vehicle fleeing from the law enforcement officer in a high speed police chase. The duty of care to a passenger in a fleeing vehicle during a high speed police chase was an issue of first impression in the appellate courts of Tennessee.

The pertinent facts on appeal were not in dispute. Danielle Fawcett, a minor, attended a party in Nashville and became severely intoxicated. Fawcett's friend, Jarrod Adreon, drove Fawcett home to Franklin in her car. Stephen Sullivan, an officer with the Franklin Police Department, was sitting in his patrol car at Kentucky Fried Chicken on Highway 96, just off of Interstate 65, when he heard a description on his two-way radio of two cars racing on Interstate 65.

Officer Sullivan then saw two cars exiting Interstate 65 and traveling west on Highway 96. Officer Sullivan pulled out of the Kentucky Fried Chicken parking lot and began to pace the cars traveling west on Highway 96. He determined that the cars were traveling 79 miles per hour in a 40- mile per hour zone. Officer Sullivan illuminated his blue lights. Meanwhile, Adreon accelerated and attempted to flee.

Adreon testified that, at the time Officer Sullivan activated his blue lights, Fawcett was asleep in the passenger seat. Adreon turned left on Mack Hatcher Parkway and continued speeding. Adreon testified that Officer Sullivan was immediately behind him once he turned onto Mack Hatcher Parkway. Adreon then entered a construction zone, and Officer Sullivan slowed his patrol car.

At about this time, Fawcett woke up and began screaming for Adreon to stop. An alarmed Adreon misread the road markings in the construction zone and veered over into the left-hand lane. Adreaon then overcorrected his steering, and the vehicle went off of the right-hand side of the road and flipped over. Adreon was thrown from the vehicle and suffered minor injuries. Fawcett received injuries that resulted in her death. Investigation of the accident revealed that Fawcett had a blood alcohol level of .18, and Adreon had a blood alcohol level of .04.

Adreon was later convicted of criminally negligent homicide.

Fawcett's father sued Adreon and the City of Franklin for negligence resulting in a wrongful death. The City moved for summary judgment. The trial court granted summary judgment to the City, finding that Mr. Fawcett was precluded from suing the City for negligence because he was not an "innocent third party." Mr. Fawcett appealed.

Mr. Fawcett argued that Tenn. Code Ann. §55-8-108(d) imposes a duty on law enforcement personnel to drive with due regard for the safety of all third parties. Since his daughter was a passenger in the fleeing car, Mr. Fawcett contended that she was a third party to whom the City owed a duty of care. The City argued that it did not owe Fawcett a duty of care because Tenn. Code Ann. §55-8-108(e) provides that no municipality, nor their officers and employees, "shall be liable for any injury proximately or indirectly caused to or by an actual or suspected violator of the law or ordinance who is fleeing pursuit by law enforcement personnel." The City asserted that Fawcett was a suspected violator of the law who was fleeing pursuit by a law enforcement officer.

In Haynes v. Hamilton County, 883 S.W.2d 606 (Tenn. 1994), the supreme court held that a police officer's decision to commence or continue a high speed chase may form the basis of liability in an action brought by a third party injured by the fleeing suspect if the officer's decision was unreasonable. In determining whether the decision to initiate or continue pursuit is reasonable, the risk of injury to a third party should be weighed against the interest in apprehending the suspect. Since the injured parties in Haynes were the occupants of a vehicle not involved in the high speed pursuit, Haynes did not address the issue of whether a passenger in a vehicle involved in a high speed police chase is a "third party" under Tenn. Code Ann. §55-8-108(e). The language of the statute does not indicate whether such a passenger would be considered a "suspected violator" or a "third party."

The Fawcett court held that, in the absence of information to the contrary, a police officer may reasonably assume that a passenger in a fleeing vehicle is engaged in a common criminal activity with the driver, and is therefore a suspected violator of the law under Tenn. Code Ann. §55-8-108(e). Where a passenger is a "suspected violator" and not a "third party", a municipality cannot be held liable for an injury to the passenger resulting from a high speed police chase. The court held that there were no facts making it unreasonable for the police officer to assume that Fawcett was engaged in a common criminal activity with Adreon, the driver. The Court concluded that, under these circumstances, Fawcett was a "suspected violator" under the statute. Thus, the City could not be held liable for Fawcett's death, even if the police officer's decision to commence or continue the chase was negligent.

William N. Bates is a partner at Farrar & Bates LLP, in Nashville. He received his law degree from the University of Memphis. He concentrates on civil litigation involving the defense of municipalities.

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Tennessee Recognizes False Light Invasion of Privacy Claims

By Douglas B. Janney III

The Tennessee Supreme Court recently accepted certification from a federal district court of the following question: "Do the courts of Tennessee recognize the tort of false light invasion of privacy, and if so, what are the parameters and elements of that tort?" In following the majority of jurisdictions in the United States, the court in West v. Media General Convergence, Inc., 53 S.W.3d 640 (Tenn. Aug. 23, 2001), held that false light invasion of privacy is a distinct, actionable tort in this state. The court concluded that the parameters and elements of the tort are set forth in Section 652 of the Restatement (Second) of Torts (1977). Section 652E of the Restatement defines the tort of false light as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The court in West observed that "[w]hile the law of defamation and false light invasion of privacy conceivably overlap in some ways, we conclude that the differences between the two torts warrant their separate recognition." West, 53 S.W.3d at 645. In distinguishing false light from defamation, the court quoted from the

Supreme Court of West Virginia: "in defamation cases the interest sought to be protected is the objective one of reputation … In privacy cases the interest affected is the subjective one of injury to [the] inner person." Id. at 645-56 (internal citation omitted). Indeed, the facts publicized may be true in a false light case, whereas truth is a defense to a defamation claim. The court stated that

[c]ertainly situations may exist in which persons have had attributed to them certain qualities, characteristics or beliefs that, while not injurious to their reputation, place those persons in an undesirable false light. … victims of [such an] invasion of privacy would be without recourse under defamation law. False light therefore provides a viable, and we believe necessary, action for relief apart from defamation.
Id. at 646.

In contrast to the minority view, the West court found that its recognition of false light would not result in unnecessary litigation, multiple recoveries, or destabilization of First Amendment protections of speech. Needless litigation is foreclosed by the fact that liability may only be imposed if the publicized matter is highly offensive to a reasonable person. Similarly, Comment "b" to Section 652E of the Restatement precludes double recovery by providing that a plaintiff asserting defamation and false light claims may "proceed under either theory, or both, although he can have but one recovery for a single instance of publicity." Finally, the "actual malice" standard adequately protects First Amendment rights where a public official, figure, or matter is involved. As in defamation claims, however, private individuals bringing false light claims concerning private matters need only prove negligence on the part of the publisher.

As to the parameters of false light, the court held that Sections 652F and 652G of the Restatement sufficiently address its limits. These sections provide that absolute and conditional privileges apply to the four invasion of privacy torts. With respect to damages, the court "emphasize[d] that plaintiffs seeking to recover on false light claims must specifically plead and prove damages allegedly suffered from the invasion of their privacy." West, 53 S.W.3d at 648. As in defamation cases, there must be proof of actual damages. A plaintiff need not prove special damages, however, "as evidence of injury to standing in the community, humiliation, or emotional distress is sufficient." Id.

The court further stated that the right to privacy is a personal right that cannot attach to corporations or businesses or be assigned to others. Rather, only persons who have actually been placed in a false light may recover for invasion of privacy. Finally, the court held that false light claims are subject to the same statutes of limitation as libel and slander claims, as set forth in Tenn. Code Ann. §§28-3-103 and -104(a)(1), depending on whether the publicity was in spoken or fixed form.

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10 Tips From the Trenches: Seeking Injunctive Relief

By Douglas B. Janney III

1. Begin with a review of Rule 65, Federal or Tennessee Rules of Civil Procedure.

2. Check the local rules. Consider this example: Tenn. R. Civ. P. 65 permits a court to grant a restraining order without notice to the opposing party; Davidson County Local Rule 19.02 requires notice unless "good cause is shown for dispensing of notice and supported by affidavit."

3. Make sure the harm for which injunctive relief is sought is "irreparable." Would the payment of money damages make the plaintiff completely whole? Can the harm be measured in dollars?

4. Make sure the harm is "imminent." Must the action complained of be stopped (or started) immediately to avoid irreparable injury?

5. Consider the "probability of success on the merits" and the "balancing of the equities" factors. Have you researched the law on the claims in the complaint? Will third parties or the public be adversely affected by the granting of injunctive relief?

6. Draft the necessary documents. These typically consist of a verified complaint or complaint supported by affidavit; an application or motion for a restraining order and/or an injunction; a supporting memorandum of law; an order detailing the precise conduct to be restrained and/or enjoined; and, a bond stating who serves as surety in the event the complaint is dismissed and/or harm is caused to the opposing party.

7. Consider who will verify the complaint or execute the affidavit. This individual may be deposed; thus, he or she should have knowledge of the facts and be a good witness.

8. File your papers quickly; otherwise, "laches" may be a viable defense in equitable proceedings.

9. If seeking an injunction, take advantage of discovery tools. First, submit requests for production of particular documents – do not submit broad "form" requests, as time is of the essence. Create a protective order or request a privilege log, if necessary. Second, turn the documents into evidence – take a concise deposition, and/or draft a detailed affidavit that meets the requirements of Fed. R. Civ. P. 56(e) or Tenn. R. Civ. P. 56.06.

10. At the hearing, make your most important points, and answer the court's questions. Be prepared to immediately appeal the denial of the relief sought if necessary to protect the client's interests.

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War Stories

During a break in a deposition, two Tennessee lawyers were discussing whether Lawyer 1 should examine Lawyer 2's client, who reportedly tipped the scales at 250, about her loss of consortium claim. Lawyer 2 advised Lawyer 1 that he ought to do so. Upon returning to the deposition, Lawyer 1 asked the client, "Ms. Smith, you are claiming damages for loss of spousal relations?" The client replied affirmatively. Lawyer 1 then asked, "before the accident, how often did you have relations with your husband?" The client advised, with a straight face, "seven or eight times per day." Lawyer 1 then asked, "well, how often do you have relations now?" The client responded, "only four or five times a day." Thinking he would impeach the client at trial, Lawyer 1 re-examined her before the jury. The client, however, offered the same responses. As she testified, two twenty-somethings were spotted in the jury box with red faces and bloated cheeks, elbowing each other out of their chairs. Nevertheless, the client prevailed on her claim.

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Submission of Material

The Litigation Section welcomes articles from attorneys for publication in the newsletter. Please submit any articles describing recent cases that you or your colleagues have handled, or that are relevant to litigation practice. Also, please submit any helpful "tips from the trenches" or humorous "war stories" that come to mind. All submissions should be sent to the editor at djanney@manierherod.com.

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Interested in becoming involved?

Welcome to the TBA's Litigation Section. If you have any questions or are interested in becoming involved in this group's leadership, please contact TBA Section Coordinator, Lynn Pointer by e-mail at lpointer@tnbar.org or by fax at (615) 297-8058 or if you have questions, contact Lynn at 1-800-899-6993 or in Nashville at 383-7421. Thanks!