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## Summary of Cases

by Matthew M. Curley & Kathryn Hannen Walker

### NOVEMBER 1, 2009 - JANUARY 31, 2010

#### **BROWN v. UNITED STATES, 2009 Fed. App'x 0772N, 2009 U.S. App. LEXIS 26762 (6th Cir. Dec. 8, 2009).**

James Carmon underwent surgery at the Veterans Administration Medical Center in Memphis, Tennessee, and Plaintiffs, next of kin, alleged that malpractice during the surgery led to Mr. Carmon's death. Plaintiffs offered an expert's opinion based on a national standard of care due to the specialized nature of the procedure. Defendant moved for summary judgment on the grounds that Plaintiffs' expert failed to demonstrate familiarity with the recognized standard of professional practice in Tennessee. Plaintiffs' response did not raise the issue of whether the locality rule set forth at Tenn. Code Ann. § 29-26-115(a), which requires that an opinion witness in a malpractice case be licensed to practice in Tennessee or a contiguous bordering state in the year preceding the date of the alleged injury, could or should be waived with respect to the opinion offered by Plaintiffs' expert. The Sixth Circuit found that Plaintiffs' argument regarding the applicability of the locality rule had been waived due to Plaintiffs' failure to raise this issue before the district court. Regardless, the Sixth Circuit concluded that even if Plaintiffs' argument had not been waived, the opinion of Plaintiffs' expert failed to satisfy the requirements of the locality rule and the district court was not permitted to waive the locality rule.

#### **McINTURFF v. BATTLE GROUND ACADEMY, No. M2009-00504-COA-R3-CV, 2009 Tenn. App. LEXIS 862 (Tenn. Ct. App. Dec. 16, 2009).**

Plaintiff, a player for a local high school baseball team, was struck in the head by a foul ball and injured during a high school baseball game while seated on a bucket outside of his team's dugout. Plaintiff filed suit against the Tennessee Secondary School Athletic Association ("TSSAA") for the umpires' failing to enforce the rules against his own conduct in sitting outside the dugout during the game. Plaintiff argued that the umpires were actual or apparent agents of TSSAA and therefore, the TSSAA should be held vicariously liable for the umpires' negligence. The Court of Appeals affirmed the trial court's grant of summary judgment, holding that the umpires were independent contractors. While the TSSAA provides umpires with instructions via rules meetings, a rule

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book, insurance benefits while umpiring games between TSSAA schools, and umpires agree to officiate according to the TSSAA rule book, the TSSAA does not control the means and method by which the umpires work. The TSSAA otherwise owed no duty to the Plaintiff by providing a framework for the conduct of athletic contests by member schools.

**COOKEVILLE REGIONAL MEDICAL CENTER AUTHORITY V. CARDIAC ANESTHESIA SERVICES, PLLC, No. M2007-02561-COA-R3-CV, 2009 Tenn. App. LEXIS 786 (Tenn. Ct. App. Nov. 24, 2009).**

Following the hospital's termination of its contract with a physician group, both parties brought claims for alleged breaches of the contract. After the trial court determined that the hospital had wrongfully terminated the contract and a jury award of \$1.4 million in damages to the physician group, the Court of Appeals reversed. The court held that the contract was unenforceable because it contained an agreement to split physician's fees, which is prohibited by Tenn. Code Ann. § 63-6-225. The physician group had agreed to give the hospital 80% of the fees it collected. The court noted that in exchange for its assignment of fees, the group was "as a practical matter, the sole or prominent provider" of cardiac anesthesia services. The court found that the plain language of the statute prohibited this arrangement and that the contract could not be enforced by either party.

**ALISIA Arias v. Duro Standard Products Company, No. W2008-02772-SC-R3-WC, 2010 Tenn. LEXIS 57 (Tenn. Jan. 22, 2010).**

In a worker's compensation dispute, the employee seeking benefits proffered a written report of a physician who performed an independent medical evaluation at the request of the employee's lawyer. The report was not in the form authorized by Tenn. Code Ann. §50-6-235, which is commonly referred to as a "C-32 report." After issuing the report, the physician became disabled and was unable to give a deposition. Over the objections of the employer, the trial court admitted the report under the business records exception to the hearsay rule and awarded benefits. On appeal, the employer argued that §50-6-235 provided the exclusive method of introducing medical evidence in worker's compensation cases.

The Tennessee Supreme Court disagreed, finding that the business records exception provided an alternative means of introducing medical evidence, overruling *Baker v. Sally Beauty Supply*, No. 02S01-9709-CH-00078 (Tenn. Workers' Comp. Panel Oct. 26, 1998). The Court, however, ruled that the trial court erred in its application of the business records exception. Because the physician's report was generated for the purpose of litigation, the Court found that it did not exhibit the inherent trustworthiness and indicia of reliability supporting the business records exception to the hearsay rule. Finding the remaining admissible evidence insufficient to establish causation or permanency, the Court vacated the benefits award and dismissed the complaint.

**KAMARJAH GORDON ET AL. v. GREENVIEW HOSPITAL, INC., D/B/A GREENVIEW REGIONAL HOSPITAL, No. M2007-00633-SC-R11-CV, 2009 Tenn. LEXIS 864 (Tenn. Ct. App. Dec. 17, 2009).**

In a medical malpractice action filed in Davidson County, Tennessee, Plaintiff sued a Kentucky corporation that owned the Bowling Green, Kentucky hospital

that was partially involved in her allegedly negligent care. In its answer, the Kentucky corporation asserted that it was not subject to personal jurisdiction in Tennessee, and several months later, filed a motion for summary judgment pursuant to Tenn. R. Civ. P. 56 on these same grounds.

The Kentucky corporation had no Tennessee property, was not registered to do business in Tennessee, and had no registered agent for service of process in Tennessee. However, the Kentucky corporation's Kentucky corporate filings listed its parent corporation's Tennessee address as its current principal office, many of its officers and directors maintained a Tennessee office, and it was both a subsidiary and remote subsidiary of a Tennessee corporation. Weighing these facts, the trial court granted the motion. After the plaintiff appealed, the Court of Appeals upheld the ruling on the grounds that the plaintiff did not show that the Kentucky corporation maintained "continuous and systematic" contacts with Tennessee giving rise to the liabilities sued on.

The Tennessee Supreme Court, in a de novo review, examined whether Tennessee courts could exercise personal jurisdiction over the Kentucky corporation. The Court examined Tennessee's personal jurisdiction statutes (Tenn. Code Ann. § 20-2-214, 225), noting that Tennessee's long-arm statute reaches to the farthest extent permitted by due process. However, in closely examining the facts of this case, the Court upheld the lower court and determined that the corporation's contacts with Tennessee, "taken alone or together," were not "continuous and sufficient" to warrant an exercise of general personal jurisdiction in a manner consistent with the United States Constitution. The Court did note that if the facts were different, another plaintiff might have been able to assert a plausible claim for specific personal jurisdiction over the Kentucky corporation if the plaintiff could show that the corporation "purposefully directed its activities toward Tennessee residents and that the subject matter of the litigation related to those events."

As a side matter, both the Court of Appeals and the Tennessee Supreme Court noted that questions relating to personal jurisdiction are properly brought before the court pursuant to Tenn. R. Civ. P. 12.02(2) rather than Tenn. R. Civ. P. 56. Unlike a 12.02(6) or 12.02(3) motion, parties may rely upon matters outside of the pleadings when supporting or opposing a 12.02(2) motion without converting it to a Rule 56 motion for summary judgment.

Notwithstanding the error, the Court stated that "motions should be construed based on their substance rather than their title" and deemed the motion to be a 12.02(2) motion to dismiss.

**LARGE V. GREENE COUNTY, TENNESSEE, No. E2008-02764-COA-R3-CV, 2009 Tenn. App. LEXIS 875 (Tenn. Ct. App. Dec. 28, 2009).** Plaintiff landowners filed suit against Greene County, alleging that defects in a bridge caused Lick Creek to flood their property. The plaintiffs characterized their claims as a nuisance action. The County filed a motion for judgment on the pleadings, characterizing the plaintiffs' suit as an inverse condemnation action, subject to a one-year statute of limitations. The trial court ruled that the plaintiffs' nuisance claims would be barred by the three-year statute of limitations applicable to permanent nuisances. In the alternative, after reviewing affidavits and other documents, the trial court determined that a taking had occurred and that the claim sounded in inverse condemnation. Due

to the trial court's review of materials outside the pleading, the Court of Appeals reviewed the decision under the summary judgment standards of Rule 56. The appellate court concluded that it was appropriate to characterize plaintiffs' action as inverse condemnation subject to the one-year limitations period. The court further found that the cause of action for statutory inverse condemnation precluded plaintiffs from pursuing a cause of action for nuisance and thus did not address the limitations appropriate for the nuisance claims. Accordingly, the Court affirmed the trial court's judgment for the County.

**GWEN FAYNE ET AL. v. TERESA VINCENT ET AL., No. E2007-00642-SC-R11-CV, 2009 Tenn. LEXIS 830 (Tenn. December 11, 2009).**

This appeal involved the issue of whether or not the Tennessee Consumer Protection Act (Tenn. Code Ann. § 47-18-101 to 130) applied to the sale of a real estate professional's personal residential property. In this case, the defendants were a husband and wife who sold their personal residence to the plaintiffs. The defendant-husband was a real estate developer and builder who constructed the house at issue and developed the subdivision in which it was located. The defendant-wife acted as defendants' real estate agent for this sale and split the commission with the buyers' agent.

Prior to selling their home, the defendants completed and signed a disclosure stating that they were unaware of any issues with the septic system; however, several months later, but before the plaintiffs toured the house, the defendants in fact did have problems with the septic system. Furthermore, when the defendant was building the house, contrary to the permit he obtained, defendant did not situate the house far enough back from the road to accommodate the septic system.

After the sale was closed, the plaintiff-buyers began having significant issues with the septic system and sued to rescind the contract and alleged that defendants violated the Tennessee Consumer Protection Act (the "Act"). After the trial court entered a judgment for the plaintiffs and ordered that the defendants repurchase the property, plaintiffs appealed the judgment to recover their attorney's fees. After a number of intermediate proceedings, ultimately the Court of Appeals affirmed the trial court's determination that the defendants violated the Act. The defendants asserted that the Act did not apply to them.

The Tennessee Supreme Court ultimately ruled that the Act did apply because the defendants were acting in a business capacity when they sold the house—even though they were using it as their residence. The Court went on to clearly state that the Act will not apply if a homeowner (even one engaged in the real estate business) is participating in the "casual and isolated sale of their personal residence and not in the conduct of trade or commerce." The factors that supported the Court's finding in this case that the Act did apply to defendants was that the defendants regularly sold the homes that they were living in, both were engaged in the real estate business, and the husband was the developer of the subdivision where the house was located. The Court noted that real estate professionals cannot escape liability under the Act by simply living in a house for a period of time.

**THE HAMILTON-RYKER GROUP, LLC v. TAMMY L. KEYMON, No.**

**W2008-00936-COA-R3-CV, 2010 Tenn. App. LEXIS 55 (Tenn. Ct. App. January 28, 2010).**

Defendant-employee executed a covenant not to compete and was the primary point of contact for a number of plaintiff's significant accounts. After working with her employer for fourteen years, she was temporarily laid-off for a period of 90-days because her job had been eliminated and she did not want to accept the other job that was offered to her by her employer. The day after her layoff, the defendant and the plaintiff's customer entered into an arrangement wherein the defendant planned to service the customer herself. To this end, the defendant accessed her Hamilton-Ryker email account (which the plaintiff had left active) and sent a significant amount of information relating to the customer to her personal email account. After obtaining this information, the plaintiff terminated her relationship with the plaintiff.

The plaintiff initially sued her for breaching her employment agreement, but then discovered that she had also violated the covenant not to compete. The trial court found for the plaintiff and awarded damages of almost \$1 million dollars. The defendant appealed and argued that the covenant not to compete was unenforceable because it was not geographically limited. The Court of Appeals held that it was in fact enforceable even though it did not contain a territorial limitation because it did contain a limitation by prohibiting defendant from soliciting the plaintiff's clients. As a result, the court determined that the provision was tailored to protect the business interest of the employer.

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