



May 2010

---

## Summary of Cases

by Daniel D. Coughlin

### FEBRUARY - APRIL, 2010

**In re Estate of Davis, No. M2009-00660, 2010 WL 1644068 (Tenn. Apr. 23, 2010).** More than four years after the first will of the widow of Gentleman Jim Reeves was admitted to probate, decedent's surviving spouse petitioned the probate court to admit her subsequent holographic will which left the entire estate to him. Pursuant to the common law doctrine of fraudulent concealment, the probate court denied the administrator's motion for summary judgment of dismissal of such subsequent will made under T.C.A. § 32-4-108 (2007), after initially finding that such section contains a statute of limitation rather than a statute of repose. The Supreme Court found that fraudulent concealment does toll the same, even though it is not expressly mentioned in the text of such statute. The court noted that fraud alone does not toll the statute, but concealment of the fraud does so, upholding its previous decision in *Phillips v. Phillips*, 526 S.W.2d 439 (Tenn. 1975).

**Hertz Corp. v. Friend, 559 U.S. \_\_\_\_\_, 130 S. Ct. 1181 (Feb. 23, 2010).** After Hertz removed California state court action alleging violations of California law to the federal district court there, Plaintiffs claimed that there was no diversity under 28 U.S.C. § 1332, arguing that Hertz was a California citizen like them. The United States District Court and Ninth Circuit Court of Appeals agreed because Hertz's "plurality" of business activity occurred in California. The Supreme Court reversed, finding that "principal place of business" under said statute "is best read as referring to the place where a corporation's officers direct, control and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.' And in practice, it should be normally be the place where the corporation maintains its headquarters." After finding that the nerve center test rather than the "significantly larger" test should be utilized in determining diversity citizenship, the Court gave the following example: "If the bulk of a company's business activities visible to the public take place in New Jersey, while its top officers direct those activities just across the river in New York, the 'principal place of business' is New York." The Court then remanded the case for further consideration in the district court under such rule.

**In re Angela E., 303 S.W.3d 240 (Tenn. 2010).** After determining that the

## IN THIS ISSUE

- [Summary of Cases](#)
- 

Daniel D. Coughlin  
Massengill & Caldwell, P.C.  
(Bristol)  
(423) 764-1174  
[danieldcoughlin@gmail.com](mailto:danieldcoughlin@gmail.com)

---

court of appeals had correctly found that the parental rights of father had not been surrendered in the trial court, the Tennessee Supreme Court held that a new termination hearing was required because the trial court's order failed to include the specific findings of fact and conclusions of law required by T.C.A. § 36-1-113(c) & (k)(Supp. 2009). In so doing, the court noted that the Western Section of the Tennessee Court of Appeals had previously held in *Rainev v. Head*, 2001 WL 277984, at \*2-3 (Tenn. App. Mar. 20,2001) that the father's agreement to terminate his parental rights obviated need for the trial court to make such findings and conclusions. However, the supreme court held that the Middle Section's disagreement with *Rainev* in *C.J.H. v. A.K.G.*, 2002 WL 1827660 (Tenn. App. Aug. 9, 2002), which held that "parents cannot agree to terminate parental rights if such determination is not in the best interest of the child" was more persuasive. The court noted that the aforesaid statutory subsections simply "do not distinguish between contested and uncontested termination proceedings." In order to adhere to the statute's "plain language," the Supreme Court decided such findings and conclusions must be made before terminating parental rights in every case. Moreover, the court noted that requiring the same such determinations to be made by clear and convincing evidence is "also necessary to protect a parent's due process rights."

**Melton v. BNSF Ry., No. W2009-00283, 2010 WL 597457 (Tenn. App. Feb. 22, 2010), perm. app. filed (Tenn. Apr. 22, 2010).** In this FELA claim by decedent's widow, the jury found that decedent's employer bore all the fault for its railcar running over decedent, and awarded plaintiff \$5,000,000.00 in damages. The appellate court reversed and remanded for new trial, finding that the evidence of defendant's non-testifying expert (which plaintiff introduced through cross-examination of another expert of defendant at trial) was not proper impeachment, and, pursuant to TENN. R. CIV. P. 36(b), "more probably than not affected the judgment or would result in prejudice to the judicial process." In distinguishing *Steele v. Ft. Sanders Anesthesia Group*, 897 S.W.2d 270 (Tenn. App. 1994), the court noted that the expert in *Steele* had relied on another deposition for facts and data used in forming his opinion, whereas the expert in this case testified that she did not even receive such deposition until after she had completed her report. The court also emphasized that the cross-examination in *Steele* was proper impeachment, whereas the cross-examination here was simply to introduce hearsay opinions, including a crucial new opinion on the speed of the railcar that killed plaintiff's husband. The court further noted that plaintiff's counsel used such evidence in her closing argument, and that the trial court issued no cautionary or limiting instruction on the same. The appellate court also found numerous improper questions and comments by plaintiff's counsel which were irrelevant to the facts at issue to have improperly influenced the jury into believing that defendant had "conspired and attempted to cover up" how the accident occurred. The court further determined that the trial court had erred in granting defendant summary judgment on plaintiff's claims that improper vegetation and/or ballast caused or contributed to the fatal accident.

**Starr v. Hill, No. W2009-00524, 2010 WL 551021 (Tenn. App. Feb. 18, 2010).** In this automobile accident claim, the Western Section of the Tennessee Court Appeals addressed cross-motions for summary judgment on the application of the Family Purpose Doctrine to impute the liability of the

minor defendant's son to his father. After noting that application of the doctrine requires (1) "the head of household must maintain an automobile for the purpose of providing or pleasure for his or her family," and (2) "the family purpose driver must have been using the motor vehicle at the time of the injury in furtherance of that purpose with the permission, either express or implied of the owner," the court addressed issues of first impression in Tennessee. It noted that no court had previously defined "head of household," nor whether an alternate residential parent (such as father here) can be considered the same under this doctrine. After reviewing cases from other jurisdictions, the court found that "a broader interpretation" of the term should be utilized to "effectuate the policies behind the family purpose doctrine in light of the realities of our modern society." Thus, it found that the maintenance of separate residences by defendants does not preclude application of the doctrine, but is merely one factor to consider. It further held that father could not escape liability under the doctrine because he had maintained this vehicle for his son alone, rather than his family in general. The court found it irrelevant whether the vehicle was placed to the family in general or only one member of such family by the parent. In reversing summary judgment for father and entering the same for plaintiff, the court also discarded father's argument that he was not personally benefitting from his son's use of the same, and that he was providing the same solely to comply with his marital dissolution agreement.

**Leggett v. Duke Energy Corp., No. W2007-00788 2010 WL 1644136 (Tenn. Apr. 23, 2010).** In this class action filed under the Tennessee Trade Practices Act (T.C.A. §§ 47-25-101 through - 112 (2001)) by Plaintiff retail consumers of natural gas, the Tennessee Supreme Court reinstated the trial court's dismissal of all claims against defendant wholesalers for allegedly conspiring to increase the price of natural gas. After tracing the history of federal legislation in the natural gas market act back nearly a century, the court found that the "field" of law in this area had been pre-empted by federal statute, and was, therefore, of no force and effect in the area of "wholesale sales of natural gas in interstate commerce." Even if the state antitrust statute were found to be "complementary" to the federal Natural Gas Act, the court found that it would still violate the intent of Congress to create national uniformity of regulation and freedom from burdensome government intervention in such market. Thus, the court reversed the intermediate appellate court and dismissed the case, despite extensive deregulation by Congress in the field of wholesale gas prices in more recent years.

**Long v. Hillcrest — West, No. E2009-01405, 2010 WL 1526065 (Tenn. App. Apr. 16, 2010) (Franks, P. J.) (Susano, J., concurring in part and dissenting in part).** The majority of the court of appeals affirmed the trial court's dismissal on summary judgment of the wrongful death claim of administrator of decedent's estate against decedent's nursing home after finding that plaintiff's claim was for medical malpractice, rather than ordinary negligence. Because plaintiff's claims involved "assessment of [decedent]'s medical condition, and specialized knowledge and/or skill in the handling of [decedent] based on her medical condition," the court found that her claims sounded in medical malpractice, rather than common law negligence based on everyday experiences. In his separate opinion, Judge Susano agreed that plaintiff's claims did allege medical malpractice, but that they also sounded in

"ordinary" or simple negligence. Thus, he opined that those simple negligence claims should have survived the summary judgment motion.

**Unarco Material Handling v. Liberato, No. M2009-01603, 2010 WL 744394 (Tenn. App. Mar. 2, 2010).** As counsel for defendant corporation, defendant attorney negotiated an indemnification agreement in favor of plaintiff's former president under the terms of which defendant corporation agreed to indemnify and defend such former president for violation of the confidentiality provisions of his retirement agreement with plaintiff. After defendant counsel obtained a sworn statement from such former president allegedly concerning such confidential information, plaintiff sued defendant attorney and defendant corporation for tortiously inducing such president to breach the confidentiality agreement, and defendant attorney moved for summary judgment, asserting that the litigation privilege was an absolute bar to such claims against him. Relying on *Simpson Strong-Tie Co. v. Stewart, Estes & Donnell*, 232 S.W.3d 18 (Tenn. 2007), as well as decisions from Hawaii and Missouri appellate courts, the court of appeals held, as a matter of first impression, that the litigation privilege did stand as an absolute bar to claims based on an attorney's conduct if "(1) the attorney was acting in the capacity of counsel for a client or identifiable prospective client when the conduct occurred, (2) the attorney was acting in good faith for the benefit of and on behalf of the client or prospective client, not for the attorney's self interest, (3) the conduct was related to the subject matter of proposed litigation that was under serious consideration by the attorney, and (4) there was a real nexus between the attorney's conduct and the litigation under consideration." The court further held that the privilege would not apply if the attorney employed wrongful means such as fraud, trespassing, threats, violence, or other criminal conduct. After finding that the litigation privilege applied to defendant attorney's alleged conduct, the court also noted that RPC 4.2 of Tennessee Supreme Court Rule 8 prohibits lawyers in this state from soliciting or assisting "in the breach of any duty of confidentiality owed by the agent to the organization," and that the litigation privilege does not prevent sanctions by the Board of Professional Responsibility for such conduct.

**Clawson v. Burrow, No. E2008-02412, 2010 WL 1741372 (Tenn. App. Apr. 30, 2010).** Less than half an hour after plaintiffs' decedent was permitted by employer to go home, and while standing behind her own truck on the side of the road, another vehicle veered off the highway, striking and killing her. Pursuant to the exclusive remedy provision of the workers' compensation statute found at T.C.A. § 50-6-108(a)(2008), the trial court granted employer's motion for summary judgment, and the court of appeals affirmed. Noting that the statute is to be given a liberal construction for its remedial purposes, and that the tragedy occurred exactly one minute after the shift for which decedent was to be paid ended, the appellate court agreed with the trial court's finding that the facts showed "a causal connection between the conditions under which the work is performed and the resulting injury." Thus, the court affirmed dismissal of employer on summary judgment.

**State ex rel. Rickard v. Holt, No. M 2009 - 01331, 2010 WL 1240894, (Tenn. App. Mar. 30, 2010).** In this child support case, the trial court found that defendant's support payments be made to the Central Child Support

Receipting Office, rather than an assignment of his wages at the commercial airline where he works. Because of evidence that defendant's employer took "a dim view" of its pilots being the subject of a wage assignment, and that "it would not be good for his job if he were subject to" the same, the trial court found that the exception found in T.C.A. § 36-5-501(a)(2)(A)(2001) applied. After reviewing cases citing the same statutory section, the court of appeals agreed. Since defendant had timely made his previous child support payments, and the best interests of the parties' children rested in the continued employment of defendant at a relatively high wage, and the possibilities of promotion with his current employer, the court found that an exemption from wage assignment was appropriate.

*This quarterly case update is brought to you by the TBA Litigation Section Executive Council. This edition's summary was prepared by Daniel D. Coughlin of the Massengill & Caldwell, P.C. law firm in Bristol, TN.*

---

© 2010 Tennessee Bar Association.

---