Recent Tennessee Developments in Legal Malpractice

(and other items of potential interest to Tennessee lawyers)

By William S. Walton

The recent collapse of American National Lawyers Insurance Reciprocal, a major underwriter of legal malpractice insurance for Tennessee practitioners,[1] has led many Tennessee lawyers to be increasingly cautious concerning potential claims for legal malpractice. Such caution is well advised. Claims for legal malpractice claims are increasingly more common, and, as virtually all practitioners can attest, reasonable insurance coverage has become more expensive and difficult to obtain.

Tennessee's Court of Appeals has addressed a variety of issues during 2005 involving legal malpractice, which Tennessee lawyers may find of interest. For example, the Eastern Section of the Tennessee Court of Appeals recently released its opinion in *Chapman v. Bearfield*.[2] *Chapman* discusses the requirements for expert affidavits in a legal malpractice case in Tennessee. It is well settled that expert testimony is required to support a claim for legal malpractice unless the alleged malpractice is within the common knowledge of layman.[3] Moreover, it is equally well established that whether a lawyer's conduct meets the applicable professional standard of care is generally considered to be beyond the knowledge of layman. *Cleckner v. Dale*.[4]

Should a lawyer from Mountain City be able to serve as an expert in a legal malpractice case against a lawyer in Memphis (or vice versa)? While several courts have debated whether the legal expert had to be familiar with the specific local custom and practice where the defendant lawyer practiced law in order to qualify as an expert,[5] *Chapman* clarifies this debate. The *Chapman* court determined that an opposing expert's affidavit in a legal malpractice case does not necessarily have to demonstrate that the opposing expert is

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familiar with the *specific* locality where the defendant lawyer practices law. Rather, the "locality" for the purposes of legal malpractice in Tennessee is defined by the borders of this state.

Chapman involved a legal malpractice claim by the plaintiffs against their former lawyer. The former lawyer (now defendant) was retained to represent the plaintiffs in a medical malpractice action. During the course of the original representation, the lawyer filed an amended complaint that repudiated the plaintiffs originally pled theory of recovery. The plaintiffs grew dissatisfied with their former counsel and subsequently hired a new lawyer. The plaintiffs then sued their former lawyer for legal malpractice.

As expected, the defendant lawyer filed a motion for summary judgment supported by his own expert witness affidavit opining that he was familiar with the "standard of care required of attorneys located in the upper East Tennessee area." The plaintiffs filed an opposing affidavit from another attorney. The opposing expert stated that he was familiar with the standard of care for lawyers practicing in Tennessee and opined that the defendant lawyer had breached the standard of care. However, the trial court later entered summary judgment for the lawyer defendant. The trial court disallowed the expert affidavit filed in opposition to the motion for summary judgment, finding that the expert's affidavit did not satisfy the so-called "locality rule." Without an expert affidavit to oppose the motion for summary judgment, the underlying legal malpractice claim was dismissed.

Observing that Tennessee law governing legal malpractice actions does not create such a fine distinction, the *Chapman* court vacated the judgment entered by the trial court. Writing for a unanimous court, Judge Swiney observed, "We hold there is no locality rule for an expert witness in a legal malpractice action, other than the expert witness must be familiar with the standard of care 'which is commonly possessed and exercised by attorneys in practice in the jurisdiction,' here, Tennessee.[6] If *Spalding* created a 'locality rule' for legal malpractice actions, the 'locality' is the state of Tennessee."

While *Chapman* appears to broaden the ability of a plaintiff to secure expert testimony in a legal malpractice case, the appellate courts have also re-emphasized in two recent decisions that plaintiffs must act promptly when they know or reasonably should know facts suggesting that they have been harmed or damaged by their lawyer's conduct or omission. This rule may still apply even though the lawyer continues to represent the client in the underlying legal action.

A cause of action for legal malpractice accrues in Tennessee when 1) the defendant's negligence causes the plaintiff to suffer a legally cognizable or actual injury; and 2) the plaintiff knows "or in the exercise of reasonable diligence should have known this injury was caused by defendant's negligence."[7] Careful practitioners are reminded that a potential legal malpractice plaintiff may not sleep on their right to pursue a cause of action for legal malpractice by waiting to determine how his or her underlying case will ultimately be resolved.

"Ironically, the lawyers in *Chrisman* and *Sommer* were both saved from a legal malpractice claim by the statute of limitations because they had brought their clients tocourt, and the clients were present when the court rendered adverse rulings."

The Tennessee Court of Appeals in *Chrisman v. Baker*[8] cautioned practitioners again that a plaintiff must be vigilant in pursuing a legal malpractice claim or face dismissal of their claim on statute of limitations grounds. In *Chrisman*, the defendant lawyer represented the plaintiff in her representative capacity as conservator and subsequently as administrator of an estate. In the underlying estate action, the probate judge had advised plaintiff in open court during 1997 that the procedures she followed to compensate herself were not legally proper and the judge intended to remove the plaintiff as conservator as soon as a new administrator was qualified.

Following this 1997 hearing, the defendant lawyer apparently acknowledged to plaintiff that he had provided advice on the wrong procedure. Nonetheless, he provided assurance to the plaintiff that her claim for services would be honored as soon as the probate

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court considered proof of her claim. Counsel apparently was wrong again.

On March 18, 2002, the probate judge denied the plaintiff's petition for caretaker services. One year later, March 17, 2003, plaintiff sued her former lawyer alleging that the lawyer was guilty of legal malpractice and she contended that the denial of her claim in 2002 was her first indication that she might have a claim against her former attorney because of her lawyer's erroneous advice. The lawyer moved to dismiss based upon the statute of limitations.

The trial court agreed that the claim was time barred and dismissed the claim. Upholding the lawyer's defense based upon the statute of limitations, the Tennessee Court of Appeals for the Eastern District of Tennessee stated, "We do not believe that reliance upon erroneous legal advice can operate to toll the statute of limitations inasmuch as the discovery rule relating to injury only applies to matters of fact unknown to a prospective plaintiff, not matters of law" (citing *Cherry v. Williams*).[9]

The Tennessee Court of Appeals for the Middle District of Tennessee in *Sommer v. Womick*[10] reached the same result as *Chrisman* on strikingly similar facts. In *Sommer*, the plaintiffs originally sued a physician for alleged medical malpractice. The federal district court dismissed the medical malpractice lawsuit on May 21, 2001, a day before the scheduled trial. During a pre-trial hearing, the federal district court excluded the plaintiff's medical expert. Without expert testimony, the underlying medical malpractice claims were dismissed. The plaintiffs in *Sommer*, like the plaintiff in *Chrisman*, were in court when the judge announced his adverse ruling.

The plaintiffs in *Sommer* appealed to the Sixth Circuit Court of Appeals. The appeal was handled by the original lawyer. The Sixth Circuit Court of Appeals affirmed the dismissal on Jan. 30, 2003. The plaintiffs subsequently sued their original lawyer for legal malpractice on April 25, 2003. The lawyer defendant defended based upon the statute of limitations. The lawyer argued that the plaintiffs were aware of an actionable wrong when the original lawsuit was dismissed in open court.

The trial court agreed that the plaintiffs had filed their legal malpractice claim beyond the statute of limitations and dismissed the claim against the lawyer. Although noting that the facts in *Sommer* led to a harsh result, the Tennessee Court of Appeals affirmed the dismissal of the legal malpractice claim and stated,

> In this case, the United States District judge stated, in the presence of the Sommers, that the law was sufficiently clear to provide adequate guidance to plaintiffs and their counsel on what the requirements for admissibility of expert opinion testimony was in a medical malpractice action. The judge then said that the Sommers' counsel had not presented expert testimony that met those requirements, and, moreover, had not done sufficient work to meet the requirements of Rule 26 (a) (2). The fact that the Sommers did not understand the judge's comments to be critical of their attorney but thought the judge was upset with [the physician expert] does not necessarily create a genuine issue of material fact that would defeat a motion for summary judgment.

Ironically, the lawyers in *Chrisman* and *Sommer* were both saved from a legal malpractice claim by the statute of limitations because they had brought their clients to court, and the clients were present when the court rendered adverse rulings (even though the clients maintained that they did not appreciate the significance of the rulings).

Additional guidance has also been provided to Tennessee lawyers in several other areas that may impact legal

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malpractice claims. Specifically, for lawyers battling the determined *pro se* litigant, Tennessee appellate courts have emphasized that the lawyer should insure that the trial court addresses all of the *pro se* party's outstanding motions before the case is sent to the appellate courts.

Lawyers litigating legal malpractice actions with *pro se* parties, and particularly those lawyers battling self represented parties who are in jail, appreciate the enormous expense and time often required to defeat such litigation. Tennessee's appellate courts recognize that litigation involving self-represented parties is difficult and challenging.[11]

The Tennessee Supreme Court in 2000 addressed such problems in the context of legal malpractice claim in the case of *Logan v. Winstead*.[12] *Logan* involved an inmate who sued his former criminal defense lawyer for legal malpractice. The lawyer filed a motion for summary judgment supported by his own expert affidavit attesting to the lawyer's compliance with the applicable standard of care. The trial court dismissed the action. The Tennessee Court of Appeals affirmed. However, the Tennessee Supreme Court found that the trial court had failed to address the *pro se* plaintiff's motion to hold the case in abeyance pending the plaintiff's release from prison. Accordingly, the case was remanded to the trial court with instructions for the trial judge to address the pending motion for abeyance filed by the *pro se* plaintiff.

Although not a legal malpractice action, the Tennessee Court of Appeals re-visited a similar issue in *Bell v. Todd*.[13] *Bell* is instructive to lawyers dealing with *pro se* plaintiffs who have filed a claim for legal malpractice. Lawyers sued by *pro se* parties may seek to file a quick motion for summary judgment supported by the lawyer's own affidavit. *Bell* cautions that appropriate attention must be devoted to other pending motions filed by the *pro se* party before summary judgment may be entered. *Bell* strongly supports the proposition that a lawyer-defendant should take care to "protect the record" and insure that the trial court has addressed the outstanding motions by the *pro se* party before the case is dismissed (and ultimately appealed).

Bell involved an appeal from a wrongful death suit filed by a murder victim's family against the person accused of the murder. The family was able to obtain a default judgment on the issue of liability and the trial court set a hearing on the issue of damages. Several months after a default judgment was granted, but before the trial on damages was to be conducted, the *pro se* defendant filed an answer and he also filed a motion to set aside the default judgment. The trial court failed to address these motions, apparently because no hearing date was set by the *pro se* movant. A subsequent jury on the issue of damages awarded a $680,000 judgment against the *pro se* defendant.

Predictably, the *pro se* defendant appealed. The appellate court vacated the lower court's judgment and remanded the case to the trial court to address the outstanding motions filed by the prisoner. The appellate court's directive on this issue is clear: "When a trial court has failed to rule on an incarcerated litigant's pending motions, reviewing courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on the pending motions." *Bell* reminds the careful practitioner that the trial court must examine and address a *pro se* litigant's outstanding motions before entering a judgment in a case.

On the other hand, *Bell* also offers hope for Tennessee lawyers concerned about the seemingly endless avalanche of litigation often generated by dissatisfied *pro se* legal malpractice plaintiffs who are in jail. Such plaintiffs often ask the court to "stay" or hold their legal malpractice claim "in abeyance" until the plaintiff is released from jail or prison. *Bell* makes clear that whether the case should be held "in abeyance" pending the inmate's release is a discretionary decision for the trial court. The trial court should balance the equities and weigh the competing interests of the prisoner to present competent proof against the burden on the judicial system and the defendant-lawyer of continuing the action for a number of years while waiting for the prisoner's release.

"The Western Section of the Tennessee Court of Appeals in *Gerber v. Segal* recently affirmed the proposition that a trial court's award of fees will be upheld if there is sufficient evidence contained in the trial record to support the fee. "

Tennessee's appellate courts have also recently addressed issues involving the reasonableness of attorneys fees. Fee disputes between lawyers and their former clients are frequently resolved before reaching the appellate courts. Conventional wisdom by those conducting legal malpractice seminars suggests that a lawyer should rarely sue a client over a fee dispute. Depending on the amount of fees involved, the outcome of the underlying case, and the underlying facts (as well as the very real possibility that such a claim may provoke a legal malpractice counter-claim by the former client), such advice is often sound.

Nonetheless, the practice of law is still a business and a collection action is sometimes necessary. The Western Section of the Tennessee Court of Appeals in *Gerber v. Segal*[14] recently affirmed the proposition that a trial court's award of fees will be upheld if there is sufficient evidence contained in

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the trial record to support the fee.

In *Gerber,* the attorney-plaintiff represented the defendant in her divorce from her husband of 28 years. The defendant-wife testified during the divorce that she still owed her attorney more than $54,000 in fees plus $7,500 in accounting fees. As part of the divorce decree, the husband agreed to pay $15,000 of his former wife's legal expenses.

After the conclusion of the divorce, the wife's attorney subsequently filed his collection action against his former client to collect his outstanding fees. Evidence was introduced during the lawsuit over the fee showing that attorney had ultimately billed the client approximately $98,000 in fees. The former client stated that she had already paid her former lawyer approximately $60,000. The former client asserted that paying any more fees would be excessive, and "unconscionable and inequitable" under the circumstances. The former client also complained that the fees billed by her lawyer "were almost as much as she was awarded in the divorce." Indeed, the former client maintained that, "when the divorce proceedings were over, she was unable to pay [the lawyer] any money and [she] was forced to file bankruptcy to save her home."

Although observing that the fee charged was "very high and certainly out of proportion to the total marital estate in this case," the *Gerber* court nonetheless affirmed the trial court's award of the fees by stating, "The trial court's application of the *Connors* factors to the facts of this case was supported by evidence in the record. Therefore, we affirm the trial court's decision."

For the record, the factors that should be considered in setting a reasonable fee were established by the Tennessee Supreme Court in 1980 in *Connors v. Connors*,[15] and include the following:

(1) the time devoted to performing the legal service,

(2) the time limitation imposed by the circumstances,

(3) the novelty and difficulty of the questions involved and skill requisite to perform the legal service properly,

(4) the fee customarily charged in the locality for similar services,

(5) the amount involved and results obtained, and

(6) the experience, reputation, and ability of the lawyer performing the legal service.

Tennessee Rule of Professional Conduct 1.5 adds several additional factors to this list including whether fee is fixed or contingent, any prior advertisements or statements by the lawyer regarding his fees, and whether the fee agreement is in writing. The same rule also now provides that "a contingent fee agreement shall be in writing, signed by the client, and shall state the method by which the fee is to be determined , including the percentage or percentages that shall accrue to the lawyer in the event of litigation, trial, or appeal; other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated."

Notes

1. "ANLIR in rehabilitation, TBA seeks replacement," *Tenn. Bar J.*, March 2003.

2. *Chapman v. Bearfield,* 2005 WL1981796 (Tenn. Ct. App. Aug. 16, 2005).

3. *Bursack v. Wilson* 982 S.W.2d 342, 343 (Tenn. Ct. App. 1998).

4. *Cleckner v. Dale*, 719 S.W.2d 535, 540 (Tenn. Ct. App. 1986).

5. *See e.g, Martin v. Sizemore*, 78 S.W.2d 249, 273 n.14 (Tenn. Ct. App. 2001) ("…[at least one] panel of this court has stated in *dicta* that the same locality rule that applies to physicians also applies to lawyers giving expert opinions in legal malpractice cases.").

6. *Citing Spalding v. Davis*, 674 S.W.2d 710, 714 (Tenn. 1984) over'd on other grounds, 849 S.W.2d 748, 752 (Tenn. 1993).

7. *Viar v. Palmer,* 2005 WL 1606067 (Tenn. Ct. App. July 6, 2005) [citing *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995)].

8. *Chrisman v. Baker*, 2005 WL 1707980 (Tenn. Ct. App. July 22, 2005).

9. *Cherry v. Williams.9,* 36 S.W.3d 78, 86 (Tenn. 2000).

10. *Sommer v. Womick,* 2005 WL1669843 (Tenn. Ct. App. July 18, 2005).

11. *See e.g. Irwin v. City of Clarksville,* 767 S.W.2d 649, 651 (Tenn. Ct. App 1988), especially when the *pro se* litigant is in prison. *Chastain v. Chastain,* 2004 WL 725277 (Tenn. Ct. App. 2004).

12. *Logan v. Winstead*, 23 S.W.3d 297 (Tenn. 2000).

13. *Bell v. Todd*, 2005 WL 2240958 (Tenn. Ct. App. Sept. 14, 2005).

14. *Gerber v. Segal,* 2005 WL 1384920 (Tenn. Ct. App. June 10, 2005).

15. *Connors v. Connors,* 594 S.W.2d 672, 676 (Tenn. 1980).

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repayment, she answered that she would have sufficient funds after victory at trial.

He testified: "She told me that she was going to be the richest bitch in Johnson City." But because she lost at trial and on appeal, I'll bet she is in worse financial straits today and that the loan remains in default. Ain't life a bitch?

More on post-judgment interest

Concerning my September column on post-judgment interest and other subjects, David Riddick of Jackson wrote to remind me that Tenn. Code Ann. §47-14-121 allows a rate other than 10 percent in some cases. That section allows a higher rate if permitted by another statute. Also, by contract the rate can equal the formula rate, which is 4 points above the average prime loan rate under Tenn. Code Ann. §47-14-102(6). I thank David for this helpful information.