



Luther-Anderson, PLLP

Newsletter

06/15/2021



LUTHER-ANDERSON, PLLP IS AN AV FIRM RATED BY MARTINDALE-HUBBELL

PENDING DECISIONS AND FIRM NEWS

Yebuah v. Ctr. For Urological Treatment, PLC – Cap on Non-economic Damages

by Jaime E. Colon-Velez

On June 2, 2021, the Tennessee Supreme Court determined that the Tennessee Statute that limits noneconomic damages in a personal injury action to \$750,000 is a cap for all claims asserted in the personal injury action. The cap, therefore, does not apply separately to the individual claims of each plaintiff.

Yebuah v. Ctr. for Urological Treatment, PLC was a healthcare liability action that involved a medical device unintentionally left inside plaintiff. (No. M201801652SCR11CV, 2021 WL 2217483, at *1 (Tenn. June 2, 2021). Plaintiff's husband sought recovery for noneconomic damages in the form of loss of

consortium. At the trial court, the jury returned a verdict against Defendant and awarded plaintiff \$4,000,000 for pain, suffering, and loss of enjoyment of life. The jury also awarded plaintiff's husband \$500,000 for loss of consortium. The trial court applied the statutory cap imposed by Tennessee Code Annotated 29-39-102 individually to each plaintiff and entered a judgment of \$750,000 in favor of victim and \$500,000 for her husband. The court of appeals affirmed the decision of the trial court to apply the statutory cap separately.

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L-A Welcomes New Associates

Luther-Anderson would like to welcome three new members to its family: Chloe E. Kennedy, Matthew Harris, and Jaime E. Colon-Velez.

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(Photo: John Partipilo)

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Luther-Anderson Welcomes New Associates



Chloe Kennedy grew up in Albertville, Alabama. In 2015, she graduated from Jacksonville State University with a B.S. in Accounting.

Upon graduating from Jacksonville State, Chloe attended the University of Mississippi School of Law and graduated in May of 2018. During her tenure at Ole Miss Law, Chloe was active as the Treasurer of the Student Bar Association, a Member of the Trial Advocacy Board, and in the Low-Income Tax Clinic. Chloe also interned at the Marshall County District Attorney's Office and clerked at a real estate law firm in Oxford, Mississippi. At graduation, Chloe received the Dean's Distinguished Service Award for her service to the student body.

In her free time, Chloe enjoys traveling, cooking, and spending time with family and friends.

Chloe focuses her practice in the area of general liability defense, including automobile and motor carrier accidents, premises liability, insurance coverage issues, and construction litigation.

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Matthew Harris concentrates his practice in the defense of civil litigation matters, primary including personal injury claims, medical malpractice, business/commercial disputes, insurance "bad faith" claims, and contract law. His clients have included physicians, hospitals, long-term care facilities, dentists, advanced practice nurses, and many other allied healthcare professionals. He also defends tort claims filed against various state agencies and departments.

Matthew aggressively litigates his cases from the moment suit is filed. He develops an early understanding and analysis of his clients' potential liability, then works with the client to determine the best and most cost-effective strategy to resolve the lawsuit. He has a proven record of obtaining dismissal in favor of his clients early in litigation and has also obtained numerous defense verdicts in cases where his clients faced considerable exposure. Matthew is a member of the Mississippi and Tennessee Bar Associations, the Capitol Area Bar Association, the Litigation Section of the Mississippi Bar Association, and was chosen to be a member of the Mississippi Bar's Professionalism Committee. Matthew lives in Signal Mountain, Tennessee with his daughter, Madeline, and twin sons, Walker and Reed.

PRACTICE AREAS: Medical Malpractice, General Negligence and Business Disputes, Contract Negotiations and Litigation.

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Jaime Colón-Velez grew up globally as a child of an Army father but spent most of his childhood near Annapolis, Maryland. In 2016, he graduated from Hofstra University with a B.A. in Communications with a minor in rhetoric.

Jaime then attended Belmont University College of Law and graduated in May 2019 with a certificate-concentration in Entertainment and Business Law. Jaime interned for the Tennessee Volunteer Lawyers for the Arts in law school, helping poor and struggling artists with a variety of legal issues. In addition, Jaime would frequently work with the Nashville Bar Association during free clinics, assisting Spanish and English speakers seeking help on issues ranging from workers' compensation to property disputes.

Jaime joined our office in February of 2021 where he focuses his practice in the area of general liability defense, including automobile and motor carrier accidents, premises liability, insurance coverage issues and construction litigation. Jaime also has experience in the fields of Workers' Compensation and Intellectual Property. Jaime has now expanded his practice into criminal defense, including felony and misdemeanor drug cases, and helping those who have been charged or convicted transition back into society by assisting with expungements.

Jaime enjoys spending free time with his dog, Rocky, cooking, and relaxing with a good movie.

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[CONTINUED] . . Yebuah v. Ctr. For Urological Treatment, PLC – Cap on Non-economic Damages

... [CONTINUED] Despite the ruling of the trial court and court of appeals to apply the statutory cap separately to each plaintiff, the Supreme Court held the language of Tennessee Code Annotated 29-39-102 allows all plaintiffs to recover only \$750,000 in the aggregate for noneconomic damages. Key in its decision the Court noted that the statute makes distinctions towards injured plaintiffs and their spouse or children to create a total aggregate cap. In its opinion, the Court examined all evidence and rationales presented by plaintiffs and remained unconvinced, finding that even though it believes the statute to not be wise or artfully written, it is the duty of the court to simply interpret the statute.

Two justices published a dissent stating that the jury had done its job by returning a fair verdict for both of the plaintiffs for their injuries. In order to meet the damages cap, courts would now need to arbitrarily set aside an amount of the total verdict to apply to the cap. This action would violate the constitutional rights of the plaintiffs.

It is important to note that this unconstitutionality argument has been made one year prior and Tennessee Code Annotated 29-39-102 was declared constitutional. In that opinion, the same two justices who issued dissent in Yebuah issued a dissent arguing that the statute as written was unconstitutional and deprived plaintiffs of the right for a jury to decide damages. It makes the jury's role a mere procedural formality.

This case presents issues for plaintiffs moving forward and will likely work to encourage settlements of noneconomic damages for plaintiffs besides the injured plaintiff. If the threat that non-economic damages will be reduced or eliminated by a judge is present, plaintiffs will likely be willing to settle those issues outside the court room. This allows cases to focus more clearly on the injured plaintiff and defendant attorneys to use this case as a basis to push for lower settlements. In time, this issue may be brought to a higher court or to the scrutiny of the state legislature but for now this precedent is immediately useful and relevant to all high damage personal injury cases.

New Tennessee House Bill- Increase to medical bills presumed necessary and reasonable

by Jaime E. Colon-Velez

On February 11, 2021, Tennessee State Senator Todd Gardenhire and Tennessee State Representative introduced a new house bill which would modify the already existing Tennessee Code Annotated, Section 24-5-1113(a)(3). In its current state, the statute creates a presumption that itemized medical, hospital and doctor's bills up to Four thousand dollars attached to a complaint or civil warrant are prima facie evidence that the bills were necessary and reasonable. As a result, it is the burden of Defendant's to prove that these bills were not necessary, reasonable, or related to plaintiff's injury.

The new legislation attempts to amend the four-thousand-dollar cap to twenty-five thousand dollars, more than six times the original cap. This change would radically change the structure of personal injury cases for plaintiffs and defendants. **CONTINUED PG. 5**

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... **[CONTINUED]** For Plaintiffs, this further incentivizes the running up of costs and bills because it eases the burden to prove these costs necessary to a court. There exists a presumption in the court that these bills are all necessary and it is the difficult task of defendants to fight this presumption. Even diagnostic tests which rule out a particular injury or relation to plaintiff's case may be recovered. *Wilson v. Monroe Cty.*, 411 S.W.3d 431, 442 (Tenn. Ct. App. 2013). As a result, it should be fully expected that the costs and bills in personal injury cases across the board will go up. Plaintiff's attorneys will likely encourage their clients to undergo more costly procedures or diagnostic tests simply to drive up costs because they no longer have the burden to prove these costs necessary up to twenty-five thousand dollars.

It should be noted however, plaintiffs must still establish that the charges were incurred as a result of the defendant's negligent conduct. *Varner v. Perryman*, 969 S.W.2d 410, 412 (Tenn. Ct. App. 1997). Even though there is this presumption, plaintiffs in a personal injury action must establish causation, an essential element in negligence. *Dedmon v. Steelman*, 535 S.W.3d 431, 440 (Tenn. 2017)

For Defendants, things become immediately more difficult as these high bills are a jury question with a presumption that they are reasonable and necessary. It becomes a difficult back and forth where plaintiffs use their full, undiscounted medical bills to satisfy the burden of proving reasonable value of medical expenses, and defendants submit any competent evidence they have. A jury then must determine the reasonable value of the medical services in light of all the evidence. *Dedmon v. Steelman*, 535 S.W.3d 431, 466 (Tenn. 2017). Defendants will accomplish this by contradicting either the necessity or reasonableness of the medical expenses. This task can be daunting at times when Tennessee courts have established that medical charges are necessary if there is a causal link between the treatment provided and the injury originally inflicted. *Wilson v. Monroe Cty.*, 411 S.W.3d 431, 442 (Tenn. Ct. App. 2013).

While the proposed bill has not been signed into law, the intent is clear that this law should be pushed into action quickly, as soon as July 1, 2021 "the public welfare requiring it." The most recent action on the bill was it being assigned to general subcommittee of senate judiciary committee on March 26, 2021. Despite the lack of movement on the bill it has not been voted on to date and should not be discounted from becoming standing law in the near future. This bill once again emphasizes the importance for those working in the law to be aware of the minute-by-minute changes to the entire profession.

Proposal for New Chancery Court to Handle Constitutional Issues

By: Jaime E. Colon-Velez

Tennessee Senate has recently proposed and advanced a bill with an amendment to the current constitutional law judicial process. This proposal would create a statewide chancery court with jurisdiction over constitutional challenges and would allow all pending cases to be transferred to the new chancery court panel upon the motion of the attorney general. The initial three members of this court would be appointed by Governor Bill Lee and from there would be elected officials starting in August 2022. For his appointment, the governor would select three chancellors, one from each grand division, from lists of finalists chosen by the Trial Court Vacancy Commission, made of appointees of the Tennessee House and Senate speakers. The appointed chancellors would serve until August 2022 and the victors of that state wide popular vote election would serve an eight-year term.

This new proposal has faced criticism from many angles. A key complaint about the proposal is that it is a clear attempt to remove the impartiality of the court and is only being done to remove the power of more liberal courts from hearing suits challenging state law. In particular, the complaints argue that this chancery court only comes in response to a ruling by Davidson County Chancery Court on voting by mail wherein Chancellor Ellen Hobbs Lyle expanded access to voting by mail during the pandemic. State Senators have not declined this rationale, and in fact agree with it. State Senator Mike Bell said that the problem with Davidson County Chancery Court is that its judges, are picked by liberal leaning constituency in the Nashville area, which is unlike the vast swaths of the deeply conservative state.

“Why should judges who are elected by the most liberal constituency in the state... be the ones deciding cases that affect the state in general? Bell asked. He went on to state “I don’t hide from the issue; I don’t hide from the reason why I’m here with this bill: Because I want judges that reflect the political makeup of the state.”

A popular vote across the state would do just that, create a court elected by the people for their own shared constitutional interests. However, it is not just Democrat State Senators complaining of this proposal. State Senator Kerry Roberts questioned the logistics of the state judicial elections and said that statewide races would require deep pockets with which to launch viable campaigns. “I want our chancellors to be the best legal minds, not the wealthiest candidates who overwhelm the others with money,” Roberts stated.

The impartiality of these chancellors also comes into question when they are subject to popular vote. A popular vote has the possibility of destroying an impartiality held by a chancellor who relies on his public image to be reelected and this line of thinking may compromise a chancellors decision making process as it pertains to the Tennessee Constitution.

A further complaint to this new chancery court is the obvious cost to tax payers. With a system to handle constitutional matters already in place, the creation of a new connotational chancery court will likely cost tax payers millions, a possible waste in light of the lack of any demonstrated need. However, in the wake of a backlog of cases following Covid, there may exist a threat to the swift application of justice which demands this new Court. The State Senators who propose this change see the necessity of a court that better reflects the populace and that it is well worth the cost to achieve proper justice as it pertains to these constitutional issues. The proposal may in fact diminish judicial efficiency as it will require issues to be bifurcated and create delays in lawsuits that raise both connotational and non-constitutional issues. Cases that deal with negligence theories or breach of contract may inadvertently run afoul of the jurisdiction of this new chancery court and require additional costs and time as these individual issues must be heard through an additional judicial process.

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[CONTINUED] . . Proposal for New Chancery Court to Handle Conditional Issues

... [CONTINUED] While this is still merely a proposal, it is clear that the state legislature is leaning towards its implementation with \$2.4 million being placed in the 2021-2022 fiscal budget towards the creation of this court. State Senators have called the solution fluid and while the creation of this super chancery court may not be the sole solution to this issue, it is a step in the right direction to have a court that is representative of the entire state in cases in which the state is the defendant.

With push from all sides for change, this new super chancery court is likely the newest in a group of nationwide changes to how constitutional issues are handled by courts. Similar judicial changes have been presented by lawmakers in 17 statehouses introducing more than 40 bills as legislatures look to make swift change. Tennessee seeks to join this new wave and seek decisive change with this bill and Tennessee legislators on all sides interested in justice for all Tennesseans are making moves.

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