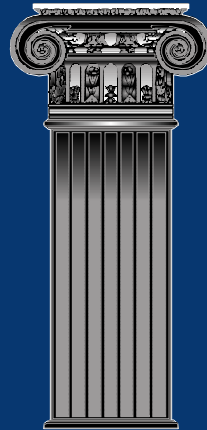


LUTHER-ANDERSON

NEWSLETTER



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FIRM NEWS • FIRM NEWS • FIRM NEWS • FIRM NEWS

LUTHER-ANDERSON STARTS SUMMER CLERKSHIP PROGRAM

Luther-Anderson officially started a summer clerkship program as a means of developing and recruiting Associates. The first law clerk to welcome aboard is Amanda Branam who will be with the firm from May to August. Ms. Branam has recently completed her second year of law school at Wake Forest University in Winston Salem, North Carolina and is expected to graduate with her Juris Doctor Degree in May, 2004.

LUTHER-ANDERSON HIRES FORMER SUPREME COURT LAW CLERK

Preston A. Hawkins is the newest Associate to join Luther-Anderson, PLLP in July. -1975- Tennessee-Chattanooga, B.S., Magna Cum Laude in Political Science; Tennessee College of Law of Knoxville, J.D., Cum Laude; Member: Admitted to Tennessee Bar, 2002. During his undergraduate study at UTC, Mr. Hawkins was a member of the men's varsity basketball team for four years, including the Mocs' 1997 NCAA Sweet Sixteen season. While in law school at UTK, Mr. Hawkins twice participated in the Dean Jerome Prince National Evidence Moot Court Competition at Brooklyn Law School, winning the National Championship in 2001 and finishing National Runner-Up in 2002. Prior to joining Luther-Anderson, PLLP, Mr. Hawkins was employed for a year as a Law Clerk for the Honorable Williams M. Barker of the Tennessee Supreme Court. Concentration: General Civil Litigation, Criminal Defense, and Insurance Defense.



ROTHSTEIN V. ORANGE GROVE CENTER

After two jury trials, two appeals and nine years following loss, the final chapter for our client, Orange Grove Center, was a defense verdict from the jury after the Tennessee Supreme Court remanded this matter for retrial upon the issue of damages. Since liability was determined in December of 1998 against defendants, the jury was instructed to determine the amount of consortium damages in a wrongful death case. Their verdict returned April 4, 2003 verdict found that the parents did not prove any additional compensable loss over what was rewarded in the prior wrongful death claim.¹

This lawsuit began as a medical malpractice action brought by Aaron and Bernice Rothstein involving the wrongful death of their 35-year-old developmentally disadvantaged daughter who died from bacterial meningitis in November 1994. She had been a resident of Orange Grove Center for the last 21 years of her life, spending 90% in residency at Orange Grove and 10% with her parents at their Nashville home.

When the action was filed in 1995 against the resident physician and his employer, Orange Grove, the wrongful death elements of damage did not include a claim for loss of consortium. This law was changed January 25, 1999 by the Supreme Court's decision in *Jordan v. Baptist Three River Hospital*, 984 S.W.2d 593. The Court held that an element of "pecuniary value" now included loss of consortium, which consists of the following factors: loss of attention, guidance, care, protection, training, companionship, cooperation, affection, love and in the case of a spouse, sexual relations. *Jordan*, however, was not dispositive of Orange Grove's ultimate liability. No less than three subsequent decisions were required to place retrospective application and to identify parents as appropriate claimants to a consortium loss of an adult child. Sam Anderson was lead counsel for Orange Grove, and the case is reported at 60 S.W.3d 807.

¹The first jury returned a verdict against defendants for \$200,000 in December, 1998. Eighty percent of fault was assigned to co-defendant and 20% to Orange Grove Center.

THE TENNESSEE HIGH SCHOOL MOCK TRIAL CHAMPIONSHIP

The Tennessee High School Mock Trial Championship team became the first team ever to win back-to-back National Championships during competition in New Orleans on May 10, 2003. The team, coached by Luther-Anderson Associate, Matthew Hargraves and Chattanooga attorney Jeff Atherton, was comprised of six (6) home school students from the Chattanooga area.

A total of 44 teams representing 42 states and the Marianas Islands competed in this year's National Competition. The Tennessee team went undefeated during the competition, receiving the highest cumulative point total in the history of the competition, and winning every round,

including the final round against Colorado, by unanimous decision. The final round was held in the Louisiana Supreme Court and presided over by Chief Justice Pascal F. Calogero, Jr. of the Louisiana Supreme Court. Prior to the final round, the Tennessee team faced students from Oregon, North Carolina, Iowa and Minnesota.

The mock trial case was based on a hypothetical lawsuit concerning fraud in a high school election. The theme of the case was very similar to issues raised in Florida during the 2000 Presidential Election, while also incorporating elements of Louisiana's own colorful election history.

CASE LAW DEVELOPMENT - Drinkers Beware

Effective July 1, 2003, Tennessee will join a legion of states who have lowered their threshold from .10% to .08% in order to obtain a conviction for Driving Under the Influence (DUI). As of July 1, 2003, it will be unlawful for any person to drive or be in physical control of any automobile or other motor driven vehicles on any of the public roads or highways in the State of Tennessee, or any other premises generally frequented by the public at large while under the influence of an intoxicant, marijuana, narcotic or drug producing stimulating effects on the central nervous system or, having an alcohol concentration in such person's blood or breath of .08% or higher. The penalties for DUI are as follows:

First offense, mandatory 48 hours in the county workhouse, 350.00 fine, \$10.00 payment to the Brain Injury Trust, and loss of license for one (1) year. If at the time of the first offense, the alcohol concentration in a person's blood or breath is .20% or more, in addition to the other penalties set out for a first offense violation in the minimum period of confinement shall be seven (7) consecutive calendar days rather than 48 hours.

For a second offense, there shall be a fine of not less than \$600.00, confinement in the county jail or workhouse for not less than 45 consecutive days, and a two (2) year loss of license.

A third conviction shall result in a fine of not less than \$1,100.00, not less than 120 consecutive days to be served in the county jail or workhouse, and a loss of license from three (3) to ten (10) years.

A fourth and subsequent conviction shall be a Class E felony, punishable by as fine of not less than \$3,000.00 or more than \$15,000.00 and by confinement of not less than 150 days to be served day for day, and a loss of license for five (5) years.

After July 1, 2003, Tennessee will no longer recognize the offense of adult driving while impaired. Adult driving while impaired was a desired reduction of offense from DUI for many people because it was punishable ONLY by a mandatory fine of \$500.00 and involved no jail time or loss of license. This will no longer be an option.

Challenges with Conducting Surveillance Under Revised Code of Professional Responsibility to Rule 8.4(c)

It has certainly been a challenging year for defense attorneys and their attempts at investigating plaintiffs and weeding out fraud.

The most illogical and somewhat frightening issue that came up in 2003 was Code of Professional Responsibility Rule 8.4(c). Rule 8.4(c) of the Code of Professional Responsibility states that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Comment (5) provides indication of what conduct is prohibited in Rule 8.4(c), and states that 8.4(c) prohibits the "secret or surreptitious recording of a conversation or the actions of another." (emphasis added). The Comment also states that a party must be informed of the fact that he/she will be recorded prior to the recording, though the reason need not be divulged unless the party inquires about the reason.

This sent many into a frenzy and great concern about whether or not surveillance violated these ethical rules. It was the opinion of many that surveillance did indeed violate these rules because of the Comments. Local defense attorney groups even conferred with one of the Justices on the Supreme Court whose opinion was that the current Rule prohibited lawyer involvement with any video surveillance even in public.

Obviously, these results could have serious consequences including an open invitation for fraud. Fortunately, Mickey Barker of the Tennessee of the Supreme Court proposed an Order, which was approved by the Supreme Court on or about April 30, 2003 and provides the following formal opinion 01-422(2001).

Secret Taping: The guidance says that there is nothing inherently deceitful or deceptive in a lawyer secretly taping another person, and that it does not violate Rule 8.4(c) to do so. This is the position that the Tennessee Bar Association took in its petition seeking the adoption of the Rules.

Surveillance: The Supreme Court repealed language in the same Comment that led many to believe that ordinary surveillance would be unethical.

As a result, surveillance of plaintiffs can continue to take place as it has in the past.

Diminution of Value Claims in First Party Suit

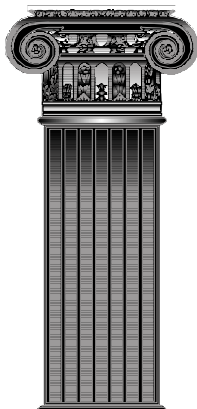
In *Black v. State Farm Mutual Automobile Ins.*, 27 TAM 50-70 116 2002, the Tennessee Court of Appeals advised that the trial court was proper in ruling that the insureds had no right to recover any diminution in value of their automobiles in addition to cost of repair where insurance policies stated that limit is insured's liability for loss to property or any part thereof is lower of actual cash value or cost to repair or replacement; plain and ordinary meaning is given to the terms of the policy to establish intent of parties, and unless until language of policy itself if determined to be ambiguous, the court will not construe policy against insurer in favor of insured.

(Endnotes)

*Luther-Anderson, PLLP Newsletter is published for use of its clients and potential clients.
The Newsletter is published generally twice a year and is accessible on our firm's website.*

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