

Luther-Anderson, PLLP

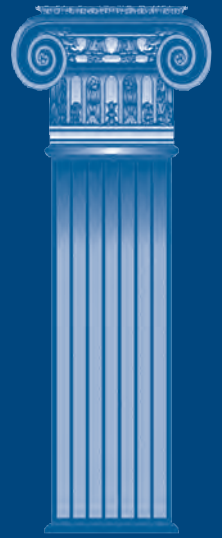
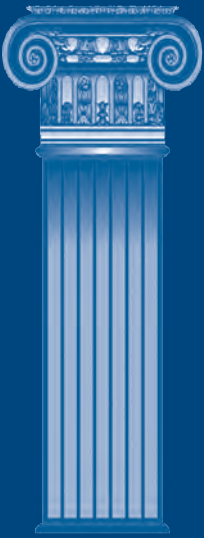
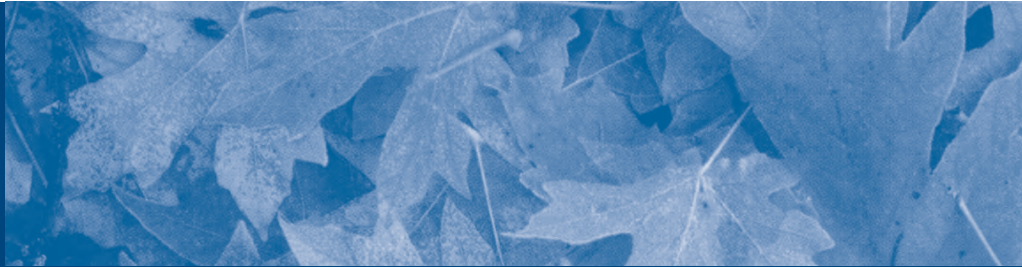
1110 Market Street, Suite 500
Warehouse Row, PO Box 151
Chattanooga, TN 37401-0151



www.lutheranderson.com

Presort Std.
U.S. Postage

PAID
Chattanooga, TN
Permit No. 371



LUTHER-ANDERSON
NEWSLETTER

Fall/Winter 2007

LUTHER-ANDERSON

FIRM NEWS • FIRM NEWS • FIRM NEWS



CONGRATULATIONS!

**AL HENRY SELECTED AS 2007
MID-SOUTH SUPER LAWYER**

Al Henry has been reselected by Mid-South Super Lawyers as being in the top five percent of attorneys in Tennessee, Arkansas, and Mississippi.



**LUTHER-ANDERSON WELCOMES
NEW ASSOCIATE**

Luther-Anderson is pleased to welcome Christine M. Vanasse to the firm. Ms. Vanasse received her bachelor's degree from Weber State University in Ogden, Utah in 2000 and her law degree from the University of Tennessee College of Law in 2002. Ms. Vanasse practices general civil litigation. She is licensed to practice in the State of Tennessee.



LUTHER-ANDERSON

NEWSLETTER



Partners: Samuel R. Anderson
Gerard M. Siciliano
Alaric A. Henry
Daniel J. Ripper
Thomas M. Horne
Clancy J. Covert

Associates: Amanda B. Rogers
Christine M. Vanasse
Legal Administrator: Pat Gill

Fall/Winter 2007

Publisher: ALARIC A. HENRY,
Managing Partner

Contributors: ALARIC A. HENRY
GERARD M. SICILIANO
CHRISTINE M. VANASSE

Luther-Anderson, PLLP
1110 Market Street, Suite 500 • Warehouse Row, PO Box 151 • Chattanooga, TN 37401-0151
(423) 756-5034 – telephone • (423) 265-9903 – facsimile • www.lutheranderson.com

CASE LAW DEVELOPMENT

GEORGIA

Headnotes: Georgia Supreme Court does not allow uninsured motorist offset for workers' compensation disability payment or other similar benefits. *Dees v. Logan*, -- S.E.2d – 2007 WL 4124536 (GA)

The Georgia Supreme Court has probably made one of the most significant decisions affecting offsets on uninsured/under insured motorist carriers ruling that non-duplication of benefits clause allowing uninsured motorist (UM) carrier to reduce benefits by any amount paid or payable to or for the insured under, any workers; compensation, disability benefits, or similar law was void and unenforceable as contrary to statute permitting exclusions of coverage for property damage if insured was compensated by other property or physical damage insurance; the legislature did not intend to authorize an insurer to set off benefits received for personal injury. This case also involves a Tennessee policy involved in a Georgia accident.

In this case, *Dees* and his wife brought suit seeking damages for injuries suffered in an automobile accident. The jury awarded the Dees \$130,000 for lost wages, \$4,939 for reimbursement of COBRA payments, \$10,000 for pain and suffering, and \$5,000 for loss of consortium.

State Farm argued it was entitled to an offset for \$83,200 of workers' compensation benefits, \$70,056 of disability benefits and a pretrial settlement with Logan's liability insurer of \$25,000. State Farm relied upon the offset provisions of the State Farm policy. The trial court accepted State Farm's argument and ordered that the Dees recover nothing from State Farm or Logan. The Dees appealed. The Court of Appeals affirmed and it was appealed up to the Supreme Court. Since such offsets are not specifically addressed in the Georgia statutes the Supreme Court indicates that any such policy language offset violates public policy of Georgia. In eliminating such offsets until a legislature amends the statute states that "regardless of the law in other states such as Tennessee, OCGA §33-7-11, when properly construed in its entirety, does not allow a policy to provide for any setoff of collateral benefits that the insured has received for personal injuries".

TENNESSEE

• COMPARATIVE FAULT

Curry v. City of Hahenwald, 223 S.W.3d 289 (Tenn. App. 2007) – In this case, a landowner filed an action against the city for injuries he sustained when he stepped backwards onto a defective water meter cover located in his front yard. The issue in the case was whether the trial court properly apportioned fault (incidentally, it was a bench – not a jury – trial). In order to assess fault, the trier of fact should consider "all circumstances" including the following factors:

- (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff;
- (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it;
- (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff;
- (4) the existence of a sudden emergency requiring a hasty decision;
- (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and
- (6) the party's particular capacities, such as age, maturity, training, education, and so forth.

Id. at 292-93 (citing *Eaton v. McClain*, 891 S.W.2d 587, 592 (Tenn. 1994) (footnotes omitted).

The Court explained that, in a premises liability case, it is not always enough that the owner or occupier warns of a known danger:

In any case where the occupier as a reasonable person should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, where there is reason to expect that the invitee's attention will be distracted as by goods on display, or that after a lapse of time they may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not

TENNESSEE

• COMPARATIVE FAULT

(continued from pg.2)

reasonably be expected or for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it.

Id. (quoting W. Keeton, Prosser & Keeton on Torts § 61 (5th ed. 1984).

• NURSING HOME LITIGATION

Conley v. Life Care Centers, 2007 WL 24828 (Tenn. App. 2007)

In this case, the estate of a former nursing home resident brought this wrongful death action, asserting sundry claims against the nursing home arising out of an attack on Mrs. Stinson by another resident. As a result of the attack, Mrs. Stinson was hospitalized and treated for injuries including a broken hip. She died four months later of pneumonia. Initially, the claims against the nursing home sounded principally in medical malpractice, with the plaintiff contending the attack, injuries, and death were the result of variety and series of acts and omissions of the nursing home, including failing to properly screen and/or subsequently discharge the residence who attacked Mrs. Stinson. The plaintiff additionally asserted claims against Genesis of Jackson, Inc., a provider of psychiatric services, and the State of Tennessee, contending they, along with the nursing home, were responsible for determining whether the resident who assaulted Mrs. Stinson should have been admitted or retained as a resident at the nursing home. The plaintiff's claim against Genesis was dismissed by the trial court, and the claim against the State was denied by the Claims Commission. The plaintiff sought to amend the complaint to add a claim for attorney fees against the nursing home under the Tennessee Adult Protection Act. The trial court dismissed the TAPA claim finding the plaintiff's claims sounded in medical malpractice and therefore, by statute, the exclusive remedy was under the Medical Malpractice Act. The plaintiff's medical malpractice claims against the nursing home went to the jury. Following a six-day jury trial, the plaintiff was awarded \$130,000 in compensatory damages against the nursing home.

On appeal, the Court ordered a new trial because it found that Genesis improperly was summarily dismissed. Significantly, the Court held that a plaintiff may not recover damages under TAPA if the cause of action lies within the scope of Tennessee's Medical Malpractice Act, i.e., Tennessee Code Annotated §29-26-101, *et. seq.*

TENNESSEE

• INSURANCE

Ragsdale v. Deering, 2006 WL 2516391 (Tenn. App. 2006).

In this case, the Court of Appeals explored a UM coverage issue. The facts are as follows:

The defendant deliberately rammed the company truck he was driving into the plaintiffs' pickup truck, severely injuring the occupant driver and passenger. The plaintiffs sued the truck driver and his employer. They also served the complaint on the injured driver's own insurance carrier, pursuant to Tenn. Code. Ann. §56-7-1206, to protect their right of recover in the event that the defendants were found to be uninsured or under insured. The defendant truck driver's liability carrier subsequently denied coverage to him under a policy exclusion for intentional acts. The injured driver's uninsured motorist insurance carrier then filed a motion for summary judgment asking the trial court to rule that the plaintiffs were not entitled to uninsured motorist coverage under the insurance contract. The trial court denied the insurance company's motion.

The Court of Appeals affirmed the trial court's decision.

The relevant policy language was as follows:

We will pay damages for **bodily injury** which an **insured** or the **insured's** legal representative is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**. The **bodily injury** must be caused by **accident** and arise out of the ownership, maintenance, or use of the **uninsured motor vehicle**.

Emphasis provided. According to the insurer, "this language excludes coverage of injuries resulting from Mr. Deering's intentional act because those injuries were not caused 'by accident' and/or did not arise out of the proper 'use' of the truck." The Court of Appeals, however, "interpreted the language of the policy at issue to include UM coverage for injuries caused by the intentional acts of uninsured motorist."

As far as the insurer's argument about proper use of the truck, the Court determined that the accident did arise out of the "use" of the vehicle and that "proper" was a mere modifier since it was not found in the insurance contract.

Accordingly, the Court held that "the cause of action remains personal to the plaintiff insofar as the running of the statute of limitations is concerned" and, therefore, the statute of limitations was tolled. *Id.* at 510-11. The Court likewise held that the existence of a durable power of attorney does not remove disability. *Id.* at 514-15.



TENNESSEE

• WORKER'S COMPENSATION

Dickerson v. Invista Sarl, E2006-02144-WC-R3-WC (Tenn. Sup. Ct. – filed October 18, 2007).

Tennessee Supreme Court Special Workers Compensation Appeals Panel upheld trial court's decision that employer is not liable for employee's injuries because of an idiopathic fall. Invista Sarl, employer, was defended by Gerard M. Siciliano, partner at Luther-Anderson. Salient facts of case are as follows:

On July 14, 2004, Willard Dickerson, a long-time employee of Invista Sarl and predecessor E.I. Dupont De Nemours was ascending a fourteen (14) step staircase at local plant when he stumbled and felt left knee pop. Medical testimony was mixed whether he struck his knee or not. Employee admitted the steps were well lit, with no foreign substance, and steps were not inherently dangerous. Medical history was undisputed that employee had a long history of prior knee problems with significant degenerative changes and two (2) prior surgeries. Testimony was mixed whether there was an aggravation of pre-existing conditions, and trial court found in the alternative that if the claim was found compensable on appeal then the employer would be responsible for all

medical and hospital expenses, including surgery for knee replacement. Trial court placed significant weight that the employee's testimony in open court, which conflicted with histories given various physicians. Employee retained Dr. Carl Dyer for IME and Dr. Dyer basically testified any injury sustained on a job site is always compensable and within the course and scope of employment, arguing there is never an idiopathic fall defense. The court ruled there was an incident on the stairwell and that the employee did injure himself while ascending the steps, but that the fall was idiopathic in nature. Idiopathic fall cases are generally strictly scrutinized and employees often argue that a hazardous condition associated with the employment such as a patch of an ice at the work place, or a fall from a height, or while working on dangerous machinery, could cause an additional risk or element taking away the idiopathic defense. In the case at hand, the court found that even though the employee was ascending a set of steps, his injury was not caused by a hazardous work related condition and the employer was entitled an absolute defense without obligation for indemnity or additional medical care. The court gives a good general history of cases that discuss the idiopathic fall defense.



LUTHER-ANDERSON

1110 Market Street, Suite 500 • Warehouse Row, PO Box 151 • Chattanooga, TN 37401-0151
(423) 756-5034 – telephone • (423) 265-9903 – facsimile • www.lutheranderson.com

(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.