

TMAA NEWS



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City Attorney to Retire

Chattanooga city attorney Randy Nelson will retire at the end of the year to spend more time with his family. He also said he would resign from his private law firm, Nelson, McMahan & Noblett, which provides attorney services to the city. Nelson has been city attorney since Jan. 1, 1990, and has worked with the city attorney's office since 1968. He graduated from the University of Tennessee Law School in 1968.

GREETINGS FROM THE PRESIDENT

--by *Jim Gass,*
City Attorney for Pigeon Forge



I hope you are looking forward to the TMAA Summer Seminar as much as I am this year. Being a history buff, I am eager to hear our speaker on Lincoln's life as an attorney. But even more so, I'm looking forward to the fellowship and camaraderie that we share every time we get together for our TMAA dinner. The network we created not only builds fellowship, but provides true value as we seize the opportunity to grow as attorneys by sharing our insights, wisdom and experiences in the ever-challenging area of municipal law. I hope you will continue to participate in *all* of our activities. It was my pleasure to serve as your President this year. Thank you for the opportunity.

TENNESSEANS LEARN AT IMLA

--by *Dennis Huffer, MTAS Consultant*



Tennessee was fairly well represented at the International Municipal Lawyers Association's Mid-Year Seminar in Washington, D.C., despite budgetary cutbacks in many cities. We did miss some of our friends whose cities are restricting travel. It is even more important in tough economic times, however, for cities not to run afoul of costly legalities. Both IMLA and TMAA help prevent this from happening – and participants are getting their money's worth, considering a single federal claim can run in the millions of dollars. The IMLA seminar had many practical suggestions on how city attorneys can help their cities avoid inadvertent legal exposure. Among many others, these included suggestions on what to include in employee handbooks to preserve the at-will status of employees and other suggestions to avoid employee liability; how to deal with the new meaning of "disability" under the Americans with Disabilities Act; how to comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA) in light of the increased number of personnel serving in Iraq, Afghanistan, and Pakistan; and preventing municipal records from being used for identity theft. I think I can speak for every Tennessean who attended when I say that there were many opportunities at the three-day seminar to learn, re-enforce and update our knowledge in these highly litigated areas.

EXCERPTS FROM APPELLATE COURTS

--by Mike Billingsley, Kingsport City Attorney, Tammy Dunn, Oak Ridge Assistant City Attorney and Karen Beyke, Editor



FRANCES HALL v. THE TOWN OF ASHLAND CITY

COURT OF APPEALS No. M2008-01504-COA-R3-CV - Filed February 12, 2009

Is going 35 to 45 miles per hour through an intersection the driver knew was dangerous consistent with the duty to drive 'with due regard for the safety of all others,' as required by Tenn. Code Ann. § 55-8-108? Yes, affirmed the Court of Appeals.

"Defendant's rescue vehicle crashed into plaintiff's car at a busy intersection. The trial court found both parties negligent, with the speed of the rescue vehicle being the overriding factor. Defendant was found responsible for 60 percent of the fault and plaintiff for 40 percent of the fault."..."On the afternoon of October 30, 2005, an Ashland City Fire Department rescue vehicle was dispatched on a call regarding an individual having a possible heart attack. The vehicle, driven by firefighter Joshua Jackson, was lime green in color and was about thirty feet long, eight feet wide and eleven feet tall....The vehicle was equipped with emergency lights, sirens and air horns, all of which were in continuous operation from the time the vehicle left the firehouse. They proceeded south on Highway 12. At the same time, Francis Hall, an 80-year-old elementary school teacher, had just finished shopping at the Wal-Mart shopping center located at 1626 Highway 12 South, Ashland City. Preparing to exit, she was second in line, behind a red pickup truck, at the stop light at the shopping center exit onto Highway 12. She intended to turn left and proceed northward along Highway 12."

"As the rescue vehicle proceeded southward down a straight section of Highway 12, lights flashing and sirens blaring, it approached the stop light at the Wal-Mart shopping center. Jackson took his foot off the accelerator. This action engaged an engine brake which decreased the vehicle's speed. The red pickup truck ahead of Hall 'darted' into the intersection. Jackson applied the brake, slowing the rescue vehicle further. The pickup truck cleared the intersection and Jackson proceeded on. Unfortunately, Hall then entered the intersection. She was looking straight ahead. Jackson swerved left attempting to avoid her but could not. The front corner of the bumper on the passenger side of the rescue vehicle collided with the left front portion of Hall's Toyota Camry."

"The percentage of a party's fault is a question of fact. *Cross v. City of Memphis*, 20 S.W.3d 642, 644 (Tenn. 2000); *Varner v. Perryman*, 969 S.W.2d 410, 411 (Tenn. Ct. App. 1997). The standard of review of the trial court's findings of fact is de novo upon the record with a presumption of correctness unless the evidence preponderates to the contrary. Tenn. R. Civ. P. 13(d)."

"Tenn. Code Ann. § 55-8-108 states in pertinent part:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions stated in this section.

(b)(1) A driver of an authorized emergency vehicle operating the vehicle in accordance with subsection (a) may: . . .

(B) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(C) Exceed the speed limits so long as life or property is not thereby endangered; . . .

(2) Subdivision (b)(1) shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall subdivision (b)(1) protect the driver from the consequences of the driver's own reckless disregard for the safety of others.

(c)(1) The exemptions granted under subsection (b) to a driver of an authorized emergency vehicle shall only apply when the vehicle is making use of audible and visual signals meeting the requirements of the applicable laws of this state....”

“...Allen Nicholson, who was riding in the front passenger’s seat of the rescue vehicle, testified that he glanced at the speedometer and their speed was 35 to 45 miles per hour when the accident occurred. Nicholson’s testimony is consistent with that of Todd Hutchinson, Hall’s accident reconstruction expert, who testified that at the point of impact the rescue vehicle ‘had reduced speed to between 35 and 46 [miles per hour].”

“Robert Krause, an expert witness called by Hall, thought Jackson should have acted differently. Krause, a firefighter and paramedic, trained firefighters and paramedics in Toledo, Ohio and was an instructor in emergency vehicle operations. After a review of the re-enactment DVDs, witness statements, the Tennessee Highway Patrol Critical Incident Report, the Ashland City Police Report, the report of the accident reconstruction expert, the depositions and court filings, Krause opined that ‘upon approaching an intersection such as this, the vehicle should have been brought to a stop or near stop.’” ...“The trial court found Jackson, and therefore Ashland City, to have been negligent. The evidence does not preponderate otherwise. We affirm the trial court’s finding of negligence.”

“Ashland City also argues that Hall was at least as negligent as Jackson. The town cites Tenn. Code Ann. § 55-8-132(a)(1)....” “Hall obviously did not comply with this statute. Her brief on appeal offers an interesting defense of her action:

The plaintiff concedes that there is ample evidence upon which the trial court could base its finding that the plaintiff should have seen or heard the rescue truck approaching. However, the only possible inference to be drawn from the facts is that she did not. This inference is supported by two presumptions. The first is that 80- year old school teachers don’t try to ‘beat’ fire engines. The second is the amnesiac presumption. An amnesiac, or a plaintiff, who due to his or her injury has no memory of an accident, is afforded the presumption that he or she acted with due care. *Jeffreys v. Louisville & N.R. Co., Inc.*, 560 S.W.2d 920, 921 (Tenn. Ct. App. 1977).

“We disagree with the plaintiff’s reasoning. First, one might think that 80-year-old women do not engage in risky behavior – after all, that may be how they reach the stage of being 80-year-old women.”

...We are not inclined, however, to think this possibility rises to the level of a legal presumption. Second, the ‘amnesiac presumption’ exists ‘only in the absence of evidence to the contrary.’ (*cite omitted*). Since Hall concedes that ‘there is ample evidence upon which the trial court could base its finding that the plaintiff should have seen or heard the rescue truck approaching,’ the ‘amnesiac presumption’ is defeated. We affirm the trial court’s finding that Hall was negligent.”

“The trial court found ‘that the overriding factor in this case, in the accident, was the speed of the rescue truck, and the Court puts a great amount of weight on that factor.’ The court also attached significant weight to the red pickup truck going through the intersection before Hall. ‘[T]he red truck coming out in front of the rescue truck should have put the driver on notice to slow down any further than he did . . . It is the Court’s belief that he should have been going at a much slower speed.’ Although the trial court found Hall was also negligent, the court ...determined that Jackson was 60 percent responsible for the accident, and Hall ... 40 percent.”

CRAWFORD v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, UNITED STATES SUPREME COURT No. 06-1595 January 26, 2009

Does Title VII of the Civil Rights Act of 1964 protection extend to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer’s internal investigation? The U.S. Supreme Court held that it does.

“In 2002, respondent (Metro), began looking into rumors of sexual harassment by the Metro School District’s employee relations director, Gene Hughes. 211 Fed. Appx. 373, 374 (CA6 2006). When Veronica Frazier, a Metro human resources officer, asked petitioner Vicky Crawford, a 30-year Metro employee, whether she had witnessed ‘inappropriate behavior’ on the part of Hughes, *id.*, at 374–375, Crawford described several instances of sexually harassing behavior: once, Hughes had answered her greeting, “Hey Dr. Hughes, what’s up?,” by grabbing his crotch and saying “[Y]ou know what’s up”; he had repeatedly “put his crotch up to [her] window”; and on one occasion he had entered her office and “grabbed her head and pulled it to his crotch,” (*cite omitted*). Two other employees also reported being sexually harassed by Hughes (*cite omitted*). Although Metro took no action against Hughes, it did fire Crawford and the two other accusers soon after finishing the investigation, saying in Crawford’s case that it was for embezzlement. *Ibid.* Crawford claimed Metro was retaliating for her report of Hughes’s behavior and filed a charge.. with the (EEOC), followed by this suit in the United States District Court for the Middle District of Tennessee. *Ibid.*”

“The Title VII antiretaliation provision has two clauses, making it ‘an unlawful employment practice for an employer to discriminate against any of his employees . . . [1] because he has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.’ 42 U. S. C. §2000e–3(a). The one is known as the ‘opposition clause,’ the other as the ‘participation clause,’ and Crawford accused Metro of violating both.”

“The opposition clause makes it ‘unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter.’ §2000e–3(a). The term ‘oppose,’ being left undefined by the statute, carries its ordinary meaning, *Perrin v. United States*, 444 U. S. 37, 42 (1979): ‘to resist or antagonize . . . ; to contend against; to confront; resist; withstand,’ Webster’s New International Dictionary 1710 (2d ed. 1958).” ...

“The statement Crawford says she gave to Frazier is thus covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense. Crawford’s description of the louche goings-on would certainly qualify in the minds of reasonable jurors as ‘resist[ant]’ or ‘antagoni[stic]’ to Hughes’s treatment, if for no other reason than the point argued by the Government and explained by an EEOC guideline: ‘When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication’ virtually always ‘constitutes the employee’s *opposition* to the activity.’” ...

“...And we would call it ‘opposition’ if an employee took a stand against an employer’s discriminatory practices not by ‘instigating’ action, but by standing pat, say, by refusing to follow a supervisor’s order to fire a junior worker for discriminatory reasons. Cf. *McDonnell, supra*, at 262 (finding employee covered by Title VII of the Civil Rights Act of 1964 where his employer retaliated against him for failing to prevent his subordinate from filing an EEOC charge). There is, then, no reason to doubt that a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”

“...Although there is no affirmative defense if the hostile environment ‘culminates in a tangible employment action’ against the employee, *Ellerth*, 524 U. S., at 765, an employer does have a defense ‘[w]hen no tangible employment action is taken’ if it ‘**exercised reasonable care to prevent and correct promptly any’ discriminatory conduct and ‘the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided** by the employer or to avoid harm otherwise,’ *ibid.*

Employers are thus subject to a strong inducement to ferret out and put a stop to any discriminatory activity in their operations as a way to break the circuit of imputed liability.

...“That aside, we find it hard to see why the Sixth Circuit’s rule would not itself largely undermine the *EllerthFaragher* scheme, along with the statute’s “primary objective” of ‘avoid[ing] harm’ to employees. *Faragher, supra*, at 806 (quoting *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 417 (1975)). If it were clear law that an employee who reported discrimination in answering an employer’s questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that ‘[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.’(citations omitted). The appeals court’s rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under our cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it ‘exercised reasonable care to prevent and correct [any discrimination] promptly’ but ‘the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer.’ *Ellerth, supra*, at 765. Nothing in the statute’s text or our precedent supports this catch-22.”

FRANK BARRETT D/B/A BARRETT CONSTRUCTION COMPANY v. TENNESSEE OCCUPATIONAL SAFETY AND HEALTH REVIEW, TN Supreme Court No. M2006-02338-SC-R11-CV - Filed May 5, 2009

The Tennessee Supreme Court held that article VI, section 14 of the Tennessee Constitution does not apply to monetary penalties imposed by a state administrative agency, reasoning that the \$50 fine limitation applies only to the judicial branch of government and therefore is inapplicable to monetary penalties assessed by an administrative agency, which is part of the executive branch.

CITY OF OAK RIDGE V. DIANA RUTH BROWN (E2008-02219-COA-R3-CV)

On May 8, 2009, the Tennessee Court of Appeals decided the case of City of Oak Ridge v. Diana Ruth Brown (E2008-02219-COA-R3-CV) and affirmed the trial court’s judgment of finding the defendant guilty of speeding 67 mph in a 45 mph posted zone on State Route 62. This is the second time this case has been on appeal to the Court. The first time the Defendant appealed she argued, and the Court agreed, that she was entitled to argue in the trial court her assertion that the speed limit on State Route 62 was not legally established. The Court remanded the case back to the trial court to give the Defendant this opportunity; however, the Court specifically stated the City could rely on the presumption of validity of the posted speed as set forth in Thomas v. Harper, 385 S.W.2d 130 (Tenn. Ct. App. 1964). On remand, the City established the posted speed limit of 45 mph and offered proof of the Defendant’s speed of 67 mph, thereby relying on the presumption of validity. The Defendant, however, offered no testimony or evidence to rebut this presumption and the trial court found the Defendant guilty of speeding 67 mph and assessed a fine of \$50.00, the maximum amount allowable for a municipal ordinance violation.

The Defendant appealed to the Court arguing that her attorney did not provide her with adequate representation and claimed she was entitled to the constitutional protection of adequate representation that is afforded to criminal defendants under the 6th Amendment. The Defendant argued this protection applied based on her assertion that municipal ordinance violations are criminal, not civil, in substance. The Court rejected this argument.

The Defendant outlined many instances to attempt to demonstrate her attorney’s lack of preparation for trial. And while the Court noted there might be times when the facts of a civil case are so egregious that justice may require some relief, the Court did not find that to be the case here. The Court noted the Defendant was well aware of the perceived inactions of her attorney and stated the Defendant must accept the consequences of her own inaction for not insuring the preparedness of her attorney. Further, the Court stated the Defendant could have been found guilty regardless of the posted speed limit because her speed exceeded the maximum speed allowable by State law for this type of highway.

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IMPORTANT DATES TO REMEMBER

TMAA Summer Seminar

The TML Annual Conference will be **June 13-16, 2009**, at the Chattanooga Convention Center. The TMAA Summer Seminar held in conjunction with the TML Conference will be Monday, June 15. Information and registration materials are available at www.tmaa.us. Don't forget to sign up for our dinner!!!



Karen Beyke,
Editor

IMLA 74th Annual Conference Miami, FL, October 18-21, 2009

IMLA gives membership break to TN small cities

The International Municipal Lawyers Association has agreed with TMAA to allow city attorneys from cities with a population of less than 2,600 who are members of TMAA to become members of IMLA for \$50.00 (normally \$375.00.) To join IMLA under this program, contact TMAA.

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