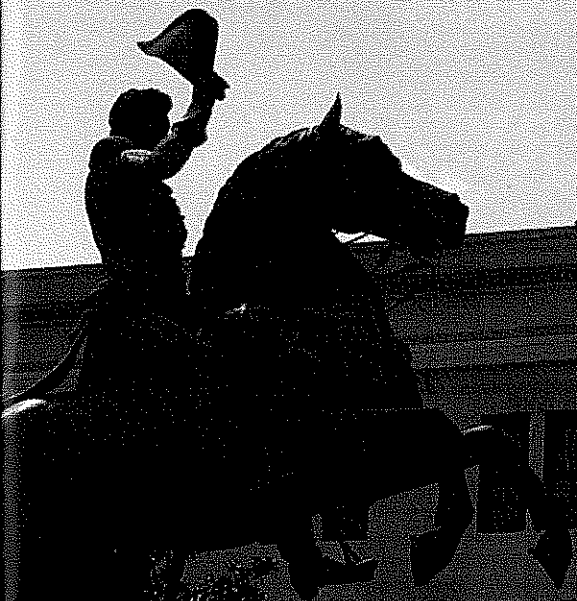


Nashville Bar Journal

July 2011 VOL. 11, NO. 1



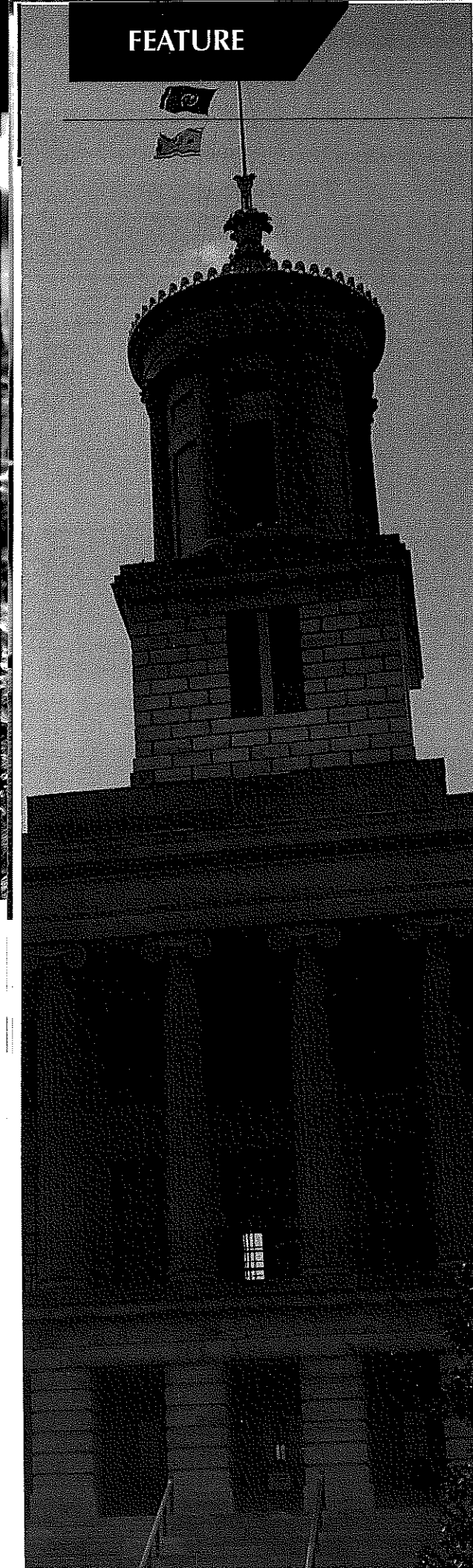
Legislative Update 2011

The Fluid State of DUI Law:
an overview of recent changes
Daphne Davis & Ed Ryan

Nuts & Bolts Series: Drafting a Basic Will
Tracy Kane & Harlan Dodson

Bill & Phil's Gadget of the Month:
Fun in the Sun with Technology
Bill Ramsey and Phillip Hampton

*****CAR-RT LOT**C-003
TRACY DRY KANE
90
DODSON PARKER BEHM & CAPPARELLA, P.C.
1310 6TH AVE N
NASHVILLE TN 37208-2604



With Republican majorities in the General Assembly and the executive branch, this year's legislative session proved to be quite active. Below are a few of the laws enacted this year that may impact your practice.

Legislative Update 2011

by: Tracy Kane and Jillian Mastroianni

Bankruptcy

Pub. Ch. No. 60 (HB0491/SB0503): Increases the personal property exemption related to execution or seizure to satisfy a judgment from \$4,000 to \$10,000. Effective 4/11/2011.

Criminal Law

Pub. Ch. No. 299 (HB0151/SB0254): Amends T.C.A. § 39-15-150 by adding new subsection (j), providing that venue and territorial jurisdiction for the offense of identity theft may be where the victim resides or is located. Effective 7/1/2011.

Pub. Ch. No. 362 (HB0300/SB0487): Amends T.C.A. § 39-17-308 to broaden the offense of harassment to include certain electronic communication with or about another person, or the transmission or display of certain images. Effective 7/1/2011.

Pub. Ch. No. 290 (HB1365/SB1086): Amends T.C.A. § 40-30-117(c) increasing the amount of time, from 10 to 30 days, a petitioner in a post-conviction relief action has to appeal the ruling of the trial court to the court of criminal appeals on a motion to reopen the petition. Effective 5/27/2011.

Pub. Ch. No. 379 (HB0391/SB0343): Amendments to T.C.A. § 55-10-403 increase the minimum time that a driver's license may be revoked for third DUI convictions from three to six years, and for subsequent DUI convictions from five and eight years. Effective 7/1/2011.

Pub. Ch. No. 292 (HB1051/SB1265): The "I Hate Meth Act" prohibits a pharmacist from selling more than 3.6 grams per day, or more than 9 grams per 30-day period, of non-exempt methamphetamine to the same individual, unless that individual has a valid prescription. The Act also allows the pharmacist to decline the sale if he or she believes the sale is for an illegitimate purpose. Effective 7/1/2011.

Civil Procedure

Pub. Ch. No. 498 (HB1358/SB1114): The stated purpose of this legislation is to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008). Effective 7/1/2011.

Pub. Ch. No. 510 (HB2008/SB1522): The Tennessee Civil Justice Act of 2011, commonly known as the tort reform law, limits non-economic damages in health care liability actions to \$750,000 per injured plaintiff, and non-economic damages in a catastrophic injury to \$1,000,000 per injured plaintiff. Effective 10/1/2011.

Pub. Ch. No. 130 (HB1189/SB1912): Clarifies that Title 50 (Employer and Employee) and Title 56 (Insurance) provide the sole and exclusive statutory remedies and sanctions applicable to an insurer, person, or entity licensed, permitted, or authorized to do business under Title 56 for alleged breach of, or for alleged unfair or deceptive acts or practices in connection with, a contract of insurance. Effective 4/29/2011.

Education

Pub. Ch. No. 466 (HB1989/SB1523): Amends Title 49, Chapter 13, relative to charter schools by allowing any student in a charter school's jurisdiction to attend the school, removing the cap on the number of charter schools in the state, and authorizing the achievement school district to approve applications to create charter schools. Effective 6/10/2011.

Pub. Ch. No. 251 (HB0301/SB0488): Amends Title 49 by defining cyber-bullying and requiring schools to implement policies against cyber-bullying. Effective 7/1/2011.

Pub. Ch. No. 457 (HB1336/SB1993): Revises restrictions on isolation and re-

straint in special education and renames the Act as "Special Education Isolation and Restraint Modernization and Positive Behavioral Supports Act." Effective 6/10/2011.

Election Law

Pub. Ch. No. 389 (HB1003/SB1915): Deletes the prohibition against corporations making contributions to political candidates and designates any corporation that makes expenditures to support or oppose any measure or candidate for public office during a calendar quarter in an aggregate amount exceeding \$250 as a political campaign committee. Additionally, the law increases contribution limits to reflect change in the consumer price index (CPI). Effective 6/1/2011.

Pub. Ch. No. 182 (HB0612/SB0599): Moves the date of the presidential preference primary from the first Tuesday in February to the first Tuesday in March and changes related qualifying deadlines for local candidates. Effective 7/1/2011.

Pub. Ch. No. 323 (HB0007/SB0016): Requires a voter, as of 1/1/2012, to present qualified photographic identification before voting. Voters without proper identification will be allowed to cast provisional ballots. T.C.A. § 2-7-112. Effective 1/1/2012.

Employment Law

Pub. Ch. No. 461 (HB1641/SB0940): Establishes a statutory burden of production and persuasion in employment discrimination, Tennessee Disability Act, and retaliatory discharge actions. As enacted, the law establishes that the burden is on the plaintiff to establish a prima facie case of intentional discrimination or retaliation. The burden then shifts to the defendant to produce evidence that one or more legitimate, nondiscriminatory reasons existed for the challenged employment action. If the defendant produces such evidence, the burden shifts to the plaintiff to

demonstrate that the reason given by the defendant was not the true reason for the challenged employment action, but a pretext for illegal discrimination or retaliation. Effective 6/10/2011.

Pub. Ch. No. 203 (HB2047/SB1785): Establishes that in cases where the employer has implemented a drug-free workplace, if the injured employee has, at the time of the injury, a specified blood alcohol concentration level or positive confirmation of a drug, then it is presumed that the drug or alcohol was the proximate cause of the injury. This law also changes the evidence requirement from a preponderance of the evidence to clear and convincing evidence for rebutting the presumption that drugs or alcohol were the proximate cause of the injury. TCA § 50-6-110(c). Effective 7/1/2011.

Pub. Ch. No. 33 (HB0283/SB0519): Provides that an employer permitting a person with a handgun carry permit to carry a handgun on the employer's property does not constitute a TOSHA occupational safety and health hazard to the other employees. Effective 3/31/2011.

Pub. Ch. No. 416 (HB1503/SB0932): Amends various provisions in Chapters 2 (Wage Resolutions), 6 (Workers' Compensation Law) and 7 (Tennessee Employment Security Law) of Title 50, including clarifying that present law does not prohibit parties in workers' compensation settlements from compromising and settling the issue of future medical benefits and clarifying that cumulative trauma conditions, such as hearing loss, carpal tunnel syndrome, or any other repetitive motion conditions, are not considered employment injuries unless such conditions arose primarily out of and in the course and scope of employment. Effective 6/6/2011.

Continued on Page 14 ➔

Pub. Ch. No. 436 (HB1378/SB1669): The Tennessee Lawful Employment Act requires employers to request and maintain certain documentation of newly hired employees' citizenship or qualified alien status in the following stages: (1) on or after January 1, 2012, for governmental entities and private employers with five hundred (500) or more employees; (2) on or after July 1, 2012, for private employers with two hundred (200) to four hundred ninety nine (499) employees; (3) on or after January 1, 2013, for private employers with six (6) to one hundred ninety-nine (199) employees. T.C.A. § 50-1-703. Effective 6/7/2011 and 1/1/2012.

Pub. Ch. No. 128 (HB0884/SB1306): Revises provisions governing claims and appeals for unemployment compensation by specifying that personnel records and other business records that are in the possession of a claimant's employer and that are relevant to a claim will be admissible, regardless of whether such evidence is hearsay or whether corroborated by direct witness testimony, if such evidence is accompanied by an affidavit of its custodian or other qualified person certifying the evidence as a business record. Effective 4/29/11.

Pub. Ch. No. 422 (HB2030/SB1550): Revises various provisions of workers' compensation law regarding construction services providers, including establishing an exemption to the general requirement that all construction services providers carry workers' compensation insurance on themselves, specifying who may apply for such an exemption, clarifying when a general contractor, intermediate contractor or subcontractor is liable for compensation to any employee injured while in the employ of any such contractor, and setting forth who must proceed with a suit to recover damages for a workers' compensation injury pur-

suant to common law. Additionally, the law requires, instead of authorizes, the secretary of state to revoke a workers' compensation exemption upon certain conditions, and revises such conditions. Effective 6/6/2011 and 10/1/2011.

Family Law

Pub. Ch. No. 86 (HB1106/SB0721): Makes various changes regarding child custody determination for a mobilized member of the armed forces. Effective 4/14/2011.

Pub. Ch. No. 460 (HB1624/SB1400): Amends T.C.A. § 39-13-601 to provide that offenses of wiretapping and electronic surveillance do not apply to an individual who installs software on a computer the individual owns if such software is intended solely to monitor and record the use of the Internet by a minor child of whom such individual is a parent or legal guardian. Effective 6/10/11.

Insurance, Healthcare, Hospitals

Pub. Ch. No. 468 (HB2007/SB1540): The Amended and Restated Tennessee Captive Insurance Act provides many requirements and specifications relevant to captive insurance companies. For example, the law allows a captive insurance company to apply to the Commissioner of the Department of Commerce and Insurance for an insurance license and to register with the Secretary of State to form a business entity in Tennessee. Further, the law establishes criterion regarding risks that a captive insurance company may insure. Effective 6/10/2011.

Pub. Ch. No. 6 (HB0303/SB361): Amends T.C.A. § 56-7-120 by changing the content requirements of the written notice that a health care facility must provide an insured in order to prohibit the insured's insurer from disregarding

the insured's assignment of benefits to a non-participating facility-based physician. Effective 3/10/2011.

Pub. Ch. No. 90 (HB1845/SB1765): Revises the law relative to the authority of the Commissioner of Commerce and Insurance to investigate insurance agents, the rights of insurance agents under investigation, and the penalties imposed against insurance agents. Effective 7/1/2011.

Pub. Ch. No. 9 (HB0115/SB0079): The Tennessee Health Freedom Act declares it to be the public policy of Tennessee that every person within the state is free to choose or to decline to choose any mode of securing health care services without penalty or threat of penalty. The law also prohibits the state government from interfering with a citizen's right to purchase or refusal to purchase health insurance, declaring any law passed in violation of the policy expressed in this bill to be void *ab initio*. Further, the Act prohibits any public official, employee, or agent of this state or any of its political subdivisions from acting to impose any penalty in Tennessee that violates the public policy set forth in this bill. Effective 3/18/2011.

Pub. Ch. No. 189 (HB0738/SB0483): The Annual Coverage Assessment Act of 2011 establishes an annual coverage fee on hospitals to help restore approximately \$400 million in proposed TennCare cuts. The law also prohibits a covered hospital from increasing charges or adding surcharges to compensate for the additional expense of the annual coverage fee. Effective 7/1/2011.

Pub. Ch. No. 67 (HB1158/SB0484): The Tennessee Patient & Quality Improvement Act of 2011 provides that records of quality improvement committees (QICs) and testimony by hospital board trustees or directors, medical staff,

administrative staff, employees or other committee members or attendees relating to activities of the QIC are confidential and privileged, and are protected from discovery, subpoena or admission into evidence in any judicial or administrative proceeding. Effective 4/12/2011.

Real Property, Estate Planning, Trusts and Probate

Pub. Ch. No. 122 (HB1921/SB1451): Revises various provisions related to the notice of the right to foreclose that must be sent by the lender to the debtor prior to foreclosure and deletes certain notice requirements. For example, the law specifies that no written notice of the right to foreclose is required to be sent to the debtor if the lender, trustee, or agent thereof has, within 180 days prior to publishing notice of foreclosure, met with the principal debtor in-person to review the loan and advised the debtor that failure to meet the loan obligations may result in foreclosure proceedings. A sworn affidavit by the lender, trustee, or agent thereof stating the time and place of the meeting with the debtor is conclusive proof of exemption from the notice requirement under this bill. Additionally, in lieu of a sworn affidavit, a document signed by both the lender, trustee, or its agent and the debtor evidencing the meeting is conclusive proof of such exemption. Effective 4/25/2011 and 1/1/2013.

Pub. Ch. No. 462 (HB1644/SB1845): The Prohibition of Covenants Providing for Transfer Fees Act of 2011 amends Title 66 by adding a new chapter providing that a transfer fee covenant recorded after the effective date of law, or any lien to the extent that it purports to secure the payment of a transfer fee, is not binding on or enforceable against the affected real property or any subsequent owner, purchaser, or mortgagee of any interest in the property. The Act defines

"transfer fee covenant" as a provision in a document, whether recorded or not and however denominated, that purports to run with the land or bind current owners or successors in title to specified real property located in this state, and that obligates a transferee or transferor of all or part of the property to pay a fee or charge to a third person upon transfer of an interest in all or part of the property, or in consideration for permitting any such transfer. Effective 6/10/2011.

Pub. Ch. No. 505 (HB1920/SB1299): Amends Title 35, Chapter 5, by providing provisions governing the description of property in the notice of a judicial or trust sale. The law also authorizes the postponement and rescheduling of a foreclosure sale without further newspaper publication under certain circumstances, unless prohibited by contract. Effective 7/1/2011.

Pub. Ch. No. 477 (HB0334/SB0387): Requires bonds of executors and administrators to include the obligation to pay expenses for court costs, attorney's fees and other related expenses of administering the estate incurred due to a failure to properly account for or utilize funds coming into the hands of the estate. Further, the law now requires, instead of authorizes, that the form of the bond be like the form shown in the Tennessee Code Annotated. Effective 7/1/2011.

Securities

Pub. Ch. No. 79 (HB1846/SB1336): Broadens transaction exemptions under the Tennessee Securities Act of 1980 by amending Title 48, Chapter 2, to include, under certain circumstances, a non-issuer transaction by or through a broker-dealer registered or exempt from registration under the Act in a security of a foreign issuer that meets certain specifications. Effective 4/14/2011.

Tax

Pub. Ch. No. 76 (HB0458/SB0636): Retroactively abolishes eligibility for carryovers for purposes of ad valorem tax equity payments made to telecommunications service providers. Effective 4/14/2011.

Pub. Ch. No. 396 (HB1141/SB0261): Increases the Hall income tax exemption for taxpayers 65 years of age or older to \$26,200 for single filers and \$37,000 for persons filing jointly beginning January 1, 2012. TCA § 67-2-104(b). Effective 6/6/2011.

Miscellaneous

Pub. Ch. No. 469 (HB2039/SB1775): Authorizes any state court judge who possesses a valid handgun carry permit and who completes both 16 hours of POST court security training and eight hours per year of POST firearm training to possess a firearm in the courtroom. T.C.A. § 39-17-1306(c). Effective 6/10/2011.

One piece of legislation that did not pass this session, but which will likely be reintroduced next year, concerns judicial elections. As introduced, HB0173/SB0127 removes provisions regarding the nomination, appointment, and performance evaluation of appellate and supreme court judges, and instead requires the election of all judges, as well as provides for the filling of any vacancies. ■



Tracy Kane is an attorney with Dodson, Parker, Behm & Capparella, PC, specializing in estate planning and business law. She is a graduate of Vanderbilt University Law School and former law clerk to the Honorable Richard Dinkins on the Tennessee Court of Appeals.

Jillian Mastroianni is a rising 3L at Vanderbilt University Law School and a summer associate with the law firm of Dodson, Parker, Behm & Capparella, PC.