

CASE COMMENTARIES

CORPORATIONS & SECURITIES

Shareholder-proposed bylaws must not require a corporation's board of directors to breach its fiduciary duties or to violate state or federal laws. *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008).

By Melanie Prince

Any shareholder-proposed bylaw that might require a Delaware corporation's board of directors to breach fiduciary duties or violate other laws cannot be included in proxy materials for a shareholder vote, even if the proposed bylaw would otherwise be an appropriate subject for shareholder action. As owners of a corporation, shareholders generally have the power under applicable state law and corporation documents to amend, modify, or repeal the corporation's bylaws. Delaware General Corporation Law permits shareholder bylaw proposals provided that the bylaw does not encroach upon the management authority of the board of directors. Therefore, shareholders can generally only attempt to impose process-related bylaws that do not impact the board's ability to manage the corporation's daily affairs. However, a bylaw that is procedural in nature but would cause the board to violate the law is not permissible. If the shareholder proposal involves a bylaw that could require the board of directors to breach fiduciary duties to the corporation, the proposal must not be included in the proxy materials or brought to a vote at the shareholder meeting. The Delaware Supreme Court resolved these important issues surrounding shareholder bylaw proposals in *CA, Inc. v. AFSCME Employees Pension Plan*.

CA, Inc. ("CA") is a business incorporated under Delaware law with a 12-member board of directors. All board members are eligible for reelection each year. CA's 2008 annual stockholder meeting was scheduled for September 9, 2008, and CA planned to file final proxy materials with the Securities and Exchange Commission ("SEC") by July 24, 2008. A CA stockholder, AFSCME Employees Pension Plan ("AFSCME"), sent a proposed bylaw to be included in CA's proxy materials for the 2008 stockholder meeting. The bylaw would have required the board of directors to reimburse an individual or group stockholder for any reasonable expenses associated with the nomination of a candidate to the board of directors, provided that one of the nominees was elected to the board. Upon receipt of the materials for this proposal, CA desired to exclude the information from its proxy materials and requested a "no-action letter" from the SEC, claiming that the bylaw was an inappropriate subject for a shareholder proposal and would force the corporation to violate Delaware corporate law if enacted. Both parties submitted legal opinions

supporting their respective positions, resulting in a conflict under Delaware law. The SEC promptly certified two questions of law to the Delaware Supreme Court for resolution, to be decided *de novo*:

1. Is the AFSCME Proposal a proper subject for action by shareholders as a matter of Delaware law?
2. Would the AFSCME Proposal, if adopted, cause CA to violate Delaware law?

The court first established that Delaware corporate law gives both the board of directors and stockholders the ability to adopt, modify or repeal bylaws. However, this concurrent power in title 8, section 109(a) of the Delaware Code is limited by section 141(a), which gives the board of directors direct management authority to the exclusion of stockholders. AFSCME's proposal facially limited director authority; however, some limitations are still permissible and within the scope of stockholder authority to adopt and modify bylaws. Procedural limitations, such as requiring a certain number of directors on the board or prohibiting board action outside of meetings, are examples of bylaws that would not usurp the board's statutory management authority. Thus, the first question concerns the nature of the proposed bylaw—specifically, is the bylaw substantive in that it restricts board power over management responsibilities, or is it primarily procedural and therefore a permissible limitation on board power? The court discussed the wording of the bylaw and acknowledged that it appeared to be a substantive restriction on board authority. The language alone is not sufficient to determine the true nature of the bylaw, however; the essential purpose and context of the bylaw are also important considerations. The shareholders have an interest in the election of directors as owners of the corporation, and the bylaw would give shareholders greater ability and opportunity to nominate new and different candidates for directorships by providing for reimbursement of expenses incurred in that process. The shareholders should have input and power in the director election process, and the fact that the board would be required to reimburse nominating shareholders or shareholder groups from corporate funds does not automatically make the shareholder proposal substantive and improper. The court concluded that AFSCME's bylaw was in essence procedural because it intended to control part of the director election process and was within the authority granted to the shareholders. Therefore, the proposed bylaw was an appropriate shareholder proposal.

After determining that AFSCME's proposal was proper, the court turned to the second question posed by the SEC. The court recognized the need to assess the proposed bylaw under many different potential scenarios to determine if its application could violate any relevant laws. The court determined that the bylaw could potentially cause a violation. In at least one circumstance, the board would be

required to reimburse a shareholder or group of shareholders involved in the nomination process in violation of title 8, section 141(a) of the Delaware Code, which prohibits breaches of fiduciary duty. As examples, the court noted that a competitor who was also a shareholder could nominate a group of individuals to director positions with the sole purpose of obtaining the corporation's proprietary information for the competitor; more generally, director nominations by shareholders might be motivated by personal, frivolous, or improper purposes that would not further the interests of the corporation. If the board was required to reimburse shareholders for improperly-motivated nominations, the reimbursements would result in a breach of fiduciary duty if the payments were at odds with CA's best interests.

To support these assertions, the court referenced prior cases involving corporations that voluntarily entered into contracts that encroached on their boards' exercise of fiduciary duties. The court invalidated those contracts because of the potential for breaches of fiduciary duty, and in the present case, the court refused to validate a shareholder proposal that could similarly result in a breach of fiduciary duty. The fact that the proposed bylaw would take the power to reimburse funds for nomination expenses completely out of the board's scope of authority does not excuse the possible statutory violation that would occur. The board's remaining authority to decide the *amount* of reimbursement did not provide enough power to negate the possible fiduciary duty breach. The court held that the board must be allowed to fully deny reimbursement when appropriate to protect the corporation's interest, and the proposed bylaw did not provide that option. While shareholders do have power to amend or modify bylaws with procedural changes that do not affect board authority over management decisions, the bylaw proposals must not have the potential to require the board to violate applicable laws.

The court ruled that the bylaw as drafted must be rejected, but commented that AFSCME could seek recourse by attempting to amend CA's Certificate of Incorporation or requesting modification of existing law. The proposed bylaw was an appropriate subject for shareholder action because it was procedural rather than substantive in effect and context, but the application of the bylaw as drafted could require the board to breach fiduciary duties to the corporation. This potential violation of Delaware corporation law prevented the inclusion of AFSCME's proposal in CA's proxy materials for the 2008 shareholder meeting.

CA, Inc. v. AFSCME Employees Pension Plan offers guidance to shareholders attempting to amend or modify a Delaware corporation's bylaws. Shareholders should draft proposed bylaws carefully and consider several issues. First, bylaws must be procedural in nature. Second, it is important to note that language alone does not determine whether a proposed bylaw is substantive or procedural. If

challenged, courts will also consider the effect of the bylaw as implemented and the context and subject of the bylaw. Therefore, shareholders should consider both the language and effect during the drafting process. Third, it may be useful for shareholders to assess many possible applications of the bylaw to ensure that the proposed bylaw does not impermissibly limit the board's authority or restrict board power such that the bylaw could compel the board to violate corporation law. Taking these steps during the drafting process may prevent the corporation from attempting to dismiss the proposal from inclusion in proxy materials and requesting a "no-action" letter from the SEC. The steps could also prevent litigation on issues similar to those presented in the case at hand, which turned somewhat on the fact that the bylaw's language did not allow the board to comply with fiduciary duty responsibilities under all circumstances. Shareholders still have latitude and power to attempt to modify corporation bylaws, but the proposals must be drafted with attention to many important issues to be successful in passing the corporation and SEC gatekeepers to reach the shareholders at large.

Retaining corporate assets exceeding secured claims may jeopardize the corporate veil. *Pamperin v. Streamline MFG., Inc.*, No. M2007-00256-COA-R3-CV, 2008 Tenn. App. LEXIS 154, 2008 WL 695865 (Tenn. Ct. App. Mar. 17, 2008).

By Stephen D. Hargraves

While corporate shareholders are not personally liable for the acts or debts of the corporation, the shareholders may become personally liable due to their own acts or conduct. In *Pamperin v. Streamline MFG., Inc.*, the Court of Appeals of Tennessee addressed whether a shareholder's retention of assets from a liquidating corporation—for personal gain—should make the shareholder personally liable if the value of those assets exceeds the value of the shareholder's secured claims.

In *Pamperin*, the plaintiff purchased a hot tub from Streamline Manufacturing, Inc. ("Streamline") with a \$3,000 down payment. At the time of the transaction, Streamline's two sole shareholders, Mr. Moore and Mr. Holt, were involved in litigation concerning control of the company. After the plaintiff made the down payment, but before the plaintiff received the hot tub, a jury determined that Mr. Holt held a security interest in all of Streamline's assets and could foreclose on the collateral if necessary. A court order entered in that case provided that Streamline would redeem Mr. Moore's equity interest in the company, Mr. Holt would receive all the company's assets, and Streamline would cease to operate. After taking possession of all Streamline's assets, Mr. Holt sold the real property to satisfy his personal debts and employed Streamline's personal property in his new hot tub

manufacturing business. Mr. Holt paid some of Streamline's debts (primarily those owed to vendors he wished to continue doing business with through his new company), but the plaintiff was informed that her hot tub would not be delivered and her down payment would not be refunded.

Upon learning of Mr. Holt's intent to keep her down payment, the plaintiff filed a lawsuit in general sessions court against Streamline, Mr. Holt, and Mr. Moore. The court entered judgment against Streamline, but it dismissed the claims against Mr. Moore and Mr. Holt. The plaintiff then appealed to the circuit court and sought to "pierce the corporate veil" to hold Mr. Moore and Mr. Holt personally liable as Streamline's sole shareholders. The circuit court entered a judgment against the corporation of \$17,663.52, which included treble damages and attorney's fees pursuant to the Tennessee Consumer Protection Act. However, the court refused to pierce the corporate veil to impose liability on either Mr. Moore or Mr. Holt.

On appeal, the Court of Appeals of Tennessee was presented with the single issue of whether the corporate veil should be pierced under the unique facts of the case. The court noted that under Tennessee corporate law, a corporation and its shareholders are viewed as distinct entities. The separate legal status given to a corporation protects its shareholders from direct responsibility for the corporation's debts and other liabilities, except in rare circumstances when a plaintiff is successful in persuading a court to pierce the corporate veil.

The most common factors used by Tennessee courts to determine whether to pierce the corporate veil are: (1) whether there was a failure to collect paid-in-capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of stock certificates; (4) the sole ownership of stock by one individual; (5) the use of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among related entities. The court noted that no one factor is conclusive in determining whether to pierce the corporate veil.

Applying the foregoing criteria to the facts in *Pamperin*, the court found that with regard to Mr. Moore, there was no misconduct that would justify holding him personally liable to Streamline's creditors. The court highlighted that Mr. Moore was never in total control of the company and that Mr. Moore was eventually removed as a director and officer and divested of all shares of Streamline stock. With regard to

Mr. Holt, the evidence showed that all of the assets of the corporation were distributed to Mr. Holt in order to satisfy the security interest and mortgages held by Mr. Holt. However, many of the assets that were distributed to Mr. Holt were used for his own personal benefit, to the detriment of Streamline and its other creditors.

Article 9 of the Uniform Commercial Code sets forth specific duties of secured parties when a debtor defaults on a secured debt. The secured party is required to make a “commercially reasonable disposition” of collateral. Where a secured debt is over-collateralized, after applying the cash proceeds to certain obligations, the secured party should account to and pay a debtor for any surplus.

In *Pamperin*, Mr. Holt did not account for any surplus in the assets that were listed as collateral securing Streamline’s original obligation. Rather, he simply took title to all Streamline’s assets. The facts clearly showed that some collateral remained after Mr. Holt’s secured obligations were satisfied. Instead of returning the surplus to Streamline, Mr. Holt personally retained all the personal property and used it in a new business for his own personal gain. If the remaining assets (or the value of the collateral that exceeded the amount of the original obligation) had been returned to Streamline, the plaintiff might have enforced her contract claim and judgment against those assets in Streamline’s hands. However, Streamline was instead made insolvent by Mr. Holt when he retained all of Streamline’s personal property rather than only retaining an amount sufficient to satisfy the debt owed to him.

As such, the court found that Mr. Holt had used his position as the sole remaining shareholder to abuse the corporate form and defraud Streamline’s other creditors, including the plaintiff. Also, because Streamline’s assets were diverted to Mr. Holt’s own personal use, Streamline became unable to fulfill its existing obligations to creditors and others. Therefore, the court held that in order to accomplish justice under the case’s unique facts, it was necessary to pierce the corporate veil in order to reach Mr. Holt.

In *Pamperin*, the court held that where a shareholder receives a corporation’s assets pursuant to a security interest but uses surplus assets for personal gain to the detriment of other creditors, that the shareholder will be personally liable to corporate creditors. A transactional lawyer should advise shareholders, officers, and directors who are foreclosing on security interests in corporate assets to make a commercially reasonable disposition of their collateral so as to avoid jeopardizing the corporate veil.

EMPLOYMENT LAW

An employer has a duty to provide reasonable accommodations if the employer knew or should have known of an employee's disability, even if the employee fails to request such accommodations. *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127 (2d Cir. 2008).

By Christie M. Weaver

Under the Americans with Disabilities Act (“ADA”), an employer must offer reasonable accommodations to assist a disabled employee in performing the essential duties of his or her job. Historically, the employee has had the responsibility of notifying their employer of the need for an accommodation. However, in *Brady v. Wal-Mart Stores, Inc.*, the United States Court of Appeals for the Second Circuit held that an employer must offer reasonable accommodations if an employee's disability is obvious or known, even if that employee does not request accommodations.

Patrick S. Brady, a nineteen-year-old with cerebral palsy, had two years of work experience in a pharmacy prior to seeking employment as a “Salesfloor Associate” in a Wal-Mart pharmacy department in Centereach, New York. When he applied, Brady signed a consent form stating that he was able to lift 50 pounds and could move up and down a ladder “either with or without an accommodation.” Brady's cerebral palsy impacted all aspects of his life, resulting in slower speech, poor vision, and a slowed and limped walk. Brady's supervisor in the pharmacy department, a co-defendant, immediately recognized his disability. The supervisor expressed dissatisfaction with Brady's job performance, and told Brady to “speed it up.” When the supervisor failed to contact Brady with his work schedule, Brady called the store and the supervisor asked if he would be willing to work in another department. At the supervisor's request, the store manager transferred Brady out of the pharmacy. Brady was sent to the parking lot, where he was instructed to collect and transport shopping carts, a task made difficult by his cerebral palsy. Later, Brady was transferred to the food department and was ordered to stock shelves. When the Wal-Mart issued a work schedule that conflicted with his community college schedule, Brady became frustrated and terminated his employment.

Brady sued Wal-Mart for discrimination, alleging violations of the ADA and New York Human Rights Law, and asserting that the Wal-Mart's actions amounted to constructive dismissal. The trial court found that Brady was disabled under the ADA and that the Wal-Mart had discriminated against Brady on the basis of his disability by transferring him to the parking lot. The court further held that the Wal-Mart had made inappropriate pre-employment health inquiries, created a hostile

work environment, and failed to reasonably accommodate Brady's disability. However, the court found that Brady had not been constructively dismissed or subjected to intentional infliction of emotional distress.

The Wal-Mart appealed to the Court of Appeals for the Second Circuit. The court affirmed the trial court's denials of the Wal-Mart's requests for judgment as a matter of law in relation to the issues of the existence of Brady's disability, the Wal-Mart's failure to provide accommodations, the admission of a consent decree into evidence, and punitive damages. The court found that sufficient evidence was presented to show that Brady was disabled under the ADA and that he was in fact perceived as disabled by the Wal-Mart. Additionally, the Court affirmed the jury's decision that Brady's transfer from the pharmacy to the parking lot (and later to the food department) amounted to an adverse employment action and was thus discriminatory. Although the transfer did not affect Brady's income or job benefits, the parking lot and food department positions were considered to be "less distinguished" positions that involved "significantly diminished material responsibilities."

The trial court found that the Wal-Mart's question concerning Brady's abilities to carry fifty pounds and climb a ladder violated the rule that pre-employment inquiries must be narrowly tailored to the specific job for which the applicant is applying. The Wal-Mart asserted on appeal that Brady had no standing to claim that the pre-employment health inquiries were discriminatory because he had responded affirmatively to the questions and was hired. The court acknowledged the difficulty of the issue, but refused to make a determination because a decision would not affect the damages awarded to Brady. The trial court assigned all compensatory damages to the state law claims and the jury attributed punitive damages (later reduced to the statutory maximum) to the discrimination claims. Thus, none of the damages awarded were associated with the Wal-Mart's pre-employment inquiries.

The most significant issue on appeal involved the Wal-Mart's failure to accommodate Brady's disability. The Wal-Mart argued that there was no duty to provide accommodations because Brady neither requested an accommodation nor personally believed he needed an accommodation. Under the ADA, an employer must provide reasonable accommodations for the "known physical or mental limitations of an otherwise qualified individual with a disability" unless the employer can show that such measures would cause undue hardship on the business. Courts have historically held that an employee must first request an accommodation before an employer can be liable for failure to accommodate. The *Brady* court found that this rule was inapplicable because Brady's disability was "obvious or otherwise known" to the employer. The court reasoned that an employer must provide

accommodations for an obvious disability because a disabled employee may not recognize their need for an accommodation, may not realize they are entitled to one, or may be too embarrassed or scared to request one. This shifts the responsibility of initiating the process of providing disability accommodations from the employee to the employer. In sum, the court's holding states that an employer must provide reasonable accommodations if an employee requests an accommodation or if an employee's disability is obvious or otherwise known.

The Second Circuit's decision in *Brady* clarifies the responsibilities of employers under the ADA. If an employer is aware of an employee's disability, the employer should not rely upon the employee to request an accommodation and should instead offer to provide reasonable accommodations to assist the disabled employee in performing the essential functions of his or her job. Tennessee courts have previously followed the old rule requiring employees to request accommodations, but have not revisited the issue since the *Brady* decision. However, in deciding a similar Ohio case only two months after *Brady*, the Sixth Circuit referenced and relied upon the old rule, which places initial responsibility on an ADA plaintiff to request accommodations.¹ Despite this decision, employers and attorneys in the Sixth Circuit should remain aware of the broader duties imposed by *Brady*, which could signal a trend of shifting responsibility of initiating the process of providing accommodations from employee to employer.

The *Brady* court also recognized the difficulty of addressing whether the Wal-Mart's pre-employment inquiries were narrowly tailored to the specific job for which Brady was applying. In refraining from deciding the issue, the court left the question open to future controversy. Guidelines for pre-employment inquiries have yet to be expressly defined for employers. Until that issue is resolved, employers should be mindful of the specificity and appropriateness of their pre-employment health inquiries.

¹ See *Talley v. Family Stores of Ohio, Inc.*, 542 F.3d 1099 (6th Cir. 2008).

ESTATE PLANNING

The one-year statute of limitations on claims against a decedent's estate is not applicable to claims for TennCare reimbursement because the personal representative of the estate is statutorily obligated to satisfy all claims to TennCare before the estate is closed. *In re Estate of Berchie Cordelia Roberts*, No. M2006-01950-COA-R3-CV, 2008 Tenn. App. LEXIS 348, 2008 WL 2415520 (Tenn. Ct. App. June 11, 2008).

By Roman Hankins

Generally, claims against the estate of a deceased person are subject to a one-year statute of limitations from the date of death under section 30-2-310(a) of the Tennessee Code. However, certain exceptions to this rule apply, most notably the three-year statute of limitations period in the case of taxes owed to the state. In *In re Estate of Roberts*, the Tennessee Court of Appeals ruled that claims by the Bureau of TennCare ("TennCare") also are not subject to the one-year statute of limitations.

Berchie Cordelia Roberts, the decedent, enrolled in TennCare and began receiving nursing home benefits at the age of 77. Ms. Roberts died in March 2003, after receiving TennCare benefits for approximately six years. In November 2003, TennCare sent a letter and form to Marie Wiser, Ms. Roberts' caretaker, stating that a claim may exist. Ms. Wiser did not respond to the letter. TennCare sent a second letter in January 2004, which also received no response.

In November 2004, Ms. Wiser was appointed personal representative of Ms. Roberts' estate. In December, the estate's attorney sent a copy of the order opening the estate to TennCare, and TennCare then filed a claim to recover \$163,237.63 from the estate for nursing facility costs paid by TennCare on behalf of Ms. Roberts. In January 2005, Ms. Wiser filed an exception to TennCare's claim on the sole basis that the claim had been filed after the statute of limitations period had run and was therefore untimely.

The trial court determined that TennCare's actions in pursuing the claim were a governmental function, essentially the same thing as the state's attempt to recover taxes owed. As such, the claim was not barred by the usual one-year statute of limitations, but it was subject to the longer three-year statute of limitations for state tax claims. TennCare was awarded the full amount of its claim, and the estate appealed.

On appeal, the Court of Appeals of Tennessee held that TennCare was entitled to recover the payments, although on different grounds from the trial court. The Court agreed that most state claims are governed by the general one-year statute of limitations provided in Tennessee Code Annotated 30-2-310(b) and that certain other tax recovery claims are covered by a three-year statute of limitations. However, the court held that neither statute of limitation is applicable to recovery by TennCare.

As noted by the court, ensuring that TennCare has recovered any properly paid benefits is an obligation of the personal representative, placed on that person by the Tennessee Legislature. As part of that obligation, the personal representative must show to the probate court either that TennCare has recovered all proper payments or that TennCare has given a release to the estate, indicating that the estate owes nothing.

TennCare also has responsibility to recover paid benefits. Under section 30-1-301 *et seq* of the Tennessee Code, if no action is taken to open an estate that possibly owes recovery to TennCare, TennCare may do so. Still, this is not an affirmative obligation on TennCare, and it is ultimately the personal representative's responsibility to ensure that any claims by TennCare are either satisfied or released before the estate may be closed. Therefore, the one-year statute of limitations does not apply to claims for recovery by TennCare.

The court also discussed an amendment to TennCare laws made since the case was filed. While not applicable in this case, the changes are noteworthy in that they place more explicit responsibility on the personal representative of an estate to notify TennCare and to determine whether the decedent was a TennCare enrollee who actually received benefits.¹

As *Estate of Roberts* illustrates, TennCare has a right to recovery for any medical assistance payments made after the decedent reaches 55 years of age, provided that the decedent left no surviving spouse or child under age 18 or who is blind or totally disabled.² While TennCare also has a responsibility to "strive vigorously to recoup any TennCare funds for a decedent during the decedent's lifetime," the personal representative carries the primary obligation to ensure that TennCare is notified and that any claims are satisfied before the estate is closed.³

¹ TENN. CODE ANN. § 71-5-116 (2004 & Supp. 2008) (amended 2007).

² *Id.* § 71-5-116(c)(1).

³ *Id.* § 71-5-116(d)(2).

Since the 2007 revisions more clearly define a personal representative's duties, probate attorneys are well advised to read these statutes and follow them closely. First, TennCare must be notified of the death by receiving notification from both the department of health (within 30 days) and the personal representative (within 60 days after receiving letters of administration or letters testamentary).⁴ Also, the personal representative must file an affidavit confirming notice, notify the court of the decedent's enrollment in TennCare, and send the notice to TennCare.⁵ Most notably, section 71-5-116(c)(2) of the Tennessee Code now explicitly requires that, before an estate may be closed, if the decedent was enrolled in TennCare at death, the personal representative must file with the clerk of the court a release from TennCare showing payment of amounts due, waiver of the TennCare's claims, or a statement showing no amount due. By following this routine process, attorneys will save time and money.

Estate of Roberts is just one of the cases in the ongoing controversy surrounding TennCare reimbursement. A companion case, *In re Estate of Tanner*, 2007 Tenn. App. LEXIS 757, 2007 WL 4287373 (Tenn. Ct. App. Dec. 7, 2007), is currently on appeal to the Tennessee Supreme Court. However, while this issue remains unsettled, the practicing attorney should follow the statutory requirements as interpreted by *Estate of Roberts* to ensure proper estate administration and minimize the risk to the personal representative.

The Tennessee Bar Association ("TBA") has voiced opposition to the *Estate of Roberts* holding and the underlying statutory amendments to section 71-5-116 of the Tennessee Code.⁶ During legislative negotiations of those amendments, the TBA argued that any time period longer than the standard one-year statute of limitations would interfere with the estate's ability to timely file accurate death tax returns. Furthermore, the TBA has argued that *Estate of Roberts* sets a dangerous precedent that a personal representative may be personally liable to the estate's reimbursement to TennCare.

The court's central holding in *Estate of Roberts* is correct. While the TBA raises valid concerns related to potential liability being inappropriately placed upon the personal representative, the court's holding in *Estate of Roberts* follows the

⁴ The form for notification and request for release can be found at <http://www.tn.gov/tenncare/forms/releaseform.pdf>.

⁵ TENN. CODE ANN. § 71-5-116(d)(1).

⁶ Albert Secor, Estate Administration & Planning Update, TBA Estate Planning Forum 2009 6-7 (Feb. 27, 2009) (unpublished materials, on file with Transactions: The Tennessee Journal of Business Law).

primary objectives of the relevant statute. Section 71-5-116 of the Tennessee Code has two primary objectives: to ensure that TennCare is properly notified of the death of a possible TennCare enrollee, and to see that TennCare is properly reimbursed before the estate is closed. The statutory language pertaining to the latter objective clearly sets the TennCare claim apart from other claims, since not all claims (i.e., those falling outside the statute of limitations) have to be settled before the estate may be closed. Furthermore, this is an issue on which TennCare is not likely to give up easily. Potentially large sums of money are at stake in this issue, which on TennCare's side consist of taxpayer dollars. Thus, the wise attorney will always follow the statutory procedure for TennCare claims and ensure that the next estate does not end up like that of Ms. Roberts.

PROPERTY LAW

Claims seeking to limit a dominant estate's use of a prescriptive easement must be based on sufficient evidence that the dominant estate's use has materially increased the burden on the servient estate. *Frye v. Presley*, No. E2007-00510-COA-R3-CV, 2008 Tenn. App. LEXIS 372, 2008 WL 2557372 (Tenn. Ct. App. June 27, 2008).

By Sabrina Carlson

An easement is a “right an owner has to some lawful use of the real property of another.” A prescriptive easement is established where there is an “uninterrupted, open, visible, and exclusive use of another’s property for at least twenty years with the owner’s knowledge and acquiescence.” Upon the establishment of a prescriptive easement, a dominant estate that benefits from the easement cannot materially increase the burden on the servient estate that is burdened by the easement. In *Frye v. Presley*, the Court of Appeals of Tennessee held that (1) the existence of a prescriptive easement to use a driveway invalidated a claim of encroachment and (2) a servient estate seeking to enjoin activity by a dominant estate must offer sufficient evidence that the dominant estate’s activity amounts to a material increase in burden to the servient estate.

The Presleys and the Fries own two contiguous tracts of land in Sweetwater, Tennessee. The tracts were purchased in 1970 and 1980, respectively. The Presley tract is accessible solely via a primarily gravel driveway comprised of an old portion of State Highway 68. The driveway runs along the northern and western boundaries of the Frye tract before continuing east toward the Presleys’ house. The driveway is no larger than fourteen feet wide where it crosses either the northern or western boundary of the Frye tract.

Neither the Presleys’ nor the Fries’ deeds specifically mentioned the driveway easement. Although the Fries’ deed stated that it is “subject to any visible easement,” the first recordation of the driveway easement was in a 1993 conveyance of a portion of the Presley tract from the Presleys to their son. The 1993 deed references a thirty-foot wide right-of-way for “ingress to and egress from” the Presley tract.

In response to increased use of the driveway by the Presleys and their children, the Fries filed a complaint asking the trial court to determine: (1) whether the Presleys possessed a lawful easement to use the driveway; (2) if an easement was present, whether the Presleys had increased the scope of their easement resulting in encroachment; and (3) whether the Presleys had unlawfully installed utility lines on

the Fries property. The trial court held: (1) that the Presleys possessed a fourteen-foot “right-of-way easement” to use the northern portion of the driveway, and lawful use of the northern portion of the driveway did not constitute encroachment; however (2) the Presleys did not possess an easement to use the western portion of the driveway, and together with the unlawful installation of utility lines, the uses presented an unreasonable increase in burden to the Fries property, constituting encroachment.

On appeal, the Court of Appeals of Tennessee examined two issues: (1) whether the trial court erred in granting the Presleys an easement to use the northern portion of the driveway and denying the Presleys an easement to use the Western portion of the driveway and (2) whether the evidence preponderated against the trial court’s finding that the Presleys’ use of the driveway unlawfully encroached upon the western portion of the Fries’ land, resulting in an unreasonable increase in burden to the Fries’ property. The appellate court affirmed the trial court’s ruling in part and reversed in part, holding (1) that the Presleys had a prescriptive easement to use both the northern and western portions of the driveway and (2) that the increased traffic and installation of utility lines on the western portion of the driveway was not an unreasonable increase in burden to the Fries’ property beyond the use permitted by the Presleys’ prescriptive easement.

The court held that there was a prescriptive easement over the entire driveway because of the Presleys’ “uninterrupted, open, visible, and exclusive use” of the driveway, under an adverse claim of right to the Fries’ real property, for at least twenty years, with the knowledge and acquiescence of the Fries. The driveway had been used as the only means of access to the Presley tract since 1970. The Fries testified that they were aware of the driveway when they purchased their tract in 1980, and that they knew their deed was “subject to all prior easement[s], rights of way, and restrictions, visible and otherwise.”

Although the Fries argued that the Presleys had expanded the driveway on the Fries’ property, the court held that the evidence preponderated against such a finding of fact. The Fries also argued that increased use of the driveway by approximately fifteen vehicles had resulted in an increase in burden to their property due to increased traffic, a “nuisance of dust,” and “rock slinging.” Citing *Adams v. Winnett*, the court stated: “[T]he owner of an easement ‘cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden.’” *Adams v. Winnett*, 156 S.W.2d 353, 357 (Tenn. Ct. App. 1941).

The holding in *Frye*, through its affirmation of the *Adams* decision, illustrates how the existence of a prescriptive easement may negate a servient estate’s claim of encroachment against a dominant estate, and how a servient estate seeking to enjoin

activity by a dominant estate must offer sufficient evidence that the dominant estate's activity amounts to a material increase in burden to the servient estate.

Transactional lawyers should advise their clients that in Tennessee, encroachment claims against a defendant who holds a prescriptive easement must be based on a provable, material increase in burden to the plaintiff's estate. *Frye* illustrates that Tennessee courts will consider easement descriptions contained in property deeds and other recorded documents to determine whether an easement holder has materially increased the burden on the servient estate. Therefore, it is important that easements are recorded, and that the recordings are meticulously drafted to exactly and comprehensively describe the easements.

The death of a joint tenant with right of survivorship extinguishes a pending suit for partition of real property. *Rusnak v. Phebus*, No. M2007-01592-COA-R9-CV, 2009 Tenn. App. LEXIS 328, 2008 WL 2229514 (Tenn. Ct. App. May 29, 2008).

By Bryan C. Hathorn

In *Rusnak v. Phebus*, a plaintiff filed suit to partition real property held in joint tenancy with right of survivorship. After the suit was filed, but before final judgment in the case, one of the joint tenants died. The court held that by operation of law, the death of a joint tenant with right of survivorship abates a pending suit for partition of real property.

The defendant's mother was in poor health and the defendant admitted her to a nursing home. The defendant's mother had previously executed a durable power of attorney in favor of the defendant. The defendant's mother had assets that were sufficient to prevent her from qualifying for Medicaid. In an attempt to deplete her mother's assets to qualify her mother for benefits, the defendant used the power of attorney to sell her mother a 45% share in a condominium. The defendant and her mother took title as joint tenants with right of survivorship.

Ultimately, the defendant's mother was ineligible for Medicaid. The defendant had stopped making payments to the nursing home on her mother's behalf, and the nursing home petitioned the court to have a conservator appointed. The court found that the condominium transaction and the defendant's failure to pay her mother's nursing home payments warranted appointment of a conservator. The court appointed Mr. Rusnak as conservator and terminated the defendant's durable power of attorney.

The conservator filed notice with the defendant of his intention to file suit for partition of the condominium. The complaint for partition was filed and the defendant's mother died approximately three weeks later. The defendant filed a motion to dismiss, asserting that the undivided title in the condominium passed to her by operation of law at the death of her mother. The conservator's response cited section 34-3-108(e) of the Tennessee Code, which grants the conservator of the estate 120 days after the ward's death to wind up the estate. Further, the conservator cited section 20-5-101 of the Tennessee Code, which holds that pending suits "do not abate by the death, or other disability of either party . . . if the cause of action survives or continues."

The nursing home filed a motion to intervene in the action in order to pursue its claim for payment against the estate. The nursing home did not file an intervening complaint. The court granted the motion to intervene, denied the defendant's motion to dismiss, and the conservator—who was appointed as administrator of the estate—filed a motion to intervene in the suit as a party plaintiff in his role as administrator. The court found for the plaintiff and ordered the sale of the property. The defendant appealed the judgment and the sale of the property was stayed pending resolution of the appeal.

On appeal, the court of appeals reversed the trial court and held that the suit for partition did not survive the death of the joint tenant. The basis for the decision was that a suit for partition does not sever a joint tenancy until final judgment is reached. Consequently, the death of the joint tenant while the suit is pending vests title exclusively in the surviving tenant or tenants by operation of law.

The court disagreed with the plaintiff's position that the suit was preserved by the language of section 20-5-101 of the Tennessee Code, which preserves an action at death or disability of a party "if the cause of action survives or continues." The court found that the phrase "if the cause of action survives or continues" is not applicable in a case involving partition of a joint tenancy with right of survivorship because, under the majority rule, the cause of action does not survive.

In the alternative, the plaintiff relied on section 20-5-102 of the Tennessee Code, which provides that an action founded upon wrongs or contracts of the defendant does not abate upon the death of either party. In the instant case, the suit was for a partition of the property and the pleadings did not allege any wrongful act of the defendant. While the court recognized that the condominium transaction appeared on its face to be self-serving and the facts suggest the transaction may have resulted from undue influence or a fraudulent conveyance, these claims were not in the pleadings. By filing a motion to intervene, rather than an intervening complaint alleging wrongdoing, the nursing home was bound to the original pleadings. With

no complaints alleging wrongdoing, the court held that section 20-5-102 of the Tennessee Code was not implicated. Because there was no alleged wrongdoing, the suit for partition abated upon death of the joint tenant.

The present case illustrates two major points. First, it demonstrates that it is frequently better to file an intervening complaint rather than to intervene by motion. The nursing home, which intervened by motion, was tied to the pleadings made by Rusnak. Those pleadings did not include claims alleging wrongdoing by the defendant.

Second, it is imperative to use due care when making pleadings in a case involving property held in joint tenancy with right of survivorship. In a suit which could abate upon death of a party, it is essential to plead causes of action which result from wrongs of the defendant if the facts support them. In the present case, no cause of action based on wrongful conduct of the defendant was alleged in the complaint. As such, section 20-5-102 of the Tennessee Code could not be implicated to save the suit.¹

This case resolved an issue of first impression in the state of Tennessee, brought Tennessee into accord with the vast majority of states. Tennessee has now adopted the rule that a death by a joint tenant terminates a pending suit for partition of a property when no misconduct is alleged and vests title in the surviving tenants by operation of law. The basis for this decision is sound in that it protects the integrity survivorship interests in joint estates, yet preserves an exception when misconduct is alleged.

¹ However, in the present case, the motion to dismiss was a responsive pleading, but a motion to amend the complaint to add the cause of action based on a fraudulent conveyance would serve the interest of justice. Had a motion to amend the complaint to include the claims alleging wrongful conduct been granted by the court, the suit would have been preserved by implicating Tennessee Code Annotated § 20-5-102.

Reference to a description of land in a plat book is sufficient to *allege* color of title to satisfy the requirements of an adverse possession claim. *Underwood Repair Service, Inc. v. Dean*, No. M2006-01367-COA-R3-CV, 2008 Tenn. App. LEXIS 354, 2008 WL 2466270 (Tenn. Ct. App. June 18, 2008).

By Drew Oldham

In order to assert a claim for adverse possession, the plaintiff must allege “exclusive, actual, adverse, continuous, open and notorious possession for the entire prescriptive period under claim of right thereto.” In Tennessee, the prescriptive period for adverse possession is seven years, for which a plaintiff may “tack on” a previous owner’s period of ownership if he sufficiently alleges “color of title.” Where a plaintiff asserts ownership over a strip of land via adverse possession, the plaintiff’s inclusion of a deed which merely references a description of the strip in a plat book satisfies the requirements for alleging “color of title.” The Tennessee Court of Appeals reached this conclusion in *Underwood Repair Service v. Dean*.

In *Underwood*, William Underwood purchased a lot from Jesse Wright on July 30, 1999. Underwood’s company, Underwood Repair Service, subsequently purchased the lot from Underwood. Billy Dean, Peggy Dean, and Dean, LLP (collectively, “the Deans”) owned a lot adjacent to Underwood’s lot. The previous owner of Underwood’s lot, Jesse Wright, fenced in a strip of land located between the two lots and used the strip of land in his business for a number of years. The strip of land was originally part of the lot owned by the Deans.

On February 22, 2005, Underwood filed a complaint alleging that he owned the strip of land in fee simple, or in the alternative, that he obtained possession of the land via adverse possession pursuant to section 28-2-101 of the Tennessee Code. The warranty deed attached to the complaint contained the following description: “Land in Davidson County, Tennessee, being Lot No. 1 on the Plan of Antioch Commercial P.U.D. Section One of record in Plat Book 5190, page 734, Register’s Office for said County, to which reference is made for a more complete description.”

In response to the complaint, the Deans filed a motion to dismiss, arguing that Underwood failed to properly allege “color of title” to the disputed strip of land and, thus, the adverse possession claim should be dismissed. In order to meet the requisite seven-year period required to establish “color of title,” Underwood would need to “tack on” Wright’s period of ownership, which (although not specifically disclosed in the opinion) would extend the period of adverse possession beyond the seven-year period. The trial court granted the Deans’ motion to dismiss, finding that the attached warranty deed, without further reference, did not sufficiently allege

“color of title.” Therefore, Wright’s period of ownership could not be tacked on to Underwood’s period of ownership in order for Underwood to reach the seven-year period required for an adverse possession claim. Essentially, the trial court determined that the facts alleged in the complaint failed as a matter of law to satisfy Tennessee’s adverse possession statute, section 28-2-101.

On appeal, the court considered whether the complaint and attachments, including the warranty deed, sufficiently alleged Underwood’s “color of title” to allow Underwood to tack on Wright’s period of ownership. The Tennessee Supreme Court has held that the essential requirements for adverse possession are “exclusive, actual, adverse, continuous, open and notorious possession for the [seven-year] prescriptive period under claim of right thereto.” On a motion to dismiss, the defendant admits the truth of all relevant and material averments in the complaint but asserts that the statements do not constitute a cause of action. In *Underwood*, the Deans’ motion asserted that while all of the other requirements of adverse possession were satisfied, the complaint did not sufficiently allege “color of title” such to meet the seven-year requirement and, thus, the complaint did not sufficiently allege a valid cause of action.

The court stated that a party may tack on the previous owner’s period of ownership to reach the seven-year requirement so long as the previous owner, as adverse possessor, intended to and actually did turn over possession of the land. As the deed demonstrates that Wright intended to “turn over” Lot No. 1, presumably including the fenced-in portion, the court concluded that Underwood could tack on the Wright’s period of ownership if the deed in fact conveyed “color of title” to the strip of land at issue. The court referenced *Cumulus Broadcasting, Inc. v. Shim*, 226 S.W.3d 366, 377 (Tenn. 2007), in which the Tennessee Supreme Court defined “color of title” as “something in writing which at face value, professes to pass title but which does not do it, either for want of title in the person making it or from the defective mode of the conveyance that is used.” The court looked next to *Slatton v. Tennessee Coal, Iron and Rail Company*, 75 S.W. 926, 927 (Tenn. 1902), in which the Tennessee Supreme Court held that a person “holds constructive possession of the whole tract only when his entry was under color of title by specific boundaries to the whole tract.” The Supreme Court also stated that “[t]he first requisite of such color of title as will give constructive possession to the claimant is, therefore, some definite description showing the extent of the claim.” The *Underwood* court therefore asked whether the description in the deed was “some definite description showing the extent of the claim.” The court concluded that, as a matter of law, Underwood’s description was of sufficient definiteness to convey color of title to the strip of land in question because it referenced the plat book that must be presumed to contain a further description that includes the land in issue. As a final note, the court stated that it reached this conclusion because it must construe the complaint liberally in

favor of the plaintiff, taking all allegations of fact therein as true. Therefore, while the description is sufficient to *allege* a claim for adverse possession, on remand, the trial court may determine that such description may not be sufficient *to be successful* on such a claim.

The *Underwood* case illustrates the necessity for drafters to fully and completely describe conveyances in deeds and other documents of transfer. In the event that a client wishes to assert a claim for adverse possession at a future date, such a description of the land is a necessary aspect to satisfying the requirements for “color of title.” Without being able to establish “color of title,” a claim to property based on adverse possession would fail unless the twenty-year period under common law has been met, which is rarely the case. While the Tennessee Court of Appeals construed the deed in this case liberally in favor of the plaintiff, the court could have reached a different outcome under these facts. As such, this case reinforces the importance of careful drafting.

Requirements for the release of a deed of trust that are part of the public record provide constructive knowledge to the entire world, which will prevent claims of equitable estoppel. *Washington Mutual Bank, F.A. v. ORNL Federal Credit Union*, No. E2007-02421-COA-R3-CV, 2008 Tenn. App. LEXIS 360, 2008 WL 2510587 (2008).

By Walter Siedentopf

In *Washington Mutual Bank, F.A. v. ORNL Federal Credit Union*, the Court of Appeals of Tennessee considered whether a senior lender can be equitably estopped from asserting its deed of trust when a junior lender pays the loan in full but has knowledge of conditions required, beyond mere payment, for the release of the deed of trust. The court also provided dicta analyzing the same question under slightly altered fact patterns, which yielded different results under the equitable estoppel doctrine.

David and Donna Lockett (“Borrowers”) took out \$100,000 on a home equity line of credit from ORNL Federal Credit Union (“ORNL”) secured by a deed of trust on the Borrowers’ Loudon County home. The deed provided that “[w]hen borrower (1) has paid all sums secured by this Deed of Trust *and* (2) has requested that the revolving line of credit be canceled, Lender shall release this deed of trust.” ORNL properly recorded the deed, including the foregoing language, with the register of deeds.

Almost a year later, Borrowers refinanced the loan with TNBank. They signed a promissory note for \$127,000, and they secured this debt with a second deed of trust on their home. TNBank, through its title company, Jackson Square Title Company (“Jackson Square”), and Jackson Square’s attorney, requested a statement of the current payoff amount from ORNL. ORNL returned two statements, showing a total debt of \$100,468.43, but failed to provide its normal notice that the borrowers needed to request the closure of their line of credit before the deed of trust would be released.

In response to the statements of debt, Jackson Square issued two checks to ORNL totaling the full amount of the debt, and ORNL returned receipt vouchers to TNBank acknowledging that the debts had been paid in full. A week later, TNBank recorded its own deed of trust and assigned it, along with the Borrowers’ debt, to Washington Mutual Bank, F.A. (“Washington Mutual”). ORNL never closed the Borrowers’ line of credit or released the deed of trust securing it.

Approximately two weeks later, the Borrowers began drawing more money from the original line of credit with ORNL. Over the next year and a half, the Borrowers borrowed an additional \$95,887.87 from ORNL, all secured by ORNL’s original deed of trust on the Borrowers’ home. Some time after this, the Borrowers began to default on the loan payments, and Washington Mutual and Jackson Square became aware that ORNL had not released its senior deed of trust.

Jackson Square requested that ORNL release its deed of trust. ORNL did not respond to the requests, and instead, it began foreclosure proceedings on the Borrowers’ home. Washington Mutual then filed a complaint against ORNL and requested that the foreclosure proceedings be enjoined. Before the trial court came to a decision, the two companies agreed to a foreclosure sale and placed the proceeds, \$108,293.09, in escrow pending the trial court’s decision.

Equitable estoppel is governed by section 66-26-105 of the Tennessee Code, but the court relied upon a Tennessee Supreme Court case, *Osborne v. Mountain Life Insurance Co.*, 130 S.W.3d 769, 774 (Tenn. 2004), for the interpretation of the equitable estoppel doctrine. This interpretation of equitable estoppel has six elements: First, with respect to the party being estopped, there must be (1) a false representation or “concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;” (2) intention that the

representation will be acted upon; and (3) knowledge of the real facts. Second, with respect to the party asserting estoppel, there must be (4) a “lack of knowledge and of the means of knowledge of the truth as to the facts in question;” (5) reliance upon the representation; and (6) action that prejudicially changes the asserting party’s position.

The trial court held that ORNL could not enforce its deed of trust on the theory of equitable estoppel. ORNL had a business practice of providing notice of additional requirements for the release of a deed of trust to any party requesting a loan payoff. When ORNL failed to comply with this internal procedure, it made a false representation to TNBank, which led the trial court to its equitable estoppel holding.

The court of appeals agreed, in principle, with the trial court’s analysis of the case, but it held that the trial court erred in not properly considering whether TNBank and Jackson Square had constructive knowledge of the additional requirements for release. The deed of trust, including a statement of all conditions for its release, was on file in the public record, and all parties involved had the opportunity to inspect it. Additionally, section 66-26-102 of the Tennessee Code states that the recording of a deed of trust provides notice to “all the world” of the deed and its contents. Finally, TNBank’s own deed of trust contained a similar provision requiring more than mere payment for release, and thus, TNBank and Jackson Square had an even higher duty to inquire about such requirements due to the heightened foreseeability of other companies using similar practices. For the foregoing reasons, the Court held that Washington Mutual had “failed to prove that Jackson Square and TNBank lacked ‘the means of knowledge of the truth as to the facts in question.’” Therefore, the doctrine of equitable estoppel was inapplicable in this case, and the appellate court overturned the trial court’s decision.

The Court also considered two other alternate fact sets that, although dicta, could provide valuable insight for similar cases or for the application of the equitable estoppel doctrine generally. First, the court stated that if there were no facts showing knowledge on the part of TNBank and Jackson Square, the trial court’s decisions would have been correct. Thus, if the additional conditions to release were not part of the public record and there was no other knowledge—constructive or actual—of such conditions, then failure to give notice and follow internal procedures would give rise to a claim of equitable estoppel.

Second, the court considered an argument made by Washington Mutual based on a Tennessee Supreme Court case, *Bennett v. Trevecca Nazarene University*, 216 S.W.3d 293 (Tenn. 2007). In this case, a university told an electrician that some of the equipment he was working on was low voltage when, in fact, the university knew

that the equipment carried high voltage. By giving the electrician false information, the university was subjected to liability when the electrician was injured. The Court said that *Bennett* stands for the proposition that, while there is no duty to inform about certain dangers, if one chooses to do so, such communications will be subjected to a duty to speak truthfully. The court found *Bennett* to be inapplicable to the current set of facts because ORNL remained silent about any additional requirements. The court stated, however, that the *Bennett* ruling “would be relevant” if ORNL had falsely informed Jackson Square that there were no other requirements or if ORNL had stated that the deed would be released anyway. The court’s language leaves the outcome of such a case uncertain.

In general, this case shows that courts will afford a great deal of deference to documents that have been properly filed and made a part of the public record. Such documents provide notice to the world of their contents, and courts will not be forgiving to those who fail to read such documents carefully. Further, this case accents the need for careful practice on the part of all parties when dealing with real estate documents. Litigation could have been avoided if ORNL had properly followed its own procedures or if Jackson Square’s attorney had read the deed of trust more carefully. For the refinancing bank, this case shows the importance of requesting all information from the original lender and carefully reading the documents that are provided or that are on record. For the original lender, this case shows the importance of documenting everything possible in the public record.

Land developers seeking to impose restrictive covenants must clearly express those intended covenants within each deed. *Massey v. R.W. Graf, Inc.*, No. E2007-02474-COA-R3-CV, 2008 Tenn. App. LEXIS 367, 2008 WL 2557362 (Tenn. Ct. App. June 26, 2008).

By Scott E. Simmons

To advance the unrestricted use of property by a landowner, any doubt concerning the applicability of a restrictive covenant to a piece of real property must be resolved against that restriction. Similarly, any ambiguity in the terms of such a covenant shall be resolved against that restriction. A developer seeking to impose a restrictive covenant on a parcel of land must expressly and unambiguously convey such intentions when drafting the covenant.

In *Massey v. R.W. Graf, Inc.*, a group of homeowners in the Deanbrook subdivision (“Plaintiffs”) brought a declaratory judgment action against adjacent property owners (“Defendants”). More specifically, Plaintiffs sought a declaration

that building restrictions on platted parcels of property received from a common grantor also applied to a non-platted parcel purchased by Defendants from a subsequent grantor.

Plaintiffs were subject to a restrictive covenant expressly recorded by the original developer (“Dean”) of the subdivision that limited further development of the land in the subdivision. Subsequent to the enactment of this covenant, Dean’s estate conveyed certain portions of the subdivision, as well as property outside the subdivision that included the property now owned by Defendants, to the University of Tennessee via warranty deed. This conveyance was guided by a restrictive covenant, which read in pertinent part that “[t]his conveyance . . . is made **subject to** Restrictive Covenants applicable to all of the lots located in the Deanbrook Subdivisions” This conveyance included land originally within the Deanbrook subdivision, but it also included an undivided 30-acre parcel that was never a part of the subdivision. Defendant Graf later purchased this 30-acre plat from the university for development, selling individual lots to prospective homeowners, who were named as defendants only as necessary parties to the litigation.

Following a hearing on Defendants’ second motion for summary judgment, the trial judge granted summary judgment to Defendants, holding that the “subject to” language of the covenant was ambiguous. The court noted it was well-established law that any ambiguity in the terms of a covenant or intent of the parties will be resolved against the restriction. Further, the trial court rejected Plaintiffs’ alternative contention that Dean’s original conveyance to the university created an implied negative reciprocal easement burdening Defendants’ property, holding that for such a doctrine to apply, there must have been evidence Dean had intent to create a general development plan for the entire original tract.

On appeal, Plaintiffs averred two counts of error, first challenging the trial court’s determination that the language in the restriction was ambiguous, and second, challenging the court’s finding that no implied negative reciprocal easement had arisen in Plaintiffs’ favor.

Upon review, the Court of Appeals of Tennessee first upheld the trial court’s determination that the language within the restrictive covenant was ambiguous, noting that it “[was] susceptible to two very different meanings. It could mean that [it] applies to all of the property conveyed . . . including the Graf property. Or it could mean that the Dean estate intended to have the reference restrictive covenants apply only to the lots within the Deanbrook subdivision”

In justifying its determination, the court relied upon a bevy of case law opposing restrictive covenants. The court cited *Williams v. Fox*, 219 S.W.3d 319, 324

(Tenn. 2007), holding that because restrictive covenants are in derogation of the fundamental right of free use and enjoyment of real property, they are not favored under Tennessee law. Similarly, *Parks v. Richardson*, 567 S.W.2d 465, 467-68 (Tenn. Ct. App. 1977), set forth the proposition that any ambiguity in the terms of a restrictive covenant will be resolved against the restriction. The court succinctly differentiated between two types of ambiguity: the first type of ambiguity arises from “general” doubt or uncertainty, while the second arises from the “possibility of the same language being fairly understood in more ways than one.” The court relied on the second type when it determined that the language of the restrictive covenant was ambiguous.

The appellate court also upheld the finding that no implied negative reciprocal easement had arisen. Such an easement arises when a property owner sells off parcels of a tract to different persons, including a restrictive covenant in the deeds for the benefit not only of the property owner who is purchasing the parcel, but also for others who buy separate portions of the tract. In such an instance, each purchaser does not acquire absolute and unqualified title to his or her respective parcel, but rather title limited by restrictions within the deed.

To equitably enforce a negative reciprocal easement, the purchaser must first pass a four-part test: (1) the parties derived their titles from a common grantor; (2) the common grantor had a general plan for the property involved; (3) the common grantor intended for the restrictive covenant to benefit the property involved; and (4) the grantees had actual or constructive knowledge of the restriction when they purchased their parcels. In line with this theory, the court of appeals determined that Dean did not have a general plan or scheme of development for the portion of the land owned by Defendants. In furtherance of its determination, the court showed that the properties originally adjacent to the Dean subdivision (a) were not platted and (b) were not expressly included in the recorded restriction.

As *Massey* demonstrates, restrictive covenants within a subdivision should be drafted carefully and unambiguously to express the clear intentions of the drafting party. More specifically, if a transactional attorney representing a developer seeks to impose a restrictive covenant on the homeowners within a subdivision, the scope and extent of the restriction must be clearly expressed within each deed.

TENNESSEE CONSUMER PROTECTION ACT

The Tennessee Consumer Protection Act can apply to the entrepreneurial, commercial, or business aspects of a medical practice. *Proctor v. Chattanooga Orthopaedic Group, P.C.*, 270 S.W.3d 56 (Tenn. Ct. App. 2008).

By Bradley J. Hearne

In *Proctor*, the Court of Appeals of Tennessee considered the issue of whether the business aspects of a medical practice are subject to the provisions of the Tennessee Consumer Protection Act (“TCPA”). The court held that the TCPA can apply to the entrepreneurial, commercial, or business aspects of a medical practice.

The plaintiff was a patient of a physician affiliated with the defendant orthopedic center. The physician performed, among other medical procedures, surgeries on each of the plaintiff’s shoulders. Due to further health complications, the plaintiff was scheduled to have another surgery on his shoulder. Prior to the plaintiff’s subsequent shoulder surgery, the plaintiff’s physician disassociated himself from the orthopedic center. Another physician, who was associated with the center, performed the later surgery. After the completion of the surgery, the center billed the plaintiff and his insurer for a total shoulder arthroplasty. However, the center’s physician actually conducted a less expensive form of surgery known as a hemiarthroplasty.

The plaintiff and his wife then sued the center, alleging violations of the TCPA resulting from the center billing for a surgery that was not performed. The Circuit Court dismissed the complaint and the plaintiff appealed. One issue was raised on appeal: whether the trial court erred in holding that the business aspects of the center’s medical practice were not subject to the provisions of the TCPA and dismissing the complaint.

Construing the complaint liberally in favor of the plaintiff, the appellate court held that the plaintiff stated a claim for alleged deceptive business practices upon which relief could be granted. Given the intent of the Tennessee General Assembly, along with case law, the center was not exempt from the TCPA because the alleged violations applied to the entrepreneurial, commercial, or business aspects of a medical practice.

In particular, the court distinguished this case from *Constant v. Wyeth*, 352 F. Supp. 2d 847 (M.D. Tenn. 2003). On appeal, the center had cited *Constant* in support

of the proposition that the TCPA does not apply to the provision of medical services. The *Constant* court found that the plaintiff had alleged a claim for medical malpractice and then alleged simply that the doctor had violated the TCPA “with no other ‘fleshing out’ of this allegation.” The *Constant* court then stated that “medical malpractice claims may not be recast as consumer protection act claims.” In *Proctor*, however, the appellate court agreed with the trial court that the gravamen of the plaintiffs’ claim sounded in alleged deceptive business practices under the TCPA, not in medical malpractice.

The significance of the *Proctor* court’s holding is that the TCPA presents an avenue to establishing physician and medical practice liability outside of a malpractice action. This sidesteps the various hurdles of a malpractice action including enhanced notice requirements, certificates of good faith, and expert testimony. Additionally, the TCPA allows the patient to recover actual damages, plus punitive damages or treble damages, plus attorney’s fees. Finally, claims under the TCPA might not be covered by professional liability insurance because these claims arguably involve some aspect of the business relationship rather than the performance of professional services. In consequence, medical practices should review their general liability insurance policy to ensure that coverage exists for TCPA claims.
