CASE COMMENTARIES

INTELLECTUAL PROPERTY

The United States Court of Appeals for the First Circuit held that a licensee's ability to retain intellectual property rights under 11 U.S.C. § 365(n) does not extend to the licensee's exclusive distribution rights or trademark licenses. *Mission Prod. Holdings, Inc. v. Tempnology, LLC (In re Tempnology, LLC)*, 879 F.3d 389 (1st Cir. 2018).

Duncan Bryant

In *Mission Product Holdings, Inc. v. Tempnology, LLC*, the First Circuit addressed whether a licensee can retain exclusive distribution rights and trademark licenses after the licensor has filed for Chapter 11 bankruptcy. According to 11 U.S.C. § 365(a), a company that is undergoing a Chapter 11 bankruptcy proceeding may, with court approval, reject any executory contract that the debtor-in-possession deems would hinder its ability to restructure. However, there is an exception — when the rejected contract is one "'under which the debtor is a licensor of a right to intellectual property,' the licensee may elect to 'retain its rights to such intellectual property.'" 11 U.S.C. § 365(n)(1). Upon review, the First Circuit held that these rights of retainer do not encompass either exclusive distribution rights or trademark licenses.

On November 21, 2012, Tempnology, LLC ("Debtor") executed a Co-Marketing and Distribution agreement with Mission Product Holdings, Inc. ("Mission"). The agreement provided Mission with (1) both exclusive and nonexclusive rights to several of Debtor's products; (2) a nonexclusive, perpetual license to Debtor's intellectual property, excluding trademarks; and (3) a nonexclusive, non-transferable license to use its trademark and logo "for the limited purpose of performing its obligations" under the agreement. Mission was also required to "comply with any written trademark guidelines," and Debtor retained the right to review all trademark usage.

On June 30, 2014, Mission exercised an option to terminate the agreement without cause. The termination option triggered a "Wind-Down Period," which would allow Mission to retain its distribution and trademark rights until July 1, 2016. On September 1, 2015, however, Debtor filed a voluntary petition for Chapter 11 bankruptcy. Debtor then filed a motion in the bankruptcy court to reject several of its active contracts, including its agreement with Mission, pursuant to 11 U.S.C. § 365(a). Debtor informed the bankruptcy court that the agreement's grant of exclusive distribution rights to Mission hindered Debtor's ability to "derive revenue from other marketing and distribution opportunities." Specifically, Debtor blamed Mission for its bankruptcy. Mission objected under the theory that 11 U.S.C. § 365(n) allowed Mission to retain its distribution rights and intellectual property licenses.

The bankruptcy court ultimately granted Debtor's rejection and held that Mission's exclusive distribution rights and limited trademark licenses could not be retained. The court stated that distribution rights "could not fairly be characterized as [intellectual property]." As such, it was not an exception to the broad rejection authority granted under 11 U.S.C. § 365(n). Moreover, the court reasoned that Congress's omission of trademarks from the definition of intellectual property found in 11 U.S.C. § 101(35A) was intended to purposely exclude them from the same kind of protection under 11 U.S.C. § 365(n).

Mission then appealed to the First Circuit Bankruptcy Appellate Panel ("BAP"). The BAP agreed with the bankruptcy court's assessment of the distribution rights but disagreed with its holding as to the trademark licenses. Instead, the BAP followed the Seventh Circuit's reasoning in *Sunbeam Products, Inc. v. Chicago American Manufacturing, LLC*, 686 F.3d 372 (7th Cir. 2012), and held that the rejection of the contract between Debtor and Mission, pursuant to 11 U.S.C. § 365(g), only relieved Debtor of its contractual obligations but did not necessarily extinguish Mission's rights. Debtor then appealed to the First Circuit.

On appeal, the First Circuit Court of Appeals noted that this was an issue of first impression. Ultimately, the First Circuit agreed with the bankruptcy court and held that Mission's exclusive distribution rights and trademark licenses were not able to be retained under 11 U.S.C. § 365(n). First, the court defined the scope of the Debtor's rights to reject or assume executory contracts under 11 U.S.C. § 365(a). The court stated that 11 U.S.C. § 365(a) was created to further the objective of a Chapter 11 bankruptcy by permitting debtors-in-possession to assume contracts that are beneficial to them and reject those that hinder their business. After rejecting the contract, the debtor is left with a liability that is deemed to be a pre-petition breach of contract pursuant to 11 U.S.C. § 365(g).

Next, the court looked to the legislative history of 11 U.S.C. § 365(n) and noted that Congress had explicitly enacted this section "to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off." The court, referencing the congressional report, also stated that Congress did not mention the protection of exclusive rights other than those to intellectual property. Thus, Mission would only be able to enforce exclusivity provisions insofar as they related to intellectual property rights.

The court also rejected Mission's argument that its right to exclusively distribute several of Debtor's products resulted in a de facto exclusive right to the intellectual property. Here, the court noted that the very language of the agreement between Debtor and Mission made it clear that "Debtor can use its intellectual property to make and sell products other than those for which the [a]greement grants Mission exclusive distribution rights." Furthermore, the court observed that "[a]n exclusive right to sell a product is not equivalent to an exclusive right to exploit the product's underlying intellectual property." Mission also tried to argue that, because of its distribution rights, no one could use the underlying patent to sell the exclusive products. The court found this argument immaterial, as Mission would retain its distribution rights regardless of whether the patent was used. To hold otherwise, said the court, "would be to find buried in a parenthetical . . . an implied exception that would . . . likely cover as much commercial territory as do some of the rights expressly defined as protected."

The First Circuit also rejected Mission's argument that its nonexclusive licenses would be of little value without the exclusive licenses. The court noted that there were several ways that Mission could continue to use its nonexclusive licenses in profitable manners, including sublicenses, use, reproduction, modifications, or derivative work based on Debtor's intellectual property. "And if those rights lacked meaningful value," the court noted, "that hardly becomes a reason for turning rights that are not intellectual property rights into intellectual property rights. Rather, it simply suggests that most of the contract's value was apparently in the exclusive distribution agreement." Thus, the First Circuit held that Mission's exclusive distribution rights were in no way retainable under 11 U.S.C. § 365(n).

The court also held that Mission's limited trademark licenses were not protected. The court noted that when Congress defined what types of intellectual property were protected under 11 U.S.C. § 365(n), the statute listed six different variants. The court observed that no references to trademarks were included in the statute. Furthermore, the Senate report on 11 U.S.C. § 365(n) stated that any decision on protecting trademark licenses were "postpone[d] . . . to allow the development of equitable treatment . . . by bankruptcy courts." S. REP. NO. 100-505, at 5. Therefore, the plain language of the statute and legislative history made it clear that a licensee cannot retain trademarks.

The First Circuit also addressed the reasoning of the Seventh Circuit in *Sunbeam*, which held that although a rejection of a contract "frees the estate from the obligation to perform[,] . . . nothing about this process implies that any rights of the other contracting party has been vaporized." *Sunbeam*, 686 F.3d at 377. However, the First Circuit observed that "rejection as Congress viewed it does not 'vaporize' a right. Rather, the rejection converts the right into a pre-petition claim for damages." There is already a statutory provision that would preserve Mission's ability to recover damages for the loss of Mission's trademark licenses. *See* 11 U.S.C. § 365(g). No rights would be "vaporized" by not allowing Mission to retain its trademark licenses.

Furthermore, the court held that allowing Mission to retain its trademark licenses would be antithetical to the purpose of contract rejection. The primary purpose of allowing a company in bankruptcy to reject executory contracts is "to release the debtor's estate from burdensome obligations that can impede a successful reorganization." However, if a company was forced to license trademarks, those licenses would necessarily require constant monitoring. Failure to do so would potentially result in the original licensor's loss of its trademark rights, which, the court noted, would hardly be conducive to a successful restructuring.

In an opinion that concurred in part and dissented in part, Judge Torruella disagreed with the First Circuit's holding that Mission's trademark licenses were not protected. He instead preferred the Senate report's calling for "equitable treatment," and proposed a case-by-case analysis as opposed to a bright-line rule. However, the majority noted that bankruptcy proceedings are often costly and unpredictable. Moreover, it is almost always impossible to determine how burdensome continuing licenses may be until the licensee's subsequent actions are performed. Thus, it was better to establish a rule that would reduce future costs and litigation.

Ultimately, the First Circuit Court of Appeals affirmed the decision of the bankruptcy court and allowed Debtor to summarily reject the agreement without being forced to continue licensing its trademarks. The court indicated that "we favor the categorical approach . . . unless and until Congress should decide otherwise."

The First Circuit's ruling in this case creates a circuit split on this issue. On October 26, 2018, the Supreme Court granted certiorari. They will decide "[w]hether, under § 365 of the Bankruptcy Code, a debtor-licensor's 'rejection' of a license agreement — which 'constitutes a breach of such contract,' 11 U.S.C. §365(g) — terminates rights of the licensee that would survive the licensor's breach under applicable non- bankruptcy law." The International Trademark Association has filed brief amicus curiae in favor of adopting the *Sunbeam* rule, claiming that it "promotes the strength and stability of the trademark system." A group of law professors have done the same, arguing that a ruling in line with *Sunbeam* will "increase commercial certainty" and "protect the legitimate expectations of debtors and non-debtors alike." Oral argument in this case has yet to be set, but attorneys should have a clear answer as to how Section 11 filings impact pre-existing intellectual property licenses soon.

REAL ESTATE

The Supreme Court of Kentucky held that in the dispersal of proceeds from the sale of joint property, absent an agreement to the contrary, a cotenant of real property is entitled to proportional contribution from other cotenants when the cotenant has paid more than her portion toward liens, taxes, and other encumbrances. *Talley v. Paisley*, 525 S.W.3d 523 (Ky. 2017).

Tanner Hamilton

In *Talley v. Paisley*, 525 S.W.3d 523 (Ky. 2017), the Supreme Court of Kentucky considered whether joint partners of a property should divide the proceeds of sale solely on the basis of ownership, rather than also considering the respective contributions of each partner. The court ultimately held that a joint tenant is entitled to recover a contribution for payments made towards the property on a cotenant's behalf. Consequently, the proceeds of sale should be used first to equalize the amount of expenses paid and then divided based on percentages of ownership.

This case arose out of the sale of jointly held property in Lexington, Kentucky. In 2004, Anne Talley ("Talley") and Daniel Paisley ("Paisley") purchased a tract of land to construct a residential home. Because Talley was legally married to another person, the parties placed the property solely in Paisley's name. In October 2006, after Talley finalized her divorce, the parties placed the property in their joint names with a right of survivorship. At that point, Talley had contributed $120,000 for the down payment of the land, and Paisley had allegedly contributed $109,942 for construction and loan costs. In November 2006, the parties acquired two mortgage loans secured by the property for $225,000 and $250,000, respectively. Both Talley and Paisley were co-mortgagors and co-makers on the notes. However, Paisley and Talley failed to execute an agreement regarding the disposition of the property if the joint tenancy relationship was to end.

After the creation of their joint tenancy relationship, Paisley began making all payments associated with the property. In July 2007, Paisley paid $200,000 towards the $250,000 mortgage and then paid off the balance in December 2009. In addition, Paisley paid $19,119 towards the $225,000 mortgage and $3,052 to close a construction loan. Further, from 2007 to March 2014, Paisley made all of the mortgage payments in full. Paisley stated that he never demanded payment from Talley because he believed Talley would pay him back after she received her $350,000 divorce settlement. In January 2013, Paisley moved out of the property and his relationship with Talley ended, but Paisley continued making mortgage and insurance payments.

Several months later, Paisley brought an action under KRS § 389A.030 requesting the sale of the property and dispersal of all equity based on each party's respective contribution. The property eventually sold for $715,000, resulting in $477,397 of equity. "Paisley proposed that these proceeds be divided based on the parties' proportionate contribution and to reflect the fact that he had contributed more to the residence." His calculations showed that Talley had contributed $120,000, and he had contributed $383,921. Consequently, Paisley asserted that Talley should only receive $105,500 from the proceeds and he should receive the remaining $369,500.

Following a bench trial, the court rejected Paisley's request to disburse the proceeds based on contribution. Instead, the court held that the proceeds should be equally divided. The court also emphasized that, had Talley and Paisley specified in an agreement regarding disposition of the property, the court would have been required to consider both parties' contribution. Paisley appealed the trial court's decision.

On appeal, the Kentucky Court of Appeals maintained the trial court's finding that there was no contract regarding division but reversed the holding that Paisley was not entitled to proportional reimbursement. Specifically, the court stated that, as a matter of law, Paisley was entitled to proportional reimbursement for payments made during the joint tenancy, despite the absence of a contract mandating such division. In response, Talley petitioned for discretionary review, and the Kentucky Supreme Court granted her petition.

Talley argued that there is a presumption that property held in joint tenancy is to be held equally and, therefore, equal division of sales proceeds is appropriate. She further claimed that even "if Paisley could rebut the presumption of equality by clear and convincing evidence, he waived any right to contribution or intended his contributions to Talley to be a gift."

The Supreme Court of Kentucky affirmed the appellate court's decision, holding that "to the extent one tenant contributed more than his or her half to the discharge of encumbrances, liens, [and] taxes, that tenant is entitled to contribution from the other." In making its determination, the court considered its decision in *Larmon v. Larmon*, 191 S.W. 110 (Ky. 1917), where the court established the general rule that a joint tenant is entitled to reimbursement from his cotenant for liens and encumbrances, including mortgages and taxes. The court also revisited its decision in *Petty v. Petty*, 295 S.W. 863, (Ky. 1927), where it clarified this rule of recovery.

Finally, the court briefly discussed its decision in *Bishop v. Wolford*, 291 S.W. 1049 (Ky. 1927), which recognized that a contract is not a prerequisite to recovery. The court further explained that "[e]quitable contribution[s] between co-tenants of undivided interests in real estate has often been recognized and enforced, even without a contract between the parties to that effect." The court acknowledged that the record did not reflect that Paisley intended to waive any rights to contribution or intend his contributions to be gifts. The court simply attributed the absence of an agreement between Talley and Paisley to a failure of the parties to anticipate the ending of their relationship. Ultimately, the Kentucky Supreme Court affirmed the Kentucky Court of Appeals' decision and remanded the case to the Fayette Circuit Court with instructions to award Paisley an amount "which will equalize [his] respective contribution." After such an amount is determined and distributed, the court provided that the remaining proceeds shall be split equally.

Justice Keller dissented stating that, under property law, the proceeds should have been divided based exclusively on equity. In addition, he stated that such a holding misattributed family law principles into the joint tenant relationship.

Overall, *Talley* seems to indicate that, absent an actual agreement, courts will likely find an implied contract between joint tenants that requires them to equally assume expenses. This may be contrary to the original intentions of the parties, but courts are reluctant to equally divide proceeds of a sale, when dealing with joint tenants, if one cotenant contributed more than the other. Practitioners should be aware that this ruling differs from common law principles of joint tenancy, where both parties to the relationship are treated as owning equal shares of the property. As such, practitioners should ensure that agreements among parties are documented and stipulate the disposition of the property in the event that the joint tenancy is terminated. Moreover, if a joint tenant agrees to pay all of the expenses when the joint tenancy is created, only a binding contract will preclude the joint tenant from proportionate recovery if she changes her mind.

SECURITIES

The Supreme Court of the United States held that the Dodd-Frank Wall Street Reform and Consumer Protection Act's whistleblower protection provision only protects individuals who have reported the alleged violation to the Securities and Exchange Commission. *Dig. Realty Tr., Inc. v. Somers*, 138 S.Ct. 767 (2018).

Drew Hove

In *Dig. Realty Tr., Inc. v. Somers*, the Supreme Court addressed whether the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act" or "Dodd-Frank") extends to individuals who have not reported the violation to the Securities and Exchange Commission ("SEC" or "Commission"). The Act was created to shield whistleblowers from retaliatory action by their employers. A whistleblower is, "any individual who provides . . . information relating to a violation of the securities laws to the Commission . . . ." 15 U.S.C. § 78u-6(a)(6). The anti-retaliation provision also offers protection to individuals who were terminated or otherwise retaliated against after making required disclosures under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), or any other law subject to the jurisdiction of the SEC. 15 U.S.C. § 78u-6(h)(1)(A)(iii). Through a careful reading of the whistleblower definition, comparisons between Sarbanes-Oxley and Dodd-Frank, and an analysis of the Act's Senate report, the Supreme Court concluded that Dodd-Frank's definition of a "whistleblower" also applies to individuals making disclosures otherwise required by law, such as those made with respect to Sarbanes-Oxley.

This dispute arose from Digital Realty Trust, Inc.'s ("Digital Realty") employment of Paul Somers ("Somers"), as the Vice President from 2010 to 2014. Digital Realty, a real estate investment trust, allegedly terminated Somers after he reported his suspicion of securities law violations to senior management. Months after his discharge, Somers filed suit in the Northern District of California alleging whistleblower retaliation under Dodd-Frank, which provides a generous statute of limitations period of six years. 15 U.S.C. § 78u-6(h)(1)(B)(iii). Somers did not file an administrative complaint within 180 days of his termination to qualify for recovery under Sarbanes-Oxley, which extends its anti-retaliation protections more broadly. 18 U.S.C. § 1514A(b)(1)(B) (2002). Digital Realty moved to dismiss the claim, asserting that Somers was not eligible for Dodd-Frank anti-retaliation protection because he did not report the securities law violations to the SEC prior to his termination. The district court denied Digital Realty's motion to dismiss, stating that reporting alleged violations to the SEC is not a requirement to obtain whistleblower status under the Act.

On interlocutory appeal, a divided panel of the Ninth Circuit Court of Appeals held that the Act should protect all employees, regardless of whether they reported the violation to the Commission. The court acknowledged that the Act defines "whistleblower" as an individual who reports information to the SEC, but ultimately decided that applying the definition to the entire Act would require making disclosures as required or protected under "any other law, rule, or regulation" *in addition to* reporting the violation to the SEC. 15 U.S.C. § 78u-6(a)(6)–(h)(1)(A)(iii). Furthermore, "such dual reporting," the majority believed, "was unlikely to occur." Therefore, the majority concluded, "the statute should be read to protect employees who make disclosures privileged by clause (iii) of § 78u–6(h)(1)(A), whether or not those employees also provide information to the SEC." The Supreme Court granted certiorari to resolve this issue, because both the Second and Fifth Circuit Courts of Appeals had established conflicting opinions of the SEC reporting requirement under Dodd-Frank's anti-retaliation provision. *See Berman v. Neo@Ogilvy L.L.C.*, 801 F.3d 145, 155 (2d Cir. 2015) (holding for an independent reading of Dodd-Frank's definition of "whistleblower" and anti-retaliation provision); *Asadi v. G.E. Energy, L.L.C.*, 720 F.3d 620, 630 (5th Cir. 2013) (holding for a dependent reading).

The Supreme Court ultimately held that the Act's anti-retaliation provision applied only to individuals who have reported the securities violation to the SEC. The Court began by reviewing the meaning of "whistleblower" in Dodd-Frank's anti-retaliation provision. The Court acknowledged that "whistleblower" is defined in the definition section of the Act, and directly instructs that the definition apply throughout the anti-retaliation provision. The Court also recognized that "another whistleblower-protection provision of Dodd-Frank imposes no requirement that information be conveyed to a government agency." Thus, the Court could only reason that Congress intentionally placed the reporting requirement in the anti-retaliation provision.

Next, the Court described how this reasoning corroborates with the purposes of both Dodd-Frank and Sarbanes-Oxley. The Court stated that Dodd-Frank was enacted amidst the 2008 financial crisis "to motivate people who know of securities law violations to tell the SEC." S. REP. NO. 111-176, at 38. While Sarbanes-Oxley's underlying intention was to "disturb the 'corporate code of silence' that 'discouraged employees from reporting fraudulent behavior not only to the proper authorities, . . . but even internally.'" *Lawson v. FMR L.L.C.*, 571 U.S. 429, 435 (2014). Thus, both statutes were designed to protect individuals who report violations to the Commission.

The Court then acknowledged that Dodd-Frank, under 15 U.S.C. § 78u-6(a)(6)–(h)(1)(A)(iii), offers protection only after reporting to the Commission, while Sarbanes-Oxley, under 18 U.S.C. § 1514A(a)(1)(C), offers remedy without disclosure to any agency. Dodd-Frank permits compensation for retaliation in twice the amount of back pay, plus interest, in addition to ten to thirty percent of the monetary sanctions, pursuant to 15 U.S.C. § 78u-6(h)(1)(C)(ii), while Sarbanes Oxley simply allows compensation for back pay with interest, pursuant to 18 U.S.C. § 1514A(c)(2)(B). Thus, "Dodd-Frank's award program and anti-retaliation provision . . . work synchronously to motivate individuals with knowledge to 'tell the SEC.'"

After a thorough reading of the Act, the Court held that the "whistleblower" definition shall apply throughout. Furthermore, the Act's definition of whistleblower operates in tandem with the three provisions providing protection for whistleblowers by ensuring protection only to those employees who have also reported the alleged violations to the SEC. *See* 15 U.S.C. § 78u-6(h)(1)(A). The Court also noted that the Act's increased awards signify Congress's intentions to provide compensation for employees abiding by Dodd-Frank's stringent requirements.

Lastly, the Supreme Court briefly responded to Somers's contention that auditors, attorneys, and other employees who are subject to internal-reporting requirements would be at risk with a dependent holding that requires SEC reporting. The Court acknowledged that Sarbanes-Oxley does require auditors and attorneys to report claims internally before making any external reports. However, the Court reiterated that the professionals will be protected under Dodd-Frank from any retaliatory actions by their employer if they also provide relevant information to the Commission.

Moreover, Somers argued that the third clause, allowing protection for employees after making required disclosures under any law subject to the jurisdiction of the Commission, would be undermined by having to report to the SEC in addition to any federal agency, internal supervisor, or the like. However, the Court saw Dodd-Frank's power conveyed most accurately when requiring a disclosure to the Commission, because Congress's intentions when writing the Act into law was to increase the number of securities law violations reported to the Commission.

Justice Thomas and Justice Sotomayor offered concurring opinions providing their thoughts of the majority's reliance on Dodd-Frank's Senate report. *See* S. REP. NO. 111-176, at 38. Justice Thomas thought the proper holding of this case lies strictly in the "whistleblower" definition, without further consideration of the Senate report. In rebuttal, Justice Sotomayor stated the best way to ensure fidelity to Congress's intent is to analyze the report used to enact the law itself.

In conclusion, the Supreme Court of the United States reversed the District Court and Ninth Circuit Court of Appeals' holdings that Dodd-Frank does not require a report to the Commission for whistleblower protection and remanded the case for further proceedings consistent with this requirement. The Supreme Court indicated that the statute's definition of "whistleblower" is clear and conclusive, and "unambiguous . . ., in short, [and] precludes the Commission from more expansively interpreting that term."

In light of this decision, to secure general employees, auditors, attorneys, and like professionals' proper anti-retaliation protection, practitioners should ensure that the concerned employee has immediately reported the alleged securities law violations to the Commission for Dodd-Frank protection. Further, to be certain the employee will be afforded protection, the practitioner should ensure that they have filed an administrative complaint within 180 days for Sarbanes-Oxley protection. Because of the Dodd-Frank's strict "whistleblower" definition, the Supreme Court cannot permit an expansive reading to offer help to a would-be worthy recipient who fails to report their claims to the Commission — effectively leaving some wrongfully terminated employees vulnerable.

STATE AND LOCAL TAX

The Tennessee Supreme Court held that Tenn. Code Ann. § 67–1–901, rather than § 67–1–1801, applies in a suit to recover municipal taxes, and under § 67–1–901(a) the plaintiff is required to pay a disputed municipality tax under protest to be eligible for a refund. *Chuck's Package Store v. City of Morristown*, 545 S.W.3d 398 (Tenn. 2018).

Madeline Leonard

In *Chuck's Package Store v. City of Morristown*, the Tennessee Supreme Court determined whether a plaintiff is eligible for a refund of disputed municipality taxes, whenever the plaintiff did not previously pay the tax under protest. To answer this question, the Tennessee Supreme Court addressed whether Tenn. Code Ann. §§ 67-1-901, *et. seq.*, or §§ 67-1-1801, *et. seq*., govern municipality tax disputes. Tenn. Code Ann. § 67–1–901(a) requires that taxpayers pay a disputed tax under protest to qualify for refunds, while Tenn. Code Ann. § 67–1–1807(b), on the other hand, eradicates the payment-under-protest requirement for taxes paid after January 1, 1986.

Tenn. Code Ann. § 57–3–501(a)(1) authorizes municipalities to impose an inspection fee on local, licensed alcoholic beverage retailers. The fee is limited, however, to a maximum percentage based on the municipality's population, as calculated by the latest federal census. Pursuant to Tenn. Code Ann. § 57–3–501(b), municipalities with fewer than 60,000 residents may charge no more than "eight percent of the wholesale price of the alcoholic beverages" supplied in the municipality. Tenn. Code Ann. § 57–3–501(c), on the other hand, provides that municipalities with populations exceeding 60,000 may charge no more than five percent of the wholesale price. The City of Morristown in Hamblen County (the "City") adopted an ordinance imposing an inspection fee of eight percent based on the county's previous population of less than 60,000. However, "[b]y January 2011, the county's population, according to the 2010 federal census, increased to over 60,000." Although the City should have decreased its fee to five percent, based on the ordinance, the City continued to collect eight percent from alcoholic beverage retailers from 2011 to 2014.

In June 2014, Chuck's Package Store, an alcoholic beverage retailer, notified the City that it was overcharging inspection fees based on the population increase. Although the City's administrative services director initially acknowledged the error and promised to refund the overpayments, the director later informed Chuck's Package Store it would not issue a refund. In October 2014, multiple alcoholic beverage retailers filed suit against the City for excessive collections, seeking reimbursement and additional damages. The City moved to dismiss the claims, arguing that the retailers did not pay the disputed taxed under protest as required by Tenn. Code Ann. §§ 67-1-901(a) and 67-1-911. The trial court denied the city's motion, holding that Tenn. Code Ann. §§ 67–1–1801, *et. seq*., applied to municipality tax disputes and did not require the alcoholic beverage retailers to pay under protest before seeking a refund. After a bench trial, the trial court awarded the plaintiffs $452,120.51 as reimbursement for the excessive collections.

The court of appeals affirmed the trial court's decision, holding that Tenn. Code Ann. § 67–1–1807 applied to all taxes paid or issued after January 1, 1986. "The [c]ourt of [a]ppeals construed [§] 67-1-1807 to remove the requirement for payment under protest for all taxes paid after January 1, 1986, with that statute controlling and superseding all conflicting laws." Because the court of appeals had previously issued conflicting decisions regarding disputed municipality taxes, the Tennessee Supreme Court granted the City's application to appeal to establish uniformity.

The supreme court first focused on the plain language of the statutes at issue to determine the legislature's intent. Tenn. Code. Ann. § 67–1–901(a) "requires a taxpayer, before seeking a refund, to pay under protest any disputed state taxes." This provision, along with others, was expanded by the General Assembly in 1959 to ensure that all sections included municipal tax disputes. In 1986, the legislature created an exception to Tenn. Code Ann. § 67-1-901 in Tenn. Code Ann. § 67–1–901(b), which states, "This section shall not apply to any tax collected or administered by the commissioner of revenue when such tax is paid on or after January 1, 1986." At the same time, the legislature also added Tenn. Code Ann. §§ 67–1–1801, *et. seq.*, to the state code. Tenn. Code Ann. § 67–1–1801(a) outlines a taxpayer's options for remedy whenever "taxes that are collected or administered by the commissioner of the revenue" are deemed "unjust, illegal, or incorrect." Furthermore, Tenn. Code Ann. § 67–1–1807 eliminated the payment under protest requirement "for the recovery of taxes as set out in [that] part." Finally, Tenn. Code Ann. § 67–1–1807(c) established that "[t]o the extent that this section conflicts with any other law, this section shall control and supersede all such laws." Therefore, the 1986 additions to the code permits taxpayers to forgo the payment-under-protest requirement whenever the disputed taxes are "collected or administered by the commissioner of revenue."

Next, the supreme court discussed prior appellate decisions that resulted in conflicting decisions. In *Lebanon Liquors v. City of Lebanon*, 885 S.W.2d 63 (Tenn. Ct. App. 1994), a group of liquor retailers sued the City of Lebanon after a population increase led to an excessive collection of inspection fees. In that case, the court of appeals held that Tenn. Code Ann. §§ 67–1–901, *et. seq.*, governed municipal taxes because the limitation in § 67–1–901(b) applied only to "taxes collected by the commissioner of revenue."

In another case, *Decactur Cty. v. Vulcan Materials Co.*, No. W2001-00858-COA-R3-CV, 2002 WL 31786985 (Tenn. Ct. App. 2002), the court of appeals held that Tenn. Code Ann. §§ 67–1–1801, *et. seq.*, governed municipal tax disputes. The court cited no previous case law, but instead relied heavily on the plain language of the statute. Because the statute's language was "quite broad," the court reasoned that Tenn. Code Ann. § 67–1–1807 eliminates the requirement for a taxpayer to pay under protest before recovering refunds.

The supreme court held that following the legislative changes made in 1986, municipal taxes and state taxes have different requirements for recovery under Tenn. Code Ann. §§ 67–1–901, *et seq.*, and §§ 67–1–1801, *et. seq.*, respectively. The 1986 revision to Tenn. Code Ann. § 67–1–901(b) and §§ 67–1–1801, *et. seq.*, eliminated the payment under protest requirement for taxes collected by the commissioner of revenue only. None of the added provisions addressed municipal taxes. Therefore, the court "cannot add 'municipal taxes' to these statutes to expand their scope." Moreover, Tenn. Code Ann. § 67–1–1807(a) limits its own applicability to "taxes as set out in this part," referring to a claim for refund under Tenn. Code Ann. §§ 67-1-901 to 67-1-912. Indeed, Tenn. Code Ann. § 67–1–1807 applies only to tax disputes by the commissioner of revenue. Furthermore, because Tenn. Code Ann. § 67–1–1807 does not control tax disputes under § 67–1–901, there is no conflict and § 67–1–1807 cannot supersede the payment under protest requirement set forth in § 67–1–901(a).

Additionally, Tenn. Code Ann. § 67–1–911(b) explicitly states that the General Assembly intended § 67–1–901 to apply to both state and municipal taxes erroneously paid to municipalities. Although the legislature could have included a corresponding provision within Tenn. Code Ann. §§ 67-1-1801 *et seq.*, it declined to do so. In addition to legislative intent, a broad reading of Tenn. Code Ann. § 67–1–1807 to remove the payment under protest requirement for all taxes paid following January 1, 1986 would impliedly repeal § 67–1–901 and § 67-1- 911, which the court disfavored.

The supreme court reversed the lower court's decision and overruled *Vulcan Materials* and other decisions inconsistent with this opinion. Based on the court's interpretation of the statutes, Tenn. Code Ann. §§ 67–1–901, *et. seq.*, applies to municipality tax disputes, and a taxpayer must pay a disputed tax under protest to be entitled to a refund. Because the retailers did not fulfill the payment under protest requirement, they are not eligible for refunds to excessive tax collections.

Following this decision, practitioners should advise clients to protest payment of disputed taxes to preserve refund eligibility. Because parties must pay disputed municipal taxes under protest to be eligible for a refund, practitioners must remain up-to-date on the statutory requirements regarding municipal taxes. Parties who are unfamiliar with the protest requirement for disputed municipal taxes will not be eligible for reimbursement of the excessive collection. Indeed, transactional attorneys must ensure their clients remain aware of municipal tax standards to avoid losing money through excessive collections.

STATUTORY LIENS

The Supreme Court of Tennessee held that, pursuant to Tenn. Code Ann. § 66-21-101, attachment of the lien-subject property is the only remedy available to a statutory lien holder who is not provided a method of enforcement by the lien statute. *Embraer Aircraft Maint. Servs., Inc. v. AeroCentury Corp.*, 538 S.W.3d 404 (Tenn. 2017).

Dixon Babb

In *Embraer Aircraft Maintenance Services, Inc. v. AeroCentury Corp.*, the Supreme Court of Tennessee addressed: (1) whether original attachment of lien-subject property is the only remedy available to statutory lien holders under the "catch-all" provision contained in Tenn. Code Ann. § 66-21-101; and (2) if special circumstances exist that allow a court to attach proceeds of the sale of lien-subject property when the property owner has made such attachment impossible. Tenn. Code Ann. § 66-21-101 provides that statutory liens lacking a prescribed method of enforcement under the statute "may be enforced by original attachment . . . to be levied on the property upon which the lien exists." The Supreme Court of Tennessee held original attachment is the only method of enforcement authorized under Tenn. Code Ann. § 66-21-101, while declining to answer the second question on the basis that it is not a defined question of Tennessee law.

This case originated from a contract between Embraer Aircraft Maintenance Services, Inc. ("Embraer") and Colgan Air, Inc. ("Colgan"), in which Embraer was to perform maintenance on a SAAB-SANIA Model SAAB 340B aircraft ("Aircraft"). Colgan originally leased the Aircraft from AeroCentury Corp. ("AeroCentury"). The lease required Colgan to conduct a return inspection and perform certain maintenance services and repairs on the Aircraft before returning it to AeroCentury at the end of the lease term. To meet these obligations, Colgan contracted with Embraer to perform the inspection and any necessary repairs. In January 2012, after working with representatives of both Colgan and AeroCentury, Embraer finally completed the necessary work. Following Embraer's completion, a repairman's lien "secured by the aircraft automatically arose under Tenn. Code Ann. § 66-19-101 and 66-19-102."

On January 25, 2012, Embraer sent an invoice to Colgan in the amount of $351,465.20 for the work completed. Colgan did not pay the invoice, and on April 1, 2012, Colgan filed for Chapter 11 bankruptcy. Shortly after, Embraer, pursuant to Tenn. Code Ann. § 66-19-301, perfected its repairmen's lien by filing a notice with the Register of Deeds for Davidson County and the Federal Aviation Administration. Embraer also notified AeroCentury and Colgan of the lien.

On January 25, 2013, Embraer filed an action in the United States District Court for the Middle District of Tennessee seeking to foreclose on the Aircraft. "Embraer asked the [d]istrict [c]ourt to direct the sale of the Aircraft, order AeroCentury to surrender possession of the Aircraft and its title to the new owner, and then apply the proceeds of the sale to the debt owed by Colgan to Embraer." In July 2013, despite the foreclosure proceedings, AeroCentury leased the Aircraft to Private Corporation International Joint Stock Aviation Company URGA ("URGA"), an aviation company located in Ukraine. In conformity with the lease, the Airplane was exported to Ukraine and removed from registration in the United States.

The lease gave URGA the option to purchase the Aircraft, which URGA exercised on March 25, 2014. The purchase agreement stated that URGA would be receiving the Airplane free and clear of any encumbrances, except the lien, which would be removed after closing. AeroCentury did not notify the court or Embraer of the sale. On November 24, 2015, Embraer filed a motion seeking summary judgment against AeroCentury, asking the court to foreclose on the Aircraft. AeroCentury filed a response, in which it disclosed the sale of the Airplane to the court and Embraer. Specifically, the response stated that "any foreclosure order from the [c]ourt . . . is of no value to Embraer, because AeroCentury had sold the Aircraft and thus could not deliver it to the [d]istrict [c]ourt for sale." Following AeroCentury's response, Embraer asked the court to order AeroCentury to deliver the proceeds from the sale of the Aircraft to satisfy the debt. The district court, in an effort to resolve the confusion over remedies available under Tenn. Code Ann. § 66-19-101, asked the Supreme Court of Tennessee to determine whether original attachment of lien-subject property is the only remedy available to statutory lien holders. Additionally, the district court asked the supreme court to address whether special circumstances exist that allow a court to attach proceeds of the sale of lien-subject property when the property owner has made such attachment impossible.

Regarding the first question, the Supreme Court of Tennessee held that the only method of enforcement for a statutory lien holder under Tenn. Code Ann. § 66-21-101 is original attachment of the lien-subject property. First, the supreme court established the validity of the automatic mechanic's lien pursuant to Tenn. Code Ann. § 66-19-101. Because Tenn. Code Ann. § 66-19-101 does not provide a method for enforcement, the court turned to Tenn. Code Ann. § 66-21-101, which addresses situation in which a lien statute does not specify a method of enforcement. Interpreting this statute, the court stated it must first "ascertain and . . . give full effect to the General Assembly's intent and purpose in drafting Tenn. Code Ann. § 66-21-101." The supreme court noted that to ascertain a statute's true meaning, its words must be interpreted according to their plain meaning and in the context of the entire statute. Further, statutes are not to be forced into a particular construction that would hinder the statute's true meaning. The Supreme Court of Tennessee, quoting its previous decision in *Parker-Harris Co. v. Tale*, 188 S.W. 54, 56 (Tenn. 1916), stated that "[w]hen a lien comes into existence by force of a statute, it must be measured by the statute, and can have no greater force than the statute gives it."

Thus, the Supreme Court of Tennessee focused on the plain language of Tenn. Code Ann. § 66-21-101, which only addresses attachment as a means of enforcement. Embraer conceded, and the supreme court acknowledged, that liens established under Tenn. Code Ann. § 66-19-101 follow the property, not the proceeds from the sale of the property. Since Embraer did not have a § 66-19-101 lien on the proceeds, § 66-21-101 provides no remedy for Embraer regarding the proceeds. Further, the supreme court clarified that that use of the word "may" in Tenn. Code Ann. § 66-21-101 "indicates only that the creditor 'may,' or may not, choose to collect the debt by attaching the lien-subject property," and "may" is not indicative of a legislative intent to include other remedies.

As to the second question, the Supreme Court of Tennessee declined to address the merits of the question because it was more of "an open-ended inquiry" as to methods by which Embraer may reach the proceeds of the sale, rather than a defined question of unsettled Tennessee law. The supreme court expressly stated that it "limits [itself] to defined questions of Tennessee law for which 'there is no controlling precedent in the decisions of the Supreme Court of Tennessee.'" Furthermore, there are several other supreme court decisions that display various remedies available to Embraer. Thus, the Supreme Court of Tennessee declined to answer to second certified question.

In light of this decision, practitioners representing repairmen should advise their clients to retain possession of repaired property until they receive payment for their services. However, if the lienholder loses possession and the lien-subject property is unreachable, the lienholder has the option to seek alternative relief, rather than rely solely on the "catch all" provision of Tenn. Code Ann. § 66-21-101. On the other hand, practitioners who represent clients that are in possession of property subject to a repairman's lien should warn their clients that selling lien-subject property does not bar the lienholder from recovery and could result in harsher punishments.

TITLE VII & DAMAGES

The Sixth Circuit Court of Appeals held that Title VII defendants have the burden of proving that the plaintiff did not exercise due diligence to mitigate their damages, and courts are required to analyze case-specific factors before awarding prejudgment interests in accordance with 28 U.S.C. §1961(a). *Pittington v. Great Smoky Mt. Lumberjack Feud*, LLC, 880 F.3d 791 (6th Cir. 2018).

Mary Beth Hendershott

In *Pittington v. Great Smoky Mt. Lumberjack Feud, LLC*, the Sixth Circuit addressed whether the district court abused its discretion in denying a plaintiff's motion for a new trial on the issue of damages, when the jury's verdict "awarded damages in an amount substantially less than *unquestionably* proved by the plaintiff's *uncontradicted and undisputed* evidence." (quoting *Anchor v. O'Toole*, 94 F.3d 1014, 1021 (6th Cir. 1996) (emphasis in original)). The court noted that back pay damages do not have to be proven to an exact certitude by a Title VII plaintiff, and any ambiguities should be resolved in favor of the plaintiff. The Sixth Circuit held further that district courts must examine several case-specific factors before applying the statutory calculation for prejudgment interest awards pursuant to 28 U.S.C. § 1961(a).

This case arose out of a retaliation claim filed by David Pittington ("Pittington") against his former employer, Great Smoky Mountain Lumberjack Feud, LLC ("Lumberjack"). In June 2012, Pittington began working as a box office clerk at Lumberjack. Pittington testified that during his employment at Lumberjack he generally worked eight or more hours a day. Pittington also stated that he received two promotions and one pay raise (from $8 to $10.50 per hour) during his time at Lumberjack. However, Pittington testified that he began experiencing retaliatory action at work for supporting his wife in her sexual harassment complaint against

Lumberjack. Specifically, Pittington stated that he was demoted, his hours and duties were decreased, and he was forced to work in conditions that aggravated his previously existing disabilities.

Lumberjack ultimately fired Pittington on October 8, 2012. Following his termination, Pittington testified that he did not find a new job until April 2013. Pittington's new job only paid $7.25 per hour and he was laid off by the end of August 2013. Pittington asserts that he worked a number of minimal paying, short-term jobs with unfavorable conditions during the two years following his termination. During that time, he also experienced periods of unemployment. Pittington sued Lumberjack, alleging that Lumberjack discriminated against him because of his disability, in violation of the Americans with Disabilities Act ("ADA"), and as a retaliatory action for his wife's sexual harassment complaint, in violation of Title VII and the Tennessee Human Rights Act.

Pittington requested that the jury award him back-pay totaling $40,632.50, and a prejudgment interest award calculated at 10%, the maximum amount allowed under the Tennessee Human Rights Act. Lumberjack argued that Pittington did not mitigate his damages adequately and should not be entitled to the full back pay amount that he requested. The jury returned a verdict in Pittington's favor regarding his Title VII and Tennessee Human Rights Act claims. The jury, however, did not award compensatory or punitive damages. As such, Pittington was only awarded $10,000 in back pay. Pittington did not agree with the jury's findings and filed a motion with the district court, asking the court to increase the jury's damages award under Federal Rule of Civil Procedure 59(e). Pittington also asked the district court for an award of front pay and prejudgment interest at a rate of 10%. The district court denied Pittington's request for front pay, increased back pay, and a new trial as to damages. The district court judge did, however, agree that Pittington was entitled to prejudgment interest. The court calculated the prejudgment interest according to 28 U.S.C. § 1961(a) in the amount of 0.66%, stating that the requested 10% would result in an "undue windfall" for Pittington. Pittington filed a motion for a new trial on the issue of damages, a motion to alter or amend the judgment, and appealed the district court judge's decision to calculate the prejudgment interest award in accordance to 28 U.S.C. §1961(a) instead of the Tennessee Human Rights Act.

On appeal, the Sixth Circuit Court of Appeals held that no reasonable jury could have found Pittington's recovery of back pay to be $10,000, and the district court abused its discretion by denying Pittington's motion for a new trial on the issue of damages. The court's decision was based primarily on its prior holding in *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614 (6th Cir. 1983). In *Rasimas*, the court established that a successful Title VII plaintiff is entitled to back pay in an amount to make them whole for the wrong they suffered. Additionally, a Title VII plaintiff does not need to prove an exact amount of back pay, and any ambiguities should be decided against the wrongdoer. Lastly, *Rasimas* established that Title VII defendants have the burden of proving that the plaintiff did not exercise due diligence to mitigate their damages.

Analyzing Pittington's case under these principles, the court determined that the district court erred by attributing the jury's limited back pay award to Pittington's failure to mitigate his damages. Instead, Lumberjack carried the burden of proving that Pittington did not exercise due diligence to mitigate his damages, which can only be satisfied by showing: 1) availability of substantially equivalent positions; and 2) Pittington did not diligently seek these positions. Lumberjack did not provide any evidence of substantially similar employment opportunities available to Pittington in Pigeon Forge, nor any evidence proving that Pittington's job search efforts were unreasonable. The jury's verdict cannot be based on an inference of these two conditions. Since Lumberjack omitted proof of Pittington's failure to mitigate his damages, the jury's award of $10,000 is not based upon the indisputable evidence. Additionally, an award of 30–50% of what Pittington was actually due does not fall within the acceptable range of back-pay amounts supported by the evidence.

Finally, the Sixth Circuit reversed the district court judge's award of prejudgment interest at 0.66% pursuant to 28 U.S.C. § 1961(a). Under *Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 687 (6th Cir. 2013), district courts are required to analyze case-specific factors before awarding prejudgment interests in accordance with 28 U.S.C. §1961(a), including "the remedial goal to place the plaintiff in the position that he or she would have occupied prior to the wrongdoing; the prevention of unjust enrichment on behalf of the wrongdoer; the lost interest value of money wrongly withheld; and the rate of inflation." The court found that the district court's judgment only mentioned one or two of these factors in passing but did not make any efforts to explain or compare rates of interests with the requirements of 28 U.S.C. §1961(a). Without this case-specific analysis, the Sixth Circuit ultimately held that the district court abused its discretion to award prejudgment interest in accordance with the calculation framework of 28 U.S.C. § 1961(a).

The Court of Appeals accordingly reversed the district court's denial of Pittington's motion for a new trial on the issue of damages, since the district court applied the wrong legal standard in holding that Pittington carried the burden of proving he mitigated his damages. The court also reversed the district court's decision on the calculation of prejudgment interest under 28 U.S.C. § 1961(a) because case-specific factors were not analyzed.

In light of this decision, practitioners should present district courts with a formula to calculate prejudgment interest awards in accordance with the *Schumacher* factors listed above, to ensure that their client will receive equitable prejudgment interest awards. This calculation should not create an unjust windfall for either party, but should focus on satisfying the remedial goals of Title VII and avoid unjustly enriching the wrongdoer. On the other hand, counsel for defendants must carry their burden of proving the unreasonableness of plaintiff's mitigation efforts by the preponderance of the evidence, and not rely on the evidence introduced by the plaintiff or upon the inferences of a friendly jury to obtain the desired verdict.

WILLS & ESTATES

Under Tennessee law, a beneficiary who had a confidential relationship with the decedent may rebut the presumption of undue influence by showing that the decedent was of sound mind and acted independently when devising the estate. *Frank v. Fields*, No. E2016-00809-COA-R3-CV, 2017 Tenn. App. LEXIS 360 (Tenn. Ct. App. May 26, 2017).

Phil Reed

In *Frank v. Fields*, No. E2016-00809-COA-R3-CV, 2017 Tenn. App. LEXIS 360 (Tenn. Ct. App. May 26, 2017), the Tennessee Court of Appeals addressed how an attorney-in-fact may rebut the presumption of undue influence arising out of a confidential relationship with a decedent who changed his bank accounts to be payable-on-death to the attorney-in-fact. The Tennessee Court of Appeals held that, although a presumption of undue influence arises when a beneficiary is granted power of attorney, that presumption is rebutted when the power of attorney is not used to benefit the attorney-in-fact, the decedent is of sound mind, and the decedent receives independent legal advice.

In January 2012, Ray L. Frank ("Decedent") died at the age of ninety-five without issue or a surviving spouse. Several years before his death, Decedent designated his nephew, Ronnie Fields ("Mr. Fields"), as his attorney-in-fact and beneficiary of several checking and certificate of deposit accounts that were payable upon the death of the Decedent. Upon Decedent's death, Mr. Fields withdrew $458,881.87 in checks made out to himself, leaving a total estate of $102,000.00 to be distributed according to Decedent's will. Three of the four remaining nieces and nephews in Decedent's will ("Plaintiffs") brought an action against Mr. Fields, alleging that Mr. Fields exercised undue influence through his confidential relationship with Decedent, and requesting that the trial court order Mr. Fields to reimburse Decedent's estate for the money he had withdrawn.

At the trial court, all parties agreed that Mr. Fields and Decedent had a close relationship in the years prior to his death. In 2004, Decedent began losing his vision and Mr. Fields would eat lunch with him several times a week. Mr. Fields also transported Decedent to appointments and "anywhere he wanted to go." In October 2005 and December 2010, Decedent executed two powers of attorney naming Mr. Fields as his attorney-in-fact. However, Mr. Fields did not exercise the power of attorney to change the payable on death status or ownership of any of Decedent's accounts. John M. Carson, Decedent's attorney, testified at trial that while preparing Decedent's will, he specifically reminded Decedent of certain assets that would pass outside his estate, including payable on death accounts. He further testified that, while Decedent was completely blind at the time of executing this last document, "his mind remained sharp."

The trial court ruled, and all parties agreed, that Mr. Fields and Decedent had established a confidential relationship. "Under Tennessee law, as in most jurisdictions, a presumption of undue influence arises where the dominant party in a confidential relationship receives a benefit from the other party." *In re Estate of Hamilton*, 67 S.W.3d 786, 793 (Tenn. Ct. App. 2001). To overcome this presumption, the dominant party must establish by clear and convincing evidence that the transaction at issue was fair. Relying on testimony from Mr. Carson, several bank employees who oversaw the accounts at issue, and the parties, all of whom described Decedent as of sound mind, the trial court found that Mr. Fields had successfully rebutted the presumption of undue influence.

On appeal, the Tennessee Court of Appeals noted that "[i]t is rare to find direct evidence of undue influence." In seeking to prove undue influence, one usually must instead prove "suspicious circumstances" that give rise to a conclusion that the person being influenced did not act freely and independently. The court, referencing their previous decision in *In re Estate of Maddox*, 60 S.W.3d 84, 88 (Tenn. Ct. App. 2001), provided that the most frequently relied-upon suspicious circumstances are: "1) the existence of a confidential relationship between the testator and the beneficiary; 2) the testator's physical or mental deterioration; and 3) the beneficiary's active involvement in procuring the will."

The court also applied *In re Estate of Davis*, No. E2015-00826-COA-R3-CV, 2016 Tenn. App. LEXIS 185, 2016 WL 944143 (Tenn. Ct. App. Mar. 14, 2016), a similar decision, in finding that Mr. Fields had rebutted the presumption of undue influence. In that case, the Tennessee

Court of Appeals upheld a decision where the decedent, who had filed for a divorce from his wife but died before it was finalized, attempted to disinherit his wife and daughters. The court specifically noted that whether a testator's decisions in their will are fair is not a relevant consideration when determining whether the testator was of sound mind and not subject to undue influence.

The court of appeals affirmed the trial court's judgment, emphasizing that all testimony, including Plaintiffs', pointed to Decedent being of sound mind when designating his accounts as payable on death to Mr. Fields. The court determined that the close relationship Mr. Fields shared with Decedent was convincing evidence that Decedent may have felt Mr. Fields deserved such a considerable share of his assets. Finally, the independent legal advice that Mr. Carson provided Decedent regarding the payable on death accounts showed the court that Decedent was aware of the accounts being excluded from the will.

The Tennessee Court of Appeals here focused on the sound mind of the Decedent when making the decision to split the remaining shares of his real and personal property. Going forward, Tennessee attorneys need to be aware that a court is less concerned with the fairness of the decisions in a Decedent's will, declining physical health, or advanced age when determining if the decedent was subject to undue influence. Thus, attorneys may wish to take note of their client's mental health while preparing a will and ensure that their client fully understands the technical aspects of their decision. By doing so, attorneys can protect their client's true wishes after death.