Endo Fought the Law, But the Law Won
Book Review: POINT MADE
Calling the Child as a Witness: a Complex Choice
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DONALD CAPPARELLA
EDITOR, TTLA

HAPPY HOLIDAYS!! Let’s help each other tilt the arc of history toward justice. Good luck to everyone, and stay safe during COVID-19, and thanks again to Theresa Grisham for her amazing work on this magazine.

Sincerely,
Donald Capparella, Editor

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Donald Capparella, Editor

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End
LIFETIME ACHIEVEMENT AWARD:

JERRY SUMMERS

On June 17, 2021, at its Annual Convention in Memphis, the Tennessee Trial Lawyers Association honored longtime Chattanooga attorney, Jerry Summers, with its most distinguished award for Lifetime Achievement as a practicing attorney. The award recognizes a trial lawyer member who has distinguished themselves providing outstanding legal representation to those who have been injured, killed, or impoverished and whose only alternative was to seek justice through the civil justice system.

Jerry H. Summers is a longtime resident of Chattanooga. Following his graduation from law school, he initially worked for two years as a prosecutor in the Hamilton County District Attorney’s Office. Entering private practice in 1969, he became the founding member of what is now Summers, Rufolo & Rodgers.

He has argued cases before the United States and Tennessee Supreme courts and has been involved in numerous landmark decisions in both civil and criminal law.

His peers in the legal profession have elected him to membership in the International Academy of Trial Lawyers, American College of Trial Lawyers, International Society of Barristers, American Board of Trial Advocates, American Board of Criminal Lawyers, and he has been selected every year since 1983 as one of the Best Lawyers in America, in both personal injury and criminal law. In 2019 he was selected as a Fellow in the American Academy of Appellate Lawyers.

In 2014 he was honored by being designated as the Distinguished Alumnus at the University of the South at Sewanee, and in 2016 the University of Tennessee at Knoxville designated him as one of the Distinguished Alumnus at that institution.

Mr. Summers has served as President of the Tennessee Trial Lawyers Association and the Tennessee Criminal Defense Lawyers Association. He has served on the national boards of the American Association for Justice and the National Association of Criminal Defense Lawyers, and he is a life member of both the state and national organizations.

He is active in numerous other legal and community groups and serves on the boards of Area IV Special Olympics, Orange Grove Center (for the mentally and physically impaired), CADAS (treatment of alcohol/drug abuse), and several others. Orange Grove Center and the Chattanooga Bar Association have both honored him as a philanthropist of the year for his community work.

He has published 7 books to date with his 8th under review. Tri-State Trivia Reflections, The Turtle and the Lawyer, Tennessee’s Forgotten Trial of the Century — Schoolfield 1958 and Schoolfield: Out of the Ashes 1958-1982, We Called Him Coach, One Shot Short, and Tennessee Trivia No. 1. Book number eight, Hope to Win, Prepare to Lose, is currently under review by the University of Tennessee College of Law.

Jerry Summers celebrated his 80th birthday by going tandem hang gliding.

Other Past Lifetime Award winners include: J.D. Lee of Knoxville, Houston Gordon of Covington, Gary Gober of Nashville, Randy Humble of Knoxville, Sidney Gilreath of Knoxville, Robert Pryor, Sr. of Knoxville, Clinton Swafford of Winchester, John T. Milburn Rogers of Greeneville, and Michelle Benjamin of Winchester.

Jerry H. Summers is a practicing attorney in Chattanooga, Tennessee. He has served as an assistant district attorney and municipal judge since he began his practice of law in 1966.

His entire life has been lived in Chattanooga, Tennessee except for seven years in St. Petersburg, Florida between the ages of seven and fourteen.

He has argued cases before the United States and Tennessee Supreme courts and has been involved in numerous landmark decisions in both civil and criminal law.

By an unsolicited vote of the lawyers of Tennessee, he has consistently been selected as one of the “Best 100 Lawyers in Tennessee” and “Mid-South Super Lawyers”.

Orange Grove Center and the Chattanooga Bar Association have both honored him as a philanthropist of the year for his community work.

In 2007 he was selected as a Distinguished Alumnus at the Centennial Celebration of Central High School.

This is his seventh published book, Tri-State Trivia Reflections, that discusses historical persons, places, and events in Tennessee, Alabama, and Georgia. His first literary attempt released in 2014 titled “The Turtle and the Lawyer” was an attempt to thank those individuals and entities that have helped him in life and to respectfully suggest that the reader to the same.

His second and third publications were an autobiography of the controversial life of Judge Raulston, Schooldfield titled Rush to Justice! Tennessee’s Forgotten Trial of the Century — Schooldfield 1958 and Schooldfield: Out of the Ashes 1958-1982. A tribute to Central football Coach Stanley J. Farmer titled We Called Him Coach was his fourth novel. A story about the 1951-1958 Chattanooga Central basketball team that lost the Tennessee State Championship Game by one point entitled One Shot Short is his fifth book. The 2020 compilation of short historical articles Tennessee Trivia No. 1 is his sixth. He has also written over 200 articles on Monday and Thursday under “Happenings” in the online newspaper chattanoogan.com.

Book number eight, Hope to Win, Prepare to Lose, is under review by the University of Tennessee College of Law. It has been accepted for publication and it will be a compilation of appellate decisions that have changed Tennessee law from the City Court of Chattanooga to the Tennessee and United States Supreme Courts. Four of those cases have been decided favorably by the U.S. Supreme Court (2 civil and 2 criminal) beginning in 1972. The purpose of said book is to motivate attorneys to raise novel constitutional issues for possible appellate review.

Orange Grove Center in Chattanooga, its staff and its clients is one of the places that has had a profound effect on his life.

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August 29, 2021, was the sort of day that a trial lawyer sees few times in a career. The father and son team of Jim and Gerard Stranch stood in Sullivan County, Tennessee, with their longtime clients and collaborators, District Attorneys Dan Armstrong, Ken Baldwin, and Barry Staubs. Gerard Stranch was announcing the historic $35 million settlement between opioid manufacturer Endo Pharmaceuticals and cities and counties in Northeast Tennessee. The press conference was the culmination of a four-year battle in which Stranch and his team at their Nashville-based firm of Branstetter, Stranch & Jennings faced discovery malfeasance, numerous appeals, endless depositions, millions of dollars in out-of-pocket expenses, not to mention a worldwide pandemic that delayed trial by over a year. General Barry Staubus, whose district encompasses Sullivan County and who had long fought for tougher sanctions against those fueling the opioid crisis in his community, touted the immediate impact that the settlement would have for the citizens who elected him: “This lawsuit allows [us] to bring money straight to communities with no filter in Nashville.”

Unlike a recently announced national settlement involving pay-boards to reach all the young women who needed treatment.

For the rapidly approaching trial when Endo reached out with a demand for more money, Jim and Gerard Stranch had a little choice but to dig deep – far deeper than in any previous case. The father and son team of Jim and Gerard Stranch had among the nation’s highest rates of neonatal abstinence syndrome. Indeed, the District Attorneys held their press conference announcing the filing of the lawsuit at a wing of Niswonger Children’s Hospital built specially to accommodate the flood of babies suffering from NAS. Shaking a pill bottle, Gerard Stranch noted that, “for many children, this is the rattle of their childhood.”

The case was assigned to Chancellor E.G. Moody in Sullivan County. Despite having one of the earliest filed cases in the country, Plaintiffs faced a number of procedural maneuvers that delayed meaningful discovery for nearly a year. First, Defendants unsuccessfully sought to remove the case to federal court. Then, the State Attorney General, Herbert Slatery, sought to intervene, only to withdraw in the face of intense opposition. Next, the Defendants tried to stay discovery in the case, which was denied with the Court finding that discovery would not be unduly burdensome and that “the potential harm to the Plaintiffs overcomes the potential harm to and expenses to the Defendants.” Finally, following the filing of a Second Amended Complaint on February 15, 2018, the Defendants filed Motion to Dismiss. Denying those motions at a hearing, Judge Moody also required Defendants to supplement their production with documents that they had already made available in other litigation, including the federal multi-district opioid litigation (“MDL”) before Judge Aiken Polster in the Northern District of Ohio.

With discovery finally commencing in earnest, the Branstetter team got an unexpected boost from Defendants. In the interest of efficiency, Judge Polster ordered that state litigants be permitted to participate in depositions taken in the MDL; and Endo, Purdue, and Mallinckrodt promptly began cross-noticing plaintiffs throughout the country on depositions of their key witnesses. Presumably, Defendants believed this would quickly overwhelm plaintiffs’ counsel and perhaps allow Defendants to deny access to witnesses later, but that proved to be a critical miscalculation. The Branstetter response, orchestrated and run by Jim Stranch, Gerard Stranch, Tricia Herzel, Joe Leniski, Ben Gastel, and Mike Stewart, was to attend every noticed deposition and aggressively question every witness regarding liability and issues specific to the Tennessee litigation and the DDLA. That made the Branstetter firm the only firm representing state plaintiffs in the United States to participate in the first depositions in the country. As a result, Branstetter attorneys deposited many of the key architects of the nation’s opioid crisis, including: Mr. Stewart’s deposition of Curtis Wright, the FDA official who approved OxyContin and then shortly thereafter went to work for Purdue, its manufacturer; Ms. Herzel’s deposition of the former CEO of Mallinckrodt, who was charged with violating the Controlled Substances Act, and who was charged with violations of the Federal Anti-Kickback Statute; Mr. Leniski’s deposition of Abdelrahman Mohamed, closed when Mohamed pleaded guilty to federal Medicaid fraud and admitting run a “drive through” practice in which addicts would line up in his office to get opioid prescriptions after a “visit” lasting just a minute or two.

The Complaint set out the scope of the crisis facing Tennessee in stark relief. At the time, Tennessee had the second highest opioid prescription rate in the nation. Overdose deaths in the state had increased 400% between 1999 and 2015, the last year statistics were then available. And as the Plaintiffs observed, every opioid addiction involved the “tip of the iceberg” of human and societal costs, with each opioid-related death correlating to 15 abuse treatment admissions, 26 emergency room visits, 115 opioid abusers, and 733 non-medical users. Tennessee, and in particular Northeast Tennessee, had among the nation’s highest rates of neonatal abstinence syndrome. Indeed, the District Attorneys held their press conference announcing the filing of the lawsuit at a wing of Niswonger Children’s Hospital built specially to accommodate the flood of babies suffering from NAS. Shaking a pill bottle, Gerard Stranch noted that, “for many children, this is the rattle of their childhood.”

The path to victory began with a billboard. Jim Stranch, who was born and raised in Kingsport, was traveling through North- east Tennessee when he saw it – a billboard urging pregnant women to seek treatment for their addiction. “That surprised me,” Stranch observed, “to realize that here where I had grown up, the opioid crisis had gotten so bad that you needed bill-boards to reach all the young women who needed treatment.

I understood that there had been litigation and decided we needed to take a hard look at holding people accountable.” The Branstetter firm was no stranger to such high-profile assign-ments involving matters of public import. Its founder, Cecil Branstetter, took on numerous progressive causes, for example representing the Highlander Center where Rosa Parks and countless other civil rights activists were trained. Before long, Branstetter attorneys were evaluating a cause of action under a little-known statute, Tennessee’s Drug Dealer Liability Act (“DDLA”), which allows governmental entities and babies born drug-dependent to recover damages from the illegal drug market. On its face, the DDLA seemed a perfect fit for communities plagued by a flood of illegally prescribed opioids. But there was a problem: no one had ever used the statute to recover against a corporate pharmaceutical manu-facturer or anyone else, for that matter. The Branstetter team decided to risk building a case under the untested statute, which provided sweeping liability for those who “knowingly participate” in the illegal drug market and made it possible to keep the case in state court in Sullivan County, Tennessee, to be decided by a Tennessee judge and jury.

One feature of the DDLA is a provision stating that “[a] pros-ecuting attorney may represent a state or a political subdivi-sion of the state in an action brought under this chapter.” The meaning of that provision, and the scope of the statute, would ultimately be decided by the Tennessee Supreme Court. But at the outset, it led the Branstetter team to reach out to the District Attorneys in the region where Jim Stranch grew up. Having spent years battling the fallout of the opioid crisis, General Armstrong, General Staubs, and Baldwin’s predecessor Tony Clark were eager to join the fight.

The Branstetter lawyers were also connected with the family of a particularly innocent victim of the opioid crisis – “Baby Doe” – a young child who, like many children in the region, was born with neonatal abstinence syndrome, a condition that can occur when a mother is addicted to opioids while pregnant. The DDLA’s expansive provisions gave children like Baby Doe a cause of action that relaxed the chain of causation require-ments under traditional tort law.
gets for Opana ER and was among the top prescribers of Opana ER nationally, possessing more Opana ER from his lone office than was prescribed in some large cities by every prescriber combined. Endo sales representatives visited his clinic over 90 times on the days that, according to his federal plea agreement, he was running the "drive through." During these visits, the sales representatives walked through the front door, passing patients in the waiting room, to deliver free meals to Dr. Mohamed and others. Endo's attorneys tried to incorporate these facts into the complaint in Opana ER. Year after year, Endo failed to report his criminal conduct to state or federal authorities. Plaintiffs searched Endo's records for any mention of other notorious Tennessee pill mills like Bearden Healthcare Associates and Advanced Pain Therapeutics and relentlessly questioned Endo witnesses about them.

As even they developed this powerful factual record, Plaintiffs faced a significant challenge as result of companion litigation. Another set of District Attorneys filed a separate DDLA lawsuit in Campbell County. Effer v. Purdue. On October 22, 2018, the judge in Effer charged the State with a rule that the discovery requests were refusing. Faced with the prospect of an imminent deposition and a liability judgment against him in 15, Mr. Sackler and Purdue declared bankruptcy on September 15, 2019, to halt the discovery proceedings. Branstetter's work on that DDLA lawsuit forced Purdue's hand in declaring bankruptcy. Since that time, Purdue's bankruptcy has been the source of great controversy – particularly the bankruptcy judge's decision to insulate the Sackler family that owns the company from personal liability. As part of their overall efforts, Branstetter attorneys in Campbell County. Effer v. Purdue. Judge Moody's meticulously detailed Default Judgment Order on Endo's conduct. Plaintiffs opposed and moved under Rule 17.01 for substitution of the local government. Judge Moody granted substitution, and the MDL plaintiffs and the Multi-State Governmental Group appealed that decision to the Tennessee Supreme Court and ordered the trial to go forward. Defendants filed emergency appeals with the Tennessee Court of Appeals and the Tennessee Supreme Court. Judge Moody denied that motion and ordered the trial to go forward. Defendants filed emergency appeals with the Tennessee Court of Appeals and the Tennessee Supreme Court, both of which were denied.

In the meantime, another defendant, Mallinckrodt, made clear that it was planning to file bankruptcy. As with Purdue's bankruptcy, Branstetter's work on behalf of the plaintiffs in Staubus had a catalyzing effect on Mallinckrodt. Faced with an imminent declaration of bankruptcy, Mallinckrodt participated in late-night negotiations about a national deal that (unlike for Purdue) would require a liability judgment against him in a federal trial on claims by Summit and Cuyahoga Counties in Ohio had been set for October 21, 2019, but settled on the courthouse steps. The May 2020 trial date and others, however, fell victim to the global pandemic, which closed the Tennessee Courts to jury trials temporarily. Plaintiffs continued to push for a new trial date, which the Court set. Yet Endo and Mallinckrodt unsuccessfully moved to stay the case entirely pending resolution of the Effter matter by the Tennessee Supreme Court. Judge Moody denied that motion and ordered the trial to go forward. Defendants filed emergency appeals with the Tennessee Court of Appeals and the Tennessee Supreme Court, both of which were denied.

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In the meantime, the BlueCross BlueShield of Tennessee attorneys in Staubus and for additional District Attorneys and NAS babies in another companion case, Dunaway, et al. v. Purdue, et al., filed in Cumberland County. In Dunaway, based on evidence for dismissal for failure to state a claim, that the DDLA did not apply to pharmaceutical companies under any set of facts. Although the trial court's ruling in that case was a short-term setback for the Effter litigants, it ultimately worked in Branstetter's favor. As the Effter case worked its way through the appellate process, the Court of Appeals and the Tennessee Supreme Court addressed and clarified various issues that impacted the DDLA's discovery in Staubus proceed. Specifically, the trial court in Effter found that it is legal for the manufacturer defendants to make FDA-approved medications and sell them to DEA-registered distributors. That, according to Plaintiffs was in fact Endo had not searched a single Tennessee employee; Plaintiffs opposed and moved under Rule 17.01 for substitution of the local government. Judge Moody granted substitution, and the MDL plaintiffs and the Multi-State Governmental Group appealed that decision to the Tennessee Supreme Court and ordered the trial to go forward. Defendants filed emergency appeals with the Tennessee Court of Appeals and the Tennessee Supreme Court, both of which were denied.

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In the meantime, another defendant, Mallinckrodt, made clear that it was planning to file bankruptcy. As with Purdue's bankruptcy, Branstetter's work on behalf of the plaintiffs in Staubus had a catalyzing effect on Mallinckrodt. Faced with an imminent declaration of bankruptcy, Mallinckrodt participated in late-night negotiations about a national deal that (unlike for Purdue) would require a liability judgment against him in a federal trial on claims by Summit and Cuyahoga Counties in Ohio had been set for October 21, 2019, but settled on the courthouse steps. The May 2020 trial date and others, however, fell victim to the global pandemic, which closed the Tennessee Courts to jury trials temporarily. Plaintiffs continued to push for a new trial date, which the Court set. Yet Endo and Mallinckrodt unsuccessfully moved to stay the case entirely pending resolution of the Effter matter by the Tennessee Supreme Court. Judge Moody denied that motion and ordered the trial to go forward. Defendants filed emergency appeals with the Tennessee Court of Appeals and the Tennessee Supreme Court, both of which were denied.
repeatedly failing to be forthright with the Court. In addition to those Tennessee prescribers were diverting Endo’s drugs into for records that simply had missed a few responsive “scraps of ed its productions when it knew that it had not done so; and T ennessee prescribers (when in fact it was withholding “re- to Plaintiffs that it had produced certain sales reports (which it continued from page 11B

- • pro forced to watch his past years’ wars, 2000 and 2001, with the 1000,000 documents, including 255,000 documents produce the missing documents on an expedited timeline.

• After the Court entered a September 2018 Order to Compel, Endo “knowingly did not fully compel” and “engaged in obfuscation and delay.”

• Endo bogged down its corporate deposition based on a false assertion that it had produced certain categories of documents, requiring the Court to order a renewed deposition at Endo’s expense as a sanction.

• In violation of its discovery obligations, Endo did not search the Sales Representatives, District Managers, Regional Managers, and non-executive compliance officials, leading to a May 4, 2020 Order sanctioning Endo and its attorneys and ordering Endo to produce the missing documents on an expedited timeline.

• During the discovery phase, Endo repeatedly misrepresented that it had produced all responsive documents and did not comply with court-ordered supplementation.

• After the close of fact discovery, Endo produced over 400,000 documents, including 255,000 documents after the May 4, 2020 Order. This included many critical documents concerning discovery by Tennessee prescribers, pill mills, and other relevant subjects.

• Endo made these untimely productions after all pretrial deadlines had passed, including deadlines for expert disclosures, summary judgment, and pretrial motions.

Based on these issues, Judge Moody held that Endo willfully withheld information in order to gain a litigation advantage at trial, that its misconduct was severely prejudicial to Plaintiffs, and that the misconduct could not be remedied without essen- tially restarting the entire case. He therefore granted a default judgment on liability, imposed other sanctions in advance of a trial on damages, and ordered Endo’s national counsel (at the law firm of Arnold & Porter) to show cause why their pro hac vice applications should not be revoked.

While a decisive defeat for Endo, the default judgment did not end the litigation. First, it precipitated a series of emergency appeals by Endo to the Tennessee Court of Appeals and the Tennessee Supreme Court. Branstetter’s appellate team, which included Gerard Stranch, Jim Stranch, Mike Wall, Karla Campbell, and Tony Orlandi, prepared expedited briefs that success- fully defeated all of these last-ditch appeals by Endo to avoid the trial – the last of which was defeated just two weeks from trial. Second, Plaintiffs were still faced with the need to prove damages at trial. This was no small task in a matter in which damages required proof from multiple experts to establish dam- ages in the billions of dollars. During the final pretrial hearing, Endo sought to re-litigate multiple issues and effectively argue li- ability during the upcoming damages trial. Gerard Stranch, lead trial counsel who handled all hearings for Plaintiffs, quoted Jerry Closser when he asked Judge Moody to “shoot up amongst” for the last time. Plaintiffs won on all pretrial issues presented. Two weeks later, Endo approached Stranch with their “last best and final offer.”

Judge Moody’s default judgment order has had national impli- cations. Since that order was announced, other litigants began seeking sanctions against Endo and its attorneys at Arnold & Porter based on the discovery misconduct that Branstetter had uncovered and documented in Staubus. For example, in New York, the Attorney General’s office claimed that Endo and Arnold & Porter were making “false assertions... trails of smoking-gun evidence” on its marketing of opioids to New York prescribers, arguing that those plaintiffs’ right to a fair trial has been “irreparably compromised.” Suffolk County Supreme Court Justice Jerry Garguilo, who is presiding over the ongoing New York trial, commented, “One would expect that when the problem occurred in Tennessee, it was anticipated that the problem was going to re-urface” in Ohio, West Virginia and New York. Similarly, in Illinois, attorneys for the City of Chicago submitted a status report stating that Endo and Arnold & Porter thoroughly tainted discovery in multidistrict opioid lit- igation. “This is the worst discovery misconduct I have seen,” said_fen Scl Iolin, counsel for Chicago, told U.S. Magistrate Judge Beth W. Jantz. “We’ve led out for you what we think is wrong on here, which is that we’re only seeing the stuff arising because of what happened in Tennessee.”

Most important, though, is the impact the settlement funds will have on the Plaintiffs. Staubus is currently the only case in the country to reach a settlement on behalf of a baby born with neonatal abstinence syndrome. Communities in Northeast Ten- nessee will soon be able to make their own decisions about how the settlement funds will be spent. They are already engaged in productive discussions to maximize the impact of the settle- ment, including the possibility of opening a 180-bed facility in Carter County to serve as a long-term addiction treatment facility. Furthermore, the State Attorney General and the MDL and members of the Multi-State Governmental Entities Group recently reached a national $26 billion settlement with Johnson & Johnson and certain opioid distributors that, over the next 18 years, will pay out additional money to these communities.

In sum, it required sustained teamwork and participation by Branstetter team, the District Attorneys, and the various local governments and their respective counsel to prevail. But this hard work by everyone involved paid off. As General Baldwin put it when announcing the settlement: “In all the cases I have done over my entire career, you put them all together and that would not have the impact that this lawsuit has had in protecting our communities.”

ABOUT THE AUTHOR

Gerard Stranch is the managing partner at Branstetter, Stranch & Jennings, PLLC (BSJ). He leads the firm’s class action, complex litigation and mass tort practice group. Mr. Stranch has served as lead counsel for the firm in numerous cases, including the steering committee of the “Clean Diesel” Marketing Sales Practices and Products Liability Litigation, which has resulted in approximately $17 Billion in settlements, making it the largest consumer auto settlement and one of the largest settlements in any matter. He was co-lead counsel in re: Alpha Corp. Securities Litigation (securities litigation resulting in a $61 million settlement), and lead counsel in Lankford v. Dow Chemical (consumer protection class action), which resulted in $4.2 million settlement. He also helped obtain a $590.5 million settlement while serving on the exec- utive committee in Dahl v. Bain Capital Partners (anti-trust), and served as liaison counsel in re: Regions-Morgan Keegan Closed- End Fund Litigation, resulting in a $62 million settlement. He also

was appointed to the Plaintiffs Steering Committee for the In re: New England Compounding Pharmacy, Inc. Products Liability Litigation MDL, and was the lawyer in charge of coordinating all litigation aris- ing in Tennessee. More than $230 million in settlements have been obtained on behalf of the victims of the New England Compounding Pharmacy and every Tennessee case has been resolved.

In addition, Mr. Stranch has handled multiple voting rights is- sues and ballot access cases, including successfully defending the Democratic National Committee in a lawsuit which sought to keep President Obama off the Tennessee ballot.

Mr. Stranch was recently appointed as class counsel for the negoti- ation class in the pending multi-district national prescription opioid litigation (MDL 2004) in Cleveland, Ohio. He is also lead trial coun- sel in Staubus v. Purdue Pharma. Et. Al, which settled on the Court house steps for $35 million and resulted in the largest per capita payment by Endo in the country.

At 15 years old, Mr. Stranch won the prestigious Congress Bundestag scholarship and studied in what had recently been East Germany for a year. A 2000 graduate of Emory University, Mr. Stranch received his J.D. in 2003 from Vanderbilt University Law School. In addition to clerking for BSJA during law school, Mr. Stranch interned at the Avenue Public Defender’s office in Nashville, and helped protect the rights of Tennessee children under the Bryan A. settlement at the Vanderbilt University Juvenile Practice Clinic. Mr. Stranch is an adjunct professor at Vanderbilt University School of Law, where he teaches trial practice and advocacy. He also serves on the ex- ecutive committee of the Class Action Trial Lawyers Association. He has been named a National Trial Lawyers Association Top 40 Under 40 and a Super Lawyers MidSouth Rising Star. Mr. Stranch regularly speaks on behalf of plaintiffs in CLASS and at other conferences.

Mr. Stranch lives on the farm on which he was raised, which is located 20 minutes outside of Nashville. He enjoys watching his two sons explore the farm like Tom Sawyer and Huck Finn, like he did as a child.

1 Video of press conference, Tennessee Holler
2 ABC News, July 29, 2021
3 Purdue Pharma, Ltd. was sued with related entity Purdue Pharma, Inc.
4 Endo Pharma, Inc is owned by Purdue Pharma, Inc.
5 Dr. Joel Koenig, with the University of Tennessee at Knoxville in 2000, was a student at Indianapolis University School of Medicine who had interned in Chicago with his father, Dr. Stephen Koenig, in the late 1960’s.
6 Dr. Joel Koenig, with the University of Tennessee at Knoxville in 2000, was a student at Indianapolis University School of Medicine who had interned in Chicago with his father, Dr. Stephen Koenig, in the late 1960’s.

2 Endo Pharma, Inc. at E宁, 62420-01994-CDA-00-RDRP, Case No. 17-955 (C.D. Cal. 2019) (July 11, 2019).
4 Plaintiffs also submitted damages reports by Lloyd I. Sederer, M.D., adjunct professor at the Columbia School of Public Health and former chief medical officer for the New York State Office of Mental Health in New York, and Patrick A. Killion, director of UCLA Integrated Substance Abuse Programs, professor emeritus at the UCLA Department of Psychiatry, and research professor, Center for Behavioral Health, Department of Psychiatry at the University of Vermont; and Joel Koenig, M.D., former chief of Pediatrics at Mission/Baptist Medical Center.

1 Order granting Default, p. 8.
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Calling the Child as a Witness: a Complex Choice

Calling a child as a witness is a fraught decision and one that is problematic at best. There are times when there may be no choice but to have a child testify. There are times when it is impossible to do so. So how does the attorney make the decision to call a child as a witness?

This article discusses four basic issues that affect the questions of whether to call a child as a witness and, if so, how to do it. The issues are the child’s competence to testify, alternatives to the child testifying in person, ethical constraints, and child witness questioning techniques.

A Child’s Competence to Testify

The first and most obvious issue is whether the child is competent to testify. This is both an evidentiary question and one of the psychology of child development. Federal Rule of Evidence 607 states that “every person is competent to be a witness unless these rules provide otherwise.” The federal rule then says that “in a civil case, state law governs the witness’s competency regarding a claim or defense for which state law supplies the rule of decision.” In other words, in a Connecticut case in federal court, the federal rule says that Connecticut state law applies. Section 6-1 of the Connecticut Rules of Evidence states that every witness is presumed competent to be a witness. Section 6-3 then defines the test for competence derived from common law principles, including whether the child can understand the duty to tell the truth, and is capable of perceiving, recalling and expressing his or her sensory perceptions. Connecticut also has a specific statutory provision that directly impacts competency of a child to testify. Section 54-86a of the Connecticut General Statutes provides that any child who is a victim of assault, sexual assault, or abuse is competent to testify without prior qualification, and that the weight to be given to the testimony is for the fact finder.

Child development literature further helps inform a lawyer’s decision on whether a child is competent to testify. Many lawyers may be familiar with the work of Jean Piaget — the renowned 20th century Swiss psychologist who pioneered groundbreaking research in child development — and, to a lesser degree, of Urie Bronfenbrenner and Paul Baltes. More recognizable will be the child-raising guides of pediatricians Benjamin Spock and T. Berry Brazelton. Even a superficial reading of this research and advice will give the lawyer some guidance in matching the child’s circumstances to the test for competence found in § 6-3. The bottom-line questions will be whether the child knows the decision between right and wrong, understands what it means to tell the truth, and can accurately report what he or she witnessed. The child witness’s age is an important factor to consider. Assistance from a mental health professional may be necessary to establish a proper foundation for the introduction of a child witness’s testimony irrespective of whether the witness is a youngster or a teenager.

Having determined that the child is competent to testify and that testifying will not be contrary to the best interests of the child, counsel must decide whether the child will be harmed by testifying in person or testifying in any other format. In other words, what will be the psychological impact on the child if she or he testifies? The adverse impact can be particularly acute in criminal, custody, tort and child protection cases because the issues raised in these cases can be so sensitive for any child — from the very young through the adolescent and teenage years.

Alternatives to In-Person Testimony

Fortunately, case law, rules of evidence and statutes, including in Connecticut, provide alternatives to the child testifying directly in front of the plaintiff or defendant and, in some instances, alternatives to testifying at all. The starting point is two cases in which the United States Supreme Court has spoken to the issue of child testimony in front of the defendant. They are Coy v. Iowa1 and Maryland v. Craig2 both are criminal cases involving the Fifth Amendment right to confrontation. The takeaway from these decisions is that the Supreme Court has suggested that some protection for the child witness is constitutionally permissible. Further protections will likely be available in settings outside the criminal context in situations where the right to confrontation does not apply. Additional protections can include having the child testify outside the presence of the opposing party, sometimes even in camera or by video.3 Connecticut practice procedure provides that in any case where a party wishes to call a child as a witness in juvenile matters, that party must first file a motion requesting permission to do so.4 The court then has wide latitude in establishing the ground rules for how the child will testify. For example, an in-camera interview with certain guidelines set by the court may take place in abuse and neglect cases in Connecticut.5 A Connecticut statute may permit the victim of child abuse to testify outside the courtroom.6

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continued from page 22B
out of Court statements and hearsay

If a decision is made that the child is cognitively or emotionally unable to testify in person in any live forum, counsel has other means to indirectly admit child testimony. If the child’s out of court statements are to be offered in evidence, exceptions to hearsay will be required. Some exceptions are obvious – statements made for purposes of medical diagnosis and treatment, spontaneous utterances, and present sense impressions. Business records can create a slippery slope because hearsay statements within a business record do not come into evidence solely based upon the business records exception to hearsay. Connecticut applies the residual exception to hearsay in determining whether to allow the child’s statement into evidence. In addition to these evidentiary exceptions, one will find specific statutory exceptions in Connecticut, e.g., C.G.S. § 66B-123(g) provides a specific exception for a child’s out of court statement as a contested hearing on the order for temporary custody. Another is the tender years exception to hearsay pursuant to Connecticut Rule of Evidence 8-10.D. It permits admission of statements by a child 12 years of age or younger regarding sexual abuse if there is particularized evidence of its trustworthy.

The Ethics of Calling a Child Witness

The ethical issues regarding whether to call a child as a witness depend in large part on the relationship of the lawyer to the child: whether the child is the lawyer’s client, the child’s parent is the client as guardian, guardian ad litem, or next friend; a lawyer is guardian ad litem; or where the child is simply a third-party witness. The situation in which the child is the lawyer’s direct client frequently occurs in child welfare, juvenile delinquency and criminal law cases. The American Bar Association Model Rule of Professional Conduct 1.14 speaks specifically to the ethics of the attorney-client relationship when the client is under a “disability.” The definition of disability under Rule 1.14 includes the situation in which the client’s capacity to make adequately considered decisions is diminished because of minority.

According to the rule, in such situations, “the lawyer shall, as far as reasonably possible, maintain a normal relationship with the client.” If this is not possible, the rule allows the lawyer to take “reasonably necessary protective action.” Combined with the lawyer’s primary responsibility to oversee the litigation process, Rule 1.14 lends support to the lawyer’s decision whether to call the child as a witness. (The Connecticut Rules of Professional Conduct provide the same guidance.) Where the lawyer is acting as guardian ad litem (GAL) for the child, one of the key issues is that the lawyer as guardian ad litem is not bound by rules of confidentiality. In this setting, the lawyer will usually make decisions that he or she concludes are best for the child. This situation can become quite nuanced and, consequently, a detailed discussion is beyond the scope of this article. However, examples of the complexity inherent in the role of GAL by a lawyer may be helpful.

First, how does a lawyer decide what is in the best interest of a child? The child may come from an entirely different socio-economic, religious, ethnic or racial background than the lawyer.12 Does the lawyer apply the best interest of the child standard as understood by the lawyer given his or her personal background, experience, and values or apply the child’s best interest given the child’s very different background?

The second example involves the lack of confidentiality between the GAL and the child. Because the attorney GAL does not have an attorney-client relationship with the child, the attorney is obligated to tell the child that the lawyer may be compelled to convey what the child tells the lawyer to others. The attorney GAL cannot give the child legal advice, even if the child asks for advice, and even if the lawyer knows it will otherwise be helpful to the child. On the one hand, a young child may not understand the concept of lack of confidentiality; but, on the other hand, an older, more sophisticated teenage may. In the latter instance, the teen may choose not to provide the GAL lawyer with highly relevant information.11

Where the child is a third-party witness, the lawyer’s ethical obligation to the child is no different than to any other witness. Thus, the attorney’s ethical obligations to the court, to adverse parties, and to witnesses, would all apply.

Some Basic Principles for Examining A Child Witness

While space limitations prohibit a detailed discussion of direct and cross-examination techniques involving a child witness, it is critical to keep in mind what we know about children’s thinking. For example, contrary to what many adults think, it is unclear in terms of professional literature whether children are more susceptible to being led than adults. In addition, we know that children’s recall involves several factors including, but not limited to, age.13 If you do have to call a child as a witness, be sure to follow these basic guidelines.

• Spend a lot of time preparing the child for direct examination.
• Explain the information you want the child to retain. Then explain it again.
• Limit your direct examination to what you need.
• Accept that children have limited attention spans.
• Understand that there is no guarantee the child will retain the information you have prepared him or her on.
• Prepare yourself to deal with that.
• Practice with the child in the courtroom, in the actual courtroom, sitting in the real witness chair.
• Ask questions using age-appropriate language.
• Ask the court if you can question sitting down.
• Start with easy, conformable introductory questions.
• Let the child tell the story.
• Limit your use of leading questions (this goes back to good prep of the witness).
• Understand that almost every child will tell the truth, on direct or cross.
• Never intimidate a child witness on cross-examination.
• Always be polite and respectful.
• Get what you need and sit down. •
NAHON, SAHAROVICH AND TROTZ

Nahon, Saharovich and Trotz is pleased to announce that A. Gardner Rudolph and Steven C. Saharovich have joined the firm as associates in the auto accident and workers’ compensation practice groups. Mr. Rudolph obtained his Bachelor of Science in Business Administration from the University of Tennessee in Knoxville where he was on the Dean’s List and was a member of the National Society of Collegiate Scholars. Mr. Rudolph earned his law degree from the University of Memphis School of Law. While in law school, Mr. Rudolph was a judicial assistant to Magistrate Judge Diane Vescovo.

Mr. Saharovich earned his Bachelor of Science in Business Administration and Economics at the University of Missouri. He served as president of Alpha Epsilon Pi. Mr. Saharovich earned his law degree from the University of Memphis School of Law. While in law school, Mr. Saharovich earned the Cali Excellence for the Future Award for ADR, Negotiation and Mediation as well as for the Neighborhood Preservation Legal Clinic. He also was on the Dean’s List for Outstanding Oral advocate and won Top 5 Oral Advocate in the Freshman Moot Court Competition.

RUDOLPH A. GARDNER
ASSOCIATE

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ASSOCIATE

RANDY KINNARD
The 2021 American Bar Association’s Pursuit of Justice Award

Congratulations to Nashville attorney Randy Kinnard for his receipt of the 2021 American Bar Association’s Tort Trial and Insurance Practice Section’s Pursuit of Justice Award. The national annual award recognizes lawyers and judges who have shown outstanding merit and who excel in providing justice for all.

Kinnard is a personal injury and medical malpractice attorney at Kinnard, Clayton & Beveridge, in Nashville.

In his more than 40 years in law practice, Kinnard has recovered millions of dollars for personal injury victims, always fighting for the maximum value of his clients’ cases.

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While partisan recriminations continue to resonate over the last presidential election, this article describes the requirements and potential hazards of filing a fraud complaint. A civil lawsuit that alleges fraud is a heavy lift. Any lawyer that elects to pursue such a claim should exercise caution.

What Constitutes Fraud in Tennessee

Under Tennessee law intentional misrepresentation, negligent misrepresentation and fraud are all the same cause of action. The necessary elements require proof of the following:

1) that the defendant made a representation of a present or past fact;
2) that the representation was false when it was made;
3) that the representation involved a material fact;
4) that the defendant either knew that the representation was false or did not believe it to be true or the defendant made the representation recklessly without knowing whether it was true or false;
5) that the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and
6) that the plaintiff sustained damages as a result of the representation.

(citations omitted) See Hodge v. Craig, 382 S.W.3d 325, 343 (Tenn. 2012).

When pleading fraud, Tennessee Rule of Civil Procedure 9.02 requires that, “… the circumstances constituting fraud or mistake shall be stated with particularity.” City State Bank v. Dean Witter Reynolds, 948 S.W.2d 729, 738 (Tenn. Ct. App. 1996) explained that the fraud allegations required under Rule 9.02 passed the particularity requirement when the complaint “specifically identifies the time and place of each alleged false representation and identifies the manner in which each representation was deemed to have been fraudulent.”

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(citations omitted) See Hodge v. Craig, 382 S.W.3d 325, 343 (Tenn. 2012).

Rule 9(b) of the Federal Rules of Civil Procedure requires when pleading fraud, “a party must state with particularity the circumstances constituting fraud.” Similar to the Tennessee state jurisprudence, the U.S. Court of Appeals for the Sixth Circuit requires at a minimum a plaintiff allege the time, place and content of the misrepresentation, reliance and harm. Coffey v. Foamex, L.P., 2 F.3d 157, 162 (6th Cir. 1993).

Specific Allegations Are Required

Tennessee jurisprudence demonstrates that courts have consistently held parties to account for nonspecific fraud allegations. The consequence of failing to plead fraud in compliance with Tennessee Rule of Civil Procedure Rule 9.02 or Federal Rule 9(b) is dismissal.

In Kincaid v. Southtrust Bank, 221 S.W.3d 32, 41 (Tenn. Ct. App. 2006), a self-storage creditor sued a bank for fraud after it acquired property without a foreclosure. The court granted the bank’s motion to dismiss for failure to state a claim:

“Plaintiffs allege, ‘each one of the defendants did the acts herein alleged with the intent to deceive and defraud...’ and ‘herein’ refers generally to 100 paragraphs. To pass the particularity test, the actors should be identified and the substance of each allegation should be pled (citations omitted). That was not done here.”

In Dell'Aquile v. LaPierre, 491 F.Supp.3d 320, 328 (M.D. Tenn. 2020) a plaintiff sued the NRA Foundation and its executive director alleging that they fraudulently solicited memberships with misleading claims as to how membership fees and donations were to be used. The District Court granted a Rule 12(b)(6) motion dismissing the fraud claims against the Foundation on the basis that the allegations failed to satisfy “time, place and content” of the alleged fraud as required under Rule 9(b).

In Strategic Capital Resources, Inc. vs. Dylan Tire Industries, LLC, 102 S.W.3d 603, 611 (Tenn. Ct. App. 2002) a financier sued a buyer and seller of a tire plant in alleged fraud:

“We think that the complaint does fail the particularity test. An inspection of the complaint shows that the allegations are only general and that no particular defendant is identified as the one making the false and misleading statements. At a minimum, the actors should be identified and the substance of each statement should be pled...”

Proceed Carefully When Pursuing a Lawsuit That Alleges Fraud

by Eddie Schmidt

The Facts

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Similar reasoning is found in Berry v. Mortgage Electric Regis-
tration Systems, 2013 WL 5634472 (Tenn. Cl. App. 2013), and
Schwartz v. Diagnostix Network Alliance, LLC, 2014 WL 6453676
(Cl. App. 2014). In both Berry and Schwartz, the fraud
cause of action was dismissed for failure to state a claim for
insufficient allegations.

Reasonable Reliance Must Be Pled

Tennessee has consistently required that a party allege with
particularity and prove his reasonable reliance upon the fraud-
ulent conduct.

• Black v. Black, 166 S.W.3d 699, 705 (Tenn. 2005),
...plaintiff does not contain particularized allegations as
to the husband’s misrepresentations or as to the reasonableness
of the wife’s reliance on such statements.

• Diggs v. LaSalle National Bank, Association, 387 S.W.3d 559,
565 (Tenn. Cl. App. 2012), a borrower sued the bank for
fraud after foreclosure proceedings. The court granted
the bank’s motion to dismiss for failure to state a claim:

“Appellee’s argument that the allegations contained in Ms.
Diggs’ complaint are unclear, conclusory and generally
insufficient. We agree. From our review of Ms. Diggs’
complaint, we find no allegations that particularly state that
any of the appellees knowingly made a false representation
of fact that was relied upon by Ms. Diggs to her detriment.”

• Schwartz v. Diagnostix Network Alliance, LLC., 2014 WL
6453676 (Tenn. Cl. App. 2014), “…we note that the
complaint does not contain any particularized allegations
regarding the reasonableness of Schwartz’s reliance on
the alleged fraudulent statements. Accordingly,
Schwartz’s fraud and misrepresentations claim was
properly dismissed.” Schwartz at p. 11.

• Solomon v. First American National Bank of Nashville, 774
S.W.2d 935 (Tenn. Cl. App. 2009), “(T)he generally a
party dealing on equal terms with another is not justified in
relying upon representations where the means of
knowledge are readily within his reach.”

Consequence of Improperly Pled Complaint

“A motion to dismiss a complaint for failure to state a
claim pursuant to Rule 12.02(6) of the Tennessee Rules of
Civil Procedure states that the allegations in the
complaint, accepted as true, fail to establish a cause of
action for which relief may be granted. Leach v. Taylor,
124 S.W.3d 87, 90 (Tenn. 2004). A motion to dismiss
admits the truth of the relevant and material allegations
contained in the complaint. Id.”


The federal counterparty is Rule 12(b)(6) of the Federal Rules
of Civil Procedure.

The consequence of a Rule 12.02(6) dismissal in state court is
severe. T.C.A. § 20-12-119 provides for the award of costs and reason-
able and necessary attorney’s fees up to $10,000.00. Such
an award is not discretionary and, in fact, is mandatory. See
App. 2016).

While there is no comparative federal statute, T.C.A. § 20-12-
119 consequences are assessed against the losing party.

The federal penalties are assessed against the losing party’s lawyer.

28 U.S.C. § 1927 allows for the recovery of “costs, expenses and
attorney fees from counsel whose conduct “multiplies the
proceedings in any case unreasonably vexatiously…”

Under Rule 11 of the Federal Rules of Civil Procedure, every
pleading filed by counsel or pro se plaintiff represents a certifi-
cation that: 1) The pleading is not filed for an improper purpose;
2) Contentions made are legally supported; 3) “factual conten-
tions have evidentiary support”; and 4) “factual contentions
are warranted by the evidence.” Failure to comply with Rule 11
subjects the offending lawyer or pro se plaintiff to sanctions.

Rule 11 under the Tennessee Rules of Civil Procedure is virtually
identical to its federal counterpart.

In determining whether Rule 11 sanctions are warranted, the
court applies an objectively “reasonable” standard ‘whether
a reasonable attorney admitted to practice before
the district court would file such a document.” Predator international, Inc. v.
CAGM Outdoor USA, Inc., 793 F.2d 1177, 1182 (10th. Cir. 2015).
Application of both 28 U.S.C. § 1927 and Rule 11 are discretion-
ary. See Ryder v. City of Springfield, 109 F.3d 288, 297-298 (6th Cir.
1997). Finally, in federal court, judges have inestimable
authority to sanction bad faith conduct where the court finds such
conduct “abuses the judicial process.” See Chambers v. NASCO,
Inc., 501 U.S. 32, 44-45, 115 S.Ct. 2123, 2132-2133, 115 L.Ed.2d

Recent Election Lawsuit Sanctions

There have been two rulings on an dismissed election challenge
lawsuits that alleged fraudulent conduct. The rulings offer so-
thing warnings to every lawyer.

Kevin O’Rourke, et al. v. Dominion Voting Systems, Inc., et al.,
20-CD-13747 (U.S. Dist. Ct.) illustrates the hazards of filing a
poorly investigated and pled fraud complaint. O’Rourke sought
to be a class action on behalf of 160 million American citi-
zens who were purportedly harmed by the 2020 Presidential
election. The complaint sought injunctive relief and damages
against several voting machine businesses, social media com-
panies and elected officials in Michigan, Pennsylvania, Georgia
and Wisconsin. The 84-page complaint alleged a “vast conspir-
acy” that tainted the Presidential-election results. As the Court
duly observed... “we are no slip-and-fruity local grocery
store.” (p. 6). Regarding the complaint’s allegations and coun-
sel’s pretrial diligence, the Court concluded:

“It appears that plaintiffs’ counsel’s process for formulat-
ing the factual allegations in this lawsuit was to compile
all the allegations from all the lawsuits and media reports
related to alleging election fraud (and only the ones
asserting fraud, not the one refuting fraud) put it in one
massive complaint, file it, and ‘see what happens.”’ (p.
55).

The supporting affidavits of several plaintiffs provided no pro-
tection to plaintiff’s counsel. The affidavits contained:

“...no first-hand knowledge by any plaintiff of any elec-
tion fraud, misconduct, or malfeasance. Instead, Plain-
tiff’s affidavits are replete with conclusory statements
about what must have happened during the election
and Plaintiffs’ beliefs that the election was corrupted,
presumably based on rumors, innuendo, and unverified
and questionable media reports.” (p. 7).

In a scathing 68-page ruling, the Court awarded attorneys fees
and costs against the plaintiffs’ attorneys under Rule 11, 28
U.S.C. § 1927 and under the Court’s inherent authority
finding counsel’s bad faith.

See 120-cv-03747-RN, Doc. 136, filed
08/03/21, U.S.D.C. Colorado.

Months later, another devastating ruling (110 pages) was
handed down in Timothy King, et al. v. Gretchen Whitmer, et al.,
No. 20-13134, U.S. District Court, Eastern District of
Michigan, Southern Division. (Case No. 2:20-CV-13134-LVP-RSW,

In contradiction to longstanding jurisprudence and
without offering any legal support, counsel argued
that they should be afforded a First Amendment
freedom of speech protection similar to that enjoyed by
journalists. (pp. 82-83).

One lawyer maintained that the lawsuit allegations
were a form of political “speech” that is “inherently
prone to exaggeration and hyperbole” such that
any reasonable person would only view the same as
“claims that await testing... through the adversary
process.” (pp. 90-91).

The Court meticulously rejected all arguments put forth by
the plaintiff lawyers and observed that “plaintiff’s counsel
may not bury their heads in the sand and therefore make affirmative
proclamations about what occurred above ground. In such cas-
es, ignorance is not bliss — it is sanctionable.” (p. 78).

The only licensed Michigan lawyer who filed the complaint
explained why he should not be sanctioned: he had only received
the Complaint with the attachments at 6:30 that evening on
the
day the complaint was filed. He skimmed through the material in an hour, didn’t make any changes or add anything, and had his secretary file the complaint. The Court was skeptical that any attorney could skim over a complaint with attachments “830 pages in all” within an hour, and found that this behavior by itself constituted sanctionable conduct. Two other lawyers complained that they only spent a couple of hours on the complaint, and were working from home. The Court rejected this argument finding that “[S]o long as the attorney bears some responsibility, the attorney may be sanctioned.”

The Court found that the attorneys’ conduct constituted bad faith and that “this lawsuit should never have been filed.” The Court ordered that the plaintiffs’ counsel be responsible for all attorney’s fees incurred by the defendants, the plaintiffs’ attorneys attend mandatory continuing legal education on pleadings standards and election law, and referred this matter to each federal and state bar where all of the plaintiffs’ attorneys were licensed for investigation into disciplinary action.

As mentioned at the outset of this article, proceed cautiously when pursuing a fraud claim.

ABOUT THE AUTHOR

Eddie Schmidt, originally from Louisiana, attended Vanderbilt undergrad and LSU Law School. In 1998 Eddie attended the Gerry Spence Trial Lawyers College and currently serves as a member of the teaching faculty. Eddie also regularly writes and speaks about trial practice. Eddie has tried all types of civil and criminal cases and obtained significant verdicts in medical malpractice, products liability, unfair trade practices and civil rights in both state and federal courts. He has a long history of strong beliefs in legal and ethical equality. Eddie is a long time supporter of TTLA and his law practice is currently in Nashville at www.eschmitdlaw.com. eddie@eschmitdlaw.com.