TTLA LIFETIME ACHIEVEMENT AWARD

Michelle Benjamin

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Editorial Staff: Donald Capparella, Theresa Grisham, Suzanne Keith, Amanda Gargus

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Darlene A. Kemp
MPH, MBA
Executive Director
Last issue in July, I told you about a new issue involving the caps on noneconomic damages, now that the $750,000 cap has been upheld as constitutional. The Court of Appeals recently ruled earlier this year that a spouse’s claim for loss of consortium is governed by its own separate $750,000 cap. In that case, the jury found for the plaintiff wife in a healthcare liability case, and awarded her $4 Million, all in noneconomic damages. Her husband also received a verdict of $500,000 for loss of consortium from the jury. The trial court found that there were two separate caps governing “each plaintiff,” and after reducing the wife’s claim under the cap statute to $750,000, found that her husband could recover the full amount of his damages.

The Court of Appeals affirmed. In examining the cap statute, Tenn. Code Ann § 29-39-102, and relying on the statute’s repeated reference that it applies to “each injured plaintiff,” the Court interpreted the statute to mean that the cap should apply to reduce damages awards to individual plaintiffs. The Court of Appeals, therefore, affirmed the judgment of the trial court and determined that the cap statute operates to give each injured plaintiff a separate, individual cap on their damages. Yebuah v. Center for Urological Treatment, P.L.C., 2020 WL 2781586 (Tenn. Ct. App. 5/28/20).

Full disclosure, as TTLA member Randy Kinnard was lead counsel in the trial court, I assisted during the post-trial phase and on appeal in that case. The Supreme Court has accepted review on this case, and the oral argument will be set for some time next year.

This magazine is an especially large issue because we had many good articles submitted. Thanks for those submittals, and I hope we will continue to get high quality articles that will be helpful to our membership. Finally, I renew my offer to answer the phone calls of any TTLA member who has questions about tort law or appeals. 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

DONALD CAPPARELLA
EDITOR, TTLA

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Rise UP!

My grandfather told me as a boy while I rode with him on his tractor around his farm... “Strong trees don’t just grow that way. They faced a lot of storms and survived for the better.” Times are tough. Adversity has been, and always will be, a part of being a mortal soul on this earth. It seems the current “new normal” is throwing changes at us faster than we can comfortably adapt. As I write this, jury trials I was so looking forward to trying in January 2021 have just been cancelled. My jury trial calendar normally holds about 6-8 cases per year, and is now filled with 15 between February 2021 and July 2021. And most of those are likely to be post-poned due to COVID-19. This simply means that our clients are not getting their shot at justice anytime soon. And justice delayed is... you know the answer.

Meanwhile, the insurance companies have figured it out by now. There is NO ACCOUNTABILITY. And since there are no jury trials currently going forth, there is not squat we can do about it presently. So they are flat out denying claims wrongfully, and, more commonly, low balling claims across the board. The 7th Amendment is a powerful motivator for both sides to resolve their differences. But when that hammer has been squelched, and there is no bad faith penalty in Tennessee for making unreasonable offers, the system comes to a screeching halt. Cases are stagnating and our inventory is growing (and growing stale). The insurance companies know a large percentage of our clients are hurting financially and they are lowballing all of them in the hopes that desperate clients will take their insulting offers.

BUT... there is hope on the horizon. With hopes of a vaccine and perhaps some herd immunity over time, we will get back to interacting more fully living life. Hopefully soon our cases will be moving again. And if recent trials and research from other jurisdictions are any indication of the future, we indeed have a lot to look forward to. Everything that keeps us safe in current times is part of a larger safety system. And when those systems are broken or non-existent, the harms are readily evident. When we expose the safety systems failures in our cases and put them at the forefront for all to see, I firmly believe obtaining a full cup of justice will be easier to obtain via jury verdicts. Regardless of your political point of view, safety for ourselves, our family, and our community, is paramount. Breakdowns in safety systems are deadly, and our jurors know this. Especially now.

So, until we get a chance to fully test my hypothesis and bring it to fruition, there are several things we must be doing now. The amount of free CLE programs over the past 6 months has been vast. I have been soaking them up and have put a lot of new arrows in my quiver that I cannot wait to unleash. We must also be preparing for those upcoming trials by focus grouping and preparing for trial now. If you simply do what you have been doing up to this point and you are not investing in yourself to make yourself a better trial lawyer, this past year is going to be wasted time. Get busy and do the extra work now to invest in yourself. The opportunities have never been better in my opinion. Your clients will be thankful you did.

Defense lawyers are so busy competing for business that they are willing to cut each other’s throats to prevent their competitor defense lawyers from doing a better job than they themselves might do. As trial lawyers, we are networked together. We help our brothers and sisters out every day to advance our common cause. We share documents, depositions, and intel. This trial lawyer perspective of cooperation is one of the building blocks of our organization, and what continues to allow us to be a great force. And in these times, I believe we are as strong as we have ever been.

I am truly thankful to be a part of this great organization of my fellow brothers and sisters. I hope each one of you has a safe and happy holiday season. Keep fighting for our worthy and noble cause and, when this pandemic is over, let’s be better and stronger because of it.

“If we had no winter, the spring would not be so pleasant; if we did not sometimes taste of adversity, prosperity would not be so welcome.”

- Anne Bradstreet
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On June 19, 2020 at its virtual Annual Convention the Tennessee Trial Lawyers Association honored longtime Winchester attorney, Michelle Benjamin, 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.

Michelle was raised in a large family (one of ten children) in North Carolina and taught kindergarten in the Virgin Islands before going to law school. She worked as a staff attorney with legal services in Tullahoma before opening her private practice in Franklin County, Tennessee. She and her husband, Eric, who is the Director of Minority Student Affairs at the University of the South, raised three sons and now have grandchildren to enjoy.

Michelle Benjamin has been on the board of the Tennessee Trial Lawyers since 1993 and also served on the board of trustees for LIFT, the Lawyers Involved for Tennessee. She served as a commissioner on the Judicial Selection Commission for 15 years and two terms on the TN Board of Professional Responsibility. She is also a member of the Franklin County Bar Association.

Michelle was described in a newspaper article as giving her clients hope. The article also said that she operates out of pure love for her fellow man and tries to treat people the way she wants to be treated.

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, Winchester, and John T. Milburn Rogers, Greeneville.
The Youth Vaping Epidemic: JUUL’s Meteoric Rise to Dominance Using Big Tobacco’s Tricks to Exploit Our Kids

by Christopher Paulos, Brenton Goodman and Matt Keen

Introduction

If you have a teenager, chances are you already have had to deal in one way or another with the latest public health crisis of youth vaping. Daily news stories of ever-increasing health consequences and overwhelmed parents and schools have emerged, and the FDA and certain states have been urgently issuing health advisories and proposed “bans” to help curtail the calamity. At the center of it all stands one company—JUUL Labs, Inc.—that rose to market dominance in dizzying fashion. JUUL first emerged as a Silicon Valley “unicorn” that promised to “disrupt” a traditional industry (tobacco) by delivering a new technology with health benefits. However, as we are now learning, rather than disrupt an already aging and corrupt industry, JUUL simply copied its playbook and repackaged it for a new generation. JUUL skirted laws intended to rein in Big Tobacco and exploited the vulnerability of our youth which has now resulted in a new youth addiction crisis. With an estimated 75% share of an e-cigarette market made up of approximately 3.6 million middle and high schoolers, JUUL’s actions are wreaking havoc on our children and our communities. JUUL has become so enmeshed in youth culture that children now regularly refer to the act of inhaling any aerosol as “Juuling.” In turn, states, municipalities, and families, have been forced to divert already limited funds to fight childhood nicotine addiction and the immediate and long-term damages it causes. Now, with the unprecedented (and seemingly unending) COVID19 global pandemic, this adolescent health crisis confronting our children is even more dire.

From the Rise of E-cigarettes to the Success of JUUL – The Evolution of Nicotine Delivery

For decades, Big Tobacco has marketed and sold combustion cigarettes (“cigarettes”) filled with tobacco leaves that, when lit by an open flame, funnel nicotine filled smoke into the users’ mouth and lungs. Big Tobacco’s century of success is attributable largely to the industry’s ability to create lifelong consumers by addicting children to nicotine.

Nicotine is addictive because it alters the brain’s systems and structures so that nicotine becomes vital to the brain’s normal functioning. Nicotine also causes the release of dopamine, serotonin, and other neurotransmitters that trigger the brain’s “pleasure center.” Once these “pleasure” hormones dissipate, a smoker is caught in a vicious cycle—driven to smoke because smoking delivers more nicotine, which boosts the pleasure hormones, which then dissipate, creating a need for more nicotine. As tobacco researcher Michael Russell said in 1971, “were it not for the nicotine in tobacco smoke, people would be little more inclined to smoke than they are to blow bubbles or light sparklers.” For years, Big Tobacco spent billions of dollars, and even hired addiction “experts,” to develop new ways in which nicotine could be delivered more efficiently, more potently, and less offensively to new users—making their products increasingly more appealing and more addictive. Along with the goal of creating a more addictive and less offensive nicotine delivery system, Big Tobacco also targeted younger consumers who were referred to in one R.J. Reynolds memo as “replacement smokers.” Big Tobacco’s ultimate goal was to get youths hooked quicker so that they buy more product, more frequently, over more years.

E-cigarettes are the newest iteration of devices whose sole purpose is to deliver nicotine to users. E-cigarettes are different than traditional cigarettes in that they use electricity to turn nicotine-infused liquid into an aerosol and they do not contain tobacco. Initially, e-cigarettes were viewed by many in the public health community as delivering nicotine to adult smokers while reducing exposure to the toxicants in cigarette smoke. Unfortunately, this fallacy remains pervasive. In the late 1960s and 1970s, Big Tobacco became infatuated with “freebasing” nicotine by increasing smoke pH in the belief that it provided more “kick.” Most e-cigarettes before JUUL delivered nicotine predominantly in a freebase form. But freebase nicotine is “harsh” in much the same way cigar smoke (which is more alkaline than cigarette smoke) is more harsh and difficult to inhale than cigarette smoke. Thus, the number of “hits” a user of e-cigarettes could take with JUUL was a game changer. It distinguished itself from other e-cigarette competitors by using a nicotine solution infused with benzoic acid, which lowers the pH of JUUL’s aerosol and provides a smoother (“less-offensive”) vapor. Because JUUL is less “harsh” than its competition, it is more appealing to “starters” (i.e., kids)
and can be inhaled repeatedly without the “smoking fatigue” one would experience with a cigarette or a harsher freebase e-cigarette.

JUUL’s design is explained in its ‘895 patent. The patent celebrates JUUL’s use of nicotine salts to reduce the “harshness” of the vapor. Even more important, JUUL’s patent claims that it can deliver nicotine to the brain as quickly and in higher doses than a traditional Pall Mall cigarette. Thus JUUL’s aerosol gives users a smoother vaping experience while speeding up nicotine intake and its related effects. Because “nicotine satisfaction is the dominant desire, as opposed to flavor and other satisfactions” for smoking, JUUL created a product that gave its users quicker and easier access to nicotine.

JUUL’s Targeting of Youth Leads to Its Meteoric Rise

In 2015, JUUL which previously spun out of the moderately successful loose-leaf cannabis vaping company PAX Labs, entered the e-cigarette market. Although JUUL’s use of nicotine salt could turn smokers and non-smokers alike into loyal brand customers, JUUL did not have any way of attracting customers to its product.

JUUL entered a market dominated by Big Tobacco. Large companies with massive marketing budgets were already successfully advertising to adult smokers and non-smokers alike. To avoid head-to-head competition with the large companies and their marketing budgets, JUUL understood they needed to find an untapped demographic that was susceptible to their marketing message. After studying Big Tobacco’s internal documents, JUUL decided on its target demographic - our kids.

For decades, cigarette companies discussed how best to attract kids to their products. Before the master settlement agreement in 1998 that banned youth marketing, Big Tobacco sought out kids because they would “account for a key share of the total cigarette volume- for at least the next 25 years . . . .” Because more than 80% of smokers begin smoking before the age of 18, and because the adolescent brain is more sensitive to addiction, children and young adults were a prime target for Big Tobacco. With Big Tobacco now constrained from youth marketing, JUUL had the field largely to itself.

JUUL also was familiar with the findings by Big Tobacco that “pre-smokers” can succumb to “psychological pressure” to smoke in social situations. Understanding the youth mentality angst-ridden and aching to be cool and independent-Big Tobacco’s ad campaigns emphasized togetherness, belonging, and group acceptance while also encouraging independence. For decades, Big Tobacco attracted children to their products by using young, attractive models as brand ambassadors and incorporating bright colors and fruit flavoring to certain products to make smoking more fun and palatable to kids. These practices were so successful that in 2009, the Tobacco Control Act banned the sale of most tobacco flavored cigarettes. But when JUUL entered the e-cigarette market, these laws and restrictions did not apply to e-cigarettes. JUUL seized the moment.

In 2015, JUUL began the “Vaporized” campaign. As part of the campaign, JUUL used a full ad blitz to attract children to their product. Specifically, JUUL packaged their product using colorful and vibrant images while touting nicotine cartridge flavors that would appeal to a younger audience such as “mango”, “fruit medley” and “cool cucumber.”

JUUL did not advertise in traditional channels where one would expect to find prospective adult customers. Rather, it penetrated social media channels (i.e. Youtube, Instagram, Snapchat and Twitter) frequented by children, employing paid advertising and recruiting young social media “influencers” to endorse its products. They created pop-up JUUL parties in swank cities that gave out JUUL pods for free or at very low prices while encouraging attendees to post pictures on social media of the event. JUUL even went to school campuses to “educate” students about the “safety” of JUUL’s e-cigarettes. In one instance, JUUL representatives told students that JUUL was “totally safe” and that it “was much safer than cigarettes.”

continued from page 10A

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Reminiscent of Big Tobacco’s past strategies, JUUL’s marketing campaign successfully reached youths by pairing JUUL products with imagery that would be attractive to children: social inclusion, sexual attractiveness, athleticism, glamour and popularity. JUUL focused on social media markets precisely because these channels were far more populated and utilized by younger generations. Even when JUUL used more traditional media to advertise, it placed its product in magazines like VICE, which claims to be the “#1 youth media in the world.”

JUUL’s targeting of these nontraditional and youth-centric media allowed it to remain inconspicuous. Aware of the pushback Big Tobacco received for directly advertising to kids, JUUL knew it could avoid scrutiny by side-stepping traditional markets used by older generations. According to Matt Myers, the president of the nonprofit Campaign for Tobacco Free Kids, JUUL’s decision to put the bulk of its ads on social media rather than magazines, billboards, or TV meant that adults and federal regulators were less likely to see the ads and flag potential issues. JUUL used social media “influencers” and its own customers to magnify their marketing reach by promoting JUUL products with “hashtags”, “likes”, “follows” and other social media tools to avoid regulatory scrutiny, and create “viral” media campaigns that would pervade the far corners of the internet and worm their way into the everyday lives of our children and teens.

JUUL was deceitful in even more ways. For instance, JUUL would have been aware that the sleek design of their product that resembled a USB flashdrive could easily be hidden from teachers or explained away to curious parents. JUUL’s “stealth” design encouraged youths to use JUUL products while in school and created an element of risk that appealed to kids prone to rebellion or adventurousness.

JUUL’s marketing strategy proved extraordinarily effective. Only a few short years after entering the marketplace, JUUL secured a 75% share of the e-cigarette market. From 2017 to 2018, JUUL’s sales increased by more than 600%. By December 2017, JUUL sold in retail shops 3.2 million devices monthly and comprised nearly 1 in 3 (29%) e-cigarette sales nationally (not including sales from internet and vape shops). The Centers for Disease Control and Prevention (CDC) suggested “many of the sales likely reflect products obtained directly or indirectly by youth.”

The connection between JUUL’s success and its youth marketing is obvious. In November 2018, the CDC reported that e-cigarette use among American high school students reached 20.8% (3.05 million users) representing a 78% increase from the prior year. This coincides with the 600% sale increase JUUL experienced from 2017 to 2018. Additionally, JUUL’s marketing decisions have been vital in driving customer desires. For instance, JUUL’s decision to create fruity flavors proved effective given that 81.5% of underage e-cigarette users admitted to using e-cigarettes because of the flavors they provided. “During the last year and a half, we’ve been hearing a lot of anecdotes from kids who say, ‘[t]he first week I was using Juul, I did it because I thought it was cool. The second week I used Juul, I did it because I had to.'” Given the situation, the FDA and other organizations began to pressure JUUL to change its advertising and its product.
On November 13, 2018, JUUL bowed to pressure and agreed to stop selling mango, fruit, crème brûlée, and cucumber flavored JUUL products at more than 90,000 retail stores. JUUL also agreed to require additional age verification measures for online sales of the flavors. The company also announced that it would delete its Facebook and Instagram accounts and halt promotional posts on Twitter. Additionally, on June 12, 2018, JUUL announced a new Marketing and Social Media Policy to use only adult models who are former smokers who switched to JUUL. Too little, too late.

The damage JUUL has wrought still persists and will do so into the future. Although JUUL halted its own Instagram posts in November 2018, a large community of predominantly young people continue to post to #juul. “In the 8 months since the company halted its promotional postings, the rate of community posting accelerated markedly resulting in the number of posts doubling to over half a million.”

Even now, with JUUL creating a new advertising campaign featuring adult models and entitled, “Make the Switch – For smokers. By design,” the campaign is widely considered a thinly veiled attempt to rehabilitate JUUL’s image: the image of the company that “knowingly targeted minors with harmful products, and cleaned up its act only after public pressure.” JUUL’s new focus and imagery highlights the egregious nature of its earlier advertising campaign and the feasibility of having marketed responsibly from the outset.

**The Negative Health Effects of JUULing**

JUUL carries more addictive potential than conventional cigarettes and a growing body of scientific literature suggests e-cigarettes like JUUL are also harmful to individuals, especially youths.

JUUL often claims that the amount of nicotine delivered in one JUUL pod would be equivalent to a pack of cigarettes. This is both false and misleading. The nicotine content of one JUUL pod actually equates to 34-38.5 cigarettes (more than a pack-and-a-half). As referenced previously, JUUL’s patented nicotine salt formula ultimately delivers nicotine into customers’ blood stream as quickly and in higher doses than a traditional cigarette. Also, given JUUL’s smooth, acidic aerosol, users are capable of “hitting” a JUUL device far more frequently than a normal person could tolerate with a conventional combustion cigarette; and this would be particularly true for adolescents unfamiliar with daily cigarette smoking.

The ease with which kids can take in nicotine using JUUL products is even more troublesome when one looks at JUUL’s potential to cause physical and mental ailments. Vaping has been linked to disturbances of cognitive functions and brain development as well as lung and other health issues such as pulmonary disease that have led to hospitalization and death. Additionally, a preliminary study presented at the 2018 annual meeting of the American Chemical Society found that vaping could damage DNA.

The study found three DNA-damaging compounds—formaldehyde, acrolein and methylglyoxal—whose levels increased in the saliva after vaping. Compared with people who do not vape, four of the five e-cigarette users showed increased DNA damage related to acrolein exposure. The type of damage, called a DNA adduct, occurs when toxic chemicals, such as acrolein, react with DNA. If the cell does not repair the damage so that normal DNA replication can take place, cancer can result. These findings are consistent with those of the FDA, which since 2009 has warned that e-cigarettes contain “detectable levels of known carcinogens and toxic chemicals to which users could be exposed.” Separate studies have also found that adolescents who started smoking at a young age had markedly reduced activity in the prefrontal cortex of the brain, an area critical for a person’s cognitive behavior and decision-making, leading to increased sensitivity to other drugs and greater impulsivity.

Youth still face all the potential health concerns that come with smoking conventional cigarettes. Kids who become addicted to nicotine through e-cigarettes often migrate to cigarettes. JUUL, who shares stakes with Altria (seller of Marlboro), advertised to youth because youths are the prime target market for tobacco products. The combination of more than 80% of smokers beginning before the age of 18, and the adolescent brain being more sensitive to addiction, gives JUUL, and its partner Altria, the incentive to target children to turn them into life-long addicts and customers. A February 2019 JAMA investigation concluded that e-cigarette use among teens is associated with increased...
risk for eventual cigarette use, even among children who otherwise would have been at low risk for cigarette initiation. Prior e-cigarette users are four times more likely to ever smoke a cigarette compared to youth with no prior tobacco use.46

JUUL is now being forced to reckon with the fact that using its product can be harmful. Only after intense regulatory scrutiny has JUUL added warnings that its pods contain nicotine, as well as chemicals known to cause cancer and birth defects.47 Nevertheless, the accuracy and sufficiency of these warnings remains questionable. To this day, kids remain unaware that using JUUL is potentially addictive, harmful, and unsafe. Nor does the current labeling warn of any specific risk of physical injury other than addiction. As a result of the harm and addiction caused by JUUL, parents and their children have had to deal with emotional and physical effects of intense nicotine addiction, nicotine poisoning and withdrawal, and the prospect of associated future risks. Counties and municipalities have also been forced to re-allocate already limited resources toward solving issues related to youth vaping addiction.48 These tax-payer funded government entities have to undo the damage done by JUUL by creating and funding services that educate about the dangers of e-cigarettes and they must now significantly increase their policing and enforcement of e-cigarette use and sales to underage buyers.49

In the months since the nationwide vaping epidemic dominated the news cycle, the world has been hit by the COVID-19 global health pandemic. Those who vape and are addicted to JUUL now face an even greater risk that their addiction will exacerbate the complications of an infection by the COVID-19 coronavirus.50 Michael Felberbaum, an FDA spokesman, noted that “E-cigarettes can damage lung cells,” and expose people who “smoke and/or vape tobacco or nicotine-containing products” to more “serious complications from Covid-19.”51 According to Nora Volkow, director of the National Institute on Drug Abuse, “[b]ecause it attacks the lungs, the coronavirus that causes COVID-19 could be an especially serious threat to those who smoke tobacco or marijuana or who vape.”52 In one recent study, young people who had used cigarettes, e-cigarettes or both in the previous 30 days were five to seven times more likely to receive COVID-19 tests than nonusers.53

**Status of JUUL Litigation**

On October 2, 2019 in MDL No. 2913, the panel centralized both putative class actions and individual personal injury actions in the Northern District of California in front of the Honorable Judge William H. Orrick III. The class actions generally assert violations of consumer protection acts, the Rack-eteer Influence and Corrupt Organizations Act, negligence, products liability design defect, and unjust enrichment against JUUL based around JUUL’s design and marketing. Other recent class action cases have been filed on behalf of cities, counties, and school districts that have borne the cost of abatement efforts. And State Attorneys General are expected to enter the fray soon. Meanwhile, individuals are bringing personal injury claims such as fraud by omission, negligence, failure to warn, product liability- design defect, breach of warranties, violations of unfair and deceptive trade practice acts, and unjust enrichment, among others.

Additionally, on October 29, 2019, a wrongful termination and retaliation complaint was filed by ex-JUUL employee, Siddharth Breja, alleging that JUUL knowingly distributed nearly 1 million contaminated or expired mint-flavored pods despite internal concerns for the health and safety of the public. Mr. Breja was allegedly terminated after raising his concerns internally. The Complaint has given us a new glimpse into the corporate culture within JUUL that routinely sacrificed safety for increased stock value and sheer profit.54

Recently, on October 23, 2020, Judge Orrick entered his order on pending substantive motions to dismiss in the MDL. In a 152-page order, Judge Orrick denied defendants’ motions related to all of the plaintiffs’ personal injury and class claims except for those in involving allegations that JUUL and Altria violated RICO. Plaintiffs were granted leave to amend the RICO allegations.55 Along with denying initial motions to dismiss, Judge Orrick has entered several case management orders providing for direct filing in the MDL, the exchange of Facts Sheets, and bellwether trial selection leading to a trial date set for the to occur in February 2022.56 There are presently over 1100 cases filed in the MDL and it is expected to grow significantly.

**Conclusion**

The trends in scientific studies combined with JUUL’s egregious acts and the already public outcry against JUUL demand that we trial lawyers use our skills to do our part in ending the scourge of vaping. However, with the backing of Altria’s deep pockets and army of tobacco litigation-tested defense lawyers, it would be reasonable to believe that litigating cases against JUUL will be long and costly. Evolving and emerging science means that the goalposts on causation are still moving and that true extent of damages and injuries may still be difficult to gauge. However, JUUL has acted egregiously, and new facts about its deplorable acts emerge every day as discovery ensues and regulators keep watch. Since the cessation of its marketing campaign, JUUL has all but concealed the moral high ground so it is now up to attorneys to seek justice and redress for the actual and future damages done to our nations’ youth.
and communities. Recent events have made this work even more pressing and, despite the difficulties posed by practicing law in a global pandemic, this fight for justice continues.

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10 U.S. Patent No. 3209817 (Filed Apr. 17, 1963) https://patents.google.com/patent/US3209817 (Oct. 31, 2019) (“The present invention… has for an object to provide a safe and harmless means for and method of smoking….”).


ing restrictions look today (Oct. 28, 2019).


29 Id.


55 See MDL No. 39213, Doc. No. 1084.

56 Id. at Doc. Nos. 309, 405, 406, 938, 995, and 996.
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Journey to the Bar

by William H. Poland

I was always somewhat envious of those persons who, early on, knew what they wanted to be when they grew up. Such clairvoyance was never mine. And there were others who did not know early on but, nonetheless, found direction that took root in their lives before young adulthood had passed. I was not in either group as it seemed my life was more like a stream meandering through a farmer’s field whose direction and purpose were pre-determined by forces other than my own. But would I, like the waters of the stream, eventually converge with a mighty river then discharge into a great ocean and traverse the world? Or, would a herd of thirsty cows come along and suck me into their bellies only later to spray me into a stand of hackberry bushes? Such thoughts plagued me as I trudged through college knowing that soon Uncle Sam would want my services before I could even start my journey along the river of life.

For those of us who graduated from high school or college in the late 1960s our job prospects were promising as long as we were interested in helping Uncle Sam in Southeast Asia. My Army recruiter induced me with the promise of a fine steak dinner, overnight lodging at a nice downtown hotel, and airfare the next morning to Ft. Dix, New Jersey for Basic Training. To my disappointment the steak was of the hamburger variety and the dilapidated hotel—well, I soon learned that it really wasn’t the worst place I could spend a night. But, when my service obligation finally ended, I was discharged as a twenty-seven year old infantry Captain who had plenty to tell my grandchildren and those experiences began to sharpen my focus on the future.

While in the Army I became reacquainted with my high school sweetheart and we planned to marry. I also had developed a strong desire to design and begin building a house with money saved during my military service. Then there were plans to use my G.I. Bill of Rights and return to my alma mater at the University of Mississippi in Oxford where I had been accepted for graduate studies in microbiology.

With these plans, I located a nice tree-shaded piece of land near Oxford and began the search for a local lawyer to prepare a deed. Many would describe Oxford as a “sleepy southern town” which, by all other accounts, is a gross understatement as the denizens fondly refer to it as “Oxpatch”. There were four roads entering Oxford and they converged on the Court House Square along streets overhung with massive magnolia trees and lined with ante-bellum homes. Unobtrusive law offices were scattered about the Square along with a drug store, a hardware store and sundry other shops. In the search for a lawyer, my Volkswagen Beetle and I puttered around the Square and parked in front of the Law Office of Bill Lamb.

I had never met Mr. Lamb. In fact, I had never met any lawyer other than “lawyer Frey” who lived on the street where I grew up in Guthrie, Kentucky. I was a child then and I only have two memories of him. The first memory is of a humid Sunday night at church when lawyer Frey stood up and verbally protested the actions of certain church members who had called an impromptu meeting for the purpose of voting a fellow member out of the church. I remember lawyer Frey speaking angrily to the assembly with his voice becoming pitched when he spoke of “fairness” to the member and his “rights” being trampled upon. The second memory was a year or so later also on a Sunday. I overheard my parents at the breakfast table talking about a disgruntled client who had fired a shotgun into lawyer Frey’s office the night before.

So, with a bit of trepidation I darted into The Law Office of Bill Lamb and told his secretary I needed a deed prepared. Mr. Lamb, who was lanky, graying, and fifty-something ambled out to look at the paperwork I had brought with me. Then, from memory and with a slow southern drawl, he began dictating as his secretary typed. I paid him ten dollars and walked out to the street with my deed along with a sense of amazement someone could have such information stored in their head that would allow them to earn a living.

continued to page 19A
With the legal requirements completed, I cleared a portion of the land, began building the house and moved into it on the first day of Spring, 1973 with my new bride. As the fall school semester drew near, I met several times with my graduate advisor at his office at The University of Mississippi Biology Department. I knew the professor when I was an undergraduate and we had stayed in touch over the years. He was a brilliant, soft-spoken, kind man who was aware my heart was not deeply rooted in the study of microbiology. He correctly perceived my entry into that program came at a time when I was searching to find what I really wanted to do in life. He sympathized with my plight and understood my ambivalence about being in graduate school but advised in time I would find a path leading me to my life’s work. According to him, it was okay to now be at a crossroads and unsure of which way to go; the really important thing was to start my journey.

One hot August afternoon I left the professor’s office with a sense of uncertain resolve about becoming a microbiologist and walked across campus where I had parked my car near the front of Lamar Hall. This building housed the university’s law school and I would later learn it had been named for Lucius Quintus Cincinnatus Lamar who had been credited with the case method of instruction still used in law schools today and he had also been a justice on the United States Supreme Court. I paused as thoughts began racing through my head. Law school. That is what I could do with the rest of my life---I could become a lawyer. I would be my own boss. I could help people. It was an honorable profession. Perhaps this would lead me out of the farmer’s field before the cows arrived.

My excitement grew as I leaped the steps to the law school’s entrance, found the Dean of Admissions, and asked him what I had to do to get admitted to the Fall class of law students. With a tired stare, he inquired about my undergraduate grade point average and my score on the Law School Admissions Test (LSAT). I told him about my stellar undergraduate grades and that I had not taken the LSAT but he hastened to emphasize I had done really well on the Graduate Record Exam and the Miller’s Analogy Test which were both prerequisites for my admission to graduate school. In a dismissive tone the Dean told me that those tests “just were not acceptable” for admission to law school and that I must take the LSAT but it would not be administered again until November. Damn. I knew I wanted to be a lawyer but I would have to wait another year to get started.

I went back to my graduate advisor and told him I now knew what I wanted to do with the rest of my life and it didn’t involve looking at microbes. He understood. I told him about the November LSAT and it would be another year before I could begin studying the law. The professor leaned back in his chair, squinted one eye as if looking through a microscope, and told me I wouldn’t have to wait a year to start. I told him he didn’t understand; I must take the LSAT to attend law school. He said I didn’t understand and explained since I was already admitted to graduate school, I could take any graduate level course at the University as long as my advisor signed off --- and he would sign off on any law course I wanted starting right then! The professor quickly added that it was not uncommon for graduate students studying in one discipline to need an occasional course taught in another discipline at the university but that did not mean a graduate student could enroll for a full load of course work in another discipline. If I did that, all bets were off as to what might happen to me. Clearly this would be an unorthodox plan and quite possibly could get me thrown out of the university altogether but the adrenalin rush had begun.

A week later I entered a side door of the law school, held my breath for fear I would be discovered as a graduate student, and waited in line with the real law students to sign up for a full load of first year law courses. As I stood there, I felt like a thief shoplifting law courses one after another, then making my escape in the blue Beetle and heading home with the back seat full of law books. If the law school administration uncovered what I had done, could I be prosecuted? I guessed that I would find out if I ever got to take a course in criminal law.

Nonetheless, all that first semester I had a recurring dream the campus police stopped me for speeding and asked why my car displayed a biology department parking permit but law books filled the back seat. Unable to give a rational explanation, I would wake up in a sweat. Luckily my scheme was not discovered by the law school administration and while I began the first semester studying law unscathed, in graduate school things did not go as smoothly.

For rather obvious reasons my graduate advisor and accomplice preferred my unconventional program of legal studies not become common knowledge.* Difficulties arose, however, when all graduate students of the biology department had our first compulsory group meeting with the Dean. At this meeting some of the students asked me why they weren’t seeing me in classes and around the biology department. They warned I shouldn’t get too far behind in my graduate work as I would never get caught up by semester’s end. I mumbled that I really had not been the same since ‘Nam and stared vacantly at the floor. They never talked to me again.

I passed all my first semester law courses with relative ease and decided it was time I met with the law school Dean to explain my double life and try to get officially admitted to law school. Of all people, wouldn’t the Dean, himself a lawyer and former prosecutor, appreciate a crafty, highly motivated young man who found a loop hole that allowed him to enroll in law classes without being formally admitted to the law school? On the other hand, would he fly into a rage and vow I would never see the inside of any law school again?
In preparing to meet with the Dean at his office, I made it a point to dress in my best (and only) suit, iron my shirt, polish my shoes, and cut my hair. The dean didn’t know me from Adam and, after all, first impressions do count even if you are a crook. Actually, the meeting with the dean went rather well although I had to explain three times what I had been doing. The first two times I gave my confession, he just sat there staring a hole through me which was extremely uncomfortable. I felt like maybe he had a secret button under his desk that he would push and my chair and I would fall through the floor to some secret crypt where fledgling law students were kept. Finally he cleared his throat, thoughtfully re-arranged some papers on his desk, and then said he didn’t see how he could keep anyone out of law school if they had already passed the course work. He shook my hand and as he walked me to his office door, he asked if I would do him a personal favor and please take the LSAT just so they would have something on file about it.

In due course I graduated from law school. At that time, Mississippi law granted what was called the “diploma privilege”; upon graduation, it was an automatic license to practice law in that state. Some of us referred to it as a “get out of jail free card” because we didn’t have to take a bar exam to become licensed to practice law. We could begin our practice the very next day after graduation so I had rented an upstairs office in an ancient building General Sherman had spared during his march to the sea. It was located on Oxford’s Court House Square facing east and is the same office where I went at 3:00 a.m. the morning after my graduation. I was so excited I was a lawyer I couldn’t sleep and I went to the old office and just sat there watching the sun rise above Lamar Avenue as I reflected on my journey thus far and what the future might hold.

I met my first client in that musty, two-room office. He was a pre-med student who had celebrated a little too much after his first semester and was charged with driving under the influence of alcohol (DUI). Although I had no idea what to charge for this service, I figured if attorney Lamb had charged me ten dollars for a deed three years earlier, I could certainly charge twenty dollars now for a DUI.

Since that first case, there have been literally hundreds of others as I have journeyed through my career as a lawyer. As I approach my fortieth year of law practice, at times I still find myself in my office during the very early morning hours. At times I am there to work on a case; occasionally I go there just to think and be alone. As the sun rises, I often reminisce of earlier days and my exceptional good fortune in becoming a lawyer --- and I am again filled with the excitement of what my journey along that meandering stream may hold.

* Following my admission to law school, the University re-vamped its policy of allowing graduate students to attend courses elsewhere at the University.

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ABOUT THE AUTHOR

William H. Poland  US. Army Infantry 1967-1972, Graduate of University of Mississippi School of Law (1977), Married forty eight years to Anne and have three children (two lawyers), and six grand children. Enjoy trout fishing, and restoration of Austin Healey’s and Triumphs.
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THE TENNESSEE GENERAL ASSEMBLY & THE 2020 ELECTION

Republicans entered the election with supermajorities in the state House and Senate. The Senate keeps its super-majority republican hold with 27-6. The House keeps its super-majority republican hold with 73-26.

In the state legislative races 16 of the 33 Senate seats were up for election while all 99 of the House seats were up. There was one open Senate seat and nine open House seats as four members were upset in the primaries and five did not seek reelection.

New Members of the 112th Tennessee General Assembly include:

SENATE:

Senate District 20: Heidi Campbell (D - Nashville) defeated Sen. Steve Dickerson in the general election. Campbell is a former mayor of Oak Hill, a satellite city of Nashville.

Senate District 26: Page Walley (R - Bolivar) won the open seat previously held by Dolores Gresham. He currently serves as the vice-mayor of Bolivar and was a Representative in the House from 1990 to 2000. Walley is a licensed clinical psychologist.

HOUSE:

House District 3: Scotty Campbell (R - Mountain City) won the seat vacated by Rep. Timothy Hill, who unsuccessfully ran for Congress. Campbell was a 911 police/fire/EMS dispatcher and worked at the local radio station. He was a Representative in the House from 2011-2012.

House District 6: Tim Hicks (R - Johnson City) beat Rep. Micah Van Huss in the primary. He serves on the Washington County Planning Commission and is the founder and CEO of Hicks Construction.

House District 7: Becky Jo Alexander (R - Jonesborough) defeated Deputy Speaker Matthew Hill in the primary. Her family owns a local funeral home. She holds a master’s degree in storytelling and is a professional storyteller and motivational speaker.

House District 15: Sam McKenzie (D – Knoxville) defeated incumbent Rep. Rick Staples in the primary and went on to win the general. He holds a master’s degree in physics. McKenzie spent over 30 years working at Oak Ridge National Laboratory. He is also a former Knox County Commissioner. Thanks to TTLA Treasurer Troy Jones who ran as an Independent in this race.

House District 16: Michele Carringer (R – Knoxville) won the seat vacated by Speaker Pro Tempore Bill Dunn who retired. She is a life-long resident of Knoxville and former Knox County Commissioner.

House District 18: Eddie Mannis (R – Knoxville) keeps the seat republican after Martin Daniel did not seek reelection. He is the founder of Prestige Cleaners, a dry-cleaning business with over 12 stores. He is also Knoxville’s former Deputy Mayor and COO.

House District 76: Tandy Darby (R - Greenfield) won the open seat vacated by Rep. Andy Holt. Darby works for Akin & Porter Produce and on his family’s cattle farm, Darby Brothers Farm.

House District 90: Torrey Harris (D - Memphis) defeated 26-year incumbent Rep. John DeBerry, who had to run as an independent after the Tennessee Democratic Party voted to remove him as a Democrat. Harris currently works in human resources for Shelby County government.

House District 92: Todd Warner (R - Chapel Hill) defeated Rick Tillis in the primary and had no opposition for the general. Todd Warner is a businessman and a row crop farmer of corn and soybeans in Marshall County.

House District 97: John Gillespie (R - Memphis) narrowly won the seat vacated by Rep. Jim Coley in a hotly contested race. Gillespie works as a grant coordinator at Trezevant Episcopal Home.

The 112th general assembly will convene at noon on January 12, 2021.

TTLA plays an important role in the legislative process by working to ensure that Tennessee citizens are not deprived of their constitutional guarantee of access to justice. The TTLA
lobby team stands ready to educate the legislators so that they understand the impact legislation will have on the civil justice system.

Thank you to all our members that support our association. We urge you to develop relationships with your legislators so we can have more of an impact in the legislature going forward.

Hopefully 2021 will be a great new year!

John Griffith, TTLA President
Mark Chalos, TTLA Legislative Chair
Lauren Brinkley, TTLA Legislative Counsel
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Joint Custody—The Unintended Results

by George D. Spanos

Tennessee has allowed divorcing and separating parents the ability to craft parenting arrangements to settle disputes without the need to have a contested hearing. T.C.A. §36-6-106(a) was amended several years ago to instruct the Court to “order a custody arrangement that permits both parents to enjoy the maximum participation possible [...]”. While this amendment is not further clarified by the legislature, many Courts have interpreted the statute as a legislative push for equal parenting time or at least the need to increase what “standard” plans once were.

In a corresponding move, the Tennessee Legislature in 2019 amended T.C.A. §36-6-410 by adding subsection (b) which provides:

(b) Notwithstanding any law to the contrary, when the child is scheduled to reside an equal amount of time with both parents, the parents may agree to a designation as joint primary residential parents or to waive the designation of a primary residential parent. In the absence of an agreement between the parties, a single primary residential parent must be designated; provided, that this designation shall not affect either parent's rights and responsibilities under the parenting plan. Tenn. Code § 36-6-410(b).

Allowing for joint primary residential parents was a logical next step. In some counties and Courts, such parenting time agreements are encouraged. Quite frankly, this provision can be instrumental in settling custodial disputes as the Primary Residential Parent designation is often the trophy that parents want and can now both have.

Attorneys and judges alike are familiar with this section of Permanent Parenting Plans

IV. PRIMARY RESIDENTIAL PARENT (CUSTODIAN) FOR OTHER LEGAL PURPOSES

The child or children are scheduled to reside the majority of the time with the mother or the father. This parent is designated as the primary residential parent also known as the custodian, SOLELY for purposes of any other applicable state and federal laws. If the parents are listed in Section II as joint decision-makers, then, for purposes of obtaining health or other insurance, they shall be considered to be joint custodians. THIS DESIGNATION DOES NOT AFFECT EITHER PARENT’S RIGHTS OR RESPONSIBILITIES UNDER THIS PARENTING PLAN.

We have also heard countless clients ask “What am I giving up if I let him/her be a Joint Primary Residential Parent?” The go to answer always used to be relocation rights as set out in T.C.A. §36-6-108. However, the 2018 amendment to T.C.A. §36-6-108 removed the necessity of that discussion as relocation is now looked at on a strict “best interest” of the child basis, which the parent who wants to relocate has the burden of proving. How does one prospectively prove it will be in the minor child’s best interest for a parent to give up their equal time and for the minor child to move away?

This joint primary residential parent designation does call into question just how far a parent can move away from another joint primary residential parent. Can the move still be up to fifty (50) miles away? The relocation statute and its interpretation by the Court of Appeals has always accounted for a parent who spends intervals of time with a child being able to move up to fifty (50) miles away from the other parent. Just how far is acceptable? If parties can still move up to fifty miles away, the parties now have a more difficult school system decision to make. Instead of deciding which school zone the child should register in, they have to decide which school system the child should be in. It was settled law that if a primary residential parent moves within the distance (fifty (50) miles) allowed under the relocation statute (T.C.A. §36-6-108), then the child would simply be registered according to the primary residential parents’ address.

While it seems that there are no hurdles in naming both parents as joint primary residential parents, educational decision-making poses a lurking dilemma for parents. Ideally, parties who can agree to the Joint Primary Residential Parent designation communicate well with one another, are respectful and considerate of each other’s point of view, and work hard to do what is best for their child. In reality, this is too often not

continued to page 27A
the case. Remember, only the parties can agree to be Joint Primary Residential Parents. The Court cannot order this in a contested case. While it is far less common, parties can also agree to waive the designation altogether. Either decision, without further clarification can, and already has begun, to create conflicts for minor children in Tennessee, with future problems lying in wait.

These educational decisions arise because parties who are able to agree to the Joint Primary Residential Parent designation undoubtedly agree to have joint education decision-making. Unfortunately, school districts across Tennessee are inadvertently put in the cross hairs. In reviewing twelve (12) of the largest school districts across the State, the zoning policies for these school districts either directly or impliedly state that the school a minor child attends is based on the address of their “custodial parent” or “legal guardian”.

In these school districts, a common theme emerged: (1) all but one district assumes that there is only one custodial parent or primary residential parent whose address determines the school zone where their child will attend classes. In this one school district, it recognizes that two parents may have equal parenting time and even allows the parents to elect to change the school zone that their child attends one time per educational level. Even here, the issue with joint decision making remains. The child could be moved one time, but Court proceedings are still necessary to place the child in a particular parent’s school zone. If the parties disagree, the school systems cannot and should not intervene and be unable to rely on their zoning policies. Likewise, neither parents nor school systems want school system employees to be the arbiter of this issue.

One situation that none of the twelve (12) school systems contemplates is that neither parent has a custodial parent or primary residential parent designation. While parents may waive this designation pursuant to the new amendment, it may not allow their child to attend school in school systems that require the primary residential parent’s address to dictate in what school zone the child is placed.

As the Legislature has only provided that parents can elect to either waive the primary residential parent designation or elect to be joint residential parents, the Courts are not creating these problems. While Courts can always take a stance on what should and/or needs to be included in Permanent Parenting Plans prior to adopting them and incorporating them into Final Decrees of Divorce or Final Orders, this is an issue that should be resolved during the settlement of the case. Moreover, if this causes parents to contest the current parenting plan and for litigation to follow it, those parents will be unable to receive the joint primary parent designation, as Courts have not been granted to the power to make such a designation.

Until there is a legislative change in this regard, there is potential for unnecessary and, quite possibly, extremely contentious litigation. If parents can agree on all the other aspects of a Parenting Plan, they should and need to agree on who the tie-breaker goes to, as it pertains to school placement, ie: education placement. Thus, we have given litigants the ability to be joint custodians with equal parenting time but now we, as their counsel, have to insist they pick a parent to make educational decisions or at least, education placement decision. If the parents cannot work it out, they will be back in Court and their child(ren) will be stuck in limbo.

ABOUT THE AUTHOR

George D. Spanos is a partner at Rogers, Shea & Spanos in Nashville, Tennessee. Having worked for Ms. Rogers and the firm while he attended law school, Mr. Spanos gained valuable insight to the firm and significant experience prior to his admission to the Bar. Mr. Spanos is now a partner at the firm and practices in all areas of family and probate law, including divorce, post-divorce, child custody and visitation, child support, juvenile, and wills and estates. Mr. Spanos has successfully tried multiple contested trials since being admitted to the practice of law. Mr. Spanos is also trained and certified as a Rule 31 Mediator.

Mr. Spanos sits on the Board of Governors for the Tennessee Trial Lawyers Association and has been an executive appointee to its Executive Committee for the past two years. He chairs the Trial Lawyers annual Domestic Law Forum and their Domestic Legislation Committee. Additionally, he has chaired and coordinated the Williamson County Mock Trial Competition since 2016. He was selected and completed the Nashville Bar Foundation’s Leadership Forum’s 2017-2018 class, and is a SuperLawyer’s Rising Star.
President-elect Biden! I like the sound of that, but we still have a lot of work to do down ballot where we came up short. The election results revealed a mixed verdict with the loss of pro-civil-justice House members and unfulfilled expectations in the Senate.

On the “definite win” side, I want to thank the entire trial lawyer community and the state TLAs for the work AAJ and state association members did to protect the vote—in all 50 states! I am pleased to report that AAJ’s Voter Protection Action Committee (VPAC) connected more than 1,200 people nationwide with volunteer opportunities. The will of our volunteers, particularly during a volatile election cycle, underscores one thing of which we are certain: trial lawyers always rise to the occasion and stand up for what is right and just.

While Joe Biden and Kamala Harris will be our next president and vice president, the Senate may continue to be led by tort reform advocate Mitch McConnell, unless the January 5 run-off elections in Georgia produce a different result. There are two incredible candidates, Rev. Raphael Warnock and Jon Ossoff, who could tip the balance in favor of access to justice in the Senate. The House continues to be led by pro-civil-justice lawmakers.

If Mitch McConnell remains as Senate Leader, there will continue to be a logjam on affirmative legislative issues and judicial appointments. Regardless of what happens in Congress, AAJ will continue to have a robust regulatory role in the federal agencies and vigilantly monitor the federal rules for proposals that could harm your clients’ cases. We anticipate that we will be working even harder in these areas to ensure that regulations have teeth and federal rules are balanced.

We will continue to build partnerships and coalitions where we can.

**Legal Affairs Update**

**U.S. Supreme Court Victory in Qualified Immunity Case**

On November 4, 2020, the U.S. Supreme Court held that the Fifth Circuit Court of Appeals erred in granting Texas correctional officers summary judgment on the basis of qualified immunity. The Court’s opinion states that under the “particularly egregious facts of this case, any reasonable officer should have realized that [plaintiff’s] conditions of confinement offended the Constitution.”

In *Taylor v. Riojas*, No. 19-1261 (U.S. Nov. 4, 2020), the plaintiff inmate was held in appallingly inhumane conditions, including being forced to sleep in overflowing sewage. He brought a § 1983 claim against the correctional officers. The Fifth Circuit held that while there was evidence that his Eighth Amendment rights had been violated, qualified immunity barred his claims.

On petition for certiorari in the Supreme Court, AAJ signed on to an amicus curiae brief (www.justice.org/resources/research/taylor-v-riojas) with a coalition of organizations urging the Court to overturn the doctrine of qualified immunity. In a step toward such a result, the Court vacated the Fifth Circuit’s finding of summary judgment based on qualified immunity. Justice Thomas dissented; Justice Barrett took no part in the consideration or decision of the case.
Federal Rules Update

A Proposal on Federal Rule of Evidence 702 — Expert Witnesses
Since March, the defense bar has filed a large volume of comments proposing changes to FRE 702 — Testimony by Expert Witnesses. Their goal is to add a preponderance of the evidence standard to the rule and limit “overstatements” by expert witnesses. The Advisory Committee on the Rules of Evidence is considering such a change and has released several draft rules that were discussed at the committee’s November 13 meeting.

At their meeting, the committee focused on whether the preponderance of the evidence standard should be added into the text of Rule 702. Committee members believe such an addition would help address what they perceive to be courts’ misapplication of Rule 702 as it currently stands. The committee also considered whether a limitation on “overstatements” should be addressed. This was met with ample opposition by the Department of Justice and support by federal defenders and other committee members.

The Advisory Committee will focus on two versions of the overstatement rule. During this informal comment period, we need to focus on further winnowing the issues involved with the potential rulemaking. If you would like to be involved, please contact Sue Steinman (susan.steinman@justice.org) and Amy Brogioli (amy.brogioli@justice.org).

Social Security Rulemaking Underway
A formal comment period is well underway for proposed supplemental rules to the Federal Rules of Civil Procedure to govern Social Security review actions. AAJ recommends that you submit comments focusing on whether supplemental rules are necessary for these cases and how they would benefit or hinder your practice, particularly in comparison to the local rules under which you currently operate.

Deadlines and Instructions: The formal comment period runs through February 16, 2021. Requests to testify at the public hearing on the rule, which will be held virtually on January 22, 2021, must be submitted no later than December 23, 2020. Additional information, including the draft rule text, can be found at www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

Issues to Consider: This rulemaking commenced as a result of studies showing that Social Security appeals make up about 7% of the federal docket. Comments may want to address the necessity of creating separate FRCP to govern Social Security review actions; how the proposed timelines compare to timing requirements in your jurisdiction; the privacy, security, or identity theft issues raised by requiring the last 4 digits of Social Security number; or any addition to the proposed rules that would improve the draft.

For additional information, please contact susan.steinman@justice.org and amy.brogioli@justice.org.

Fighting for You and Your Clients
Thank you for your continued support. Despite these difficult times, AAJ continues to fight all attempts to deny access to justice. We will keep you informed about important developments and welcome your input. You can reach me at advocacy@justice.org.
Your office receives a phone call related to a catastrophic tractor-trailer crash. Upon talking with the potential client, you learn that the potential client’s spouse rear-ended a tractor-trailer that was stopped in the slowing lane of travel without any type of warning. You learn that this crash took place in the state of North Carolina. Researching the tractor-trailer company, you learn that the company is based out of Virginia with a terminal in Florida. Additionally, your investigation uncovers that the driver is from Florida.1

Once the case is signed up, the process of creating a strategy to maximize justice for the client begins in earnest. As experienced practitioners, we all know that not every jurisdiction is created equal. The 50 states are broken down into 4 categories of negligence. Four states practice pure contributory negligence 2, which means that if the defense is able to show the plaintiff had 1% negligence that was the proximate cause of the injuries, the case is dismissed outright.3 Twelve states practice pure comparative fault.4 The remaining states practice modified comparative fault. The other version of modified comparative fault is when plaintiff recovers with 50% comparative fault.6 South Dakota has its own special rules about comparative fault.

Depending on where the case can be brought can determine whether a plaintiff can be successful in recovery based upon the alleged or found negligence by the plaintiff. Under the given fact scenario, it is highly probably that the plaintiff’s case will be barred as a jury will likely find the plaintiff 1% at fault. Conversely, bringing the case in a pure contributory negligence venue will allow the plaintiff to recover, so long as the plaintiff’s negligence does not equal 100%.7

Until 2011, a practitioner would sit down and analyze which court had personal jurisdiction and would review the International Shoe v. State of Washington United States Supreme Court decision.8 Black’s Law Dictionary defines jurisdiction as “1. A government’s general power to exercise authority over all persons and things within its territory. 2. A court’s power to decide a case or issue a decree.” Black’s Law Dictionary, 7th Edition, p.855 (1999). Without personal jurisdiction power, a court has no authority to act.

International Shoe involved the state of Washington trying to collect unemployment compensation from the International Shoe company. The International Shoe Company challenged whether it was subject to the jurisdiction of the Washington state court under the due process clause of the 14th Amendment. In answering the due process clause requirements, the United States Supreme Court articulated the substantial contacts test. Specifically, the United States Supreme Court said:

‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.

In further articulating the “continuous and systematic” contacts approach, the United States Supreme Court further explained:

... the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires a corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

From the International Shoe case, case law developed creating two categories of personal jurisdiction, specific jurisdiction and general jurisdiction.9 See Conn v. Zakharov, 667 F.3d 705, 712-13 (6th Cir. 2012). Black’s Law dictionary defines general jurisdiction as “1. A court’s authority to hear a wide range of cases, civil or criminal, that arise within its geographic area. 2. A court’s authority to hear all claims against a defendant, at the place of the defendant’s domicile or the place of service, without any showing that a connection exists between the claims and the forum state.” Black’s Law Dictionary, 7th

continued to page 31A
ed, p.856 (1999). Limited (specific) jurisdiction is defined as "jurisdiction that is confined to a particular type of case or that may be exercised only under statutory limits prescribed." Black’s Law Dictionary, 7th ed, p.856 (1999).

Specific jurisdiction occurs when the defendant has sufficient minimum contacts that arise from or are related to the cause of action. See Aristech Chemical International Ltd. v. Acrylic Fabricators Ltd., 138 F.3d 624, 628 (6th Cir. 1998). A plaintiff must establish the following three items: "(1) the defendant purposefully availed himself of the privilege of acting in the forum or intentionally caused a consequence in the forum, (2) the cause of action arose from the defendant’s activities in the forum, and (3) the acts of the defendant or consequences caused by the defendant have a substantial enough connection with the forum to make the exercise of jurisdiction reasonable." See Aristech, 138 F3d at 628. In the above scenario, bring the case in North Carolina against the defendant driver and defendant trucking company would satisfy all three prongs.10

General jurisdiction arose when a defendant’s contacts with the forum were “continuous and systematic in nature” that a court could exercise its power over a defendant even if the lawsuit was unrelated to contacts that gave rise to the exercise of jurisdiction. See Third National Bank v. WEDGE Group, Inc., 882 F.2d 1087, 1089 (6th Cir. 1989). In the above scenario, having a terminal in Florida could give rise to Florida exercising personal jurisdiction through a general jurisdiction analysis. A court could find that owning property, paying taxes, picking up and routing deliveries each day satisfy the systematic and continuous test developed from the International Shoe progeny. In 2011, the United States Supreme Court issued a ruling in Goodyear Dunlop Tires Operations v. Brown11 that signaled a sea change in traditional jurisdictional analysis. This unanimous Court heard the issue, “Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?” See Goodyear Dunlop Tires Operations v. Brown, 564 U.S. 915, 918 (2011). Plaintiffs in this case brought suit in North Carolina from a crash in Paris, France, caused by a defective tire. This crash killed two North Carolina boys. The defective tire was traced to a Turkish manufacturer. Suit was commenced against Goodyear Tire and Rubber Company (Goodyear), and three foreign subsidiaries from Turkey, France, and Luxembourg. See Goodyear, 564 U.S. at 918.

Analyzing the jurisdictional question, the United States Supreme Court reasoned that North Carolina could not exercise specific jurisdiction over the case because the crash occurred in Paris France, the tire was manufactured in Turkey and the tire sold abroad outside of North Carolina. See Goodyear, 564 U.S. at 919. Overturning North Carolina’s exercise of general jurisdiction, the United Supreme Court referenced its Perkins v. Benguet Consolidated Mining Co. 1952 decision stating, “A corporation’s ‘continuous activity of some sorts within a state,’ International Shoe instructed, ‘is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.’” Goodyear, 564 U.S. at 928.12

Justifying that continual and systematic contacts may not be sufficient for general jurisdiction, the Court stated, “any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed. See Goodyear, 564 U.S. at 930.

The “Shoe” dropped in the United States Supreme Court case, Daimler v. Bauman.13 Citing to dicta that was not the basis for the Goodyear decision, the Court stated that the proper analysis is not whether a corporations contacts are systematic and continuous, but rather whether it’s affiliations are within the state are continuous and systematic to render the corporation essentially at home within the state. See Daimler, 571 U.S. 117, 138-139 (2014) (quoting Goodyear, 564 U.S. at 924.).14 The systematic and continuous affiliations test rejects any substantial, continuous and continuous course of business test because such is “unacceptably grasping.” Daimler, 571 U.S. at 138.

Rejecting decades of jurisprudence, the Court solidified the “systematic and continuous affiliations” test which limits the general jurisdiction of corporations to a corporation’s place of incorporation and a corporation’s principal place of business. See Daimler, 571 U.S. at 137. Its rationality for such a bright line rule was affiliations were easy and ascertainable thus encouraging predictability.15 Plaintiffs have one clear and certain forum in which a corporate defendant may be sued on all claims. See Daimler, 571 U.S. at 137.

In the above scenario the specific jurisdiction analysis does not change, North Carolina courts would have jurisdiction for the case. Under the new “systematic and continuous affiliations” test for general jurisdiction, Virginia would have jurisdiction since the tractor-trailer company’s incorporation is in that state. Florida court’s which once would have been considered highly probable as having general jurisdiction since the company maintained a continuous presence, is now circumspect because maintaining a terminal may not be considered a principal place of business especially if the tractor-trailer company has more than one terminal in multiple states. At the very least, plaintiff should be allowed to conduct limited discovery to determine jurisdiction.16 In some instances, a corporation may be “too big for general jurisdiction.” Daimler, 571 U.S. at 143 (Justice Sotomayor concurring in judgment).

ABOUT THE AUTHOR

Danny Ellis works with referral lawyers all across the country focusing on tractor-trailer, bus, and commercial vehicle litigation. Danny is board certified by the National Board of Trial Advocacy in

1 These facts are fictitious. Any similarity to a case is purely coincidental.
2 TVashington D.C., practices contributory negligence in most situations. See Knobles v. Golf Service Industries, 317 F.Supp. 2d 14, 18 (D.C. 2004). However, in some statutory instances, like a motorized vehicle hitting a pedestrian, a modified comparative fault analysis applies. See DC ST 50-2204.52.
3 These four states are: NC (see NGCSA § 143-299–1); VA (see Jenkins v. Pyles, 611 S.2d 404 (Va. 2005)); AL (see Brown v. Piggly Wiggly Stores, 454 So.2d 1370 (Ala. 1984)); and MD (see Union Mem. Hosp. v. Dorsey, 724 Atl.2d 1272 (Md. App. 1999).
4 AK, AZ, CA, FL, KY, LA, MS, MO, NM, NY, RI, WA
5 ME, ND, IA, UT, NE, WY, KS, AR, TN, GA, SC
6 OR, NV, MT, CO, OK, TX, MN, IA, MI, IL, IN, OH, PA, NJ, WV, VT, NH, DE, MA
7 If a plaintiff’s damages are $10 million and the defendant is found 10% at fault, a $1 million recovery is sufficient.
8 326 U.S. 310, 66 S.Ct. 154 (1945).
9 Jurisdiction should not be confused with venue. Venue: 1. The proper or a possible place for the trial of a lawsuit, usually because the place has some connection with the events that have given rise to the lawsuit. Black’s Law Dictionary, 7th ed., p1553 (1999). A court may be the proper place to bring a case but the court may not have jurisdiction over a party.
10 However, filing suit in North Carolina all but assures a zero for the client under a contributory negligence analysis.
11 564 U.S. 915, 131 S.Ct. 2846 (2011)
12 Perkins involved a Philippine mining company that ceased activities during World War II. The company conducted business, to a limited extent, in Ohio while the Philippines was occupied by the Japanese. The company president maintained an office, kept company files and supervised from Ohio. Ohio was the corporation’s principal, if temporary, place of business. See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952).
14 The Daimler case arose from plaintiffs suing Daimler Chrysler’s Argentinian subsidiary’s involvement in kidnapping, detention, rape, torture and killing of Argentinian workers during the “Dirty War.” For more information on the “Dirty War” see https://en.wikipedia.org/wiki/Dirty_War
15 Simple jurisdictional rules . . . promote greater predictability. Daimler 571 U.S. at 137 (quoting Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010)).
16 We agree that discovery may be appropriate when a defendant moves to dismiss for lack of jurisdiction. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

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Jerry Summers Book On Judge Raulston Schoolfield Chosen To Be Included In Notable Trials Series

Saturday, October 24, 2020

A book on controversial and colorful local Judge Raulston Schoolfield by Chattanooga attorney Jerry Summers has been chosen to be included in the Notable Trials Series.


A special leather-bound edition of the book has been privately printed for the members of the Notable Trials Library.

Noted scholar Alan Dershowitz is the chairman of the Notable Trials Library. Mr. Dershowitz wrote an introduction to the new edition of the book.

Past President Jerry Summers also has another book out titled “Tennessee Trivia No. 1” – a compilation of short articles about Persons, Places and Events in the Volunteer State.

All proceeds benefit clients at OGC who suffer from mental and physical disabilities and are tax deductible.

Contact Jerry if you would like to purchase any of his books – jsummers@summersfirm.com - 1/423-265-2385.
Eric Buchanan & Associates, PLLC, is pleased to announce that Kaci Dupree has joined our disability team helping individuals who have been denied individual or group policy disability benefits. We also help individuals who have been denied life, health, or similar insurance benefits.

Ms. Dupree graduated from Pennsylvania State University School of Law, Cum Laude, in May of 2020. While at Penn State, Ms. Dupree served as the Managing Editor of the Penn State Arbitration Law Review and worked in the Entrepreneur Assistance Clinic, helping entrepreneurs one-on-one across Pennsylvania form businesses and providing free legal assistance so that they could achieve their goal to start their own small businesses.

Ms. Dupree graduated with honors from the University of Tennessee at Chattanooga and earned B.A. degrees in History and Spanish and a B.S. in Political Science. Although she grew up in Eastern Kentucky and in Murfreesboro, TN, Chattanooga feels like home to her, and she looks forward to continuing to serve our clients with the team in Chattanooga.

Although the COVID-19 pandemic has delayed her opportunity to take the bar exam, she is looking forward to taking the Tennessee bar and to working as an attorney for the team. In her spare time, she enjoys spending time outdoors, hiking, or going to the lake with friends and family. She also is an avid sports fan and spends a lot of her free time cheering on the Kentucky basketball team and the Penn State football team.
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Joining Lawyers Involved for Tennessee is simple. An ongoing, monthly contribution to LIFT via credit card or bank draft is the easiest way to provide your support. See suggested monthly contribution allocation or indicate your allocation below.

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