

2015 TENNESSEE LEGISLATIVE UPDATE FROM THE 109TH GENERAL ASSEMBLY

NEW LAWS

- **Health Care Liability**

T.C.A. §29-26-103 was enacted and provides that the results of a survey, inspection, or an investigation of a healthcare provider that is conducted by any state or federal department or agency, including any statement of deficiencies and all findings and efficiencies cited in the statement of deficiencies on the basis of the survey, inspection, or investigation, and all proposed or implemented plans of correction submitted by the healthcare provider, and statements of or records of interviews with employees or independent contractors of the healthcare provider, shall not be admissible in evidence in any healthcare liability action in any court or arbitration proceeding on the basis that it satisfies an exception to the Tennessee Rules of Evidence governing hearsay.

The statute further prohibits the use of a survey in any advertisement, unless the advertisement includes the date the survey, inspection, or investigation was conducted, a statement that the finding or deficiency has been corrected, if applicable, and the date the finding or deficiency was corrected, and a statement that the advertisement is neither authorized nor endorsed by the department of health, the department of mental health and substance abuse services, or any other government agency.

However, the statute provides that a survey, inspection, or investigation may still be used in any administrative proceeding or in a state or federal civil or criminal proceeding that is initiated by a state or federal department or agency.

The statute further provides that the results of a survey, an inspection, or investigation may still be used to impeach a witness in a healthcare liability action.

T.C.A. §29-26-121(f)(2) was amended to make clear that “[n]otwithstanding any other provision of statutory or common law to the contrary, any healthcare provider’s disclosure of protected health or other relevant information, including, but not limited to, opinions as to the standard of care of any defendant, compliance with or breach of the standard, causation of the alleged injury, or any other information relevant to the early analysis and evaluation of the plaintiff’s claim, shall be deemed a permissible disclosure under Tennessee law.” This amended was made effective as of the date of enactment and arguably means that it may be applied retrospectively to all pending healthcare liability actions.

T.C.A. §29-26-101 was amended to add definitions of “licensee,” “management company,” and “passive investor.” A passive investor is defined as an individual or entity that has an ownership interest in a licensee but does not directly participate in the day-to-day decision making or operation of the licensee.

In related legislation, **T.C.A. §29-26-102** was created to prohibit a healthcare liability action from initially being filed against a “passive investor” and provides that suit may only initially be filed against the “licensee” and “management company.” However, such a lawsuit may subsequently be amended upon a proper showing to the court that there is sufficient evidence in the record to establish a reasonable showing that a passive investor owed a duty of reasonable care to the claimant and that the individual or entity breached that duty; and the breach of that duty is a legal cause of injury to the claimant.

In related legislation, **T.C.A. §29-26-121** was amended to add the following language: “(5) In the event a person, entity, or health care provider receives notice of a potential claim for health care liability pursuant to this subsection (a), the person, entity, or health care provider shall, within thirty (30) days of receiving the notice, based upon any reasonable knowledge and information available, provide written notice to the potential claimant of any other person, entity, or health care provider who may be a properly named defendant.” The intent of this amendment was to require a notice recipient to communicate to the potential claimant that a “passive investor” has improperly received notice and to provide to the claimant information as to the identity of the proper defendant licensee and/or management company. This amendment only applies to actions instituted on or after April 24, 2015.

- **Statute of Limitations**

PRACTICE ALERT: Notably, **T.C.A. §29-26-102** contains the following problematic language: “(c) When determining the statute of limitations in a health care liability action, the date of the original pleading shall control regardless of whether there are amended pleadings or substituted or added parties.” In other words, the statute as currently worded provides that the statute of limitations in a healthcare liability action relates back to the original pleading regardless of whether there are amended pleadings or substituted or added parties.

T.C.A. §28-3-104 is amended to provide that the statute of limitations is suspended in a civil action if a criminal prosecution is commenced that is based upon the same conduct, transaction, or occurrence that gives rise to a cause of action for civil damages. The time between the commencement of the criminal prosecution and the conclusion of it shall not be computed as part of the period within which the civil action must be brought. Note that no tolling and statute of limitations shall exceed 10 years from the date the civil cause of action accrued. The statute defines when a criminal

prosecution is commenced and when it is concluded for purposes of calculating the tolling period.

- **Workers Compensation**

T.C.A. §50-6-203 is amended to provide that in any case where an employer has paid permanent partial disability benefits to an employee in an attempt to settle a claim for workers compensation benefits but the employee and employer have not entered into a settlement agreement that has been approved by worker's compensation judge, the statute of limitations for filing a claim to recover workers compensation benefits shall be extended for 2 years from the date the last payment of permanent partial disability benefits was made to the employee.

T.C.A §50-6-217(a)(2) provides that any party aggrieved by an order for temporary disability or medical benefits or for an order either awarding permanent disability or medical benefits or denying a claim for permanent disability or medical benefits issued by a worker's compensation judge may appeal the order to the worker's compensation appeals board. This subsection sets forth the procedure for accomplishing such an appeal and time deadlines.

T.C.A §50-6-240 is amended to provide that no party may settle a claim for permanent disability benefits unless the settlement agreement has been approved by a workers compensation judge. Any settlement agreement not so approved is void.

T.C.A. §63-19-106(b) was amended to remove the highlighted and italicized sentence:

"A physician assistant shall function only under the control and responsibility of a licensed physician. There shall, as all times, be a physician who is answerable for the actions of the physician assistant and who has the duty of assuring that there is proper supervision and control of the physician assistant and that the assistants activities are otherwise appropriate. ***The supervising physician has complete and absolute authority over any action of the physician assistant.***"

- **Governmental Tort Liability Act**

T.C.A. §29-20-102 of the Governmental Tort Liability Act was amended to broaden the definition of a "governmental entity" to include a nonprofit public benefit corporation or charitable entity that is appointed by statute, ordinance, resolution, contract, or other governmental directive to develop, maintain, manage, and provide services and activities at government owned property that is a public park.

- **Limited Immunity for Volunteer Drivers of Senior Citizens**

T.C.A. §29-34-210 is known as the "Protection of Volunteer-Insured Drivers of the Elderly (PROVIDE) Act." The act provides that any volunteer who provides volunteer transportation for senior citizens through a charitable organization or human service agency shall not be individually liable for any civil damages for any injury to such senior citizens arising out of or resulting from such transportation if such volunteer was acting in good-faith within the scope of their official actions and duties on behalf of the charitable organization or human service agency unless the conduct of such volunteer amounts to willful and wanton misconduct.

- **Chiropractors**

T.C.A. §63-4-122 is amended to provide that it is "considered unethical" for a chiropractor or an employee or agent of a chiropractor to solicit by telephone the victims of an accident or disaster and will subject the chiropractor to disciplinary action. Telemarketing transcripts must be maintained for two years following their utilization and a log of contacts shall be maintained for two years following a telemarketing encounter.

Deferred or Failed To Pass

- **Financial Responsibility/Uninsured Motorist**

A Senate bill to amend in its entirety **T.C.A. §56-7-1201** failed to make it out of committee and had no House sponsor. As introduced, it increases the minimum limits for automobile liability insurance coverage to \$100k single limit or split-limits of \$50k/\$100k; provides for discovery of policy limits; permits stacking of multiple insurance policies and prohibits setoff from any other insurance coverage.

A Senate bill to amend in its entirety **T.C.A. §55-12-102(12)** failed to make it out of committee and had no House sponsor. If passed, this bill would permit the patient or a family member, "to prove medical bills, including their reasonableness and necessity, without authentication by the medical provider and without expert testimony. However, the bill provides that *"nothing in this section shall be construed to limit the right of a thorough and scrutinizing cross-examination as to such items of evidence."*

- **The Practice of Law/Civil Litigation**

Action was deferred on a bill to establish a commission to study and recommend possible reforms to the civil litigation process. If passed, the commission is directed to study and consider possible reforms and improvements to the civil litigation system including reducing the costs of the discovery process, increasing accessibility to the civil justice system for working and middle-class citizens, and drawing possible distinctions between simple and complex litigation.

The Senate unanimously passed a bill to establish an advisory task force to study and report recommendations on electronic filings in state courts and the appointment of counsel for indigent defendants. Action on the bill was deferred in the House Finance Subcommittee. The bill provides that “the General Assembly finds that Tennessee needs to move forward as expeditiously as possible to provide litigants and their counsel the option to e-file documents in Tennessee’s court system and especially in Tennessee’s trial courts.”

A bill to amend **T.C.A. §23-1-103** directing the Supreme Court to promulgate a rule establishing a procedure whereby a person may apply for and take the Tennessee bar examination regardless of whether the person attended or graduated from a law school was withdrawn in the Senate and failed to make it out of committee in the House.

A bill to amend **T.C.A. §24-9-136** failed to make it out of committee. It would require a person taking a deposition to disclose all conflicts by submitting a specific written stipulation to all parties of record and specifies when objection to reporter must take place. It prohibits a reporter from giving an advantage to one party, payment being contingent on the outcome of the action, providing other advocacy or litigation support to a party, or cost of deposition differing between parties except in certain circumstances. It specifies the format of the deposition transcript and the penalty for violation of the rules. It prohibits the parties from waiving certain rules. If passed, *the bill would remove as a conflict engaging in a sexual relationship with one of the parties, or an attorney for one of the parties, in the past two years.*

- **Judicial Appointments**

Action was deferred on a bill that establishes the procedure for the appointment, confirmation and retention of appellate court judges pursuant to Article VI, Section 3 of the Constitution of Tennessee. It provides that appellate judges shall be appointed by the governor and confirmed by the general assembly. It replaces the judicial nomination commission with the judicial confirmation committee, and outlines its organizational structure and duties with regards to the appointment of appellate judges. It outlines the criteria to be followed for an incumbent appellate judge seeking reelection by retention.

Action was deferred on amendments to **T.C.A. §§17-4-101 and 17-4-102** to create a judicial nominating commission to select qualified persons to send to the governor for filling of vacancies in state trial courts.

- **Jury Service**

Action was deferred on a bill to amend **T.C.A. §22-1-107** to reduce jury service terms.

Action was deferred on a bill to amend **T.C.A. §22-2-317** that would provide protections to small businesses for jury service and for allowing a juror to select a service date from a list of dates, and additional reforms, including allowing an employer with fewer than five employees to postpone jury service of an employee if certain conditions exist.

A bill to amend **T.C.A. §22-1-103(b)(5)** to excuse persons 70 years of age or older from jury duty failed to make it out of committee.

- **Unfair Trade Practices by Insurers**

A bill to amend **T.C.A. §56-8-104** failed in the Senate that would have specified additional acts that would constitute unfair trade practices by insurers and allow the insured to bring a civil cause of action against an insurer for violation of those unfair insurance practices. If the bill had passed, it would have declared an “unfair insurance provision” as one including a provision that would require alternative dispute resolution prior to filing a court action and one including in an insurance policy a provision that would require the insured to complete repairs prior to the settlement of a claim.

- **Health Care Liability/Qualified Protective Orders**

House and Senate action was deferred on a bill to amend **T.C.A. §29-26-121(f)** to make the granting of a petition for a qualified protective order in a healthcare liability action discretionary with the trial court rather than mandatory.

- **Statute of Limitations**

A bill to amend **T.C.A. §28-3-104** to extend the statute of limitations from one year to three years for personal injury causes of action failed to make it out of committee in either the House or Senate.

- **Exemption from Trial Subpoena**

A bill to amend **T.C.A. §24-9-101(a)(6)** to exempt licensed social workers from subpoena to trial but subject them to subpoena to a deposition failed to make it out of committee.