



RAINEY • KIZER
REVIERE & BELL PLC

Jackson Offices

105 S. Highland Avenue
Jackson, TN 38301
and

209 E. Main Street
Jackson, TN 38301
P 731.423.2414

Memphis Office

Morgan Keegan Tower
50 N. Front Street, Ste. 610
Memphis, TN 38103
P 901.333.8101

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TORT AND INSURANCE NEWSLETTER

January 2009 Issue

Tennessee Supreme Court Expands Potential Liability for Claims of Negligent Infliction of Emotional Distress

The Tennessee Supreme Court recently expanded the scope of those individuals who can recover for a stand-alone claim of negligent infliction of emotional distress. Eskin v. Bartee, 262 S.W.3d 727 (Tenn. 2008). In Eskin, the court determined that a family member's allegation of a sensory observation of the immediate aftermath of an injury – producing event can provide the basis for a claim of negligent infliction of emotional distress (“NIED”). Id. at 738. Previously, Tennessee had fallen in line with the majority rule which required the bystander to prove the following elements to successfully assert a stand-alone claim for NIED:

- (1) the plaintiff was located in close proximity to the injury, (however, the plaintiff need not be in the “zone of danger”);
- (2) the plaintiff's awareness of the injuries;
- (3) the seriousness of the victim's injuries; and
- (4) the relationship between the plaintiff and the victim.

Id. at 736. Historically, courts nationwide were reluctant to reward a person for alleged emotional injury when that person merely observed an injury, was located at the scene of an accident, or was related to an injured victim. However, as the case law progressed, Tennessee courts allowed a person, with limited exceptions, to recover if the person observed an injury, was located at the scene, and was related to the injured victim.

In Eskin, Brendan Eskin's mother was unable to pick up Brendan from school. Id. at 730. Bartee arrived at the school, lost control of her vehicle, and struck an unattended vehicle. Id. Bartee's vehicle then jumped the curb and struck Brendan. Id. Brendan's mother was telephoned from the scene and arrived before her son was moved from his injured position. Id. She viewed her son lying in a pool of blood. Id. Brendan suffered permanent brain damage, and his mother, along with her family members, filed suit seeking damages for emotional injuries. Id.

The trial court granted the defendant's motion for summary judgment because Brendan's mother and the other family members did not have a contemporaneous viewing of the accident. The Tennessee Court of Appeals reversed, determining that, “sensory observance of the injury-producing event is not an absolutely essential element of a claim for negligent infliction of emotional distress.” Id. at 731. The Tennessee Supreme Court agreed, and held that a contemporaneous observance is no longer required to recover for NIED in Tennessee. Id. Instead, a plaintiff may now recover if he or she observes the immediate aftermath of an injury, so long as he or she is related to the victim and views the injuries shortly after they occur. This decision expands potential liability in NIED claims in Tennessee and should be taken into account when evaluating cases with similar facts.

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Handling Information Requests From Other Insurers

Sometimes multiple insurers become involved in the investigation of a single loss. On occasion, an insurer will investigate a loss only to find that the policyholder suffered a prior loss of a similar nature while insured by a different company. Although it is well-settled in Tennessee that an insurer may assist fire investigators and law enforcement when arson is suspected on the part of the insured, a question arises as to what extent an insurer may share information with another company where the information relates to a common insured.

For present purposes, assume that a loss has occurred and Giant Insurance Company is investigating its insured's personal property inventory submitted in support of the claim. During that investigation, it is discovered that the insured suffered a similar loss while insured years prior by Small Insurance Company. Small Insurance Company needs to know if and to what extent it may share information with Giant Insurance Company. While no applicable case law has been discovered in Tennessee, there are statutes which shed light on possible answers to these questions.

Tennessee Code Annotated § 56-53-109(d) provides that "[a]ny person [defined to include corporation] who has a reasonable belief that an act violating this chapter [on insurance fraud] will be, is being, or has been committed, or any person who collects, reviews or analyzes information concerning insurance fraud may furnish and disclose any information in such person's possession concerning such act to an authorized representative of an insurer who requests the information for the purpose of detecting, prosecuting or preventing insurance fraud."

Tennessee Code Annotated § 56-53-110 states that "in the absence of actual malice, no person furnishing...information pursuant to 56-53-109 shall be subject to civil liability for libel, slander, or any other cause of action arising from the furnishing . . . of such information."

While there is no case law discussing the information sharing statutes cited above, the plain language of the statutes suggests that if Small Insurance Company believes that there is the possibility of perpetuation of fraud, then the statute allows it to share information in its possession with Giant Insurance Company when it has been requested.

Importantly, the sharing insurer must have a reasonable belief that a fraud is being perpetrated in order to share information with the requesting insurer. In our hypothetical, suppose that the insured has listed an unusual number of large items, such as flat screen televisions, in the personal property inventory. In that case, Giant Insurance Company should make Small Insurance Company aware of the suspicious items, inform Small of the suspected fraud, and request all documents created during Small's prior investigation. Obviously, the statute does not require either insurer to share otherwise privileged information and best practices would suggest that they not do so. Even disclosures to law enforcement include an exception for otherwise privileged material. However, to the extent that privilege does not apply, and a reasonable belief of potential fraud exists, neither insurer should fear retaliation under theories of libel, slander or other causes of action.

In the arson-fraud context, a reasonable belief could potentially arise after a contents sift at a fire scene fails to reveal debris generally consistent with the personal property inventory submitted by the insured. As always, insurers should seek legal counsel for advice concerning specific situations, especially in light of the lack of case law interpreting the provisions of these statutes.

Insurers should be aware that the information sharing statutes referenced in this article do not apply to workers' compensation insurance policies.

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