# Tennessee Attorneys Memo

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## Supreme court revisits negligent infliction of emotional distress

In two recent cases, the Tennessee Supreme Court revisited the tort of negligent infliction of emotional distress (NIED). The tort has been refined and expanded since its recognition in 1996.

***Origin.*** Ninety years ago, the Supreme Court rejected the idea that persons could recover for emotional distress unless that emotional distress was physically manifested in some way. *Memphis Street Railway Co. v. Bernstein,* 194 SW 902 (Tenn. 1917). A decade later, the court rejected the idea that persons could recover for the mental distress caused by observing the serious injury of another person. *Nuckles v. Tennessee Electric Power Co.,* 299 SW 775 (Tenn. 1927).

Between 1927 and 1982, the court systematically diluted the requirement that the emotional distress must either have some physical manifestation or be accompanied by a physical injury. In 1978, the court noted that according to the "zone of danger" rule approved in Tennessee, a plaintiff might recover for "physical" pain resulting from fright or psychic shock caused by fear for his or her own safety, which was brought about by the negligence of a defendant. But the court refused to expand the negligent defendant's liability to allow recovery to a plaintiff who was not located within the "zone of danger" of physical impact and did not visually or audibly witness the infliction of injuries to one "near and dear to him." *Shelton v. Russell Pipe & Foundry Co.,* 570 SW2d 861 (Tenn. 1978).

***Abandonment of "physical manifestation" rule.*** In 1996, the Supreme Court abandoned the "physical manifestation" rule and adopted new requirements designed to distinguish meritorious and nonmeritorious claims. The court held that a prima facie NIED claim must include evidence establishing each of the five elements of negligence. For "stand-alone" NIED cases, the court held that a plaintiff who has not suffered a physical injury must demonstrate through expert medical or scientific proof that he or she has suffered a "severe" emotional injury. The court stated that an emotional injury is "severe" if "a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." The court did not abandon the "zone of danger" rule and indicated that it would wait for an appropriate case to integrate it into the general negligence approach. *Camper v. Minor,* 915 SW2d 437 (Tenn. 1996).

In *Camper v. Minor,* the plaintiff was operating a cement truck when a vehicle operated by the defendant pulled in front of him. The defendant was killed immediately in the resulting collision. Although the plaintiff suffered only minor physical injuries, he filed a NIED claim alleging that he suffered emotional injuries from viewing the other driver's body immediately after the accident. The Supreme Court reversed the decision of the Court of Appeals that the plaintiff had not satisfied the *Shelton* requirements for a prima facie case of NIED.

***Rejection of "zone of danger" rule.*** Nine months after *Camper v. Minor,* the Supreme Court rejected the argument that the "zone of danger" test could be integrated into the *Camper v. Minor* analysis. The court held that a plaintiff who saw his

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## Highlights




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mother hit by a car could bring a suit for NIED regardless of whether he was physically injured or placed in immediate danger of being physically injured. The court held that in addition to being required to present expert medical or scientific evidence that he had suffered a severe emotional injury, the plaintiff had to establish that he was sufficiently near the injury-causing event to allow sensory observation of the event and that the injury was, or was reasonably perceived to be, serious or fatal. *Ramsey v. Beavers,* 931 SW2d 527 (Tenn. 1996).

***Relationship between plaintiff and injured person.*** In 2004, the Supreme Court was faced with a case in which a mail carrier had witnessed a homeowner shoot the homeowner's wife and then commit suicide. The mail carrier had no personal relationship with the homeowner or the homeowner's wife, requiring the court to focus on the nature of the relationship between the plaintiff and the victim required to recover damages for the negligent infliction of emotional distress. The court held that persons who see another person commit suicide after shooting another could maintain a NIED action against the estate of the person who committed suicide without establishing a close relationship with that person. *Lourcey v. Estate of Scarlett,* 146 SW3d 48 (Tenn. 2004).

***Stand-alone claim.*** In July 2008, the Supreme Court reversed a trial court's award of compensatory and punitive damages on a mother's NIED claim because the mother failed to prove that she suffered severe emotional injuries. The mother and her 8-month-old son were passengers in a minivan at the time of a collision that resulted in fatal injuries to the child.

The mother argued that her NIED claim was not a "stand-alone" claim to which the heightened proof requirements of *Camper v. Minor* were applicable. The mother relied on the fact that she also brought a wrongful death suit on behalf of her son, but the court noted that the wrongful death claim belonged to the son, not the mother. The mother relied on the fact that she suffered minor injuries in the accident but chose not to bring a claim for those injuries. The court noted that even if the mother had chosen to bring a claim for her minor physical injuries, a NIED claim would remain a "stand-alone" claim because the emotional injuries sustained from witnessing the death of her son were unrelated to any physical injuries she may have sustained. Finally, the mother argued that the severity of her emotional injuries was obvious. The court refused to create an exception to the requirements set forth in *Camper v. Minor* based on the particular circumstances of the mother's case. *Flax v. DaimlerChrysler Corp.,* 33 TAM 31-1 (Tenn. 2008).

***Arriving at scene after accident.*** In August 2008, the Supreme Court decided a case in which a mother saw her young child lying unconscious in a pool of blood in his school's driveway minutes after he had been struck by a car. The court held that when a plaintiff does not witness the injury-producing event, the cause of action for NIED requires proof of the following:

- the actual or apparent death or serious physical injury of another caused by the defendant's negligence,
- the existence of a close and intimate personal relationship between the plaintiff and the deceased or injured person,
- the plaintiff's observation of the actual or apparent death or serious physical injury at the scene of the accident before the scene has been materially altered, and
- the resulting serious or severe emotional injury to the plaintiff caused by the observations of the death or injury.

The court stated that it did not intend to overrule its holding in *Camper v. Minor* or *Lourcey v. Estate of Scarlett* that plaintiffs who witness the injury-producing event may recover without demonstrating the existence of a close and intimate personal relationship with the deceased or injured person. The required relationship between the plaintiff and the deceased or injured person is not necessarily limited to relationship by blood or marriage. Other intimate relationships such as engaged parties or step-parents and step-children will also suffice. *Eskin v. Bartee,* 33 TAM 34-1 (Tenn. 2008).

## Supreme Court applicants narrowed to three, Holder to become chief justice

The Judicial Selection Commission has narrowed to three the field of applicants for the Supreme Court vacancy. The vacancy will be created by the retirement of Chief Justice William M. Barker on September 15. The three names sent to the governor were:

- Sharon G. Lee of Knoxville, Court of Appeals judge.
- John Westley McClarty, Chattanooga attorney.
- D. Bruce Shine, Kingsport attorney with the Law Offices of Shine and Mason.

Justice Janice M. Holder, the third woman in the state's history to serve on the Tennessee Supreme Court, will become the court's first female chief justice when she is sworn into office at 2 p.m. on September 2 at the Supreme Court Building in Nashville. Justice Holder will become one of 20 women chief justices nationwide, according to the National Center for State Courts in Williamsburg, Virginia.

Retiring Chief Justice Barker will administer the oath of office to Holder, who was elected by the court to serve a two-year term as chief justice. She was appointed to the Supreme Court in December 1996 and was elected in 1998 to a full eight-year term. In 2006, she was re-elected to a second eight-year term.

# Supreme Court

▼ **When plaintiff did not witness injury-producing event, cause of action for negligent infliction of emotional distress requires proof of following elements: actual or apparent death or serious physical injury of another caused by defendant's negligence, existence of close and intimate personal relationship between plaintiff and deceased or injured person, plaintiff's observation of actual or apparent death or serious physical injury at scene of accident before scene has been materially altered, and resulting serious or severe emotional injury to plaintiff caused by observation of death or injury**

**TORTS: Emotional Distress.** On 11/19/02, Ms. Eskin arranged for her neighbor, Durban, to pick up and bring home her son (Brendan), who attended nearby elementary school. School maintained area for students using private transportation to travel to and from school. As Bartee was attempting to park in front of unattended van in this area, she lost control of her automobile and slammed into Durban's vehicle that had stopped at curb. Bartee's automobile then jumped curb and struck Brendan, seriously injuring him. Ms. Durban phoned Ms. Eskin from scene and said her automobile had been struck from rear and that Brendan had been hurt. Ms. Eskin assumed that accident must have been just "fender

bender" and that Brendan had not been seriously injured. Ms Eskin told Durban that she was "on [her] way to the school to get Brendan." After she hung up, Ms. Eskin gathered up her younger son (Logan), her daughter, and child who was visiting Logan and drove very short distance to school. After Ms. Eskin parked her automobile at school, she and children walked to pick up and drop off area. As Ms. Eskin and children approached area, she and Logan saw Brendan lying on pavement in pool of blood. According to Ms. Eskin, Brendan was not being attended to, and he appeared to be lifeless. Both Ms. Eskin and Logan screamed and tried to run to Brendan but were restrained. Brendan sustained permanent brain damage as result of being struck by Bartee's automobile. On 11/17/03, Eskins filed suit against Bartee, Shelby County, and Shelby County Board of Education. Complaint alleged that Ms. Eskin and Logan had been "emotionally traumatized by the event" and that they had been damaged by "[f]right, serious shock, and severe emotional injuries," "[l]oss of enjoyment of life," and "[e]xpenses for medical, psychological, and pharmaceutical services," both incurred and to be incurred. Based on these and other claims, Eskins requested $9 million in compensatory damages on behalf of Brendan, $500,000 in compensatory damages on behalf of Logan, and $1 million for themselves. Because Bartee lacked adequate insurance, Eskins served copy of complaint on USAA Casualty Insurance Company (USAA), their own insurance carrier, in accordance with Tennessee's uninsured motorist statutes. USAA contended that it was entitled to judgment as matter of law with regard to Ms. Eskin's and Logan's negligent infliction of emotional distress claims because they had not been present when accident occurred, and hence, did not "observe the accident occur through one of ... [their] senses." Following hearing, trial judge granted USAA summary judgment. Trial judge designated order as final and immediately appealable under TRCP 54.02. Court of Appeals (32 TAM 7-2), in its majority opinion, interpreting *Ramsey v. Beavers,* 931 SW2d 527 (Tenn. 1996), determined that "sensory observance of the injury-producing event is not an absolutel[y] essential" element of claim for negligent infliction of emotional distress. In separate opinion, Judge Kirby concurred with majority opinion by noting that result was not required by *Ramsey v. Beavers* but rather was "reasonable extension" of holding in *Ramsey v. Beavers.* **Affirmed.** (1) Development of tort of negligent infliction of emotional distress in Tennessee tracks development of tort in other states. It has been influenced by court's desire to separate, at prima facie stage and in meaningful and rational manner, meritorious cases from nonmeritorious ones. Like other states, this court has undertaken to accomplish this goal by using many of same principles — or "objective standards" — that have been used by courts in other states. After drawing clear line against permitting recoveries for negligent infliction of emotional distress, Tennessee's courts began process of making exceptions to rule and then moving line to permit recovery in certain circumstances. Between 1927 and 1982, this court systematically diluted requirement that emotional distress must either have some physical manifestation or be accompanied by physical injury. Similarly, we signaled our willingness to permit negligent infliction of emotional distress claims filed by persons who observe death or serious injury of another person with whom they had close personal relationship. *Shelton v. Russell Pipe & Foundry Co.,* 570 SW2d 862 (Tenn. 1978), marked beginning of 30-year period in which this court has steadily and consistently expanded ability of bystanders to recover damages for negligent infliction of emotional distress. In *Camper v. Minor,* 915 SW2d 437 (Tenn. 1996), we abandoned physical manifestation or injury requirement. We held that prima facie claim for negligent infliction of emotional distress must include evidence establishing each of five elements of negligence and, for "stand-alone" negligent infliction of emotional distress cases, expert proof establishing that plaintiff's emotional distress is "serious" or "severe." In *Ramsey v. Beavers,* we noted that "very real injuries may be suffered by those outside the zone of danger, but close to a traumatic, emotive event involving a close relative." In *Lourcey v. Estate of Scarlett,* 146 SW3d 48 (Tenn. 2004), we held that persons who see another person commit suicide after shooting another could maintain negligent infliction of emotional distress action against estate of person who committed suicide without establishing close relationship with that person. (2) In Tennessee, as in other states, courts have moved from completely denying bystanders right to assert negligent infliction of emotional distress claims, to approving these claims if bystander saw injury-producing incident, and then to approving these claims if bystander heard or had some other sort of sensory perception of incident. This case involves plaintiffs who did not actually see or hear injury-causing accident but who were in sufficient proximity to accident to be able to arrive at accident scene quickly before it had significantly changed and before injured person had been moved. In this circumstance, it is appropriate and fair to permit recovery of damages for negligent infliction of emotional distress by plaintiffs who have close personal relationship with injured party and who arrive at scene of accident while scene is in essentially same condition it was in immediately after accident. This court's decision is premised on two considerations. First, we have historically recognized that it is easily foreseeable that persons who have close personal relationship with injured party will suffer serious or severe emotional distress when they see someone "near and dear" to them injured. Second consideration is lack of principled basis to differentiate between parent who sees or hears accident that seriously injures or kills his or her child and parent who sees his or her injured or dead child at scene shortly after accident. It defies reason that mental distress of latter parent is less than former parent. When plaintiff did not witness injury-producing event, cause of action for negligent infliction of emotional distress requires proof of following elements: actual or apparent death or serious physical injury of another caused by defendant's negligence, existence of close and intimate personal relationship between plaintiff and deceased or injured person, plaintiff's observation of actual or apparent death or serious physical injury at scene of accident before scene has been materially altered, and resulting serious or severe emotional injury to plaintiff caused by observation of death or injury. Ms. Eskin and Logan were not physically present when Bartee struck Brendan. Neither of them had sensory perception of accident itself, i.e., neither of them saw or heard Bartee's automobile strike Brendan. But both of them observed Brendan in seriously injured state at scene of accident. According to Ms. Eskin's affidavit, only evidence submitted on this point, she and Logan saw Brendan lying on pavement in pool of blood. His body was apparently lifeless, No one was trying to help Brendan when Ms. Eskin and Logan first saw him, and boy had apparently not been moved. Based on these facts, both Ms. Eskin and Logan have made out prima facie negligent infliction of emotional distress claim. They have alleged that Brendan's serious injuries were caused by Bartee's negligence. They have demonstrated that they have close and intimate personal relationship with Brendan. They have demonstrated that they observed Brendan in seriously injured state at accident scene shortly after accident occurred. They have alleged that they have experienced severe or serious mental injuries as result of observing Brendan at scene. (***Eskin v. Bartee,*** 33 TAM 34-1, 8/14/08, Jackson, Koch, unanimous, 13 pages.)

▼ **In workers' comp case, negligence is appropriate standard for determining whether independent intervening cause relieves employer of liability for subsequent injury purportedly flowing from prior work-related injury; employee failed to exercise due care, and thus, was negligent in placing his hand on hot burner of stove in his kitchen, and negligence relieved employer of liability for medical expenses incurred in treating injuries resulting from that negligent act**

**WORKERS' COMPENSATION: Causation.** On 12/6/01, employee suffered work-related fracture to his left elbow. He had surgery to "reduce the fracture and make it nondisplaced." Following period of recovery, he was released to return to work with instructions to wear brace on his elbow. Thereafter, he resumed his duties with employer. On 8/18/03, employee and employer's workers' compensation insurance carrier reached settlement of 44% permanent disability to left arm. Settlement provided that employer's insurer would pay "reasonable, necessary, authorized and compensable future medical benefits" stemming from compensable elbow injury. Settlement designated employee's treating physician, Dr. Freels, as authorized physician for future medical treatment arising from elbow injury. In 6/04, employee returned to see Freels complaining of pain and decreased range of motion in his left elbow. Following CT scan and MRI which revealed "loose bodies" in employee's elbow, Freels performed second surgery on 10/26/04 to remove bone fragments from elbow. When employee awoke from surgery, he immediately noticed that he had no feeling in two fingers on his left hand. According to Freels, numbness in employee's fingers was due to ulnar nerve injury, complication of second surgery. In 12/04, employee was cooking hamburgers at home when he dropped skillet and hamburgers on floor. He was using his right hand to cook because his left arm was still bandaged from surgery and needed to be propped up. As he bent over to retrieve these items, he placed his left hand on what he thought was edge of stove in order to help keep his balance. While bent over to floor, he smelled his hair and skin burning. Standing up, he realized that he had placed his left hand on hot burner of stove. Due to numbness in his fingers, he felt no pain as his flesh burned, and he sustained severe burn to his little finger. Freels initially treated burn conservatively, but employee's finger was "rotting off." As employee's skin deteriorated, bone in his finger became exposed. On 2/15/05, Freels amputated part of little finger and placed skin graft on remaining part of finger. Plaintiff moved in with his sister while recovering from amputation and skin graft surgery. On 2/24/05, plaintiff decided to take walk by creek near his sister's house after it had just stopped raining. When he attempted to step over wet log, he slipped and fell. His left hand struck tree. Fall caused recent skin graft on his finger to burst open. Plastic surgeon performed additional surgery, removing first skin graft and then sewing remaining part of little finger to ring finger to permit skin to grow over site of amputation. Relying upon terms of 2003 settlement agreement, employee filed petition seeking payment of medical benefits arising from burn and fall injuries to his hand. Following hearing, chancellor denied petition on basis that burn and fall injuries to plaintiff's hand were result of independent intervening causes, specifically plaintiff's own negligence, which should relieve employer of liability for medical expenses stemming from hand injuries. Workers' Compensation Appeals Panel reversed. Based upon Freels' opinion that numbness in employee's hand resulted from second elbow surgery, which in turn resulted from original work-related elbow injury, panel concluded that injuries to employee's hand were direct and natural consequence of prior work-related injury. Hence, panel found that employer was liable for medical expenses relating to burn injury and subsequent fall over log. **Judgment of Workers' Compensation Appeals Panel reversed.** (1) When primary injury is shown to have arisen out of and in course of employment, every natural consequence that flows from injury likewise arises out of employment, unless it is result of independent intervening cause attributable to employee's own intentional conduct. More specifically, progressive worsening or complication of work-connected injury remains compensable so long as worsening is not shown to have been produced by intervening non-industrial cause. (2) This court rejects employee's argument that only reckless or intentional misconduct can constitute intervening cause. Instead, negligence is appropriate standard for determining whether independent intervening cause relieves employer of liability for subsequent injury purportedly flowing from prior work-related injury. (3) Employee failed to exercise due care, and thus, was negligent in placing his hand on hot burner of stove in his kitchen. His negligence operates to relieve employer of liability for medical expenses incurred in treating injuries resulting from that negligent act. Despite knowing that he had lost protective sensation in his fingers, employee failed to watch where he was placing his hand when he bent over to retrieve skillet and hamburgers on floor, task that had nothing to do with his employment. When employee disregarded condition and placed his fingers on hot stove, responsibility for accident and its consequences could no longer fairly be ascribed to his original compensable injury. Imposing liability upon employer under these circumstances would simply stretch purpose of workers' compensation law too far and go beyond risks that employer should be required to bear. (4) In light of this court's conclusion that employee's burn injury did not arise out of his employment, it follows that compensability of additional injuries suffered in fall over log, namely reinjury of surgically repaired burned finger, is moot point. (***Anderson v. Westfield Group,*** 33 TAM 34-2, 8/12/08, Nashville, Clark, unanimous, 10 pages.)

▼ **Document, drafted and signed by employee of small company not subject to workers' compensation law, was unambiguous and released employer and its employees from liability for accidents and injuries that might occur while plaintiff was "running business or personal errands"; plaintiff's accident at work was not covered by release**

**COMMERCIAL LAW: Release. TORTS: Negligence. CONTRACTS: Exculpatory Clause.** In 8/02, plaintiff began working for defendant as administrative assistant. At that time, there were only two other employees of company: Almany, president, and Louallen, office manager. Almany approached plaintiff and asked her to draft and sign document that would release defendant from liability. Document, drafted and signed by plaintiff and dated 1/23/04, stated that plaintiff released defendant "from any liability if I am running business or personal errands that I agree to do on company time. If I am in an accident or injured, I will not hold [defendant] or any employees at fault or liable." On 2/24/03, while plaintiff was standing on step-stool and working out of top drawer of filing cabinet, filing cabinet fell over and knocked her to ground, injuring her head and back. Plaintiff filed suit against company, Almany, and Louallen (defendants) seeking damages for personal injuries suffered in 2/03 accident. Because defendant was not subject to Tennessee's workers' compensation laws, complaint alleged damages only in common law tort. Trial judge found that release of liability was unambiguous and that it released defendants from liability for all accidents and

injuries, including 2/24/03 accident. Court of Appeals reversed (32 TAM 36-4), holding that release was invalid as against public policy. **Affirmed.** Contract only released defendants from liability for accidents and injuries occurring while plaintiff was running errands outside of physical office environment. Meaning of first sentence of contract — "I ... release [defendant] from any liability if I am running business or personal errands that I agree to do on company time" — is agreed upon by both parties: If plaintiff is injured while running errands outside of office but during work hours, she will not hold defendant or its employees liable. If second sentence — "If I am in an accident or injured, I will not hold [defendant] or any employees at fault or liable" — is read independently and in isolation, it could be read to mean that plaintiff was releasing defendant and its employees from all liability for any injury sustained either at workplace or while she was out running errands. But portions of contract cannot be read in isolation — they must be read together to give meaning to document as whole. To do otherwise would render first sentence meaningless. If there was general release for all injuries or accidents, there would be no need to have specific release for injuries or accidents while running errands. Instead, when read together, it becomes clear that release is limited to accidents and injuries that might occur while plaintiff is "running business or personal errands." First sentence explains when liability is being released and for what. Document is unambiguous and only releases liability for accident and injuries occurring while plaintiff is off-premises, running errands. Hence, accident at issue does not fall under release. (***Maggart v. Almany Realtors Inc.,*** 33 TAM 34-3, 8/14/08, Nashville, Barker, unanimous, 5 pages.)

▼ **Pursuant to applicable provisions of Metropolitan Government of Nashville's (Metro's) Code, lump sum payments for unused vacation days received by plaintiffs, 16 individuals who were formerly employed either in Metro's police or fire departments, subsequent to their termination of employment, were not includable in plaintiffs' "average earnings" for purposes of calculating their retirement benefits**

**GOVERNMENT: Public Employees.** Sixteen plaintiffs, each of whom was formerly employed in police or fire departments of Metropolitan Government of Nashville (Metro), filed suit, asking to have lump sum payments for unused vacation days paid at their retirement included in formula determining amount of their pensions. Pursuant to memorandum issued on 10/31/01, Metro department heads were instructed not to issue lump sum payments for unused vacation days to employee until after date of retirement. In consequence, each of plaintiffs received their lump sum entitlement for unused vacation days subsequent to conclusion of their employment, and that amount was not used in calculating plaintiffs' pensions. Pursuant to applicable provisions of Metro Code, trial court granted Metro's motion for summary judgment, holding that lump sum payments to plaintiffs should not be included in their "average earnings" for purposes of calculating their pensions. Court of Appeals (32 TAM 39-14) upheld judgment of trial court. **Affirmed.** Lump sum payments for unused vacation days received by plaintiffs subsequent to their termination of employment were not includable in plaintiffs' "average earnings" for purposes of calculating their retirement benefits. Court of Appeals accurately determined that plaintiffs' lump sum payments for accrued vacation qualified as compensation, but incorrectly concluded that lump sum payments to plaintiffs for unused vacation days were "not for performing personal services." Lump sum payment for vacation time is compensation for personal services, and amount of pay for any unused vacation time is form of payment. Absent some agreement to contrary, vacation pay is just like any other compensation that has accrued up to time of separation. Hence, in present case, lump sum payment was essentially deferred compensation for personal services. Plaintiffs could have chosen paid vacation, but instead elected to work and accept pay at later date. Plaintiffs argued that Metro should have paid for accrued vacation "prior to the final point of termination" because Civil Service Rule 5.13 states that such employees whose services "are being terminated ... shall be paid for all regular earnings due and accrued and vacation pay." Plaintiffs argued that phrase "are being terminated" specifies that termination will be in future, after payment. Rule 5.13, when read contextually, separates "all regular earnings due and accrued" from "vacation pay" with conjunction "and." This court interprets phrase "regular earnings" to mean only those earnings that occur on consistent, periodic basis, such as salary payment. Moreover, Metropolitan Executive Order 42, issued in 1971, mandated that salaries be paid after pay period is completed. So, even though Rule 5.13 uses phrase "are being terminated," regular salary has for years been directed to take place after date of termination. There is little reason to interpret Code so as to treat "vacation pay" any differently. In addition, lump sum vacation payments appear to be effort by Metro to afford fair treatment to terminating employees with remaining vacation credit. These payments provide workable alternative to forcing retiring employee to take vacation at end of his or her term. At same time, Metro might have determined that those employees who have taken advantage of their vacation time should not be penalized with lesser pension. Excluding accrued vacation payment from pension calculation appears to treat all employees equally and promote uniformity as to vacations and pensions. Until 10/01, there was no uniform policy or practice as to when payment for unused, accrued vacation time would be made to terminating employee. But pursuant to uniform payment policy adopted 10/31/01, accrued vacation time could no longer be paid until employee retires, as part of last paycheck. Metro Code makes no provision for including payments for accrued vacation in their pension calculations, and one should not be implied. (***Amos v. Metropolitan Government of Nashville,*** 33 TAM 34-4, 8/15/08, Nashville, Wade, unanimous, 12 pages.)

▼ **In case in which defendant was convicted of conspiracy to commit especially aggravated robbery, especially aggravated robbery, aggravated burglary, and reckless endangerment, trial court did not err in denying defendant's request to suppress his written statement to police, and neither fact that defendant was denied his request to make telephone call prior to writing his statement nor officer's statement that defendant's confession had to be written immediately rendered defendant's statement involuntary; trial court's decision to suppress videotape of defendant's statement as sanction for state's violation of rules of discovery was appropriate under circumstances; metal flashlight, as used by defendant — defendant hit victim over head with flashlight multiple times — was "deadly weapon" for purposes of especially aggravated robbery statute**

**CRIMINAL LAW: Especially Aggravated Robbery — Deadly Weapon — Conspiracy. CRIMINAL PROCEDURE: Right to Counsel — Confession — Phone Call — Discovery.** Defendant was convicted of conspiracy to commit especially aggravated robbery, especially aggravated robbery, aggravated burglary, and reckless endangerment and was given effective sentence of 24 years. Court of Criminal Appeals (32 TAM 15-22)

affirmed defendant's convictions but remanded case for sentencing hearing so trial court could properly include findings required for consecutive sentencing. Neither party appealed Court of Criminal Appeals' decision to remand for resentencing. **Affirmed.** (1) Trial court did not err in denying defendant's request to suppress his written statement to police. (a) Defendant's questioning by police did not violate his Fifth Amendment right to counsel. Defendant told transporting officer that he had planned to turn himself in after he got attorney. Defendant merely mentioned prior notion of obtaining counsel. He never requested attorney following his arrest or suggested that he wished to speak with one in future. Trial court correctly found that this was not unequivocal request for attorney. (b) Defendant's questioning by police did not violate his Sixth Amendment right to counsel. After initiation of formal charges against accused, Sixth Amendment right to counsel attaches, guaranteeing accused right to rely on counsel as medium between himself and state in any critical confrontation with state officials. Defendant never requested assistance of counsel. Evidence did not preponderate against trial court's conclusion that mention by defendant to arresting officer that he had intended to turn himself in after getting attorney was not invocation of his right to counsel. Additionally, defendant waived any right that had attached by signing waiver after receiving *Miranda* warnings. (c) Defendant's written statement was not rendered involuntary by actions of investigating officers. (i) Defendant argued that denial of his request to make telephone call required suppression of his written statement. While investigating officers did not comply with requirements of TCA 40-7-106(b), which grants person under arrest right to make telephone call to attorney, relative, minister, or some other person within one hour of his or her arrest, this statutory violation does not warrant suppression of defendant's statement. Defendant's request to make phone call came after he had already made his verbal confession to investigating officers. Their denial of his request until after he provided statement in writing, given totality of circumstances, did not render that written statement product of police coercion. Hence, defendant's written statement was voluntary and admissible at trial. (ii) Defendant's statement was not rendered involuntary by officer's statement that defendant's confession had to be written immediately. Defendant never refused to give statement, and he had already given verbal account of events, which was videotaped. When asked to write out his statement, he simply asked if he could do that "later." He never told officers that he no longer wished to cooperate or that he no longer wished to make statement. Defendant's request to give his statement "later" was not clear and unequivocal expression that he wished to remain silent. (iii) Officer's statement that written confession could not "hurt" defendant did not negate *Miranda* warning or require suppression. Police did not exercise any compelling influence over defendant, and defendant's statements were not induced by promises of leniency. Defendant had already confessed to crimes, and it was only before written statement that this discussion of cooperation and leniency took place. (2) Trial court did not err in overruling defendant's motion to dismiss indictment when state violated rules of discovery. At trial, state entered defendant's written statement into evidence and then began to play videotape of defendant's statement, at which time trial court stopped tape because tape showed investigators telling defendant about possible range of punishment for crimes of which he was accused. Defense counsel then asked if this was same videotape that had been furnished to defendant and had been played at suppression hearing. Outside presence of jury, trial court and counsel for both parties determined that first few minutes of interview were not copied when duplicate of original was made for state and defense. State's actions were in violation of TRCrP 16(a)(1)(B). Additionally, state's failure to disclose entire videotape is violation of due process. TRCrP 16(d)(2) sets forth possible penalties for failing to disclose complete video. Although defendant moved for charges against him to be dismissed, trial court sanctioned state by excluding use of tape at trial. Although TRCrP 16 does not explicitly provide as one of sanctions dismissal of indictment after failure to comply with discovery request or order, rule does allow court to enter such sanction "as it deems just under the circumstances." Trial court's decision to suppress videotape of defendant's statement as sanction for state's violation of rules of discovery was appropriate under circumstances. Trial court was able to give curative instruction to jury regarding portion of video that had been played, which contained discussion of possible sentence ranges, thus negating any prejudice that may have occurred. (3) Defendant was convicted of especially aggravated robbery and conspiracy to commit especially aggravated robbery, both of which require use of deadly weapon. Defendant argued that flashlight, which he used to beat victim over head, is not deadly weapon. Flashlight, as used by defendant in present case, is capable of causing serious bodily injury. Defendant hit victim over head with flashlight multiple times, causing potential life-threatening head injuries which left victim in hospital for over month. Under circumstances, flashlight was "deadly weapon." (4) Evidence was sufficient to convict defendant of conspiracy to commit especially aggravated robbery. There was agreement between defendants to "knock" victim out if necessary to complete robbery. Testifying co-defendant admitted that she and defendant discussed what to do if victim awoke and that "there was a discussion, what was brought up was [the defendant] would knock [the victim] out." Evidence was sufficient to support agreement that this would require use of some type of weapon or object with which to hit victim in order to knock him unconscious. (5) Case is remanded for resentencing pursuant to judgment of Court of Criminal Appeals. (***State v. Downey,*** 33 TAM 34-5, 8/15/08, Nashville, Barker, unanimous, 14 pages.)

▼ **When defendant, who conducted religious services in name of Universal Life Church, was indicted on charges of child neglect in connection with death of 14-year-old daughter of church member who lived in his home, trial court erred in dismissing indictment against defendant; when deciding motion to dismiss indictment, trial court may consider undisputed facts that are clearly and unequivocally agreed upon by parties; person standing *in loco parentis* to child may have legal duty of care, breach of which may result in criminal culpability; state is not bound at outset of trial by legal theories espoused in its bill of particulars**

**CRIMINAL LAW: Child Neglect — Responsibility for Another's Conduct. CRIMINAL PROCEDURE: Motion to Dismiss — Bill of Particulars.** In 2001, defendant began to conduct religious services in name of Universal Life Church. He permitted eight of his parishioners, including Crank, her son, and her daughter (Jessica), to move into his six-bedroom residence. Jessica's father died in 1995. In 2/02, when Jessica was 14, Crank made appointment with chiropractor for examination of Jessica's enlarged right shoulder. Defendant was present for this examination. Chiropractor treated Jessica, but one week later, he apparently expressed concern about her condition and recommended that Jessica be examined at University of Tennessee Medical Center. Jessica did not go to hospital to be seen by specialist, but,

instead, was taken to walk-in clinic. According to defendant, Crank did not have adequate health insurance to pay for Jessica's medical care, and, in consequence, church initiated effort to raise funds necessary to pay for future tests on Jessica's shoulder. In 9/02, Jessica died of Ewing's Sarcoma, type of bone cancer most commonly found in young people under age 20. Defendant was indicted on charges of child abuse and neglect, charging that defendant had knowingly treated Jessica "in such a manner as to inflict injury or neglect ... so as to adversely affect the child's health and welfare." Later, in bill of particulars, state alleged that defendant repeatedly held himself out as Jessica's father and one of her caretakers, thereby creating duty on his part to provide care for Jessica. Trial court sustained defendant's motion to dismiss indictment on grounds that defendant could not be held criminally liable for her death because he had no legal or special duty to provide care for Jessica in that he was not her father and was not married to Crank. Court of Criminal Appeals (32 TAM 35-31) reversed order of dismissal and remanded case for trial. **Affirmed.** (1) Defendant argued that Court of Criminal Appeals erred in ordering trial court to consider only "formal stipulations" in motion to dismiss. When ruling upon motion to dismiss, trial court may consider evidence beyond face of indictment, and this may include undisputed facts or stipulations that are clearly and unequivocally agreed upon by parties. Motion to dismiss under TRCrP 12 allows trial court to decide issues that are ripe for resolution without full trial on merits. Determining whether trial court correctly dismissed indictment under TRCrP 12 is two-step process. First, it must be determined whether trial court based its decision upon findings of law, which would be appropriate, or findings of fact that should have been presented to jury. Second, as to questions of law, trial court's holding is reviewed *de novo* with no presumption of correctness. In present case, trial court granted motion to dismiss after considering that defendant was neither married to Crank nor legal guardian of her daughter, Jessica. Because state conceded those facts, dismissal was based upon issue of law rather than any resolution of evidence and is subject to this court's *de novo* review. (2) Trial court erred in granting defendant's motion to dismiss indictment. At time of Jessica's death, TCA 39-15-401 could be broken down into two classifications — abuse and neglect. Section pertaining to neglect is composed of three essential elements — person knowingly must neglect child, child's age must be within applicable range set forth in statute, and neglect must adversely affect child's health and welfare. First element is at issue in present case. In order to establish neglect, state must first prove that defendant owes legal duty to child. Other jurisdictions have assessed criminal liability for failure to act on behalf of child when law imposed duty to do so. Tennessee's criminal code does not include definition for "child neglect," and it does not address requisite nature of affiliation before duty arises to provide medical care or treatment. In juvenile proceedings, dependent and neglected child is one whose "parent, guardian, or custodian" neglects or refuses to provide necessary medical, surgical, institutional, or hospital care for such child. Because defendant was neither Jessica's parent or guardian, question becomes whether he was Jessica's "custodian." "Custodian" is defined as "person, other than a parent or legal guardian, who stands *in loco parentis* to the child or a person to whom temporary legal custody of the child has been given by order of a court." Tennessee's criminal code envisions that person standing *in loco parentis* to child may be subject to criminal liability for child neglect. Only relevant undisputed facts in present case were that defendant was not Jessica's biological parent or legal guardian and that he was not married to her mother. This is simply not enough information to warrant dismissal of indictment. State may present other circumstances that might establish duty on part of defendant arising out of *in loco parentis* relationship. Defendant's relationship with Crank may be circumstantial evidence of duty, but ultimate question is nature and degree of defendant's relationship with Jessica. In theory, state might be able to establish that defendant failed to perform statutory duty to provide adequate medical care for Jessica. (3) Defendant contended that he could not be guilty under theory of criminal responsibility for conduct of another, which is also known as accomplice liability. State did not allege that defendant was guilty under theory of criminal responsibility by assisting Crank's neglect of Jessica either in indictment or bill of particulars. Nevertheless, state is not precluded from pursuing theories of criminal liability that are not mentioned in bill of particulars, so long as such theories of liability do not exceed scope of indictment. In short, purpose of bill of particulars is to alert criminal defendants as to how state will proceed with litigation, not to lock state into specific theory of prosecution. State is not bound at outset of trial by legal theories espoused in its bill of particulars. If state significantly deviates from bill of particulars at trial, this potentially could be ground for reversal, but only if defendant can, as stated, demonstrate prejudice in form of unfair surprise or inability to prepare adequate defense. In present case, defendant cannot show requisite degree of prejudice since there has yet to be trial in which prejudice may arise. Moreover, it cannot be determined whether reasonable juror could find that defendant's conduct aided, assisted, or encouraged Crank to engage in conduct constituting child neglect. At close of proof, trial court may consider whether evidence is insufficient to sustain such conviction. Sufficiency of evidence would then be subject to appellate scrutiny. (***State v. Sherman,*** 33 TAM 34-6, 8/15/08, Knoxville, Wade, unanimous, 13 pages.)

# Court of Appeals

▼ **In suit by state maintenance worker (plaintiff), who was injured while cleaning water out of elevator pit in Legislative Plaza, trial court properly granted summary judgment to defendant, contractor that provided elevator maintenance and repair services to state; defendant did not violate contract with state when parties placed practical construction on contract that defendant handled mechanical issues and state or other contractors handled other physical and structural issues relating to elevator shaft, and hence, state was responsible for removing water from elevator pit; defendant was independent contractor who had no contractual duty to undertake activity which plaintiff, state employee, had been instructed by his superiors to perform**

**TORTS: Negligence — Duty. COMMERCIAL LAW: Services Contract. CIVIL PROCEDURE: Summary Judgment.** Plaintiff, employee of Tennessee Department of General Services, is building maintenance man for War Memorial Complex, including Legislative Plaza. At one end of Legislative Plaza is set of escalators and two elevators that lead to Motlow Tunnel, which in turn leads either outside to Charlotte Avenue or further under Capitol to two elevators that take passengers upward into Capitol building. Two elevators in Legislative Plaza are subject to water seepage when it rains and water collects in elevator pits. Sump pumps were installed at some point to address this

problem. Defendant is company that contracted with State of Tennessee to maintain and repair its elevators in Legislative Plaza. Few days prior to incident giving rise to this litigation, Rollins, employee of defendant, noticed water in pit of one of elevators and "let [Rosenboro] know that the sump pump wasn't working and he had about 3 foot of water in the pit." According to comments made during Rosenboro's deposition, Rosenboro's administrative assistant, Gregg, apparently relayed Rollins' oral report of water in pit to Cousins, facility supervisor. Cousins passed on information about water in pit to Maze and plaintiff. Plaintiff testified that there were about 18 inches of water and six inches of "gunk" in pit. He and Maze spent 3/29/05 getting water out of pit and morning of 3/30/05 getting "gunk" out. Elevator had been parked on floor above. On morning of 3/30/05, plaintiff was in pit scooping "gunk" into bucket and handing it up to Maze, who would then go dump it. When Maze left to deposit some of "gunk," plaintiff took break and climbed out of pit. Plaintiff said that when Maze "started coming back," he went back into pit. When he was reaching for his bucket and shovel, he "noticed the elevator coming — the elevator door shutting." He tried to open doors because "if the door don't shut, the elevator won't go." At same time, Maze was trying to open door from outside. As elevator came down, plaintiff's arm was cut and he was apparently hit on head. Doors were opened and plaintiff was pulled from pit. Plaintiff had to have rotator cuff surgery and rehabilitation. After accident, he developed high blood pressure. He also complained of feeling as if he "had the zombie head," and of frequent light-headedness. In fall 2006, he had stroke which had no lasting effects. Plaintiff filed suit for breach of contract and negligence. Trial judge granted defendant summary judgment. (1) Plaintiff takes issue with bare-bones nature of order granting summary judgment. Order merely states that "the Court finds that [defendant's] Motion is due to be granted." This is type of order this court has criticized in past. TRCP 56.04 was amended in 2007 to alleviate this problem. Rule now requires trial court to state legal grounds upon which court denies or grants motion for summary judgment, which must be included in order reflecting court's ruling. In present case, basis of trial judge's ruling can be readily ascertained since record includes CD-ROM of hearing, including court's ruling from bench, Hence, technical problem with order's failure to reveal basis of ruling does not present insurmountable obstacle to this court's ability to understand reasons for trial court's ruling and to undertake appellate review. (2) Plaintiff contended that defendant breached its contractual duty to state to clean elevator pit, thereby causing plaintiff's injury. It appears that parties placed practical construction on contract that defendant handled mechanical issues and that state or other contractors handled other physical and structural issues relating to elevator shafts. Thus, state was responsible for removing water from elevator pits. This interpretation is consistent with actions state's employees took leading up to plaintiff's injury. In light of contract's provisions and parties' course of dealing, defendant did not violate contract with state. (3) Plaintiff contended that genuine issues of material fact exist as to defendant's negligence. Defendant stated that "existence of the duty upon the Defendant via Roger Rollins to shut down the elevator and the breach of said duty is classic contest of testimony to be weighed by the trier of fact." In searching for duty, courts have looked at action and inaction. As to action, risk is unreasonable and gives rise to duty to act with due care if foreseeable probability and gravity of harm posed by defendant's conduct outweigh burden upon defendant to engage in alternative conduct that would have prevented harm. In present case, there is no evidence that Rollins, acting on behalf of defendant, did anything to create dangerous situation that gave rise to plaintiff's injury. As to inaction, persons do not ordinarily have duty to act affirmatively to protect others from conduct other than their own. Exception to this rule arises when certain socially recognized relations exist which constitute basis for such legal duty. No such relationship exists between defendant and plaintiff. Defendant was independent contractor who had no contractual duty to undertake activity which state employee, plaintiff, had been instructed by his superiors to perform. Hence, even if Rollins, defendant's employee, knew that state employees would be cleaning out elevator pit, defendant was under no legal duty to take any action to make their work safer. (***Burgess v. Kone Inc.,*** 33 TAM 34-7, 7/18/08, MS, Bennett, 7 pages.)

▼ **When defendant builder appealed trial court's confirmation of adverse arbitration award, arguing that arbitrator exceeded his authority by refusing to enforce provision of contract that would have rendered owners' suit time-barred — contract waived limitations on actions for defective improvements to real estate, as provided by TCA 28-3-201 *et seq.,* and substituted one-year limitation — chief complaint was nonfeasance, not malfeasance, when owners averred that certain items, such as plumbing, were left uncompleted by builder and when arbitrator awarded owners cost to complete residence; this distinction removes suit from purview of TCA 28-3-202 because statute applies to actions predicated upon defective improvements to real property, property damage, and personal injury or wrongful death attributable to defective work; because statute does not apply, neither do contractual waiver and one-year limitation**

**COMMERCIAL LAW: Construction Contract — Arbitration. CONTRACTS: Limitation Clause. CIVIL PROCEDURE: Statute of Repose.** Plaintiffs entered into contract with defendant on 2/14/01 for construction of residence. Contract price for house was $370,000, and defendant was to use his best efforts to complete construction within 180 days from start of framing, which began on 5/1/01. In 2/02, defendant ceased working on house and left job site. According to plaintiffs, they had already paid defendant total of $369,476 by that time, but then had to pay additional $100,000 to another contractor to complete construction. Plaintiffs obtained Certificate of Occupancy on 3/7/02. On 11/17/05, plaintiffs filed breach of contract action. Arbitration hearing occurred from 2/21/07 through 2/23/07. On 4/6/07, arbitrator rendered award in favor of plaintiffs and specifically found that defendant had breached contract. Arbitrator awarded plaintiffs $214,866, which included cost to complete construction, attorney fees, arbitration costs, and mortgage and construction loan interest. Plaintiffs then filed application in chancery court for confirmation of arbitrator's award, after which defendant filed motion to vacate or modify same. Following hearing, chancellor confirmed award and found that it complied with requirements of Uniform Arbitration Act as adopted in Tennessee. In accordance with TRCP 54.02, chancellor directed entry of final judgment on 8/10/07, reserving issue of additional attorney fees for later date. On appeal, defendant contended that one-year time limitation provision in contract barred plaintiffs' lawsuit. Paragraph 14 of contract addressed builder's limited warranty and provided for repair of covered defects. Subparagraph (F) provided that upon receipt of owner's written report of defect, if defective item is covered by builder's limited warranty, builder will repair or replace it at no charge to owner, within 30 days. Subparagraph (F) stated that parties waived statutory

limitations on actions for defective improvements of real estate, as provided by TCA 28-3-201 *et seq.,* and in lieu thereof agreed that all actions under this statutory provision would be brought within one year after substantial completion of house. TCA 28-3-202 establishes four-year statute of repose for "[a]ll actions to recover damages for any deficiency in the design, planning, supervision, observation of construction, or construction of an improvement to real property." Defendant argued that arbitrator was required to enforce waiver and one-year limitations provision. To determine whether this suit falls within ambit of referenced statute of repose, thereby making it subject to one-year limitation, this court looks to gravamen of complaint and to basis for which damages are sought. Although there are some references made to inferior workmanship in complaint, suit plainly rests upon nonfeasance more so than malfeasance, or partial performance rather than defective performance. Following items were left uncompleted by defendant: plumbing items, electrical items, heating and air conditioning, flooring (including carpet, hardwood, and tile), painting, septic system connection, concrete work, interior and exterior trim work, window screens, gutters, landscaping, shutters, and installation of dryer vent, range and hood, door to crawl space, vanity mirrors, and kitchen and laundry appliances. Moreover, it appears that arbitrator awarded plaintiffs cost to complete residence. Plaintiffs averred that they were required to pay another contractor approximately $100,000 to complete house, even after having paid defendant almost entire contract price. Compensatory damages for home's physical shortcomings amounted to $99,599, less than half of arbitrator's $214,866 award. Balance of that amount consisted of additional interest on construction loan, additional mortgage interest, attorney fees, and costs of arbitration. In this breach of contract case, chief complaint was nonfeasance, not malfeasance. Distinction removes action from purview of TCA 28-3-202 because statute applies to actions predicated upon defective improvements to real property, property damage, and personal injury or wrongful death attributable to defective work. Because statute does not apply, neither do contractual waiver and one-year limitation period. Chancellor's confirmation of arbitrator's award is affirmed. (***Pons v. Harrison,*** 33 TAM 34-8, 7/9/08, WS at Nashville, Farmer, 4 pages.)

▼ **Evidence did not preponderate against trial court's finding that mother, who filed request to regain custody of her son after she executed agreed order transferring custody to grandparents, relinquished her superior right to custody and was required to show material change in circumstances warranting revision in custody, which she failed to do**

**FAMILY LAW: Child Custody — Child Support.** Parties' son was born in 1998, and in 3/02, parties were divorced. Mother was designated as child's primary residential parent at time of divorce. On 8/4/04, mother and father signed agreed order and revised permanent parenting plan to provide that "substantial and material change of circumstances has arisen such that the best interests of the child would be served in modifying said Plan and placing custody with the maternal grandparents." Grandparents were subsequently awarded "care and custody" of child, with "reasonable visitation" awarded to each parent. In 10/05, grandparents filed "Petition for Termination of Parental Rights and Adoption," with mother filing counter-petition for custody. Trial court dismissed grandparents' termination petition, finding that grandparents had failed to show by clear and convincing evidence that parents had abandoned child. Trial court also denied mother's counter-petition requesting change of custody. (1) Evidence did not preponderate against trial court's finding that mother relinquished her superior right to custody and was required to show material change in circumstances warranting revision in custody, which she failed to do. Mother argued that agreed order was not sufficient to overcome her superior right as parent because agreed order was not voluntary transfer of custody with knowledge of its consequences. Mother was 25 years old at time she signed agreed order and permanent parenting plan. Mother testified that she was represented by counsel in her divorce proceeding and that she understood significance of custody designation in parenting plan filed therein. Grandmother testified that mother was advised when presented with agreed order that she could obtain her own attorney, which she refused. Although mother maintained that she thought arrangement was only temporary and not permanent and was done only so her son could be enrolled in better schools, neither agreed order nor revised permanent parenting plan provided that it was temporary, and grandparents testified that agreed order was not represented to be temporary. While it would have been preferable for agreed order to expressly state that mother was voluntarily given grandparents custody such that her superior parental rights were relinquished, such is not requirement if evidence supports finding that mother signed agreed order understanding its consequences. Moreover, trial court's finding that mother failed to prove material change in circumstances to satisfy threshold issue of whether material change in circumstances has occurred is supported by record. Although mother is correct that interference with visitation can constitute material change in circumstances, grandparents denied that they interfered with mother's visitation. Evidence did not preponderate against trial court's implicit finding that there was no significant interference that affected child's well-being in meaningful way. Additionally, mother herself testified that grandparents' interference was not new and had started when child was born. (2) Grandparents argued that trial court erred in setting mother's child support obligation at $150 per month. Trial court erred in failing to apply Child Support Guidelines — trial court declined to do so citing absence of proof in record of mother's income, even though mother testified about her income. Case is remanded to trial court to determine mother's child support in accordance with applicable Guidelines. (***In re J.C.S.,*** 33 TAM 34-9, 7/28/08, MS, Cottrell, 8 pages.)

▼ **In case in which appellant, after years of litigation regarding child's custody, filed petition for custody, alleging serious deficiencies in mother's care of child, parties entered into agreed order to allow genetic paternity testing, test showed that appellant was not child's father, and based on results of DNA test, juvenile court dismissed appellant's petition for custody, juvenile court erred in dismissing appellant's petition for custody when juvenile court retained jurisdiction over child as dependent and neglected child and erred in failing to hear evidence on appellant's allegations regarding mother's care of child; while fact that appellant is not child's biological father is important consideration, that fact alone does not preclude him from filing custody petition**

**FAMILY LAW: Child Custody — Paternity — Visitation. CIVIL PROCEDURE: Jurisdiction — Juvenile Court.** After years of litigation regarding child's custody, appellant putative father filed petition for custody, alleging serious deficiencies in mother's care of child. Mother then questioned appellant's paternity, and parties entered into agreed order to allow genetic paternity testing. Test showed that appellant was not child's father.

Appellant then filed paternity petition. Based on results of DNA test, juvenile court found that appellant was not child's biological father, dismissed appellant's petition for custody, and terminated appellant's right to visitation and other non-custodial parental rights. (1) Juvenile court retained jurisdiction over child as dependent and neglected child. (2) Evidence did not preponderate against trial court's finding that appellant was not child's biological father. Prior to DNA test, appellant would have been presumed to be child's legal father in that he received child into his home and openly held child out as his natural child. This presumption was rebutted by DNA test. Under definition of "father" in parentage statute, whomever is "biological" father of child is child's "father." (3) Appellant contended that trial court erred in dismissing his custody petition. While fact that appellant is not child's biological father is important consideration, that fact alone does not preclude appellant from filing custody petition. Appellant has been parental figure and sometimes custodian of child and was in position to bring to juvenile court's attention concerns regarding child. Appellant's petition makes serious allegations about mother's care of child, including assertions that mother fails to provide child with adequate food, housing, and supervision, and that mother drinks to excess and verbally abuses child. Despite seriousness of appellant's allegations and fact that record demonstrates that mother has been unstable parent during much of child's childhood, trial court's "Statement of Evidence" states that "no evidence was taken" at hearing. Moreover, trial court went beyond addressing appellant's request for custody and modified 11/4/04 order which granted primary custody to mother and granted appellant visitation and other rights of non-custodial parent. Record does not contain any request for modification or other relief from mother or any other party. Mother's earlier petition to revoke appellant's visitation had been denied, and this holding was not appealed. In addition, there was no other "would-be father" before trial court. Despite these facts, trial court awarded mother sole legal and physical custody of child and stripped appellant of any right to visitation with child or other non-custodial parental rights. In view of fact that record contains no pending request for relief from existing custody/visitation order by mother or any other party, trial court erred in, *sua sponte,* divesting appellant of any rights whatsoever related to child. Although mother is child's biological parent, while appellant is not, trial court erred in dismissing appellant's custody petition without hearing proof on allegations regarding mother's care of child and in terminating appellant's right to visitation and other non-custodial parental rights in absence of any request for such relief from mother. Case is remanded to trial court for further proceedings. (***Polk v. Denney,*** 33 TAM 34-10, 7/28/08, WS at Nashville, Kirby, Crawford not participating, 12 pages.)

**FAMILY LAW: Parental Rights — Child Abandonment.** Two children were removed from parents' home in 12/05, following finding of dependency and neglect. In 6/07, Department of Children's Services (DCS) filed petition to terminate parental rights of both mother and father to children. Trial court granted DCS's petition as to both parties. Mother argued that DCS erred in terminating her parental rights. Father did not challenge termination of his parental rights. (1) Mother contended that trial court should have dismissed case because DCS failed to provide her with copy of explanation of criteria for termination. Trial court found that although mother "insisted at trial" that DCS never advised her that failure to visit her children could be considered abandonment and grounds for termination of her parental rights, mother received "Criteria for Termination of Parental Rights" information sheet ("Criteria") from DCS. DCS case manager testified that "Criteria" was verbally explained at first permanency plan meeting, that, although mother did not attend second permanency plan meeting, "Criteria" was mailed to her with permanency plan, and that mother had signed "Criteria" on 12/20/05. (2) Evidence did not preponderate against trial court's termination of mother's parental rights on ground of abandonment for failure to support. Trial court found that mother had not sent any child support or support of any kind to children and that she "sent almost nothing for holidays or birthdays." Although trial court acknowledged that mother had stated that she could not afford her rent and other bills without government assistance, trial court concluded that mother was aware of her duty to support children, had means to send some support, and simply failed to do so. (3) Evidence did not preponderate against trial court's termination of mother's parental rights on grounds of persistence of conditions and failure to substantially comply with requirements of permanency plan. Although mother initially made some efforts to ameliorate conditions leading to children's removal, mother remained unable to provide suitable home for children as required by permanency plan at time DCS filed its petition to terminate parental rights. Although mother was no longer abusing illegal drugs, she had been living in cars, homeless shelters, substandard housing, and with relatives throughout her adult life, and that although she had signed lease 10 days before termination hearing for apartment in Chicago, mother would be unable to support her children on long-term basis. Although mere poverty is neither ground nor arguable reason for termination of parent's rights, mother has net income of approximately $1,000 per month. Mother points to no evidence to indicate that she obtained suitable housing until just few days before termination hearing or that she is able to provide food, clothing, and other necessary goods for children. (4) Termination of mother's parental rights was in childrens' best interests. Children have lived with their foster parents since 12/05, when youngest child was less than one year old. Children have bonded with their foster parents, foster parents want to adopt children, and mother's contact with children has been limited only to some telephone conversations. (***In re JQW,*** 33 TAM 34-11, 7/23/08, WS, Farmer, 5 pages, mem. op.)

▼ **In case in which father objected to being required to pay his child support to Central Child Support Receipting Unit on religious grounds — father, born again Christian, contended that Department of Human Services was attempting to compel him to submit to order which relies for its authority upon federal statute, 42 USC 666, containing number "666," which, according to Book of Revelations, is associated with "Mark of the Beast" — since present case is Title IV-D case, TCA 36-5-116(a)(1) removes any discretion from DHS or court to allow father to send his child support payments anywhere other than state's central collection and disbursement unit; state's interest in establishing and enforcing child support orders is sufficiently important to override certain challenges based on Free Exercise Clause of Tennessee Constitution in situations where burden or intrusion existed that was greater than one in present case**

**FAMILY LAW: Child Support. CONSTITUTIONAL LAW: Freedom of Religion — Separation of Powers.** Father and mother were divorced in 1988, and father was ordered to pay mother $75 per week in child support for couple's son. Father did not make all his weekly payments as ordered, and fell behind on child support obligation. Mother applied for assistance with child support enforcement from Department of Human Services (DHS) in 2003. DHS became involved in enforcing father's child

support obligation and sent him several letters or notices in late 5/03 or early 6/03. One of these notices required that father send his future child support payments, not to his former wife or clerk of divorcing court, but instead to state's Central Child Support Receipting Unit (Unit). DHS subsequently issued father "Federal Tax Refund Offset Notice," notifying father of DHS's intention to seize any federal income tax refund to satisfy father's child support obligation. Father objected to being required to pay his child support to Unit on religious grounds. Father, born again Christian, contended that DHS was attempting to compel him to submit to order which relies for its authority upon federal statute, 42 USC 666, containing number "666," which, according to Book of Revelations, is associated with "Mark of the Beast." Father refused, on religious grounds, to pay his child support to Unit. Trial court rejected father's argument and held that DHS's submission of father's name for federal income tax refund intercept was valid and that he owed child support arrearages of $1,673 as of 10/31/03. (1) Trial court properly rejected father's religious argument. Since present case is Title IV-D case, TCA 36-5-116(a)(1) removes any discretion from DHS or court to allow father to send his child support payments anywhere other than Unit. Requiring father to send his child support to Unit can have, at most, only incidental burden on his religious practice. Statute is facially neutral as to religion and is uniformly applicable. Although this court has found no case examining precise issue raised in present case, there are number of cases wherein state's interest in establishing and enforcing child support orders has been found sufficiently important to override certain challenges based on Free Exercise Clause of Tennessee Constitution in situations where burden or intrusion existed that was greater than one in present case. (2) Father sought review of tax intercept notice and calculation of arrearage underlying issuance of that notice. Father also objected to notice that he pay his child support to Unit. Administrative hearing determined amount of father's arrearage and validated tax intercept notice. Those determinations were reviewed by trial court, and father's constitutional challenges were determined by trial court. There is no separation of powers violation in administrative procedures at issue, which are only procedures that affected father. Moreover, there is no merit to father's arguments regarding use of administrative hearing officers in administrative hearing. First, record does not indicate that hearing officer in question was not licensed attorney. Consequently, father cannot claim that his rights were somehow adversely affected by decision made by non-lawyer. Additionally, type of decision made by hearing officer in present case, i.e., calculation of amount of support due and amount paid, does not require "professional judgment of a lawyer." Finally, it is clear that DHS's hearing officers are not judges of inferior courts and, therefore, are not subject to constitutional provisions regarding election of judges. (3) Father contended that he did not owe arrearage assessed against him, thus making intercept notices invalid. Because all payments at issue, before 6/03 notice was sent to father, were made directly to mother and were counted by DHS in calculating arrearage, first tax refund intercept notice was not related in any way to father's failure to pay based on his religious objections. In fact, he was not directed to send his payments to Unit until late 5/03 or early 6/03, and he paid his arrearage (or most of it) to that Unit after receiving intercept notice. Consequently, issue of whether payment to Unit infringes on father's free exercise of his religion was not implicated by first notice. But second notice resulted from arrearages because father refused to send any more child support payments to Unit after his payment of accrued arrearages in 6/03. Father's failure to make any subsequent payments allowed arrearage to build up again. From 8/1/03 to 11/06/03, when second "Federal Tax Refund Offset Notice" was sent, at least 13 weeks had elapsed, and thus, father had accrued new obligation of at least $975. Thus, "Federal Tax Refund Offset" threshold was reached once again. Because father's arrearage and intercept notice arose from his refusal to send child support to Unit, his assertion of impingement on his free exercise rights was issue properly before this court. (***Sherrod v. Tennessee Department of Human Services,*** 33 TAM 34-12, 7/25/08, MS, Cottrell, 16 pages.)

**FAMILY LAW: Child Support. CIVIL PROCEDURE: Dismissal — Discovery.** Parties were never married but had child together in 12/88. From 1988 until 1994, child lived with mother. Although no child support was ordered, father testified to paying mother $200 per month from 1988 to 1994 and to providing health insurance for child. Father also visited child at least six times per year, despite fact that child lived in Tennessee and father lived in Texas. In 1994, father filed petition seeking custody of child, and trial court agreed, awarding father custody. Trial court's order was silent as to child support. Child lived with father until 2002, and during that time, mother allegedly paid no child support. In 5/03, custody of child was returned to mother. In 1/04, mother petitioned court for both prospective and retroactive child support, as well as medical insurance. Father also petitioned for retroactive child support. Juvenile court referee set father's prospective child support obligation at $540 per month and ordered father to provide medical insurance for child, but reserved issue of retroactive child support pending parties' admission of their past years' financial records. After multiple continuances and father's apparent unwillingness to comply with trial court's discovery order, referee dismissed petitions of both parties. Special judge affirmed. Both mother and father argued that trial court erred in dismissing their respective petitions for support. In 5/05, mother moved for sanctions against father, requesting that father's petition for retroactive child support be dismissed for want of prosecution. Mother contended that father's current income was known and available and should be imputed to past years because father failed to provide his actual income figures. Father and his counsel never provided mother or court with required financial information, despite multiple continuances which appear to be at request of father or his counsel. Father appears to have continually stymied these child support proceedings by his willful non-compliance with discovery process and those deadlines imposed by juvenile court. Although both orders are silent as to reason for dismissal, it seems most likely that referee and special judge dismissed parties' petitions because of numerous requested continuances and father's failure to supply financial documents required by consent order and referee's scheduling order of 12/8/04. Trial court may have dismissed parties' petitions as sanctions, pursuant to TRCP 37.02(C), or as involuntary dismissal for failure to prosecute, pursuant to TRCP 41.02. With only sparse record and two non-specific orders, trial court's reason for dismissing both parties' petitions cannot be ascertained, let alone whether trial court abused discretion in dismissing case for sanctions, failure to prosecute, and/or finding that retroactive child support was unjust or inappropriate. Accordingly, case is remanded to juvenile court with instructions to issue order that sets out requisite authority and explains reasoning behind dismissal. Additionally, if dismissal is intended to be denial of parties' petitions for retroactive child support, trial court's order must comply with Child Support Guidelines requirements. Each party is to be responsible for his or her own attorney fees. (***Golden v. Murrell,*** 33 TAM 34-13, 7/23/08, WS at Memphis, Farmer, Crawford not participating, 7 pages.)

**FAMILY LAW: Alimony. APPEAL & ERROR: Frivolous Appeal.** Parties were married in 11/66 and had three children together. Parties separated on 9/17/02, and at that time, wife was 58 years old, while husband was 59. Parties subsequently filed for divorce. During course of parties' long-term marriage, wife retired from her job as teacher because of multiple health problems. Husband worked at newspaper and ultimately became owner and publisher of small newspaper, *Memphis Silver Star News,* and owner of ballroom business. Husband is also practicing minister. In 4/06, trial court entered final decree of divorce and divided parties' marital property. Trial court found that wife was disabled and in need of alimony *in futuro,* so husband was ordered to pay wife $1,000 per month as alimony *in futuro,* terminable only upon wife's death or further orders of trial court. (1) Evidence did not preponderate against trial court's award to wife of $1,000 per month as alimony *in futuro*. Wife had been disabled for two years prior to trial, and only income she was receiving was $454 per month in Social Security disability and $34 per month from her Memphis City School retirement. Wife had three surgeries in 2005, including heart bypass, removal of bone in her spine, and total knee replacement. Wife was forced to live with family members because she could not afford to live on her own. Husband is able-bodied and capable of generating substantial income. Husband repeatedly engaged in time-honored methods of disguising income and hiding assets from wife, i.e., putting proceeds from his business ventures into separate bank accounts and writing well over $200,000 in checks to himself or to "cash," purportedly to pay unspecified "business expenses." Moreover, husband paid substantial monies to his paramour and for benefit of at least one child fathered with his paramour. While wife has no vehicle, husband has several, and even purchased one for his paramour. Far from mere evidence of "unhealthy" marital relationship, proof showed that husband has far more income that he will admit, and that he engaged in behaviors that are directly relevant to issue of his ability to pay alimony. Thus, husband has ability to pay wife $1,000 per month as alimony *in futuro.* (2) Husband's appeal is frivolous. While husband questions trial court's findings of fact, he gives this court appellate record with little to support his argument. Moreover, issues raised by husband on appeal turned largely on trial court's determination of parties' credibility, which apparently was highly unfavorable to husband. In addition, husband has consistently flouted trial court's order to pay *pendente lite* support to wife. All of this leads to conclusion that husband's appeal is frivolous and was undertaken solely to delay payment of spousal support he is obligated to pay. As result, wife is awarded her reasonable damages incurred as result of appeal, including, but not limited to, interest on judgment against husband for any arrearages, and her attorney fees, costs, and expenses. Case is remanded to trial court for determination of wife's damages. (***Williams v. Williams,*** 33 TAM 34-14, 7/28/08, WS, Kirby, Crawford not participating, 9 pages.)



**▼ In case in which then 18-year-old plaintiff, in 1981, entrusted to her father settlement proceeds she received as compensation for serious injuries sustained in vehicular accident, after recovering in her parents' home for two years, plaintiff married and moved out of parents' home, plaintiff did not ask for return of funds until 2002 at earliest and possibly 2005, and plaintiff filed suit for conversion against parents in 2006, trial court properly ruled that suit was barred by statute of limitation; plaintiff did not establish fraudulent concealment exception to statute of limitation when she did not prove that her father took affirmative action to conceal her cause of action from her, she failed to establish that, through exercise of reasonable diligence, she could not have discovered existence of circumstances that would have or should have alerted her to fact that she had cause of action, and plaintiff proved that she was anything but diligent by admitting that she did not inquire about remaining funds and admitted that her parents made no statements to her concerning status of remaining funds from 1993 until 2002, at earliest**

**CIVIL PROCEDURE: Statute of Limitation. TORTS: Conversion.** In 1991, then 18-year-old plaintiff sustained serious and deliberating injuries in vehicular accident. She filed negligence suit against driver of vehicle in which she was riding. She settled case and received net award of $63,000. At time of settlement in 5/92, plaintiff was living with her parents as she continued to recuperate from her injuries. When she received settlement proceeds, she entrusted entire sum to her father with understanding that he would use funds to pay her medical bills and purchase car for her. Parties' intentions and understanding of what was to be done with funds that remained after medical bills were paid and her car was purchased was not stated at time. Plaintiff believed that father would hold funds that remained in trust for her benefit, while father believed that he was entitled to keep remaining funds for caring for plaintiff and providing room and board during her lengthy recovery. Plaintiff continued to reside with her parents until she got married in 1993. Plaintiff testified that she did not inquire about remaining funds until 2002, at which time her mother assured her that money was being held for her benefit. Mother denied that any such conversation occurred. Plaintiff made no other inquiries about money until 2005, when she wrote letter to her parents seeking information about settlement

proceeds after hearing rumor that her parents had spent all of money. After receiving no response from her parents, plaintiff contacted attorney who sent letter to father seeking accounting of funds. Father replied to letter, stating that all of settlement money had been used to pay medical bills and purchase car for plaintiff. After determining that information given by father was not correct, plaintiff filed suit against her parents on 3/29/06. Plaintiff alleged that parents converted approximately $30,000 of funds she entrusted to them and that they took steps to fraudulently conceal their wrongful actions. Following bench trial, trial judge found that plaintiff had failed to state cause of action against mother. Trial judge also ruled that claim was time-barred as to both parents, finding that there was "no fraudulent concealment on the part of the Defendants due to the fact that the Plaintiff did not act diligently or exercise reasonable care in discovering her cause of action within the statutory time prescribed by law." Plaintiff appealed dismissal of claim against father, but she did not appeal dismissal of claim against mother. Statute of limitation barred plaintiff's conversion claim. Actions for conversion of personal property must be commenced within three years of accruing of cause of action. Cause of action accrues when plaintiff knew or reasonably should have known that cause of action existed. Trial judge correctly determined that father owed fiduciary duty to plaintiff while she was living with parents as she recuperated following her 1991 accident. This confidential relationship ended when plaintiff got married in 1993 and moved out of her parents' home to live with her husband. Moreover, plaintiff knew father was still in possession of substantial amount of her settlement proceeds when she moved out of parents' home in 1993, but she made no inquiries concerning funds. Plaintiff admitted that she did not speak with parents about funds until 2002 at earliest, and possibly 2005, depending on whether one believes plaintiff's or mother's testimony concerning alleged 2002 discussion. Plaintiff had fully recuperated by 1993 when she married and moved out of parents' home. She lived independent of parents at all times thereafter, and there was no longer reason for father to hold remaining funds for plaintiff's benefit. This is because all of plaintiff's medical bills had been paid, and car she wanted father to purchase for her with settlement proceeds had been purchased by 1993. With exception of accounting for settlement proceeds and returning remaining funds to plaintiff, all of father's fiduciary duties that arose from confidential relationship had been completed by 1993. Hence, statute of limitation began to run in 1993, when father failed to make accounting and deliver remaining funds to plaintiff. Plaintiff failed to establish that she fell within fraudulent concealment exception to statute of limitation. She did not prove that father took affirmative action to conceal her cause of action from her. She failed to establish that, through exercise of reasonable diligence, she could not have discovered existence of circumstances that would have or should have alerted her to fact that she had cause of action. To contrary, plaintiff proved that she was anything but diligent by admitting that she did not inquire about remaining funds and admitting that her parents made no statements to her concerning status of remaining funds from 1993 until 2002, at earliest. For fraudulent concealment defense to save day for plaintiff, she had to prove that father fraudulently concealed cause of action from her prior to third anniversary of her moving out of parents' home. There is no evidence in record to support finding that father took any affirmative action to conceal plaintiff's cause of action prior to that time. Statute of limitation for claim of conversion ran in 1996, 10 years prior to commencement of this suit. (***Hanna v. Sheflin,*** 33 TAM 34-15, 7/22/08, MS, Clement, 5 pages.)

**▼ Trial court abused discretion in dismissing plaintiff's cause of action for failure to comply with pretrial discovery order requiring plaintiff to produce two witnesses for deposition within 45 days when plaintiff attempted to comply with order and was within scheduling order established by trial court**

**CIVIL PROCEDURE: Discovery — Dismissal.** Plaintiff was employed as switchman for defendant railroad from 1996 to 2006. In 1/06, plaintiff filed suit under Federal Employers' Liability Act. Plaintiff alleged, *inter alia,* that defendant failed to provide him with reasonably safe place in which to work and failed to provide him with appropriate protective clothing and devices to protect him when working around hazardous material. Plaintiff alleged that he had endured and will continue to endure physical damages including shortness of breath and reduced lung function as result of exposure to hazardous materials, and that he had developed and is at increased risk to develop serious diseases as result of exposure. He sought damages of $750,000. Defendant denied plaintiff's allegations of negligence and asserted seven affirmative defenses. In 11/06, plaintiff responded to defendant's first set of interrogatories. Plaintiff included diagnostic report and letter completed by Dr. Ballard of Birmingham, Ala., concluding that plaintiff's medical condition was consistent with asbestosis and silicosis. Defendant moved for summary judgment in 2/07. Defendant asserted that only factual basis offered by plaintiff to support his claim of injury was diagnosis of asbestosis and silicosis made by Ballard and that Ballard had been irrefutably discredited as physician able to provide diagnosis of asbestosis or silicosis. Trial judge issued scheduling order on 4/3/07. Trial judge's order included orders that plaintiff designate expert witnesses by 8/1/07, that parties exchange preliminary witness lists by 10/1/07, and that all designated witnesses be made available for discovery deposition upon request. Trial was set for 1/22/08. On or about 4/16/07, plaintiff responded to defendant's statement of facts. Plaintiff asserted that Ballard had not diagnosed him with both asbestosis and silicosis, but had simply indicated that medical findings were consistent with both conditions. Plaintiff disputed defendant's assertion that Ballard had provided only medical evidence in case and asserted that Dr. Breyer had also provided medical evidence of asbestosis and silicosis. Motion for summary judgment was heard on 4/19/07 and denied on 4/26/07. Trial judge ordered plaintiff to produce Ballard and Breyer for deposition within 45 days of entry of 4/26/07 order. On 6/22/07, defendant moved to dismiss plaintiff's suit under TRCP 37.02(C) for failure to comply with trial judge's 4/26/07 order to produce Ballard and Breyer for deposition. Plaintiff responded to defendant's motion to dismiss on 7/12/07. In his response, plaintiff asserted that counsel for Ballard had advised him that Ballard was "unwilling to sit for deposition" and would assert his Fifth Amendment rights to refuse to answer any questions which might be posed in deposition. Plaintiff further asserted that he had informed court that he did not intend to rely on Ballard. Plaintiff stated that Breyer had been unavailable for deposition due to illness. Plaintiff attached correspondence from Breyer dated 5/14/07 in which Breyer stated that he was physically unable to sit for deposition but anticipated being available beginning 8/1/07. Following hearing on 7/13/07, trial judge granted defendant's motion and dismissed matter pursuant to TRCP 37.02. TRCP 37.02(C) provides that when party or other person designated by rule fails to obey order of trial court, court may enter "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a

judgment by default against the disobedient party." In present case, although plaintiff's response to defendant's motion to dismiss was filed late, record does not support conclusion that plaintiff merely disregarded or flouted trial judge's discovery order. Discovery was within bounds of scheduling order issued by court in 4/07. In addition, Ballard asserted his Fifth Amendment right, and his deposition would be of little or no assistance in this matter. Breyer was unavailable for deposition due to illness, but he would be available within time lines originally established by trial judge in 4/07 scheduling order. In light of totality of record, plaintiff's failure to produce witnesses for deposition as ordered by trial judge does not rise to level of conduct exhibited in *Alexander v. Jackson Radiology Associates P.A.,* 156 SW3d 11 (Tenn.App. 2004), or *Holt v. Webster,* 638 SW2d 391 (Tenn.App. 1982). Dismissal is drastic measure to be utilized to sanction and deter abuse of discovery process and disregard of authority of courts. Although trial court has discretion to impose sanctions under TRCP 37, that discretion is not unlimited. Sanction of dismissal was not appropriate in present case when plaintiff attempted to comply with trial court's order and was within scheduling order established by trial court in 4/07. Although plaintiff's time to obtain competent medical proof is not unlimited, and although this court takes no position on merits of plaintiff's claim, harsh sanction of dismissal was not appropriate at this juncture. (***Pegues v. Illinois Central Railroad Co.,*** 33 TAM 34-16, 7/22/08, WS, Farmer, 6 pages.)

**CIVIL PROCEDURE: Post-Judgment Relief.** Plaintiff filed suit against her parents (defendants) for injuries she received while burning brush on defendants' property when brush pile exploded due to hidden incendiary device. Trial judge granted defendants summary judgment. Counsel for plaintiff filed notice of appeal within 30 days of judgment but filed notice with Clerk of Appellate Courts instead of with Clerk of Circuit Court of Marshall County. TRAP 3(e) and 4(a) require that notice of appeal as of right must be filed with and received by clerk of trial court within 30 days after entry of judgment appealed from. After receiving notice from appellate clerk that notice of appeal had been filed in wrong office, plaintiff's counsel attempted only available procedural recourse at that time and filed with trial court motion to vacate previously-entered judgment and enter new judgment. If that motion were granted, plaintiff would have new 30-day period in which to properly file notice of appeal. Motion referenced TRCP 60 and stated that according to that rule "a request can be made to allow the filing of the Notice of Appeal even though the deadline has run due to the fact that a simple Clerical Error occurred." Following hearing, trial judge denied motion. (1) Although TRCP 60 motion mentioned "clerical error" as justification for relief, thereby implicating TRCP 60.01, trial court analyzed motion under TRCP 60.02. Plaintiff's only available means of redress is through TRCP 60.02 because attorney's error in filing notice of appeal with wrong clerk is not type of "clerical mistake" that would make TRCP 60.01 applicable. (2) Plaintiff's motion must be considered to have been made under either first or fifth clause of TRCP 60.02. (a) Trial judge properly denied relief under TRCP 60.02(5). Relief under TRCP 60.02(5) is only appropriate in cases involving extraordinary circumstances or extreme hardship. (b) Trial judge did not abuse discretion in denying TRCP 60.02(1) relief. Plaintiff's motion must rest on ground of mistake, inadvertence, or excusable neglect. Trial judge noted that counsel had declined to present proof of explanation for failure to file notice of appeal in trial court, but stated that counsel had cited his lack of experience in handling appeals as well as short period of time he has practiced law. (***Holly v. Holly,*** 33 TAM 34-17, 7/9/08, MS, Cottrell, 5 pages.)

**APPEAL & ERROR: Certiorari. CRIMINAL SENTENCING: Parole.** In 12/98, petitioner was convicted of various felonies and sentenced to 10 years of probation. In 6/00, petitioner was convicted of committing additional felonies and sentenced to 12 years, to be served consecutively to original 10-year sentence. Hence, at that point in time, petitioner effectively was sentenced to 22 years. In 6/03, petitioner was released on parole. In 6/04, petitioner's parole was revoked after he was arrested and once again charged with committing felony. Petitioner was convicted on new felony charge and sentenced to two years in prison, to be served consecutive to his outstanding sentences. Petitioner appeared before parole board in 8/06. In 9/06, petitioner was denied parole, with parole board's stated reason being seriousness of his most recent offense. Petitioner's next parole hearing was scheduled for 2012. Petitioner filed administrative appeal, which was denied. After exhausting his administrative remedies, petitioner filed petition for common law writ of certiorari in 1/07. Petitioner claimed, *inter alia,* that parole board had acted arbitrarily and illegally when it denied him parole and then set his next parole hearing date in 2012. Defendants filed motion to dismiss, claiming that chancellor lacked subject matter jurisdiction because petition was not verified by sworn affidavit as required by TCA 27-8-104 and because petition did not state that it was first application for writ as required by TCA 27-8-106. Petitioner claimed that petition was properly verified or, if it was not, chancellor should waive requirements because petitioner was *pro se,* had low IQ, and was uneducated. Chancellor properly dismissed petition. In *Jackson v. Tennessee Department of Correction,* 240 SW3d 241 (Tenn.App. 2006), this court affirmed dismissal of petition for common law writ of certiorari because it was not notarized. *Jackson* court went further and held that failure to provide statement that petition was first application for writ was additional basis on which to dismiss petition. Petition in present case contains only certificate of service which states: "I certify that a copy of the above has been forwarded by first class postage pre paid US mail, to office of Cristi Scott at 2 Metro Chtse, Nash, Tn 37201 on this 19 day of January, 2007." Certificate of service is signed by petitioner and notarized. Noticeably lacking from petition is any verification wherein petitioner verifies contents of petition. Petition must contain both verification and notarization. Since petition in present case lacked verification, chancellor correctly determined that he lacked subject matter jurisdiction. TCA 27-8-106 requires that petition for writ of certiorari "shall state that it is the first application for the writ." Petition in this case does not so state. Because this statement is required by law to be in petition, we follow our holding in *Jackson* and dismiss "the petition for this reason as well." (***Stewart v. Tennessee Board of Probation & Parole,*** 33 TAM 34-18, 7/11/08, ES at Nashville, Swiney, 6 pages.)

**CIVIL PROCEDURE: Amendment — Statute of Repose. TORTS: Medical Malpractice — Respondeat Superior.** Plaintiffs' petition to rehear prior opinion (33 TAM 27-5) is denied. Plaintiffs' primary argument is that this court erred in holding that allegations based solely on Dr. Rankin's conduct contained in amended complaint, filed more than three years after injury and after statute of repose had run as against Rankin, did not relate back to original complaint, which was timely filed against Dr. Marlow and Internists of Knoxville. Although it was eventually undisputed that Marlow and Rankin were its employees and it became clear that only possible avenue of liability as against Internists of Knoxville was *respondeat superior* doctrine, complaint did not even allege that Marlow was agent/employee of Internists of Knoxville and provided no notice that plaintiffs intended to rely on vicarious

liability or *respondeat superior. Hawk v. Chattanooga Orthopaedic Group P.C.,* 45 SW3d 24 (Tenn.App. 2000), indicates that whether notice is actual requirement for application of relation back doctrine depends on whether amendment seeks to change party or add new party. If it seeks to add new party, plain language of TRCP 15.03 requires notice, among other things. If it does not, then *Hawk* indicates that notice is not required element, although "notice may be a useful analytical tool." This case presents rather unusual situation — technically, Internists of Knoxville was original party defendant, but new allegations filed more than three years later regarding administration of heparin are completely dependent on, and arise from, actions of Rankin, who was never party to action. Under these circumstances, although notice may not be requirement, common sense, reason, and notions of fairness support conclusion that issue of whether notice was provided to defendant in original complaint regarding application of *respondeat superior,* and possibility that plaintiff is bringing his or her action against possibly as-yet unnamed employee/agents, is relevant to relation back analysis. Notice was wholly lacking in complaint that plaintiffs were alleging *respondeat superior* or claiming that Internists of Knoxville was vicariously liable for actions of its employees. Complaint does not contain any general allegation against Internists of Knoxville regarding agency theory upon which plaintiff can rely in support of their relation back argument. (***Huber v. Marlow,*** 33 TAM 34-19, 7/10/08, ES, Lee, 4 pages.)

# Court of Criminal Appeals

▼ **In case in which defendant was convicted of four counts of first degree felony murder and one count of especially aggravated robbery in connection with 1994 robbery of Clarksville Taco Bell restaurant and slayings of four restaurant employees, although nearly nine-year delay between defendant's filing of motion for new trial and trial court's ruling on motion cannot be condoned, defendant's due process rights were not violated by delay given fact that defendant and/or his counsel contributed significantly to delay, and neither defendant nor his counsel inquired into status of motion for over seven years**

**CRIMINAL LAW: Felony Murder — Especially Aggravated Robbery — Double Jeopardy — Responsibility for Another's Conduct. CRIMINAL PROCEDURE: Due Process — Jury Deliberation — Televised Coverage — Venue — Jury Instructions — Victim Impact Statements. EVIDENCE: Photographs — Relevancy. CRIMINAL SENTENCING: Death Penalty — Aggravating Circumstances — Dangerous Offender.** In 1996, defendant was convicted of four counts of first degree felony murder and one count of especially aggravated robbery in connection with 1/30/94 robbery of Clarksville Taco Bell restaurant, where defendant worked, and slayings of four restaurant employees. Jury sentenced defendant to term of life in prison without possibility of parole for each first degree murder conviction, and trial court sentenced defendant to 25 years for especially aggravated robbery and ordered all sentences be served consecutively. (1) Defendant contended that nearly nine-year delay between filing of motion for new trial and trial court's ruling on motion resulted in denial of his right to due process. On 9/12/96, defendant filed timely motion for new trial along with request that trial court defer any proceedings on motion until after preparation of transcript. On 10/23/00, one of defendant's attorneys filed motion to withdraw, which was granted by trial court. In 2003, trial court later re-appointed that same attorney to represent defendant "to the conclusion of all trial court matters." On 10/9/03, state and defendant filed joint motion to reschedule hearing on motion for new trial from 10/16/03 to date in 12/03. Although order denying motion for new trial indicates that "matter was submitted on briefs in December 2003," order also notes that amended motion for new trial was filed by defendant in 1/04. Motion for new trial was overruled without hearing on 3/15/05. On 3/30/05, defendant filed several *pro se* pleadings including timely notice of appeal. Although nearly nine-year delay between defendant's filing of motion for new trial and trial court's ruling on motion cannot be condoned, defendant's due process rights were not violated by delay given fact that defendant and/or his counsel contributed significantly to delay, and neither defendant nor his counsel inquired into status of motion for over seven years. (2) Trial court did not abuse discretion by permitting in-court cameras. Defendant failed to establish that he was prejudiced by presence of cameras. Defendant argued that he is entitled to new trial because cameras "invaded the sanctity" of jury deliberations. In order denying motion for new trial, trial judge explained that jury was permitted to use courtroom for deliberations because of large number of exhibits. Trial court ordered that single, ceiling-mounted camera that was providing video feed for media be pointed at state seal. At some point, court learned that different image was on camera. Testimony showed that during jury deliberations from approximately 9:30 a.m. until around 3 p.m., courtroom camera was focused upon wall above judge's chair. This image, which was not accompanied by any sound, was fed to monitors located in courthouse media room and in at least two media trucks on site. At some point, members of media who were gathered in media room wondered whether proceedings had resumed in courtroom, and using control device from media room, camera operator lowered focal point of camera approximately five feet to judge's chair to determine that judge had not returned to courtroom. No one saw any jurors, exhibits, or any movement on monitor. Record supports trial court's conclusion that no intrusion occurred. No evidence established that any member of jury was even aware of incident. Evidence did not show that camera movements within courtroom during deliberation impaired jurors' ability to decide case only on evidence or that trial was adversely affected by impact of media coverage on one or more of participants. (3) Trial judge did not abuse discretion in denying defendant's motion for change of venue prior to trial. Jurors for defendant's Montgomery County trial were selected from Davidson County venire to avoid effect of pretrial publicity on jury. Trial court concluded that Davidson County jurors were not exposed to same level of pretrial publicity as was populace of Montgomery County. Defendant has neither alleged nor shown that any of Davidson County jurors who sat for this trial were biased or prejudiced. (4) Trial judge did not abuse discretion in admitting *in situ* photographs of victims. Only photo to which defendant objected at trial was exhibit number 50, which is photo depicting body of one of victims. Because defendant failed to lodge contemporaneous objection to admission of other photos at trial, issue is waived as to all photos but exhibit number 50. As to single photo at issue, that photo was not so graphic as to inflame jury or create danger of unfair prejudice. (5) Trial judge did not abuse discretion in admitting testimony of medical examiner (Harlan) regarding number of wounds suffered by each victim and in permitting Harlan to utilize charts, notes, and demonstrative aids during his testimony. It is unclear whether defendant is challenging admission of Harlan's testimony at trial

or at sentencing hearing. Although Harlan did not offer live testimony at sentencing hearing, state specifically adopted and utilized his trial testimony during sentencing phase of bifurcated proceeding. As to admissibility of testimony during guilt phase, Harlan's testimony established cause and manner of death for each of victim and was, therefore, relevant. As to admission of testimony during sentencing phase, rules of evidence do not limit admissibility of evidence in capital sentencing proceeding. Rules of Evidence should not be applied to preclude introduction of otherwise reliable evidence that is relevant to issue of punishment, as it relates to mitigating or aggravating circumstances, nature and circumstances of particular crime, or character and background of individual defendant. Because Harlan's testimony meets these requirements, trial court did not err in admitting this testimony. (6) Evidence was sufficient to convict defendant of four counts of first degree felony murder and one count of especially aggravated robbery. Both Ward, defendant's roommate and fellow service member, and Ward's wife testified that defendant knew details of Taco Bell murder otherwise known only to law enforcement officers, including manner in which perpetrator had entered and exited restaurant, where victims' bodies were located, how many shots had been fired, and type of weapons used. Both Ward and Cooper, who attended party on 1/30/94 at residence shared by defendant and Ward, saw defendant load shotgun and 9 mm handgun before wiping his fingerprints from weapons and placing them into black book bag. During that time, defendant wore white surgical gloves. Defendant also donned black clothing over Miami Hurricanes sweat suit and told them that they would "never see" black clothing again. One day prior to murders, defendant asked Peghee to allow him to examine safe in Ft. Campbell mail room and specifically asked Peghee if one could access safe by shooting dial with shotgun. On that same day, defendant asked Underwood if exiting rear door of Taco Bell would activate alarm. Defendant's jacket was found on bank of Red River short distance from Taco Bell. Stains on jacket tested positive as blood of one of victims, and black plastic fragments found in pocket matched black fragments from dial of safe in Taco Bell. Nine millimeter cartridge casings found at scene and bullets recovered from bodies of two victims matched casings and bullets found in defendant's residence. Shotgun shells recovered from scene matched those found at defendant's residence and bore same mechanism marks as shotgun recovered from defendant's residence. Bowling ball bag found in defendant's car contained $2,576 hidden under bottom panel. Moreover, defendant's fingerprints were found on door facing and ceiling vent cover in men's restroom of Taco Bell. (7) Defendant's dual convictions for especially aggravated robbery and felony murder did not violate double jeopardy. (8) Defendant contended that trial judge erred by interrupting jury's deliberations to provide instruction on criminal responsibility for conduct of another. Evidence introduced by defendant resulted in instruction. Defendant put on evidence, including "charge agreement," that raised issue of Housler's involvement in offenses. Once issue was raised, trial court was required to provide instruction on criminal responsibility. As to timing of instruction, although trial court's timing was not ideal, it did not cause jury to place undue emphasis on instruction. Jury had been deliberating only short time when trial court called parties to courtroom and indicated that it had "inadvertently omitted" instruction on criminal responsibility. Trial court specifically informed jury that omission of instruction in earlier charge was unintentional and twice warned jury not to place undue emphasis on instruction. (9) Evidence supported jury's finding that murders were "heinous, atrocious, or cruel." Harlan's testimony established that each of victims suffered gunshot wounds in excess of what would have produced death. Notably, evidence established that three victims (Campbell, Wyatt, and Price) suffered either close or contact gunshot wounds to head in addition to wounds to other parts of their bodies, including defensive wounds. Gunshot wounds suffered by victims supported state's theory that perpetrator entered employee area of Taco Bell in "hail of lead" designed to incapacitate victims and then, at some point thereafter, returned to execute victims. Harlan testified that his findings were consistent with Price's twisting and turning during initial shots. Placement of shell casings indicated that victims had attempted to escape gunfire. Each of victims suffered gunshot wounds that were, alone, non-fatal. (10) Trial judge did not abuse discretion in allowing state to present victim impact evidence. Use of victim impact evidence had been approved by both Tennessee and U.S. Supreme Courts prior to commission of crimes in present case. Moreover, specific approval of victim impact evidence "did not change existing law" and instead "clarified existing practice in Tennessee relating to victim impact evidence." (11) Trial judge properly imposed consecutive sentences. Defendant is dangerous offender. Defendant entered Taco Bell in what prosecutors termed "hail of lead," firing more than 25 shots at his four co-workers. Additionally, consecutive sentencing is reasonably related to grievous nature of crimes, and society needs to be protected from defendant. (***State v. Matthews,*** 33 TAM 34-20, 7/8/08, Nashville, Witt, 23 pages.)

**CRIMINAL LAW: Murder I. CRIMINAL SENTENCING: Reasonableness — Dangerous Offender.** Defendant was convicted of first degree murder of Michael Gross and attempted first degree murder of Michael's brother, Charles Gross, and was sentenced to life imprisonment and 35 years, respectively, with sentences to be served consecutively. (1) Evidence was sufficient to convict defendant of first degree murder. Defendant and Charles were involved in fight after Charles attempted to separate defendant and defendant's daughter from altercation. Michael attempted to stop fight between Charles and defendant, and Charles got better of defendant in fight. Grosses went inside after fight for short period of time, and defendant went to another apartment and retrieved gun. Grosses went outside to get into car and leave when defendant fired shots, striking both of them. Michael was struck four times, and by end of attack, defendant was standing over Michael firing into his body. There was period of time between end of fight and shooting of at least minute or two but possibly as long as 15 to 20 minutes. Defendant was able to get away from fight with Charles, but instead of staying in safety of apartment to which he fled, he retrieved gun and shot both of Grosses later as they were attempting to leave apartment complex. (2) Defendant's 35-year sentence for attempted first degree murder was not excessive. In imposing sentence, trial judge applied three enhancement factors — previous history of criminal convictions or criminal behavior, commission of offense involving more than one victim, and lack of hesitation in committing offense when risk to human life was high. Trial judge erred in applying factors for multiple victims and defendant's lacking hesitation to commit crime when risk to human life was high. Nevertheless, trial judge properly applied enhancement factor for defendant's prior criminal convictions. Defendant had history of numerous misdemeanor convictions for assault, driving offenses, drug offenses, and malicious mischief. Although defendant's last conviction was several years before his present offenses, his history of criminal convictions demonstrated alarming pattern of illegal activity during much of his adult life. On basis of defendant's criminal convictions alone, he was deserving

of 35-year sentence. Moreover, sentencing on basis of prior criminal convictions without jury determination does not run afoul of Sixth Amendment. (3) Trial judge properly imposed consecutive sentences. Trial judge properly relied on defendant's protracted criminal history and his use of weapon against multiple victims in present offenses. Trial judge correctly determined that defendant was offender who was deserving of extended sentence. Fact that defendant had been arrested 23 times since 1980 demonstrated that defendant was danger to society. (***State v. Rubin,*** 33 TAM 34-21, 7/8/08, Jackson, Tipton, 9 pages.)

**CRIMINAL LAW: Especially Aggravated Kidnapping. CRIMINAL SENTENCING: Dangerous Offender — Reasonableness.** Defendant was convicted of four counts of aggravated robbery and one count of especially aggravated kidnapping. Trial judge merged four aggravated robbery convictions into two convictions and sentenced defendant to 12 years for each of these two convictions and to 20 years for especially aggravated kidnapping conviction. Sentences were ordered to run consecutively, for effective sentence of 44 years. (1) Evidence was sufficient to convict defendant of especially aggravated kidnapping. Wilkins testified that defendant, along with several other men, came to her boyfriend's house with gun. After kicking in back door and ransacking house, defendant and other men forced Wilkins at gunpoint to go with them in car to Cooper's house. Defendant told other men to watch Wilkins so she would not run away. He also told her that she was going to die because she had seen his face. Wilkins was so scared that she urinated on herself. Defendant's actions went far beyond that of mere facilitator, and defendant was principal actor in Wilkins' abduction. (2) Trial judge properly imposed consecutive sentences. Defendant is dangerous offender, and his actions, along with those of his cohorts, were despicable and horrifying, not only to Wilkins, Cooper, and Cooper's two young children, but arguably to community at large. (3) Defendant's sentences were not excessive. Defendant's previous criminal convictions, standing alone, justified enhancement of his sentence. Defendant had extensive criminal history, including, in addition to his juvenile convictions, one conviction for indecent exposure, two convictions for assault, two convictions for possessing weapon, one conviction for driving on revoked license, and one conviction for violating his probation. (***State v. Lyons,*** 33 TAM 34-22, 7/9/08, Jackson, Smith, 9 pages.)

▼ **When defendant was convicted of aggravated burglary and theft under $500, doctrine of collateral estoppel did not bar state's introduction, at defendant's second trial, of evidence relating to defendant's constructive possession of truck or of items in truck in light of his acquittal of theft of truck in earlier case**

**CRIMINAL LAW: Aggravated Burglary — Theft — Lesser Included Offenses. CRIMINAL PROCEDURE: Collateral Estoppel — Prosecutorial Misconduct.** Defendant was convicted of aggravated burglary and theft under $500 and was sentenced to concurrent terms of three years at 30% for aggravated burglary conviction and 11 months and 29 days at 75% for theft conviction, to be served consecutively to his sentences in three previous cases. (1) Evidence was sufficient to convict defendant of aggravated burglary and theft. Defendant was discovered asleep on porch of Halcomb cabin, which had been broken into and from which number of items had been removed and placed in pickup truck that was hidden from view. When asked where truck was, defendant replied that it was "up in the woods" and inquired as to how arresting officer had known where to find him. Cabin was dirty, beds were unmade, food stored in cabin was missing, and electric bill for month of January was three times higher than typical month when no one was occupying cabin. Rational juror could have reasonably concluded that defendant broke into Halcomb cabin with intent to commit theft and that he stole items that were missing from cabin. (2) Trial judge did not err in failing to instruct jury on criminal trespass and aggravated criminal trespass as lesser included offenses of aggravated burglary. Because defendant has waived plenary review of issue by failing to place his requests for jury instructions in writing, issue will be reviewed under doctrine of plain error. At time of defendant's trial, law was unsettled as to whether aggravated criminal trespass was lesser included offense of aggravated burglary. Given unsettled nature of law during relevant time period, no clear and unequivocal rule of law was breached in present case. Hence, trial court's refusal to issue requested lesser included jury instructions did not rise to level of plain error. (3) Doctrine of collateral estoppel did not bar state's introduction, at defendant's second trial, of evidence relating to defendant's constructive possession of truck or of items in truck in light of his acquittal of theft of truck in earlier case. Defendant was first tried for burglary of "Annie's Auto Sales," used car lot business, and theft from business of various items, including miscellaneous tools and engine parts that had been stored in buildings and McMurray's Ford pickup truck which had been parked in outside lot. State also presented evidence about defendant's having been discovered asleep on porch of Halcomb cabin, having been asked by arresting officers where truck was located, and having replied that it was "up in the woods." Defendant, on other hand, presented two witnesses, his girlfriend and her sister, who both testified that Thomas was only person they ever saw driving on doing anything with truck. Jury convicted defendant of burglary of

business and theft of tools and other miscellaneous items, but acquitted him of theft of truck. Defendant's acquittal on elements of theft of truck at first trial did not necessarily preclude finding of his constructive possession of truck or of items in truck at second trial. (4) Defendant contended that state committed prosecutorial misconduct by introducing during its case-in-chief and referring in closing to evidence of his unindicted crimes, specifically, his alleged theft of electrical services and food from cabin. Evidence was relevant to show that someone was in cabin during time period defendant was found asleep on porch, and any error was cured by trial court's repeated instructions to jury that defendant was not on trial for stealing food and electricity. Moreover, complained-of testimony and comments occupy only small portion of entire transcript, prosecutor adequately explained that his purpose in introducing evidence was to refute defendant's claim that he had not entered cabin and had been on porch only that one day to take nap, trial court issued instructions to jury sufficient to cure any prejudice, and ample proof was presented to sustain defendant's convictions. (***State v. Eads,*** 33 TAM 34-23, 7/14/08, Knoxville, Glenn, 9 pages.)

▼ **In case in which defendant was convicted of 15 counts of sale of securities by unregistered broker-dealer or agent in violation of TCA 48-2-109, evidence was not sufficient to prove that defendant willfully violated TCA 48-2-109 when state failed to prove that defendant knew, prior to his agreement to stop selling stock, that his actions were illegal and nevertheless continued selling securities; legislature intended only to criminalize selling of securities by unregistered broker-dealer when person selling securities is aware that his or her conduct is prohibited by TCA 48-2-109, and yet nevertheless intentionally sells security knowing he or she is violating law; defendant's convictions are reversed and dismissed**

**CRIMINAL LAW: Securities Crimes. EVIDENCE: Relevancy. CRIMINAL PROCEDURE: Venue.** In 2003, Department of Commerce and Insurance opened investigation into sale of PhyMed Partners Inc. (PhyMed) convertible preferred stock by business named Olde South Trust that was located in Murfreesboro and owned by defendant. Defendant was subsequently convicted of 15 counts of sale of securities by unregistered broker-dealer or agent in violation of TCA 48-2-109 and was sentenced to four years on each count, with sentences to run consecutively to each other. Trial judge suspended sentences after service of 11 months in jail and ordered defendant to spend 12 years on probation. Defendant received $500 fine for each conviction. In addition, he was ordered to complete 1,000 hours of community service and pay restitution to victims in amount of $136,000. (1) Evidence was not sufficient to prove that defendant willfully violated TCA 48-2-109. State failed to prove that defendant knew, prior to his agreement to stop selling stock, that his actions were illegal and nevertheless continued selling securities. Tennessee Securities Act of 1980, TCA 48-2-101 *et seq.,* creates two distinct classes of violators of provisions of security laws that require certain persons who sell securities to be registered. First class involves people who sell securities without being registered, but who do so in way that does not willfully violate statute. Those individuals are subject only to civil penalties up to $10,000 per violation. Second class involves persons who "willfully violate" provisions of TCA 48-2-109. Those persons are subject to criminal penalties as well as civil penalties. Given creation of these two distinct classes of offenders, legislature must have intended that "willfully violate" means something more than simply intentionally selling securities without properly registering as broker-dealer under TCA 48-2-109. Distinction between criminal and non-criminal offenders means that legislature intended only to criminalize selling of securities by unregistered broker-dealer when person selling securities is aware that his or her conduct is prohibited by TCA 48-2-109, and yet nevertheless intentionally sells security knowing he or she is violating law. In present case, all of counts of indictment for which defendant was convicted involved sales of securities prior to entry of agreed order on 3/15/05, wherein defendant agreed to cease and desist selling PhyMed preferred stock. Defendant complied with this order. Prior to being informed by Department of Commerce and Insurance (Department) that he was required to register as broker-dealer to sell these securities, defendant believed that he was exempt under federal law from registration requirement. Only evidence adduced by state to show that defendant knew his actions were illegal was testimony that in sales involving viaticals unrelated to securities, defendant had been ordered by Department in 2000 to cease sales involving viaticals without proper registration. But given complexities of state and federal securities laws, and interplay between two, knowledge that selling one type of security is forbidden does not translate into complete omniscience regarding these laws. State failed to carry its burden of proving beyond reasonable doubt that defendant knew, prior to his agreement to stop selling PhyMed preferred stock, that his actions were illegal and nevertheless continued selling securities. Defendant's convictions are reversed and dismissed. (2) Trial judge did not abuse discretion in allowing state to introduce agreed order between defendant and Department wherein defendant admitted that he had engaged in offer and sale of unregistered securities without being registered as broker-dealer or agent of broker-dealer. Defendant contended that agreed order was entered into as part of civil proceeding that requires different burden of proof than criminal proceeding. Agreed order was relevant to proceedings at trial, and admissions made by defendant in agreed order were not unfairly prejudicial. There was no evidence that agreed order was coerced or was in any way involuntary. Moreover, order only reflects that defendant was selling securities without proper registration, not that he was "willfully" doing so. (3) Evidence did not preponderate against trial court's finding that proper venue was established in Rutherford County. While not all of victims resided in Rutherford County, all of paperwork memorializing their agreements with Olde South Trust in which they agreed to purchase PhyMed preferred stock was processed through and in office of Olde South Trust in Rutherford County. Therefore, integral element of sale of securities to residents of other counties occurred in Rutherford County, and venue was proper in that county. (4) Defendant contended that his incarcerative sentence was improper because TCA 48-2-123(a) provided that no person may be imprisoned for violation of any rule or order if person proves that he or she had no actual knowledge of rule or order. While this court's holding with regard to sufficiency of evidence renders any argument on this point largely moot, it should be noted that defendant was convicted of violating TCA 48-2-109(a), which requires registration as broker-dealer with Department in order to sell various types of securities. He was not convicted of violating administrative rule or order promulgated by Department. Language of TCA 48-2-123(a) on which defendant relies has no applicability to present case. (***State v. Casper,*** 33 TAM 34-24, 7/3/08, Nashville, Smith, 13 pages.)

**CRIMINAL PROCEDURE: Informant.** Defendant pled guilty to possession of less than .5 gram of cocaine with intent to sell and to tampering with evidence. As part of plea agreement, defendant reserved right to appeal certified question as to whether trial court properly determined that state was not required to release name of

confidential informant mentioned in affidavit accompanying search warrant for defendant's residence which was executed prior to his arrest. Trial judge did not err in ruling that state was not required to disclose identity of confidential informant. There is no black and white rule stating when state must reveal identity of confidential informant. Defendant has burden of establishing materiality of confidential informant's identity to his or her defense by proving one of four circumstances by preponderance of evidence — when disclosure would be relevant and helpful to defendant in presenting defense and is essential to fair trial, informant was participant in crime, informant was witness to crime, or informant has knowledge which is favorable to defendant. In present case, defendant has not demonstrated by preponderance of evidence that any of these four circumstances apply. Confidential informant's role was limited to establishment of probable cause for issuance of search warrant. In addition, defendant's indictments were based on evidence obtained during search, and state did not need any testimony or information from informant to make its case against defendant. (***State v. Butler,*** 33 TAM 34-25, 7/7/08, Nashville, Welles, 5 pages.)

▼ **In case in which defendant, inmate, was indicted on two counts of introduction of contraband into penal institution pursuant to TCA 39-16-201 — during routine search of defendant's jail cell, steel "shank" or knife was found taped to underside of basket, and five amoxicillin pills were discovered under defendant's bunk — was convicted of one count of introduction of contraband into penal institution based on his possession of shank, and trial judge found that indicted offense of introduction of contraband included possession of contraband and therefore charged jury on elements of possession, trial judge erred in instructing jury on elements of possession of contraband; trial judge's determination that possession was implicitly contained in charged offense resulted in duplicitous indictment; trial judge erred in failing to acquit defendant of charged offense of introducing contraband into penal institution when evidence established only that defendant "possessed" contraband in jail; defendant's two convictions are reversed, and charges against him are dismissed**

**CRIMINAL LAW: Introducing Contraband Into Prison. CRIMINAL PROCEDURE: Indictment.** During routine search of defendant's jail cell, steel "shank" or knife was found taped to underside of basket, and five amoxicillin pills were discovered under defendant's bunk. Defendant was indicted on two counts of introduction of contraband into penal institution pursuant to TCA 39-16-201. Defendant was not indicted for possession of either shank or pills. Defendant was subsequently convicted of one count of introduction of contraband into penal institution based on his possession of shank. Trial judge found that indicted offense of introduction of contraband included possession of contraband and therefore charged jury on elements of possession. Trial judge erred in instructing jury on elements of possession of contraband. Trial judge's determination that possession was implicitly contained in charged offense resulted in duplicitous indictment. Trial judge was correct when he stated that introduction and possession were separate offenses under statute and carried separate penalties. But trial judge erred in allowing defendant's trial to proceed based on presumption that possession was inherent in indicted offense, when it was in fact, separate, indictable offense. Moreover, trial judge's instruction to jury on possession prevented jury from reaching unanimous verdict because it was unknown whether jury's conviction was based upon introduction of contraband as charged, or based upon impermissible inference of possession. Trial judge erred in failing to acquit defendant of charged offense of introducing contraband into penal institution when evidence established only that defendant "possessed" contraband in jail. Defendant's two convictions are reversed, and charges against him are dismissed. (***State v. Burton,*** 33 TAM 34-26, 7/9/08, Jackson, McLin, 5 pages.)

**CRIMINAL SENTENCING: Presentence Report — Persistent Offender. CRIMINAL PROCEDURE: Plea Bargain. APPEAL & ERROR: Waiver.** Defendant pled guilty to attempting to obtain controlled substance by fraud in case number S50,151 and was sentenced to eight years to be served on probation. Defendant also pled guilty to attempting to obtain controlled substance by fraud and fraudulently obtaining benefits for medical assistance in case number S50,727. For controlled substance conviction, he received eight-year sentence to be served on probation concurrently with sentence in case S50,151. For medical assistance conviction, agreed sentence was six years, to run consecutively to other two sentences. (1) Defendant argued that trial judge failed to make defendant's presentence report available. Trial court determined that presentence report was filed on 4/4/07, more than five months before sentencing hearing on 9/13/07. Accordingly, defendant had opportunity to obtain presentence report at least five months prior to sentencing hearing. Even if presentence report was not in clerk's file when defense counsel made copies of it, defendant failed to request continuance or otherwise object to issue. When defendant noted issue, trial court took recess and, upon returning, asked defendant if he had completed his review of presentence report. Defense counsel stated, "Your Honor, I don't — I — I've reviewed it, Your Honor. I don't know that I had an objection, Your Honor." Defense counsel then proceeded to call his first witness. Hence, defendant failed to "take whatever action was reasonably available to prevent or nullify the harmful effect of an error" because he did not object. (2) Trial judge properly sentenced defendant as Range III "persistent" offender. Pursuant to defendant's "Request for Acceptance of Plea of Guilty," defendant pled guilty with understanding that he would be sentenced as Range III "persistent" offender. Defendant's classification as Range III offender is legitimate bargaining tool. Therefore, even if defendant did not have enough convictions to be classified by statute as Range III offender, such classification may be negotiated. Moreover, even if range was not bargained for, defendant, who was convicted of Class E felony in present case, has four convictions for burglary of auto, in addition to convictions for burglary of structure other than habitation, theft between $500 and $1,000, introducing drugs into jail, and theft between $1,000 and $10,000. All of these felony convictions can be applied to qualify defendant as Range III offender. In any event, defendant failed to object to trial court's sentencing him as Range III offender, so issue is waived. (***State v. Taylor,*** 33 TAM 34-27, 7/9/08, Knoxville, Wedemeyer, 4 pages.)

**CRIMINAL SENTENCING: Community Corrections — Reasonableness.** Defendant pled guilty to aggravated sexual assault, driving on suspended license, and reckless driving and was given effective six-year sentence. (1) Trial judge properly denied defendant alternative sentence. Defendant contended that he should have been sentenced to community corrections program. Trial judge properly found defendant to be Range II offender because of his five prior felony convictions. Moreover, defendant committed auto burglaries in 2000 while serving community corrections sentence for 1999 burglaries, indicating history of unwillingness to comply with conditions of sentence involving release into community. (2) Defendant's Range II, six-year sentence was

not excessive. In imposing sentence, trial judge determined that defendant had previous history of criminal behavior and convictions and that defendant had previous history of unwillingness to comply with conditions of probation. Sentencing in present case did not violate Sixth Amendment. At time of offenses, Range II sentence for aggravated statutory rape, Class D felony, was four to eight years. Trial judge properly applied enhancement factor for previous history of criminal convictions or criminal behavior based on defendant's history of three prior auto burglary convictions and two prior burglary convictions. Trial judge also properly applied enhancement factor for previous history of unwillingness to comply with conditions of sentence involving release into community based on fact that defendant's previous community corrections sentence had been revoked in 2001. There were no applicable mitigating factors. (***State v. Jernigan,*** 33 TAM 34-28, 7/7/08, Nashville, Witt, 5 pages.)

**CRIMINAL SENTENCING: Judicial Diversion.** Defendant pled guilty to theft between $1,000 and $10,000 and was sentenced to two years to be served on probation supervised by community corrections. Trial judge properly denied defendant's request for judicial diversion. Trial judge denied defendant's request for diversion primarily because she committed offense by taking money and gift cards on five occasions over several days. Trial judge commended defendant on completing Job Corps program and securing employment at Target shortly thereafter, but trial court found that defendant's discharge from her subsequent job at Subway, her criminal history of driving without license, and her questionable efforts in seeking employment at time of hearing revealed that defendant lacked direction and discipline. In addition, repetitious nature of present offense, indicating defendant's sustained intent to violate law, weighed heavily against granting of judicial diversion. Moreover, defendant abused position of private trust by stealing from her employer. Trial judge also considered defendant's criminal history of driving without license on two occasions to reveal lack of discipline and direction in defendant's life. This lack of discipline and direction also negatively implicates her amenability to correction. Trial court also considered deterrence value of judicial diversion when it found defendant's offense — stealing thousands of dollars from one's employer — to be serious one and not type of offense for which it normally granted judicial diversion. In addition, trial court's statement that it did not believe that defendant was seeking employment despite her testimony that she was looking for job indicated that trial court questioned defendant's credibility. Trial court considered all appropriate factors and simply found that circumstances of offense outweighed defendant's positive points. (***State v. Fields,*** 33 TAM 34-29, 7/9/08, Jackson, Ogle, 6 pages.)

**CRIMINAL PROCEDURE: Post-Conviction Relief.** On 1/29/01, petitioner pled guilty to several offenses and received effective 30-year sentence. On 2/8/02, petitioner filed post-conviction petition. Post-conviction judge granted state's motion and dismissed petition. On 4/28/03, petitioner filed motion asking post-conviction judge to reopen his post-conviction petition, arguing that "[t]he petition was timely filed by Petitioner. However, due to an institutional lockdown, the Petition did not reach the Shelby County Clerks until February 8, 2002." This motion was granted. On 10/14/04, petitioner filed amended post-conviction petition alleging ineffective counsel. On 2/5/07, post-conviction hearing was held on amended petition. At conclusion of hearing, post-conviction judge found that petitioner had failed to prove claim alleged in his amended post-conviction petition. For first time on appeal, state contended that post-conviction judge did not have jurisdiction to hear petitioner's amended post-conviction petition. State acknowledged that petitioner's guilty plea did not become final until 2/28/01, and hence, his original petition, which was filed on 2/8/02, was timely. Upon erroneous dismissal of original petition, petitioner should have filed, within 30 days, notice of appeal. Instead, more than one year after dismissal, petitioner filed motion to reopen his original petition. Motion was granted. In certain limited circumstances, petitioner may file motion to reopen prior petition for post-conviction relief. Petitioner's motion to reopen did not fall into any of three limited circumstances listed in TCA 40-30-117(a) for filing motion to reopen first post-conviction petition. Hence, post-conviction court erroneously granted motion to reopen. Because petitioner did not file notice of appeal contesting dismissal of his original petition, 30 days after order dismissing petition was filed, post-conviction court's judgment became final. Hence, no "amended" petition could be filed on completed action. Moreover, "amended" petition cannot be treated as new post-conviction petition. Generally, petitioner may file only one petition for post-conviction relief. Hence, post-conviction court had no jurisdiction to address complaints in amended petition. (***Sheffa v. State,*** 33 TAM 34-30, 7/2/08, Jackson, Ogle, 4 pages.)

▼ **In post-conviction cases alleging ineffective counsel, "reasonable probability" standard does not conflict with "clear and convincing evidence" standard; "clear and convincing" is burden of proof — petitioner must prove disputed factual allegations by clear and convincing evidence — while deficient representation and reasonable probability of different outcome is what must be proven**

**CRIMINAL PROCEDURE: Effective Counsel. EVIDENCE: Rape Shield Law.** As result of two separate trials, petitioner was convicted of 17 crimes involving his sexual contact with three minor females. This court affirmed on appeal. Petitioner subsequently filed post-conviction petition, which was denied following evidentiary hearing. (1) In order to obtain post-conviction relief, petitioner must show that his or her conviction or sentence is void or voidable because of abridgment of constitutional right. Pursuant to TCA 40-30-110(f), petitioner bears burden of proving factual allegations in petition for post-conviction relief by clear and convincing evidence. Petitioner argued that this "clear and convincing" standard is irreconcilable with *Strickland v. Washington,* 466 US 668 (1984). *Strickland* sets forth two-prong test applied to claims of ineffective counsel — that counsel's performance was deficient and that counsel's errors were so serious as to deprive petitioner of fair trial. If petitioner clears first hurdle of proving deficiency, he or she must then show that "there is reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different." Petitioner contended that "reasonable probability" standard conflicts with Tennessee's "clear and convincing evidence" standard. Two standards do not conflict. Petitioner must prove disputed factual allegations by clear and convincing evidence. For example, in present case, petitioner claimed that he gave counsel pay-stub allegedly proving that he was moving drywall in Bell Buckle on 6/4/02. Counsel disputed this, claiming he never received pay-stub. Petitioner must prove by "clear and convincing" evidence that he actually gave counsel pay-stub. If he does not meet this burden, this court analyzes case as though petitioner did not give pay stub to counsel. Having resolved that factual dispute, we would then proceed to two-prong *Strickland* test, analyzing deficiency and prejudice. In other words, "clear

and convincing" is burden of proof. Deficient representation and reasonable probability of different outcome is what must be proven. In this respect, statute is not in conflict with established precedent. Moreover, Tennessee Supreme Court has upheld and applied this statute in numerous cases, and this court is bound by rulings of that court. (2) Petitioner did not establish ineffective counsel claim. (a) Petitioner contended that counsel was ineffective in failing to adequately cross-examine victims with their prior inconsistent statements. Specifically, petitioner noted that counsel failed to cross-examine K.J. about her inconsistent statements concerning dates, times, and relationships of four episodes. In addition, petitioner argued that counsel failed to cross-examine K.J. about statements allegedly made by petitioner and about her relationship with her boyfriend, Riley. With respect to C.G., petitioner alleged that counsel failed to adequately cross-examine C.G. about inconsistencies concerning where petitioner touched her and what she was wearing during incidents. At post-conviction hearing, counsel testified that he obtained all of victims' statements prior to trial, and he believed he cross-examined victims adequately. He also noted that particularly harsh cross-examination of child might make jury sympathize with child. Hence, he chose not to emphasize every particular inconsistency in linear order as tactical strategy. During cross-examination, K.J. admitted that she could not recall on what date incidents occurred, and she was imprecise in recalling specific times. Counsel also cross-examined K.J. about Riley and any possible bias K.J. may have had against petitioner, although trial court prevented counsel from questioning K.J. about her sexual relationship with Riley, With respect to C.G., counsel cross-examined her about inconsistencies in pretrial statements concerning date on which events happened. Specifically, counsel questioned, "So you are saying that you knowingly lied about this?" C.G. responded, "Yes, with my family sitting there, the first time I got called to her office." Counsel asked, "But you are tying to tell these people that you are not knowingly lying today, right?" C.G. stated, "Yes." Counsel did not specifically confront C.G. with inconsistent statements concerning where she alleged petitioner touched her and concerning what she wore during incident. But counsel skillfully cross-examined K.J. and C.G. using their pretrial statements. Moreover, decision to refrain from harsh line-by-line cross-examination is within discretion of counsel in present case, particularly because of age of victims. (b) Petitioner contended that counsel failed to adequately investigate and prepare for two trials because he met with petitioner only twice and failed to investigate alibi defense provided by pay-stub. Counsel testified that he met with petitioner 10 to 12 times and was prepared for both cases. Counsel also testified that petitioner never provided him with pay-stub, but, even if petitioner had provided stub, it would not have provided adequate defense as alleged work only required three hours, while crimes occurred over several days. Counsel met with petitioner number of times, spoke with potential witnesses, and proceeded to trial based on petitioner's defense of "I didn't do it." (c) Petitioner contended that counsel failed to file TRE 412 motion to introduce testimony that K.J. and Riley had sex on petitioner's couch. Counsel testified that he found no basis under TRE 412 to introduce statement, and hence, he attempted to "slip it by" state at trial. State objected to testimony, and trial court excluded it. TRE 412 generally prohibits use of specific instances of victim's "sexual behavior." If certain procedural requirements are followed, specific instances of sexual behavior may be admitted if offered by defendant on issue of credibility of victim, provided prosecutor or victim has presented evidence as to victim's sexual behavior, and only to extent needed to rebut specific evidence presented by prosecutor or victim. To support his argument that "credibility exception" applies in this instance, petitioner cited to K.J.'s numerous inconsistent pretrial statements concerning her sexual relationship with Riley. Statements came from following sources: medical record, interview with sheriff's department deputy, interview with sheriff's department lieutenant, and preliminary hearing. For defendant to utilize this exception at trial, state or victim must present evidence at trial. Because state and victim presented no evidence at trial concerning victim's sexual behavior, credibility exception to TRE 412 does not apply, and TRE 412 motion would not have been successful. (***Thompson v. State,*** 33 TAM 34-31, 7/3/08, Nashville, Wedemeyer, 19 pages.)

**CRIMINAL PROCEDURE: Effective Counsel.** Petitioner was convicted of second degree murder. He received 24-year sentence as violent offender. He subsequently filed *pro se* post-conviction petition. Counsel was appointed, amended petition was filed, and petition was denied following evidentiary hearing. Petitioner did not establish ineffective counsel claim. Petitioner contended that there was intervening cause of death, which should have been investigated. He asserted that "intervening cause of death was either actions taken by Bobby Marshall or medical malpractice." According to petitioner, if "these theories [had] been proper[l]y investigated and fully litigated at trial [t]he results of the trial may very well have been different." In addition, petitioner contended that counsel was ineffective in failing to file motion to suppress petitioner's statement to police until well after trial was underway. Petitioner contended that this error "affect[ed] the very foundation of [petitioner's] trial strategy[,] and [t]he decision on whether to testify on his ... own behalf." Post-conviction judge accredited testimony of trial counsel and wholly discounted testimony of petitioner, whom he found to be untruthful on multiple occasions. When petitioner in post-conviction proceeding alleges counsel was deficient in failing to pursue motion to suppress or perform in specific manner, it is petitioner's burden to establish by clear and convincing evidence that motion to suppress would have been granted and that petitioner's allegation of deficient performance has merit, and that had counsel performed as suggested, there is reasonable likelihood that result would have been different. Clearly, counsel cannot be considered ineffective in failing to pursue motion that is without merit. (***Clark v. State,*** 33 TAM 34-32, 7/2/08, Jackson, Hayes, 8 pages.)

**CRIMINAL PROCEDURE: Effective Counsel — Guilty Plea.** Petitioner entered plea of *nolo contendere* to five counts of aggravated sexual battery and five counts of incest. Trial court sentenced petitioner to effective 10-year sentence. Petitioner subsequently filed post-conviction petition, which was denied following evidentiary hearing. (1) Petitioner did not establish ineffective counsel claim. (a) Petitioner contended that counsel should have investigated notes handwritten by detective who took his statement and should have interviewed victims, his children. Petitioner failed to present any evidence at post-conviction hearing proving content of handwritten notes or providing information about what interviews with his children would have revealed. (b) Petitioner contended that counsel failed to adequately argue his pretrial motions. Petitioner did not want his children to be required to testify, so he chose to waive his preliminary hearing. In fact, counsel said that she normally recommends preliminary hearing in order to gain chance to view state's witnesses. Petitioner failed to show how counsel was ineffective in following his instructions. Moreover, petitioner failed to present evidence at post-conviction hearing to prove that any pretrial motions could have been successfully pursued by counsel.

(2) Petitioner did not prove that his guilty plea was not knowingly and voluntarily entered. Trial court questioned petitioner at great length to make sure his guilty plea was voluntarily and knowingly entered. In addition, counsel said she relayed state's offer to petitioner, and she also explained to him differences between concurrent and consecutive sentencing and potential maximum amount of time he faced. Petitioner admitted that he took plea deal because he "didn't know what else to do. It was basically either take the plea or go to trial and get a lot of time." (***Walton v. State,*** 33 TAM 34-33, 7/2/08, Nashville, Wedemeyer, 6 pages.)

**CRIMINAL PROCEDURE: Effective Counsel — Guilty Plea — Miranda Warning. CRIMINAL SENTENCING: Probation.** Petitioner pled guilty to rape and incest and agreed to allow trial court to sentence him. After sentencing hearing, trial court imposed effective sentence of 10.5 years. On appeal, this court concluded that trial court erred in enhancing sentence based on victim's age and in enhancing sentence based on "pleasure or excitement" factor. Nevertheless, this court concluded that effective sentence of 10.5 years was appropriate. In addressing alternative sentencing, this court concluded that those convicted of rape were technically eligible for alternative sentencing but only if sentence was less than 10 years. As petitioner's sentence was more than 10 years, he was ineligible for alternative sentence. This court thus affirmed trial court's judgment. After this court's decision, petitioner filed post-conviction petition, which was denied following evidentiary hearing. (1) Petitioner did not establish ineffective counsel. Petitioner contended that counsel was ineffective in withdrawing his motion to suppress. Officer requested petitioner come to police station, and petitioner drove himself there voluntarily. When he arrived, officer asked him if he knew why he was there. Petitioner responded, "yes," that he believed it dealt with sexual molestation of his daughter. Counsel testified that, based on his investigation, officer then read petitioner his *Miranda* rights and obtained written statement. Under counsel's version of facts, only statement made before officer read petitioner his rights was statement that he believed he was called to police station in order to answer accusations that he molested his daughter. Although questioning took place at police station, duration was very short, and suspect transported himself to station. Petitioner presented no evidence that he was restrained from leaving or that officer's tone was particularly harsh. Law supports post-conviction judge's determination that petitioner was not "in custody" at time he made tis statement. Actions of police fully comply with requirements of *Miranda,* and counsel had no basis to suppress statement. (2) Petitioner did not prove that his guilty plea was not knowing and voluntary. Petitioner alleged that he was told he would be eligible for alternative sentencing after he pled guilty. He stated, "[M]y understanding was, I might could spend a few years in prison, then get out on probation, or the Judge could give me probation or community service." Counsel testified that, because rape carried minimum sentence of eight years, petitioner would be eligible for alternative sentence, although probation was unlikely. This is precisely what this court held on petitioner's direct appeal. In pleading guilty to rape, petitioner allowed trial court to set his sentence. Range for sentence was 8 to 12 years. Sentence between 8 and 10 years would make petitioner candidate for alternative sentence, and anything above 10 years would not. Counsel properly and precisely explained to petitioner his options. (***Allen v. State,*** 33 TAM 34-34, 7/3/08, Nashville, Wedemeyer, 8 pages.)

**CRIMINAL PROCEDURE: Effective Counsel.** Petitioner was convicted of premeditated murder and two counts of especially aggravated kidnapping. He was sentenced to life without possibility of parole for murder and to two consecutive 32-year, 6-month sentences for especially aggravated kidnappings. This court affirmed on appeal, and Tennessee Supreme Court denied permission to appeal. Petitioner subsequently filed post-conviction petition, which was denied following evidentiary hearing. Petitioner did not establish ineffective counsel claim. (1) Petitioner contended that counsel was ineffective in failing to interview "key witnesses" prior to trial. At post-conviction hearing, counsel testified that he had testimony of witnesses from previous trial and preliminary hearing, in addition to interviews provided by other defense counsel's investigators and reports made by his own investigators. Counsel testified that he interviewed witnesses who would speak to him and "he had a file on every witness who took the stand, either with a prior statement or prior testimony." Post-conviction judge accredited counsel's testimony, and petitioner did not show how further pretrial interviews with state's witnesses would have affected outcome of his trial. (2) Petitioner contended that counsel was ineffective in failing to "adequately cross-examine the State's witnesses during trial." More specifically, petitioner broadly asserted that counsel knew only one of state's witnesses would testify to his presence at scene of crime and that counsel did not properly impeach him. Post-conviction judge found that counsel's strategy to impeach only witnesses who placed petitioner on scene using their prior conflicting statements was reasonable. Petitioner made no showing of prejudice. (3) Petitioner contended that counsel was ineffective because he "failed to properly consult with [petitioner] prior to trial." Counsel testified that he met with petitioner "regularly." Counsel also explained that he went over testimony of state's witnesses and his defense strategy with petitioner. Post-conviction judge accredited testimony of counsel. (***Dixon v. State,*** 33 TAM 34-35, 7/8/08, Jackson, Welles, 7 pages.)

**CRIMINAL PROCEDURE: Post-Conviction Relief — Statute of Limitation.** After jury trial on 8/23/04 and 8/24/04, petitioner was convicted of second degree murder. He was sentenced to 25 years at 100%. This court affirmed on appeal on 9/14/06, and no application for permission to appeal was filed. On 11/7/07, petitioner, incarcerated and proceeding *pro se,* mailed his post-conviction petition. Post-conviction judge ruled that petition was barred by statute of limitation. Post-conviction judge did not address in her order of dismissal whether due process required tolling of limitations period, stating only that "none of Petitioner's claims fall within any of the recognized exceptions to the statute of limitations." Petitioner, relying on *Williams v. State,* 44 SW3d 464 (Tenn. 2001), argued that due process considerations require tolling of statute of limitation because trial counsel deprived him of reasonable opportunity to seek post-conviction relief. Petitioner averred that he believed that counsel was continuing to represent him through appeals process. Petitioner stated that counsel assured him "that he would take the case all the way to the Tennessee Supreme Court." Petitioner further claimed that counsel failed to notify him that counsel did not intend to file TRAP 11 application for permission to appeal and that counsel failed to formally withdraw as attorney of record or otherwise failed to inform petitioner of his withdrawal. Based on *Williams,* post-conviction judge erred in dismissing petition without conducting hearing to make determinations similar to those outlined in *Williams.* Case is remanded for evidentiary hearing to determine whether due process tolled statute of limitation period to present his claim in meaningful time and manner, and if so, whether petitioner's filing of post-conviction petition in 11/07 was within reasonable opportunity afforded by due process tolling. (***Baker v. State,*** 33 TAM 34-36, 7/3/08, Nashville, Welles, 3 pages.)

**CRIMINAL PROCEDURE: Post-Conviction Relief — Statute of Limitation.** On 11/19/82, petitioner was convicted of aggravated rape and second degree burglary. He was sentenced to 40 years. This court affirmed, and Tennessee Supreme Court denied permission to appeal on 6/27/83. On 8/19/83, petitioner filed post-conviction petition. Post-conviction court found that petitioner was mentally incompetent to proceed and dismissed petition on 3/10/88. Petitioner subsequently filed second post-conviction petition contending that he had regained competency. Post-conviction court dismissed petition in light of court's dismissal of first petition. On 11/7/05, petitioner filed *pro se* motion to reopen first post-conviction petition. Motion stated that petitioner did not appeal post-conviction court's dismissal of first petition because "due to his incompetence, [he] was unaware that [he] had to refile for an appeal." As grounds for reopening petition, motion alleged only that "PCR was not further pursued by petitioner's attorney for unknown reasons." Motion contained no factual allegations regarding petitioner's competence between 1991 and 2005. Post-conviction court conducted evidentiary hearing on whether to treat petitioner's pleading as motion to reopen prior post-conviction petition or as new post-conviction petition. Petitioner presented no proof at hearing. Post-conviction court treated pleading as new petition for post-conviction relief and dismissed it as untimely. (1) Although pleading which forms basis for this appeal is styled "Motion to Reopen Post-Conviction Petition," post-conviction court treated it as new petition because 1988 petition filed by petitioner was never resolved on its merits. Trial court is not bound by title of pleading but has discretion to treat pleading according to relief sought. Moreover, to treat pleading as motion to reopen would lead to inequitable result in present case, given shorter limitations period for appealing denial of motion to reopen. Petitioner may appeal within 30 days dismissal of petition for post-conviction relief, and post-conviction court's 4/19/07 order dismissing petition stated that petitioner had 30 days to file notice of appeal. Petitioner filed notice of appeal on 5/15/07. In contrast, appeal from denial of motion to reopen prior petition must be filed within 10 days. To characterize petitioner's pleading as motion to reopen, as state argues on appeal, would render petitioner's notice of appeal untimely. Hence, pleading will be analyzed as new petition for post-conviction relief. (2) Post-conviction court properly dismissed petition as untimely because petitioner did not make prima facie showing of incompetence requiring tolling of statute of limitation. Final action was taken on his previous post-conviction petition in 1991. His 2005 petition contains no specific factual allegations that he was unable to manage his personal affairs or understand his legal rights and liabilities during previous 14 years. Moreover, he presented no evidence regarding mental incompetence during evidentiary hearing conducted by post-conviction court. Petitioner did not prove by clear and convincing evidence that his filing was timely or that statute of limitation should be tolled for incompetence. **Dissent:** Last court to consider petitioner's mental fitness was trial court that dismissed his post-conviction case without prejudice in 1988 because petitioner was mentally incompetent to proceed. This court is now faced with motion to reopen form that is quite limited when compared to form for petition for post-conviction relief. But it does assert that petitioner was found incompetent and that he did not seek appeal because he was unaware of process due to his incompetence. When trial court considered motion to be post-conviction petition and appointed counsel, it ordered that case be set for evidentiary hearing regarding petition's timeliness. Counsel did not amend pleading to include necessary information to pursue post-conviction case, including any reason that would toll statute of limitation. Counsel also did not present any evidence at hearing that would allow trial court to consider whether petitioner's incompetence justified late filing. Petitioner lost his original post-conviction day in court because he was found to be incompetent. He has now lost his day in court for not specifically alleging and proving his incompetence. Petitioner should be presumed incompetent for tolling of statute of limitation until state proves to contrary in appropriate hearing. (***Moore v. State,*** 33 TAM 34-37, 7/10/08, Knoxville, Glenn, dissent by Tipton, 6 pages.)

**CRIMINAL PROCEDURE: Habeas Corpus. CRIMINAL SENTENCING: Sentence Enhancement. CONSTITUTIONAL LAW: Retroactivity.** Defendant was convicted of armed robbery on 4/29/85 and ordered to serve life sentence. His conviction and sentence were affirmed (11 TAM 3-46), and his petition for post-conviction relief was denied (20 TAM 15-47). Subsequently, defendant filed at least two meritless petitions for habeas corpus relief. On 7/19/07, he filed "Motion to Vacate Sentence and Judgment" based on "void" conviction, asserting that his sentence was void because his Sixth Amendment right to jury trial was violated when sentencing court enhanced his sentence above minimum after unilaterally finding statutory enhancement factor — previous history of unwillingness to comply with conditions of sentence involving release into community — was applicable in his case. Trial court correctly dismissed defendant's "motion," finding that if it were treated as petition for post-conviction relief, it was time-barred, and if it were treated as petition for habeas corpus relief, it was filed in wrong county. Trial court also ruled that defendant was not entitled relief under either *Blakely v. Washington,* 542 US 296 (2004), or *Cunningham v. California,* 549 US 270 (2007). In interest of judicial economy, defendant's argument will be addressed in anticipation of possibility of defendant re-filing motion as petition for habeas corpus relief in proper court. Defendant's motion lacks merit because this court has repeatedly held that *Blakely* and its progeny did not create new rule of law which was entitled to retroactive application when raised within context of habeas corpus proceeding. (***Wallace v. State,*** 33 TAM 34-38, 7/2/08, Jackson, Welles, 3 pages.)

**CRIMINAL PROCEDURE: Habeas Corpus — Indictment.** Petitioner was convicted of possession of contraband in penal institution and sentenced to 10 years as Range III offender. This court affirmed on appeal, and Tennessee Supreme Court denied permission to appeal. In this his second habeas corpus petition, petitioner alleged that he did not knowingly and voluntarily waive his right to counsel when he represented himself at trial and that indictment was defective. Trial court did not err in summarily dismissing petition. (1) Allegation that petitioner did not knowingly and voluntarily waive his right to counsel when he represented himself at trial is not colorable claim for habeas corpus relief. (2) Petitioner is not entitled to habeas corpus relief on allegation that indictment was fatally deficient. Petitioner did not attach indictment to habeas petition. Assuming that indictment read as petitioner alleged in habeas corpus petition, it conformed to requirements of *State v. Hill,* 954 SW2d 725 (Tenn. 1997). According to petition, indictment alleged that petitioner "did unlawfully[,] feloniously and knowingly have in his possession a controlled substance while present in the Weakley County Jail, a penal institution where prisoners were quartered and under custodial supervision[,] without the express written consent of the chief administrator of said institution" in violation of TCA 39-16-201(a)(2). (***Higgs v. Worthington,*** 33 TAM 34-39, 7/7/08, Knoxville, Wedemeyer, 4 pages.)

**CRIMINAL PROCEDURE: Habeas Corpus. CRIMINAL SENTENCING: Legality — Release Eligibility. CRIMINAL LAW: Class X Felony.** Petitioner was convicted of second

degree murder. This court affirmed, and Tennessee Supreme Court denied permission to appeal. Petitioner made several collateral attacks in state courts and one in federal court. In this petitioner's fourth habeas corpus petition, he alleged that his sentence was illegal. Petitioner complained that his sentence of not less than nor more than 25 years was indeterminate sentence; that judgment form should have reflected percentage of his sentence he must serve in confinement before becoming eligible for release, specifically maintaining that he should have received release eligibility after serving 30% of his sentence; and that he should not have been sentenced as Class X offender. Trial court properly dismissed petition. (1) This court has previously determined that petitioner's sentence of not more than but not less than 25 years is determinate sentence. Hence, petitioner was not subjected to illegal, indeterminate sentence. (2) Petitioner was correctly sentenced as Class X offender. Petitioner murdered his wife in 1980, prior to inception of 1982 sentencing act. At time of murder, second degree murder was Class X offense punishable by sentence of 10 years to life. This designation was not changed by 1982 sentencing act. In fact, Class X Felonies Act of 1979 was not repealed until enactment of 1989 sentencing act. (3) TCA 40-35-112(a) (1986) provides: "For all persons who committed crimes prior to July 1, 1982, the prior law shall apply and shall remain in full force and effect in every respect, including but not limited to sentencing, parole and probation." But 1982 act was amended in 1985, prior to petitioner's sentencing, to add: "The release eligibility date, manner of service of sentence, and the release and parole of any person convicted and sentenced as a Class X offender for a crime committed before July 1, 1982, shall be governed by part 5 of this chapter." Petitioner received sentence of 25 years for his second degree murder conviction, sentence permitted for offense. Also, judgment does not impose impermissible release eligibility percentage for sentence. In fact, judgment is silent as to release eligibility. "Technical" omission in standard judgment form does not render judgment void and is thereof not basis for habeas corpus relief. As such, judgment at issue in this case is not void on its face. Regardless, TCA 40-35-501(c) (1986) provided that standard Range I offender such as petitioner would be eligible for release after service of 30% of his sentence. Under 1989 sentencing act, which was enacted after petitioner's conviction, judgment form "shall be returned to the sentencing court" for completion of any omitted information. Petitioner is not entitled to relief. (***Walker v. Carlton,*** 33 TAM 34-40, 7/10/08, Knoxville, Ogle, 3 pages.)

**CRIMINAL PROCEDURE: Habeas Corpus.** Petitioner pled guilty to two counts of felony murder and received concurrent life sentences. In 8/07, he filed habeas corps petition claiming that he was denied due process because trial court failed to ensure that he pled guilty knowingly and voluntarily by questioning him during guilty plea hearing as required by *Boykin* and TRCrP 11. He also claimed that trial court was without jurisdiction to enter judgments against him. Trial court properly denied petition. By not attaching judgments of conviction to his petition, petitioner failed to comply with requirements of TCA 29-21-107(b)(2) for seeking habeas corpus relief. Procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. Hence, trial court properly denied petition on that basis alone. Moreover, petitioner's claim regarding his guilty pleas being unknowing and involuntary is not cognizable in habeas corpus action because, even if true, judgments merely would be voidable, not void. Petitioner's allegations do not establish that trial court lacked jurisdiction to convict or sentence him. (***Mosley v. Morrow,*** 33 TAM 34-41, 7/11/08, Knoxville, Ogle, 2 pages, mem. op.)

**APPEAL & ERROR: Timeliness.** Petitioner entered plea of no contest to sexual battery. Trial court imposed sentence of six years probation and service of one year in Montgomery County Workhouse. Petitioner was also required to register as sex offender and complete sex offender program. Petitioner was confined in Montgomery County Jail beginning in 12/99 and was later moved to Montgomery County Workhouse where he served until 9/00. After his release, he was on probation in Tennessee from 9/00 until 12/00. In 12/00, his probation was transferred to Chicago, Ill. Petitioner was on probation in Chicago from 12/00 until 8/03. In 8/03, he was arrested for probation violations and ordered to serve 180 days in jail with credit for 85 days. After he served 180 days in jail, his probation was reinstated in 1/04. In 7/04, he was arrested and confined in Montgomery County Jail from 7/04 through 8/06. He received credit for jail time. At conclusion of probation revocation hearing on 7/27/06, trial court ordered that petitioner serve balance of his original sentence due to his probation violations and assault conviction while on probation. On 6/15/07, petitioner filed habeas corpus petition. Petition was summarily dismissed by written order on 7/9/07. Petitioner filed notice of appeal on 10/11/07. Notice of appeal must be filed within 30 days after date of entry of judgment from which petitioner is appealing. Although notice of appeal is not jurisdictional, and requirement of untimely notice of appeal may be waived in interest of justice, this court declines to do so in present case. Petitioner filed notice of appeal more than three months after trial court issued its written order denying habeas corpus petition. He did not offer explanation for untimely filing of his appeal or advance any argument as to why his appeal warrants consideration despite its untimeliness. Appeal is dismissed. (***Robertson v. State,*** 33 TAM 34-42, 7/8/08, Jackson, McLin, 3 pages.)

**APPEAL & ERROR: Coram Nobis.** In 1994, petitioner pled guilty to arson. In 2008, he filed petition for writ of error coram nobis. As grounds for relief, petitioner asserted that his conviction was void because grand jury illegally indicted him for crime other than crime which had been bound over to grand jury. Petitioner asserted that this legal argument attacking action of grand jury constitutes "newly discovered and subsequent evidence." Trial court did not err in summarily dismissing petition. Petitioner's argument is totally without merit. (***McGowan v. State,*** 33 TAM 34-43, 7/11/08, Nashville, Welles, 2 pages, mem. op.)

# Sixth Circuit Court of Appeals

▼ **In products liability suit in case alleging that airbag failed to deploy when vehicle veered off road, traveled down embankment through small wire fence, and hit tree, district court erred in considering several unsworn letters from various experts for defendant manufacturer; analyzing plaintiffs' claim under consumer expectation test — and without considering defendant's hearsay expert reports — district court inappropriately granted summary judgment on ground that plaintiff failed to present genuine issue of material fact as to existence of defect in airbag; plaintiff offered sufficient evidence from which reasonable jury could find that defective airbag proximately caused her injuries, and defendant did not produce admissible evidence to support any contrary theory**

**TORTS: Products Liability. EVIDENCE: Expert Witness — Expert Testimony. CIVIL PROCEDURE: Summary Judgment.** On 9/23/04, plaintiff was involved in single-car accident while traveling northbound on Interstate 75 in Bradley County,

Tenn. According to plaintiff's recollection and affidavit filed by Williams, motorist who was driving his car 75 to 100 yards behind plaintiff, plaintiff was driving approximately 70 mph immediately prior to accident. Plaintiff's vehicle, 1999 Honda Accord EX (Accord), "veered off the road, drove down an embankment and through a small wire fence, and hit a tree." Tree, approximately six inches in diameter, was uprooted by collision. Williams' declaration states that when he saw plaintiff's vehicle "suddenly veer off the roadway [he] did not see any brake lights or blinkers" and that "[t]he car then went down the embankment and into a clump of trees." Plaintiff's Accord was "certified pre-owned" vehicle equipped with driver's side airbag, which did not deploy. Accord's airbag should have deployed if vehicle, when it collided with tree, experienced rapid deceleration from speed of over 14 mph, or possibly 25 mph. Plaintiff was unconscious at time of accident and in semi-conscious state when she was transported to hospital. Plaintiff does not recall collision, or indeed anything after she entered highway before her loss of consciousness and accident. Record contains photographs depicting damage sustained by Accord in accident, and plaintiff's insurance carrier "declared the vehicle a total loss due to frontal damage and paid [plaintiffs] a total of $11,109.25" on their claim. According to plaintiff and her husband, on day following accident plaintiff had developed quarter-sized bruise above her left eye. Plaintiff then "developed severe headaches, dizziness and neck soreness (which she did not experience before the accident), which caused her to return to the hospital a week after the accident. [Plaintiff] admits to experiencing a 'possible seizure' prior to the accident, but alleges that since the accident, she has been experiencing seizures of aggravated duration and intensity." Plaintiff claims that "[d]ue to these seizures, [she] cannot drive, had to discontinue nursing school, and is limited in her daily functioning." Plaintiff also claims that her symptoms resulted from second collision during her accident and that deployed airbag would have prevented such second collision. In 9/05, plaintiff filed products liability suit against American Honda Motor Company (Honda) in state court. In 10/05, Honda removed suit to federal district court. District court granted summary judgment to Honda after considering several unsworn letters from various experts for Honda. (1) District court did not abuse discretion in granting Honda's motion *in limine* to exclude Griffin from offering evidence on subject of accident reconstruction and on subject of potential defects in Accord. Although Griffin appears to be able mechanic, substance of his evidence deals with estimating speed at which plaintiff's vehicle was traveling when it struck tree, matter of accident reconstruction. Griffin's report and declaration also offered opinion as to why airbag failed to deploy, but Griffin's "usual practice" is to examine vehicle, and he was unable to inspect plaintiff's Accord because plaintiff's insurance company had already salvaged vehicle. Griffin's evidence thus pertained to accident reconstruction, area in which he lacked expertise, and to analyzing automobile after accident, area in which Griffin does have expertise, but his method involves physically examining vehicle, which did not occur in this case. (2) Plaintiff contended that district court improperly relied on three expert reports that Honda attached to its motion for summary judgment. Even construing Honda's argument as contending that plaintiff forfeited her evidentiary objections because she failed to object to hearsay evidence by filing motion *in limine,* as opposed to simply raising objection in her motion in opposition to summary judgment, Honda's argument fails. District court improperly considered Honda's unsworn, hearsay evidence in deciding to grant Honda's motion for summary judgment, and plaintiff adequately raised issue by objecting multiple times to this hearsay evidence in her response to plaintiff's motion for summary judgment and motion *in limine.* (3) District court abused discretion in excluding testimony of Dr. Heisser, plaintiff's expert. Critical portion of Heisser's declaration states that assuming that plaintiff's vehicle was traveling at least 20 mph when it struck tree, and further assuming that plaintiff's head struck interior of vehicle during collision, within reasonable degree of medical certainty, such trauma to head more than likely aggravated or exacerbated her pre-existing seizure disorder. Contrary to district court's assertion, record contains evidence to support Heisser's assumptions. Specifically, plaintiff's deposition and Williams' declaration provided evidence that plaintiff was driving approximately 70 mph before Accord veered off road, and Williams testified that he did not see any brake lights or blinkers on plaintiff's vehicle. Although it is not clear how far car traveled after leaving highway, declarations of Williams and Rogers, highway patrolman who responded to accident, indicate that car traveled down embankment and through small fence before going into clump of trees. Given that Honda moved for summary judgment, this court must draw all reasonable inferences from evidence in favor of plaintiff, and available evidence permits inference that Accord was still traveling at relatively high rate of speed — at least above 20 mph as Heisser assumed — when it collided with tree. Moreover, although plaintiff was unconscious at time of accident and no witness saw impact, whether plaintiff's head struck interior of car is disputed issue of material fact given testimony from plaintiff and her husband that she developed bruise on her head day after accident. Given remaining admissible evidence, reasonable jury might choose to believe that circumstantial evidence demonstrates that Accord was more likely than not traveling at speed in excess of 20 mph when it collided with and uprooted tree. Reasonable jury might also believe plaintiffs and find that, as result of airbag's failure to deploy, second collision occurred and caused plaintiff's bruise in which case Heisser's expert opinion — that such second collision and resulting head trauma is likely to have exacerbated plaintiff's pre-existing seizure condition — is highly relevant. (4) District court erred in granting Honda summary judgment. (a) Consumer-expectation test is acceptable standard by which to evaluate plaintiff's claim. Plaintiff offered evidence that airbag is such familiar product and that consumers — and, indeed, manufacturers like Honda — have expectations about product's performance and safety. (b) Analyzing plaintiff's claim under consumer-expectation test — and without considering Honda's hearsay expert reports — district court inappropriately granted summary judgment on ground that plaintiff failed to present genuine issue of material fact as to existence of defect in airbag. Because none of Honda's hearsay expert reports should have been considered, only evidence in record regarding nature of accident is circumstantial evidence that plaintiff presented — that prior to her seizure, she was driving at speed of approximately 70 mph, that Accord suddenly veered off road, that eyewitness did not see any brake lights, that Accord collided with and uprooted tree located some distance downhill from interstate, and that plaintiffs' insurance company declared vehicle "total loss" and paid plaintiffs over $11,000 on their insurance claim, showing that vehicle sustained significant damage and giving rise to inference that their vehicle was traveling at high speed when it collided with tree. Shorn of its expert reports concluding that collision was relatively low-speed accident, Honda has essentially no evidence to counter plaintiffs' circumstantial evidence that Accord struck tree at high speed, in which case, according to

Honda's own brochure, airbag likely should have deployed. Plaintiff's claim should survive summary judgment because only evidence in record, viewed according to our obligation to draw all reasonable inferences in her favor, supports her hypothesis that airbag in her Accord was defective because her accident more likely than not involved conditions in which airbag, should have deployed. In contrast, without its hearsay expert reports, no evidence supports Honda's alternative hypothesis that airbag was not defective and should not have deployed because Accord was traveling at speed insufficiently great to cause rapid deceleration and deployment. (c) Plaintiff offered sufficient evidence for which reasonable jury could find that defective airbag proximately caused her injuries, and Honda failed to produce admissible evidence to support any contrary theory. Given that both plaintiff and her husband offered testimony that plaintiff developed bruise on her head day after accident, plaintiff's proof adequately presented genuine issue of material fact that jury could resolve regarding existence of second collision. This is especially so when combined with plaintiffs' circumstantial evidence regarding vehicle's speed just before it veered off interstate, which would tend to suggest that Accord collided with tree at speed capable of causing second interior collision in absence of deployment of Accord's airbag. Heisser's opinion that if second collision occurred, such trauma to head more than likely aggravated or exacerbated her pre-existing seizure disorder provides sufficient evidence for reasonable jury to conclude that defective airbag was responsible to some degree for enhancing plaintiff's injuries. No evidence supports district court's suggestion that plaintiff's injuries may not have been different or avoided if airbag had deployed. Honda's brochure warns that "airbags inflate with tremendous speed — over 10 mph," that airbags can "cause abrasions and bruises," and that if occupant "sit[s] too close, or do[es]n't wear a seat belt, or do[es]n't sit in a proper position, an inflating airbag can cause broken bones or more serious injuries." According to this information, depending on plaintiff's position in her seat, plaintiff could possibly have suffered injuries and bruising on her head even if her airbag had deployed properly in high-speed collision with tree. But record lacks any evidence regarding plaintiff's position in car and regarding likelihood that deployment of airbag would cause injuries or bruising similar to that which plaintiff experienced. Likewise, Honda offered no admissible evidence to support any theory that plaintiff's worsened seizure condition stems entirely from effects of initial collision, that her deteriorating seizure condition has no connection to head injury, or that plaintiff would likely still have suffered injury and deterioration in her condition had airbag deployed properly. Heisser Declaration satisfies plaintiff's initial burden of demonstrating that sufficient evidence exists to allow reasonable jury to find that defective airbag proximately caused her injuries due to failure to deploy and prevent second collision. **Dissent:** This case presents textbook example of when district court should grant summary judgment. There was no evidence by which jury could find defect in car. Car was disposed of prior to suit. There is no basis for finding defect from non-deploying airbag unless plaintiff's car came to sudden stop while going at least 14 mph. Simply put, there was no evidence that car was going that fast when it came to rest. When car leaves highway at 70 mph and coasts for uncertain distance to stop in wet ground in bunch of small trees, there is no way that reasonable juror could conclude, without more, on more-probable-than-not-basis, that car was going over 14 mph when it suddenly came to stop. (***Sigler v. American Honda Motor Co.,*** 33 TAM 34-44, 7/8/08, Moore, dissent by Rogers, 17 pages, Pub.)

# U.S. District Courts

▼ **Certified question of state law as to whether Tennessee law recognizes exception to economic loss doctrine under which recovery in tort is possible for damage to defective product itself when defect renders product unreasonably dangerous and causes damage by means of sudden, calamitous event**

**TORTS: Products Liability. APPEAL & ERROR: Certification of State Law Question.** Insured of plaintiff purchased bus manufactured by Prevost Car (US) Inc. (Prevost) with engine produced by Detroit Diesel Corporation. Due to alleged defect in engine, bus caught fire. Fire did not cause any personal injury or damage to any property besides bus. Plaintiff paid insured $405,250 under its insurance policy to cover fire damage. Plaintiff filed complaint alleging, among other counts, negligence and strict products liability tort claims. Suit was removed to this court. Prevost moved to dismiss charges for failure to state claim. Prevost argues that economic loss doctrine bars Prevost's tort claim. Doctrine bars plaintiff from bringing products liability tort claims to recover purely economic losses, such as loss of value, costs of repair and replacement of defective goods, or consequent loss of profits. Prevost attests that doctrine applies when defective product causes neither personal injury not damage to any property besides product itself. Plaintiff urges this court to recognize exception to doctrine for instances in which defective product poses unreasonable danger to user or his property, and damage to that product is caused by sudden, calamitous event. Parties dispute whether Tennessee law recognizes such exception. Tennessee Supreme Court has not ruled on issue, federal courts sitting in diversity have reached contradictory conclusions, and one potentially on-point Court of Appeals case did not address issue. Following question is certified to Tennessee Supreme Court: Does Tennessee law recognize exception to economic loss doctrine under which recovery in tort is possible for damage to defective product itself when defect renders product unreasonably dangerous and causes damage by means of sudden, calamitous event? (***Lincoln General Insurance Co. v. Detroit Diesel Corp.,*** 33 TAM 34-45, 6/27/08, M.D.Tenn., Trauger, 7 pages.)

# Administrative Agencies

▼ **Amendments to Child Support Guidelines include increase in annual gross income to be imputed in establishing initial order for support when there is no reliable evidence of income and provision that criminal activity and/or incarceration will result in finding of voluntary underemployment or unemployment**

**FAMILY LAW: Child Support.** Department of Human Services has promulgated amendments to Child Support Guidelines (Chapter 1240-2-4). Amendments were filed on 5/8/08 and were to take effect on 7/22/08. Joint Government Operations stayed effective date until 8/14/08. Amendments include following: (1) Rule 1240-2-4-.04(3)(a)1(xiii) is amended to include "net" capital gains as gross income. (Amendment reflects change to TCA 36-5-101(e)(1)(B) pursuant to 2007 PC 187, 32 TAM 23-53.) (2) Rule 1240-2-4-.04(3)(a)2(i)(I) is amended to provide that criminal activity and/or incarceration will result in finding of voluntary underemployment or unemployment, and child support will be awarded

based upon this finding of voluntary underemployment or unemployment. (3) Rule 1240-2-4-.04(3)(a)2(iv)(I)III is amended to increase amount of annual gross income to be imputed in establishing initial order for support when there is no reliable evidence of income to $37,589 for male parents and $29,300 for female parents. These figures represent full-time, year-round worker's median gross income for Tennessee population only, from American Community Survey of 2006 from U.S. Census Bureau. (4) Rule 1240-2-4-.04(3)(a)5 is amended to provide that federal benefits received by child on account of parent are counted as income to parent on whose account benefit is drawn and later deducted to determine Final Child Support Order. Before amendment, only Social Security Title II benefits were treated in this manner. (5) Rule 1240-2-4-.04(4)(c) and (d) are amended to reflect federal government's increased amount of gross income subject to Social Security employment tax (FICA) to $102,000 from $90,000. (6) Previous (6/26/06) version of Child Support Guidelines explains that in 50-50/equal-parenting cases, and in cases with 50-50/equal-parenting arrangement combined with standard or split parenting arrangement, father would be designated as Alternate Residential Parent for 50-50 child(ren) solely for purpose of calculating Parenting Time Adjustment (PTA). This language was found in Rule 1240-2-4-.04(7)(g)4, titled "Reduction in Child Support Obligation for Additional Parenting Time." In amended Guidelines, this information has been reworded for added clarity and moved to Rule 1240-2-4-.04(7)(b)2, where it replaces existing language. (7) Rule 1240-2-4-.04(7)(b)4 provides that calculation of parent's annual average parenting time with multiple children includes number of parenting days with all children covered by order, including 50-50/equal-parenting child (182.5 days). As result, line 5a ("equal parenting time") was removed from Child Support Worksheet. (8) New Rule 1240-2-4-.04(7)(d) clarifies that in non-parent caretaker situations, neither parent is entitled to PTA credit for spending more than standard parenting time with child(ren). Subsequent subparagraphs were renumbered. (9) Rule 1240-2-4-.04(8)(c)4 is amended to remove any distinction between work-related childcare expenses paid by payroll deduction and such expenses that are paid by parent or non-parent caretaker directly to child care provider. As result, line 8d (Work-related childcare — Non Payroll Deducted) was removed from Child Support Worksheet. (10) Rule 1240-2-4-.05(2)(d)2(i) is amended to reflect increase in poverty level for single adult to $10,400 from $9,645 annual gross income. (11) New Rule 1240-2-4-.05(8) concerns prohibition against retroactive modifications and fact that, by operation of law, overdue support is judgment subject to enforcement. Intent is to reiterate that these provisions apply to all Tennessee courts. (***Amendments to Child Support Guidelines, Rulemaking Hearing Rules,*** 33 TAM 34-46, 8/15/08, Dept. of Human Services, 12 pages.)

# Attorney General Opinions

▼ **Proposed bill, which would establish *de facto* custodianship status under Tennessee law, would, as currently drafted, unconstitutionally infringe on parent's rights under both state and federal constitutions; substituting language "substantial harm" for phrase "adverse harm" in Sections 1(c)(2) and 1(c)(3) of bill would render proposed bill constitutional**

**FAMILY LAW: Child Custody.** Proposed bill (SB 3047/HB 2883), which would establish *de facto* custodianship status under Tennessee law, would, as currently drafted, unconstitutionally infringe on parent's rights under both state and federal constitutions. Section 1(a) of proposed bill provides that individual may be declared *de facto* custodian of child when there is clear and convincing evidence that individual had been primary caretaker and financial supporter of child under three years old for more than six months or of child three years or older for more than one year. Section 1(b) provides that if both requirements of Section 1(a) and any of circumstances in Section 1(c) are proven by clear and convincing evidence, there is rebuttable presumption that it is in best interest of child to remain in custody of *de facto* custodian. Circumstances under Section 1(c) are that (1) parent has willfully abandoned child younger than three years old for more than six months or has willfully abandoned child three years old or older for year or more, (2) parent has engaged in conduct that may adversely harm child, (3) child may suffer harm if removed from custody of *de facto* custodian, or (4) there is prior court order awarding custody to party other than parent. Proposed bill goes on to lay out 11 best interest factors for court to consider in determining custody of child. Substituting language "substantial harm" for phrase "adverse harm" in Sections 1(c)(2) and 1(c)(3) of bill would render proposed bill constitutional. (***Attorney General Opinion 08-132,*** 33 TAM 34-47, 8/13/08, 4 pages.)

▼ **General sessions courts have authority under 18 USC 2703 to issue subpoenas *duces tecum* for electronically stored telephone and other electronic data**

**CIVIL PROCEDURE: Subpoena Duces Tecum — General Sessions Court. GOVERNMENT: City Court.** (1) General sessions courts have authority under 18 USC 2703 to issue subpoenas *duces tecum* for electronically stored telephone and other electronic data. General sessions courts are courts of competent jurisdiction within meaning of 18 USC 2703 and, therefore, have authority to issue such subpoenas. Nevertheless, such authority is limited to county in which court is located. (2) City courts that possess concurrent jurisdiction with general sessions courts to issue subpoenas for electronic records pursuant to TCA 40-17-123 are courts of competent jurisdiction within meaning of 18 USC 2703. Whether particular city court is such court of competent jurisdiction depends on language of private act that established that particular city court. (***Attorney General Opinion 08-136,*** 33 TAM 34-48, 8/15/08, 3 pages.)

▼ **Legislative committee acting alone cannot constitutionally suspend, delay, or otherwise negate effectiveness of rule of state agency**

**GOVERNMENT: Administrative Law.** (1) In conducting its rules review responsibilities under TCA 4-5-226(c), TCA 4-5-226(k) does not constitutionally permit legislative committees, acting without legislative enactment, to suspend, delay, or otherwise negate effectiveness of rule of state agency. Legislative committee acting alone cannot constitutionally suspend, delay, or otherwise negate effectiveness of rule of state agency. (2) If legislative committees vote to suspend, delay, or negate effectiveness of agency rule, and, as result of such vote, notify Secretary of State of such act under TCA 4-5-226(k)(1)(C), and if, pursuant to that same statute, Secretary of State publishes notice in Tennessee Administrative Register (TAR) stating that such rule will not become, or is no longer, effective because of such vote, rule still becomes effective, or remains effective, and state agency may proceed to enforce its rule despite publication of notice in TAR. (3) Presuming no court has adjudged provisions of TCA 4-5-226, allowing legislative committees to suspend agency rules, unconstitutional, failure to provide 15-day advance notice to agency and opportunity for

agency to be heard on contemplated suspension of rule pursuant to TCA 4-5-226(k))(1)(A) nullifies committees' actions suspending agency rule(s) despite contrary publication in TAR. Failure to adhere to statute providing affected agency notice and opportunity to be heard nullifies committees' action. (***Attorney General Opinion 08-131,*** 33 TAM 34-49, 8/11/08, 4 pages.)

**CRIMINAL SENTENCING: Probation — Fines. CRIMINAL LAW: Prostitution.** TCA 39-13-513(b)(3) and 39-13-514(b)(3) provide, respectively, that person convicted of prostitution or patronizing prostitution within 1.5 miles of school must, in addition to any other authorized punishment, be sentenced to at least seven days incarceration and fined at least $1,000. Hence, if person is convicted of or pleads guilty to prostitution or patronizing prostitution within 1.5 miles of school, he or she must serve minimum sentence of seven days in jail and be fined at least $1,000. Language of both statutes clearly provides mandatory minimums for incarceration and fines. (***Attorney General Opinion 08-120,*** 33 TAM 34-50, 6/13/08, 3 pages.)

**GOVERNMENT: Elections.** TCA 2-2-107(a)(1) provides that person must be registered as voter of precinct in which he or she resides and, "if provided for by municipal charter or general law, may also be registered in a municipality in which the person owns real property in order to participate in that municipality's elections." Pursuant to TCA 2-2-107(a)(1), General Assembly has passed number of private acts authorizing individuals to vote in municipal elections where individual does not reside in municipality but does reside in county where municipality is located and owns real property within municipality's boundaries. Such legislation does not violate provisions of Tenn. Const. Art. IV, Sec. 1, which require that qualifications for registering to vote be "equal and uniform" and/or that voters "vote in the election precinct in which they may reside." Tennessee Supreme Court has determined that Tenn. Const. Art. IV, Sec. 1 does not apply to municipal elections. (***Attorney General Opinion 08-122,*** 33 TAM 34-51, 7/10/08, 3 pages.)

**COMMERCIAL LAW: Identity Theft — Consumer Protection. GOVERNMENT: Courts.** In 2007, General Assembly, pursuant to PC 170, adopted Credit Security Act (Act), which provides, in Section 6, that after 1/1/08, any person, non-profit business entity, or for-profit business entity in Tennessee that has obtained federal social security number for legitimate business or governmental purpose must make reasonable effort to protect that social security number from disclosure to public. Section 6 of Act does not apply to Clerk of Appellate Courts. (***Attorney General Opinion 08-123,*** 33 TAM 34-52, 7/14/08, 3 pages.)

**GOVERNMENT: Counties — Elections.** Pursuant to TCA 5-1-104, as amended by 2008 PC 871, vacancies in office of county mayor — such as occurred in Sumner County when incumbent mayor died on 7/6/08 — are filled by appointment by county legislative body, and successor is elected at next general election. In all but Davidson and Shelby counties, appointment by county legislative body is governed by procedures set forth in TCA 5-5-111, as rewritten by PC 871, Section 3. (***Attorney General Opinion 08-125,*** 33 TAM 34-53, 7/18/08, 4 pages.)

# Web Links

**33 TAM 34-1:**
http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/083/EskinMOPN.pdf
**33 TAM 34-2:**
http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/083/AndersonBOPN.pdf
**33 TAM 34-3:**
http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/083/MaggartOPN-CORR.pdf
**33 TAM 34-4:**
http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/083/Amos%20v.%20Metro%20Gov't%20of%20Nash.OPN.pdf
**33 TAM 34-5:**
http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/083/DowneyOPN.pdf
**33 TAM 34-6:**
http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/083/ShermanOPN.pdf
**33 TAM 34-7:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/BurgessBOPN.pdf
**33 TAM 34-8:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/PonsPierreOPN.pdf
**33 TAM 34-9:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/JCS-Opn.pdf
**33 TAM 34-10:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/PolkCLOPN.pdf
**33 TAM 34-11:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/JQWopn.pdf
**33 TAM 34-12:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/SherrodMWOpn.pdf
**33 TAM 34-13:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/GoldenMichaelOPN.pdf
**33 TAM 34-14:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/WilliamsDPopn.pdf
**33 TAM 34-15:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/HannaAnnetteOPN.pdf
**33 TAM 34-16:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/PeguesLloydMopn.pdf
**33 TAM 34-17:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/HollyMSOpn.pdf
**33 TAM 34-18:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/StewartTOPN.pdf
**33 TAM 34-19:**
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/083/HuberKathypet%20to%20rehearORD.pdf
**33 TAM 34-20:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/MathewsCourtneyBOPN.pdf
**33 TAM 34-21:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/rubinrobertOPN.pdf
**33 TAM 34-22:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/lyonsmopn.pdf
**33 TAM 34-23:**
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**33 TAM 34-24:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/caspermoopn.pdf
**33 TAM 34-25:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/ButlerLavidoOPN.pdf
**33 TAM 34-26:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/BurtonRichardOPN.pdf
**33 TAM 34-27:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/TaylorMFopn.pdf
**33 TAM 34-28:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/JerniganGeorgeLucasOPN.pdf
**33 TAM 34-29:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/FieldscmOPN.pdf
**33 TAM 34-30:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/SheffatOPN.pdf
**33 TAM 34-31:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/ThompsonJROPN.pdf
**33 TAM 34-32:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/ClarkRobertBOPN.pdf
**33 TAM 34-33:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/WaltonHLopn.pdf
**33 TAM 34-34:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/AllenJGopn.pdf
**33 TAM 34-35:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/DixonMatthewOPN.pdf
**33 TAM 34-36:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/BakerShelvyOPN.pdf
**33 TAM 34-37:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/MooreLebronOPN.pdf
**33 TAM 34-38:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/WallaceGaryOPN.pdf
**33 TAM 34-39:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/HiggsTEopn.pdf
**33 TAM 34-40:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/WalkerMartinOPN.pdf
**33 TAM 34-41:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/Mosleycvrule20.pdf
**33 TAM 34-42:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/RobertsonAnthonyOPN.pdf
**33 TAM 34-43:**
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/083/McGowanJohnnyLOPN.pdf
**33 TAM 34-44:**
http://www.ca6.uscourts.gov/opinions.pdf/08a0247p-06.pdf
**33 TAM 34-46:**
http://www.tn.gov/sos/rules_filings/05-06-08.pdf
**33 TAM 34-47:**
http://tn.gov/attorneygeneral/op/2008/OP/OP132.pdf
**33 TAM 34-48:**
http://tn.gov/attorneygeneral/op/2008/OP/OP136.pdf
**33 TAM 34-49:**
http://tn.gov/attorneygeneral/op/2008/OP/OP131.pdf
**33 TAM 34-50:**
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**33 TAM 34-53:**
http://tn.gov/attorneygeneral/op/2008/OP/OP125.pdf