Tennessee Attorneys Memo

A weekly summary of all new Tennessee law developments

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Variety of issues on Supreme Court's 2002 agenda

The Tennessee Supreme Court begins 2002 with less than 50 cases pending in which the court has granted permission to appeal, but the cases will give the court an opportunity to address a variety of issues.

Torts. For several years, tort issues, particularly those which arose in the aftermath of the adoption of comparative fault principles, dominated the court's agenda. This year the court has few tort issues before it.

● The court will review a Court of Appeals' decision holding that should facts justify the establishment of a master/servant or principal/agent relationship, resident physicians who are immune from personal liability by virtue of their status as state employees can also be servants of a hospital in a transaction for which there would normally be no immunity for the servant or agent. *Johnson v. Lebonheur Children's Medical Center,* 25 TAM 26-13, *appeal granted Dec. 4, 2000.*

● The court will hear a case involving claims for inducement of breach of contract and abuse of process against an insured and his insurance company under principles of *respondeat superior* for damages allegedly caused by a law firm that the insurer hired to represent the insured in the defense of a personal injury action. *Givens v. Mullikin,* 26 TAM 1-8, *appeal granted May 7, 2001.*

● The court will review a Court of Appeals' ruling that a "Physician Practice Management Company," which receives referrals from attorneys who represent persons who are injured and unable to afford private medical care or are not covered by health insurance, stated a cause of action against an insurance company and four of its employees for tortious interference with a business relationship. *Trau-Med of America Inc. v. Allstate Insurance Co.,* 26 TAM 1-9, *appeal granted May 14, 2001.*

Employment. The court granted permission to appeal in a case in which the issue, one of first impression, is whether a concurrent common law claim remains for retaliatory discharge of an employee for refusing to participate in, or remain silent about, illegal activities, after the enactment of Tennessee's whistleblower statute, TCA 50-1-304. The Court of Appeals reasoned that since a plaintiff, in establishing a claim under the whistleblower statute, must show that he or she was discharged solely for refusing to participate in, or remain silent about, illegal activities, it would not make sense to have a concurrent common law whistleblower claim for which a plaintiff need only show that the refusal to participate in, or remain silent about, illegal activities was a "substantial factor" in an employee's discharge. *Guy v. Mutual of Omaha Insurance Co.,* 26 TAM 15-10, *appeal granted July 9, 2001.*

The court agreed to hear a case in which the trial court dismissed a suit by in-house counsel for common law retaliatory discharge. *Crews v. Buckman Laboratories International Inc.,* 26 TAM 31-14, *appeal granted Oct. 22, 2001.*

Estates & trusts. The court will decide whether a confidential relationship was established when the proponent of a will did not become aware that a decedent had executed a power of attorney in her favor until after the decedent executed the will. *Childress v. Currie,* 25 TAM 27-9, *appeal granted Jan. 22, 2001.*

The court has pending a case involving the application of the Uniform Simultaneous Death Act. *Heirs of Ellis v. Estate of Ellis,* 26 TAM 23-15, *appeal granted Sept. 17, 2001.*

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Highlights

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Family law. The court will have a chance to resolve the issue of what is the proper measuring stick to be used by courts in determining whether an economically disadvantaged spouse cannot be rehabilitated, and hence, should be awarded alimony *in futuro.* In the case under review, the Court of Appeals ruled that the parties' standard of living should be used. *Robertson v. Robertson,* 25 TAM 38-19, *appeal granted March 12, 2001.*

The court has agreed to hear two change of custody cases. *Blair v. Badenhope,* 25 TAM 50-14, *appeal granted April 30, 2001,* and *Shoemake v. Kendrick,* 26 TAM 28-18, *appeal granted Dec. 27, 2001.*

The court granted review in a case in which the trial court ordered the father, who was designated as the primary custodian of the parties' children, to pay the mother child support. The Court of Appeals ruled that when time spent with the child(ren) is more evenly divided between the parents and courts are allowed to deviate from the Child Support Guidelines, the deviation may include the re-alignment of the obligor and the obligee. *Gray v. Gray,* 26 TAM 16-13, *appeal granted July 2, 2001.*

Practice of law. The court will consider the application of the common fund doctrine in a wrongful death case. *Kline v. Kline,* 26 TAM 12-7, *appeal granted Sept. 10, 2001.*

The court will review a ruling that the state constitution does not prevent an elected, non-attorney juvenile court judge from appointing a juvenile court referee, who is an attorney but not elected, to hear cases involving the termination of parental rights. *In re Valentine,* 26 TAM 19-13, *appeal granted Sept. 10, 2001.*

Criminal law. The court granted permission to appeal in a case as to how the burden of proof on the issue of insanity affects the standard of review of a jury's findings on insanity. *State v. Flake,* 26 TAM 35-29, *appeal granted Dec. 17, 2001.*

The court has agreed to hear two cases concerning a trial court's failure to charge lesser included offenses. *State v. Allen,* 25 TAM 19-37, *appeal granted Oct. 30, 2000,* and *State v. Locke,* 26 TAM 33-22, *appeal granted Dec. 17, 2001.*

Criminal procedure. The court has agreed to hear a case in which the Court of Criminal Appeals held that the "pursuit" of a suspect on foot by an officer in a patrol car does not constitute a "seizure." *State v. Randolph,* 26 TAM 21-29, *appeal granted Sept. 17, 2001.*

The court agreed to review a case in which the Court of Criminal Appeals held that a defendant's consent to search "in the vehicle for weapons" encompassed easily accessible areas underneath the vehicle. *State v. Troxell,* 26 TAM 27-36, *appeal granted Sept. 24, 2001.*

Criminal sentencing. The court agreed to decide the issue of whether, in cases in which the denial of pretrial diversion is appealed after trial, the Court of Criminal Appeals may consider the evidence at trial when reviewing the denial of diversion. *State v. Yancey,* 26 TAM 3-33, *appeal granted May 14, 2001.*

The court will resolve an issue upon which intermediate appellate courts have split — whether the sentence enhancement factor for the commission of an offense under circumstances under which the potential for bodily injury to a victim was great applies when individuals other than the victim of the crime are placed at risk. *State v. Imfeld,* 26 TAM 14-30, *appeal granted July 2, 2001.*

The court will review a holding that the fine provisions of TCA 55-50-504(a)(2) — permitting the imposition of a fine with no maximum limit for a second or subsequent conviction of driving on a revoked, suspended, or cancelled driver's license — constitute "excessive punishment," and hence, are unconstitutional. *State v. Taylor,* 26 TAM 24-42, *appeal granted Sept. 17, 2001.*

Workers' Comp Panel

▼ **Award of benefits for 12.5% permanent disability to employee who suffered hematoma and complained of debilitating pain and stiffness is affirmed when evaluating physician testified that employee was permanently impaired, whether or not AMA Guides provide table for calculating her impairment, and when lay testimony indicated that employee was restricted in her ability to work and earn income**

WORKERS' COMPENSATION: Permanent Disability. On 2/15/99, plaintiff, who assembles yard and garden tractors, was sitting at her desk when co-worker accidentally drove tractor into back of her chair, pinning her to her desk. Plaintiff was taken to emergency room, where she received first aid for hematoma and was released. When hematoma did not resolve itself, she was referred to Dr. Johnson, orthopedic surgeon. Johnson treated plaintiff conservatively at first but, when hematoma — collection of blood — did not resolve itself, he treated it surgically. Plaintiff returned to work but continues to have complaints of debilitating pain and stiffness. Johnson opined that plaintiff would not be permanently injured. Plaintiff's attorney sent plaintiff to Dr. Boals, who examined plaintiff on 1/4/00. Boals, using AMA Guides, opined that plaintiff would retain permanent medical impairment of 5%. Chancellor awarded plaintiff workers' compensation benefits for 12.5% permanent disability. **Affirmed.** Defendant contended that there is no competent expert medical evidence of permanency because AMA Guides do not provide table for calculating plaintiff's permanent impairment. Dr. Boals opined that plaintiff is permanently impaired, whether Guides provide table or not. In such case, trial court may award permanent disability benefits if there is supporting lay proof, as medical or anatomical impairment rating is not always indispensable to trial court's finding of permanent vocational impairment. It is equally clear from lay testimony that plaintiff is restricted in her ability to work and earn income. Moreover, it is within trial court's discretion to conclude that opinion of certain experts should be accepted over that of other experts and that one opinion contains more probable explanation. (***Sangster v. MTD Products Inc.,*** 27 TAM 2-1, 10/25/01, Jackson, Loser, 3 pages, adopted and affirmed per curiam 12/6/01.)

WORKERS' COMPENSATION: Permanent Disability. On 10/24/98, plaintiff was sealing drain lines with concrete at Center Hill dam when he and another worker attempted to move large rock. While moving rock, plaintiff felt pop in his right knee followed by "warm" sensation. By next day, plaintiff could not walk and sought medical treatment. Plaintiff eventually required several reconstructive knee surgeries. Plaintiff has not been able to work. Dr. Posman, orthopedic surgeon, initially treated plaintiff. Physical therapy and other conservative treatment failed to improve plaintiff's condition. On 4/6/99, Posman performed surgery on plaintiff's right knee. When plaintiff continued to experience pain, Posman referred him to Dr. MacKay, orthopedic surgeon in same practice group. MacKay ordered follow-up

MRI, which revealed torn meniscus in plaintiff's right knee. On 9/8/99, MacKay performed surgery to repair tear. Plaintiff later underwent third surgery as well as second round of physical therapy before being placed at maximum medical improvement on 3/28/00. MacKay recommended cane as needed and gave plaintiff knee brace, which plaintiff testified he uses daily. MacKay testified that plaintiff could not return to his previous employment in part because he could not climb ladders. Before his deposition, MacKay assessed 17% impairment based on plaintiff's knee injury. But, during cross-examination while responding to questions from defendant's counsel, MacKay testified that 10% might be more appropriate. Trial judge awarded plaintiff workers' compensation benefits for 80% permanent disability to right leg. **Affirmed.** (1) Defendant argued that trial judge erred in failing to consider 10% impairment rating discussed during MacKay's deposition. There is no error with respect to this issue. MacKay assessed plaintiff's 17% impairment rating using Table 36 of fourth edition of AMA Guides. While cross-examining MacKay, defendant's counsel quoted from text preceding Table 36 and questioned MacKay about table *vis a vis* 17% impairment rating. MacKay agreed that 10% might be more appropriate. (2) Defendant contended that trial judge erred in failing to fully consider plaintiff's age, education, work experience, skills, and training. Trial judge specifically mentioned these factors in his judgment. Moreover, these factors go to vocational disability. Worker does not have to show vocational disability or loss of earning capacity to be entitled to benefits for loss of use of scheduled member. (***Jenkins v. Kemper Insurance Co.,*** 27 TAM 2-2, 10/31/01, Knoxville, Byers, 4 pages, adopted and affirmed per curiam 12/7/01.)

▼ **In case in which trial court found that employee had 25% medical impairment and awarded employee benefits for 90% permanent disability, preponderance of expert testimony was that employee also suffered from depression from work-related back injury and that medical impairment was 33% — 25% plus 8% for depression; preponderance of lay and expert testimony established that employee was unable to work at occupation that generates income, and hence, is entitled to benefits for permanent and total disability**

WORKERS' COMPENSATION: Causation — Permanent Disability. On 12/1/98, plaintiff was performing trash detail duties when he injured his back. Plaintiff was lifting 20 to 50 pounds of cardboard boxes at time and placing them in baler. MRI revealed ruptured disc, which was subsequently treated with surgery. After surgery, plaintiff continued to experience disabling pain in his back and leg. Despite extensive treatment for his work-related injury, plaintiff has not been able to return to work. Post-surgical MRI revealed inoperable scarring at surgical site. Functional capacity evaluation, performed on 2/23/99, showed plaintiff capable of performing sedentary work. Later functional capacity evaluation, performed by same examiner, showed plaintiff incapable of even sedentary work. Dr. Finelli performed laminectomy and removed large free fragment of disc material that was compressing nerve root on plaintiff's left side. When plaintiff's condition failed to improve after surgery, Finelli referred plaintiff to pain management specialist. Dr. Lucas, pain management specialist, diagnosed plaintiff with severe post-laminectomy syndrome and began conservative treatment with pain medication. When conservative treatment failed, Lucas instituted more aggressive treatment that ranged from injections to surgical implantation of spinal cord stimulator. Plaintiff did not obtain any pain relief from treatment and began to suffer from depression. Lucas did not believe plaintiff could return to any kind of gainful employment. Dr. Browder, specialist in pain management who performed independent medical examination of plaintiff, opined that plaintiff suffered 37% whole body impairment — 10% as result of herniated disc, 15% as result of gait disturbance, 8% resulting from depression, and 9% as result of sexual dysfunction. Browder did not think plaintiff would ever be able to work again. Dr. Koenig, orthopedic surgeon who performed independent medical evaluation of plaintiff, found that plaintiff suffered 25% whole body impairment — 10% as result of herniated disc and 15% as result of gait disturbance. Koenig indicated that his testing suggested possible symptom magnification or malingering. Koenig declined to assess impairment for depression or sexual dysfunction, stating that such ratings would require psychiatrist and urologist. Koenig made no statement regarding plaintiff's ability to work. Dr Anchor, clinical psychologist and vocational disability expert who evaluated plaintiff, reported that plaintiff was 75 to 80% vocationally disabled from entire United States labor market. After reviewing reports from Browder and Lucas, Anchor found plaintiff to be 100% vocationally disabled from McMinn County labor market. Anchor reported test results that were indicative of mood disorder (major depression recurrent without psychotic features). Anchor ruled out malingering, symptom magnification, secondary gain, and other manifestations of obstructiveness on part of plaintiff. Chancellor awarded plaintiff workers' compensation benefits for 90% permanent disability. **Affirmed as modified.** (1) Uncontroverted medical testimony indicates plaintiff's medical impairment rating for his back injury is 25% to body as whole. Plaintiff argued that trial judge erred in failing to consider 8% rating attributable to his depression. Preponderance of expert testimony shows that plaintiff suffers from depression stemming from his work-related injury. Hence, evidence preponderates in favor of medical impairment of 33% to body as whole. (2) Evidence preponderates in favor of permanent and total disability. Preponderance of lay and expert testimony establishes that plaintiff is unable to work at occupation that generates income. Plaintiff, who was 40 years of age at time of trial, has high school education and training as auto mechanic. Dr. Anchor testified that plaintiff is 100% disabled in local job market. Plaintiff testified that he knows of no job he could perform in his disabled condition. Medical and vocational testimony indicates that plaintiff is not qualified to return to even sedentary work. (***Prater v. Mayfield Dairy Farms Inc.,*** 27 TAM 2-3, 11/6/01, Knoxville, Byers, 6 pages, adopted and affirmed per curiam 12/11/01.)

▼ **Evidence did not preponderate against trial court's award of benefits for mental injury when employee, nurse, stuck herself in thumb with dirty needle when HIV-positive patient made unexpected move, employee received letter from county health department that she was HIV-positive, employee later learned that letter was intended for someone else with same or similar name and that she was not infected, employee became anxious about her condition and family, and psychiatrist established medical causation and permanency; mental and nervous illnesses are compensable when causally connected to work-related accident**

WORKERS' COMPENSATION: Causation. Approximately two years after beginning work for defendant, plaintiff, licensed practical nurse, was required to perform treatment on HIV-positive, hepatitis infected patients. Plaintiff followed usual precautions of donning two pairs of gloves, two pairs of shoes, coat, and

cap, and then began treatment in room secluded from other patients. After plaintiff removed needle from patient, patient made unexpected move and plaintiff accidentally stuck herself in thumb with dirty needle. Although tests conducted soon after accident reflected no evidence of infection, plaintiff received notice from Obion County Health Department that letter from Shelby County Health Department indicated that she was HIV-positive. Plaintiff later learned that letter was intended for someone else with same or similar name and that she was not infected. Tests had been conducted in Shelby County. Plaintiff was given literature to read and advised of organizations available to her as her disease progressed. Plaintiff became anxious about her condition, and her family and other personal relationships suffered. Plaintiff's attorney referred plaintiff to Dr. Bond, psychiatrist, who established both medical causation and permanency. At time of trial, plaintiff was taking prescription antidepressant medication. Plaintiff is now working for different employer but becomes squeamish at sight of blood and when using needles. Chancellor awarded plaintiff workers' compensation benefits for 15% permanent disability. **Affirmed.** Defendant contended that mental injuries are compensable only if they can be traced to identifiable, stressful, work-related event producing sudden mental stimulus such as fright, shock, or excessive unexpected anxiety. But mental and nervous illnesses are also compensable when causally connected to work-related accident. Dr. Bond's report established permanency. Evidence did not preponderate against chancellor's findings. (***Thompson v. Vivra Renal Care Inc.,*** 27 TAM 2-4, 11/5/01, Jackson, Loser, 4 pages, adopted and affirmed per curiam 12/11/01.)

▼ **When employee chose orthopedic surgeon from panel of doctors, saw that doctor on two visits during 3/98, was discharged on 3/16/98, and requested, but was denied, permission to see psychiatrist, it was reasonable for employee to seek medical attention of her own choosing since she claimed she was still in need of treatment; medical expenses of two doctors incurred during period of time between furnishing list of designated physicians and discharge of employee by designated physician are disallowed; employer is liable for all medical expenses of doctors and psychiatrist which were incurred after this period of time**

WORKERS' COMPENSATION: Causation — Medical Expenses. On 1/13/98, employee, secretary, was asked to go down in plant and work with box of metal parts. Employee testified that box of parts weighed about 40 to 50 pounds and that as she attempted to pull box off table to move box, box started to fall and that she felt pop in her back with pain running down her buttock and left leg. On 1/20/98, employee went to Dr. Coffey, family practice physician, who treated her with medicine and therapy and, after period of time, referred her to several other doctors. Employee eventually returned to work during 3/98 but only worked light duty job for about 10 days. Prior to 1/13/98 incident, employee had neck and shoulder pain that had been diagnosed as fibromyalgia, she suffered from endometriosis which caused some back pain, she had upper back pain for which she took pain medication, and she had suffered from depression. Employee also testified that she had hurt her back at work during 6/97 while lifting but never mentioned event to employer. Medical records from doctor's clinic indicate chronic back pain dating back to late 1996. Dr. Hyde, orthopedic surgeon, examined employee on 2/13/98 and took history that employee had injured her back at work during 6/97 and had reinjured herself on 1/13/98 while working. Hyde testified that MRI showed degenerative disc disease and small disc herniation at L5-S1. During his testimony, Hyde originally attributed cause of problem to 6/97 work incident and 1998 work incident but later testified that employee's condition was probably more related to last incident. Hyde opined that employee had 10% medical impairment and was not employable. Dr. Kennedy, retired orthopedic surgeon, examined employee during 11/98 and took history that she had no significant low back pain prior to 1/13/98 work activity. Kennedy felt employee's symptoms were exaggerated. Kennedy stated that MRI showed broad-based disc bulge which was consistent with degenerative disc disease but not indicative of any disc injury, that main cause of employee's condition was aging process but that 1998 work incident aggravated her condition, and that employee had 13% impairment. Dr. Lieberman, psychiatrist, examined employee during 5/98. Lieberman testified that employee was extremely depressed apparently due to fact that she was not able to work. Lieberman classified employee's condition as major depression, chronic and recurrent, with 55 to 60% impairment. Dr. Johnson, orthopedic surgeon, examined employee on 3/3/98 and saw her again on 3/16/98. Johnson concluded that diminished disc height on MRI at L5-S1 was long-standing condition and that surgery would not be recommended. Dr. Hankins, vocational consultant, administered tests and found that employee had IQ of 122. Hankins opined that if one accepted opinions and restrictions of Lieberman and Hyde, vocational disability would be 100%. If restrictions of Kennedy and Hyde were accepted, vocational disability would still be 100%. Under Johnson's assessment of employee's condition, there would be no vocational disability. Dr. Caldwell, vocational consultant, found vocational disability to be 20 to 25% if Hyde's and Kennedy's restrictions were imposed. Caldwell agreed that no vocational disability would exist under Johnson's testimony. Trial judge awarded employee workers' compensation benefits for 25% permanent disability. **Modified and affirmed.** (1) Evidence did not preponderate against award. Evidence is somewhat equivocal with reference to cause of employee's present condition. Drs. Coffey and Hyde gave opinion that 1/13/98 incident probably caused employee's present physical condition but based their opinions on assumption that employee had no prior back complaints or problems. There was considerable evidence that pre-existing back problems existed, and this reduces complete acceptability of these expert opinions. Dr. Kennedy opined that employee was exaggerating her complaints and that her main problem was due to degenerative disc disease but that this prior condition had been aggravated by lifting incident she described on 1/13/98 and that this resulted in permanent impairment. Dr. Lieberman found extensive depression, but other evidence indicated that employee had been treated for depression prior to 1998 work activity. (2) Insurance carrier agreed to pay for unauthorized expenses up to 2/13/98, when injury was reported and list of physicians was being furnished. Employee chose Dr. Johnson from list, and he saw her on two visits during 3/98 and discharged her on 3/16/98. Several days later, employee's request for permission to see psychiatrist was denied so she was without designated orthopedic doctor and/or psychiatrist. Under these circumstances, it was reasonable for employee to seek medical attention of her own choosing since she claimed she was still in need of treatment. But chancellor's ruling is modified to disallow medical expenses of Drs. Coffey and Hyde which were incurred from 2/13/98 to 3/16/98, period of time between furnishing list of designated physicians and discharge of employee by that physician. Employer is liable for all medical expenses of these doctors and psychiatrist which were incurred after this period of time. (***Firefly Industries Inc. v. Sexton,*** 27 TAM 2-5, 11/6/01, Knoxville, Thayer, 8 pages, adopted and affirmed per curiam 12/11/01.)

▼ **Trial court erred in awarding employee replacement cost of prosthetic flex foot system when work accident that damaged flex foot did not cause actual physical injury to employee; there is no specific statutory provision that provides for compensation for damage to artificial members or appliances unaccompanied by physical injury**

WORKERS' COMPENSATION: Medical Expenses — Attorney's Fee. Plaintiff, who was injured in 1979 motorcycle accident, has above-the-knee prosthesis. On 12/28/98, plaintiff had just dismounted tow motor and taken step when he heard popping, breaking sound, and flex foot section of his prosthesis broke. Plaintiff had to leave before his shift ended in order to seek replacement prosthetic foot, but he was able to return to work on next day. Plaintiff suffered no injury to any other part of his prosthetic leg or to his body and suffered no pain when prosthesis broke. Prosthesis at issue was fitted on 2/9/94 as replacement for original, post-accident prosthesis. Plaintiff's health insurance denied 5/98 claim for cost of replacement prosthesis. Trial judge found that plaintiff had sustained accidental injury and awarded plaintiff replacement cost of prosthetic flex foot system. **Reversed.** (1) Question of whether plaintiff may recover replacement cost of artificial member when accident that damaged artificial member does not also cause physical injury is one of first impression in Tennessee. In absence of specific statutory provision for compensation for damage to artificial members or appliances unaccompanied by physical injury, such injuries are not compensable. (2) Provision for attorney fees under Workers' Compensation Law is conditional — plaintiff must be found to have suffered compensable work-related injury. Since plaintiff's injury is not compensable work-related injury, attorney fees are not appropriate. (***Coldwell v. Hartford Casualty Insurance Co.,*** 27 TAM 2-6, 11/9/01, Knoxville, Byers, 4 pages, adopted and affirmed per curiam 12/12/01.)

▼ **Suit, filed more than one year after employee was injured in work-related car accident, was timely, as statute of limitation did not begin to run until employee was told by doctor that back injury was work-related; retention of counsel does not trigger running of statute of limitation; employee does not have to file suit for benefits within one year from time that employee suspects injury is work-related**

WORKERS' COMPENSATION: Permanent Disability. CIVIL PROCEDURE: Statute of Limitation. On 10/16/95, plaintiff was involved in work-related car accident. Dr. Miller, approved physician, told employer's insurer that plaintiff's condition was not related to car wreck, and insurer's representative related this information to plaintiff. Plaintiff filed workers' compensation suit on 5/7/97. Chancellor awarded plaintiff workers' compensation benefits for 25% permanent disability. **Affirmed.** (1) Suit was timely. Evidence did not preponderate against chancellor's finding that beginning date for running of statute of limitation was 7/97, when Dr. Allen informed plaintiff that his back injury was work-related. Retention of counsel does not trigger running of statute of limitation. Nothing in law requires injured worker to initiate action for benefits within one year from time injured worker suspects that injury is work-related. (2) Evidence did not preponderate against award of 25% permanent disability. Plaintiff is 65-year-old high school graduate with experience in sales. (***Seiver v. Plumbmaster Inc.,*** 27 TAM 2-7, 9/17/01, Nashville, Loser, 3 pages, adopted and affirmed per curiam 12/6/01.)

Court of Appeals

▼ **In suit by passengers in vehicle, transporting church leaders, which collided at intersection with tractor-trailer truck, material evidence supported jury's verdict in favor of defendant driver of vehicle when parties offered conflicting testimony regarding color of traffic light as driver approached intersection and whether driver was driving in safe manner just prior to accident and when driver attacked credibility of several of plaintiffs' witnesses; trial court properly directed verdict in favor of defendant pastor on negligent entrustment and vicarious liability claims; trial court did not err in permitting cross-examination of witness, who gave testimony damaging to driver, regarding incident at church two months before collision during which witness kicked lady in mouth and had to be tackled by church elders, as prior encounter might have led witness to be biased against driver**

TORTS: Automobile Accidents — Negligent Entrustment — Imputed Liability. EVIDENCE: Impeachment. In summer 1998, group primarily composed of church leaders from Living Word Community Church in Davidson County traveled to Houston, Tex. When group arrived in Houston, they rented Chevrolet Suburban. As group searched for hotel, Suburban entered intersection and collided with tractor-trailer. Churn was driving Suburban at time of accident. Plaintiff, passenger, suffered several injuries. Plaintiff and her husband filed suit against Churn and Beard, pastor of church. (1) Trial judge did not err in allowing Churn to question

Harvey, plaintiffs' witness, about incident at church two months before accident. Over plaintiffs' objection, Harvey admitted that he "create[d] an incident in church one day, kick[ed] a lady in the mouth, [and] had to be tackled" by elders of church. Harvey admitted that Churn, elder of church, was one of persons who took Harvey to hospital after incident. Following this exchange, Harvey stated that he regarded Churn as untruthful person. On direct examination, Harvey testified that Churn was not paying attention to his surroundings at time of collision. Harvey also testified that traffic light changed from yellow to red immediately prior to collision. Hence, Harvey provided testimony that Churn ran through red light when Churn collided with tractor-trailer. TRE 616 states that "party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." Hence, rule establishes that evidence of witness's possible bias against party is relevant for impeachment purposes. Moreover, this form of impeachment is not considered collateral matter, as rule specifically permits introduction of extrinsic evidence. Evidence established that Harvey could have maintained biased opinion of Churn. Evidence illustrates that Harvey and Churn have had previous encounter that might influence course of Harvey's testimony. As encounter might have led Harvey to be prejudiced against Churn, it was proper for jury to hear this testimony. (2) Material evidence supported jury's verdict in favor of Churn. Parties offered conflicting testimony regarding color of traffic light as Churn approached intersection. Churn's witnesses stated that light was green, while plaintiffs introduced evidence that traffic light was red. Witnesses for parties offered varying accounts of whether Churn was driving in safe manner just prior to accident. By eliciting damaging testimony and utilizing prior inconsistent statements, Churn effectively attacked credibility of several of plaintiffs' witnesses on cross-examination. (3) Trial judge did not err in directing verdict in favor of Beard. (a) With respect to negligent entrustment claim, plaintiffs did not present evidence that would permit reasonable inference that Beard had right to control vehicle or that Beard entrusted vehicle to Churn. Plaintiffs argued that Beard's position as pastor of church, coupled with plaintiffs' testimony at trial, established entrustment of vehicle. Testimony that Beard and Churn were at counter together when vehicle was rented fails to provide reasonable inference that Beard entrusted Churn with vehicle. Plaintiffs' testimony merely provides route for jury speculation and guesswork. Plaintiffs also failed to establish that Churn was incompetent to drive Suburban. (b) Plaintiffs argued that Beard is subject to vicarious liability because of acts of Churn. Evidence did not indicate that Beard and Churn had agency or employment relationship that would impose liability on Beard for Churn's acts. (c) Jury found that Churn was not at fault in collision. Beard could only be liable, under plaintiffs' theories, if Churn were found to be negligent in his operation of Suburban. (***Harper v. Churn,*** 27 TAM 2-8, 12/10/01, WS at Nashville, Farmer, 6 pages.)

▼ In suit by owner who was injured when ladder broke as he was climbing to inspect work on his building, trial court properly granted general contractor summary judgment; contractor owed no duty to owner, and to extend duty of general contractor under facts of case would require contractor to foresee not only that owner would use ladder belonging to subcontractor but also that subcontractor would make use of defective ladder

TORTS: Negligence — Duty — Independent Contractor. Plaintiffs owned building in which restaurant was operated by lessee. In early 1998, plaintiffs determined to have addition made to building for expansion of restaurant. Thompson Construction Company had previously done extensive renovation work on restaurant building for plaintiff. When renovation architect drew plans for 1998 expansion, plaintiff husband specifically asked architect to be sure that Thompson received copy of plan in order that Thompson might submit bid. Thompson was low bidder and subcontracted with Boyd Electric to do all electrical work on project. Plaintiff visited job scene periodically to inspect work and discuss various matters with Thompson's employees. On 12/15/98, near end of renovation as Boyd was finishing electrical work on building, Boyd had placed extension ladder against building to gain access to roof area. In Boyd's absence, plaintiff started to ascend extension ladder in order to look at roof. Extension ladder broke, and plaintiff fell to ground, injuring his leg. Plaintiffs filed suit against Thompson and Boyd alleging negligence on part of Thompson and on part of Boyd for which Thompson was alleged to be vicariously liable. Trial judge granted Thompson summary judgment and certified judgment as final under TRCP 54.02. (1) This court has not discovered case in Tennessee similar to present one in which owner of project is suing his selected contractor alleging negligence by contractor causing injuries to owner. Only basis asserted for liability is that fiberglass extension ladder placed against building by electrical subcontractor broke under weight of 240-pound owner of property, causing him injury. To extend duty of general contractor, on facts of present case, would require Thompson to foresee not only that plaintiff would use ladder belonging to subcontractor but also that subcontractor would make use of defective ladder, thus extending contractor's duty to meticulous inspection of ladder. Logically, duty could not stop there but must also onerate principal contractor with same duty to meticulously inspect not just his own equipment on job but all independent contractor equipment that might conceivably cause injury. Nothing in plaintiff's own inspection of ladder indicated any problem. Ladder belonged to Boyd not Thompson. Foundation under ladder was solid, and plaintiff determined beforehand that ladder was properly positioned. Nothing gave Thompson "superior knowledge" as to any defect in ladder. To establish duty, risk must be foreseeable, and such "is foreseeable if a reasonable person could foresee probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable." "Remote possibility" is not "reasonably foreseeable probability." No duty was owed by Thompson to plaintiff under facts established in present case. (2) Boyd was independent contractor, and hence, was not vicariously liable. Employer or general contractor is not ordinarily liable for negligence of independent contractor. Boyd contracted to do electrical work for Thompson according to his own method in accordance with plans and specifications submitted to him and used in forming basis of his monetary bid for complete electrical job. Boyd used his own employees, furnished his own tools and equipment — including alleged defective ladder — and scheduled his own working hours in order to fit electrical work in proper timing with other parts of construction. Boyd also served other customers on other electric jobs. Plaintiffs primarily sought to avoid independent contractor status by asserting that Thompson retained power to terminate relationship with Boyd at will. This assertion is based upon premise established by testimony that if Thompson was not satisfied with Boyd's work, he could be removed by Thompson. Proof established no dissatisfaction with work of Boyd, and fact that Thompson could breach his contract with Boyd by terminating his services without cause is not equivalent to unconditional right to terminate without cause. (***Wilson v. Thompson Construction Co.,*** 27 TAM 2-9, 12/10/01, MS, Cain, 8 pages.)

EMPLOYMENT: Employment Contract. CIVIL PROCEDURE: Res Judicata — Amendment — Sanctions. APPEAL & ERROR: Frivolous Appeal. Plaintiffs filed suit in 8/99 against Dr. Bruce and D&C Property Management Corp. alleging breach of employment contract. Bruce and D&C filed motion to dismiss for failure to state claim and failure to join indispensable party, which was granted by trial court. Trial court found that no employer-employee relationship existed between plaintiffs and Bruce and D&C, but that employer-employee relationship did exist between plaintiffs and Prime Focus Inc. Plaintiffs then filed suit against Prime Focus. Prime Focus filed motion for summary judgment, alleging that plaintiffs were actually employed by Bruce and D&C. Plaintiffs then filed motion for leave to join Bruce and D&C as indispensable parties and filed amended complaint to include Bruce and D&C. Bruce and D&C argued that complaint against them was unwarranted due to court's action in previous case wherein plaintiffs' cause of action was dismissed for failure to state claim. Bruce and D&C notified plaintiffs that they would seek sanctions pursuant to TRCP 11 if amended complaint was not withdrawn. Complaint was not withdrawn, and Bruce and D&C subsequently filed TRCP 11 motion for sanctions against plaintiffs. Trial court ordered that amended complaint joining Bruce and D&C be stricken from record and granted motion for sanctions, awarding Bruce and D&C $1,338 in attorney fees and expenses. (1) Trial court properly found that doctrine of *res judicata* barred plaintiffs from pursuing their claims against Bruce and D&C in second court action. In first case, filed on 8/99, trial court specifically found that plaintiffs' claims were dependent on existence of employer-employee relationship between plaintiffs and Bruce and D&C, that employer-employee relationship existed between plaintiffs and Prime Focus, that Prime Focus was indispensable party to claim, and that no employer-employee relationship existed between plaintiffs and Bruce and D&C. Trial court then granted motion to dismiss for failure to state claim, as well as for failure to join indispensable party. Since it was not appealed, trial court's order became final judgment 30 days after its entry. Once order became final, doctrine of *res judicata* operated to bar plaintiffs from asserting claim against Bruce and D&C which was or which could have been litigated in first action. Clearly, question of whether employer-employee relationship existed between parties not only could have been, but in fact was, issue resolved in first action. Plaintiffs' proper course of action would have been to appeal order in first action, not merely to re-assert claim in second action. (2) Plaintiffs argued that trial court in second action erred in holding that plaintiffs failed to secure leave of court before amending their complaint against Prime Focus to join Bruce and D&C. Plaintiffs contended that they were not required to seek leave of court to amend their complaint because, although answer had been filed by Prime Focus, no answer had been filed by Bruce and D&C, to whom amendments applied. TRCP 15.01 permits party to amend his or her complaint once as matter of course before responsive pleading is served. Once responsive pleading has been filed by named opposing party, that party's written consent or leave of court is required for later amendments. Since defendant in second action (Prime Focus) had filed answer, leave of court was required for plaintiffs to amend their complaint. Plaintiffs improperly filed their amendment before obtaining leave of court to do so. (3) Trial court did not abuse discretion in imposing TRCP 11 sanctions. Plaintiffs were properly notified that Bruce and D&C would seek sanctions and were given opportunity to withdraw their claim as required by TRCP 11.03. Plaintiffs' counsel should have known that trial court order in first action, which plaintiffs failed to appeal, was final judgment on merits and thus precluded litigation of same claim against same parties in subsequent action. Plaintiffs' counsel should also have known that leave of court was required before amended complaint could be filed. Trial court's judgment is modified to award $1,338 judgment against plaintiffs' counsel, rather than against plaintiffs. (4) Appeal was not frivolous. (***Boyd v. Prime Focus Inc.,*** 27 TAM 2-10, 12/5/01, WS at Nashville, Farmer, 6 pages.)

EMPLOYMENT: Employment Contract. CIVIL PROCEDURE: Post-Judgment Relief. APPEAL & ERROR: Frivolous Appeal. Plaintiffs filed suit against Dr. Bruce and D&C Property Management Corp. in 8/99 seeking compensation based on alleged employer-employee relationship. In 12/99, trial court dismissed plaintiffs' suit for failure to state claim upon which relief can be granted and for failure to join indispensable party. No appeal was taken from this order. In 2/00, plaintiffs filed motion to set aside 12/99 order pursuant to TRCP 60.02. This motion was denied in 3/00. In 10/00, plaintiffs filed motion to amend 12/99 order pursuant to TRCP 60.01 to delete phrase "failure to state a claim upon which relief can be granted." This motion was denied in 1/01. Plaintiffs contended that trial court erred in denying their TRCP 60.01 motion. Appeal in present case is totally without merit, and hence, is frivolous. Plaintiffs asked trial court to delete language constituting basis of trial court's ruling, i.e., that complaint failed to state claim upon which relief could be granted. Plaintiffs failed to appeal previous denial by court of their TRCP 60.02 motion, but nevertheless decided to file this appeal of trial court's denial of their TRCP 60.01 motion. Case is remanded to trial court for determination of damages due appellees, Bruce and D&C. (***Boyd v. Bruce,*** 27 TAM 2-11, 12/5/01, WS at Nashville, Crawford, 2 pages.)

▼ **Claim of insured, who was injured in automobile accident, for additional post-settlement medical payments is denied as result of execution of release and order of compromise and settlement which extinguished insurer's subrogation rights; insurer's subrogation claim will be defeated even though insured settled tort claim without knowledge of insurer when parties have either agreed that insured has not been made whole by tort recovery, or underlying facts are clear that recovery did not make insured whole; when it was undisputed by parties that insured was not made whole, insurer's subrogation claim was not valid under principles of *Tennessee Farmers Mutual Insurance Co. v. Farmer***

INSURANCE: Subrogation. On 4/8/93, plaintiff was injured while passenger in car owned and driven by her daughter, Ford. Truck driven by Gotcher turned left directly into path of vehicle driven by Ford. At time of accident, plaintiff and Ford were both insured by automobile policies issued by Tennessee Farmers Mutual Insurance Company which contained medical payment coverage with limits of $5,000. Plaintiff was eligible for medical payment coverage under both policies for total of $10,000. At time of accident, Gotcher was also insured by automobile policy issued by Farmers Insurance Exchange that carried liability limit of $25,000. Shortly after accident, plaintiff sought and received $3,000 as compensation for her initial medical expenses under terms of two insurance policies written by Tennessee Farmers. Tennessee Farmers was under contractual obligation to make payment for medical expenses up to liability limit of $10,000. Plaintiff's medical expenses totaled $46,000. Delk, agent for Tennessee Farmers, advised plaintiff's husband that insurer was

prepared to make payment of additional $7,000 under applicable insurance policies if plaintiff accepted $25,000 limit of Gotcher insurance policy. Delk indicated that Tennessee Farmers would not make such payment if suit was filed against Gotcher seeking damages in excess of $25,000 policy limit. Plaintiff elected to file suit against third party tort-feasors, Gotcher and Springfield Office Machines & Printing (Springfield Printing) on 4/14/94, rather than pursue second demand on Tennessee Farmers for remaining $7,000 of medical coverage. Tennessee Farmers was served with copy of complaint as uninsured motorist carrier. On 5/27/94, agreed order was entered whereby Tennessee Farmers was dismissed from third party tort claim. Third party tort-feasors, Gotcher and Springfield Printing, filed for bankruptcy under Chapter 11 six days prior to trial with plaintiff. On 10/27/97, settlement was reached between plaintiff and Gotcher for total payment of $60,000. Farmers Insurance Exchange paid its policy limit of $25,000 while remaining $35,000 was paid by some combination of Gotchers and Springfield Printing. As result of this settlement, plaintiff executed release and order of compromise and settlement releasing third party tort-feasors from any liability arising from 4/8/93 accident and dismissing tort claim with prejudice. Bankruptcy petitions of Gotcher and Springfield Printing were ultimately dismissed by bankruptcy court on 11/13/97. On 3/22/99, plaintiff filed suit against Tennessee Farmers, alleging breach of contract for failure to make payment of remaining $7,000 pursuant to medical payment provision of two insurance policies. On 3/29/00, Tennessee Farmers filed answer denying coverage and counter-complaint seeking reimbursement of $3,000 payment. Chancellor found that plaintiff was not made whole by settlement of third party tort claim for $60,000. But chancellor held that Tennessee Farmers was under no obligation to make additional medical payments to plaintiff since Tennessee Farmers did not consent to settlement and was not consulted. Chancellor dismissed complaint and counter-complaint. (1) Filing of bankruptcy petitions by Gotcher and Springfield Printing did not extinguish Tennessee Farmers' subrogation claim and is irrelevant to disposition of respective claims of plaintiff and Tennessee Farmers. Plaintiff's settlement of third party claim had significant impact upon Tennessee Farmers' subrogation claim. Tennessee Farmers reserved right of subrogation through terms of insurance policy and enjoyed identical rights to those of plaintiff. Hence, plaintiff extinguished rights of Tennessee Farmers under its claim for subrogation when she relinquished her rights through execution of release and order of compromise and settlement. Additional consequence of settlement is that plaintiff's ability to recover additional compensation from Tennessee Farmers was precluded or forfeited. If insured destroys insurer's subrogation rights after payment, insured forfeits any rights of recovery against insurance carrier. Hence, plaintiff's claim for additional post-settlement medical payments is denied as result of execution of release and order of compromise and settlement which extinguished Tennessee Farmers' subrogation rights. (2) Typically, "made whole" doctrine would operate to preclude insurer from exercising right of subrogation when insured was not fully compensated for his or her injuries. Exception to "made whole" doctrine exists under Tennessee law, espoused in *Tennessee Farmers Mutual Insurance Co. v. Farmer,* 23 TAM 39-14 (Tenn.App. 1998), when insurer did not participate in settlement negotiations surrounding tort claim and did not waive right of subrogation. In present case, Tennessee Farmers' right of subrogation was extinguished by plaintiff's settlement of third party tort claim. Tennessee Farmers neither participated in settlement negotiations with Gotcher nor consented to release and order of compromise and settlement. But *Tennessee Farmers Mutual Insurance Co. v. Farmer* also states that insurer's subrogation claim will be defeated when parties have either agreed that insured has not been made whole by tort recovery or underlying facts are clear that recovery did not make insured whole. This court is precluded from speculating that plaintiff was made whole through her voluntary acceptance of settlement offer of $60,000, amount which exceeded her $46,000 in medical expenses, because it is undisputed by parties in case that plaintiff was not made whole. Hence, Tennessee Farmers' subrogation claim is not valid under principles of *Tennessee Farmers Mutual Insurance Co. v. Farmer.* Tennessee Farmers' claim for reimbursement is denied. (***Doss v. Tennessee Farmers Mutual Insurance Co.,*** 27 TAM 2-12, 12/10/01, MS, Ash, 5 pages.)

▼ **Trial court did not err in offsetting value of withdrawing partner's debt to partnership as of trial date, rather than dissolution date; trial court erred in adding $20,000 "going concern value" adjustment to value of partnership as of dissolution date; trial court did not err in refusing to apply minority and/or marketability discounts when withdrawing partner had only one-third interest and remaining partners were married couple with power to outvote any other partner; minority and/or marketability discounts will not be applied to valuation of partnership in absence of specific authorization under Tennessee law**

COMMERCIAL LAW: Partnerships. On 9/1/89, plaintiffs formed oral partnership known as Customer Fireplaces & More. Plaintiffs made personal loan to defendant on 4/15/91, as evidenced by two notes for $9,500 and $19,500. Defendant repaid his personal loan from plaintiffs on 8/12/92 by refinancing it with loan from partnership. Partnership issued check payable to defendant for $29,087. Defendant endorsed check in favor of plaintiffs. Loan by partnership was further evidenced by promissory note (Bowen Note). Bowen Note was carried on books of partnership as partnership asset. On 8/21/92, plaintiffs made separate advance to partnership, also in amount of $29,087, from their personal funds. Advance was carried on books of partnership as partnership liability. Plaintiffs notified defendant that partnership was dissolved by letter dated 9/10/92. Plaintiffs filed complaint to dissolve partnership on 10/5/92 requesting judicial dissolution and continuation of business with defendant to receive his appropriate share. Defendant filed answer on 11/18/92 and consented to continuation. Hale was appointed special master on 5/6/93. Hale was removed as special master due to potential conflict of interest on 11/5/93 and replaced by Camp. Camp's report found that it was proper to employ excess earnings method to value business, that it was proper to add $20,000 as going concern adjustment, that defendant's debt should not be offset against his capital account in determining his dissolution date value until date of distribution, and that marketability and/or minority discount does not apply to partnership. Chancellor held limited hearing on plaintiffs' objection and initially found that withdrawing partner's debt should be offset against his capital position as of date of dissolution, 9/10/92, and remanded matter to Camp for reconsideration. Camp filed final report on 11/25/98 acquiescing to chancellor's recommendation that debt should be applied as reduction to defendant's capital account. Camp died before he was able to present his testimony to court. Chancellor appointed Thorne to review Camp's report. Thorne filed his report on 3/9/00. Thorne could find no fault with addition of $20,000 as going concern value. Thorne also stated that proper time for offsetting loan to defendant was at time of settlement. Final hearing

was held before chancellor on 7/10/00, and chancellor signed resulting order on 8/24/00. Plaintiffs filed notice of appeal on 9/15/00. Defendant filed motion to alter or amend on 9/22/00. Chancellor filed amended order on 11/30/00. (1) Chancellor did not err in offsetting value of withdrawing partner's debt to partnership as of trial date, 12/31/99, rather than dissolution date, 9/10/92. Two scenarios in which former partner's interest in dissolved partnership may be calculated are distinguishable. Dissolution may be achieved through completely winding up partnership's operations. Accounting between former partners and calculation of withdrawing partner's interest is appropriate as of date of distribution only when partnership has been wound up. In contrast, two or more of former partners may elect to continue operation of partnership without participation of one or more former partners. Tennessee's adoption of Uniform Partnership Act provides specific instructions for proper calculation of withdrawing partner's interest in continuing partnership. TCA 61-1-141 indicates that withdrawing partner of continuing partnership is entitled to receive value of his or her fixed interest on date of dissolution plus his or her election of either interest or profits attributable to continuing partners' use of his interest in now dissolved partnership. Purpose of TCA 61-1-141 is to compensate withdrawing partner for profits earned by continuing partnership as result of use of former partner's equity. Defendant consented to continuation of partnership, and calculation of withdrawing partner's interest as of date of dissolution is appropriate under TCA 61-1-141. Terms of promissory note executed by parties control when note becomes due and timing for offset of defendant's debt to partnership. Agreement states that "in the event of a buyout, the unpaid balance of this note, including interest due to date, will be subtracted from the agreed selling price of my 1/3 (one third) share of all the owner equity tools, equipment, accounts, and general intangibles of Customer Fireplaces & More." This agreement constitutes demand note, and there are two events that must occur in order for note to come due — there must be buyout and agreed selling price must be calculated. Buyout may be accomplished through negotiation, through tender offer, or through merger. In present case, purchase of withdrawing partner's share in company and calculation of agreed selling price were not completed until trial date. Hence, note should be offset against value of defendant's interests as of 12/31/99. (2) Chancellor erred in adding $20,000 "going concern value" adjustment to value of partnership as of dissolution date. Chancellor adopted excess earnings approach as method for valuing partnership. Excess earnings method considers value of both tangible and intangible assets when arriving at total value of business. Going concern value of partnership must be classified as either tangible or intangible asset. Thorne ultimately classified going concern value of partnership as tangible asset and assessed value of $20,000. Thorne failed to cite any material evidence to support his conclusion that going concern value of partnership was tangible asset or that it should be valued at $20,000. Only evidence in record related to going concern value of partnership suggests it may be intangible asset. Thorne eventually concluded value of all intangible assets consisted of $3,428. (3) Defendant contended that chancellor erred in applying "artificially low salary adjustment" to reflect contributions of three partners to business prior to dissolution date in determining value of partnership and that chancellor erred in applying "artificially low salary adjustment" to reflect contributions of remaining partners to business after dissolution date in determining value of partnership. Salary figures for contributions of partners must represent reasonable wage for similar personnel performing same or similar functions in similar sized business. Material evidence supported concurrent finding of both special masters and chancellor. (4) Chancellor did not err in refusing to apply minority and/or marketability discounts when withdrawing partner had only one-third interest and remaining partners were married couple with power to outvote any other partner. Application of minority and/or marketability discounts to valuation of withdrawing partner's interest is question of law. It is also issue of first impression in Tennessee. This court is not willing to apply minority and/or marketability discounts to valuation of partnership in absence of specific authorization under Tennessee law. (5) Chancellor did not err in applying adjustment for portion of legal and professional expenses incurred by partnership when determining withdrawing partner's interest. TCA 61-1-141 provides that withdrawing partner becomes creditor of partnership as of date of dissolution. Surviving partners are entitled to attorney fees for defending partnership assets. Record contains ample authority to affirm concurrent findings of special masters and chancellor determining that defendant was creditor of partnership and applying adjustment for portion of legal and professional expense incurred by partnership. (***Marengo v. Bowen,*** 27 TAM 2-13, 12/10/01, MS, Ash, 6 pages.)

▼ **Trial court properly dismissed plaintiffs' claim under Consumer Protection Act when defendant's breach of contract — defendant failed to install new gas heating and air conditioning unit that was compatible with plaintiffs' existing ductwork — did not amount to unfair or deceptive act or practice in violation of act; trial court did not err in concluding that proper measure of damages for defendant's breach of contract was cost of upgrading plaintiffs' existing ductwork, rather than rescission with damages being costs of removing new unit and making repairs to walls and paneling**

COMMERCIAL LAW: Services Contract — Consumer Protection. DAMAGES: Breach of Services Contract. Plaintiffs are Parton and her son Sampson. Parton previously gave deed to Sampson for her home, but Parton continued to reside in house. In 1996, Parton and defendant entered into oral agreement in which defendant agreed to replace plaintiffs' electric heating and air conditioning system with gas unit and install gas line for fireplace. Parton testified that defendant told her that her old 2.5-ton electrical unit (old unit) was too small for plaintiffs' home. Plaintiffs contended that defendant told Parton that plaintiffs' house required three-ton gas pack central system which was combination gas furnace and electric air conditioner (new unit). Parton testified that defendant planned to install new unit at front exterior of house. Parties' agreement was silent regarding ductwork. Parties agreed upon price of $3,200 for entire job. Parton paid defendant full contract price despite fact that defendant had not completed promised work. Shortly thereafter, defendant's employees installed new unit at rear of house. After defendant installed new unit, plaintiffs became dissatisfied. Plaintiffs' complaints involved size of new unit, location and installation of new unit, installation of new return air duct, and quality of defendant's workmanship. Plaintiffs also claimed that new unit does not properly heat or cool their house. In 3/98, plaintiffs filed suit in general sessions court for breach of contract, alleging unspecified damages under $15,000. In 10/98, plaintiffs filed amended civil warrant to include violations of Tennessee Consumer Protection Act (TCPA) and Uniform Commercial Code. General sessions court awarded plaintiffs $2,150. Plaintiffs appealed to circuit court. Following bench trial, trial judge awarded plaintiffs breach

of contract damages of $2,600 plus court costs. Trial judge dismissed TCPA claim. Trial judge made no specific mention of UCC claim, and plaintiffs raised no issue on appeal concerning UCC claim. (1) Evidence did not preponderate against trial judge's findings and resulting determination that plaintiffs did not establish that defendant's conduct amounted to unfair or deceptive act or practice in violation of TCPA. Proof established that defendant failed to install new gas heating and air conditioning unit that was compatible with plaintiffs' existing ductwork and that this was breach of contract by defendant. While plaintiff may recover, under certain circumstances, for negligence under TCPA, defendant's breach of contract as proven by plaintiffs did not constitute violation of TCPA. (2) Trial judge did not err in concluding that proper measure of damages for defendant's breach of contract was cost of upgrading plaintiffs' existing ductwork plus additional $500 for damages associated with use of new unit with existing inadequate ductwork, rather than rescission with damages being costs of removing new unit and making repairs to walls and paneling. Evidence did not preponderate against trial judge's finding as to amount necessary to place plaintiffs in condition they would have been had defendant not breached contract. (***Sampson v. Winnie,*** 27 TAM 2-14, 12/11/01, ES, Swiney, 9 pages.)

▼ **In suit by three members of joint venture (plaintiffs) who paid more than their prorated share of joint venture's debt to recover against former member of joint venture (defendant), trial court erred in classifying members of joint venture as "co-sureties" and in basing her decision on suretyship principles; so-called suretyship agreements executed by joint venture members had legal effect of altering what otherwise would have been each member's unlimited joint and several liability for joint venture's debts, and as result of agreements, each member's individual liability was made several only and was capped at $280,000; because obligation paid by plaintiffs were individual rather than common, plaintiffs never paid more than their share of common obligation and had no right to seek contribution from defendant**

COMMERCIAL LAW: Joint Venture — Suretyship — Contribution. In 7/87, 10 individuals, including Hardy, Flowers, Hopper, and Miller, formed joint venture known as Hardscuffle Associates to acquire and develop 14.5-acre tract. To fund development, joint venture borrowed $1,400,000 from Commerce Union Bank. All 10 members of joint venture signed loan agreement. At bank's insistence, each member also signed suretyship agreement guaranteeing to repay not more than $280,000 of joint venture's debt. Miller and Gianikas were initially co-managers of joint venture. But in mid-1991, joint venture expelled Miller because of his failure to make his required ongoing capital contributions. Gianikas, who then became sole manager of Hardscuffle Associates, instructed joint venture's accountant to redistribute Miller's interest to remaining members of joint venture. In 7/91, Hardscuffle Associates executed renewal and modification deed of trust note for $1,273,715, which was to mature on 9/15/92. On 10/30/92, Hardscuffle Associates signed "forbearance agreement" acknowledging that this note had not been paid, that Hardscuffle Associates was in default, and that Hardscuffle Associates was indebted for full amount of note plus interest. NationsBank, which had acquired Commerce Union Bank, proceeded against individual members of joint venture to collect debt. Between late 1992 and early 1993, Hardy, Flowers, and Hopper (plaintiffs) paid NationsBank $280,000 under personal guarantee they had signed in 1987. NationsBank also looked to Miller for payment, and he paid bank $22,885 during 1994 and 1995. In 5/96, plaintiffs filed suit against Miller alleging that Hardscuffle Associates' debt had been completely satisfied and that they had been required to pay more than their share of its outstanding debt. Plaintiffs sought contribution from Miller up to his prorated share of debt. Miller responded that his former joint venturers had waived their right to seek contribution from him when they expelled him from joint venture in 1991 without returning his capital contributions. Miller also sought to recover $22,885 he had paid to bank. Following bench trial, trial judge ordered Miller to pay plaintiffs $96,418 plus prejudgment interest of $53,727. Chancellor dismissed Miller's counterclaim. (1) Chancellor erred in basing Miller's liability on rules governing contribution among co-sureties. Suretyship agreement necessarily involves three parties — debtor who is primarily liable for debt, creditor to whom debt is owed, and surety who agrees to pay debt if debtor does not. Identifying first two necessary parties is easy. Hardscuffle Associates, as signatory "borrower" in loan agreement, is unquestionably debtor or principal obligor. NationsBank is creditor of Hardscuffle Associates. Controlling question is whether any party or parties other than Hardscuffle Associates stepped into role of surety. Business organizations with separate legal identity and their owners or shareholders may be sureties. But rules that apply to corporations do not apply with same force to partnerships or joint ventures because they do not have separate legal identity independent of their partners or members. General rule that partner cannot be surety of partnership debts controls outcome of suretyship issues in present case. Parties in interest, Hardscuffle Associates, its members, and bank, did not establish suretyship in 7/87 transaction. In reality, so called suretyship agreements executed by Hardscuffle Associates' members had legal effect of altering what otherwise would have been each member's unlimited joint and several liability for joint venture's debts. As result of these agreements, each member's individual liability was made several only and was capped at $280,000. Hence, these agreements actually served as "limitation of liability" agreements benefiting individual members of joint venture. Because no suretyship was ever created, chancellor erred in classifying members of Hardscuffle Associates as "co-sureties" and by basing its decision on suretyship principles. (2) Chancellor also based her decision on principle of partnership law that permits partners to obtain contribution from other partners. Because partners are jointly and severally liable for partnership debts, partner who pays partnership debt out of his or her own funds is entitled to contribution from other partners when partnership assets are insufficient to reimburse partner. Had parties not executed suretyship agreements as part of 7/87 financing transaction, original 10 members of Hardscuffle Associates joint venture would have been jointly and severally liable for bank's $1,400,000 loan to Hardscuffle Associates. But bank and members of Hardscuffle Associates modified this liability when they signed suretyship agreements. These agreements changed each member's otherwise joint and several liability to several liability capped at $280,000. Effect of these agreements was spelled out in 8/24/88 letter to members in which one of bank's vice presidents wrote that pursuant to terms of suretyship agreements, right of recovery against individual partners is limited to $280,000 each, plus interest and collection costs. Actions of parties following Hardscuffle Associates' default are consistent with interpretation that suretyship agreements changed each member's liability from joint and several to several. Following default, bank dealt with each of its members, not as if they were jointly liable, but as if each one of them was individually liable up to $280,000. Bank never pursued any of members of Hardscuffle Associates as if any one of them was jointly and severally liable for whole debt. Rather, it went after

each member separately for $280,000 maximum liability under suretyship agreement. For example, according to complaint, bank cancelled and returned Flowers' suretyship agreement after he paid bank $280,000. Similarly, after Hopper paid bank $100,000 in 10/92, bank modified his suretyship agreement by reducing his liability to $180,000. Plaintiffs did not pay obligation that was common to all members of joint venture. Rather, each of them paid bank in accordance with separate contractual obligation in their suretyship agreements. Because these obligations were individual rather than common, plaintiffs never paid more than their share of common obligation. Hence, chancellor erred in concluding that they had right to seek contribution from Miller. (3) Chancellor did not err in denying Miller's claim for reimbursement of $22,885 he paid to bank under his 7/87 suretyship agreement. Miller insisted that he was no longer personally liable for joint venture's debts after his fellow members expelled him in mid-1991, and hence, that he was entitled to reimbursement for payments he made on joint venture's behalf. Miller became directly and primarily liable to bank when he signed suretyship agreement in 7/87. None of members of Hardscuffle Associates became sureties for partnership's debt because, as matter of law, they could not stand as sureties on same debt they simultaneously owed as principal obligors. Because Miller was not surety, $22,885 he paid was in partial satisfaction of his own several liability to NationsBank under his 7/87 suretyship agreement. He has no right of reimbursement for paying his own debt. (***Hardy v. Miller,*** 27 TAM 2-15, 12/10/01, MS, Koch, 8 pages.)

▼ **In suit in which jury awarded plaintiff $250,000 for conversion upon finding that defendant did not have right to repossess plaintiff's truck, trial court did not err in failing to grant defendant directed verdict when dealing between parties for three-year period was such that plaintiff had been led to believe that defendant would accept late payments without considering plaintiff in default; gravamen of complaint is for conversion, and hence, it was governed by three-year statute of limitation for conversion; trial court erred in allowing plaintiff's testimony as to lost profits when it was uncertain that plaintiff would have received job contracts even if defendant had not repossessed his truck; award of total damages is modified to $20,946**

COMMERCIAL LAW: Secured Transactions — Repossession. TORTS: Conversion. CIVIL PROCEDURE: Statute of Limitation. DAMAGES: Conversion — Mitigation of Damages — Lost Profits. By "Retail Installment Sale Contract and Security Agreement" (sales contract), dated 3/12/94, plaintiff purchased new 1994 Chevrolet pickup truck from Lofton Chevrolet Inc. Sales contract was assigned to defendant bank which provided financing on truck. Total sales price of $27,394 was to be paid in 48 monthly installments of $409, beginning on 4/25/94. Contract provides, "You are giving [bank] a security interest in the vehicle being purchased." Plaintiff also entered into "Agreement for Purchaser to Provide Accident Physical Damage Coverage." On 9/29/97, bank repossessed truck and sold it because plaintiff allegedly defaulted upon his obligations to make scheduled monthly payments and also failed to have his insurance agent endorse policy with loss payable endorsement in favor of bank. Plaintiff alleged that he fulfilled his obligations under terms of both contracts by making all of required monthly payments and continuously carrying insurance on truck at all times prior to bank's repossession. Plaintiff filed suit for damages resulting from repossession of truck. Jury returned verdict against bank for $250,000 for conversion. (1) Trial judge did not err in refusing to direct verdict in favor of bank. Each payment plaintiff made to bank during period of over three years was after 25th of month and, according to contract as written, was late. But at no time prior to repossession did bank refuse any of plaintiff's late payments or notify plaintiff that future late payments would not be accepted. In fact, bank accepted one of plaintiff's payments on 10/6/97, after plaintiff's truck had been repossessed. Course of dealing between plaintiff and bank during period of over three years was such that plaintiff had been led to believe that bank would accept late payments without considering plaintiff in default. Moreover, as to insurance contract, bank knew that truck was insured and that it was not listed as loss payee, but at no time during period of over three years, did bank place plaintiff in default for not endorsing bank as loss payee on insurance policy he had on truck. Rather, bank simply added their own insurance on truck and charged it to end of plaintiff's loan. (2) Plaintiff's suit was not barred by statute of limitation. Bank contended that plaintiff's action is barred under TCA 28-3-104, one-year statute of limitation for "injuries to person." Bank asserted that object of plaintiff's action is credit reporting damages, and hence, is "injury to the person" similar to defamation. Gravamen of plaintiff's complaint is for conversion governed by TCA 28-3-105, three-year statute of limitation for conversion of personal property. (3) Bank raised issues relating to damages plaintiff allegedly suffered from loss of his truck caused by bank's repossession. (a) Law in Tennessee on loss of use damages in conversion cases can be compared to collision cases. Permitting recovery for loss of use during period necessary to replace injured or destroyed chattel would be consistent with Tennessee decisions in contract cases involving loss of use. As general rule, plaintiff's damages in action for conversion are measured by sum necessary to compensate him or her for all actual losses or injuries sustained as natural and proximate result of defendant's wrong. Consequential damages must be proven with reasonable certainty. Ordinary measure of damages for conversion is value of property converted at time and place of conversion, with interest. (b) Bank contended that plaintiff's claim for conversion damages is barred because plaintiff should have exercised ordinary diligence by making his payments to bank on time which would have prevented bank from repossessing his truck. Bank's course of dealing with plaintiff over three years led plaintiff to believe that late payments would be accepted. Hence, trial judge correctly denied bank's motion for directed verdict. (c) Bank argued, in alternative, that even if plaintiff's claim is not barred for failure to mitigate his damages, he cannot recover for damages that could have been avoided or minimized by exercise of due diligence on part of plaintiff. Bank mentioned in its brief that plaintiff's air travel and rental car expenses, as well as his lost profit damages, are damages that plaintiff failed to mitigate. Bank alleged that trial judge's erroneous action which raised this issue was its denial of bank's motion *in limine* to exclude argument for and statements about plaintiff's claim for damages and evidence sole purpose of which is to support that claim. There is no clear and definite ruling on bank's motion *in limine.* Moreover, record does not indicate that bank made objection to plaintiff's testimony that total amount of car rental and airline expenses he incurred as result of not having his truck was $20,946. In absence of clear and definite ruling on bank's motion *in limine* and in absence of timely objection by bank to evidence introduced, this court cannot consider alleged error. (d) Trial judge erred in admitting evidence of plaintiff's alleged lost profit damages. Plaintiff testified that his damages, as result of bank's repossession and conversion of his truck, include anticipated lost profits from six competitive bid job

contracts worth between 15 and 20% of total job amount. According to plaintiff's own testimony, there is no material evidence of plaintiff's lost profit damages. It is uncertain that plaintiff would have received job contracts even if bank had not repossessed his truck. In fact, plaintiff testified that he did not even submit bid on four of six job contracts on which he claims damages. Plaintiff's testimony as to lost profits is speculative and uncertain. (e) Because plaintiff's lost profit damages are uncertain and speculative, trial judge abused discretion when he allowed plaintiff's testimony of lost profits based on credit reputation injury. Plaintiff testified that damage to his credit reputation, resulting from bank reporting repossession to credit bureaus, prevent him from obtaining bonding and insurance necessary to receive job contracts on which he claims damages. Even if plaintiff would have been able to obtain bonding and insurance, there is still nothing to indicate that he would have received job contracts. Plaintiff's testimony that "[I] [n]ever did go to get one [job contract] that I didn't get if I wanted it" and "[i]f I wanted the job, I come home with it," is uncertain and speculative. Judgment is modified to award plaintiff total damages as proven of $20,946. (***Crowe v. First American National Bank,*** 27 TAM 2-16, 12/10/01, WS, Crawford, 13 pages.)

▼ **TCA 67-5-903(f), under which fixed rates of allowable depreciation costs are established for valuing nine categories of locally assessed business and industrial personal property, is constitutional; TCA 67-5-1509(a), which provides that Board of Equalization (Board) "shall" by order or rule direct that industrial and commercial tangible personal property assessments be equalized using appraisal ratios adopted by Board in each jurisdiction, is constitutional**

TAXATION: Property Tax. Consortium of counties and cities (appellants) appeal decision of Davidson County Chancery Court upholding action of State Board of Equalization (Board) in applying depreciable life schedules forming part of TCA 67-5-903(f) to commercial and industrial tangible personal property and in holding that personal property is not constitutionally required to be valued at its actual value in implementation of TCA 67-5-1509(a). Chancellor upheld constitutionality of both TCA 67-5-903(f), under which fixed rates of allowable depreciation costs are established for valuing nine categories of locally assessed business and industrial personal property, and TCA 67-5-1509(a), which provides that Board "shall" by order or rule direct that industrial and commercial tangible personal property assessments be equalized using appraisal ratios adopted by Board in each jurisdiction. Present case follows in wake of two sister cases already decided by appellate courts. First of these cases, *In re All Assessments 1998,* 58 SW3d 95 (Tenn. 2000), involved centrally assessed public utility personal property equalization for 1998. Tennessee Supreme Court held that Board was authorized to reduce (or increase) appraised value of centrally-assessed public utility tangible personal property as part of equalization process. Second case, *In re All Assessments 1999 & 2000,* 26 TAM 44-13 (Tenn.App. 2001), involved centrally assessed public utility tangible personal property assessments for tax years 1999 and 2000 and involved only challenge to constitutionality of TCA 67-5-903(f) and TCA 67-5-1302(b)(1). Both statutes were held to be constitutional by Court of Appeals. In light of fact that TCA 67-5-903(f) has already been deemed constitutional, only remaining issue left to be addressed is constitutionality of TCA 67-5-1509(a). Appellants contended that sales appraisal ratio undervalues personal property by percentage derived from real estate values on top of undervaluation already resulting from application of depreciation schedules set forth in TCA 67-5-903(f). Although use of such sales ratios may provide least unsatisfactory method of appraising tangible personal property, it is legislative decision unshackled by constitutional prohibition. TCA 67-5-1509(a) mandates that locally assessed industrial and commercial personal property be adjusted by sales ratio in each county. It necessarily follows that, to achieve equalization, public utility personal property must likewise be adjusted under TCA 67-5-1302(b)(1). Once it is established that "one hundred percent of actual value" is no longer constitutionally mandated by Tenn. Const. Art. II, Sec. 28, legislative prerogative evidenced by TCA Title 67, Chapter 5, Part 15 is, wisely or unwisely, free of constitutional infirmity. As such, constitutional challenge to TCA 67-5-1509(a) must fail. (***Williamson County v. State Board of Equalization,*** 27 TAM 2-17, 12/10/01, MS, Cain, 4 pages.)

▼ **Resignation of co-executors/co-trustees before completion of administration of estate or settlement of trust authorized trial court to determine and award reasonable fees for executor and trustee services provided prior to resignation, regardless of method of compensation in will; although trial court made no finding that testator was unduly influenced in his decision to include compensation provision in will, court was within its authority to scrutinize transaction and its result to determine their fairness and reasonableness; trial court did not err in ordering attorney co-executor/co-trustee to disgorge over $70,000 in attorney fees paid by testamentary trust's major asset, corporation formerly owned solely by testator, when co-executors/co-trustees were directors of corporation, and disgorged fees had been paid pursuant to retainer agreement pre-existing testator's death**

ESTATES & TRUSTS: Executors — Trustees — Attorney's Fee — Wills. COMMERCIAL LAW: Corporations. Testator died on 12/18/94 in automobile accident. He was survived by four adult children. One of testator's children predeceased testator, leaving two sons. Children and two grandchildren were beneficiaries of testator's estate. At time of testator's death, his net taxable estate was worth over $5,000,000, while his gross estate was valued at $10,600,000. Principal asset was Feldkircher Wire Fabricating Company (FWC) of which testator had been sole shareholder. Testator's will appointed three co-executors: testator's daughter (Sandlin), his attorney (Pursell), and his accountant (Whisenant). Will directed that co-executors and co-trustees be paid fees equal to those fees customarily charged by NationsBank or its successors for estate and trust administrative services. Will contained several bequests of specific property to named individuals and directed that remainder of estate's assets, which included stock in FWC, be placed in M.L. Wakefield Family Trust. Trust was to terminate prior to 11th anniversary of testator's death. Will directed that co-trustees continue to operate FWC as its board of directors until trust was terminated. Will specified that directors could sell FWC if they deemed it financially advisable. Will included *in terrorem* clause providing for revocation of benefits to any beneficiary who contested will. On 12/28/94, Pursell filed petition to probate will, and, on that day, probate court entered order admitting will into probate. Controversy arose between beneficiaries, including Sandlin, and non-family co-executors, Pursell and Whisenant (appellants). Pursell, or his law firm, initially provided legal representation to estate. Because of developing difficulties between appellants and beneficiaries, appellants retained new counsel for estate in spring 1996. Whisenant's accounting firm provided accounting services to estate. Appellants resigned as co-executors and co-trustees, as

reflected in agreed order entered in 7/97, in which beneficiaries agreed to indemnify appellants from "any and all duties, responsibilities, liabilities, and/or obligations of either of them arising out of or in connection with the duties and obligations in each capacity." First American National Bank was appointed as substitute co-executor along with Sandlin. Appellants also resigned as directors of FWC. Beginning with interim accounting for period ending 11/20/95, beneficiaries have questioned details of accountings and questioned or opposed various actions proposed or taken by appellants. On 4/9/96, appellants petitioned probate court for approval of fees, seeking payments for their activities as executors, members of FWC board of directors, and accountants and lawyers for estate. Appellants sought interim payments of $120,000 to be equally divided among co-executors, and hourly fee of $125 for their work on board of directors. On 10/18/96, probate court approved payments of interim co-executors' fee of $150,000 to be divided equally among three co-executors. Order also approved payments of legal and accounting fees. On 3/7/97, appellants sought approval of another interim payment of executors' fees of over $91,000, which request had increased to $232,303 by time of hearing. Adult beneficiaries filed objection to this request. Shortly thereafter, adult beneficiaries filed petition for construction of will, seeking instruction on whether they could contest fees sought by appellants without triggering *in terrorem* clause. Appellants filed counterclaim seeking declaratory judgment enforcing *in terrorem* clause, which would result in revocation of bequests to those beneficiaries who filed petition for construction. On 6/27/97, probate judge, on his own initiative, held status conference. After appellants' resignation, issue of additional fees remained. Following nine days of testimony and argument on appellants' second fee request and beneficiaries' response thereto over period of almost five months, probate judge denied appellants' application for additional fees. Probate court declined to require appellants to disgorge $50,000 they each had previously received pursuant to agreed order resolving their initial fee request, but court ordered Pursell to disgorge $70,625, part of fees paid to him for legal services to FWC. Appellants contested court's rulings. In cross-appeal, beneficiaries argued that probate court erred in denying their request that additional fees be disgorged. (1) When will is silent regarding compensation for executor, executor will be credited with reasonable compensation as determined by court. But when testator has established compensation of executor, court will generally give effect to testator's intent to extent it is ascertainable. Resignation of co-executors and co-trustees before completion of administration of estate or settlement of trust authorized probate court to determine and award reasonable fees for executor and trustee services provided prior to resignation regardless of method of compensation established in will. (2) Probate court's findings and inquiry preceding those findings were based, primarily, on court's concern with multiple roles filled by appellants and with appellants' relationships to testator, corporation, and estate. Those roles and relationships justify probate court's examination of reasonableness of request for additional fees. (a) Existence of confidential relationship between testator and his attorney and accountant at time will was drafted and executed, combined with appointment of attorney and accountant as fiduciaries, created situation which authorized probate court to inquire into compensation of fiduciaries who were claiming benefit of will provision setting compensation. Underlying principles and policy concerns justify court's scrutiny of consequence and effect of testator's disposition of benefit to person who had fiduciary responsibility to testator at time of making of that disposition. As Connecticut court stated in *Andrews v. Gorby,* 675 A2d 449 (Conn. 1996), and as Tennessee courts have stated, it is fiduciary relationship which is overriding consideration and which demands high degree of scrutiny from courts. Hence, although probate court made no finding that testator was unduly influenced in his decision to include compensation provision in his will, court was within its authority to scrutinize transaction and its result to determine their fairness and reasonableness, including effect of application of fee schedule to estate. Burden of establishing fairness of compensation provision, or fairness of compensation itself, in view of totality of circumstances, lay with fiduciaries claiming benefit from will. Probate court's decision to award appellants only reasonable fees is affirmed. (b) Various roles assumed by appellants, and potential compensation for each role, created situation wherein fiduciary was required to make decisions which could potentially benefit fiduciary. Attorney-client relationship between Pursell and FWC was fundamentally changed by death of testator. As director, Pursell was client, and as fiduciary had to exercise independent judgment in selection and compensation of legal service providers. Same is true regarding Whisenant and accounting services. Because of fiduciary duties imposed upon appellants by virtue of their status as co-executors, co-trustees, and directors, court had authority to closely scrutinize any transaction wherein fiduciary decided to hire himself. In this situation, court has authority to examine fiduciaries' performance and its consequences to estate and beneficiaries. And burden of establishing fairness in transactions properly falls to fiduciary, especially when beneficiaries raise issue of reasonableness of overall compensation. (2) Probate court refused to award appellants additional fees on basis of NationsBank fee schedule and determined that $50,000 previously awarded each appellant was reasonable in light of all circumstances. Application of NationsBank percentage fee schedule, as appellants interpreted that application, would result in fees that were not reasonable in light of all circumstances of present case. Based on percentage fee schedule, 236.2 hours performed by Purcell on "ordinary services" for estate would be compensated at $445.40 per hour, and Whisenant's 238.7 hours of "ordinary services" would be compensated at $440.74 per hour. These rates are unreasonable. If all of hours claimed by co-executors were considered to have been spent on "ordinary services," and none on "extraordinary services," total request would result in compensation of $221.06 per hour for Pursell and $211.97 per hour for Whisenant. On other hand, if their total services as co-executors were compensated at $125 per hour, Pursell would receive total of $59,488 for his claimed 475.9 hours, and Whisenant would receive total of $62,038 for his claimed 496.3 hours. Beneficiaries did not challenge number of hours. Their main complaint was classification of some hours as extraordinary services on top of percentage fee. Appellants were entitled to be paid for hours they documented at reasonable rate. Hence, award is modified to $59,488 to Pursell and $62,038 to Whisenant. Both amounts include $50,000 previously awarded to each appellant. (3) Appellants challenged probate court's action in ordering Pursell to disgorge $70,625 of attorney fees paid to him by FWC. (a) Appellants contended that probate court lacked jurisdiction to order Pursell to disgorge $70,625 of attorney fees paid to him by FWC when FWC was not party to this action and did not request such relief. Because there was ongoing litigation concerning administration of estate and testamentary trust, specifically regarding fees paid to fiduciaries, probate court correctly exercised its jurisdiction to review all fees paid to fiduciaries. Beneficiaries' response to petition for additional fees called into question "the totality of all fees

charged." Response included attachment detailing amounts received by appellants in their various capacities, including those received by Pursell and his firm for legal services to FWC. Response specifically asserted that it is not reasonable to separate work done for estate from work done for company because it is major asset of estate, co-executors by terms of this will serve as co-directors, and there was no independent board of directors to provide oversight of reasonableness or appropriateness of fees charged by Pursell and Whisenant and their respective firms to FTC. Appellants were on notice of issue. (b) Probate court exercised its authority to examine management of assets of estate and found that accepting retainer fee under circumstances was unreasonable. Probate court found that although retainer arrangement — $3,000 per month — was not unreasonable while testator was alive and made choice to continue it, after testator's death, "a lot of things changed. Not only was the client not there anymore, the attorney was really the client after [testator's] death." Probate court also considered other multiple fees received by Pursell and determined that retainer of $3,000 was clearly unreasonable. (c) Probate court's order to disgorge unreasonable fees already paid does not equate to type of liability for which beneficiaries agreed to hold Pursell harmless. (4) Appellants objected to statements by probate judge that they characterize as indicating that appellants' invocation of *in terrorem* clause was "improper." There is no basis for appellants' claim that they were penalized for raising clause. (5) Beneficiaries contended that probate court erred in allowing appellants to retain $50,000 each in interim executor's fees that were awarded to them by agreed order. Probate court had authority to award reasonable fees, and it determined that $150,000 was reasonable fee for all co-executors. Similarly, while probate court found monthly payments under retainer arrangement with FWC to have been unreasonable, court allowed payment of reasonable fees for documented time spent on legal work for FWC. This court affirmed probate court's awards in both instances, modifying amount upward. Probate court's refusal to order additional disgorgements is affirmed. **Partial dissent:** (1) There was nothing improper about including provision in will that bases executor's compensation on fee schedule used by financial institution. But when such provision is used, will should contain other provisions that address computation of fees for executors who resign before estate is closed, that define nature and type of services covered by fee, and that provide method for computing fee for extraordinary services that are not normally part of administration of estate. Provision in will upon which Pursell and Whisenant rely does not contain any of these provisions, and hence, there is no reliable basis for determining what testator's intentions would have been in these circumstances. When will does not contain fee provision, executor is entitled to reasonable fee. Probate court had power to award Pursell and Whisenant reasonable fee because fee provision of testator's will was unenforceable. In addition to interim fees already collected, Pursell is entitled to $9,488 in additional fees, and Whisenant is entitled to $12,038 in additional fees. (2) Court exercising probate jurisdiction does not have subject matter jurisdiction to adjudicate shareholder's derivative claim simply because some or all of corporation's stock is in hands of estate within probate court's jurisdiction. Hence, probate court exceeded its jurisdiction when it ordered Pursell to disgorge portion of retainer fee he had received from FWC following testator's death. If this claim is to be pursued, it should be pursued in another forum either by FWC or by testator's estate for benefit of FWC. (***In re Estate of Wakefield,*** 27 TAM 2-18, 12/10/01, MS, Cottrell, partial dissent by Koch, 40 pages.)

▼ In case in which series of post-divorce petitions resulted in hearing in which no witnesses were called and no sworn testimony was offered, trial court did not abuse discretion in modifying parties' final divorce decree based only on petitions, answers, and statements of counsel — trial court modified decree with respect to husband's obligations to pay wife's health/medical insurance premiums, medical expenses, and life insurance premiums and denied wife's petition for post-judgment interest on payment to wife that had been ordered in final decree — when there was no indication that wife objected to method of proceeding or that wife was surprised by husband's position

FAMILY LAW: Property Settlement. CIVIL PROCEDURE: Post-Judgment Interest. Series of post-divorce petitions resulted in hearing on 7/22/99 in which neither witnesses were called nor any sworn testimony offered. Based on petitions, answers, and statements of counsel, trial court modified parties' final divorce decree with respect to husband's obligations to pay wife's medical insurance premiums, medical expenses, and life insurance premiums. Trial court denied wife's petition for post-judgment interest on payment to wife that had been ordered in final decree. (1) Wife contended that trial judge erred in modifying terms of final divorce decree when there were no pleadings or proof justifying amendments. After divorce, both parties moved out of state which complicated husband's ability to follow some of provisions of divorce decree. Wife filed two subsequent petitions for contempt against husband. Wife ultimately filed amended petition for civil contempt to which husband responded with answer and counterclaim. Thus, stage was set for "hearing" on 7/22/99. Record shows that trial court did hear proof at 7/99 hearing, although not in usual form. Apparently, attorneys appeared without their clients and simply stated what had happened since final decree. Order following hearing, drafted by wife's attorney, states that order was drafted based "upon the proof before the court." There is no indication that wife objected to proceeding on 7/22/99, and there is no indication that she was surprised by husband's position. Husband's defenses to wife's contempt petitions in substance raise same issues that would support modification of final decree. Although hearing on 7/22/99 involved unorthodox procedure, every trial judge in state has probably decided cases under same or similar circumstances. Counsel appear before court and state that certain facts are true, and court then decides legal effect of undisputed facts. While such proceeding should be used with caution — and nearly without exception it is good idea to have record of proceeding — parties should be encouraged to admit facts about which there is no genuine dispute. As such, trial court did not abuse discretion in modifying parties' final divorce decree based on petitions, answers, and statements of counsel. (2) Wife contended that she was entitled to post-judgment interest on $700 check that was awarded to her in final divorce decree as division of marital property. TCA 47-14-121 provides that interest accrues at 10% per year on judgments and decrees "from the day on which the jury or the court, sitting without a jury, returned the verdict." Statute applies to money awards in final divorce decree. Final decree in present case lists marital property awarded to each of parties, and in both lists "Insurance check $700" appears. Apparently, trial court divided insurance payment equally between wife and husband, but decree does not award judgment against husband. Therefore, since final decree does not award money judgment against husband, TCA 47-14-121 does not apply to $700 check. Any award of interest then becomes matter of discretion with trial judge. Since present case is not situation in which husband had use of funds, trial judge did not abuse

discretion in refusing to award wife post-judgment interest. (***Hofmeister v. Hofmeister,*** 27 TAM 2-19, 12/10/01, MS, Cantrell, 7 pages.)

▼ Trial court read TCA 4-5-325(a) too narrowly in finding that "abuse in the nature of intentional conduct, such as harassment or bad faith by an agency" is required for party to recover attorney fees; statute states alternative grounds for awarding attorney fees when citation issued for reason not well grounded in fact and not warranted in existing law, rule, or regulation, or for improper purpose such as to harass, cause unnecessary delay, or cause needless expense; proceeding brought with utmost good faith may result in award of attorney fees to cited party if citation was not well grounded in fact and not warranted by existing law

GOVERNMENT: Administrative Law — Attorney's Fee. On 2/1/00, 3-year-old child walked out of American Child Care Center (American) and walked into traffic. Employee at neighboring business saw incident and safely retrieved child from street. On 2/9/00, Department of Human Services (DHS) summarily suspended American's license based on its "zero tolerance policy." Working with DHS, American was able to get its license reinstated on 2/29/00. American filed request for attorney fees, and DHS filed motion for summary judgment to dismiss American's request. Trial court granted DHS's motion for summary judgment. American argued that trial court erred in failing to grant its request for attorney fees pursuant to TCA 4-5-325. Trial court found that TCA 4-5-325(a) only allows recovery of attorney fees when there is abuse in nature of intentional conduct, such as harassment or bad faith by agency, but only when bad faith of agency has resulted in business having been put through rigors and expense of entire contested case proceeding. Trial court read TCA 4-5-325(a) too narrowly in finding that "abuse in the nature of intentional conduct, such as harassment or bad faith by an agency" is required for party to recover attorney fees. Statute states alternative grounds for awarding attorney fees when citation is issued (1) for reason not well grounded in fact and not warranted in existing law, rule, or regulation, or (2) for improper purpose such as to harass, cause unnecessary delay, or cause needless expense. Therefore, proceeding brought with utmost good faith may result in award of attorney fees to cited party if citation was not well grounded in fact and not warranted by existing law. DHS also argued that fee statute was not involved because citation did not result in contested case hearing. But TCA 4-5-320(d) only dispenses with procedural niceties that ordinarily attend contested cases. Statute does not change definition of contested case contained in TCA 4-5-102(3) — in which contested case is defined as proceeding in which legal rights, duties, or privileges of party are required by any statute or constitutional provision to be determined by agency after opportunity for hearing. Although issues in present case were resolved without formal and protracted contested case proceeding, that fact does not remove proceeding from statutory definition. Moreover, if DHS could avoid paying American's attorney fees because DHS did not issue formal citation, it would have incentive to adopt same procedure in future. DHS's action in summarily suspending American's license was not well-grounded in fact, because there was not adequate investigation in implementing zero tolerance policy. DHS acted outside of existing law in applying its zero tolerance policy, and trial court ruled that DHS had violated Tennessee law as well as its own regulations. Therefore, pursuant to TCA 4-5-325(a), American is entitled to attorney fees. (***American Child Care Inc. v. Department of Human Services,*** 27 TAM 2-20, 12/10/01, MS, Cantrell, 5 pages.)

▼ When subdivision developer, who was sued as result of failure of subdivision plat plan to reflect existing drainage easement, filed third party complaint for indemnity against surveyor who prepared plat plan, trial court properly granted surveyor summary judgment; placement of drainage easement on plat plan is act that reflects measuring and locating of natural feature on surface of earth, and hence, omission of drainage easement from plat plan is surveying rather than engineering error; because suit that prompted developer to file third party complaint was based on survey reflected on final plat, claim was likewise based on final plat and because alleged faulty survey occurred more than four years before developer filed third party complaint, developer's cause of action was barred by statute of repose for surveying errors

CIVIL PROCEDURE: Statute of Repose. PROPERTY: Surveyors. In 1992, Bryan, subdivision developer, purchased land which he later developed into subdivision known as Beech Tree. Shortly after purchasing property, Bryan entered into oral agreement with Ragan-Smith, surveying company, to prepare plat plan for subdivision. On 12/7/93, plat plan entitled "Final Plat," outlining 16 lots in subdivision by metes and bounds, was completed, certified, and stamped by Fuqua, registered land surveyor employed by Ragan-Smith. On or before 1/1/95, Bryan requested that Ragan-Smith make minor revision to plat plan for Lot No. 15 in subdivision. As stated on plat plan, sole purpose of this revision was to "s[e]t out an easement for subsurface disposal systems" for neighboring landowner. This revision to plat plan, entitled "Minor Revision Lot No. 15 Beech Tree," was completed by Fuqua on 1/5/95. Myers and his wife entered into contract with Bryan to purchase Lot No. 15. In 1997, Myers discovered drainage ravine on their lot running through building site, effect of which was to substantially decrease size of house that could be built on lot. This ravine was not reflected on plat plan that Bryan had shown Myers. As result, on 5/22/98, Myers filed suit against Bryan alleging fraud, negligent misrepresentation, and violation of Consumer Protection Act with respect to their purchase of Lot No. 15. Myers alleged that plat plan was not accurate because it did not show drainage easement on their lot. On 12/28/98, Bryan filed third party complaint against Ragan-Smith, alleging that Bryan was entitled to indemnification from Ragan-Smith for any damages awarded against Bryan for deficiencies in plat plan prepared by Ragan-Smith. Ragan-Smith thereafter filed motion for summary judgment asserting that Bryan's cause of action was barred by four-year statute of repose for surveying errors set forth in TCA 28-3-114. Chancellor properly granted Ragan-Smith summary judgment. (1) Placement of drainage easement on plat plan is act that reflects measuring and locating of natural feature on surface of earth, and hence, omission of drainage easement from plat plan is surveying rather than engineering error. (2) Bryan's third party complaint was barred by TCA 28-3-114, four-year statute of repose for surveying errors. Bryan argued that critical drawing is "Minor Revision," not "Final Plat." If Ragan-Smith made surveying error by omitting drainage easement, this error was committed on "Final Plat" completed on 12/7/93. As soon as this drawing was completed, four-year statute of repose began running. "Minor Revision," completed on 1/5/95, did nothing to change "Final Plat" as far as drainage easement is concerned. As stated on "Minor Revision," sole purpose of revision was to "s[e]t out an easement for subsurface disposal systems for ... [an] adjoining property owner, and the addition of a small tract to the west [of] Lot 15 to make up the area of easement as agreed to by both property owners." Easement for subsurface disposal had nothing to do with drainage easement

omitted from "Final Plat." If error was made, it was made on 12/7/93, date of "Final Plat." Original complaint filed by Myers was based upon survey reflected on "Final Plat." Since that suit prompted original defendant, Bryan, to file his third party complaint, latter action was likewise predicated on "Final Plat" dated 12/7/93. Because alleged faulty survey occurred more than four years before Bryan filed third party complaint on 12/21/98, his cause of action is barred by TCA 28-3-114. (***Myers v. Bryan,*** 27 TAM 2-21, 12/10/01, ES at Nashville, Susano, 6 pages.)

GOVERNMENT: Prisons. CONSTITUTIONAL LAW: Due Process. CIVIL PROCEDURE: Costs. PROPERTY: Exemptions. On 5/23/00, prisoner filed suit against Commissioner of Correction and warden complaining of urinalysis drug screen and seizure of funds from his trust account for payment of court costs. No process was issued or served on defendants. Trial judge, *sua sponte,* dismissed complaint and denied attached application for temporary restraining order. (1) Prisoner's allegations challenged intrinsic correctness of disciplinary proceeding held by Department of Correction. Pursuant to urinalysis drug screening program, prisoner was randomly tested on 5/23/00 and field test was positive for THC. Test was sent to lab for confirmation, which, on 6/3/00, confirmed him as testing positive for THC. He was charged with drug screen positive disciplinary infraction. He raised no question of notice of proceedings but complained that hearing officer's findings of fact did not establish guilt because results were from legally prescribed medicine or second-hand smoke. Facts alleged, taken as true, do not assert that hearing officer acted illegally, fraudulently, arbitrarily or exceeded jurisdiction. (2) Pursuant to *Sandin v. Conner,* 515 US 472 (1995), there is no due process protection for in-prison infliction of punishment not imposing atypical and significant hardship on inmate in relation to ordinary incidents of prison life. Imposing of $22.50 fine for lab test, $4 for processing of disciplinary infraction, and loss of visitation for six months does not rise to dignity contemplated by *Sandin* standard. (3) Prisoner asserted that his inmate trust fund account is exempted from execution or liability for court costs assessed against him. This position is without merit on basis stated in *Palmer v. Tennessee Department of Correction,* 26 TAM 51-19 (Tenn.App. 2001). (***Taylor v. Campbell,*** 27 TAM 2-22, 12/10/01, MS, Cain, 4 pages.)

CRIMINAL SENTENCING: Sentence Credit. In 1991, petitioner was convicted of theft in Davidson County and was sentenced to eight years. After his parole in 9/92, he started working as long-haul truck driver. In 3/95, petitioner violated his parole by becoming unemployed and by failing to report to his parole officer. Tennessee Board of Paroles (Board) issued warrant for petitioner, and in 8/96, he was arrested in Conway, Ark., after routine inspection of his truck uncovered drug paraphernalia. Following his arrest, petitioner was incarcerated in Faulkner County, Ark., where he remained until he was convicted of possessing illegal drug paraphernalia on 1/27/97. Petitioner was sentenced to 18 months in Arkansas penal system, with sentence to be served concurrently with any sentence received on charges pending in Tennessee. In 8/97, petitioner was returned to custody of Tennessee Department of Correction, and on 9/23/97, petitioner's parole was revoked, and he was ordered to serve remainder of his Tennessee sentence. Board determined that petitioner would not receive any credit for time between 3/95, when parole violation warrant was issued, and 8/97, when petitioner was returned to Tennessee — including time petitioner was incarcerated in Faulkner County jail and Arkansas penal system. Petitioner filed petition for common law writ of certiorari in Davidson County Chancery Court. Chancellor dismissed petition after finding that Board had not acted arbitrarily, fraudulently, or illegally in revoking petitioner's parole and in setting remainder of his time to be served. Petitioner contended that Board erroneously failed to give him credit for time served in Arkansas penal institutions. (1) Board did not act illegally in refusing to credit petitioner's time in Faulkner County jail against his Tennessee sentence. Petitioner did not prove that he was being held in Faulkner County jail solely because of outstanding Tennessee parole violation warrant. Moreover, petitioner had already received 173 days of credit against his Arkansas sentence for this time. As such, petitioner is not entitled to "double dip" by insisting that he is also entitled to credit against his Tennessee sentence. (2) Board did not act illegally or arbitrarily in refusing to credit seven months petitioner spent in Arkansas penal system against his unexpired Tennessee sentence. Petitioner contended that his Arkansas lawyer told him that he would spend only three days in Arkansas classification unit and would then be transferred to Tennessee. Purported representation by petitioner's criminal defense lawyer is not binding on Tennessee. Moreover, Arkansas court had no authority to dictate how or how long petitioner would serve remainder of his Tennessee sentence. For purposes of Tennessee law, petitioner's Arkansas sentence and his existing Tennessee sentence were deemed to run consecutively, not concurrently. Nothing decreed by Arkansas court could affect that principle. (***Beaucamp v. Tennessee Board of Paroles,*** 27 TAM 2-23, 12/5/01, MS, Koch, 5 pages.)

Court of Criminal Appeals

▼ **Denial of bail by juvenile court and subsequent bond of $25,000 set by circuit court did not violate due process; evidence, although circumstantial, was sufficient to convict defendant of first degree murder when defendant was intimately involved with victim, who was on her way to see him in hours prior to her death, weapon used to kill victim was discovered in defendant's home less than 24 hours after victim's body was found, and defendant behaved suspiciously when discussing victim's murder with police**

CRIMINAL LAW: Murder I — Premeditation. CRIMINAL PROCEDURE: Bail — Juveniles — Due Process. APPEAL & ERROR: Waiver. Following transfer to circuit court for trial as adult, defendant was convicted of first degree murder in death of his pregnant girlfriend and was sentenced to life imprisonment. (1) Defendant contended that he was denied due process by being detained without bail from time of his arrest on 10/28/99 until 3/23/00 and that bail which was finally set at his bond hearing ($250,000) was excessive and punitive. (a) Denial of bail by juvenile court did not violate due process. Juvenile court did not err in ordering defendant's detention or declining to specify basis for detention in writing because TCA 37-1-114(c)(3), which requires written order for detention, was not applicable in present case. TCA 37-1-114(c)(3) applies only in circumstances in which child is alleged to have committed only "delinquent offense" and when "special circumstances" indicate that child should be detained. Defendant also argued that juvenile court erred in denying bond at conclusion of transfer hearing. TRJP 24(b)(7) requires that any order of transfer from juvenile court to adult criminal court specify grounds for transfer and set bond if offense is bailable pursuant to state law — offense at issue was "bailable." As such, juvenile court's summary denial of bail to defendant at transfer hearing was inappropriate. Nevertheless, defendant has waived this issue. Proper recourse subsequent to denial of bond in juvenile court was

for defendant to seek relief in circuit court, which he did not. In fact, defendant delayed his objection to juvenile court's decision to deny bail until he filed his motion for new trial. As such, even if juvenile court's decision to deny defendant bail was erroneous, failure to grant bond does not necessarily give rise to dismissal of indictment. (b) Amount of bond set ($250,000) was neither excessive nor punitive. Because defendant failed to seek relief at appropriate time for raising issue of excessiveness of bail, issue is waived. Nevertheless, issue is without merit. Some of reasons, as stated by prosecutor as grounds for setting high bond, were not appropriate factors for determining bail amount. But there is nothing in record to indicate that trial judge set amount of bond based upon any inappropriate reasons submitted by prosecutor. Fact that amount set was more than defendant's family was in fact able to raise does not render amount "punitive." Because defendant was granted bond hearing, he was afforded sufficient procedural due process so that pretrial detention was permissible, especially in light of his failure to raise any objection to court's ruling until after his trial and conviction. (2) Evidence, although circumstantial, was sufficient to convict defendant of first degree murder. Defendant was intimately involved with victim, who was on her way to see him in hours prior to her death. Weapon used to kill victim was discovered in defendant's home less than 24 hours after victim's body was found, and defendant knew how to use weapon. Defendant behaved suspiciously when discussing victim's murder with police, he reacted strangely when confronted with murder weapon, and he was untruthful regarding his phone calls with victim on evening of crime. Defendant's response upon being told of victim's death by his mother was indicative of his guilt — defendant's first remark was "They found her? Where she was?" Jury could reasonably infer from this statement that defendant already knew about homicide because he committed it. In addition, evidence was sufficient from which jury could infer premeditation. Defendant procured and then used deadly weapon on unarmed victim. Since murder weapon was not readily available, but stored in purse in his parents' closet, defendant had to purposefully locate gun prior to shooting victim. Victim was unarmed, and multiple wounds were inflicted upon her, with three bullets fired into her head at point blank range. Autopsy revealed that she was probably also smothered during encounter. In addition, although defendant did not attempt to conceal victim's body — victim's body was discovered lying in field next to her car — defendant attempted to clean murder weapon and returned it to place he initially found it within 24 hours. Day after killing, defendant acted relatively normal — he went to school, prepared for upcoming boxing competition, and even wept with victim's family. (***State v. Wiggins,*** 27 TAM 2-24, 12/14/01, Jackson, Woodall, 11 pages.)

▼ **Neither TRCP 5.02 nor TRCP 5.03 specifically require that physical address be included for service to be valid; pursuant to TRCP 60.02, motion for relief from civil judgment or order based upon voidness must be made within "reasonable time," and when appellant failed to seek relief from default judgment declaring him to be motor vehicle habitual offender until five years and nine months after its entry, motion was not brought within "reasonable time"**

CRIMINAL LAW: Motor Vehicle Habitual Offenders. CIVIL PROCEDURE: Service of Process — Post-Judgment Relief. On 3/22/95, petition was filed requesting that appellant be declared motor vehicle habitual offender (MVHO), and accompanying petition was "show cause" order, directing appellant to appear on 4/11/95 to show cause as to why he should not be found to be MVHO. Copy of petition and order was served on appellant on 4/4/95. Appellant failed to appear at hearing, and default judgment signed by trial judge on 4/12/95 found appellant to be MVHO. Default judgment was filed by clerk for entry on 4/19/95. District attorney certified by means of "Certificate of Service" that copy of default judgment was sent by mail to appellant on 4/12/95. On 1/9/01, appellant filed motion to set aside default judgment pursuant to TRCP 60.02. Trial judge subsequently denied appellant's motion, finding that it was not filed within "reasonable time," as required by TRCP 60.02. (1) Appellant argued that judgment was void because certificate did not include address to which judgment was mailed and was void because no return receipt was introduced to prove that appellant ever received copy of judgment. TRCP 5.02 provides that "service ... upon a party shall be made by delivering to him or her a copy of the document to be served or by mailing it to such person's last known address." TRCP 5.03 provides that proof of service "may be by certificate of a member of the bar of the court or by affidavit of the person who served the papers, or by any other proof satisfactory to the court." Neither TRCP 5.02 nor 5.03 specifically require that physical address be included for service to be valid. Moreover, appellant does not dispute fact that he received copy of default judgment by mail, rather, he argues noncompliance of various procedural rules. Appellant was served copy of order directing him to appear on 4/11/95, only eight days prior to date judgment by default was mailed to him. Accordingly, judgment by default was proper and became final judgment for purposes of appeal upon its entry on 4/19/95. (2) On 1/9/01, appellant filed motion to void judgment pursuant to TRCP 60.02. Motion for relief from civil judgment or order based upon voidness must be made within "reasonable time." Appellant sought no relief from default judgment entered against him until five years and nine months after its entry. Appellant was served on 4/4/95, with notice to appear on 4/11/95, to show cause as to why he should not be declared MVHO. Appellant chose not to appear or respond to pleadings. This court is far from persuaded that almost six-year delay in bringing motion to void judgment is "reasonable" under TRCP 60.02. Delay may be deemed unreasonable when defendant knows of judgment against him and offers no reason for his failure to timely challenge judgment. (***State v. Branch,*** 27 TAM 2-25, 12/10/01, Knoxville, Hayes, 6 pages.)

▼ **In case in which defendant pled guilty to DUI, trial judge erred in denying defendant's motion to suppress evidence discovered as result of investigatory stop when officer did not have "reasonable suspicion" to stop defendant's car in light of fact that defendant was operating his vehicle within bounds of law while being observed by officers, and stop of defendant's vehicle was based solely on radio dispatch in which another officer had radioed description of defendant's vehicle based on that officer's belief that defendant had just "left the scene of a confrontation"**

CRIMINAL PROCEDURE: Search & Seizure. APPEAL & ERROR: Certified Question. Defendant pled guilty to DUI and reserved certified question of law regarding validity of traffic stop. (1) State contended that defendant's certified question was not properly before court because defendant did not comply with mandates of *State v. Preston,* 759 SW2d 647 (Tenn. 1988). Trial court entered judgment on 9/26/00 that made no mention of certified question of law. Attempting to correct oversight, on 10/20/00, within 30 days before judgment became final and before notice of appeal was filed, trial court entered "Agreed Order Amending the Judgment." "Agreed Order" stated that defendant reserved right to

appeal certified question of law which "will be dispositive of the matter" and that certified question of law for review is "whether or not the trial court erred in failing to suppress evidence gathered pursuant to a traffic stop of Defendant's vehicle conducted by the Smyrna Police Department in the absence of reasonable suspicion to make such traffic stop." Judgment in present case was properly amended, and as amended, judgment meets requirements of *Preston.* (2) Trial judge erred in denying motion to suppress evidence discovered as result of investigatory stop of defendant's vehicle. Neither Officer Gibson nor Corporal Lucas was able to articulate any fact that they observed that would support reasonable suspicion that crime had been or was about to be committed. Both officers testified that defendant behaved completely within bounds of law while they observed him. Gibson observed defendant yelling at vehicle in parking lot, but could articulate no other suspicious activity. Lucas stated that he relied completely on Gibson's dispatch in pulling defendant over to side of road, and further stated that he would not have stopped defendant were it not for Gibson's dispatch. As such, no reasonable suspicions existed to allow Lucas to stop defendant's vehicle. Because investigatory stop of defendant's vehicle was in violation of defendant's Fourth Amendment rights as well as his rights pursuant to Tenn. Const. Art. I, Sec. 7, all evidence obtained as result of illegal stop must be suppressed. (***State v. Williams,*** 27 TAM 2-26, 12/13/01, Nashville, Welles, 6 pages.)

▼ **Trial judge properly allowed arresting officer to testify that he had released 150 people whom he had previously stopped for DUI after determining that these individuals were not under influence of alcohol when evidence was relevant in assessing officer's experience and ability to recognize motorists who are driving under influence; trial judge did not err in refusing to instruct jury on driving while impaired as lesser included offense of DUI**

CRIMINAL LAW: Driving Under Influence — Lesser Included Offenses. EVIDENCE: Blood Alcohol Test — Relevancy. CRIMINAL PROCEDURE: Discovery — Offer of Proof. Defendant was convicted of DUI with blood alcohol level of .10% or more and was sentenced to 11 months and 29 days, with all but seven days of sentence suspended. (1) Defendant contended that because he did not voluntarily submit to blood alcohol test, trial judge erred in failing to suppress results of test. Defendant was driving on public road when he was stopped by Officer Hawtin. Suspecting that defendant was intoxicated, Hawtin asked defendant to perform field sobriety tests, to which defendant responded that he did not know if he should. Defendant argued that his "refusal" to perform field sobriety tests lends credence to his contention that he also refused blood test. But videotape of traffic stop clearly shows that defendant never expressly refused to participate in field sobriety tests. Instead, defendant repeatedly delayed making decision concerning whether he should take field sobriety tests. After waiting some length of time for defendant to decide, Hawtin arrested defendant for DUI. At suppression hearing, defendant only testified that he did not expressly consent to taking blood alcohol test, and he did not maintain that he had, at any time, expressly refused to take blood test. Therefore, results of blood alcohol test were admissible at trial. (2) Defendant contended that trial judge erred in failing to grant, under TRCrP 16, defendant's motion to compel "all results of reports and scientific tests" relating to blood alcohol testing. Because defendant failed to make offer of proof regarding materiality of documents requested, it must be deemed that trial judge acted properly in denying defendant's motion to compel. (3) Defendant contended that trial judge erred in allowing Officer Hawtin to testify that he had released 150 people whom he had previously stopped for DUI. During course of explaining to jury his experience with motorists who drive under influence, Hawtin testified that, in 1994, he ceased counting his DUI stops. Nevertheless, Hawtin testified that he has arrested at least 200 individuals for DUI and has released approximately 150 others after determining that they were not under influence. Testimony was relevant in assessing Hawtin's experience and ability to recognize motorists who are driving under influence. Accordingly, trial judge properly admitted Hawtin's testimony. Even assuming *arguendo* that Hawtin's statement was irrelevant, contested testimony was only one small part of approximately one and one-half days of testimony, and even without statement, evidence of defendant's guilt was sufficiently strong for this court to conclude that statement had no effect on jury's verdict. As such, any error on part of trial judge was harmless. (4) Trial judge did not err in failing to instruct jury on offense of driving while impaired (DWI) as lesser included offense of DUI. Offense of adult DWI is not lesser included offense of DUI. (5) Defendant contended that trial judge's instruction on Count 1 that individual with blood alcohol content of .10% or more may be presumed intoxicated under TCA 55-10-401(a)(1) and instruction on Count 2 that, pursuant to TCA 55-10-401(a)(2), that blood alcohol content of .10% or more is element of offense of DUI, were so unclear as to confuse or mislead jury. Because defendant was charged alternatively under both TCA 55-10-401(a)(1) and 55-10-401(a)(2), trial judge was correct in instructing jury on both subsections. There was nothing confusing about trial judge's explicit instructions to jury. (***State v. Flittner,*** 27 TAM 2-27, 12/14/01, Nashville, Ogle, 8 pages.)

CRIMINAL SENTENCING: Post-Trial Diversion — Probation — Sentence Credit. Defendant pled guilty to vehicular homicide by recklessness and was sentenced to five years, with 10 months, day-for-day, to be served in county jail and remainder of sentence to be served on probation. (1) Trial judge did not abuse discretion in denying defendant judicial diversion. It is questionable whether defendant's plea agreement allowed for judicial diversion in light of fact that plea agreement called for defendant to plead guilty and accept five-year sentence, with remaining consideration of manner of serving sentence to be decided by trial court. Agreeing to sentence would foreclose option of judicial diversion. Nevertheless, trial judge concluded that circumstances of offense and defendant's criminal history were factors that weighed against granting his request for judicial diversion. As for defendant's contention that trial judge could not consider deterrence as factor, trial judge found that circumstances of offense and defendant's criminal history alone outweighed all other factors. Therefore, even if trial judge improperly considered deterrence factor, such error would not have changed result in present case. (2) Trial judge did not abuse discretion in denying defendant probation. Although defendant is correct in that death of victim alone is not sufficient justification for denying probation, sentencing hearing transcript shows that trial judge considered many factors and determined that facts and circumstances of offense, defendant's criminal history, and need to avoid depreciating seriousness of offense warranted denying defendant full probation. Defendant admitted to driving car while legally drunk and causing victim's death. In addition, defendant put lives of his two other passengers in jeopardy. Imposition of 10-month sentence of incarceration was warranted. (3) Imposition of 10-month sentence of confinement to be served "day-for-day" does not operate to preclude applicable conduct credits. Defendant sentenced to county jail for less than one year is entitled to earn good conduct credits. (***State v. Barnes,*** 27 TAM 2-28, 12/10/01, Knoxville, Tipton, 11 pages.)

▼ **Post-conviction court had authority to inquire into propriety of involvement of attorney as *de facto* "next friend" of allegedly incompetent petitioner; TRE 706 and Supreme Court Rule 28 give post-conviction court legal authority to order, on its own motion, mental evaluation in trial proceeding; post-conviction judge did not err in its order of mental examination, appointment of attorney *ad litem,* and inquiry into competency and conflicting interests**

CRIMINAL PROCEDURE: Post-Conviction Relief — Psychological Evaluation — Recusal. EVIDENCE: Judicial Notice. APPEAL & ERROR: Extraordinary Appeal. On 5/21/98, petitioner entered best interest guilty plea to attempted rape of child and received eight-year sentence. At sentencing hearing, trial court imposed incarceration as manner of service of sentence, and this court affirmed on appeal. Mother of minor victim filed civil suit against petitioner, his wife, and his co-defendant. Attorneys Hardin and Howser have appeared for petitioner in civil case. Attorneys Howser and Bryant have appeared for petitioner's wife, and Morrison, petitioner's daughter and guardian *ad litem* in civil case. In one proceeding, Howser and Hardin are reflected as appearing for "the defendants," which technically would include co-defendant from criminal case as well as petitioner and petitioner's wife. Howser and Bryant apparently practice in same law firm. On 2/2/00, petitioner, by and through his "next friend," Morrison, filed post-conviction petition. Pleading was filed by attorney Mitchell as counsel of record. Post-conviction court dismissed petition as prematurely filed. No appeal was apparently taken. On 4/20/00, petitioner, through Morrison as "next friend," again filed post-conviction petition. Mitchell filed this action as counsel of record. Post-conviction judge dismissed petition, finding that "next friend" status was not permissible manner in which to bring post-conviction action. It appears that no appeal was taken. On 7/13/00, petitioner filed post-conviction petition styled "Jesse C. Minor, individually, and by and through counsel, Hal D. Hardin v. State of Tennessee." Mitchell filed action as counsel of record. Petition alleged that petitioner is in poor health and suffers from irreversible dementia that seriously affects his cognitive abilities. Petitioner attacked his attempted rape of child conviction on basis that he was incompetent and unable to understand prior proceedings and therefore incapable of entering voluntary guilty plea, that state failed to disclose material exculpatory evidence, that false and/or materially misleading statements were offered to trial court by victim and her mother, and that trial counsel did not provide effective assistance. At beginning of hearing, post-conviction judge expressed concerns that petitioner's attorneys in post-conviction case had conflicting interests due to their representation of petitioner and various family members in civil proceeding. Post-conviction judge entered written order for petitioner to be evaluated and apparently entered order appointing Loy as attorney *ad litem* to assist with mental evaluation. On 10/21/00, petitioner filed motion to reconsider orders appointing attorney *ad litem* and requiring mental evaluation. Memorandum accompanying that motion complained of post-conviction judge's "previous ruling" that Morrison could not proceed as "next friend." Following hearing, post-conviction judge denied motion to reconsider. On or about 12/7/00, petitioner's counsel sent letter to post-conviction judge requesting that she recuse herself. Post-conviction judge denied request for recusal. Petitioner filed motion for certification of interlocutory appeal seeking review of post-conviction judge's rulings that Morrison could not proceed as petitioner's "next friend," appointing attorney *ad litem,* and ordering mental evaluation. On 1/10/01, petitioner filed motion for recusal. On 3/7/01, post-conviction judge denied both petition for interlocutory appeal and motion for recusal. This court granted petitioner's application for extraordinary appeal. (1) First issue upon which this court accepted review was whether "next friend" may file post-conviction petition on behalf of incompetent prisoner. This issue pertains to petitioner's complaint that post-conviction judge prevented Morrison from maintaining action as his "next friend." Review of this question was improvidently granted. Although this litigation is related to, and even resultant from, post-conviction judge's ruling in prior action that post-conviction petition may not be maintained by "next friend," review of adverse ruling of post-conviction judge should have been pursued via direct appeal of prior action. (2) Second issue is whether post-conviction court may, *sua sponte,* order mental evaluation of prisoner or conduct other inquiries into matter to determine whether "next friend" petition was properly filed on prisoner's behalf. Because this court has held that there is no justiciable question of propriety of "next friend" petition before us, this issue, as stated, is likewise not justiciable. But examination of closely related question is appropriate. That question is whether post-conviction judge properly entered *sua sponte* order for mental evaluation of allegedly incompetent petitioner to assist court in determining (a) whether petitioner is competent to make decisions regarding pursuit of case, and if not, whether petitioner's best interests are being served by his present attorneys. (a) Post-conviction judge had authority to inquire into propriety of attorney Hardin's involvement as representative of petitioner, and if necessary, to appoint substitute representative. It is in province of court in which matter is pending to inquire at any time into fitness of "next friend" to represent interests of incompetent and to allow or direct that someone else be substituted in his or her place. In view of question of potential conflicts affecting attorney Hardin as *de facto* "next friend" and other members of

petitioner's legal team, appointment of attorney Loy as guardian and advocate for limited purpose was proper exercise of court's authority. Once competency inquiry is completed, petitioner will either be before court as competent party, in which case he may retain or discharge his present counsel, or alternatively, he will be before court as incompetent party, in which case court may allow him to proceed through attorney Hardin as his representative or appoint attorney Loy or some other individual as his guardian *ad litem* for remaining litigation. If latter situation of incompetency arises and if petitioner is not indigent, petitioner's representative would have duty of choosing counsel to represent petitioner, subject to court's authority to discharge any attorney whose representation would run afoul of Code of Professional Responsibility. (b) Post-conviction judge had authority to order mental examination as means of effecting inquiries into competency and conflicting interests. Trial court may on its own motion order mental evaluation in trial proceeding, but it has no specific authority under TCA 33-7-301 to do so in post-conviction proceeding. But TRE 706 provides that, in bench-tried cases, court may on its own motion or on motion of any party enter order to show cause why expert witnesses should not be appointed and may request parties to submit nominations. Moreover, Supreme Court Rule 28 allows court latitude to enter such orders "as are necessary to efficient management of the case" and "as may be required." These provisions gave lower court legal authority to order mental evaluation. (c) Post-conviction judge did not follow TRE 706 procedure of entering preliminary show cause order and permitting parties to submit nominations for mental evaluation expert. Any error was *de minimis* because post-conviction judge afforded parties opportunity to address propriety of mental evaluation. This took place at what was originally scheduled to be evidentiary hearing and evolved into essentially *de facto* show cause hearing. Record reflects that petitioner was allowed thorough opportunity to oppose mental evaluation at this hearing. Petitioner was afforded additional opportunity to voice his opposition at subsequent hearing on motion to reconsider, and he also did so in extensive memorandum filed with court. Likewise, petitioner was not prejudiced by post-conviction judge's choice of expert without accepting nominations. Post-conviction judge ordered evaluation at Middle Tennessee Mental Health Institute, one of entities authorized to perform mental evaluations in criminal cases or on motion of party in post-conviction case. Even though TCA 33-7-301 does not apply to post-conviction mental evaluations on court's motion, statute provides guidance in determining propriety of post-conviction judge's choice of expert. Hence, choice of expert was reasonable and logical one. (3) Post-conviction judge did not abuse discretion in refusing to recuse herself. (a) Petitioner contended that recusal was required because post-conviction judge was previously employed in supervisory position with district attorney's (DA's) office. Post-conviction judge dispelled any concerns about her actual involvement as prosecutor or supervisor of petitioner in present case. Nothing in vague allegations about conduct of another prosecutor indicates that conduct transpired during judge's tenure in DA's office or that allegedly culpable individual was employed during same time period as post-conviction judge served as prosecutor. Prosecutorial misconduct allegation pertained to discovery violations and allowing false testimony at sentencing hearing, both of which occurred after return of indictment. Post-conviction judge had departed from DA's office over one year before return of indictment. (b) Petitioner contended that recusal was required because post-conviction judge met with Professor Cohen, one of petitioner's prospective expert witnesses, in chambers without presence of counsel. Post-conviction judge indicated that her communications with Cohen were related to earlier, unrelated conversation about jury selection in capital cases. Nothing in disciplinary rules for judges or lawyers prohibits judges, lawyers, and professors of law from communicating with one another about unrelated matters when they are involved in varying capacities in ongoing litigation, and no improper appearance is generated in usual circumstances. (c) Petitioner contended that recusal was required because post-conviction judge made *ex parte* investigation by reviewing circuit court file in civil case. Court must generally restrain itself to consideration of those facts that are before it and may not conduct independent investigation. But post-conviction judge was empowered to judicially notice civil file. Court may take judicial notice of facts "not subject to reasonable dispute" that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Court records fall within general rubric of facts readily and accurately ascertained. Post-conviction judge referred to records of civil proceedings on two occasions. No objection was registered until nearly three months after post-conviction judge's first reliance on judicially noticed facts and one month after second occurrence. Even then, counsel did not make request under TRE 201 for hearing on propriety of judicial notice. Petitioner's counsel waived any complaint under TRE 201 to post-conviction judge's reference to civil file by failing to promptly request hearing on propriety of judicial notice. Because post-conviction judge properly exercised powers of judicial notice, reference to civil file did not constitute improper, *ex parte* investigation, and provided no basis for recusal. (d) Petitioner contended that recusal was required because post-conviction judge has issued "egregious rulings" and has not adhered to Supreme Court Rule 28. Issue was not raised as basis for recusal in trial, and hence, is not basis upon which this court granted TRAP 10 review. Moreover, there is nothing egregious about post-conviction judge's rulings. (***Minor v. State,*** 27 TAM 2-29, 12/5/01, Nashville, Witt, 15 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner pled guilty to second degree murder and received 40-year sentence as 100% violent offender. Evidence did not preponderate against post-conviction judge's finding that petitioner received effective counsel. At post-conviction hearing, petitioner testified that he pled guilty only because he felt that his attorney was not helping him and that he hoped to get better help for himself after he left county jail. Petitioner testified that he told counsel everything about his involvement in offense — that he and co-defendant planned to rob victim but that he did not know homicide was going to occur. Petitioner admitted that counsel explained plea offer and that he faced sentence of life without parole if he proceeded to trial for indicted offense of first degree murder. Petitioner stated that although he could read and write fairly well, he was young, did not understand law, and had lot on his mind at guilty plea hearing. Petitioner stated that even though he said that he understood Range II sentencing when judge explained it to him at guilty plea hearing, he did not understand it. Although he admitted that he had no witnesses who could have helped him and no defense, he believed that he could have been convicted of lesser offense had case gone to trial. Counsel testified that she discussed case with petitioner and that petitioner gave no alibi or defense witnesses. Counsel testified that petitioner received two mental evaluations, which revealed no mental incapacity defense. Counsel stated that petitioner had confessed to robbing victim and to being present when murder occurred. Counsel testified that aside from co-defendant, who pled guilty and planned to testify against petitioner, state had two other witnesses, including witness who would testify that petitioner knew murder was about to occur. Counsel interviewed co-defendant who told her that petitioner helped plan murder, obtained gun,

and brought some garbage bags for disposing of body. Counsel stated that she discussed with petitioner state's offer and fact that he would be pleading outside of his range, which was Range I. Counsel stated that petitioner completely understood what he was doing but was not happy with offer because he wanted lesser sentence. Counsel agreed that although petitioner was reluctant, he wanted to accept plea offer. Post-conviction judge resolved issue of credibility in favor of counsel. (***Page v. State,*** 27 TAM 2-30, 12/7/01, Jackson, Tipton, 3 pages.)

CRIMINAL PROCEDURE: Effective Counsel — Guilty Plea. Petitioner pled guilty to two counts of first degree premeditated murder and one count of aggravated burglary. Petitioner received effective sentence of life plus 12 years. Evidence did not preponderate against post-conviction judge's finding that petitioner received effective counsel and that petitioner entered guilty pleas knowingly and voluntarily. Petitioner testified at post-conviction hearing that counsel never discussed state's evidence with him and that he did not understand what state's evidence against him was. Petitioner stated that his confessions to police were false and made in fear of co-defendant. Petitioner admitted telling counsel that his statements to police were true in order, he claimed, "to get out of that county jail." Petitioner testified that on day he pled guilty, counsel told him that he would be receiving sentence of 102 years. Petitioner admitted that counsel went over plea agreement with him and tried to explain it but that he did not understand. Petitioner testified that he was too confused and frightened to explain his lack of understanding to trial court during his plea hearing. Petitioner testified that all of his schooling had been in special education schools. Prior to post-conviction hearing, petitioner earned GED degree, making "the lowest score in the whole camp." Post-conviction judge found that petitioner was evaluated by medical professionals and that counsel explored and examined all possible defenses and suppression issues. State had overwhelming case against petitioner, including confessions. Post-conviction judge found that petitioner's testimony in support of his claim that he did not knowingly and voluntarily enter guilty pleas "not credible," finding that majority of petitioner's testimony indicated that he understood nature of case and alternatives from which he could choose. (***State v. Milliken,*** 27 TAM 2-31, 12/7/01, Nashville, Welles, 5 pages.)

U.S. District Courts

▼ Tandy is granted summary judgment on AutoZone's claim of trademark infringement based on Tandy's use of POWERZONE mark; dissimilarity of AUTOZONE and POWERZONE marks and lack of evidence of actual confusion weigh strongly against finding of likelihood of confusion; Tandy is granted summary judgment on AutoZone's trade name infringement claim; Tandy is granted summary judgment on AutoZone's dilution claim as AUTOZONE and POWERZONE marks are not sufficiently similar given heightened similarity requirement in dilution context

COMMERCIAL LAW: Trademarks — Trade Names — Unfair Competition. CIVIL PROCEDURE: Settlement. In 1979, AutoZone Inc.'s predecessor, Malone & Hyde Inc. (M&H), began business using trade name Auto Shack. In 1982,Tandy Corporation filed suit against M&H for trademark infringement and dilution of its Radio Shack marks. On 12/15/86, parties settled earlier litigation. As part of settlement agreement, M&H agreed to use replacement name AutoZone. AutoZone alleged that it adopted AutoZone name, alone and in combination with Speedbar Design, for retail auto parts store services. Plaintiffs, AutoZone and Speedbar Inc., also use AUTOZONE as brand name on certain automotive parts and accessories. AutoZone alleged that it has continuously used these marks in connection with advertising, marketing, and sales of its goods and services within interstate commerce and within Tennessee since 1987. AutoZone registered AUTOZONE mark and AUTOZONE & Speedbar Design with U.S. Patent and Trademark Office and registrations subsequently issued. Registrations were transferred to Speedbar Inc. as of 5/10/98. Speedbar then licensed use of marks to AutoZone for use in connection with rendering and promotion of retail auto parts store services, as well as automotive parts and accessories. On 7/2/98, Tandy began using POWERZONE mark to identify section inside its Radio Shack stores where batteries, extension cords, converters, and other power-related accessories are sold. On 2/1/99, AutoZone requested that Tandy cease using POWERZONE mark and abandon its application to register mark. When Tandy ultimately refused to comply with request, AutoZone and Speedbar (plaintiffs or AutoZone) filed this suit alleging service mark and trademark infringement, trade name infringement, breach of contract, unfair competition, and service mark and trademark dilution. (1) Tandy is granted summary judgment on AutoZone's trademark infringement claim. In *Daddy's Junky Music Stores Inc. v. Big Daddy's Family Music Center,* 109 F3d 275 (6th Cir. 1997), Sixth Circuit Court of Appeals set forth elements necessary to succeed on claim of trademark infringement. Touchstone of liability under 15 USC 1114 is whether defendant's use of disputed mark is likely to cause confusion among consumers regarding origin of goods offered by parties. When determining whether likelihood of confusion exists, court must examine and weigh eight factors: similarity of marks, strength of senior mark, relatedness of goods or services, evidence of actual confusion, marketing channels used, likely degree of purchaser care, intent of defendant in selecting mark, and likelihood of expansion of product lines. Looking at eight factors together, dissimilarity of marks and lack of evidence of actual confusion weigh strongly against finding of likelihood of confusion. Factors that weigh in favor of likelihood of confusion, including strength of AUTOZONE mark and degree of purchaser care, are less persuasive. There were no contested factors whose resolution would necessarily be dispositive on likelihood of confusion issue. (2) Tandy is granted summary judgment on AutoZone's trade name infringement claim. Governing issue in trade name infringement case is whether purported infringer's use of particular mark is likely to cause confusion. Tennessee courts have analyzed likelihood of confusion under common law trade name infringement according to eight factors identified by Sixth Circuit. Analysis using eight factors for likelihood of confusion leads to conclusion that use of POWERZONE mark is not likely to cause confusion with AUTOZONE. (3) Tandy is granted summary judgment on AutoZone's breach of contract claim. AutoZone alleged that Tandy's use of POWERZONE mark constitutes breach of settlement agreement from earlier litigation. Section III.D of agreement prohibits Tandy from using any trade name or mark which is confusingly similar to AUTOZONE name, which was adopted as part of settlement. POWERZONE mark is not confusingly similar to AUTOZONE. Hence, use of mark does not constitute breach of settlement agreement. (4) Tandy is granted summary judgment on AutoZone's unfair competition claim. Lanham Act imposes liability on any person who, on or in connection with goods or services, uses in commerce any false designation of origin, false or misleading description of fact, or false or misleading representation of fact,

which is likely to cause confusion or to cause mistake, or to deceive as to origin of his or her goods, services, or commercial activities. Deceptive practices prohibited by 15 USC 1125 have loosely been described as "unfair competition." AutoZone argued that Tandy's adoption and use of POWERZONE mark constitutes false designation of origin within meaning of statute. AutoZone alleged that Tandy used POWERZONE mark to confuse or deceive public by misrepresenting that retail store services and products offered for sale are in some way connected or affiliated with AutoZone. Tandy's use of POWERZONE is not "likely to cause confusion, or to cause mistake, or to deceive ... as to the origin" of its products. (5) Tandy is granted summary judgment on AutoZone's dilution claim. Federal antidilution statute, 15 USC 1125(c)(1), provides that owner of famous mark is entitled to injunction against another person's commercial use in commerce of mark or trade name, if such use begins after mark has become famous and causes dilution of distinctive quality of mark. To prove claim for dilution under federal statute, plaintiff must establish five necessary elements: senior mark must be famous, it must be distinctive, junior use must be commercial use in commerce, it must begin after senior mark has become famous, and it must cause dilution of distinctive quality of senior mark. There are no reported Tennessee cases interpreting dilution statute. Tennessee and federal dilution statutes are very similar, and Sixth Circuit has analyzed claims together. Consequently, this court will examine both dilution claims utilizing five factors set out in *Kellogg Co. v. Exxon Corp.,* 209 F3d 562 (6th Cir. 2000). Factors one, three, and four are conceded for purposes of summary judgment. AUTOZONE mark is moderately distinctive, so second factor is not fatal to AutoZone's claim. With respect to fifth factor, Sixth Circuit, in *V Secret Catalogue Inc. v. Moseley,* 259 F3d 464 (6th Cir. 2001), adopted analysis of Second Circuit in *Nabisco Inc. v. PF Brands Inc.,* 191 F3d 208 (2nd Cir. 1999). Second Circuit developed list of 10 nonexclusive factors to determine if dilution has, in fact, occurred — distinctiveness; similarity of marks; proximity of products and likelihood of bridging gap; interrelationship among distinctiveness of senior mark, similarity of junior mark, and proximity of products; shared consumers and geographical limitations; sophistication of consumers; actual confusion; adjuctival or referential quality of junior use; harm to junior user and delay by senior user; and effect of senior's prior laxity in protecting mark. Based on analysis of factors recited by Sixth Circuit in *V Secret* to determine if junior use dilutes distinctive qualities of senior mark, AutoZone's dilution claims fails as matter of law. AUTOZONE and POWERZONE marks are not sufficiently similar given heightened similarity requirement in dilution context, and other factors weighing in favor of dilution are inadequate to preclude summary judgment on AutoZone's dilution claim. (***AutoZone Inc. v. Tandy Corp.,*** 27 TAM 2-32, 11/9/01, M.D.Tenn., Wiseman, 31 pages.)

Attorney General Opinions

▼ Legislature does not have power to create group as commission to set or regulate state taxes

CONSTITUTIONAL LAW: Power to Tax — Delegation of Legislative Function. Power of taxation belongs to state in its sovereign capacity, and this power is vested in Tennessee legislature by state constitution. Legislature does not have power to create group or commission to set or regulate state taxes in Tennessee. Delegation of legislature's taxing power to any entity other than counties and towns would violate Tenn. Const. Art. II, Sec. 29. In order for legislature to delegate taxing authority, state constitution would have to be amended to provide that specific group or commission other than legislature is vested with taxing authority. Amending constitution would have to be done through formal procedure outlined in Tenn. Const. Art. XI, Sec. 3. (***Attorney General Opinion 01-172,*** 27 TAM 2-33, 12/18/01, 3 pages.)

TAXATION: Business Tax. (1) Business name, business owner's name, and business address stated on application routinely made to county clerk or municipal tax collector for purpose of collecting business tax may be released as public information pursuant to TCA 67-4-722(d). (2) Telephone number(s) listed by applicant on application routinely made to county clerk or municipal tax collector for purpose of obtaining business license do not become public information pursuant to TCA 67-4-722(c). (3) Other identifying numbers obtained by state, county, or city for reporting and enforcing business tax, including federal employer identification numbers, social security numbers, or state sales tax numbers, are not considered public information pursuant to TCA 67-4-722(c) or TCA 67-1-1701 *et seq.* (***Attorney General Opinion 01-165,*** 27 TAM 2-34, 11/15/01, 3 pages.)

Articles of Interest

Editor's note: Following is a list of articles of interest to Tennessee attorneys. Copies may be obtained from the respective law schools or publications.

- Amundsen, Amy J., *Mutual Temporary Injunctions in Divorce Cases,* 37 Tenn.B.J. 17 (November 2001)
- Arrington, Robert L., *Employment Dispute Resolution: An Idea Whose Time Has Come?,* 37 Tenn.B.J. 32 (October 2001)
- Avery, Wesley H., *Consumers to Benefit by Recent Inflationary Adjustments to the Bankruptcy Code,* 37 Tenn.B.J. 30 (September 2001)
- Barna, James Francis, *Government Contractors Beware: Recent Changes to Federal Affirmative Action Requirements,* 37 Tenn.B.J. 14 (September 2001)
- Bland, Timothy S. and Licia M. Williams, *Overland v. Swifty Oil Co.: Employer Not Liable for Manager's Egregious Misconduct,* 37 Tenn.B.J. 17 (October 2001)
- Blankenship, Michael B. and Kristie R. Blevins, *Inequalities in Capital Punishment in Tennessee Based on Race: An Analytical Study of Aggravating and Mitigating Factors in Death Penalty Cases,* 31 Mem.L.Rev. 823 (Summer 2001)
- Bracher, Pamela Blass, *Recent Developments in The Law of Trade Practices in Tennessee,* 37 Tenn.B.J. 26 (December 2001)
- Cleek, Laurel L., *The Constitutionality of the "Heinous, Atrocious, or Cruel" Aggravating Circumstance in Death Penalty Cases and Its Interpretation by Tennessee Courts,* 31 Mem.L.Rev. 939 (Summer 2001)
- Craft, Perry A. and Arshad (Paku) Khan, *The Court in Action: A Summary of Key Cases From the U.S. Supreme Court 2000-2001, Part 1,* 37 Tenn.B.J. 18 (September 2001)
- Craft, Perry A. and Arshad (Paku) Khan, *The Court in Action: A Summary of Key Cases From the U.S. Supreme Court 2000-2001, Part 2,* 37 Tenn.B.J. 18 (October 2001)
- Davis, Lee and Bryan Hoss, *Tennessee's Death Penalty: An Overview of the Procedural Safeguards,* 31 Mem.L.Rev. 779 (Summer 2001)

● Day, John A., *Fear the Dark No More,* 37 Tenn.B.J. 37 (September 2001)

● Farringer, John L. VI, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed,* 54 Vand.L.Rev. 2441 (November 2001)

● Foley, Daniel J., *Death By Election? A UT Professor Says Voters Have Changed the Way the Supreme Court Decides Death Penalty Cases,* 37 Tenn.B.J. 12 (December 2001)

● Foley, Daniel J., *The Tennessee Court of Appeals: How Often It Corrects the Trial Courts — And Why?,* 68 Tenn.L.Rev. 557 (Spring 2001)

● Gilbert, Justin S., *Prior History, Present Discrimination, and the ADA's "Record Of" Disability,* 31 Mem.L.Rev. 659 (Spring 2001)

● Gill, Bruce D., *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians,* 68 Tenn.L.Rev. 361 (Winter 2001)

● Hancock, Jonathan C. and John B. Starnes, *Revisiting Kolstad v. American Dental Association: Reform of Punitive Damages Awards in Employment Discrimination Cases Since the Supreme Court Adopted the Standard of Malice or Reckless Indifference,* 31 Mem.L.Rev. 641 (Spring 2001)

● Hart, Tomeka R., *Employment Law — Parker v. Warren County Utility District: Tennessee Holds Employers Vicariously Liable for Sexual Harassment by Their Supervisors,* 31 Mem.L.Rev. 709 (Spring 2001)

● Headrick, Audrey A., *Workers' Compensation — Nance v. State Industries, Inc.: Tennessee Adopts Affirmative Defense Standard for Willful Failure or Refusal to Use a Safety Appliance,* 31 Mem.L.Rev. 727 (Spring 2001)

● Holbrook, Dan W., *The Revolution is Underway, "Total Return Trusts" Come to Tennessee,* 37 Tenn.B.J. 33 (December 2001)

● Hudson, David L., *Confusion Over "Comparables": Will the Sixth Circuit Stick to One Standard with Respect to "Similarly Situated" Employees?,* 37 Tenn.B.J. 25 (November 2001)

● Hutton, Robert L., *The Right of the Condemned to Have Counsel Present at Execution as Established in the Case of Robert Glen Coe,* 31 Mem.L.Rev. 757 (Summer 2001)

● Kight, Yolanda R., *Present Competency to Be Executed — Van Tran v. State: Common Law and Constitutional Prohibitions Against Executing the Insane and the Inherent Authority of the Tennessee Supreme Court to Adopt and Enforce These Rights,* 31 Mem.L.Rev. 973 (Summer 2001)

● Kuzur, Laureen K., *Torts — Defamation — Compelled Self-Publication: Sullivan v. Baptist Memorial Hospital,* 68 Tenn.L.Rev. 395 (Winter 2001)

● Minton, Christopher M., *A Broken Record: Nationally Recognized Defects Corrupt Two Tennessee Death Penalty Cases,* 31 Mem.L.Rev. 807 (Summer 2001)

● Morrissey, Daniel J., *SEC Injunctions,* 68 Tenn.L.Rev. 427 (Spring 2001)

● Paine, Donald F., *Law of the Courthouse,* 37 Tenn.B.J. 32 (September 2001)

● Paine, Donald F., *Separation of Powers and the "Mallard" Decision,* 37 Tenn.B.J. 24 (December 2001)

● Parrish, Brandy S., *Walking an Evidentiary Tightrope: The Aftermath of Reeves v. Sanderson Plumbing Products Inc.,* 31 Mem.L.Rev. 677 (Spring 2001)

● Reynolds, Glenn Harlan, *Guns, Privacy, and Revolution,* 68 Tenn.L.Rev. 635 (Spring 2001)

● Russotto, Sarina Maria, *Effects of the Sutton Trilogy,* 68 Tenn.L.Rev. 705 (Spring 2001)

● Scally, Sean P., *To Pay or Not To Pay: A Primer on the Federal Unrelated Business Income Tax (UBIT) for Non-Tax Lawyers,* 37 Tenn.B.J. 12 (October 2001)

● Vandiver, Margaret and Michael Coconis, *"Sentenced to the Punishment of Death": Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee,* 31 Mem.L.Rev. 861 (Summer 2001)

● Wallace, Chad E. and Andrew T. Wampler, *Skimming the Trout From the Milk: Using Circumstantial Evidence to Prove Product Defects Under the Restatement (Third) of Torts: Products Liability Section 3, Tennessee and Beyond,* 68 Tenn.L.Rev. 647 (Spring 2001)

Permission to Appeal

Appeal Granted

Poper v. Rollins, 26 TAM 40-9 (CA 8/15/01), appeal granted 12/31/01 (when plaintiff, who filed wrongful death action on behalf of his wife who died from injuries in auto accident, received $530,000 after he settled with all defendants but one, uninsured motorist insurance carrier is entitled to offset amounts collected from defendants who had previously settled; broad language of TCA 56-7-1201(d) cuts across language of insurance policy and limits uninsured motorist insurer's liability to policy amount offset by sum of all policy limits collectible and applicable to death of insured)

Woo-Jun Ki v. State, 26 TAM 39-11 (CA 8/13/01), appeal granted 12/31/01 (with respect to wrongful death of student in fire on college campus, claims commissioner erred in awarding student's parents $500,000 for their injuries, in addition to $500,000 in damages on behalf of student; there is only one cause of action for wrongful death, which is cause of action student would have had if he had survived, and parents were not entitled to recover loss of consortium under TCA 9-8-307(e))

Other Appeals

Betts v. State, 26 TAM 40-43 (CCA 8/13/01), appeal denied 12/31/01
Drummer v. State, 26 TAM 42-39 (CCA 8/29/01), appeal denied 12/31/01
Goins v. State, 26 TAM 39-38 (CCA 8/3/01), appeal denied 12/31/01
Hall v. State, 26 TAM 44-43 (CCA 9/7/01), appeal denied 12/31/01
Kinnaird v. State, 26 TAM 39-39 (CCA 8/7/01), appeal denied 12/31/01
Kyle v. State, 26 TAM 49-41 (CCA 10/18/01), appeal denied 1/7/02
McKee v. State, 26 TAM 43-37 (CCA 8/31/01), appeal denied 12/31/01
Smith v. Johnson, 26 TAM 40-6 (CA 8/27/01), appeal denied 12/31/01
State ex rel. Barger v. City of Huntsville, 26 TAM 41-32 (CA 8/17/01), appeal denied 1/7/02; opinion designated "For Publication"
State v. Avery, 26 TAM 36-33 (CCA 7/16/01), petition to rehear denied 26 TAM 41-58; appeal denied 12/31/01
State v. Bailey, 25 TAM 12-30 (CCA 1/25/00), appeal denied 12/31/01
State v. Barr, 26 TAM 35-39 (CCA 7/10/01), appeal denied 12/31/01
State v. Boyd, 26 TAM 44-25 (CCA 9/10/01), appeal denied 12/31/01
State v. Caldwell, 26 TAM 37-40 (CCA 7/20/01), appeal denied 12/31/01
State v. Carpenter, 26 TAM 41-39 (CCA 8/16/01), appeal denied 12/31/01
State v. Clark, 26 TAM 37-43 (CCA 7/25/01), appeal denied 12/31/01
State v. Cole, 26 TAM 40-30 (CCA 8/10/01), appeal denied 12/31/01
State v. Eidson, 26 TAM 41-45 (CCA 8/16/01), appeal denied 12/31/01
State v. Garcia, 26 TAM 38-32 (CCA 7/31/01), appeal denied 1/7/02
State v. Goode, 26 TAM 44-26 (CCA 9/10/01), appeal denied 12/31/01
State v. Humphreys, 26 TAM 38-41 (CCA 7/26/01), appeal denied 12/31/01
State v. Hurston, 26 TAM 40-33 (CCA 8/13/01), appeal denied 12/31/01
State v. Hurt, 26 TAM 41-46 (CCA 8/16/01), appeal denied 12/31/01
State v. Larmond, 26 TAM 22-43 (CCA 4/10/01), appeal denied 1/7/02
State v. Layne, 26 TAM 35-34 (CCA 7/11/01), appeal denied 12/31/01
State v. Livingston, 26 TAM 38-37 (CCA 7/31/01), appeal denied 1/7/02
State v. Morrison, 26 TAM 39-31 (CCA 8/7/01), appeal denied 1/7/02
State v. Scarbrough, 26 TAM 35-26 (CCA 7/11/01), appeal denied 1/7/02
State v. Shannon, 26 TAM 38-35 (CCA 7/27/01), appeal denied 12/31/01
State v. Thompson, 26 TAM 39-22 (CCA 8/9/01), appeal denied 12/31/01
Thompson v. Adcox, 26 TAM 40-11 (CA 8/13/01), appeal denied 1/7/02
Wade v. State, 26 TAM 43-35 (CCA 8/30/01), appeal denied 12/31/01

Hot Cases

1. *Rothstein v. Orange Grove Center Inc.,* 26 TAM 50-2 (SC 11/29/01) (when trial court erred in failing to instruct jury in wrongful death case on plaintiffs' claim for loss of consortium of adult daughter, case is remanded for new trial on issue of filial consortium)
2. *Bogan v. Bogan,* 26 TAM 47-1 (SC 11/8/01) (bona fide retirement of obligor constitutes substantial and material change in circumstances so as to permit modification of alimony when decision to retire is objectively reasonable; in deciding whether to modify support award, need of receiving spouse cannot be single-most dominant factor, and ability of obligor to provide support must be given at least equal consideration)
3. *Nelson v. Innovative Recovery Services Inc.,* 26 TAM 52-9 (CA MS 11/21/01) (when insured was injured in automobile collision, health maintenance organization under TennCare paid $6,267 in medical expenses, plaintiff hired attorney to represent her in claim against other driver, and attorney settled case for $25,000, there was no proof, or any finding of fact, by trial court accepting settlement as to whether or not insured was "made whole," and hence, requirements of "made whole" doctrine were not established; when there was no express or implied agreement between plaintiff's attorney and TennCare, plaintiff was not entitled to retain one-third of $6,267 subrogation interest as attorney fees)
4. *Godfrey v. Ruiz,* 26 TAM 46-4 (CA MS 10/4/01) (trial court properly granted defendants summary judgment in suit arising out of accident between vehicle in which plaintiffs were riding and van owned by defendants and driven by defendant husband's cousin, as there was no evidence to refute assertions made by defendants that cousin was not on any business of defendants at time of accident and was driving van without defendants' permission)
5. *NPS Energy Services Inc. v. Jernigan,* 26 TAM 47-4 (WC 7/9/01) (award of benefits is reversed when doctor never testified that in his opinion based upon reasonable medical certainty there was any aggravation or change in employee's pre-existing condition other than increase in pain and when, in doctor's opinion, finding anatomical change would require speculation that something occurred at "mythical" microscopic level)
6. *Frazier v. Bridgestone/Firestone Inc.,* 26 TAM 48-2 (WC 9/18/01) (referral by trial court to special master for purposes of making findings and conclusions on main issues in controversy in workers' compensation case is prohibited)
7. *Limbaugh v. Coffee Medical Center,* 26 TAM 43-1 (SC 10/16/01) (Governmental Tort Liability Act removes governmental immunity for injuries proximately caused by negligent act or omission of governmental employee except when injury arises out of only torts enumerated in TCA 29-20-205(2); when harm arising from tortious acts of intentional tort-feasor was foreseeable risk created by negligent defendant, and all tort-feasors have been made parties to suit, each tortious actor will be jointly and severally liable for damages)
8. *Miller v. Choo Choo Partners L.P.,* 26 TAM 49-11 (CA ES 11/5/01) (in personal injury case, expert medical testimony was sufficient to establish that fall aggravated or exacerbated plaintiff's pre-existing back and neck injuries)
9. *United States v. Draper,* 26 TAM 47-48 (USCA6 10/2/01) (when district court accredited officer's testimony that he observed seatbelt violation, officer had probable cause to make initial stop)
10. *Estate of Kirk v. Lowe,* 26 TAM 44-11 (CA WS 9/28/01) (uninsured motorist procedures provided by TCA 56-7-1201 *et seq.* do not extend statute of limitation for personal injury actions so that action can be maintained when previously unknown and subsequently identified motorist is in fact insured)

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