Tennessee Attorneys Memo

A weekly summary of all new Tennessee law developments

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2003: Tennessee Supreme Court in review

The Tennessee Supreme Court issued around 70 decisions in 2003. Among its rulings, the court declined to adopt a cause of action for loss of parental consortium in a personal injury case, refused to relax the rule requiring an injured employee to show actual intent to harm in order to file a tort action against an employer, and announced a standard to be applied in DUI cases when a defendant contests the element of "physical control" based upon the inoperability of a vehicle.

Torts. The court declined to adopt a common law cause of action for loss of parental consortium in a personal injury case. *Taylor v. Beard*, 104 SW3d 507.

In a suit for damages for personal injury and wrongful death resulting from an automobile accident in which the plaintiff was injured and her husband was killed, the court held that the defendant doctor owed a duty to the plaintiff and her husband to warn the other driver of the risks of driving while under the influence of two prescribed drugs, Soma (muscle relaxant) and Esgic-Plus (barbiturate). The doctor was held not to owe a duty to the plaintiff and her husband in deciding whether or not to prescribe medications to the other driver. *Burroughs v. Magee*, 28 TAM 41-1.

The court ruled that when a trial court, acting as thirteenth juror, finds that a jury's allocation of fault is not supported by the weight of evidence, the only remedy is granting a new trial. The trial court may not reallocate the percentages of fault between the parties either in whole or in part. *Jones v. Idles*, 114 SW3d 911.

The court held that the applicable statute of limitation for a negligence action against a blood testing lab regarding a report used to impose child support was the three-year statute of limitation for injuries to property. *Gunter v. Laboratory Corp. of America*, 28 TAM 52-1. Regarding the applicable statute of limitation in a tort action, the court made the following distinctions.

- When a claim alleges negligent conduct which constitutes or bears a substantial relationship to the rendition of medical treatment by a medical professional, the medical malpractice statute and its concomitant one-year statute of limitation apply.
- Claims for economic damages arising from the invasion of rights that "inhere in man as a rational being" are governed by the one-year statute of limitation for injuries to the person.
- Claims for economic damages arising from property rights fall under the three-year statute of limitation for injuries to property.

Workers' compensation. The court reiterated the rule that workers' compensation is an employee's exclusive remedy unless the employee can show that the employer actually intended to injure the employee. *Valencia v. Freeland & Lemm Construction Co.*, 108 SW3d 239.

The court issued other important rulings in the workers' compensation area.

- An employee seeking workers' compensation benefits for a mental injury due to potential exposure to the HIV virus must demonstrate actual exposure through a medically recognized channel of transmission. *Guess v. Sharp Manufacturing Co. of America*, 114 SW3d 480.
- A trial court has the authority to initiate temporary workers' compensation benefits before the final adjudication of an employee's claim. *McCall v. National Health Corp.*, 100 SW3d 209, and *Shelton v. ADS Environmental Services*, 100 SW3d 214.

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Highlights

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● A trial court may reconsider a previous workers' compensation award that has been capped at 2.5 times an employee's medical impairment rating when an employee resigns, but the trial court may only increase the award if the resignation is reasonably related to the employee's injury. *Hardin v. Royal SunAlliance Insurance,* 104 SW3d 501.

● An employee's action to reconsider an award of workers' compensation benefits must be filed within one year of his or her loss of employment with his or her pre-injury employer. The action is not timely if filed within one year of the loss of employment with a later or successor employer. *Perrin v. Gaylord Entertainment Co.,* 28 TAM 50-1.

Insurance. The court held that a direct action against an uninsured motorist carrier was proper when a policy required written consent before the insured could settle with a third party and when the insurer knew of its insured's effort to settle a claim with a tort-feasor's insurer but took no action to notify or warn the insured about the effects of such settlement. *Gaston v. Tennessee Farmers Mutual Insurance Co.,* 28 TAM 46-1.

Estates. The court held that the doctrine of exoneration — under which an heir or devisee is generally entitled to have encumbrances upon real estate paid by the estate's personalty unless, in the devisee's case, the will directs otherwise — does not apply to mortgages on property passing outside probate. *In re Estate of Vincent,* 98 SW3d 146.

Attorney's lien. The court held that an attorney's lien is not required to be noted in a final judgment. So long as adequate notice of the lien is provided to the public and to future purchasers, the requirements of TCA 23-2-102 and 23-2-103 are met. *Schmitt v. Smith,* 28 TAM 45-1.

Family law. The court defined "marital debts" as all debts incurred by either or both spouses during the course of the marriage up to the date of the final divorce hearing. Under the holding, unless a court has made provisions for the distribution of property in a decree of legal separation, the period of separation before a divorce has no effect on the classification of a debt as marital or separate. *Alford v. Alford,* 28 TAM 46-2.

The court held that a substantial and material change in circumstances must be shown in order to extend, or otherwise modify, a trial court's temporary, open-ended alimony award. *Perry v. Perry,* 114 SW3d 465.

DUI. In a DUI case in which the defendant contested the element of "physical control" based upon the alleged inoperability of a vehicle, the court adopted the "reasonably capable of being rendered operable" standard. The proper focus is not on the condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, the vehicle can no longer move. *State v. Butler,* 108 SW3d 845.

Insanity. The court reversed a decision of the Court of Criminal Appeals which had modified a guilty verdict to not guilty by reason of insanity. The court found that a reasonable trier of fact could have found that the defendant, a schizophrenic, failed to show by clear and convincing evidence that, as a result of severe mental illness or defect, the defendant was unable to appreciate the wrongfulness of his actions. *State v. Flake,* 114 SW3d 487.

Criminal procedure. The court found that a police officer's traffic stop of a defendant was not based upon reasonable suspicion when, although the defendant's driving may not have been perfect, the officer did not witness the defendant speed, drive too slowly, cross any lanes of traffic, illegally pass another vehicle, follow too closely, commit a violation regarding the use of a turn signal, or drive on the shoulder. *State v. Garcia,* 28 TAM 41-5.

The court stated that the standard for a valid invocation of the right to counsel is the same under both Tenn. Const. Art. I, Sec. 9 and the Fifth Amendment to the U.S. Constitution. The accused must articulate his or her desire to have counsel present sufficiently clearly that a reasonable police officer would understand the statement to be a request for an attorney, and if the suspect fails to make such unambiguous statement, the police may continue to question him or her without clarifying any equivocal requests for counsel. *State v. Saylor,* 117 SW3d 239.

The court ruled that the failure to preserve an electronic recording or its equivalent of a preliminary hearing under TRCrP 5.1(a) requires the dismissal of an indictment and remand for a new preliminary hearing unless the state establishes that all material and substantial evidence that was introduced at the preliminary hearing was made available to the defendant and that the testimony made available to the defendant was subject to cross-examination. *State v. Graves,* 28 TAM 23-1.

The court held that a guilty plea was not rendered unknowing or involuntary based on the fact that the defendant, who pled guilty to two counts of attempted rape of his 13-year-old niece, was not informed that he must undergo a psychiatric evaluation and certification for sex offenders prior to being released on parole. *Jaco v. State,* 28 TAM 50-2.

Criminal sentencing. The court ruled that a trial court erred in requiring a defendant to legitimate her child as a condition of probation. *State v. Mathes,* 114 SW3d 915.

The court upheld two death sentences. In one case, two aggravating circumstances were present — previous conviction of one or more felonies whose statutory elements involved the use of violence to a person and murder that was especially "heinous, atrocious, or cruel." *State v. Carter,* 114 SW3d 895. In the other case, three aggravating circumstances were present — previous conviction of one or more felonies involving the use of violence to a person, murder while engaged in the commission of a kidnapping, and mutilation of the victim's body after her death. *State v. Davidson,* 28 TAM 43-2.

Supreme Court

▼ Counsel's deficient performance was presumptively prejudicial when counsel failed to file timely motion for new trial or, at very least, motion to withdraw so that petitioner could file proper and timely *pro se* motion; counsel's deficient performance supported post-conviction judge's grant of delayed appeal

APPEAL & ERROR: Delayed Appeal. CRIMINAL PROCEDURE: Effective Counsel. Petitioner was indicted for first degree murder for 1996 killing. Petitioner retained counsel and executed agreement explicitly stating that counsel would be responsible only for representation at trial and would not be responsible for handling any potential appeals. Petitioner was convicted of first degree murder, and judgment of conviction was

entered on 1/31/97. After conviction, counsel sent petitioner letter instructing him as to how to prepare motion for new trial and what legal issues should be raised but did not obtain court approval to withdraw as attorney of record. Petitioner filed timely *pro se* motion for new trial. On 5/28/97, petitioner filed second *pro se* motion for new trial, alleging that evidence was insufficient to support jury's verdict, that trial court erred in admitting hearsay evidence and other evidence, and that trial court made inappropriate comments in presence of jury. Trial court granted counsel's motion to be relieved from representing petitioner, but did not grant either of two late-filed motions for new trial. Court of Criminal Appeals concluded that because no timely motion for new trial had been filed, all issues were waived on appeal except for sufficiency of evidence. Appellate court held that evidence was insufficient to support first degree murder, and it remanded case to trial court for resentencing for second degree murder. On remand, trial court sentenced petitioner to 25 years for second degree murder. Petitioner appealed resentencing, which Court of Criminal Appeals affirmed. In post-conviction petition, petitioner, now represented by new counsel, alleged that his original trial counsel was ineffective in failing to file timely motion for new trial. Petition alleged that petitioner was prejudiced in his original trial because trial court allowed state to present inadmissible hearsay evidence that victim had previously stated that she was afraid of petitioner, which directly contradicted evidence presented by petitioner that victim had been treated kindly by petitioner. Petition further alleged that state withheld exculpatory evidence as to victim's state of mind and that prosecution had in its possession TBI agent's report that would have provided basis to impeach prejudicial hearsay testimony. At hearing on petition, petitioner argued that these errors were prejudicial and provided sufficient grounds for delayed appeal and new trial. Post-conviction judge found that petitioner had been denied his direct appeal of these issues due to ineffectiveness of counsel in failing to file motion for new trial. Post-conviction judge granted delayed appeal, allowed petitioner to file motion for new trial, and then denied motion. Court of Criminal Appeals (28 TAM 4-31) dismissed delayed appeal, concluding that petitioner had received direct appeal, although only on issue of sufficiency of evidence. Appellate court concluded that petitioner had not been prejudiced and that post-conviction judge lacked authority to grant delayed appeal. **Reversed and remanded.** (1) TCA 40-30-113 and 40-30-111(a) indicate that defendant may receive delayed appeal when there has been denial of effective assistance of counsel in violation of Sixth Amendment to U.S. Constitution and Tenn. Const. Art. I, Sec. 9. In determining whether defendant has been denied constitutional right to effective counsel, courts apply two-pronged *Strickland* test. First, defendant must prove that counsel was ineffective in showing errors made by counsel that caused assistance of counsel to fall below prevailing professional norms. Secondly, upon establishing that counsel was deficient, petitioner must establish reasonable probability that outcome of trial would have been different but for deficiencies of counsel. Although second prong is commonly referred to as "actual prejudice," there is small category of cases in which actual prejudice need not be shown. When counsel entirely fails to subject prosecution's case to meaningful adversarial testing, process becomes "presumptively unreliable" and proof of actual prejudice is not required. (2) With regard to first prong, counsel's failure in present case to file timely motion for new trial, as well as his failure to withdraw so as to allow petitioner to file *pro se* motion for new trial, was deficient. Indeed, counsel's failure to take any timely action following trial created Catch 22 predicament — petitioner had counsel in name only, who failed to preserve petitioner's post-trial and appellate remedies, yet having that counsel also prevented him from proceeding in *pro se* fashion to preserve his remedies. Counsel's failure to file timely motion for new trial, despite clear desire of petitioner to do so, constitutes deficient performance notwithstanding retainer agreement that purported to limit counsel's representation to trial work. Taking necessary steps to preserve post-trial remedies, including filing of motion for new trial, are clearly responsibilities of counsel. (3) With regard to second prong, Court of Criminal Appeals concluded that petitioner was not prejudiced because he had benefit of direct appeal on issue of sufficiency of evidence, and thus, was not entitled to delayed direct appeal under TCA 40-30-113. Prejudice prong of analysis cannot be resolved simply by reasoning that petitioner had direct review on issue of sufficiency of evidence alone. Nothing in statutory language specifically limits trial court's discretion to order delayed direct appeal to circumstances when there was complete denial of direct appeal. Likewise, this court disagrees with Court of Criminal Appeals' conclusion that petitioner is required to demonstrate actual prejudice from counsel's deficient performance. Counsel failed to file timely motion for new trial or, at very least, motion to withdraw as counsel so petitioner could file proper and timely *pro se* motion. Counsel's abandonment of his client at such critical stage of proceeding resulted in failure to preserve and pursue available post-trial remedies and complete failure to subject state to adversarial appellate process. Hence, counsel's deficient performance was presumptively prejudicial and supported post-conviction judge's grant of delayed appeal under TCA 40-30-113. (***Wallace v. State,*** 29 TAM 1-1, 12/23/03, Nashville, Anderson, unanimous, 9 pages.)

Court of Appeals

▼ **In defamation case by plaintiff, member of not-for-profit social organization, trial court properly granted summary judgment to defendant organization; intra-corporate communication rule applies to not-for-profit organization; there was no publication when letter outlining charges against plaintiff was only sent to voting members of organization, as it was their responsibility to receive and review charges pursuant to bylaws of organization**

TORTS: Libel & Slander. Plaintiff was member of not-for-profit social organization, Grand Krewe of Sphinx (Krewe). Krewe is incorporated and has its own bylaws to govern conduct and activities of organization. Plaintiff had been member of Krewe for 15 years and had held various offices. At one particular general membership meeting of Krewe, plaintiff began challenging actions of Krewe and criticized certain Krewe member. In response, Keith, Krewe's chairman, charged plaintiff with violations of Krewe's bylaws. As required under bylaws, Keith sent letter to plaintiff and all Krewe's voting members notifying them of special hearing and charges alleged against plaintiff. This letter accused plaintiff of causing false reports to be filed with Tennessee's secretary of state, acting as unauthorized executive officer, conduct unbecoming gentleman, and pattern of deliberately misleading Krewe's general membership and officers. Following letter's distribution, Krewe convened and voted to terminate plaintiff's membership. Plaintiff filed suit against Krewe, its officers, and certain members alleging defamation. Chancellor

properly granted Krewe summary judgment. No publication occurs when only intra-corporate communications exist. This intra-corporate communication rule applies to not-for-profit organizations. Plaintiff did not cite any case law drawing distinction between for-profit and not-for-profit organizations. There is no Tennessee case law on point. In *Carter v. Willowrun Condominium Association Inc.*, 345 SE2d 924 (Ga.App. 1986), Georgia Court of Appeals stated that no publication occurs in "situations involving communications between members of corporations, unincorporated groups, and associations." In present case, reasoning underlying both *Carter* and Tennessee's intra-corporate communication rule militate against making for-profit corporation and not-for-profit incorporated organization distinction urged by plaintiff. Letter outlining charges against plaintiff was only sent to voting members of Krewe, as it was their responsibility to receive and review charges pursuant to bylaws of organization. Letter never left corporate structure of Krewe, and hence, no communication ever occurred to third party. Plaintiff failed to demonstrate publication of alleged libelous statements, and no actionable libel can result. (***Siegfried v. Grand Krewe of Sphinx,*** 29 TAM 1-2, 12/2/03, WS, Farmer, 4 pages.)

▼ **In slip and fall case in which trial court apportioned 80% of fault to city and 20% of fault to plaintiff, evidence did not preponderate against trial court's finding of causation between knee injury and fall when exacerbation of pre-existing problems by fall hastened need for knee replacement surgery; plaintiff, who tripped over uneven joint between bricks on road while using walker or crutches and carrying tote bag, was not 50% or more at fault when although he had limited vision, plaintiff had right to assume sidewalk was safe for passage, there was no proof that plaintiff's sometimes unsteadiness caused fall, and there was no proof, except perhaps inferentially, that tote bag or shopping bag caused or contributed to fall**

TORTS: Slip & Fall — Comparative Negligence. DAMAGES: Personal Injury. On 12/22/00, while walking on brick sidewalk on west side of Market Street in downtown Knoxville, Emert tripped over uneven joint between bricks. Because he was legally blind, Emert was walking with assistance of either cane or crutches. He sustained injury to his right knee, which required total replacement on 5/14/01 followed by second replacement surgery on 8/22/02. On 10/15/01, Emert filed suit alleging that City of Knoxville (City) owned and controlled sidewalk and that it knew or should have known that on date of accident sidewalk was in defective or dangerous condition. City did not controvert finding of negligence. Emert died on 11/29/02, and executrix of his estate was substituted as plaintiff. Bench trial was held on 2/11/03, and trial judge found that City had constructive notice of dangerous and defective condition of sidewalk and that its negligence was proximate cause of Emert's fall and resulting injury to his right knee. Damages of $100,000 were assessed. Fault was apportioned 80% to City and 20% to Emert, resulting in judgment for $80,000. (1) Evidence did not preponderate against trial judge's finding of causation. Emert had long history of problems with his right knee. City argued that Emert had already scheduled appointment for right knee replacement before 12/22/00 fall and that it is illogical to attribute fall as cause of his replacement surgeries. Emert testified that he "was getting along" relatively good before he fell and was close to putting his crutches aside. First surgery was not performed until 5/14/01, more than five months after accident which worsened knee problem. Absent exacerbation, it is not conclusive under proof when surgery would be necessitated, merely "sooner or later" according to doctor. City correctly argued that it cannot be held liable for Emert's pre-existing condition and that trier of fact must separate pre-existing injuries from new injury and award damages only for new injury. Trial judge recognized this principle by emphasizing exacerbation of pre-existing problems by fall which hastened need for knee replacement surgery, and by disallowing medical expenses apportioned to pre-existing condition. To adopt City's argument would require finding that fall did not worsen Emert's problems with his right knee. Such finding cannot be made because aggravation of pre-existing condition is compensable. City argued that trial judge inappropriately awarded damages for Emert's revised knee surgery because doctor testified that there is "no direct relationship" between fall and second surgery. Doctor's testimony is essentially out of context. In another statement, doctor explained that "knee that was put in as a result of the flare didn't work, and the knee not working required revision." (2) City contended that Emert was at least 50% at fault. Emert had limited vision, but he was not "entirely unreasonable" in undertaking risk of unassisted walking, as he had right to assume sidewalk was safe for passage. Emert was unsteady and fell frequently, but there was no proof that his sometimes unsteadiness caused fall at issue. Emert was using walker or crutches while carrying tote bag by means of shoulder strap and box of candy in shopping bag. There was no proof, except perhaps inferentially, that tote bag or shopping bag caused or contributed to his fall. With respect to accusation that Emert was under influence of narcotic drug, record is silent on subject of narcotic over-use in 12/00. Emert's use of narcotic drugs apparently commenced in 2001. There is no expository reason to disturb trial judge's apportionment of fault. (***Emert v. City of Knoxville,*** 29 TAM 1-3, 11/20/03, ES, Inman, 6 pages.)

▼ **In suit under Governmental Tort Liability Act for personal injuries and property damage in which plaintiffs were riding in wagon being pulled by horse and mule team and mule allegedly slipped off bridge causing wagon to become entangled at end of bridge, trial court properly granted defendant county summary judgment as to plaintiffs' complaint that bridge was "defective, unsafe, or dangerous" because of lack of guardrails; summary judgment was not appropriate as to plaintiffs' theory that deteriorating curb rendered bridge "defective, unsafe, or dangerous," when this theory was not addressed by material filed in support of county's motion for summary judgment, and hence, there was no obligation on part of plaintiffs to prove this theory at this juncture in proceedings**

TORTS: Governmental Tort Liability Act. On 8/20/00, plaintiff husband was driving horse-drawn wagon across bridge, and plaintiff wife was riding in back of wagon. Wagon was being pulled by horse and mule team owned by plaintiffs. As horse and mule were pulling wagon across bridge, mule side-stepped water puddle on bridge and then slipped off bridge, dragging horse, wagon, and plaintiffs. Wagon caught on part of bridge's super-structure, preventing wagon from falling completely off bridge. Plaintiff wife was thrown violently about back of wagon. Plaintiff husband was thrown forward, but was able to grab one of bridge girders, thereby avoiding falling into river gorge 50 feet below. Horse in team was dragged partially off bridge when mule fell, but other individuals with plaintiffs were able to grab horse and pull it back to safety. Plaintiff husband and others cut mule out of its harness, and it fell into river. Mule was injured but survived fall. Plaintiffs filed suit against Carter County (County) alleging that "defective, unsafe, or dangerous condition of the bridge" proximately caused accident.

(1) Trial judge properly granted County summary judgment as to all issues pertaining to guardrails. Bridge had never been equipped with guardrails; it was built over 80 years ago; it "served less than seven families"; and as far as anyone could recall, there had been only one accident on bridge in past, and that mishap involved drunk driver. This court agrees with trial judge's implicit holding that reasonable minds could not disagree as to whether lack of guardrails made bridge "defective, unsafe, or dangerous" under TCA 29-20-203(a). Reasonable minds could not disagree as to this critical issue. Trial judge did not err in holding that bridge was not "defective, unsafe, or dangerous" as result of lack of guardrails. (2) Trial judge erred in granting County summary judgment as to plaintiffs' theory that deteriorating curb rendered bridge "defective, unsafe, or dangerous" under TCA 29-20-203(a). County's motion asserting immunity as to guardrails does not address plaintiffs' theory of recovery based upon their assertion that bridge was "defective, unsafe, or dangerous" due to deteriorating curb. This court has no idea as to whether this rendered bridge "defective, unsafe, or dangerous," nor do we know whether there is proof that deteriorating curb was proximate cause of accident. What we do know is that deteriorating curb was part of plaintiffs' theory of why they were entitled to recover. Since this theory was not addressed by material filed in support of County's motion, there was no obligation on part of plaintiffs to prove this theory at this juncture of proceedings. This is because burden never shifted to plaintiffs on this factual issue in this "battle on the papers." (***Reed v. Carter County,*** 29 TAM 1-4, 11/25/03, ES at Morristown, Susano, 7 pages.)

▼ **When plaintiffs whose vehicle struck rear of another vehicle filed claim against state alleging that dangerous condition existed on portion of interstate (I-40 through Knoxville) where accident occurred and that section of interstate was negligently designed and maintained, evidence did not preponderate against finding by claims commission that negligently-designed stretch of I-40 was not cause of plaintiffs' accident; four-year statute of repose set forth in TCA 28-3-202 was not intended to be applicable to owner of subject property, but rather to designer of property; as state has "actual possession or the control" of highway at issue, it cannot assert statute of repose as defense to plaintiffs' claim**

TORTS: Negligence — Proximate Cause. CIVIL PROCEDURE: Statute of Repose. On 8/12/90, Belchers were traveling eastbound in center lane of Interstate 40 through Knoxville. Two 18-wheeler trucks slowly passed Belchers on either side as three vehicles approached 17th Street overpass. Meanwhile, Wilson was traveling ahead of Belchers in far left-hand lane. Wilson was lost. On instructions of one of his passengers, Wilson slowed his vehicle and attempted to switch lanes in order to exit interstate. Wilson then moved into center lane of interstate. Belchers crested hill over 17th Street overpass. Approximately 475 feet from apex of hill, Belchers' vehicle struck rear of Wilson's vehicle. Belchers sustained serious injuries as result of accident. Belchers filed claim against state alleging that state negligently designed, approved, and maintained dangerous and defective roadway and that this condition caused accident. Before claim was heard, Belchers died. Their daughter was substituted in their place. Claims commission found that Belchers were not entitled to relief. (1) State asserted that claim was barred by four-year statute of repose set forth in TCA 28-3-202. TCA 28-3-205(a) provides that statute of repose may not be used as defense by anyone who possesses or controls "as owner, tenant, or otherwise" deficient property that allegedly caused injury or death that formed basis for legal action. Intent of legislature in enacting TCA 28-3-202 was to "insulate contractors, architects, engineers, and others from liability for defective construction or design of improvements to realty" when injury or death occurs more than four years after improvement is substantially completed. Four-year statute of repose was not intended to apply to owner of subject property, but rather to designer of property. As state has "actual possession or the control" of highway at issue, it cannot assert statute of repose as defense to Belchers' claim. (2) It is not enough to prove existence of dangerous condition on highway, pursuant to TCA 9-8-307(a)(1)(J), or to prove that state negligently approved, constructed, and maintained highway, pursuant to TCA 9-8-307(a)(1)(I). Belchers were also required to prove that those conditions were cause in fact and proximate cause of accident. Evidence did not preponderate against claims commission's determination that Belchers did not prove that deficiency in design of highway caused their injuries. While Belchers took issue with claims commission's findings with respect to speed of Belchers' vehicle and exact location of accident, evidence did not preponderate against those findings. There was dearth of evidence in record to support Belchers' contention that defective highway caused accident and, consequently, their injuries. Indeed, Belchers' own expert witness failed to testify that design of highway caused accident. Because of this lack of evidence, evidence did not preponderate against claims commission's determination that this negligently-designed stretch of I-40 was not cause of Belchers' accident. (***Belcher v. State,*** 29 TAM 1-5, 11/25/03, ES at Morristown, Susano, 8 pages.)

EMPLOYMENT: Unemployment Compensation. Claimant was employed by company that manufactures battery chargers. Claimant's primary function was to mount transformers on circuit boards. Plaintiff was initially compensated on hourly basis, but his compensation was changed to piece-work rate by which he was paid by number of transformers he mounted to circuit boards. Employer reserved right to assign different work to claimant with understanding that claimant may be paid by different methods and amounts of compensation for other work. On 11/14/01, claimant's supervisor instructed claimant to work at different area to perform different function. Specifically, claimant was asked to mount transformer for special order. New assignment required more time to assemble than mounting process at claimant's primary work station. Realizing that new assignment was more time consuming, claimant requested specific increase in his piece-work rate of payment in order not to reduce amount of money he would make in day. Although company officials refused to give specific increase, claimant was assured they would "figure out" rate of compensation later. Claimant refused to perform new duties until he was assured of his exact pay. His supervisor admonished him and asked claimant if he would be willing to sign statement confirming his refusal to accept assignment. Claimant ultimately agreed to do requested work and reported to appropriate area of plant to do work for special order. Upon arriving at new work station, claimant determined that there was insufficient work for him to do, specifically that there was insufficient supply of transformers to remain busy. Claimant unilaterally left new assignment, returned to his normal work station, and did not subsequently inquire to see if his services were needed for special order. Later that evening, company's production manager discovered that not all of special order had been assembled and ascertained that claimant had left his new assignment. On following day, claimant was terminated for insubordination for not assembling special order as instructed. Claimant's application for unemployment compensation was denied. Board of Review found that there was sufficient evidence of misconduct, that claimant's failure to follow his supervisor's instructions

constituted work-related misconduct, and that such conduct disqualified claimant from unemployment benefits as work-related misconduct under TCA 50-7-303(a)(2). Chancellor affirmed decision of Board of Review. Substantial and material evidence supported Board of Review's decision. (***Foxx v. Neely,*** 29 TAM 1-6, 11/21/03, MS, Clement, 3 pages, mem. op.)

▼ **Trial court properly dismissed suit under policy of commercial insurance alleging loss by theft when suit was filed beyond two-year period in which suit could be brought under terms of policy; if *Alcazar v. Hayes* — abolishing common law approach that notice was condition precedent to recovery under policy and that no showing of prejudice was necessary — is to be expanded to introduce "prejudice" analysis into limitation of actions provisions, statutory or contractual, such expansion must come from Tennessee Supreme Court or from Tennessee General Assembly**

INSURANCE: Limitation Clause — Property/Casualty Insurance — Estoppel to Deny Coverage. CIVIL PROCEDURE: Motion to Dismiss — Summary Judgment. Plaintiff alleged that during evening hours of 12/12/99, its transmission repair business was burglarized, causing theft loss that was insured under commercial property policy. Plaintiff filed timely notice of its loss with insurer. On 3/20/00, plaintiff, through its principal owner (Anderson), received letter from insurer advising that loss was still under active investigation. On 4/4/00, plaintiff filed its sworn proof of loss with insurer. On 6/27/00, Anderson received letter from counsel for insurer requesting that he submit to oral examination and requesting that be bring with him certain documents for examination. On 6/11/02, plaintiff filed suit to recover under policy. Insurer filed TRCP 12.02(6) motion to dismiss, relying upon provision stating, "No one may bring a legal action against us under this Coverage Part unless: 1. There has been full compliance with all the terms of the Coverage Part; and 2. The action is brought within 2 years after you first have knowledge of the 'loss.'" (1) Since insurance policy appeared in case as exhibit to motion to dismiss, provisions of TRCP 12 converted motion at that time to motion for summary judgment under TRCP 56. Non-moving party is therefore entitled to benefit of reasonable opportunity to present all material made pertinent to such motion by TRCP 56. Failure to comply with specifics of TRCP 56 is rendered harmless if record clearly shows that non-moving party cannot remedy defect fatal to his or her cause of action. In present case, non-moving party did not seek to take additional discovery after filing 9/30/02 affidavit of Anderson. That affidavit is fatal to plaintiff's case under *Certain Underwriter's at Lloyd's of London v. Transcarriers Inc.*, 107 SW3d 496 (Tenn.App. 2002), unless plaintiff can find some way around that case. (2) Tennessee has long held that insurance policy provision establishing agreed limitations period within which suit may be filed against insurer is valid and enforceable. Insured sought to escape effect of *Certain Underwriter's* by expanding scope of *Alcazar v. Hayes*, 982 SW2d 845 (Tenn. 1998), which rejected traditional common law approach that notice was condition precedent to recovery under policy and that no showing of prejudice was necessary. *Alcazar* adopted standard involving two questions — did insured provide timely notice in accordance with contract?, and if not, did insured carry its burden of proving that insurer was not prejudiced by delay? Attempting to apply *Alcazar* to contractual limitation of actions provision in policy would present same near insurmountable obstacle as would be presented in trying to apply it to statutory limitation of actions provision. First *Alcazar* question would be whether or not insured filed his or her action within contractual limitation period. In present case, answer is "no." Next question would be whether or not insured could carry its burden of proving that insurer was not prejudiced by failure to timely file action. This would seem to be impossible burden for plaintiff to carry since statute of limitation "confers a positive right" on defendant. If *Alcazar* is to be expanded to introduce "prejudice" analysis into limitation of actions provisions, statutory or contractual, such expansion must come from Tennessee Supreme Court or from Tennessee legislature. (2) Plaintiff asserted that policy provision relative to "full compliance" with terms of policy is ambiguous and puts insured in impossible position. First, insured must comply with extensive document production demand contained in insurer's letter of 6/27/00. Then, suit must be brought within two years after expiration of settlement immunity period. Plaintiff asserted that importance of "full compliance" phrase in policy is that if insured was attempting to comply with demands of insurer but was unable to, insured would be in quandry as to how to get relief — either keep trying to comply with insurer's demands (which might put one over two-year period) or sue insurer while not being in "full compliance." Difficulty with this position is that it assumes incompatibility between "full compliance" provision of policy and limitation of action provision. "Full compliance" provision of policy does not provide extension to settlement immunity period. Nor is it prerogative of insurer to decide question of whether or not insured is in full compliance. (3) Plaintiff asserted that insurer should be estopped to rely on limitation of action provision of policy. Record establishes no basis for estoppel. Record shows no action at all by either party between 6/27/00 letter by insurer demanding production of documents and expiration of limitation of action period on 5/4/02. Record shows no action by insurer designed to lull insured to sleep and no action of any kind by insurer after letter of 6/27/00. (***Brick Church Transmission Inc. v. Southern Pilot Insurance Co.,*** 29 TAM 1-7, 11/25/03, MS, Cain, 15 pages.)

▼ **In case in which modular home was placed on wrong lot — one adjacent to lot purchased by plaintiffs — evidence preponderated against trial court's finding that seller's acts were willful and deceptive as defined in Tennessee Consumer Protection Act when seller advised purchasers to obtain survey and in good faith attempted to remedy problem by purchasing lot upon which modular home was placed and conveying it to purchaser and paying sum to owner of lot upon which modular home was placed; award of treble damages is reduced to award of actual damages**

COMMERCIAL LAW: Consumer Protection. Plaintiffs purchased lot upon which they intended to place modular home. Modular home was placed on wrong lot, one adjacent to lot purchased by plaintiffs. Plaintiffs filed suit against seller of lot and seller of modular home. Owner of lot upon which modular home was placed filed counter-complaint seeking rents from plaintiffs for their use of lot. Following bench trial, chancellor found that Consumer Protection Act applied to case and awarded damages of $11,000 and then triple that amount against seller. Chancellor awarded fair market rental against plaintiffs in favor of owner of tract of land upon which modular home was placed in amount of $14,714. Evidence preponderated against chancellor's finding that seller's acts were willful and deceptive as defined in Consumer Protection Act. Seller advised plaintiff to obtain survey and in good faith attempted to remedy problem by purchasing lot upon which modular home was placed and conveying it to them and paying sum to owner of lot upon which modular home was placed. Award of treble damages is reduced to award of $11,000. (***Evans v. Douglas,*** 29 TAM 1-8, 11/21/03, ES, Goddard, 3 pages.)

▼ **In suit alleging fraudulent misrepresentation and violation of Tennessee Consumer Protection Act (TCPA) in connection with sale of car, trial court did not abuse discretion in granting rescission and awarding plaintiff judgment for $2,100 purchase price; jury found that defendant violated TCPA and committed fraudulent misrepresentation, and, as result, jury's findings establish that defendant's actions constituted "willful or knowing" violation of terms of TCPA, and hence, trial court was vested with authority under TCPA to grant relief that it determined to be "necessary and proper" in case; although generally speaking, attorney fees may not be awarded in cases involving common law actions such as claim for fraudulent misrepresentation, jury's special verdict expressly found that defendant violated TCPA and hence, trial court acted within its authority in awarding attorney fees and costs under that statutory scheme**

COMMERCIAL LAW: Consumer Protection — Attorney's Fee. CONTRACTS: Rescission. Plaintiff purchased 1991 Nissan automobile from defendant. Plaintiff filed suit alleging fraudulent misrepresentation and violation of Tennessee Consumer Protection Act (TCPA) in connection with sale. In addition to other relief, plaintiff sought compensatory damages. In alternative, plaintiff asked for rescission of sale. Jury returned verdict in favor of plaintiff, determining, by way of special verdict form, that defendant was liable to plaintiff for violating TCPA, that plaintiff suffered no damages as result of defendant's violation of TCPA, that defendant was liable to plaintiff for fraudulent misrepresentation, and that plaintiff was entitled to $2,100 in compensatory damages for defendant's fraudulent misrepresentation. Defendant filed motion for judgment NOV. Plaintiff asked trial judge to alter or amend judgment and to award him attorney fees. Plaintiff specifically requested that trial judge rescind contract, order defendant to refund purchase price of automobile, and award him reasonable attorney fees and costs. Trial judge entered judgment on jury's verdict. One week later, trial judge entered "order of judgment," denying defendant's request for judgment NOV and granting plaintiff's request for rescission. Trial judge ordered plaintiff to return 1991 Nissan automobile to defendant, directed defendant to refund to plaintiff $2,100 purchase price, and awarded plaintiff $12,000 in attorney fees and costs. (1) Trial judge did not abuse discretion in granting rescission and awarding plaintiff judgment for $2,100 purchase price. Under TCPA, trial court has discretion to award "necessary and proper" relief when defendant willfully violates TCPA. In present case, jury found that defendant violated TCPA and committed fraudulent misrepresentation. As result, jury's findings establish that defendant's actions constituted "willful or knowing" violation of terms of TCPA. Hence, trial judge was vested with authority under TCPA to grant relief that he determined to be "necessary and proper" in case. Moreover, defendant is incorrect in his assertion that trial judge awarded damages under TCPA. Rather, trial judge, based on jury's findings, decreed rescission and ordered defendant to return $2,100 purchase price to plaintiff. (2) Trial judge did not abuse discretion in awarding plaintiff attorney fees under TCPA. Defendant argued that jury "of necessity found that [TCPA] did not ... apply" because of jury's finding that plaintiff did not suffer actual damages under TCPA. Specifically, defendant argued that attorney fees may not be awarded in present case because jury did not find plaintiff was due any damages under TCPA. Defendant pointed out that damages were awarded in present case in connection with trial judge's finding of fraudulent misrepresentation, tort for which attorney fees are not available as part of remedy. Although defendant is correct that, generally speaking, attorney fees may not be awarded in cases involving common law actions such as claim for fraudulent misrepresentation, defendant's argument that TCPA is not implicated in present case is not persuasive. Defendant's position flies in face of jury's special verdict expressly finding that defendant had violated TCPA. Because defendant violated TCPA, trial judge acted within his authority when he awarded attorney fees and costs under statutory scheme. (***Vineyard v. Varner,*** 29 TAM 1-9, 11/25/03, ES, Susano, 5 pages.)

▼ **TCA 67-4-1425(c) and (d), which allow double taxation of hotels/motels by county and cities in Shelby, Williamson, and Rutherford counties, are constitutional**

TAXATION: Privilege Taxes — Payment Under Protest. CONSTITUTIONAL LAW: Equal Protection — Class Legislation. CIVIL PROCEDURE: Justiciability — Standing — Jurisdiction. APPEAL & ERROR: Standard of Review. TCA 67-4-1425(c) and (d) create exceptions to general proscription preventing both county and municipality from levying occupancy taxes upon hotels and motels within their borders to allow for double taxation of hotels and motels in Shelby, Williamson, and Rutherford counties. Plaintiffs, certain hotels and motels affected by statutes and guests of establishments who paid taxes created by statutes, filed suit against defendants, towns of Germantown, Collierville, Bartlett, and Millington, as well as Shelby County, seeking to have statutes declared unconstitutional. Trial court properly held that statutes were constitutional. (1) Plaintiffs had no precedent obligation to pay disputed taxes "under protest" before bringing their claims. TCA 67-1-1807 relieves obligation to pay "under protest" before pursuing claim against governmental entity imposing tax. Wording of statute is sufficiently broad to encompass claims involving taxes paid to local entities such as counties and municipalities. (2) Trial court erred in failing to dismiss all claims against City of Millington. While Millington has authority to impose occupancy tax, it has declined to actually do so. Likewise, record fails to indicate that Millington has any plans to begin enforcing challenged tax. As such, there is no justiciable controversy involving Millington's occupancy tax. (3) Trial court lacked jurisdiction to hear claims of any plaintiffs who were not actual taxpayers. Those plaintiffs who were not actual taxpayers lacked standing to bring forth claim. Nevertheless, trial court properly exercised jurisdiction over claims of taxpayer plaintiffs. (4) Plaintiffs contended that trial court failed to employ cognizable constitutional standard when analyzing validity of TCA 67-4-1425(c) and (d) and private acts passed thereunder. Proper standard of review to be used in analyzing constitutionality of tax statute is rational basis standard. As such, standard for trial court was whether any reasonable basis exists for population exclusion brackets contained in occupancy tax statute. Language of final order, which indicates that trial court considered proper factors, including reasonableness of, and grounds for, classifications, demonstrates that trial judge employed correct standard. (5) TCA 67-4-1425(c) and (d), as well as private acts enacted thereunder, are constitutional. Defendants provided expert affidavits giving possible reasons for exclusions granted to Shelby, Williamson, and Rutherford counties in occupancy tax statute. Experts opined that all three counties had experienced rapid and substantial population growth during last few decades and that this growth had increased burden on counties to provide more county and municipal services, such as schools, streets, and police and fire protection. Defendants have shown through expert opinion that there exists fair debate over need of three counties for their respective exclusions. (***Admiralty Suites & Inns LLC v. Shelby County,*** 29 TAM 1-10, 11/24/03, WS, Highers, 9 pages.)

▼ **In case in which taxpayer corporation, sole owner of stock in subsidiary corporation from 1987 through 1998, filed claim for refund of 1996 franchise and excise taxes it paid, claiming deduction based on its assertion that stock in subsidiary became worthless or was abandoned in 1996, assuming, without deciding, that abandonment of stock can constitute "other disposition" for purposes of TCA 67-4-805(b)(2)(D), taxpayer's conduct fell short of clear abandonment when taxpayer presented no authority to support contention that disavowing stock and handing it over to corporate counsel constituted legal abandonment of property; taxpayer did not submit sufficient evidence of difference in its basis for state tax purposes and its basis for federal tax purposes so as to justify claimed deduction under TCA 67-4-805(b)(2)(D)**

TAXATION: Franchise Tax — Excise Tax. From 1987 through 1998, plaintiff corporation was sole owner of stock in subsidiary corporation, Extradition Corporation of America (ECA). In 1994, plaintiff transferred to Corrections Corporation of America (CCA) all of ECA's operating assets. In plaintiff's 1996 franchise and excise tax return, plaintiff claimed deduction based on its assertion that stock in ECA became worthless or was abandoned in 1996 because in that year restrictions under escrow agreement in 1994 CCA sale — agreement that 10% of CCA shares would be held in escrow for one to two years — had closed, and remainder of CCA stock was distributed. Commissioner of Revenue (Commissioner) disallowed deduction and sent plaintiff notice of assessment. Plaintiff paid assessment and filed suit seeking refund. Trial court properly rejected plaintiff's claim and denied refund. (1) Plaintiff submitted insufficient evidence that there was "other disposition" of its stock in 1996 to entitle it to claimed deduction under TCA 67-4-805(b)(2)(D). In order for stock to become worthless in certain year, there must be identifiable event in that year to show that worthlessness actually occurred in that year, as opposed to previous or later year. Plaintiff claimed that this identifiable event occurred in 1996 because that was year in which 1994 CCA sale became irrevocable through closing of escrow account and, therefore, ECA's contractual obligations in 1994 CCA sale were met at that time. But testimony of Schmerling, founder of plaintiff and certified public accountant, shows that, from 1990 forward, plaintiff had no reasonable expectation that ECA stock would acquire value through foreseeable future operations. Schmerling said that ECA had been losing money for three years and that plaintiff licensed away assets to cut its losses. Even if ECA had value, or there was glimmer of reasonable expectation of future value, during course of licensing agreement, any such value or expectation of value ended when parties executed 1994 CCA sale agreement. Expiration of escrow agreement clearly would not constitute "identifiable event" showing that ECA stock became worthless in that year. As such, even if property becoming worthless can constitute "disposition" of that property under TCA 67-4-805(b)(2)(D), ECA's stock became worthless, if at all, in year other than 1996. In addition, assuming, without deciding, that abandonment of stock can constitute "other disposition" for purposes of TCA 67-4-805(b)(2)(D), plaintiff's conduct fell short of clear abandonment when plaintiff presented no authority to support contention that disavowing stock and handing it over to corporate counsel constituted legal abandonment of property. (2) Plaintiff did not submit sufficient evidence of difference in its basis for state tax purposes and its basis for federal tax purposes so as to justify claimed deduction under TCA 67-4-805(b)(2)(D). Plaintiff invested large sums of money in ECA, but plaintiff's basis in ECA stock may have fluctuated over time, and there was no way to determine from record amount of that fluctuation, in part because plaintiff failed to keep any "separate entity" records for ECA after 1990 licensing agreement. Lack of documentary evidence supporting claimed basis differential is made apparent by testimony of certified public accountant (Hoskins) who prepared plaintiff's 1996 franchise and excise tax returns. Hoskins did not arrive at plaintiff's capital loss deduction by engaging in analysis of plaintiff's investments and ECA's income. Commissioner's expert testified that capital loss is normally computed by reference to computation in tax return involving cost basis and book value of asset, and then corresponding gain or loss from disposition of that asset. In present case, there was no such computation. As such, trial court properly determined that plaintiff was not entitled to basis differential deduction of $1,923,890 claimed on its 1996 franchise and excise tax return. (3) Although Commissioner erred in listing $187,686 as plaintiff's 1990 income, when, in fact, plaintiff had reported loss of $187,686 in that year, error was harmless. Commissioner contended that $187,686 loss to which plaintiff refers was plaintiff's consolidated loss. Because of Tennessee's separate entity rules, plaintiff's separate income or loss should have been used. Breakdown attached to 1990 federal return showed that plaintiff actually had income of $295,469. Consequently, if error were to be corrected properly, plaintiff's separate income of $295,469 for 1990 would be utilized, not consolidated loss of $187,686. Greater amount of income would result in even greater assessment against plaintiff. As such, Commissioner's error did not adversely affect plaintiff. (***American Corrections Transport Inc. v. Johnson,*** 29 TAM 1-11, 11/25/03, WS at Nashville, Kirby, 15 pages.)

PROPERTY: Boundary. CIVIL PROCEDURE: Costs. Private roadway, identified as Jackson Lane, was created in 1932 as "strip of land 16 feet in width" to serve Stovall property as sole means of access to public roadway. Property of Oakley bounds Jackson Lane on east. Bagsby property bounds Jackson Lane on west. Lane is 1,096 feet in length, straight-line measure, or 1,102.29 feet, according to conflicting measurements. At issue is portion of Jackson Lane abutting eastern boundary of Bagsby land extending from public road to point where it intersects with Bagsbys' northeast corner and physically widens to 21 feet. From 1936 to 1984, width of Jackson Lane was not changed, and Bagsbys' northeast corner was rounded along its western margin until it was gradually "squared off" and corner relocated by Bagsbys in accordance with Brown's survey in 1984. Stovall objected to this relocation of Bagsbys' northeast corner although it did not interfere with use of Jackson Lane. Bagsby testified that prior to retaining services of Chapdelaine, none of other surveyors, who had been retained to relocate his northeast corner, had opined that Jackson Lane encroached on Bagsby tract. Bagsby thereafter removed fence along entire western margin of Jackson Lane, which was eastern boundary of their land, and announced their intentions to erect new fence that would encroach upon asphalt surface of lane. Stovall objected because new fence Bagsby planned to erect would interfere with use of Jackson Lane since it would extend approximately five feet onto asphalt pavement at northeast corner. First trial proceeded to final judgment, and new trial was awarded after procedural morass developed involving conflicting decretal provisions. Testimony at first trial was preserved and presented, at least in part, at second trial. Host of witnesses, including five surveyors, testified. Chancellor ruled that Stovalls had acquired title to Jackson Lane, together with "a twenty-one and one-half foot area in its northeast corner," by adverse possession. Chancellor prohibited Bagsbys from establishing their eastern line to interfere with Jackson Lane. Decretal provisions were again questioned, resulting in adoption by chancellor of survey performed by Lowery. (1)

Evidence did not preponderate against chancellor's findings. Contrary to all but one surveyor, Bagsbys insisted that Lowery survey could not be relied on as accurate depiction of location of Bagsbys' northeastern corner or eastern line because establishment of both is dependent upon correct establishment of location of Jackson Lane. This contention is contrary to testimony of Lowery and another surveyor, Fuqua, that Bagsbys' northeast corner does not require prior location of Jackson Lane. Bagsbys had no quarrel with Lowery's location of their southeastern and northwestern corners, and basic agreement among all experts at trial was that northwest corner of defendants' property was appropriately located. (2) Chancellor awarded Stovalls $8,000 discretionary costs. Motion for discretionary costs, as amended, included court-ordered surveying and engineering expenses owing to Ragan-Smith Associates for $6,697. These expenses should be taxed as court costs, rather than as discretionary costs. Invoices from other surveyors do not distinguish fees for field and administrative work from fees for testifying. TRCP 54.04(2) limits recovery of expert fees to fees incurred for actual deposition or trial testimony. Fees for preparation time are not recoverable. Case is remanded for trial court to make this determination. (***Stovall v. Bagsby,*** 29 TAM 1-12, 11/24/03, MS, Inman, 6 pages.)

PROPERTY: Easement. APPEAL & ERROR: Transcript. Appellees — Bounds and Bozemans — filed suit alleging that Bozemans owned 12-foot wide easement across property of appellant. Appellant filed answer, relying upon "the affirmative defense of abandonment plus adverse possession by [appellant]." Following plenary trial, chancellor found that Bozemans had express easement across property of appellant and that Bozemans "ha[d] not taken action of clear and unmistakable character indicating an abandonment of the easement." Appellant asked this court to hold that evidence preponderates against chancellor's determination that appellant failed to show abandonment of easement. In support of her position, appellant referred in her brief to testimony of number of witnesses who apparently appeared before trial court. Without transcript or statement of evidence, this court cannot make this preponderance-of-evidence judgment. When trial court decides case without jury, court's findings of fact are presumed to be correct unless evidence in record preponderates against them. This court cannot review facts *de novo* without appellate record containing facts, and hence, we must assume that record, had it been preserved, would have contained sufficient evidence to support trial judge's factual findings. Judgment is affirmed pursuant to Court of Appeals Rule 10. (***Bounds v. Cupp,*** 29 TAM 1-13, 11/25/03, ES, Susano, 2 pages, mem. op.)

▼ **Evidence did not preponderate against trial court's decision to modify joint custody arrangement and to award father primary physical custody of child based on material change in circumstances when mother's home environment changed as result of her remarriage to man (Spears) with violent disposition; father was comparatively more fit than mother to be child's primary physical custodian based on fact that mother had interfered with father's efforts to obtain medical treatment and therapy for child, fact that mother had demonstrated her inability to manage her anger toward father, and fact that mother had married Spears despite his abusive tendencies**

FAMILY LAW: Child Custody — Visitation. Parties were divorced in 1999, and marital dissolution agreement provided for joint custody of parties' 7-year-old daughter (Chelsea), with mother being Chelsea's primary residential parent. In 4/00, father filed petition seeking sole custody of Chelsea because of effect that violent conduct of mother's new husband (Spears) was having on her. Trial court modified existing joint custody arrangement and ordered that father be Chelsea's primary custodial parent. Trial court also ordered that Chelsea not be left alone at any time with Spears and granted father authority to make decisions regarding Chelsea's medical care when parties were unable to agree on her treatment. (1) Mother's marriage to abuser provides ample basis for trial court's conclusion that material change in circumstances had occurred. Mother's home environment changed as result of her remarriage to Spears, man with violent disposition who has physically abused mother, as well as his own biological son and former girlfriend. Although Chelsea has so far been spared from Spears' abuse does not mean that she has not been affected materially by being exposed to his abusive treatment of others. Record contains evidence that Chelsea's behavior already reflects effects of Spears' conduct. (2) Evidence did not preponderate against trial court's determination that Chelsea's interests would best be served by modifying joint custody arrangement and awarding father primary physical custody. Existing "revolving door" custody arrangement was not working and would become even more unworkable now that Chelsea is starting school. Father was comparatively more fit than mother to be Chelsea's primary physical custodian based on fact that mother had interfered with father's efforts to obtain medical treatment and therapy for Chelsea, fact that mother had demonstrated her inability to manage her anger and animosity toward father by being unable to control her use of derogatory remarks and profanity, and fact that mother had married Spears despite his abusive tendencies and saw nothing harmful in exposing Chelsea to this abusive environment. (3) Evidence did not preponderate against trial court's determination that Chelsea not be left alone with Spears, without another adult present. Spears has already physically abused mother, his son, and his former girlfriend. Trial court was properly concerned about effect that living in this environment was having on Chelsea and about possibility that father could direct this sort of conduct at Chelsea at some point. Trial court's decision to permit Spears to have only supervised contact with Chelsea appropriately balances Chelsea's safety with Spears' opportunity to develop appropriate relationship with his stepdaughter. (4) Trial court did not abuse discretion in giving father final decision-making authority regarding Chelsea's health care. Mother had unreasonably resisted obtaining medical care and therapy for Chelsea's speech problem, and father has demonstrated that he is fully capable of making prudent decisions regarding Chelsea's health care. (***McEvoy v. Brewer,*** 29 TAM 1-14, 11/25/03, MS, Koch, 8 pages.)

▼ **When father, who had executed acknowledgment of paternity in 1995, filed petition for custody of child in juvenile court, alleging that mother had exhibited violent tendencies and that child would "suffer immediate and irreparable loss, injury, or damage" if left in mother's care, juvenile court granted father custody, father married mother in 10/97, chancery court, in 2001 divorce decree, awarded parties joint custody but later ruled that it did not have jurisdiction to determine custody, and juvenile court later awarded custody to father, although father did not expressly allege that child was "dependent and neglected," allegations in father's petition were tantamount to allegations of dependency and neglect, and hence, juvenile court correctly invoked its exclusive jurisdiction over child**

FAMILY LAW: Child Custody. CIVIL PROCEDURE: Jurisdiction — Juvenile Court. APPEAL & ERROR: Scope of Review. Child was born to parties on 8/24/96. While parties had

been dating for approximately one year, they were not married. Two days after child's birth, parties executed voluntary acknowledgment of paternity. On 10/15/96, father filed petition for custody in juvenile court, alleging that mother had exhibited violent tendencies; that mother was not "fit and proper mother"; that, in past, mother had "evidenced desire to do harm to the child"; that child would "suffer immediate and irreparable loss, injury or damage" if court did not grant father's petition; and that it would be in child's best interest to grant custody to father. On day petition was filed, juvenile court granted temporary custody to father. By order entered on 10/23/96, juvenile court granted father sole custody of child. Parties reconciled in late 1996. On 10/12/97, parties married. Three and one-half years later, parties divorced. As part of divorce judgment, entered on 5/11/01, chancery court granted parties joint custody of child, naming mother as primary residential custodian. In 8/01, mother filed petition for contempt in chancery court divorce case, alleging that father had obtained domestic assault warrant against mother and that he had failed to return child to mother as required by terms of divorce judgment. Father then filed motion to dismiss petition, as well as petition for restraining order, contending that chancery court lacked jurisdiction to determine custody of child. In 12/01, chancery court reversed itself, holding that it did not have jurisdiction over child's custody. In so holding, chancery court concluded that juvenile court had exclusive jurisdiction to determine child's custody as result of entry of that court's earlier order of 10/23/96. Following chancery court's order, father filed petition with juvenile court seeking to enforce that court's earlier custody order. At conclusion of hearing, juvenile court entered order on 9/23/02 awarding father custody of child. Two days later, juvenile court ordered sheriff to accompany father to pick up child from mother. (1) In her notice of appeal, filed on 10/18/02, mother expressly referred to last juvenile court order of 9/25/02 — order in which juvenile court directed sheriff to pick up child from mother, but in her brief, mother raises issues pertaining to trial court's earlier order of 9/23/02 in which juvenile court awarded father custody of child. Father contended that by referring to 9/25/02 order in her notice of appeal, mother has deprived herself of right to raise issues pertaining to order of 9/23/02. Father cited language of TRAP 3(f) providing that appealing party "shall designate the judgment from which relief is sought." Notice of appeal was filed within 30 days of both 9/23/02 order and 9/25/02 order. Mother's failure to expressly refer to order of 9/23/02 does not preclude her from raising issues with respect to that order. Having timely filed her notice of appeal, mother is not precluded from raising issues pertaining to earlier order. Mother's notice of appeal was sufficient to vest this court with jurisdiction to consider, at minimum, any and all issues raised by order pertaining to all decrees formalized by court orders entered within 30 days of filing of notice of appeal. (2) Mother argued that juvenile court did not have exclusive jurisdiction to determine which of child's parents should be awarded custody of child. This appears to be oblique challenge to chancery court's ruling to contrary. That ruling was not appealed. Appeal of that decision would have been appropriate way to raise issue now before this court. If we had agreed with mother's position on issue of whether chancery court had jurisdiction to address issue of child's custody, we would have been in position to remand divorce case to chancery court. Failure of mother to pursue appeal of chancery court divorce deprives us of this potential avenue of relief. But all of this is academic because juvenile court had exclusive jurisdiction regarding custody of child as result of what occurred in that court in 1996. Once juvenile court has exercised jurisdiction over child in dependency and neglect proceeding, that court retains exclusive jurisdiction over that child until child reaches age of majority, or until juvenile court dismisses case or transfers it to another court. Moreover, once juvenile court has invoked its exclusive jurisdiction, any subsequent order concerning custody entered by court having jurisdiction over original divorce proceeding is void. While mother agrees that juvenile court has exclusive jurisdiction when it initially exercises jurisdiction pursuant to TCA 37-1-103, mother contended that initial decision of juvenile court in present case was not made in dependency and neglect proceeding. Mother relied on fact that initial petition filed by father in juvenile court was styled, in relevant part, as "Petition for Custody of Minor Child," rather than as petition to have child declared dependent and neglected. Review of father's petition in juvenile court reveals that father alleged that mother has demonstrated violent tendencies; that mother has assaulted him on several occasions; that mother was incarcerated for one day following attack on father; that mother was required to attend anger management classes; that upon her release from jail, mother began "striking herself in the stomach, while pregnant with [child], in an attempt to cause a spontaneous abortion"; that mother's older two children had been taken from her pursuant to court order due to mother's violence; that mother had in past evidenced desire to do harm to child, does not have sufficient wherewithal to care for child, and is not fit and proper mother to be caring for child at that time; and that child will suffer immediate and irreparable loss, injury, or damage if court does not restrain mother from removing child from father's home. While father does not expressly allege that child is "dependent and neglected," allegations in his petition, if true, are tantamount to allegations of dependency and neglect. In granting sole custody to father, juvenile court found father's petition to be "well taken," indicating that it had found father's allegations to be true. Hence, juvenile court treated this petition as one of dependency and neglect. As such, juvenile court correctly invoked its exclusive jurisdiction over child pursuant to TCA 37-1-103. (3) Evidence supported juvenile court's findings that award of custody to father was in child's best interest. Juvenile court found that mother was admitted manic depressive, that mother was unpredictably violent and had demonstrated her violence in presence of her children, that mother had not shown change of circumstances since entry of juvenile court's prior order which would in best interest of child require that order be set aside, that father was good parent and provided stable and loving home, and that it was in child's best interest for custody to remain with father. (***J.W.G. v. T.L.H.G.,*** 29 TAM 1-15, 11/25/03, ES at Nashville, Susano, 7 pages.)

▼ **Biological parent's willful failure to support or visit is not excused by custodial parent's or third party's conduct unless conduct either actually prevents parent from performing his or her duty to support or visit or amounts to significant restraint on or interference with parent's efforts to support or develop relationship with his or her child; attempts by others to frustrate or impede parent's visitation do not necessarily provide justification for failing to financially support child; when trial court made no specific findings of fact to support conclusion that father had not willfully abandoned child, order denying petition to terminate parental rights is vacated, and case is remanded to trial court for findings of fact and conclusions of law**

FAMILY LAW: Parental Rights. Dalton and Holcomb had non-marital child in 1996. Dalton, who was 19 years old at time, stopped seeing Holcomb for approximately eight months, and during this time, he had brief affair with 17-year-old Muir. Dalton returned to Holcomb soon after he learned that Muir was pregnant with his child. Dalton continued relationship of sorts

with Muir. Dalton accompanied Muir on several visits to her obstetrician, and Dalton purchased change table and crib for baby before he was born. When child was born in Fort Oglethorpe, Ga., in 3/98, Muir declined to include Dalton's name on birth certificate. Dalton briefly visited Muir and child in hospital and had four other brief visits with child. Dalton's last visit with child occurred in 9/98. Within weeks after child's birth, Muir began dating Whited whom she had met shortly after Dalton left her for Holcomb. Muir and Whited began living together in 1/99 and married in 6/99. Whited financially supported both Muir and child and developed parental relationship with child. Eventually, Whiteds had child of their own. In 1/00, Whiteds filed petition to terminate Dalton's parental rights and for stepparent adoption of child by Whited. Dalton married Holcomb in 5/00. He did not contact Muir directly about visiting child after petition was filed, and his lawyer's informal efforts to arrange for visitation were rebuffed. Between 4/00 and 6/00, Dalton forwarded four support checks to Muir, but Muir returned them on advice of her lawyer. Although Whiteds had been divorced in 11/01, they insisted at 5/02 hearing that they desired to proceed with adoption because Whited was only father child had ever known. On 12/2/02, trial judge filed order denying petition to terminate Dalton's parental rights because there had not been "willful abandonment" by Dalton as to child. On 3/25/03, trial judge entered another order directing Dalton to pay Muir $20,534 in back child support and childbirth expenses and to begin paying $78 per week in prospective child support. Order also provided Dalton with limited visitation rights. (1) Trial judge made no specific findings of fact to support his conclusion that Dalton had not willfully abandoned child. Hence, 12/2/02 order is vacated, and case is remanded to trial court for preparation of findings of fact and conclusions of law required by TCA 36-1-113(k). (2) Threshold issue in every termination case is whether parent whose rights are at stake has engaged in conduct that constitutes one of grounds for termination of parental rights in TCA 36-1-113(g). If answer is "yes," trial court must then determine whether child's interests will be best served by terminating parent's parental rights. If answer is "no," court should proceed no further and should dismiss termination petition. In present case, trial judge did not get past threshold question because he determined that Dalton's conduct did not warrant terminating his parental rights. Whited's petition to terminate Dalton's parental rights rests solely on TCA 36-1-113(g)(1). When Tennessee Supreme Court invalidated TCA 36-1-102(1)(D), it reinstated prior definition of abandonment that required "intent" with regard to failure to support until General Assembly cured constitutional deficiency with statute. Legislature had not acted by time Muir filed her petition in 1/00. Accordingly, elements of "abandonment" were found in TCA 36-1-102(1)(A)(i). Legislature has now corrected statute's constitutional shortcomings. Accordingly, any reconsideration of Muir's abandonment claim must be guided by current law. Concept of "willfulness" is at core of statutory definition of abandonment. For purpose of TCA 36-1-102(1)(A)(i), parent cannot be found to have abandoned child unless parent either has "willfully" failed to engage in more than token visitation or has "willfully" failed to provide more than token monetary support to child for four consecutive months. Failure to support child is "willful" when person is aware of his or her duty to support, has capacity to provide support, makes no attempt to provide support, and has no justifiable excuse for not providing support. Biological parent's willful failure to support or visit is not excused by custodial parent's or third party's conduct unless conduct either actually prevents parent from performing his or her duty to support or visit or amounts to significant restraint or interference with parent's efforts to support or develop relationship with his or her child. Hence, attempts by others to frustrate or impede parent's visitation do not necessarily provide justification for failing to financially support child. Willfulness of particular conduct depends upon actor's intent. Dalton neither supported nor visited his child for 15 consecutive months before Muir filed termination petition. But Muir and Dalton presented dramatically different versions of events during this time. Dalton insisted that he telephoned Muir at least twice per month requesting to visit child and that she rebuffed him. Dalton also stated that he did not try to contact Muir after 2/99 because Whited had told him to stop bothering Muir and that child "had a father in his life." Dalton also asserted that he paid $150 toward Muir's childbirth expenses and that he had intended to pay more but stopped making payments after Muir refused to permit him visitation with child. Dalton also stated that Muir refused his offers of financial support on other occasions and that he told her to call him if she ever needed money. Dalton offered no explanation for failing to send child birthday or Christmas presents or for not using courts to establish his parentage, thereby securing his support obligations and visitation rights. Muir insisted that she telephoned Dalton repeatedly and "begged" him to visit child. According to Muir, Dalton "always had something better to do." Muir testified that Dalton told her in early 1999 that he "still loved me and wanted to be with me but that he couldn't see [child] because of [Holcomb]." Muir also denied ever preventing Dalton from visiting child or telling him that she did not want financial support from him. Muir stated that she heard little from Dalton during 1999 and that she was uncomfortable allowing child around Holcomb because Holcomb had stated that she "hated" Muir and her child. Pivotal questions in present case are whether Dalton willfully failed either to visit or to support child for at least four consecutive months before Muir filed her petition to terminate his parental rights. It is difficult to discern factual basis or legal rationale for trial judge's decision that Dalton's failure to support or visit child for 15 consecutive months was not willful. But it is not this court's role to speculate about basis for trial judge's decision. It is trial judge's obligation in first instance to provide this explanation. (***In re Adoption of Muir,*** 29 TAM 1-16, 11/25/03, MS, Koch, 7 pages.)

FAMILY LAW: Parental Rights. Evidence did not preponderate against trial court's decision to terminate mother's parental rights to child born on 5/12/90. There was clear and convincing evidence that mother had failed to substantially comply with plan of care formulated for her by Department of Children's Services (DCS). Mother had failed to provide DCS with psychological and parenting assessments, with recommendations for correcting past problems, she had failed to provide DCS with rent receipts for six months of housing or check stubs for six months of employment, and she had failed to submit to counseling. Although mother testified that she had very recently made some attempts at compliance with plan of care after getting out of prison, child had been in custody for two years — during which time mother was in prison for total of seven months — and mother had done little in attempting to comply with plan of care. Conditions which led to original removal of child were that mother left child home alone. Child was returned to mother on trial basis, but he was removed again when mother's boyfriend left, mother had no job, and child had missed first few days of school. While mother had made some progress, trial court was justified in finding that conditions would not be remedied. Record establishes that DCS made reasonable efforts toward

reuniting family in past. DCS is only required to make "reasonable" efforts, not "herculean" efforts. Child's best interests would be served by terminating mother's parental rights based on child's recent stabilization in his foster home and his stated preference to remain there. Child is now doing well, and after having been disappointed by mother on so many occasions, he deserves stability and consistency that he is getting in his foster care placement. (***State Department of Children's Services v. SJMW,*** 29 TAM 1-17, 11/24/03, ES, Franks, 4 pages.)

FAMILY LAW: Parental Rights. Child came into custody of Department of Children's Services (DCS) in 10/01, and at that time, father's whereabouts were unknown. In 7/02, father filed motion seeking to establish visitation with child. Permanency plan developed for father contained numerous items which he needed to complete. Justis, DCS caseworker assigned to case, testified that father had failed to complete psychological assessment and parenting class, both of which were requirements of DCS's permanency plan. Plan also required father to secure appropriate housing for child independent of his parents. Reason for this was assault conviction against father's father and father's claim that his father had abused him as child. Justis testified that to her knowledge, father was still living with his parents. In addition, father had no suitable transportation, and he remained unemployed. Evidence did not preponderate against trial court's decision to terminate father's parental rights. Father has apparently never had suitable home for child. At time of final hearing, father was sleeping on friend's couch. Father was unemployed and had no source of income with which to raise young child. Equally important is fact that father had stopped taking his medication, and his emotional capacity was beginning to regress. There was no proof that any of these conditions would be remedied in near future. During eight-month period after plan's requirements were explained to him, father had gone "backwards." Evidence was clear and convincing that continuation of parent-child relationship would greatly diminish child's chances of early integration into safe, stable, and permanent home. (***State Department of Children's Services v. R.A.W.,*** 29 TAM 1-18, 11/25/03, ES, Swiney, 11 pages.)

▼ **Evidence preponderated against trial court's decision to reduce husband's alimony *in futuro* payments to wife to $920 per month based on husband's retirement and concomitant reduction in income when husband profligately "spent down his investments," commingled his assets with those of his new wife, thereby hindering his ready access to cash, and made no effort whatsoever to convert his non-income producing assets to those which could produce income; husband cannot be allowed to manipulate assets so as to create what prima facie appears to be material change in circumstances for his benefit; husband's obligation to pay wife periodic alimony is reinstated at $1,415 per month**

FAMILY LAW: Alimony — Attorney's Fee. Parties were married in 1954 and divorced in 1999. Husband is 70 years old, and wife is 69, and each has health problems. At time of divorce, husband was earning $8,500 per month pursuant to contract resulting from sale of his business. Wife had no income at time of divorce and was awarded $2,200 per month as alimony *in futuro,* which was later reduced to $1,682 per month when wife began receiving her social security. Wife's present income is $752 per month, exclusive of her alimony, and her monthly expenses are $2,176. In 2001, husband filed petition to reduce his alimony payments based on his retirement. Trial court reduced husband's alimony obligation to $920 per month. Husband has been remarried for 11 years, and he and his present wife live and work on their 30-acre farm, which is valued at $390,000. Evidence preponderated against trial court's decision to reduce husband's alimony *in futuro* payments to wife to $920 per month based on husband's retirement and concomitant reduction in income. Husband profligately "spent down his investments," commingled his assets with those of his new wife, thereby hindering his ready access to cash, and made no effort whatsoever to convert his non-income producing assets to those which could produce income. Husband cannot be allowed to manipulate assets so as to create what prima facie appears to be material change in circumstances for his benefit. Husband's obligation to pay wife periodic alimony is reinstated at $1,415 per month. Wife requires $2,167 per month for living expenses, and she receives $752 per month in social security benefits, which should be deducted from husband's alimony obligation. Wife should not have to pay cost of defending her entitlement to alimony, and hence, judgment denying wife her attorney fees is reversed, and case is remanded to trial court for determination of amount of attorney fees to be awarded to wife, both at trial and on appeal. (***Maples v. Maples,*** 29 TAM 1-19, 11/25/03, ES, Inman, 4 pages.)

FAMILY LAW: Protection Order. CRIMINAL PROCEDURE: Contempt. EVIDENCE: Relevancy. Agreed orders of protection without social contact were issued on 8/15/02 enjoining respondents from coming about petitioner for any purpose, and specifically from abusing, threatening to abuse petitioner, or committing any acts of violence upon petitioner. Order enjoined respondents from destroying petitioner's property and from placing petitioner in fear. All respondents were found guilty of violating respective order of protection, and each was sentenced to 10 days in jail for contempt, with five days suspended. Statement of evidence reveals that two witnesses testified, first of whom was Poston, attorney, who represents respondents "in this matter in criminal charges from which the original order of protection flowed." Poston testified that respondents were present in courthouse for purpose of testifying in divorce case and that nothing untoward occurred between them and petitioner. Petitioner testified "about the alleged assault" which was basis for orders of protection. Petitioner saw respondents at courthouse. None of respondents spoke or gestured to him. Petitioner testified that he "was afraid of the Respondents" and "that everywhere he went in the Courthouse he looked up and saw the Respondents as if they were 'following him.'" Violation of order of protection is criminal act, and contempt orders in such case require guilt to be established beyond reasonable doubt. Trial judge accredited testimony of petitioner and adjudicated contempt, because of "their proximity to the petitioner in the Courthouse," and because they represented credible threat to safety of petitioner. Trial judge further found that respondents "came about the petitioner in violation of the Orders of Protection thereby placing him in fear." Printed form entitled "Order of Protection" was utilized by trial judge for each respondent. Prima facie, this document is confusing. It initially purports to be restraining order, then progresses to findings of fact respecting violation of previous agreed order, then regresses to specific restraints, and, finally, to judgment that respondent is sentenced to 10 days in jail for criminal contempt, with five days suspended. Printed form contains language "[t]he court finds that the petitioner has proved domestic abuse by a preponderance of the evidence." Respondents came about petitioner in violation of previous agreed order of protection, thereby placing him in fear. Mittimus dated 11/14/02 provides that three respondents are guilty beyond reasonable doubt of willful contempt of three no-contact orders of

protection, and each respondent was found guilty beyond reasonable doubt of criminal contempt, and record supports findings and judgments. Evidence supported findings of guilt by trier of fact beyond reasonable doubt. (2) Trial judge did not err in admitting evidence of assault by respondents in 6/02, arguing that such evidence was irrelevant. Assault was apparently reason for issuance of order of protection, and evidence of its relevance is manifest. (***Johnson v. White,*** 29 TAM 1-20, 11/26/03, ES, Inman, 4 pages.)

▼ **Father's filing of notice of appeal was not timely when it was filed more than 30 days after entry of order denying father's TRCP 59 and 60 motion; stay exemption created by 11 USC 362(b)(2)(A)(ii) of Bankruptcy Code for establishment or modification of order for alimony, maintenance, or support, applied when father was appealing trial court's decision to grant mother's petition to establish and modify his support obligation; appeal, in essence, is continuation of mother's petition, and hence, father's appeal of trial court's ruling establishing arrearages and modifying his child support obligations was not stayed**

APPEAL & ERROR: Timeliness. FAMILY LAW: Child Support. COMMERCIAL LAW: Bankruptcy. Parties were divorced in 7/92, and mother was awarded custody of parties' minor child. Trial court found that because father's income was over $6,250 per month, it was not appropriate to apply Child Support Guidelines, and trial court found that it was in child's best interest to order father to pay $1,000 per week in child support. Trial court's order provided that to extent there was at least 5% increase in father's income in one calendar year, beginning with 1993, his child support obligation will increase according to same percentage, but in no event will father's support obligation drop below $1,000 per week or rise above $2,000 per week. In 12/96, father filed first of several petitions to modify his child support and alimony obligations. In 5/97, father filed amended petition seeking modification of his alimony and child support obligations in amount "commensurate to his ability to pay," stating that he had suffered severe financial setbacks since 2/97, was on verge of shutting down his business, and had not been able to pay himself any salary since 2/97. In 12/97, father filed third petition alleging that mother had willfully and intentionally interfered with his visitation schedule and had habitually made disparaging remarks about him to child. Consent order was filed on 9/14/98, addressing allegations and claims set out in father's several petitions. Parties agreed, in part, to reduce father's child support obligations to $400 per month, effective 9/1/98. Order also stated that parties agreed that as father's income increased 15%, father would automatically increase his monthly child support obligation accordingly, and thereafter, at each 15% increase in income, father would voluntarily increase his monthly child support obligation accordingly. Mother agreed not to hold father liable for due and owing child support obligations, recognizing that such debt arose from his drastic decrease in income. Father agreed to continue to provide child with medical insurance. In 9/00, mother filed "Petition for Contempt," requesting increase in father's child support payments in accordance with "his income and current lifestyle." In 7/01, trial court found that although father, through no fault of his own, was forced to cease operation of his business in 1997, he was voluntarily underemployed, he had ability to earn $90,500 per year, and he should have been able to find comparable work within 12 months of his company's closure. Trial court also determined that father had maintained essentially same lifestyle that he maintained before his business failed and that he had not sold either his house, his jewelry, or his guns. Trial court increased father's child support obligation to $1,100 per month, effective 9/1/99, and awarded mother judgment against father for child support arrearages ($14,700), attorney fees ($30,000), and expenses incurred in bringing present action ($2,205). Father filed motion pursuant to TRCP 59 and 60, seeking relief from trial court's 7/17/01 order. Trial court denied father's motion on 11/21/01 and amended its 7/17/01 order to state that father was "willfully and voluntarily underemployed." On 2/27/02, father filed notice of appeal from court's 7/17/01 and 11/21/01 orders. In 4/03, father filed "Motion for Consideration of Post-Judgment Facts," requesting this court to consider his Chapter 7 bankruptcy petition and schedule detailing his liabilities and assets in his bankruptcy estate. On 6/5/03, this court granted father's motion "insofar as it discloses that [father] filed a Chapter 7 Bankruptcy Petition on October 30, 2001," but denied remainder of motion. Mother filed motion to dismiss father's petition on basis that father failed to file timely notice of appeal. Father's notice of appeal, which was filed more than 30 days after entry of order denying his TRCP 59 and 60 motion, was not timely. Pursuant to TRCP 4(a) and (b), notice of appeal must be filed within 30 days after date of entry of judgment or if timely motion as specified is filed within 30 days of entry of order denying timely filed motion. Father contended that he filed Chapter 7 bankruptcy petition on 10/30/01 and that, by virtue of 11 USC 362, there is automatic stay of all proceedings, and as such, he had 30 days after lifting of stay on 1/30/02 within which to file his notice of appeal. Stay exemption created by Bankruptcy Code, 11 USC 362(b)(2)(A)(ii), for establishment or modification of order for alimony, maintenance, or support, was applicable in present case. Father was appealing decision of trial court to grant mother's petition for establishment and modification of his support obligation. Appeal, in essence, was continuation of mother's petition, and hence, father's appeal of trial court's ruling establishing arrearages and modifying his child support obligations was not stayed. (***Frame v. Frame,*** 29 TAM 1-21, 11/21/03, WS, Crawford, 10 pages.)

APPEAL & ERROR: Timeliness. Final divorce decree was entered on 1/14/03, and wife filed notice of appeal on 2/25/03. Appeal is dismissed. TRAP 4(a) requires that notice of appeal be filed within 30 days after date of entry of judgment appealed from. TRAP 2 does not permit extension of time for filing notice of appeal. By same token, extension of time provisions of TRAP 21(b) provide that court may not enlarge time for filing notice of appeal. Thirty-day time limit is mandatory and jurisdictional in civil cases. Hence, this court has no jurisdiction to consider issues raised by wife. (***Loines v. Loines,*** 29 TAM 1-22, 11/25/03, ES, Susano, 2 pages.)

APPEAL & ERROR: Record. On 9/28/92, judgment was rendered in favor of plaintiff against defendant. Judgment was unpaid and unassigned. Within time allowed, judgment creditor petitioned trial court to revive judgment, and proper notice was served on defendant. Defendant testified and denied that he executed note which was basis of 1992 judgment. Trial judge ruled that judgment was *res judicata* and sustained petition to revive. Defendant's appeal does not comply with Tennessee Rules of Appellate Procedure. Defendant does not specify any issues for this court's consideration. This court cannot review facts without appellate record, and, by law, we are consequently required to assume that record, had it preserved evidence, would have contained sufficient evidence to support action of trial court. Judgment is affirmed. (***Combustion Federal Credit Union v. Farmer,*** 29 TAM 1-23, 11/26/03, ES, Inman, 2 pages.)

GOVERNMENT: Prisons. CRIMINAL SENTENCING: Release Eligibility. CIVIL PROCEDURE: Mandamus — Costs. In 6/88, petitioner received life sentence as habitual criminal. At that time, persons receiving life sentence became eligible for parole after serving 30 years. But newly created Parole Eligibility Review Board declared petitioner parole-eligible in 1992, and he was paroled in 8/94. Petitioner was later arrested for aggravated robbery and received five-year sentence, to be served consecutively to his 1988 life sentence. As result of robbery conviction, parole board (board) revoked petitioner's earlier parole, and he resumed serving his 1988 life sentence. Board eventually determined that petitioner would be paroled from his life sentence in 7/00 and that he would begin serving his five-year armed robbery sentence at that time. Board also determined that petitioner would again become eligible for release on parole on 9/14/00. Board did not consider petitioner for parole in 9/00. Petitioner became convinced that this oversight was caused by fact that his records still contained date that he would have been eligible for parole from his 1988 conviction had Parole Eligibility Review Board not declared him parole-eligible in 1992. On 10/6/00, petitioner filed petition for writ of mandamus in Davidson County Chancery Court seeking order directing Department of Correction (Department) to "correct" his release eligibility date and to certify him as being eligible for parole. In response, Department conceded that it had "incorrectly calculated" petitioner's release eligibility date and stated that he would be placed on "first available parole docket." Board provided petitioner belated parole hearing in 2/01 and denied parole. Board decided to consider petitioner for parole again in 2/02. Chancellor granted Department summary judgment on ground that Department "is not violating the petitioner's legal rights in the manner in which it maintains its records." (1) Chancellor reached correct result — solely because of limited purpose of writ of mandamus. Courts will not issue writ of mandamus against public official unless proof shows that official is clearly refusing to perform some non-discretionary, ministerial act. Act is considered "ministerial" when law prescribes and defines duties to be performed "with such precision and certainty as to leave nothing to exercise of [official's] judgment." Department has statutory duty to maintain prisoner records and to calculate each prisoner's earliest release date. But statutes do not prescribe how these records should be kept or how Department should calculate prisoner's earliest release date. Department has discretion regarding how and in what form it will maintain its records and how it will calculate and communicate prisoner's release eligibility date. Hence, prisoner in Department's custody does not have clearly established legal right to have his or her records kept or displayed in any particular way or to require Department to calculate his or her release eligibility date in any particular manner. Prisoners who believe that Department has incorrectly calculated their release eligibility dates may, after exhausting their administrative remedies, file petition for declaratory order pursuant to TCA 4-5-225 to obtain judicial review of these calculations. Why Department needs to continue including outmoded release eligibility dates in its prisoner records is far from clear. But it is clear that Department has discretion to do as it chooses, and therefore, prisoners do not have vested legal right to have their records maintained in any particular form. Hence, petitioner has not established that he has clear legal right to require Department to remove from his records entry showing what release eligibility date for his 1988 life sentence would have been had Parole Eligibility Review Board not designated him as parole eligible in 1992. Because petitioner failed to establish clear legal right and because he has other adequate legal remedies should Department fail to calculate his release eligibility date properly, chancellor correctly denied his petition for writ of mandamus. (2) Chancellor did not err in declining to award petitioner discretionary costs. Petitioner is not prevailing party, and TRCP 54.04(2) does not permit award of discretionary costs against state or any of its departments or agencies. (***Johnson v. Tennessee Department of Correction,*** 29 TAM 1-24, 11/25/03, MS, Koch, 4 pages.)

GOVERNMENT: Prisons. CIVIL PROCEDURE: Dismissal. Petitioner was convicted on 9/27/01 of possession with intent to sell over 100 grams of methamphetamine. On 4/24/02, he was given parole hearing. Parole board declined to release him and deferred next hearing until 4/04. Petitioner appealed decision to director of parole board. His appeal was turned down. On 10/3/02, petitioner filed petition for writ of certiorari, accompanied by affidavit of indigency. Petition alleged that petitioner, Mexican citizen, had been denied parole because of his "Spanish Nationality" and that parole board abused its powers in failing to acknowledge that in event he was paroled, detainer lodged against him by U.S. Immigration Service would prevent him from entering streets of this country. Inmate Trust Fund Certification Balance, filed on same day, stated that petitioner had current cash balance of $85.91 and that his average account balance for previous six months had been $101.91. On 11/7/02, trial judge filed order which stated that petitioner had not complied with requirements of TCA 41-21-801 *et seq.*, which deals with lawsuits by inmates. Specifically, petitioner had not filed affidavit of previous claims and lawsuits as required by TCA 41-21-807. Trial judge's order gave petitioner 20 days to comply or face dismissal of his petition. Petitioner filed motions for appointment of counsel and for waiver of filing fee, petition for habeas corpus *ad prosecandum* and/or *ad testificandum*, reply to state's motion which included request for oral argument, and affidavit required by TCA 41-21-805. But petitioner did not pay any part of filing fee. Trial judge properly dismissed petition. TCA 41-21-807 requires inmate who wishes to file civil action *in forma pauperis* to pay full amount of filing fee. If inmate does not have means to pay full amount, statute allows partial payment from inmate's trust account, with balance forwarded to court as trust account is replenished. Failure to pay fee constitutes ground to dismiss action. In present case, petitioner was notified of requirement of payment and consequences for failure to comply. Nonetheless, he failed to make any payment. His trust fund account statement indicates that he had money to pay filing fee or make partial payment. He failed to present any justification for his failure to comply with TCA 41-21-807. (***Parra-Soto v. Newble,*** 29 TAM 1-25, 11/25/03, MS, Cottrell, 3 pages.)

Court of Criminal Appeals

▼ **Death sentence, based on prior violent felony aggravator, is affirmed; although it is questionable whether, in penalty phase of trial, trial judge had authority to find that defendant's prior felony convictions were crimes of violence and to so instruct jury, any error was harmless; fingerprinting of defendant, who refused to stipulate identity with respect to prior convictions, in presence of jury at penalty phase of trial, was not so prejudicial as to render trial fundamentally unfair; fact that defendant was juvenile at time prior felonies were committed is insufficient, standing alone, to render his death sentence disproportionate**

CRIMINAL LAW: Murder I. CRIMINAL SENTENCING: Death Penalty — Aggravating Circumstances. EVIDENCE:

Photographs — Demonstration — Hearsay. CRIMINAL PROCEDURE: Self-Incrimination — Victim Impact Statements — Verdict. APPEAL & ERROR: Waiver. Defendant was convicted of premeditated first degree murder and was sentenced to death based on application of one aggravating circumstance — that defendant has prior violent felony conviction. (1) Evidence was sufficient to convict defendant of premeditated first degree murder. Defendant asked victim to go to grassy area behind apartment complex. Unsatisfied with victim's refusal to pay $15 debt, defendant pointed gun at unarmed victim and repeatedly ordered him to open his mouth. As victim told defendant to "stop playing" and backed away, defendant shot him above left eye and then shot him above left ear from distance of less than one inch in order to ensure that he was dead. Defendant then retrieved victim's car keys, left victim in grassy field, used victim's car to make his escape, and discarded weapon. Defendant returned to scene twice to search for his electronic pocket organizer. Defendant later stated that he wanted victim to "start respecting me." Rational trier of fact could have found that defendant intentionally and premeditatedly killed victim. (2) Trial judge did not abuse discretion in admitting portrait-style photograph of victim taken during his lifetime. Family photo may be relevant to establish victim's identity as person killed. Nevertheless, even if trial judge erred in admitting photo, error was harmless. Although photo added little to other information provided to jury, it did not prejudice defendant. (3) Trial judge did not abuse discretion in admitting two autopsy photographs depicting close-ups of victim's scalp. Photos revealed gray ring of soot around one wound indicating it was result of gunshot fired at close range. Photos were relevant to supplement testimony of medical examiner that victim's wound was inflicted from contact range, from which jury could infer premeditation, and not from few feet away as claimed by defendant during his statement to police. Additionally, photos dispelled defendant's claim of self-defense. Photos were not particularly gruesome. Probative value of photos was not outweighed by their prejudicial effect. Moreover, admission of photos did not affirmatively affect results of trial. (4) Fingerprinting of defendant, who refused to stipulate identity with respect to prior convictions, in presence of jury at penalty phase of trial was not so inflammatory or prejudicial as to render defendant's trial fundamentally unfair. Prejudice may arise in cases in which requested performance or demonstration would unjustly humiliate or degrade defendant, or in which such performance would be damaging to defendant's image and is irrelevant to issue at trial. Fingerprinting, unlike being handcuffed or wearing inmate's uniform, does not portray defendant as dangerous criminal. Moreover, fingerprinting is non-testimonial evidence that is not subject to privilege against self-incrimination. Defendant contended that by taking his thumb print, state engaged in practice which "undermine[d] the presumption of innocence." Yet, at time jury saw technician fingerprint defendant, it had already convicted him of first degree murder, and hence, he was no longer presumed innocent. (5) Defendant contended that trial judge erred in excluding testimony by defendant's father regarding whether defendant had expressed any remorse about victim's death. Defendant has waived this issue by failing to make offer of proof and failing to raise issue in motion for new trial. Nevertheless, any error on part of trial judge in excluding testimony of defendant's father was harmless. Defendant, during his own testimony, expressed remorse for victim's death. Potential hearsay testimony about defendant's expressions of remorse to his father would not have affected jury's verdict. (6) Defendant contended that trial judge's finding and instruction that statutory elements of his prior convictions involved use of violence to person deprived jury of opportunity to decide whether prior offenses involved violence. During penalty phase of trial, trial judge instructed jury that defendant was previously convicted of one or more felonies, other than present charge, statutory elements of which involved use of violence to person. Trial judge told jurors that state was relying on crimes of robbery, kidnapping, reckless endangerment, and attempted rape, "which are felonies, the statutory elements of which do involve use of violence to the person." Question is whether Sixth and Fourteenth Amendments require jury, and not trial judge, to make findings that must go beyond mere fact that prior conviction exists in order to apply aggravating circumstance for commission of prior violent felony by defendant. Disparity of views exists as to whether trial judge can decide issues which involve examination of underlying facts of prior conviction. Although issue has not been definitively decided by U.S. Supreme Court, *Apprendi v. New Jersey*, 530 US 466 (2000), requires that any "fact" which increases penalty beyond prescribed statutory maximum, "other than the fact of a prior conviction," must be submitted to jury and found beyond reasonable doubt. *Ring v. Arizona*, 536 US 584 (2002), dictates that death penalty is penalty beyond prescribed statutory maximum. With regard to Tennessee's prior violent felony aggravating circumstance, *State v. Sims*, 45 SW3d 1 (Tenn. 2001), authorizes examination of underlying "facts" in order to determine whether prior felonies were or were not, in fact, "violent." When trial judge examines underlying facts, factually determines that prior offense involved violence, and then, based upon its finding of fact, instructs jury as matter of law that prior felony involved violence, it is arguable that this usurps role of jury as trier of fact. Therefore, it is arguable that procedure outlined in *Sims* may well be in violation of *Ring.* Nevertheless, this court need not rest our ultimate disposition in present case upon such holding, as this case will be automatically reviewed by Tennessee Supreme Court. Although it is questionable whether, during penalty phase of trial, trial judge had authority to find that defendant's four prior felony convictions were crimes of violence and to instruct jury that these prior convictions were crimes of violence, any error was harmless beyond reasonable doubt. Jury heard detailed and horrid testimony of victim of four prior offenses, and each of offenses involved defendant's use of deadly weapon, which was pointed at victim. Jury expressly wrote each of prior four felonies on its verdict form and found that this aggravating circumstance outweighed any mitigating circumstances beyond reasonable doubt. (7) Trial judge properly instructed jury relative to its consideration of victim impact evidence. Exact instruction utilized by trial judge was recommended by Tennessee Supreme Court in *State v. Nesbit*, 978 SW2d 872 (1998). (8) Evidence was sufficient to support application of aggravating circumstance that defendant "was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Defendant had prior convictions for robbery, kidnapping, felony reckless endangerment, and attempted rape, all arising from one incident with single victim. Victim of prior offenses testified that all of offenses were accomplished through defendant's use of gun. Defendant pointed gun at victim and forced him to surrender control of his car and move from driver's seat to passenger's seat. Defendant then spun barrel of gun, pointed it at victim's head, and pulled trigger in "Russian Roulette" fashion. At some point during five-hour encounter, gun-wielding defendant forced victim to perform oral sex upon him. Additionally, defendant and his accomplice engaged in conversation indicating that they were going to kill victim and discussed where they could dump his body. Pointing gun at victim is violent act. (9) Defendant contended that jury verdict form was incomplete because none of his four previous crimes were listed as aggravating

circumstance and because jury did not find that crimes were those whose statutory elements involved use of violence to person. Defendant has waived his right to challenge this issue on appeal because he failed to object to jury's verdict and failed to raise issue in his motion for new trial. Nevertheless, issue is without merit. Jury's verdict need not be verbatim statement of aggravating circumstance relied upon by state. Jury form in present case was clear and unequivocal in that it stated that "We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances." Trial judge asked jurors whether "in writing these four [prior] offenses on here you have determined that the aggravating circumstance, as written on the charge, has been proven beyond a reasonable doubt." Jury foreman responded in affirmative. (10) Tennessee's death penalty statutes are constitutional. Aggravating circumstance for commission of prior violent felony provides meaningful basis for narrowing class of death-eligible defendants. (11) Sentence of death imposed on defendant was not disproportionate to penalty imposed in similar cases. Twenty-year-old defendant directed 27-year-old victim to secluded, grassy area behind apartment complex. Defendant, who was upset because victim had not repaid small debt, held gun to victim's head and told victim to open his mouth. As victim began to back away, defendant, without provocation or justification, premeditatedly shot unarmed, helpless, retreating victim in head. In order to ensure that victim was dead, defendant then placed gun within one inch of victim's head and shot him again. He then retrieved victim's car keys from victim's body and escaped in victim's car. After murder, defendant stated that victim owed him $15 and needed to "start respecting" him. Subsequently, defendant fled from officers and misrepresented that he would turn himself in. In 1997, defendant pled guilty to robbery, kidnapping, felony reckless endangerment, and attempted rape for crimes he committed in 1995 when he was 15 years old. Fact that defendant was juvenile at time prior felonies were committed is insufficient, standing alone, to render his death sentence disproportionate. Jury was instructed that defendant's age at time of commission of prior offenses could be considered mitigating circumstance. (***State v. Cole,*** 29 TAM 1-26, 11/24/03, Jackson, Riley, 24 pages.)

CRIMINAL LAW: Reckless Endangerment. APPEAL & ERROR: Appeal from General Sessions Court. CRIMINAL PROCEDURE: Arrest Warrant — Jurisdiction. CRIMINAL SENTENCING: Reasonableness — Vulnerability of Victim — Probation. (1) Evidence was sufficient to convict defendant of misdemeanor reckless endangerment. Arrest warrant charging defendant with misdemeanor reckless endangerment indicated that victim was 6-year-old child who was passenger in defendant's vehicle. Defendant backed his vehicle from Ceiga residence at high rate of speed, ran stop sign, proceeded at up to 80 mph down highway, attempted to force police cruiser off road, and abruptly stopped, losing control of vehicle. Defendant knew, or should have known, that he was in near proximity to two other vehicles during this time, and all of this occurred while he had 6-year-old child as passenger. (2) State contended that trial court lacked "authority" to determine defendant's guilt or innocence of offense. Case came before Obion County Circuit Court following defendant's appeal from Obion County General Sessions Court, where charge was initiated in arrest warrant. Defendant was also convicted, as result of same incident, of resisting arrest and disorderly conduct. Defendant appealed those convictions at same time, and circuit court found him not guilty of those two offenses following trial. State argues for first time on appeal that defendant pled guilty to all three offenses in general sessions court, and therefore, could only appeal sentences imposed. State apparently relies upon fact that on each of three arrest warrants, word "guilty" is circled in boilerplate, pre-printed language under heading "Request to have case tried in General Sessions Court." While word "guilty" is circled, each arrest warrant has pre-printed language listing litany of rights waived upon plea of guilty. On this part of arrest warrant, spaces for signatures of defendant, his attorney, and general sessions judge are blank, which strongly indicates that there were no guilty pleas in general sessions court. In addition, there is, in transcript, persuasive indication that trial court, prosecutor, and defense attorney were all aware that appeals were from convictions following trial in general sessions court. While "judgment" portion of each arrest warrant does not clearly indicate that fines and sentences were imposed following trial rather than guilty pleas, and word "guilty" is circled on portion of arrest warrant, this court is confident from review of entire record that defendant did, in fact, appeal to circuit court three convictions which resulted from trial following pleas of "not guilty." As such, state is not entitled to relief it seeks on issue. (3) Trial judge sentenced defendant to 11 months and 29 days in county jail, with all but 30 days of sentence suspended. Defendant's sentence was not excessive. Trial judge properly applied enhancement factor for vulnerability of victim. Defendant had promised to take child swimming. Defendant was agitated with two police officers and with one or more other persons at Ceiga residence. He placed child into his vehicle and immediately initiated course of conduct which led to his conviction. Due to his age, victim was unable to resist crime and/or summon help. While this consideration might apply to any passenger no matter age, adult or at least older minor passenger might be able to reason with defendant or take control of vehicle before it left Ceiga residence. Therefore, this enhancement factor is entitled to some, but little, weight. Trial judge found that defendant had "absolutely no remorse" and that defendant was not truthful in his testimony. Lack of candor and lack of remorse show lack of potential for rehabilitation and weigh against totally suspended sentence. (***State v. Dilling,*** 29 TAM 1-27, 11/24/03, Jackson, Woodall, 7 pages.)

▼ **In case in which defendant was convicted of four counts of aggravated assault and one count of felony reckless endangerment as lesser included offense of aggravated assault, because felony reckless endangerment is not lesser included offense of aggravated assault, jury was improperly instructed on that offense, and hence, defendant's felony reckless endangerment conviction is reversed; generally, more than one conviction for single criminal act may stand when there are multiple victims**

CRIMINAL LAW: Aggravated Assault — Double Jeopardy — Lesser Included Offenses — Reckless Endangerment. CRIMINAL SENTENCING: Reasonableness — High Risk Crime — Dangerous Offender — Probation. Defendant was convicted of four counts of aggravated assault and one count of felony reckless endangerment and was given effective 12-year sentence. (1) Evidence was sufficient to convict defendant of four counts of aggravated assault. Caldwell and Dixon testified that defendant and Dixon had confrontation in front of Dixon's house. Dixon told defendant to "move on" after defendant made some "mocking gestures." Defendant drove away, returned approximately 10 to 15 minutes later, and started shooting. Dixon, Farris, and Ross testified that they were on front porch with Yarbro when defendant drove by and started shooting at them. Separate convictions for each of four victims standing on porch was proper. Generally, more than one conviction for single criminal act may stand

when there are multiple victims. Defendant argued that because Yarbro did not testify at trial, there was no proof that defendant pointed gun or shot at Yarbro or that Yarbro was afraid. Witnesses testified that defendant shot at men on porch and that all of them, including Yarbro, fearfully ran inside house. Such testimony was sufficient to establish defendant's guilt of aggravated assault of Yarbro. (2) Defendant's sentence was not excessive. (a) Defendant did not challenged trial judge's application of enhancement factor for previous history of criminal convictions or criminal behavior or commission of delinquent act as juvenile that would constitute felony if committed by adult. (b) Trial judge improperly applied enhancement factor for lack of hesitation in committing offense when risk to human life was high. Defendant fired shots at house where four named victims were standing on porch and fifth named victim was inside house. While state presented further proof that shots were fired in residential neighborhood and that there was daycare center in vicinity, there was no proof that shots actually created risk to life of any other specific person. (c) Trial judge properly imposed partial consecutive sentencing after finding defendant to be dangerous offender. Trial judge imposed maximum sentence of six years for each aggravated assault conviction and maximum two-year sentence for felony reckless endangerment conviction and imposed partial consecutive sentencing to create effective 12-year sentence. Extended sentence was necessary to protect public from further criminal conduct by defendant, and consecutive sentencing was reasonably related to severity of offenses. (d) Trial judge properly denied defendant alternative sentence. At time defendant committed present offenses, he was on probation for assault. Defendant had received suspended sentences in past, yet he continued to commit criminal offenses. Twenty-four-year-old defendant had numerous misdemeanor convictions as well as juvenile adjudication for burglary. In addition, defendant admitted to long-term, frequent use of illegal drugs. (3) Although not raised by either party, jury was improperly instructed on felony reckless endangerment as lesser included offense of aggravated assault. Felony reckless endangerment is not lesser included offense of aggravated assault committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of deadly weapon. As such, defendant's conviction for felony reckless endangerment is reversed. On remand, defendant may be tried for "any offenses which qualify as lesser included offenses of aggravated assault that were not originally charged or were charged but which are lesser offenses than felony reckless endangerment. (***State v. Morrow,*** 29 TAM 1-28, 11/25/03, Jackson, Ogle, 7 pages.)

▼ **When defendant was convicted of aggravated child abuse of her 17-month-old daughter — defendant was caught on tape injecting substance into victim's feeding tube, and victim, who began exhibiting seizure-like symptoms, was subsequently found to have very high level of acetone in her bloodstream — any error in admitting testimony of Dr. Lazar, pediatric gastroenterologist, about effects of acetone ingestion on body was harmless when, even without testimony of Lazar, Dr. Rose, pediatric neurologist, testified that, in his opinion, there was direct relationship between what was introduced into victim's body by defendant and victim's reaction and that in his medical opinion, acetone caused victim's symptoms**

CRIMINAL LAW: Aggravated Child Abuse. EVIDENCE: Expert Testimony. (1) Evidence was sufficient to convict defendant of aggravated child abuse of her 17-month-old daughter. Dr. Lazar, pediatric gastroenterologist, first saw victim when she was 10 months old. Victim was having problems "spitting up." Victim was admitted to hospital several times over next several months with seizure-like episodes. Victim did not have diabetes or any metabolism problem. Lazar testified that she researched symptoms of acetone ingestion and discovered that it could cause "seizure-like looking appearance" similar to victim's symptoms. Because doctors were unable to determine cause of victim's seizures, they felt that video monitoring might help them understand how seizures started and progressed. Dr. Rose testified that when he explains monitoring process to parents, he usually does not explain that cameras in room will still function even when lights are turned off. On 9/13/95, victim was moved to monitoring room, and approximately two hours later, Rose checked in on victim, who appeared to be doing fine. After leaving victim's room, Rose went into control room, where technologist and nurse were monitoring situation. Technologist noticed that defendant turned off lights in room and appeared to be doing something to victim. Defendant was observed opening cap to victim's feeding tube and inserting syringe filled with some type of liquid. Defendant emptied contents of syringe into feeding tube and walked away. Defendant returned few moments later and injected another full syringe of liquid into infant. Seconds later, victim's condition changed. She turned suddenly to right and drew up her legs. Victim's breathing pattern changed, her legs were "floppy," and her eyes were deviated to one side. Rose entered room and noticed that bubbles were coming out of feeding tube. Rose detected smell of acetone or fingernail polish remover coming from feeding tube. Victim's stomach contents tested positive for very high level of acetone — 20 times higher than what is considered to be toxic. Rose testified that victim was "at very significant risk of death" when she was transferred to intensive care. In light of fact that defendant was observed turning off lights in room and injecting liquid substance into victim, fact that extremely high level of acetone was found in victim's stomach contents that were removed within minutes of injection, and fact that almost empty bottle of fingernail polish remover was found in monitoring room, it was reasonable for jury to find that substance injected by defendant was acetone and that it alone caused symptoms suffered by victim. (2) Defendant contended that trial judge erred in allowing testimony by Dr. Lazar concerning effects of acetone ingestion on body. When asked about effects of acetone ingestion, Lazar stated that she was not expert but that she had researched effects of acetone. Trial judge allowed Lazar to testify that, in her medical opinion, presence of acetone "could well have caused these symptoms." Even if admission of Lazar's testimony was erroneous, error was harmless. Dr. Rose testified that, in his opinion, there was direct relationship between what was introduced by defendant and victim's reaction. In his medical opinion, acetone caused victim's symptoms. As such, even without Lazar's testimony regarding effects of acetone, Rose came to same conclusion. As such, admission of Lazar's brief statement about effects of acetone did not more probably than not affect result of trial. (***State v. Love,*** 29 TAM 1-29, 11/26/03, Jackson, Williams, 7 pages.)

CRIMINAL LAW: Identity Theft. CRIMINAL PROCEDURE: Witness Misconduct. APPEAL & ERROR: Waiver. (1) Evidence was sufficient to convict defendant of identity theft. TCA 39-14-150(a) defines crime of identity theft as knowingly transferring or using, without lawful authority, means of identification of another person with intent to commit, or otherwise promote, carry on, or facilitate any unlawful activity. Defendant knowingly used victim's debit card, which had both victim's name and electronic identification number imprinted on it, as well as in magnetic tape on card, without lawful authority, with intent to facilitate "any unlawful activity." Defendant committed forgery

when he signed victim's name to receipt from Dodge store. State was authorized by TCA 39-11-109(a) to prosecute defendant under general statute of identity theft, rather than more specific statute of fraudulent use of debit card. (2) Defendant challenged sentence imposed. Defendant was sentenced to 12 years as career offender. Defendant personally accepted, in open court, sentence imposed in connection with negotiated plea in two other cases, which included provision that sentences in unrelated cases would be served concurrently with 12-year sentence imposed for conviction of identity theft. Defendant clearly asserted that he was not waiving his right to appeal his conviction but was only waiving his right to appeal his sentence if conviction was affirmed. Therefore, issue is waived. (3) Defendant contended that trial judge should have declared mistrial when prosecutor made reference to victim being "attacked." Defendant argued that prosecutor's comment tainted jury "to make them think that [defendant] played a part in [victim's] being robbed." Because defendant failed to object to prosecutor's comment, issue is waived. Nevertheless, issue is without merit. Defendant was not charged with robbery, and neither victim nor anyone else identified defendant as person who "attacked" victim. Defendant admitted that he made purchase at Dodge store using victim's debit card. Since defendant was not clearly identified as person who "attacked" victim, it cannot be said that "other crimes" by defendant were admitted into evidence in violation of TRE 404(b). Also, proof of defendant's guilt as to identity theft was so overwhelming that even if it was error to allow prosecutor's comments to stand, comments did not change outcome of trial. (***State v. Turner,*** 29 TAM 1-30, 11/24/03, Jackson, Woodall, 7 pages.)

CRIMINAL LAW: Evading Arrest — Drug Offenses. (1) Evidence was sufficient to convict defendant of felony evading arrest. Officers attempted to stop defendant's vehicle because they felt he was in violation of city's noise ordinance. But instead of complying with officers' request to stop, defendant increased his speed and attempted to elude police. Defendant argued that state failed to prove that officers were attempting to lawfully arrest him when he failed to stop his vehicle because officers had no warrant for his arrest and violation of noise ordinance did not authorize arrest. Defendant's argument is misplaced. Defendant did not rely upon statutory defense found at TCA 39-16-603(b)(2), which provides that it is defense to prosecution for felony evading arrest if attempted arrest was unlawful, and presented no proof to support its existence. Accordingly, jury was not instructed upon this defense. Because this defense was not presented for determination in lower court, it may not be raised for first time on appeal. Moreover, defendant may not change theories from trial court to appellate record. (2) Evidence was sufficient to convict defendant of misdemeanor possession of cocaine. Defendant attempted to elude police as they attempted to stop his vehicle. He was then seen running from his vehicle to area where bag of cocaine was found. After running between two houses, he immediately turned and approached officer with his arms raised. Drugs were found in area where officers testified that they saw no other people. Officers stated that two individuals, owner of house and his guest, were in their cars in driveway at time, but officers did not see either of these individuals in immediate vicinity where drugs were found. Drugs were found in plastic bag that was located on top of debris. (***State v. Hughes,*** 29 TAM 1-31, 11/21/03, Nashville, Hayes, 5 pages.)

CRIMINAL LAW: Evading Arrest. Evidence was sufficient to convict defendant of evading arrest. Officer Wiser spotted defendant driving vehicle, and Wiser was aware that defendant had outstanding warrant for probation violation. Wiser followed defendant for approximately two blocks until defendant turned into driveway. Defendant exited vehicle and ran. Wiser got out of his patrol car and exclaimed, "stop Ant." Defendant ignored Wiser's command to stop, and Wiser chased defendant on foot but did not apprehend him at that time. Wiser returned to his vehicle approximately 30 minutes after chase had begun. Wiser then ran license plate of abandoned vehicle and discovered that it was registered to defendant's mother. It was reasonable for jury to find that defendant knew that Wiser was attempting to arrest him, because Wiser commanded defendant to stop using his street name. Defendant admitted that he knew that he had outstanding arrest warrant on night of incident. (***State v. McCurry,*** 29 TAM 1-32, 11/26/03, Jackson, Williams, 4 pages.)

▼ **Officer's stop of defendant's car was justified when officer, who expressed familiarity with window tinting requirements of TCA 55-9-107(a)(1) and explained basis upon which he formed his opinion that defendant's tinted windows were "too dark," had more than corroborated his initial "fleeting glance" of tint and was able to base investigatory stop upon articulable and reasonable suspicion**

CRIMINAL PROCEDURE: Stop. Defendant pled guilty to simple possession of marijuana and reserved certified question of law challenging legality of investigatory stop of his vehicle. Around 4:50 p.m. on 10/6/01, Trooper Franks slowed his vehicle as he approached intersection. At that point, vehicle driven by defendant proceeded through intersection at approximately 45 mph. During two- or three-second opportunity Franks had to observe exterior of vehicle's passenger window, he developed suspicion that vehicle's tinted window treatment was "too dark." Franks followed defendant's vehicle and, during two or three minutes it took to find safe place to stop, he was able to further examine tint of car windows. As Franks approached vehicle, he smelled marijuana coming from interior. Search of vehicle uncovered three marijuana roaches in center ash tray. Franks' stop of defendant's vehicle was justified. TCA 55-9-107(a)(1) makes it "unlawful for any person to operate, upon a public highway, street or road, any motor vehicle registered in this state, in which any window ... has been altered, treated or replaced by the affixing, application or installment of any material which: (A) Has a visible light transmittance of less than thirty-five percent (35%); or (B) ... reduces the visible light transmittance in the windshield below seventy percent (70%)." Statute expressly authorizes "police officer of this state to detain a motor vehicle being operated on the public roads, streets or highways of this state when such officer has a reasonable belief that the motor vehicle is in violation of subdivision (a)(1), for the purpose of conducting a field comparison test." During his testimony, Franks expressed familiarity with tint requirements in state and explained basis upon which he formed his opinion that defendant's tinted windows were "too dark." While he had observed vehicle for two or three seconds as defendant drove by at approximately 45 mph, Franks was able to confirm his belief during two or three minutes that elapsed before he activated his blue lights. Franks had more than corroborated his initial "fleeting glance" of tint and was able to base investigatory stop upon articulable and reasonable suspicion. (***State v. Edwards,*** 29 TAM 1-33, 11/24/03, Jackson, Wade, 4 pages.)

CRIMINAL SENTENCING: Consecutive Sentencing. Defendant pled guilty to aggravated robbery and felony evading arrest and was sentenced to 12 years and 3 years, respectively. Trial judge ordered that sentences be served consecutively to previously-imposed Knox County sentence. Trial judge properly

imposed consecutive sentences. Fact that defendant was on probation for prior robbery offense at time he committed present offenses justified imposition of consecutive sentencing. (***State v. Sons,*** 29 TAM 1-34, 11/21/03, Knoxville, Williams, 3 pages.)

CRIMINAL SENTENCING: Sentence Credit. Defendant pled guilty to fourth offense DUI and was sentenced to two years, with sentence suspended after service of 150 days. Defendant was placed on community corrections in 8/01. Petition to revoke his community corrections status was filed in 11/01. Defendant admitted that last time he reported to his probation officer was in 8/01. Trial judge granted defendant "street credit" for period from 8/2/01 to 8/21/01. Trial judge erred in not allowing defendant full credit for time that defendant had served in community corrections program — 8/2/01 through 11/7/01, when petition to revoke his community corrections sentence was filed. Trial judge refused to grant defendant full amount of time served in community corrections on basis that defendant had "absconded" from serving his sentence as of 8/21/01, last day on which defendant reported to his probation officer. There was no proof in record that defendant was in absconded status from 8/21/01 to 11/7/01. Accordingly, defendant is entitled to credit for time served in community corrections commencing 8/2/01 and ending 11/7/01. Case is remanded to trial court solely for purpose of entry of order granting defendant credit for 98 days served in community corrections program. (***State v. Wakefield,*** 29 TAM 1-35, 11/25/03, Jackson, Welles, 3 pages.)

CRIMINAL PROCEDURE: Effective Counsel. On 4/4/97, petitioner was convicted of four counts of aggravated rape, one count of attempted aggravated rape, three counts of rape, one count of aggravated robbery, two counts of robbery, and three counts of aggravated burglary. Trial court imposed effective sentence of 99 years. This court affirmed, and Tennessee Supreme Court denied permission to appeal. Evidence did not preponderate against post-conviction judge's finding that petitioner received effective counsel. Petitioner contended that counsel was ineffective in failing to procure expert to refute state's expert on DNA evidence. Dobson and Heinsman represented petitioner at trial. Dobson filed motion requesting DNA expert for petitioner and obtained services of Dr. Shields. Heinsman testified that Shields reviewed state's DNA analysis and concluded that analysis contained no errors or irregularities. Heinsman stated that because Shields found no errors in state's DNA analysis, he and Dobson did not file motion with trial court to have samples retested in another lab. Heinsman explained that he and Dobson decided that they would not call Shields to testify because he would not help petitioner's case. Heinsman met with Shields day before petitioner's trial in order to decide whether expert would testify and to prepare to cross-examine state's DNA expert. Heinsman studied two DNA treatises to prepare to cross-examine state's DNA expert. Moreover, Heinsman stated that he vigorously cross-examined state's DNA expert regarding his qualifications and his analysis of petitioner's DNA and samples obtained from victims. Counsel's performance fell within wide range of reasonable professional assistance, and petitioner failed to prove that either attorney's performance prejudiced his defense. (***Peek v. State,*** 29 TAM 1-36, 11/20/03, Knoxville, Wedemeyer, 14 pages.)

CRIMINAL PROCEDURE: Effective Counsel. Petitioner pled guilty to eight counts of aggravated rape. Following sentencing hearing, petitioner received effective sentence of 100 years. Evidence did not preponderate against post-conviction judge's finding that petitioner received effective counsel. (1) Petitioner contended that trial counsel "failed to explore the effects to judgment of two (2) incidents of trauma suffered by [petitioner] when [he] was young." Petitioner submitted that "the effect of these two (2) traumatic childhood accidents caused [him] to be discharged from the military for mental instabilities." Prior to guilty plea hearing, counsel filed motion for competency evaluation, which was granted. After completion of evaluation, it was determined that petitioner was competent to stand trial, could defend himself in court, understood legal process, understood charges pending and consequences that could follow, and could advise counsel and participate in defense. Counsel introduced petitioner's military records at sentencing hearing and argued that court should mitigate petitioner's sentence based upon information in records. Petitioner did not prove that counsel's performance was deficient in this regard. (2) Petitioner asserted that counsel "inaccurately advised [him] that [he] was facing ten (10) life sentences as potential punishment in this case." Petitioner signed document, which stated that he refused state's offer of 100 years in exchange for his guilty pleas. Document stated, "The 36 indictments against me carry at least 10 life sentences and a total of around 300 years for the other charges." At post-conviction hearing, counsel explained, "Basically, I guess, the — the range that would be available to the Judge when he sentenced [petitioner] was the equivalent of the rest of his life." Even assuming *arguendo* that counsel was deficient by inserting this language, this court fails to see how, but for this failure alone, petitioner would not have pled guilty and insisted on trial. (***Crittenden v. State,*** 29 TAM 1-37, 11/20/03, Nashville, Hayes, 9 pages.)

CRIMINAL PROCEDURE: Effective Counsel — Post-Conviction Relief. CRIMINAL LAW: Murder I — Premeditation — Lesser Included Offenses. On 2/3/88, petitioner was convicted of first degree murder and sentenced to life imprisonment. This court affirmed on appeal, and Tennessee Supreme Court denied permission to appeal. (1) Evidence did not preponderate against post-conviction judge's finding that petitioner received effective counsel. (a) Petitioner contended that counsel was ineffective in failing to fully develop diminished capacity issue. Petitioner claimed that it was not enough for counsel merely to establish her borderline intelligence, dependent personality, and lack of criminal intent through Dr. Daniel, psychologist. Daniel testified that because petitioner depended upon her boyfriend completely, she felt like "her whole world" was disintegrating or failing apart in front of her. Because Daniel was not called as witness at post-conviction hearing, this court is left to speculate on how counsel might have more effectively questioned Daniel. (b) Petitioner contended that counsel was ineffective in failing to fully prepare for trial. Mere allegation that counsel had practiced law for only four years at time of trial and had not previously represented defendant in trial of first degree murder case is not enough to show insufficient preparation. Burden is on petitioner to show how further preparation might have produced different result or how lack of prior experience hampered defense. No new witnesses were presented at post-conviction hearing, and nothing in record suggests that counsel failed to invest adequate amount of time in his preparations or otherwise failed in his responsibilities as advocate during trial. (c) Petitioner contended that counsel was ineffective in failing to move for mistrial. Counsel testified that he observed jurors' reaction to outburst of victim's brother during final argument. It was counsel's assessment that jurors had collectively disapproved of comments made in courtroom which, in counsel's opinion, was basis of hope for leniency in verdict. Counsel presented mistrial issue on direct appeal. Although failure of counsel to request mistrial at time of outburst resulted in procedural waiver of issue

as potential ground for relief, this court, on direct appeal, ruled on merits of issue and found that spectator's acts, more probably than not, did not affect verdict of jury. (d) Petitioner contended that counsel was ineffective in failing on direct appeal to allege as ground for relief denial of motion to suppress. At suppression hearing, trial court accredited testimony of officer who took petitioner's statement that he had advised petitioner of her constitutional rights and believed that she had fully comprehended content of waiver form before signing it. While petitioner claimed to have been coerced into providing statement based upon promises of help, she was not able to produce any proof at post-conviction hearing which corroborated that claim. It is unlikely that appeal of denial of motion to suppress would have been successful. (2) Petitioner contended that evidence of premeditation and deliberation was insufficient to support verdict. (a) This claim was raised and rejected on direct appeal. Claim which has been previously determined cannot be basis for post-conviction relief. (b) Even if *State v. Brown*, 836 SW2d 530 (Tenn. 1992), were applied retroactively, elements of deliberation and premeditation were adequately established by significant period of time that elapsed between discovery of victim at residence and fatal shots. Although petitioner clearly reacted to circumstances in emotional way, she afterwards had sexual relations with her boyfriend, slept, drove to market, took possession of weapon, and stated intention to shoot victim well before commission of act. Under these circumstances, evidence was sufficient to support finding that petitioner had opportunity to consider her alternatives before committing crimes. (3) Petitioner contended that instructions to jury precluded consideration of lesser included offense until jury had acquitted petitioner on greater offenses. Petitioner conceded that trial court provided charge in compliance with Tennessee Pattern Jury Instructions. But she argued that jury should have been instructed that if it could not agree on applicability of greater offense, it could have also considered second degree murder or voluntary manslaughter or any other lesser crime. (a) Issue was waived when petitioner failed to raise it on direct appeal. (b) In *State v. Rutherford*, 876 SW2d 118 (Tenn.Cr.App. 1993), trial court instructed jury that it could only consider lesser included offenses after finding that defendant is not guilty of greater offense, and this court found no error in instructions. (***Brown v. State,*** 29 TAM 1-38, 11/24/03, Knoxville, Wade, Tipton not participating, 8 pages.)

Sixth Circuit Court of Appeals

▼ **In class action suit filed against State of Tennessee on behalf of children in custody of Tennessee Department of Children's Services in which settlement agreement provided that plaintiffs were prevailing parties and entitled to attorney fees pursuant to 42 USC 1988, and in which plaintiffs were awarded $1,524,358 in fees and expenses, district court did not abuse discretion in finding that plaintiffs' decision to hire out-of-town attorneys — Children's Rights Inc. law firm located in New York — was reasonable**

CONSTITUTIONAL LAW: Civil Rights. In class action suit against State of Tennessee on behalf of children in custody of Tennessee Department of Children's Services, plaintiffs alleged that Tennessee's foster care system violated constitutional and statutory rights of children in its care. Case was settled, and settlement agreement provided that plaintiffs were prevailing parties and, hence, entitled to recover attorney fees pursuant to 42 USC 1988. Plaintiffs initially requested $1,629,328 in fees and expenses for work of two law firms — Children's Rights Inc. (CRI), located in New York City, and Hollins, Wagster and Yarbrough, firm located in Nashville. Fee request was based on hourly rates ranging from $175 per hour to $375 per hour for more than 6,900 hours billed. Defendants objected to sum requested. While district court approved hourly rates sought by plaintiffs, district court denied plaintiffs' request for compensation for certain categories of work and expenses. District court directed plaintiffs to file amended motion for fees and expenses. Defendants again objected. District court disallowed certain items and directed plaintiffs to file second amended request for fees and expenses. District court awarded plaintiffs $1,524,358 in fees and expenses. (1) District court did not abuse discretion in awarding hourly rates sought by plaintiffs. In determining reasonable hourly rate, courts typically look to "prevailing market rate in the relevant community." This circuit has found that "prevailing market rate" is that rate which lawyers of comparable skill and experience can reasonably expect to command within venue of court of record, rather than foreign counsel's typical charge for work performed within geographical area wherein he or she maintains his or her office and/or normally practices. But court may award higher hourly rate for out-of-town specialist if (a) hiring out-of-town specialist was reasonable in first instance, and (b) if rates sought by out-of-town specialist are reasonable for attorney of his or her degree of skill, experience, and reputation. Defendants do not contend that rates sought by CRI attorneys are unreasonable for attorneys of their degree of skill, experience, or reputation. Rather, defendants argue that it was unreasonable to hire out-of-town specialists. District court noted that it had reviewed both parties' submissions and concluded, "With regard to the use of New York billing rates for out-of-town counsel, the Court finds that the use of an 'out-of-town specialist' was reasonable in the first instance and that the rates sought by out-of-town specialists are reasonable for an attorney of like degree and skill, experience and reputation." Record included declarations by prior Tennessee attorneys general, submitted by defendants, referring to four complex civil rights class actions brought by Tennessee attorneys. Plaintiffs submitted affidavits from Tennessee experts in child and family law, who were familiar with issues involved in case and opined that there was no local attorney or coalition of local attorneys who had resources, expertise, or willingness to bring the instance suit. While independent review of record would lead to some disagreement among members of this panel as to whether it was reasonable to hire out-of-state lawyers at more than double local rate, we agree that under deferential standard this court is required to apply, district court did not abuse discretion in finding that plaintiffs' decision to hire out-of-town specialists was reasonable. (2) District court did not abuse discretion in determining number of compensable hours. Defendants contend that counsel for plaintiffs exercised poor billing judgment because case was allegedly overstaffed, resulting in inefficiencies and unnecessary duplication. Defendants did not object to particular time entries. Rather, defendants argued that overall time expended by plaintiffs' counsel on various activities was excessive. When faced with specific objections, district court reviewed plaintiffs' fee petition and twice required plaintiffs to eliminate excessive hours. While eliminated hours constituted only small percentage of total hours claimed, absent more specific objections, district court did not abuse discretion in refusing to reduce further billable hours. (***Brian A. v. Hattaway,*** 29 TAM 1-39, 11/21/03, Rogers, 7 pages, N/Pub.)

▼ **When inmate (Bowman) died while incarcerated at South Central Correctional Center (SCCC), and Bowman's mother (plaintiff) subsequently filed civil rights suit alleging that defendants — Corrections Corporation of America (CCA), warden of SCCC, and physician (Coble) with whom CCA contracted for medical services for inmates housed at SCCC — had violated Bowman's right to adequate medical care while incarcerated, district court's holding that CCA's medical policy, as reflected in its agreement with Coble, was unconstitutional and its subsequent granting of injunctive relief enjoining CCA from enforcing its contract with Coble is reversed; district court did not have jurisdiction to issue injunctive relief since it confronted no live "case or controversy"; although plaintiff's case could conceivably lend itself to pleading as class action, this court cannot change posture of case on appeal, and given fact that Bowman is dead, any claim for injunctive relief is moot**

CONSTITUTIONAL LAW: Civil Rights — Cruel & Unusual Punishment. EVIDENCE: Expert Testimony — Relevancy — Habit. APPEAL & ERROR: Mootness. Bowman was inmate at South Central Correctional Center (SCCC) who had long history of medical problems associated with sickle cell anemia. Over course of his incarceration at SCCC, Bowman experienced numerous infections and was hospitalized repeatedly. During one such episode, on 1/3/96, Dr. Coble, medical director at SCCC, admitted Bowman to SCCC infirmary, having diagnosed him with "early pneumonia," and on 1/4/96, Bowman was transferred to hospital, where he died one day later. Plaintiff, Bowman's mother, filed civil rights suit alleging that defendants — Corrections Corporation of America (CCA), warden of SCCC (Myers), and Coble, physician with whom CCA contracted for medical services for inmates housed at SCCC — had violated Bowman's right to adequate medical care while incarcerated. Jury found that defendants had not acted with deliberate indifference toward Bowman's serious medical condition. District court entered judgment in accordance with jury verdict, but granted plaintiff's motion for judgment as matter of law in part, holding that CCA's medical policy, as reflected in its agreement with Coble, was unconstitutional. District court enjoined CCA and all parties acting in concert with it from enforcing its contract with Coble and additionally granted plaintiff's motion for sanctions, but only to extent of awarding attorney fees in relation to particular evidentiary dispute in which CCA failed to supplement properly its discovery responses as to number of referrals it had made to medical specialists on behalf of inmates. (1) District court properly denied plaintiff's motion for judgment as matter of law, or in alternative, motion for new trial. Defendant's proof included testimony of two physicians who were familiar with treatment of sickle cell anemia. Both of these physicians testified that Coble's treatment of Bowman was appropriate. Based on this testimony, jury could have reasonably concluded that Coble was not deliberately indifferent. Plaintiff argued that Myers was liable because he failed to investigate medical care Bowman was receiving after he received telephone call from Department of Correction commissioner on 1/2/96, which put him on notice about concerns regarding Bowman's medical care. Coble's medical decisions were not reviewable by Myers. Moreover, Myers testified that he relied on Coble to provide Bowman with appropriate medical care. Jury could have reasonably concluded that even after having received concerned phone call, Myers' reliance on Coble did not rise to level of deliberate indifference. Although there was evidence to contradict conclusion reached by jury, there was nevertheless sufficient evidence to support jury's findings. Plaintiff argued that even if Coble and Myers did not act with deliberate indifference, CCA's policy, as embodied in its contract with Coble, and its subsequent lack of investigation as costs for medical care for inmates at SCCC plummeted, was nevertheless unconstitutional. But without constitutional violation of Bowman's Eighth Amendment right by Coble or Myers, CCA cannot be held liable for its policy, even if it were to encourage deliberate indifference. (2) Plaintiff argued that she is entitled to new trial because district court improperly admitted testimony of four medical expert witnesses for defense, erred in excluding testimony of medical ethicist (Paris), and improperly allowed Myers to testify in contradiction to admission he made during pretrial interrogatory and allowed him to testify as to his "habit" without having raised issue prior to trial. (a) District court did not abuse discretion in allowing defendants to call four medical experts in present case, all of whom testified as to different aspects of Bowman's care and medical condition. Experts were used to rebut testimony of plaintiff's experts that Bowman could have died from various causes, including sickle cell anemia, bacterial infection, or pulmonary infection. (b) District court did not abuse discretion in refusing to allow Paris to testify. After hearing testimony by plaintiff's expert, licensed physician, regarding ethical impropriety of contract between CCA and Coble, district court determined that Paris' testimony on this issue would be cumulative. In light of fact that Paris was not physician, and his expert report "read like a lawyer's brief," district court concluded that it was not appropriate for him to testify. Plaintiff has not demonstrated how exclusion of Paris' testimony resulted in substantial injustice to plaintiff. (c) District court did not abuse discretion in allowing Myers to testify that he did not "specifically recall" receiving commissioner's telephone call, in spite of Myers' response to request for admission by plaintiff, in which Myers had stated that "to the best of [his] memory and recollection" he had received such call. On cross-examination, plaintiff's lawyer led Myers through his pretrial admissions. Moreover, district court's corrective action — district court ruled that Myers was bound by his response to specific request for admission and so instructed jury — rendered any error harmless. (d) District court did not abuse discretion in allowing testimony regarding Myers' habits. Myers testified that there was "informal procedure" for dealing with phone calls received from "outside sources" such as commissioner. Plaintiff did not object to admission of what she describes as "habit" testimony by Myers. As such, any objection to such testimony is waived. Nevertheless, testimony was properly admitted. Habit evidence is entirely admissible under FRE 406. Moreover, testimony offered by Myers did not conflict with FRE 404, which expressly prohibits admission of prior bad acts used to establish party's propensity to act in conformity therewith, except under narrowly prescribed circumstances. (3) District court's holding that CCA's medical policy, as reflected in its agreement with Coble, was unconstitutional and its subsequent granting of injunctive relief enjoining CCA from enforcing its contract with Coble is reversed. District court did not have jurisdiction to issue injunctive relief since it confronted no live "case or controversy." Although plaintiff's case could conceivably lend itself to pleading as class action, this court cannot change posture of case on appeal, and given fact that Bowman is dead, any claim for injunctive relief is moot. Plaintiff has no standing to request injunction because requested relief would not redress injury suffered. Enjoining Coble's contract with CCA will not affect plaintiff in any way and will not redress her alleged injury. Case would have been relevant only if Bowman were still alive or if there had been other prisoners who were parties and would still have been subject to medical policy at issue. (4) Because this court has reversed sole ground on which plaintiff

succeeded, plaintiff is no longer entitled to award of attorney fees or costs, as she is no longer "prevailing party" for purposes of statute. As such, district court's award of attorney fees and costs is reversed. (***Bowman v. Corrections Corporation of America,*** 29 TAM 1-40, 11/21/03, Boggs, 41 pages, Pub.)

▼ **District court properly determined that defendant, Tennessee Highway Patrol Officer, was entitled to qualified immunity in case in which plaintiff claimed defendant used excessive force against him during tax protest at state capitol in 7/01; when plaintiff — who had been led away from restricted area in capitol by defendant and told not to return for hour and half, returned 10 minutes later and placed himself in area where defendant could not miss his presence and subsequently refused defendant's order to leave — defied defendant's authority, reasonable officer in defendant's position could have believed that pushing plaintiff out of hallway was necessary to protect legislators; district court properly applied qualified immunity defense to plaintiff's assault and battery claim**

CONSTITUTIONAL LAW: Civil Rights. TORTS: Assault & Battery — Government Immunity. On 7/12/01, Tennessee House of Representatives and Senate were scheduled to vote on proposed income tax. Public, including plaintiff, turned out in large numbers to protest possible passage of income tax. Defendant, Tennessee Highway Patrol officer, was posted at House of Representatives to protect legislators. Plaintiff attempted to gain access to Senate chambers but was told by sergeant-at-arms that he would have to watch debate from balcony. Plaintiff then made his way to House chambers, where he was told by defendant that he would have to come back approximately hour and half later. Ten minutes later, plaintiff returned to stairwell where defendant was positioned. Plaintiff situated himself four feet away from defendant. At this point, defendant leaned around and said, "get out of my face." Plaintiff responded, "I'm not in your face." Defendant then said, "I told you to get out of here," and plaintiff stated, "I'm going to wait right here until 7:30, so I can go up those stairs like you told me I could, like everybody has told me I could." At that point, defendant struck plaintiff in neck. Plaintiff turned around, saw television camera, and lifted his arms as if to say that he was doing nothing wrong. Defendant then began to lead plaintiff out of area. Defendant then grabbed plaintiff around arms and began pushing him. Defendant then spun plaintiff around and pushed plaintiff down to floor. After plaintiff was down, defendant grabbed his legs and began dragging him across floor. Plaintiff filed 42 USC 1983 suit against defendant alleging excessive force. (1) District court properly determined that defendant was entitled to qualified immunity. Plaintiff had gone into restricted area and was actively led away from area at 6 p.m. by defendant, who told plaintiff that doors would not be open until 7:30 p.m. Plaintiff then returned to area 10 minutes later. Upon his return, plaintiff placed himself in area where defendant could not miss his presence, thereby implicitly defying defendant's authority. When defendant told plaintiff to clear himself from area, plaintiff openly defied him. Based on totality of circumstances, reasonable officer in defendant's position could have believed that pushing plaintiff out of hallway was necessary to protect legislators. (2) District court properly applied qualified immunity defense to plaintiff's assault and battery claim. Qualified immunity applies to state law claims against state officer. (***Rogers v. Gooding,*** 29 TAM 1-41, 11/24/03, Keith, 8 pages, N/Pub.)

▼ **Department of Correction's (DOC's) policy of withholding from inmates mail that "in the opinion of the warden," advocates "anarchy" or contains "obscenity" does not violate First Amendment; because plaintiff, inmate at Northwest Correctional Complex, has not established property or liberty interest in receiving non-subscription, standard-rate mail — DOC's policy does not affect subscription, standard rate mail — his due process rights have not been violated**

GOVERNMENT: Prisons. CONSTITUTIONAL LAW: Civil Rights — First Amendment — Due Process. Plaintiff, inmate at Northwest Correctional Complex who is serving life sentence, filed suit against several Tennessee prison officials under 42 USC 1983 challenging validity of several prisoner-mail policies adopted by State of Tennessee, including most notably state's policy of withholding incoming mail from "anarchist" organizations. Department of Correction (DOC) has adopted policy of withholding mail that may pose threat to institutional security, including mail that, "in the opinion of the warden," could "reasonably be considered" to "[a]dvocate, facilitate, or otherwise present a risk of lawlessness, anarchy, or rebellion against government authority." Policy also covered mail that could "reasonably be considered" to "[c]ontain obscene photographs, pictures, or drawings" or "materials specifically found to be detrimental to prisoners' rehabilitation because [they] could encourage deviate criminal sexual behaviors." DOC has two other policies at issue. One prohibits prisoners from receiving books, magazines, and newspapers unless their publisher or recognized distributor sends them directly to inmate. Other policy prohibits prisoners from receiving "standard rate mail," also known as "bulk rate mail." Under this policy, prison mail room will return such items when sender guarantees return postage, but otherwise destroys them. Prisoners who want to receive other items that are normally sent bulk rate mail must make arrangements to prepay first-class or second-class postage. (1) DOC's policy of withholding mail advocating "anarchy" or containing "obscenity" is, on its face, constitutional. Prison officials have articulated rational connection between policy and legitimate and neutral penological interests. Maintaining security constitutes legitimate penological interest. As for "rational connection" between policy and these interests, issue is not whether prohibited materials have in fact caused problems or are even "likely" to cause problems, but whether reasonable official might think that policy advances these interests. Because anarchy and obscenity are incompatible with security, order, and rehabilitation, DOC's policy falls well within realm of reasonable. Moreover, alternative means of exercising First Amendment rights remain open under policy. Policy permitting prisoners to receive materials that advocate anarchy or contain obscenity would have significant impact on prison guards, other inmates, and allocation of prison resources. Although there is no reason to believe that plaintiff will rise up against his jailers or engage in deviant sexual conduct should he possess such materials, possibility cannot be discounted that other more volatile prisoners will. Regulation in question does not represent "exaggerated response to the problem at hand." Plaintiff has not met his burden of pointing to alternative that fully accommodates his rights at *de minimis* cost to valid penological interests. Only alternative proposed by plaintiff — allowing him to receive these materials upon his promise not to disseminate them — would require prison officials to take him at his word or would require prison officials to devote considerable resources to verifying that he is keeping his word. Likewise, it makes no difference that policy grants prison officials broad discretion and that prison officials exercise this discretion differently in different Tennessee prisons. (2) Plaintiff

argued that DOC policy violates First Amendment "as applied" to specific mail sent to him advocating "anarchism." Plaintiff has not shown either that he requested challenged publications in discovery or that state improperly denied him access to publications through discovery. In addition, plaintiff has not shown that district court improperly refused to order state to produce publications. To extent plaintiff wished to preserve meaningful "as applied" challenge in present case, it was his duty to seek these publications in discovery, and it was his duty, to extent discovery access to publications improperly was denied, to ask district court to order production of documents. Plaintiff has not shown that he did any of these things. As such, his "as applied" challenge is rejected. (3) Plaintiff contended that district court erred in rejecting his First Amendment challenges to DOC's "publishers only" policy and DOC's "standard rate mail" policy. "Publishers only" policy prohibits inmates from receiving books, magazines, and newspapers from sources other than their publisher. *Bell v. Wolfish,* 441 US 520 (1979), held that "publishers only" rule for receiving hard cover books did not violate First Amendment. This court extended that rule to soft cover materials in *Ward v. Washtenaw County Sheriff's Department,* 881 F2d 325 (6th Cir. 1989). Precedent also defeats plaintiff's First Amendment challenge to "standard rate mail" policy. In *Sheets v. Moore,* 97 F3d 164 (6th Cir. 1996), this court upheld constitutionality of similar Michigan prohibition against what was then known as "bulk rate mail." In addition, this court upheld constitutionality of very same Tennessee policy at issue in present case in unpublished opinion, *Jones v. Campbell,* 23 Fed. Appx. 458 (6th Cir. 2001). (4) Although district court did not address issue, plaintiff's complaint also appears to raise due process challenge to standard-rate mail policy. Plaintiff takes issue with lack of notice to inmate that occurs under policy when standard-rate mail is received by prison and either returned to sender or destroyed. Plaintiff argued that in absence of notice that standard-rate mail was rejected or destroyed, prisoner cannot arrange to have first-class or second-class postage paid. Plaintiff has not established property or liberty interest in receiving non-subscription, standard-rate mail, and policy does not affect subscription, standard-rate mail. Without deprivation of protected interest, plaintiff has no due process claim separate from First Amendment claim. (***Thompson v. Campbell,*** 29 TAM 1-42, 11/20/03, Sutton, 15 pages, N/Pub.)

▼ **Officers, who were executing search warrant at defendant's residence, did not violate "knock and announce rule" when they knocked repeatedly and announced "Police. Search Warrant," and after receiving no answer, broke open door after waiting at least 15 seconds; in light of fact that, at time of entry, officers knew that defendant may have possessed AK-47, that defendant had been convicted of violent felony, and that he was suspected gang member, officers' 15-second wait before forcing open door was reasonable; officers' use of "flash-bang" device — diversionary device which emits loud bang and bright flash of light — was reasonable when officers knew both that defendant possessed assault rifle and that he had previously been convicted of violent crime; although defendant suffered some property damage from use of "flash-bang" device — shattered penny jar, dented file cabinet, and burn marks on floor — this damage did not create Fourth Amendment violation, as appropriate remedy, if any, for this damage lies in tort**

CRIMINAL PROCEDURE: Search Warrant. Following search of defendant's apartment on 7/12/00, defendant was indicted for possession of firearm by convicted felon. Defendant filed motion to suppress rifle and ammunition discovered as result of search. District court granted in part and denied in part motion to suppress, and defendant pled guilty to charge on 1/9/01. (1) Officers, who were executing search warrant at defendant's residence, complied with "knock and announce rule." Officers knocked repeatedly and announced "Police. Search Warrant." After receiving no answer, officers broke open door after waiting at least 15 seconds. At time of entry, officers knew that defendant may have possessed AK-47 weapon, weapon capable of firing rounds that could penetrate bullet-proof vests, that defendant had previously been convicted of violent felony, and that he was suspected gang member. Armed with this information, officers' 15-second wait before forcing open door was reasonable. (2) Officers' use of "flash-bang" device — diversionary device which emits loud bang and bright flash of light — was reasonable. Officers knew both that defendant possessed assault rifle and that he had previously been convicted of violent crime. Although defendant suffered some property damage from use of "flash-bang" device — shattered penny jar, dented file cabinet, and burn marks on floor — this damage did not create Fourth Amendment violation, as appropriate remedy, if any, for this damage lies in tort. (3) Defendant contended that officers conducted impermissible general search. Defendant argued that warrant granted officers permission to search only for firearms and ammunition but officers were actually searching for drugs. Areas searched could very well have contained small arms or ammunition, making officers' broad search permissible under terms of warrant. Although officers seized items, including scales, beepers, and documents that were beyond scope of warrant — and were excluded by court below — search was not so broad as to be in flagrant disregard to limitations of warrant. (***United States v. Dawkins,*** 29 TAM 1-43, 11/24/03, Russell, 7 pages, N/Pub.)

▼ **When officers obtained, from judicial commissioner (Meeks), search warrant to search defendant's motel room, Meeks was authorized to issue search warrants, and police officers properly obtained search warrant because, premised upon their objective good faith, they had no reason to question whether Meeks possessed authority to issue warrant**

CRIMINAL PROCEDURE: Search Warrant. Between 1/01 and 3/01, confidential informant made five cocaine purchases from defendant. These "controlled buys" were monitored by police. On 4/30/01, confidential informant notified detective that, within previous 72 hours, informant had been in defendant's hotel room and that defendant possessed four ounces of crack, pistol, and large amount of cash. Detective knew informant, whom he had known for approximately one year, to be reliable. In addition, detective had received information from another narcotics detective that defendant had recently been involved in "heavy" drug trafficking. Detective took this information to judicial commissioner (Meeks) in order to obtain search warrant. Hamilton County judicial commissioners are on duty during evening hours when state judges are usually unavailable, and as common practice, Chattanooga law enforcement officers normally obtain warrants from judicial commissioners rather than awaking state judges during late hours. Meeks issued search warrant for defendant's hotel room, and upon execution of warrant, officers discovered approximately two ounces of crack cocaine, loaded handgun, and large amount of cash. District court properly denied defendant's motion to suppress evidence obtained as result of search of his motel room. Defendant argued that Meeks was not authorized to issue search warrant. Meeks was authorized to issue search warrants under Tennessee law, and police

officers properly obtained search warrant. Because Meeks was legally appointed under Tennessee law, he had apparent authority to issue warrant to search defendant's hotel room, and premised upon officers' objective good faith, officers had no reason to question whether Meeks possessed authority to issue warrant. Hence, police officers, acting in good faith, relied upon Meeks' apparent authority to issue search warrant. (***United States v. Malveaux,*** 29 TAM 1-44, 11/21/03, Siler, 8 pages, Pub.)

U.S. District Courts

▼ **Plaintiff's claims against his employer, Southwest Tennessee Community College, under both Tennessee Human Rights Act (THRA) and 42 USC 1981, are barred by Eleventh Amendment; Congress has not abrogated immunity of State of Tennessee, and state has not waived its Eleventh Amendment immunity, so as to allow 42 USC 1981 suit against state; State of Tennessee has not waived its immunity to suits in federal court for violation of THRA**

EMPLOYMENT: Discrimination. GOVERNMENT: Government Immunity. CONSTITUTIONAL LAW: Civil Rights — Eleventh Amendment. Defendant Southwest Tennessee Community College (STCC) is post-secondary educational institution that was formed by merger of State Technical Institute of Memphis (State Tech) and Shelby State Community College on 7/1/00. Plaintiff, African-American male, began his employment with defendant in 10/91 as Case Manager in State Tech's Development Center, Office of Job Training. On 7/1/93, plaintiff was promoted to position of Executive Assistant to President of State Tech, and he received salary adjustment with promotion. Plaintiff continued in this job position until 6/15/01 at which time he was appointed to position of Temporary Interim Director at DACUM/WorkKeys. On 7/1/02, plaintiff's title was changed to Director of DACUM/WorkKeys, and his salary was reduced by 10%. After receiving right to sue notice from EEOC, plaintiff filed suit alleging race discrimination and retaliation under Title VII, Tennessee Human Rights Act (THRA), and 42 USC 1981. Plaintiff's 42 USC 1981 and THRA claims are dismissed. (1) Plaintiff's 42 USC 1981 claim is barred by Eleventh Amendment. Eleventh Amendment of U.S. Constitution bars suits by private individuals against non-contesting states in federal court unless Congress has validly abrogated state's immunity, or state has waived its immunity. Eleventh Amendment applies to both state itself and state agencies. Defendant is agency of State of Tennessee. Although no decisions have explicitly addressed Eleventh Amendment status of STCC in particular, it being relatively recent state creation, *Dotson v. State Technical Institute of Memphis*, 1997 WL 777949 (6th Cir. 1997), held State Tech, STCC's predecessor institution, to be state agency for Eleventh Amendment purposes. Moreover, several decisions have held other members of Tennessee's university system to be "arms" or "alter-egos" of State of Tennessee and, hence, entitled to state's Eleventh Amendment immunity. It follows that plaintiff's 42 USC 1981 claim is barred unless Congress has validly abrogated state's immunity, or state has waived its immunity. Congress did not validly abrogate states' immunity when it enacted 42 USC 1981. For Congress to abrogate immunity, statute at issue must be enacted under Section 5 of Fourteenth Amendment, and there must be present in statute explicit congressional intent to include states as defendants. Sixth Circuit, as well as several other circuit courts, have held such intent to be lacking in 42 USC 1981. State of Tennessee did not waive its Eleventh Amendment immunity to suits under 42 USC 1981. No Tennessee statute waives state immunity for suits under 42 USC 1981. To contrary, state specifically reserves its sovereign immunity with regard to most claims against University of Tennessee. (2) Plaintiff's THRA claim is barred by sovereign immunity. Eleventh Amendment provides jurisdictional bar to suits by private individuals of non-consenting states in federal court on state law claims, as well as on federal law claims. Federal court supplemental jurisdiction over state law claims does not override Eleventh Amendment. Unless State of Tennessee has waived its immunity to suits in federal court for violations of THRA, this claim is barred as well. Although Tennessee legislature has waived state's immunity for THRA suits in state courts, its has not done so for suits in federal courts. (***Henderson v. Southwest Tennessee Community College,*** 29 TAM 1-45, 9/16/03, W.D.Tenn., Donald, 6 pages.)

▼ **Magistrate's award of sanctions against defendants was contrary to law when defendants did not flaunt court discovery order or fail to disclose information in violation of FRCP 37, procedures necessary to issue FRCP 11 sanctions were not followed, and procedures for 28 USC 1927 sanctions were not followed**

CIVIL PROCEDURE: Motion to Strike — Sanctions. Plaintiff based their claims against Equity Title Company of Memphis and Steven Winkel (defendants) on alleged predatory lending practices in connection with sale of residences to plaintiffs. On 3/28/03, magistrate judge issued order requiring defendants to disclose portion of their closing files. Defendants subsequently filed motion for reconsideration of magistrate's order, amended motion for protective order, and motion for limitation of discovery. Plaintiffs responded with memorandum in opposition to defendants' motions and motion to strike and for sanctions. Defendants thereafter filed their own motion to strike and for sanctions. On 5/23/03, magistrate judge denied defendants' motions for protective order and for limitation of discovery, granted plaintiffs' motion to strike and to issue sanctions, and denied defendants' motion to strike and to issue sanctions. Defendants filed motion for reconsideration of magistrate judge's 5/23/03 order. (1) Defendants contended that their amended motion for protective order and motion for limitation of discovery were not frivolous and should not have been stricken. Defendants' motion for limitation of discovery, motion to strike, and "amended" motion for protective order are merely repetitions of previous motions, which have already been denied. Hence, motions are frivolous. Magistrate judge's order denying defendants' motions was not clearly erroneous or contrary to law. (2) Defendants contended that sanctions were inappropriate because magistrate judge did not have legal authority nor follow proper procedures for issuing sanctions. When issuing sanctions, magistrate judge pointed to repetition and impropriety of defendants' motions. There are variety of legal foundations allowing courts to issue sanctions. FRCP 37 provides for sanctions when party has failed to disclose necessary information in discovery or has failed to comply with discovery order. FRCP 11 affords district court discretion to award sanctions when party submits to court pleadings, motions, or papers that are presented for improper purpose, are not warranted by existing law or non-frivolous extension of law, or if allegations and factual contentions do not have evidentiary support. Attorney may also be liable for excessive costs for multiplying litigation "unreasonably and vexatiously." Sanctions under 28 USC 1927 are warranted when attorney has engaged in some sort of conduct that, from objective standpoint, falls short

of obligations owed by member of bar to court and which, as result, causes additional expense to opposing party. Finally, court may rely on its inherit authority to issue sanctions when there has been showing of bad faith conduct. Defendants did not flaunt court discovery order or fail to disclose information in violation of FRCP 37. Procedures necessary to issue FRCP 11 sanctions were not followed. Procedures for 28 USC 1927 sanctions were not followed. Magistrate judge's award of sanctions was contrary to law, and hence, magistrate judge's order allowing plaintiffs' motion for sanctions is reversed. (***Tyson v. Equity Title & Escrow Co. of Memphis LLC,*** 29 TAM 1-46, 9/25/03, W.D.Tenn., Donald, 6 pages.)

▼ **In case in which defendant was charged with bank robbery, defendant's motion to suppress his pretrial lineup identification is denied when, in light of fact that at time of physical lineup, although defendant had been arrested, no formal adversarial proceedings had been initiated against him, his Sixth Amendment right to counsel had not yet attached; use of physical lineup to confirm photographic identification of defendant made by bank teller was not unduly suggestive**

CRIMINAL PROCEDURE: Lineup — Right to Counsel — Photographic Array — Identification. Defendant was charged with three counts of bank robbery and three counts of carrying firearm in connection with crime of violence. Defendant filed motions to suppress pretrial photographic identifications, pretrial lineup identifications, previous in-court identifications, and any subsequent in-court identifications by bank teller (Jerles). (1) Defendant contended that pretrial lineup identification by Jerles should be suppressed because he did not have benefit of counsel during lineup. At time of physical line-up, defendant had been arrested, but no formal adversarial proceedings had been initiated against him. As such, his Sixth Amendment right to counsel had not yet attached. Defendant's motion to suppress on this ground is denied. (2) Identification procedures were not unduly suggestive. Although defendant objected to use of photographic array with Jerles, rather than sequential showing of photos, defendant has not offered any evidence demonstrating that sequential showing is any less likely to result in misidentification than is array. Defendant also contended that two videotaped versions of physical lineup exist and that one version shows Officer Everson forcing someone to identify someone. There is no discernible difference between two tapes, and Everson denied telling anyone that they had to make identification, yelling at anyone, or threatening anyone during identification process. In addition, use of physical lineup to confirm Jerles' photographic identification of defendant was not unduly suggestive. (3) Probative value of Jerles' identifications was not outweighed by any prejudice to defendant. Jerles made her identification based on her opportunity to view perpetrator at time of crime. Although defendant allegedly had placed gun in front of Jerles' face, and although Jerles was likely affected by stress of situation, she had ample opportunity to view perpetrator when he exited his vehicle outside bank, when he entered bank and "stood around for a few minutes," and when she "focused" on him after he put his gun in her face. In addition, although Jerles felt only 70% sure of her identification from photograph, fact that she requested opportunity to view man in photo in person suggests that she was hesitant to make identification without being entirely positive. (***United States v. Johnson,*** 29 TAM 1-47, 9/17/03, W.D.Tenn., Donald, 7 pages.)

Trial Courts

▼ **In suit to collect on two notes in connection with sale of market, seller may recover on inventory note when none of seller's alleged misrepresentations related to inventory; with respect to note pertaining to sale of business, seller was 80% at fault when he failed to make it clear to buyer's agent that his statement that sales volume of market was $2,000 per day was guess based upon outdated information from preceding year or so when his son operated market; buyer was 20% at fault in not enforcing provision in contract giving him right to insist that seller provide sales records**

COMMERCIAL LAW: Notes — Sale of Business — Fraud — Negligent Misrepresentation — Interest — Attorney's Fee. TORTS: Comparative Negligence. DAMAGES: Misrepresentation. Plaintiff and his son owned market at 3909 Clarksville Highway in Nashville. In 1999, while plaintiff's son operated market, sales volume reached $60,000 per month, or $2,000 per day. After plaintiff's son left Nashville for other employment, plaintiff was unable to operate market along with his full-time job. Plaintiff attempted to lease market but had to re-enter premises because of defaults by lessee. Glasgow, who had acted as defendant's agent in several purchases of markets like one operated by plaintiff, contacted plaintiff about purchasing business. Glasgow claims that plaintiff told her that sales volume of market was unqualified $2,000 per day. Plaintiff claims that he told Glasgow that sales volume of market was $2,000 per day but qualified statement with explanation that sales volume was derived from time that his son had run market. Glasgow told defendant that sales volume of market was $2,000 per day, and defendant was interested in purchasing market. Defendant had other sources of information. He owned market within one-half mile of market at issue. He had experience in purchasing markets. And he briefly viewed market at issue with plaintiff prior to purchase. Provision was inserted in sales contract that plaintiff would provide two months of verified sales figures. Contract stated that if any of contingencies could not be met, contract would become null and void and earnest money would be returned within seven business day. After negotiation through Glasgow on price, parties agreed to contract under which defendant would pay plaintiff $50,000 in cash at time of closing and sign two promissory notes — one for $7,824 for inventory and other for additional payment of $25,000 for business. Defendant also paid $20,000 commission to Glasgow, and defendant assumed payment of note that plaintiff had carried on business with Hollingsworth Oil. Closing occurred in early 1/02. At no time prior to closing or on day of closing did plaintiff provide two months of verified sales figures. At no time prior to or on day of closing did defendant invoke provision of contract that allowed him to cancel contract if plaintiff failed to furnish verified sales figures. On day following closing, defendant's sales were significantly lower than $2,000 per day. Defendant contacted Glasgow who requested that plaintiff forward records of last two months of sales volume. Plaintiff furnished information for 11/01 and 12/01 showing sales volume significantly less than $2,000 per day. During time defendant operated market, his sales remained consistently lower than $2,000 per day. Defendant's obligation to pay on notes commenced on 2/1/02, and defendant refused to pay. In 9/02, defendant sold market, along with other market he owned nearby, for total of $75,000. On 4/10/02, plaintiff filed suit to recover payments due under notes, interest, and attorney fees. Defendant filed counterclaim seeking

recovery for breach of contract, fraud, or negligent misrepresentation. (1) Plaintiff is entitled to judgment on inventory note. Value of inventory was determined prior to closing by independent valuation conducted by defendant. After closing, defendant received, had use of, and sold inventory. None of alleged misrepresentations of plaintiff pertained to inventory. Plaintiff is awarded principal amount of $7,824, interest at rate of 10% per annum beginning on date of breach, and reasonable attorney fees to be determined at post-trial hearing. (2) With respect to note pertaining to sale of business, defendant's counterclaim for breach of contract is dismissed. Defendant waived requirement that on or before closing he be provided sales volume documentation. (3) Defendant's counterclaim for fraud is dismissed. Defendant proved that sales volume of market was not $2,000 per day, and defendant showed, through his track record in operating market along with records of volume of sales for 1999 and 2000 under plaintiff's ownership, that characterization of sales volume as $2,000 per day was inaccurate. (4) Although not culpable by fraud, plaintiff unwittingly represented to Glasgow that sales volume at market was $2,000 per day. This representation was not intentionally inaccurate. Plaintiff did not personally place as much meaning on sales information as he did on good will and reputation in considering value of market. Plaintiff did not know what sales volume was during time tenant was managing market, and plaintiff did not have recent sales figures. Thus, plaintiff quoted Glasgow sales volume he knew from time his son operated market. This court credits testimony of Glasgow that plaintiff did not qualify and make clear that $2,000 per day sales volume was based on preceding year or so when his son operated market. Plaintiff was negligent in that he did not make it clear to Glasgow that his statement that sales volume was $2,000 per day was plaintiff's guess based upon outdated information from time his son operated market. Having being asked directly what sales volume was, plaintiff had duty to either tell Glasgow that he did not know or that information he was providing was not current. Hence, plaintiff was negligent in representation he made to Glasgow. But defendant was also negligent. Defendant had secured, as provision of contract, right to insist that plaintiff provide sales records. By not enforcing that provision of contract, defendant contributed to misunderstanding over sales volume. (5) Amount of damages that defendant sustained from negligent misrepresentation, before being reduced by his comparative fault, is $25,000. Note is appropriate measure of defendant's damages given totality of transaction — defendant paid $50,000 down for business, he assumed payment on note to Hollingsworth Oil and signed $25,000 note, defendant operated business and ultimately sold it at loss, and sales while defendant was operating market were significantly less than volume represented by plaintiff. Comparative fault is then applied to total $25,000 damages. Plaintiff is assessed with 80% of fault for negligent misrepresentation, and defendant is assessed with 20% of fault. Defendant is awarded $20,000 on his negligent misrepresentation claim. (6) This court declines to award plaintiff interest on $25,000 note or attorney fees. Provisions for interest and attorney fees state, "Upon default, Maker agrees to pay the remaining unpaid principal balance of the indebtedness evidenced hereby and all court costs and expenses, including reasonable attorneys fees, incurred by the Payee, in collecting any amounts due hereunder." Based upon 80% comparative fault of plaintiff in negligent misrepresentation, it would not be reasonable to award attorney fees or interest on note related to value of business. Hence, plaintiff is awarded $25,000 on note, and defendant's $20,000 award on negligent misrepresentation claim is offset against plaintiff's recovery. (***McNeil v. Nofal,*** 29 TAM 1-48, 9/24/03, Davidson Chancery, Lyle, 11 pages.)

Attorney General Opinions

CRIMINAL PROCEDURE: Judicial Commissioner. Hamilton County may legally give its judicial commissioners, appointed under 1996 Private Act 192, annual salary increases as may be approved for all other county employees. Neither Tennessee Constitution nor Private Act 192 prevents county from paying its judicial commissioners annual salary increases as may be approved for all other county employees. (***Attorney General Opinion 03-150,*** 29 TAM 1-49, 11/17/03, 3 pages.)

CRIMINAL PROCEDURE: Costs. APPEAL & ERROR: Coram Nobis. Petitioner whose conviction is reversed pursuant to writ of error coram nobis is obligated to pay previously-incurred costs of appeal unless he or she is relieved of this obligation by order of pertinent appellate court. (***Attorney General Opinion 03-151,*** 29 TAM 1-50, 11/25/03, 2 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.

- Algero, Mary Garvey, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions,* 70 Tenn.L.Rev. 605
- Bland, Timothy, *Recent Court Decisions Have Implications for Arbitration and Mediation,* 39 Tenn.B.J. 22 (October 2003)
- Bobbitt, Jonathan L., *Torts — Trau-Med of America, Inc. v. Allstate Insurance Co.: The Tennessee Supreme Court Recognizes a Cause of Action for the Intentional Interference with Business Relationships,* 33 Mem.L.Rev. 661 (Spring 2003)
- Butler, Eric, *Estates and Probate — Ellis v. Ellis: Survivorship Properties in Tennessee Remain Unaffected by the 120 Hour Provision of the Tennessee Uniform Simultaneous Death Act,* 33 Mem.L.Rev. 681 (Spring 2003)
- Craft, Perry A. & Michael G. Sheppard, *Supreme Court Review, Part I,* 39 Tenn.B.J. 18 (September 2003)
- Craft, Perry A. & Michael G. Sheppard, *Supreme Court Review, Part II,* 39 Tenn.B.J. 12 (October 2003)
- Day, John A., *The Last of the "Blue Chippers,"* 39 Tenn.B.J. 37 (September 2003)
- Goins, Reagan, *Agency — Givens v. Mullikin: Tennessee Supreme Court Holds that Insurance Company and Insured May Be Vicariously Liable for the Tortious Acts of Defense Counsel,* 33 Mem.L.Rev. 703 (Spring 2003)
- Hamill, Doug, *The Fifty-Dollar Fines Clause Re-Emerges After Thirty-Five Years of Slumber,* 70 Tenn.L.Rev. 887 (Spring 2003)
- Heilig, Brent A., *Criminal Procedure — State v. Randolph: The Tennessee Supreme Court Sheds New Light on Seizures Under Article I, Section 7 of the Tennessee Constitution,* 33 Mem.L.Rev. 727 (Spring 2003)
- Holbrook, Dan W., *Don't Worry* ... Be HIPAA!, or, Why Every Health Care Power of Attorney (and some property powers) May Need Revisiting, 39 Tenn.B.J. 15 (December 2003)
- Johns, Horace E., *Nine Means to an End: The Members of the U.S. Supreme Court (Part I),* 39 Tenn.B.J. 26 (September 2003)

● Johns, Horace E., *Nine Means to an End: The Members of the U.S. Supreme Court (Part II)*, 39 Tenn.B.J. 27 (October 2003)

● Overall, Lisa, *Retaliatory Discharge and In-House Counsel — A Comparative Analysis of State Law in the Wake of the Tennessee Supreme Court's Decision in Crews v. Buckman Laboratories*, 33 Mem.L.Rev. 629 (Spring 2003)

● Paine, Donald F., *Wigmore on Evidence*, 39 Tenn.B.J. 16 (September 2003)

● Paine, Donald F., *Punitive Damages: "Hodges" and "State Farm,"* 39 Tenn.B.J. 33 (November 2003)

● Pierce, Carl A., *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part II)*, 70 Tenn.L.Rev. 321 (Winter 2003)

● Pierce, Carl A., *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part III)*, 70 Tenn.L.Rev. 643 (Spring 2003)

● Raybin, David L., *Amending the Indictment: Substance Over Form*, 39 Tenn.B.J. 14 (November 2003)

● Regan, Judy & Suzan Hughes-Harling, *The Limited Liability of Corporate Health Maintenance Organizations*, 39 Tenn.B.J. 27 (December 2003)

● Schneider, Kent N., *The Jobs and Growth Tax Relief Reconciliation Act of 2003: Significant, but Fleeting Relief for Taxpayers*, 39 Tenn.B.J. 26 (November 2003)

● Tennyson, Julie, *Tax Incentives for the Biotechnology Industry: Should Tennessee Offer Sales Tax Exemptions and Net Operating Loss Extensions?*, 70 Tenn.L.Rev. 567 (Winter 2003)

● Van Horn, Daniel, *Restraining Punitive Damages*, 39 Tenn.B.J. 18 (December 2003)

● Wear, Justin D., *Tort Law — Criminal Malpractice — Criminal Defendant's Ability to Sue his Defense Attorney for Legal Malpractice*, 70 Tenn.L.Rev. 905 (Spring 2003)

● Williams, John P., *Let the Games Begin: Examining the Lottery*, 39 Tenn.B.J. 19 (November 2003)

Permission to Appeal

Appeal Granted

Conley v. State, 28 TAM 26-7 (CA 5/27/03), appeal granted 12/22/03 (trial court erred in dismissing, for failure to state claim, claim filed against state in case in which decedent, resident of nursing home, died as result of being severely beaten by Johnson, another resident, who had been diagnosed with agitated psychosis; allegations that there was medical malpractice in state's decision that nursing home was suitable place for Johnson to be housed were sufficient to allow claimant to proceed past motion to dismiss; it cannot be said beyond reasonable doubt that allegations cannot support claim for negligent control when held to generous standard for motion to dismiss; TCA 20-1-119 is applicable to state — suit was filed after one-year statute of limitation had run, but it was filed pursuant to saving provision of TCA 20-1-119 within 90-day period after comparative fault of state was alleged in nursing home's answer)

Stokes v. State, 28 TAM 34-34 (CCA 7/7/03), appeal granted 12/22/03 (petitioner was denied due process by post-conviction counsel's failure either to properly withdraw under Supreme Court Rule 14 or to timely apply for permission to appeal; because all of circumstances suggest that petitioner desired to make application for appeal but was neither timely notified of his counsel's inaction nor informed of appellate court's opinion, he was caught in "procedural trap" and effectively denied his right to request review by Tennessee Supreme Court; appellate court's opinion affirming denial of post-conviction relief is vacated and re-entered to permit time for filing application for permission to appeal with Supreme Court)

Other Appeals

Arnett v. Domino's Pizza I L.L.C., 28 TAM 37-10 (CA 7/24/03), appeal denied 12/22/03

Baldwin v. Tennessee Board of Paroles, 28 TAM 39-24 (CA 8/15/03), appeal denied 12/22/03

Bankers Trust Co. v. Collins, 28 TAM 33-8 (CA 6/30/03), appeal denied 12/22/03

Blanton v. State, 28 TAM 37-31 (CCA 7/30/03), appeal denied 12/29/03

Boykin v. State, 28 TAM 37-32 (CCA 7/28/03), appeal denied 12/22/03

Carroll v. State, 28 TAM 35-36 (CCA 7/11/03), appeal denied 12/29/03

Chance v. State, 28 TAM 42-45 (CCA 9/2/03), appeal denied 12/29/03

Crawford v. State, 28 TAM 38-29 (CCA 8/4/03), appeal denied 12/22/03

Daniel v. State, 28 TAM 45-44 (CCA 9/23/03), appeal denied 12/22/03

DeMarcus v. State, 28 TAM 33-29 (CCA 6/27/03), appeal denied 12/29/03

First State Bank of Holly Springs, Mississippi v. Wyssbrod, 28 TAM 36-26 (CA 7/23/03), appeal denied 12/22/03

Henderson v. State, 28 TAM 40-30 (CCA 8/14/03), appeal denied 12/29/03

Holland v. City of Memphis, 28 TAM 31-6 (CA 6/10/03), appeal denied 12/22/03

In re Estate of Brown, 28 TAM 36-14 (CA 7/24/03), appeal denied 12/22/03

In re L.J.C., 28 TAM 36-18 (CA 7/24/03), appeal denied 12/22/03

Johnson v. Gulley, 28 TAM 37-6 (CA 7/28/03), appeal denied 12/22/03

KHB Holdings Inc. v. Duncan, 28 TAM 32-6 (CA 6/25/03), appeal denied 12/22/03

Manning v. City of Lebanon, 28 TAM 34-11 (CA 7/8/03), appeal denied 12/22/03

McCullough v. State, 28 TAM 38-28 (CCA 8/4/03), appeal denied 12/29/03

McMinn County v. Ocoee Environmental Services Inc., 28 TAM 34-4 (CA 7/9/03), appeal denied 12/22/03

Miller v. City of Murfreesboro, 28 TAM 33-12 (CA 7/2/03), appeal denied 12/22/03

Mitchell v. State, 28 TAM 46-44 (CCA 9/30/03), appeal denied 12/29/03

Pelts v. International Medical Services Corp., 28 TAM 42-11 (CA 8/28/03), appeal denied 12/22/03

Prodigy Services Corp. v. Johnson, 28 TAM 39-12 (CA 8/12/03), appeal denied 12/22/03

Romine v. Fernandez, 28 TAM 35-3 (CA 7/15/03), appeal denied 12/22/03

Smith v. State, 28 TAM 39-39 (CCA 8/12/03), appeal denied 12/29/03

Squeeky Clean Laundries Inc. v. Harvey, 28 TAM 35-14 (CA 7/11/03), appeal denied 12/22/03

State Department of Children's Services v. Butler, 28 TAM 41-15 (CA 8/27/03), appeal denied 12/22/03

State Department of Children's Services v. DLSJ, 28 TAM 39-15 (CA 8/11/03), appeal denied 12/22/03

State ex rel. Commissioner of Transportation v. Any & All Parties with Interest in Property Identified as Tax Map 158, Parcel 34, 28 TAM 32-18 (CA 6/23/03), appeal denied 12/22/03;opinion designated "Not For Citation"

State v. Brown, 28 TAM 35-27 (CCA 7/17/03), appeal denied 12/22/03

State v. Cunningham, 28 TAM 36-30 (CCA 7/24/03), appeal denied 12/22/03

State v. Eakes, 28 TAM 34-14 (CCA 7/1/03), appeal denied 12/22/03

State v. Finch, 28 TAM 41-27 (CCA 8/22/03), appeal denied 12/22/03

State v. Franklin, 28 TAM 33-18 (CCA 6/27/03), appeal denied 12/22/03

State v. Franks, 28 TAM 37-28 (CCA 7/29/03), appeal denied 12/22/03

State v. Grooms, 28 TAM 38-24 (CCA 8/1/03), appeal denied 12/29/03

State v. Higley, 28 TAM 40-23 (CCA 8/18/03), appeal denied 12/29/03

State v. Holloway, 28 TAM 44-24 (CCA 9/17/03), appeal denied 12/22/03

State v. Holt, 28 TAM 40-26 (CCA 8/15/03), appeal denied 12/22/03

State v. Jones, 28 TAM 40-21 (CCA 8/19/03), appeal denied 12/22/03

State v. Jose, 28 TAM 34-16 (CCA 7/9/03), appeal denied 12/22/03

State v. Ledbetter, 28 TAM 38-19 (CCA 8/7/03), appeal denied 12/29/03

State v. Littrell, 28 TAM 42-30 (CCA 8/27/03), appeal denied 12/22/03

State v. Mitchell, 28 TAM 39-27 (CCA 8/13/03), appeal denied 12/22/03

State v. Paris, 28 TAM 37-21 (CCA 7/29/03), appeal denied 12/22/03

State v. Perkey, 28 TAM 39-33 (CCA 8/12/03), appeal denied 12/22/03

State v. Ramsey, 28 TAM 35-24 (CCA 7/15/03), appeal denied 12/22/03

State v. Rock, 28 TAM 42-37 (CCA 8/29/03), appeal denied 12/29/03

State v. Rogers, 28 TAM 35-20 (CCA 7/17/03), appeal denied 12/22/03

State v. Roland, 28 TAM 40-19 (CCA 8/21/03), appeal denied 12/22/03

State v. Snow, 28 TAM 35-29 (CCA 7/15/03), appeal denied 12/22/03

State v. Strickland, 28 TAM 41-30 (CCA 8/22/03), appeal denied 12/22/03

State v. Syhalath, 28 TAM 43-26 (CCA 9/5/03), appeal denied 12/22/03

State v. Turnage, 28 TAM 38-22 (CCA 8/4/03), appeal denied 12/22/03

State v. Vaughn, 28 TAM 38-25 (CCA 8/1/03), appeal denied 12/22/03

State v. Williams-Bey, 28 TAM 41-28 (CCA 8/21/03), appeal denied 12/22/03

State v. Wolfe, 28 TAM 43-30 (CCA 9/9/03), appeal denied 12/22/03

Tompkins v. Helton, 28 TAM 30-1 (CA 6/12/03), appeal denied 12/22/03

Walker v. State, 28 TAM 37-29 (CCA 7/29/03), appeal denied 12/22/03

Hot Cases

Following is a listing of the 10 most frequently ordered TAM opinions for the past month. Asterisks denote new entries.

1. *Holliday v. Epperson*, 28 TAM 44-44 (USDC 10/1/03) (Tennessee Supreme Court would hold that plaintiff cannot recover prejudgment interest in personal injury or wrongful death case)

*2. *Anderson v. Wilder*, 28 TAM 52-12 (CA ES 11/21/03) (in dispute between members of limited liability company (LLC), trial court erred in granting defendants, who together owned 53% of LLC, summary judgment in suit by plaintiffs, members who were expelled from LLC by vote of defendants, alleging that defendants' actions violated their fiduciary duty and duty of good faith to plaintiffs; majority shareholders of LLC stand in fiduciary relationship to minority shareholders)

3. *Southeast Drilling & Blasting Services Inc. v. Hu-Mac Contractors LLC*, 28 TAM 43-12 (CA MS 9/4/03) (when no definite time for performance of contract is specified, law will imply reasonable time under circumstances; trial court did not err in finding that contractor wrongfully terminated subcontractor when subcontractor's work schedule appears to have been reasonably calculated to complete contract within time contemplated by parties; contractor failed to deal in good faith and fairness with subcontractor by discharging subcontractor seven days after subcontractor moved on premises and long before contract deadlines would have to be met; subcontractor is entitled to award of attorney fees under Prompt Pay Act)

4. *In re D.L.B.*, 28 TAM 43-1 (SC 10/20/03) (only parent's conduct in four months immediately preceding filing of petition to terminate parental rights then before court may be used as ground to terminate parental rights under TCA 36-1-102(1)(A)(i))

5. *Turner v. Yovanovitch*, 28 TAM 43-19 (CA WS at Nashville 9/11/03) (mother showed by preponderance of evidence that child support based on father's net income in excess of $10,000 per month was reasonably necessary to provide for child's needs when mother testified not only about her actual monthly expenses for child, but also testified as to what she could provide for child if more funds were available)

6. *Lacey v. Lacey*, 28 TAM 49-11 (CA WS 10/31/03) (in case in which mother sought to reduce her child support obligation, evidence did not preponderate against trial court's finding that mother was not willfully and voluntarily underemployed when mother, prior to losing her job, had planned to continue pursuing her doctorate degree on non-resident basis, mother's loss of her job was involuntary and unforeseen, and mother decided at that point to enroll full time in doctorate program and take temporary teaching position; waiver of mother's tuition by university is not included in mother's income when determining her child support obligation)

*7. *Jackson v. Hamilton*, 28 TAM 49-2 (CA WS 11/4/03) (in automobile accident case, trial court committed prejudicial error in refusing to instruct jury on common law rule holding original tort-feasor liable for subsequent negligence of treating physician; defendants may not amend answer to assert affirmative defense of comparative fault of plaintiff's chiropractor)

*8. *Dennis Joslin Co. v. Johnson*, 28 TAM 50-5 (CA WS at Memphis 11/3/03) (trial court did not err in ruling that doctrine of laches barred suit for deficiency judgment; laches may be applied in action at law prior to running of statute of limitation)

9. *Whirlpool Corp. v. Pratt*, 28 TAM 49-1 (WC 9/25/03) (evidence did not preponderate against award of 75% permanent disability for serious disfigurement in case in which employee's three teeth, two of them front teeth, were knocked out, her upper lip was bruised, and her bottom lip was cut)

10. *Pickler v. Parr*, 28 TAM 49-9 (CA WS 10/28/03) (in case in which Shelby County Board of Education petitioned court to condemn 20-acre tract of unimproved real property for construction of elementary school, Board was authorized to exercise its eminent domain right as provided in TCA 49-6-2001(a), and fact that Board attempted to condemn land with no present plan to begin construction of proposed school was irrelevant when Board's inaction was result of conscious effort to prevent potential governmental waste)

Web Links

29 TAM 1-1:
http://www.tsc.state.tn.us/OPINIONS/TSC/PDF/034/wallaced.pdf
29 TAM 1-2:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/Siegfrie.pdf
29 TAM 1-3:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/emert.pdf
29 TAM 1-4:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/ReedJR.pdf
29 TAM 1-5:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/BelcherEW.pdf
29 TAM 1-6:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/Foxx.pdf
29 TAM 1-7:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/BrickChurch.pdf
29 TAM 1-8:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/evanscarl.pdf
29 TAM 1-9:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/VineyardST.pdf
29 TAM 1-10:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/AdmiraltyInns&Suites.pdf
29 TAM 1-11:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/Ameritrans.pdf
29 TAM 1-12:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/stovall.pdf
29 TAM 1-13:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/BoundsM.pdf
29 TAM 1-14:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/McEvoyKS.pdf
29 TAM 1-15:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/JWG.pdf
29 TAM 1-16:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/Muir.pdf
29 TAM 1-17:
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29 TAM 1-18:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/RAW.pdf
29 TAM 1-19:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/Maples.pdf
29 TAM 1-20:
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29 TAM 1-21:
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29 TAM 1-22:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/LoinesRK.pdf
29 TAM 1-23:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/combustion%20federal.pdf
29 TAM 1-24:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/JohnsonDB.pdf
29 TAM 1-25:
http://www.tsc.state.tn.us/OPINIONS/TCA/PDF/034/Parra.pdf
29 TAM 1-26:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/ColeD.pdf
29 TAM 1-27:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/Dilling.pdf
29 TAM 1-28:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/Morrow.pdf
29 TAM 1-29:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/LoveA.pdf
29 TAM 1-30:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/TurnerJ.pdf
29 TAM 1-31:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/Hughes.pdf
29 TAM 1-32:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/McCurryJA.pdf
29 TAM 1-33:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/EdwardsC.pdf
29 TAM 1-34:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/SonsGN.pdf
29 TAM 1-35:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/wakefie.pdf
29 TAM 1-36:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/peekma.pdf
29 TAM 1-37:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/Crittende.pdf
29 TAM 1-38:
http://www.tsc.state.tn.us/OPINIONS/tcca/PDF/034/BrownCD.pdf
29 TAM 1-40:
http://pacer.ca6.uscourts.gov/opinions.pdf/03a0413p-06.pdf
29 TAM 1-44:
http://pacer.ca6.uscourts.gov/opinions.pdf/03a0411p-06.pdf
29 TAM 1-45:
http://www.tnwd.uscourts.gov/JudgeDonald/opinions/225.pdf
29 TAM 1-46:
http://www.tnwd.uscourts.gov/JudgeDonald/opinions/230.pdf
29 TAM 1-47:
http://www.tnwd.uscourts.gov/JudgeDonald/opinions/227.pdf
29 TAM 1-49:
http://www.attorneygeneral.state.tn.us/op/2003/OP/OP150.pdf
29 TAM 1-50:
http://www.attorneygeneral.state.tn.us/op/2003/OP/OP151.pdf