

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE
& THE TENNESSEE RULES OF EVIDENCE**

Filed: September 12, 2005

ORDER

The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Procedure. In August 2005, the Advisory Commission completed its 2004-2005 term and presented its recommendations to the Court. After considering the amendments recommended by the Commission, the Court hereby publishes for public comment the proposed amendments set out in the attached Appendix A to this order.

The Court hereby solicits written comments on the proposed amendments from the bench, the bar, and the public. The deadline for submitting written comments is Monday, November 14, 2005. Written comments should be addressed to:

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

The Clerk shall provide a copy of this order, including Appendix A, to LexisNexis and to Thomson-West. In addition, this order, including Appendix A, shall be posted on the Tennessee Supreme Court's website.

PER CURIAM

APPENDIX A

**PROPOSED AMENDMENTS
PUBLISHED FOR PUBLIC COMMENT**

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 7

STAY OR INJUNCTION PENDING APPEAL

[Add a third paragraph to Rule 7(a).]

A party may appeal a Court of Appeals' decision on a motion for review by filing a motion for review in the Supreme Court within 15 days of filing of the Court of Appeals' order. The motion shall be accompanied by a copy of the trial court's order, the motion filed in the Court of Appeals, the order of the Court of Appeals, and all other documents (including transcripts) filed in the Court of Appeals on the issue of stay or injunction pending appeal. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may file an answer within 10 days of the filing of the motion in the Supreme Court. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

2006 Advisory Commission Comment

A third paragraph is added to Rule 7(a) to provide a procedure for Supreme Court review of a Court of Appeals denial of a Rule 7 application.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 18

APPEALS BY POOR PERSONS

(d) Motion in an Appellate Court for Leave to Proceed as a Poor Person on Appeal. If a party to an action on appeal is unable to bear the expenses of the appeal due to poverty, but that party has not sought leave from the trial court to proceed on appeal as a poor person, or that party becomes indigent during the appeal, the party may seek leave from the appellate court to proceed on appeal as a poor person. A motion for leave to proceed on appeal as a poor person filed in the appellate court shall be accompanied by a Uniform Affidavit of Indigency as set forth in Supreme Court Rule 13 (criminal cases) or by a Uniform Civil Affidavit of Indigency as set forth in Supreme Court Rule 29 (civil cases). If leave to proceed as a poor person is denied by an intermediate appellate court, the appellate court shall state in writing the reasons for the denial.

(e) Subsequent Proceedings on Denial by an Intermediate Appellate Court of Leave to Proceed as a Poor Person on Appeal. If leave to proceed as a poor person is denied by an intermediate appellate court, or an intermediate appellate court finds that the party is not entitled so to proceed, the clerk of the appellate courts shall forthwith serve notice of such action. A motion for leave to proceed as a poor person may thereafter be filed in the Supreme Court within 15 days after service of notice of the action of the intermediate appellate court. The motion shall be accompanied by copies of any papers filed in the trial and appellate courts seeking leave to proceed as a poor person and by a copy of the statement of reasons given by the trial and intermediate appellate courts for their actions.

2006 Advisory Commission Comment

Prior to this amendment, the rule authorized trial courts to determine whether a party should be permitted to proceed on appeal as a poor person, but the Rule did not expressly authorize an appellate court to do so. In some cases, however, the issue of a party's financial condition does not arise until after the notice of appeal is filed. New paragraphs (d) and (e) give the appellate courts the authority to determine whether an appealing party should be permitted to proceed on appeal as a poor person. The term "poor person" as used in the Rule is intended to refer to persons who are indigent for purposes of Rule 13 (appointment, qualifications and compensation of counsel for indigent defendants), or Rule 29 (uniform civil affidavit of indigency), Tenn. S. Ct. R., or any other provision of law.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 8

GENERAL RULES OF PLEADING

8.01 Claims for Relief.—A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the party seeks, including the dollar amount of any damages sought. Relief in the alternative or of several different types may be demanded.

. . . .

8.03 Affirmative Defenses.—In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction, arbitration and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasors), discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and any other matter constituting an affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

2006 Advisory Commission Comment

The new language in Rule 8.01(2) makes expressly clear what is implicit in Rules 15.02 and 54.03: a demand for damages must specify the dollar amount sought. This would apply in a medical

malpractice action, although the amount is not disclosed to the jury because of T.C.A. §29-26-117.

The affirmative defenses of statute of repose and workers' compensation immunity are added to the list in Rule 8.03.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 13

COUNTERCLAIM AND CROSS-CLAIM

13.01 Compulsory Counterclaims.—A pleading shall state as a counterclaim any claim which at the time of serving the pleading that the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. This rule shall not be construed as requiring a counterclaim to be filed in any court whose jurisdiction is limited either as to subject matter or as to monetary amount so as to be unable to entertain such counterclaim.

2006 Advisory Commission Comment

[Delete the original comment to 13.01.]

Revised rule 13.01 eliminates some language in the original draft that addressed nonexistent issues.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 23

CLASS ACTIONS

23.05 Dismissal or Compromise.—A certified class action shall not be voluntarily dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If attorney fees are sought as part of a compromise, a motion for fees must be filed and served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. A class member, or a party from whom payment is sought, may object to the motion.

2006 Advisory Commission Comment

The second and third sentences of Rule 23.05 are new. Objections can be made to attorney fees sought as part of a settlement.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 28

INTERPRETERS

The court may appoint an interpreter pursuant to section 3 of Tennessee Supreme Court Rule 42. Reasonable costs associated with an interpreter's services may be assessed against the indigent defense fund pursuant to Tennessee Supreme Court Rule 13 if the party is indigent and is involved in a proceeding in which he or she has a statutory or constitutional right to appointed counsel. In all other proceedings the court may fix the reasonable compensation of an interpreter, and such compensation shall be taxed as costs.

2006 Advisory Commission Comment

[Delete the original comment.]

This revised rule distinguishes between indigent and other litigants. It also cross-references the procedure judges should follow in selecting interpreters pursuant to Supreme Court Rule 42.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 32

USE OF DEPOSITIONS IN COURT PROCEEDINGS

32.01 Use of Depositions.—At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:

. . . .

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is “unavailable” as defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1).

2006 Advisory Commission Comment

The new language in Rule 32.01(3) incorporates by cross-reference all of the unavailability grounds listed in Evidence Rule 804(a). That list includes deponents who are more than 100 miles from the courthouse on trial day. The more restrictive provision for discovery depositions of experts is retained.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 34A

SPOILIATION OF EVIDENCE

34A.01 Testing of Tangible Things.—Before a party or an agent of a party, including experts hired by a party or counsel, conducts a test materially altering the condition of tangible things that relate to a claim or defense in a civil action, the party shall move the court for an order so permitting and specifying the conditions. Rule 37 sanctions may be imposed on an offending party.

34A.02 Other Spoliation.—Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence.

2006 Advisory Commission Comment

The rule has a new, broader heading. Rule 34A.02 is new. Also, Rule 37 sanctions are made available against offenders. Those sanctions include, at 37.02, refusal to allow claims or defenses; even dismissal of a plaintiff's complaint and entry of default judgment against a defendant are possible.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 37

FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

37.03 Failure to Disclose or Refusal to Admit.--

[Number existing language as paragraph (2) and add the following language as paragraph (1):]

(1) A party that without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court on motion may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses (including attorney fees) caused by the failure, these sanctions may include any of the actions authorized under Rule 37.02(A), (B), and (C) and may include informing the jury of the failure to supplement or amend.

2006 Advisory Commission Comment

Rule 37.03(1) expressly provides sanctions for failure to supplement or amend discovery responses. The usual sanction will be exclusion of evidence at trial. Courts already have this power under the common law. *Lyle v. Exxon*, 746 S.W.2d 694 (Tenn. 1988), and *Ammons v. Bonilla*, 886 S.W.2d 239 (Tenn. Ct. App. 1994).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 41

DISMISSAL OF ACTIONS

41.01 Voluntary Dismissal—Effect Thereof.—

2006 Advisory Commission Comment

Although Rule 41.01(2) allows two nonsuits without prejudice, a plaintiff must determine that the saving statute codified at T.C.A. §28-1-105 is available for recommencement. An action voluntarily dismissed after the original limitations period has expired and after the one-year saving year has expired cannot be recommenced successfully. Taking a second nonsuit does not initiate an additional year under the saving statute. A plaintiff gets the one-year saving statute only one time.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 69

EXECUTION ON JUDGMENTS

69.07 Execution on Realty.—

. . . .

(2) Judgment Lien.—A judgment lien against the judgment debtor’s realty is created by registering a certified copy of the judgment in the register’s office of the county where the realty is located. Once a judgment lien is created by registration, it will last for the time remaining in a ten-year period from the date of final judgment entry in the court clerk’s office and for any extension granted by the court pursuant to Rule 69.04. For the extension of the lien to be enforceable, the judgment creditor must register the court’s order extending the judgment.

2006 Advisory Commission Comment

The only change in Rule 69.07(2) is to drop the final word in the original paragraph, “lien.” The court’s order granted pursuant to Rule 69.04 extends the judgment, not the judgment lien. The lien is extended by registering that order.

TENNESSEE RULES OF EVIDENCE

RULE 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE
CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally.—Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity with character or trait on a particular occasion except:

(1) Character of Accused.—Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same or, if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution.

2006 Advisory Commission Comment

If the defense introduces a character trait of the victim to prove conforming conduct, the prosecution can in turn offer evidence of that same character trait of the defendant. Methods of proving a character trait are limited by Rule 405(a) to reputation or opinion evidence. The amendment does not permit specific acts to prove a trait. Contrast *State v. Ruane*, 912 S.W.2d 766 (Tenn. Crim. App. 1995), admitting specific violent acts of a victim only for the limited purpose of corroborating a defense theory of first aggressor.

TENNESSEE RULES OF EVIDENCE

RULE 604

INTERPRETERS

An interpreter is subject to the provisions of these rules and applicable statutes relating to qualification of an oath to make a true interpretation.

2006 Advisory Commission Comment

The last word is changed from “translation” to “interpretation.”

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 1

TITLE OF RULES; SCOPE; PURPOSE AND
CONSTRUCTION; SITUATIONS NOT COVERED BY RULES

(b) Scope. These rules shall govern the procedure in Juvenile Court in all cases in which children are alleged to be delinquent, unruly, dependent and neglected, or abandoned; in all cases involving emergency temporary care under T.C.A. §37-1-128; in all cases to revoke the probation of delinquent or unruly children; and in all cases to terminate home placements under T.C.A. §37-1-137. The procedures employed in General Sessions Court under the Tennessee Rules of Criminal Procedure shall govern all cases in which children are alleged to have committed juvenile traffic offenses as defined in T.C.A. §37-1-146 and all cases heard in juvenile court involving child abuse prosecutions under T.C.A. §37-1-412 and §39-15-401, nonsupport of children, or contributing to the delinquency or unruly behavior or dependency and neglect of children. The Tennessee Rules of Civil Procedure shall govern all cases involving the termination of parental rights, paternity cases, guardianship and mental health commitment cases involving children, and child custody proceedings under T.C.A. §§36-6-101 et seq., 36-6-201 et seq., and 37-1-104(a)(2) and (f); however, discovery in such cases in juvenile court shall be governed by Rule 25 of these rules. Contempt proceedings shall be conducted pursuant to the procedures applicable in courts of general jurisdiction.

2006 Advisory Commission Comment

Rule 1(b) is amended to ensure that children and their families in specified domestic relations cases pending in the Juvenile courts enjoy the same procedures, rights, and rules as those children and families have in similar cases pending in Circuit, Chancery, or other courts with concurrent

jurisdiction.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 25

DISCOVERY

[Add three sentences to the existing rule.]

A party to a civil action in juvenile court that is otherwise governed by the Tennessee Rules of Civil Procedure may serve notice of or request for discovery on another party. The party on whom notice or request is served may seek a protective order with regard to the notice or request. Leave to obtain discovery shall be freely given when justice so requires.

2006 Advisory Commission Comment

The final three sentences are new. The amendment is intended to allow discovery in Juvenile Court on issues other than those in delinquency and unruly proceedings.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 33

PREDISPOSITION REPORT/SOCIAL HISTORY

(e) Inspection of Reports; Confidentiality. Generally, the child, the child's attorney, the child's parent, guardian or legal custodian, and other parties shall be entitled to inspect and obtain copies of the predisposition report and all medical, psychological and other reports on which it is based, except that information protected from disclosure by law. However, the court in its discretion may decline to permit inspection or copying of sensitive reports, or portions thereof, to anyone other than an attorney if it determines that such inspection would be detrimental to the child. If a party is unrepresented and is denied the right to inspect and make copies, an attorney shall be appointed for the party and shall be permitted to inspect and copy reports as herein provided. The court shall issue such orders as are necessary to maintain the confidential nature of information so classified. However, in order to permit response pursuant to Rule 32(f), the court shall disclose, at least to attorneys for the parties, any confidential information relevant to disposition.

2006 Advisory Commission Comment

The amendment allows parties to inspect and copy reports. The court has discretion to limit inspection to attorneys of parties.